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INTRODUCTION

The Trump administration assumed office armed with promises to eradicate unlawful immigration through an all-out assault. There would be no exceptions; everyone was a priority.[1] The administration equated migrants with criminals in statement after statement.[2] President Obama's "[f]elons not families" became a

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[1] *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) ("We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement."). To implement this Executive Order (EO), then-Department of Homeland Security (DHS) Secretary John Kelly revoked the "Morton memo," a 2010 memorandum from then-Immigration and Customs Enforcement (ICE) Director John Morton, which established priorities for immigration officers to follow when enforcing immigration laws. *See* Memorandum from John Kelly, Sec'y Homeland Sec., on Enforcement of the Immigration Laws to Serve the National Interest to Kevin McAleenan, Acting Comm'r U.S. Customs & Border Prot, Thomas D. Homan, Acting Dir. U.S. Immigr. & Customs Enf't, Lori Scialabba, Acting Dir. U.S. Citizenship & Immigr. Servs., Joseph B. Maher, Acting Gen. Counsel, Dimple Shah, Acting Assistant Sec. for Int'l Affairs, & Chip Fulghum, Acting Undersec'y for Mgmt. (Feb. 20, 2017) [hereinafter Kelly Memo], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/JH5L-77FH]; Memorandum from John Morton on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens to all ICE Employees (June 30, 2010) [hereinafter Morton Memo] https://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf [https://perma.cc/AL8W-VNLJ].

[2] On the campaign trail, President Trump's speeches created an inextricable link between migrants and criminal behavior, insisting on severe immigration enforcement as a means to a safer end. *See, e.g.*, *Transcript: Donald Trump's Full Immigration Speech, Annotated*, L.A. TIMES (Aug. 31, 2016), http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html [https://perma.cc/HG9K-TRQ4] (stating that "deadly, non-enforcement policies that allow thousands of criminal aliens to freely roam our streets, walk around, do whatever they want to do, [commit] crime all over the place"). President Trump continued this migrant-criminal rhetoric. *See* Alana

rallying cry for the Trump administration to deport both as swiftly as possible.[3] Immigration arrests climbed steadily along with the use of dragnet tactics intended to instill fear in immigrants and their families regardless of circumstance.[4] With talk of walls, raids, and rapists,[5] immigrants withdrew to their living rooms, closed their shades,[6] and tried to limit exposure to anyone who might call in Immigration and Customs Enforcement (ICE).[7] The consequences were predictable: fewer crimes were reported; children were absent from schools and doctors' offices; parents missed work; shops closed; and communities faltered.[8] Cities and states have responded with a

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Abramson, *'I Can Be More Presidential Than Any President.' Read Trump's Ohio Rally Speech*, TIME (July 26, 2017), http://time.com/4874161/donald-trump-transcript-youngstown-ohio/ [https://perma.cc/NQ63-NMR8] ("The predators and criminal aliens who poison our communities with drugs and prey on innocent young people, these beautiful, beautiful, innocent young people will, will find no safe haven anywhere in our country. And you've seen the stories about some of these animals.").

[3] *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017); Press Release, White House Off. of the Press Sec'y, Remarks by the President in Address to the Nation on Immigration Reform (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [https://perma.cc/L6C2-TWSX]; Morton Memo, *supra* note 1; Team Fix, *The CNN-Telemundo Republican Debate Transcript, Annotated*, WASH. POST (Feb. 25, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/02/25/the-cnn-telemundo-republican-debate-transcript-annotated/?utm_term=.900f3d2a7a11 [https://perma.cc/3MBP-WA6Z]; Vivian Yee, *Immigrants Hide, Fearing Capture on 'Any Corner,'* N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html [https://perma.cc/EFX3-TQF5]; Ryan Devereaux, *Trump Targets Undocumented Families, Not Felons, in First 100 Days*, INTERCEPT (Apr. 28, 2017), https://theintercept.com/2017/04/28/100-days-of-deportations-trump-policies-terrorize-immigrant-families-and-neglect-criminals/ [https://perma.cc/XY4W-HNZ6].

[4] *See, e.g.*, Stephen Dinan, *No Apologies: ICE Chief Says Illegal Immigrants Should Live in Fear of Deportation*, WASH. TIMES (June 13, 2017), http://www.washingtontimes.com/news/2017/jun/13/thomas-homan-ice-chief-says-illegal-immigrants-sho/ [https://perma.cc/KAP2-L9Q6].

[5] *See* James Doubek, *ICE Detains More Than 100 in Los Angeles-Area Immigration Raids*, NAT'L PUB. RADIO (Feb. 15, 2018), https://www.npr.org/sections/thetwo-way/2018/02/15/585973495/ice-detains-more-than-100-in-los-angeles-area-immigration-raids [https://perma.cc/M9XH-8UE5]; Sam Levin, *Hundreds Arrested in Sanctuary Cities across US*, GUARDIAN (Sept. 28, 2017), https://www.theguardian.com/us-news/2017/sep/28/sanctuary-city-raid-deportation-trump-immigration[https://perma.cc/2Q68-3R8H]; Ron Nixon & Linda Qiu, *Trump's Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html [https://perma.cc/9388-BS7H]; *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.d8130b3f4481 [https://perma.cc/7T66-U2FH].

[6] *See, e.g.*, Vivian Yee, *Immigrants Hide, Fearing Capture on 'Any Corner'*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html [https://perma.cc/EFX3-TQF5].

[7] Immigration and Customs Enforcement (ICE) is the agency within the Department of Homeland Security (DHS) that is responsible for enforcing federal immigration law. *See Who We Are*, IMMIGR. & CUSTOMS ENF'T (Dec. 14, 2018), https://www.ice.gov/about [https://perma.cc/B755-PMTQ].

[8] *See, e.g.*, Jonathan Blitzer, *After an Immigration Raid, a City's Students Vanish*, NEW YORKER (Mar. 23, 2017), https://www.newyorker.com/news/news-desk/after-an-immigration-raid-a-citys-students-vanish [https://perma.cc/5NLW-UJ79; John Burnett, *Fearing Checkpoints, Undocumented Immigrants Cut Off from Medical Care*, NAT'L PUB. RADIO (Nov. 3, 2017), https://www.npr.org/2017/11/03/561883665/fearing-checkpoints-undocumented-immigrants-cut-off-from-medical-care [https://perma.cc/E59W-5FTC]; Alexandra Hart, *Houston Police Chief Alarmed by*

wave of "sanctuary" measures[9] and lawsuits aimed at separating local policies and local resources from federal enforcement initiatives.[10] The Trump administration, in turn, has focused its officers, lawsuits, and rhetoric on these sites of resistance.[11]

Decreased Crime Reporting by Hispanics, TEX. STANDARD (Apr. 10, 2017), https://www.texasstandard.org/stories/houston-police-chief-alarmed-by-decreased-crime-reporting-by-hispanics/ [https://perma.cc/44M8-ZD5A]; Jack Healy, *Stay, Hide, or Leave? Hard Choices for Immigrants in the Heartland*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/us/stay-hide-or-leave-hard-choices-for-immigrants-in-the-heartland.html?_r=0 [https://perma.cc/J5CU-44H3]; Casey Parks, *'Everyone is Affected.' Immigration Raids Turn Oregon City into Ghost Town*, OR. LIVE (Apr. 7, 2017), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2017/04/woodburn_taught_latinos_to_dre.html [https://perma.cc/LZ5G-S3UE]; James Queally, *Latinos Are Reporting Fewer Sexual Assaults Amid a Climate of Fear in Immigrant Communities, LAPD Says*, L.A. TIMES (Mar. 21, 2017), http://www.latimes.com/local/lanow/la-me-ln-immigrant-crime-reporting-drops-20170321-story.html [https://perma.cc/V9WB-3AZM; Eli Saslow, *'Are You Alone Now?' After Raid, Immigrant Families are Separated in the American Heartland*, WASH. POST (June 30, 2018), https://www.washingtonpost.com/news/national/wp/2018/06/30/feature/are-you-alone-now-after-raid-immigrant-families-are-separated-in-the-american-heartland/?utm_term=.a6ea14a27854 [https://perma.cc/8R9A-NDBX]; Catherine E. Schoichet, *After ICE Raid, More Than 500 Kids Miss School*, CNN (Apr. 12, 2018), https://www.cnn.com/2018/04/12/us/tennessee-immigration-raid-schools-impact/index.html [https://perma.cc/4CRC-T8AK]. This is an easily foreseeable effect hardly limited to this administration; in 2016, for example, a North Carolina high school senior was arrested by ICE on his way to school, and attendance subsequently dropped by twenty percent. Mario Boone, *Durham High School Sees Attendance Drop after Immigration Raid*, WNCN (Feb. 11, 2016), https://www.cbs17.com/news/durham-high-schools-attendance-drops-following-students-arrest 20180327003035641/1080730621 [https://perma.cc/PGJ8-G3YB].

[9] The label "sanctuary policy" has no fixed meaning, taking on more political than legal significance. Generally, the term "sanctuary" encompasses policies that restrict the relevance of an individual's immigration status in local law enforcement activities. This can include "don't ask" or "don't police" policies addressing street-level police engagement, policies limiting detention solely on the basis of administrative "immigration detainers [or] administrative immigration warrants[,]" policies limiting disclosure of non-public jail release-date information, and general confidentiality policies that can include immigration status information. Christopher N. Lasch et al. *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1707, 1709–10, 1739, 1741, 1748, 1761 (2018) (describing the varying definitions of "sanctuary" and categorizing types of "sanctuary" policies state and local jurisdictions have adopted to disentangle local resources from federal immigration enforcement); Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 545 (2017) (describing "[f]our [w]aves" of "sanctuary" policies) (internal citations omitted); *see also* Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 233–35 (2016) (examining history of "sanctuary" cities in context of California's "Kate's Law"); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities after Secure Communities*, 91 CHI.-KENT L. REV. 13, 14 (2016) (examining state noncooperation "with executive action and nonbinding federal policy" as "policy (re)making in immigration enforcement").

[10] *See, e.g.*, Complaint for Declaratory & Injunctive Relief at 1, Cty. of Santa Clara v. Trump, No. 17-CV-00574-WHO (N.D. Cal. Feb. 3, 2017), ECF No. 1 (case consolidated with identical case filed by City of San Francisco); Complaint for Injunctive & Declaratory Relief at 1, City of Chicago v. Sessions, No. 1:17-CV-5720 (N.D. Ill. Aug. 7, 2017), ECF No. 1; Complaint for Declaratory & Injunctive Relief at 1, City of Philadelphia v. Sessions, No. 2:17-CV-03894-MMB (E.D. Pa. Aug. 30, 2017), ECF No. 1; Complaint for Declaratory & Injunctive Relief at 1, City of L.A. v. Sessions, No. 2:17-CV-07215 (C.D. Cal. Sept. 29, 2017), ECF No. 1.

[11] *See* Steven Dubois, *Sessions: 'Sanctuary Cities' Undermine Law's Moral Authority*, CHI. TRIB. (Sept. 19, 2017), http://www.chicagotribune.com/news/nationworld/politics/ct-sessions-sanctuary-cities-20170919-story.html [https://perma.cc/6JRY-MGMA]; Eric Westervelt, *ICE Raids Target Cities*, NAT'L PUB. RADIO (Sept. 29, 2017), https://www.npr.org/2017/09/29/554424186/ice-

President Trump's "anti-sanctuary" campaign is really a contest for control over local law enforcement officers.[12] With 5,800 deportation and immigration enforcement agents[13] available to pursue an estimated 10.7 million immigrants living in the United States without authorization,[14] the Trump administration faces a massive gap between its enforcement goals and its enforcement capacity.[15] Cities, counties, and states, on the other hand, employ an estimated eight hundred thousand law enforcement officers.[16] For those jurisdictions that resist the Trump administration's aggressive efforts, the goal is to focus local resources on local issues.[17] For the Trump administration and the jurisdictions that support its enforcement policies, the goal is to employ local resources as "[q]uintessential [f]orce [m]ultiplier[s]" for federal immigration agents.[18]

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raids-target-sanctuary-cities [https://perma.cc/PP2F-JS9U]. As states have passed their own legislation, then-Attorney General (AG) Jeff Sessions responded with lawsuits to reflect the administration's immigration stance. *See* Plaintiff's Motion for Preliminary Injunction & memorandum of Law in Support at 1, United States v. California, No. 18-264 (E.D. Cal. Mar. 6, 2018). ECF No. 2-1; *see also* Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 152–53 (2013) [hereinafter Lasch, *Rendition Resistance*].

[12] Complaint at 2, United States v. California, No. 18-264 (E.D. Cal. Mar. 6, 2018); Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801 (Jan. 25, 2017) ("[J]urisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary."); Jon Herskovitz, *Texas Governor Signs Into Law Bill to Punish 'Sanctuary Cities'*, REUTERS (May 7, 2017), https://www.reuters.com/article/us-usa-immigration-texas-id USKBN18402L [https://perma.cc/R8MZ-AENU]; Sanya Mansoor & Cassandra Pollock, *Everything You Need to Know About Texas' "Sanctuary Cities" Law*, TEX. TRIB. (July 6, 2017), https://www.texastribune.org/2017/05/08/5-things-know-about-sanctuary-cities-law/ [https://perma.cc/G8B7-5K2N]; Lasch et al., *supra* note 9, at 1705, 1707.

[13] DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF, FISCAL YEAR 2016, at 47 (2015), https://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf [https://perma.cc/FN3Q-3UPM].

[14] *See* Gustavo López, Kristen Bialik, & Jynnah Radford, *Key Findings about U.S. Immigrants*, PEW RES. CTR. (Nov. 3, 2018), http://www.pewresearch.org/fact-tank/ 2017/05/03/key-findings-about-u-s-immigrants/ [https://perma.cc/4VTK-7EZJ].

[15] Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,800 (Jan. 25, 2017) (charging the Secretary of Homeland Security to "hire 10,000 additional immigration officers" and to "empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States").

[16] *See* Duren Banks et al., *National Sources of Law Enforcement Employment Data*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE 2 (Apr. 2016), https://www.bjs.gov/ content/pub/pdf/nsleed.pdf [https://perma.cc/4NNW-YGJA]. Data updated through 2012 and comes from self-reporting through the Uniform Crime Reporting Program (UCR). *Id.* at 1–2.

[17] *See CA Values Act (SB54)*, ICE OUT OF CAL., http://www.iceoutofca.org/ca-values-act-sb54.html [https://perma.cc/P8JG-FY2N].

[18] *See* Kris Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005–2006); Kelly Memo, *supra* note 1; *see also* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R44118, SANCTUARY JURISDICTIONS AND CRIMINAL ALIENS: IN BRIEF 10 (2017); Press Release, Charles Perry, Tex. State Senator Dist. 28, Sanctuary City Ban Author Issues Statement Regarding Today's Hearing (June 26, 2017), https://senate.texas.gov/members/d28/press/en/p20170626a.pdf [https://perma.cc/M443-FKHB]; Jazmine Ulloa, *Most California Sheriffs Fiercely Opposed the 'Sanctuary State' Law. Soon They'll Have to Implement It*, L.A. TIMES (Nov. 12, 2017),

A key means of conscription is the immigration detainer.[19] Immigration detainers are administrative forms used by federal immigration agents that ask local law enforcement officers to notify immigration agents of the migrant's expected date of release from jail or prison, rearrest the migrant, and hold him or her in local jails beyond the time justified by local criminal charges.[20] If a detainer is issued, individuals may be held even if bail is posted or the charges are dropped.[21] This article focuses on the particular impact and legal challenges of prolonging local custody due to a federal detainer. Detainers are not limited to people suspected of being in the United States without authorization, but are also used to target long-time lawful permanent residents who may have violated immigration laws.[22] Through detainers, the federal government enlists local law enforcement officers in arresting and detaining migrants in order to widen the net of the deportation system far beyond what federal agents could achieve on their own.[23] President Trump's focus on detainers in his first year in office bore this out. In his first week as president, he promised to

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http://www.latimes.com/politics/la-pol-ca-sanctuary-state-california-sheriffs-20171112-htmlstory.html [https://perma.cc/EY54-RHNA].

[19] *See* 8 C.F.R. § 287.7(a) (2018).

[20] *See Detainers*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detainer-policy [https://perma.cc/CJ4E-3ZEU]; *see also* ICE Policy Directive 16001.2, Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE (Dep't Homeland Sec. 2015), https://www.ice.gov/sites/default/files/documents/Document/2017/16001.2.pdf [https://perma.cc/SQF3-SY5B] [hereinafter ICE Policy Directive No. 16001.2]. Prior versions of the immigration detainer distinguished between requests for notification and requests to hold the individual. The current form requests local law enforcement officers to take both actions.

[21] *See infra* Part II.

[22] *See, e.g.*, *Who Are the Targets of ICE Detainers?*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR. (Feb. 20, 2013), https://trac.syr.edu/immigration/reports/310/ [https://perma.cc/C7T8-5HST]; *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR. (Feb. 20, 2013), https://trac.syr.edu/immigration/reports/311/ [https://perma.cc/CU9Y-HN4Q] (examining data between FY 2008 and 2012). These data are not current because of DHS's refusal to fulfill standing FOIA requests on vital pieces of data. *Latest ICE Data on Detainer Usage Updated Through April 2018*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR. (July 27, 2018), https://trac.syr.edu/immigration/reports/522/ [https://perma.cc/8MFU-MHVK].

[23] *See* Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL'Y REV. 87, 90 (2016) (discussing federal reliance on local actors to enforce federal immigration law). When a local jurisdiction submits a subject's fingerprints to the FBI, they are automatically forwarded to ICE, and a local ICE field office may issue a detainer on this basis. *See, e.g.*, *Secure Communities, Sanctuary Cities and the Role of ICE Detainers*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR. (Nov. 7, 2017), https://trac.syr.edu/immigration/reports/489/ [https://perma.cc/9HX2-X7NL]. Historical information from the Transactional Records Access Clearinghouse (TRAC) indicates that detainers have not been a large contributor to deportations as ICE frequently did not pick people up, but this information is not available after 2011. *See* Alex Newman, *This Is the Data We No Longer Get About Immigration Enforcement Under the Trump Administration*, PUB. RADIO INT'L (Mar. 30, 2017), https://www.pri.org/stories/2017-03-30/data-we-no-longer-get-about-immigration-enforcement-under-trump-administration [https://perma.cc/TEG7-JPRQ]. Nonetheless, detainers may well result in significant numbers of *removal proceedings*, and they have significant effects on the results of state criminal proceedings as well as on the level of fear in immigrant communities.

retaliate against jurisdictions that did not enforce detainers,[24] and over the course of his first two years in office, his administration issued nearly 320,000 detainers—a seventy-five percent increase over the last two years of the Obama administration.[25]

While the dispute is over federal immigration enforcement, its resolution lies increasingly in state law. Detainers are a mechanism for federal immigration enforcement and thus must fit within Congress's legislative scheme.[26] Additionally, as with any law enforcement action, detainers must be consistent with the federal Constitution.[27] But because detainers rely on arrests by state law enforcement officers the actions of those officials must also find support in state law.[28] Consequently, gaps in either federal or state authority render detainer enforcement illegal. Conversely, for immigration detainers to be valid, either federal or state law must affirmatively authorize these arrests and both federal and state law must permit their use. State law is thus a key source for local resistance or cooperation, and states take different approaches to detainer enforcement. For instance, Texas and California provide a recent example with Texas passing a law to facilitate the participation of local officers in federal immigration enforcement and California doing the opposite.[29]

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[24] Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,800 (Jan. 25, 2017) (withholding federal funding from sanctuary jurisdictions and creating a public database that listed the subjects of detainers these offices refused).

[25] *Latest Data: Immigration and Customs Enforcement Detainers*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR. (2017), http://trac.syr.edu/phptools/immigration/detain/ [https://perma.cc/U4NC-ZKAR] [hereinafter *Latest Data: TRAC*]. These numbers are actually larger because the data do not include detainers from December 2017. *About the Data*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE IMMIGR. (2016), http://trac.syr.edu/phptools/immigration/detain/about_data.html [https://perma.cc/6WY2-KYP8] [hereinafter *About the Data: TRAC*]. The initial data under the Trump administration represents a marked jump from the last two years of the Obama administration, but reflects far fewer detainers than earlier periods in the Obama administration. The Trump administration is no longer releasing data associated with detainers. *See* Complaint for Declaratory & Injunctive Relief at 1, Long v. U.S. Immigr. & Customs Enf't, No. 5:17-CV-506 (N.D. N.Y. May 9, 2017) (seeking to compel release of agency records).

[26] 8 U.S.C. § 1357(d) (providing for the use of detainers in the context of controlled substance offenses); *see infra* note 47 and accompanying text (discussing discrepancy between Congress's statutory text and the agency's regulation).

[27] *See infra* Part I, notes 49—77 and accompanying text (discussing requirements of Fourth and Tenth Amendments as applied to immigration detainers).

[28] *See, e.g.*, Cisneros v. Elder, No. 18-CV-30549, 2018 Colo. Dist. LEXIS 3388, at *2 (Dist. Ct. Colo. El Paso Cty. Dec. 6, 2018); C.F.C. v. Miami-Dade Cty, 349 F. Supp. 3d. 1236, 1245 (S.D. Fla. 2018); Creedle v. Miami-Dade Cty., 349 F. Supp. 3d 1276, 1286 (S.D. Fla. 2018); Lunn v. Commonwealth, 78 N.E.3d 1143, 1146 (Mass. 2017); Esparza v. Nobles Cty, No. 53-CV-18-751, 2018 WL 6263254 (Minn. Dist. Ct. Oct. 19, 2018); Valerio-Gonzales v. Jarret, 390 Mont. 427 (2017): People *ex rel.* Wells v. DeMarco, 88 N.Y.S.3d 518, 522 (App. Div. 2018).

[29] Texas S.B. 4 prohibited local law enforcement entities from having policies that prevented officers from asking about an individual's immigration status and mandated enforcement of immigration detainers. *See* TEX. GOV'T CODE ANN. § 752.053(b) (West 2018). The

Scholars and advocates have successfully explained that federal law fails, on its own, to authorize local enforcement of civil immigration law through immigration detainers.[30] Using claims rooted in the Tenth and the Fourth Amendments, advocates have forced current and past administrations to refine their detainer policies to address glaring violations of federal law.[31] Though federal claims remain, revisions in the Trump administration's detainer policy make their success less certain.[32] State law, however, contains multiple sources to challenge detainer enforcement.[33] While courts are looking more closely at the limitations on local immigration enforcement contained in state law, legal scholarship is lacking.[34]

California's Values Act prohibited, *inter alia*, "[i]nquiring into an individual's immigration status" or "[d]etaining an individual on the basis of a hold request." *See* CAL. GOV'T CODE § 7284.6(a)(1) (Deering 2018); *see also* S.B. 5497 § 6(8) (prohibiting local law enforcement officers in the State of Washington from holding individuals based on immigration detainers) http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Passed%20Legislature/5497-S2.PL.pdf#page=1 [https://perma.cc/X9X8-XVYQ].

[30] *See, e.g.*, Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOYOLA OF L.A. L. REV. 629, 633–34 (2013) [hereinafter Lasch, *Federal Immigration Detainers*];; Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 165 (2008) [hereinafter Lasch, *Enforcing the Limits*]; Juliet Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1262 (2015); Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1106, 1006 (2013); Shareef Omar, Note, *Breaking the ICE: Reforming State and Local Government Compliance with ICE Detainer Requests*, 40 SETON HALL LEGIS. J. 159, 163 (2015) (discussing the federal claims and associated judicial opinions that could create municipal liability for detainer enforcement); Lasch, *Rendition Resistance*, *supra* note 11, at 150. Immigration law scholars, represented by Christopher Lasch, Professor at Denver University, and Mark Fleming and Kate Melloy-Goettel from the National Immigrant Justice Center, have filed amicus briefs in detainer challenges all over the country, describing the lack of federal authority for local officers to enforce detainers. *See, e.g.*, Brief for Immigr. Legal Academics as Amici Curiae, Lunnv. Commonwealth, 477 Mass. 517 (2017) (No. SJC-12276); Amici Curiae Brief in Support of Petitioner's Petition for Writ of Habeas Corpus, Valerio-Gonzales v. Jarret, 390 Mont. 427 (2017) (Case No. OP 17-0659); Brief of Law Professors et al. as Amici Curiae in Support of Affirmance, Sanchez Ochoa v. Campbell, 716 F. App'x 741 (9th Cir. 2018) (No. 17-35679), 2017 WL 5127850.

[31] *See, e.g.*, Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014) (holding that detainers can be only requests, not commands, under the Tenth Amendment regardless of the language on the form); Buquer v. City of Indianapolis, No. 1:11-CV-00708, 2013 WL 1332158, at *10 (S.D. Ind. Mar. 28, 2013) (describing detainers as requesting warrantless arrests); Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015) (holding that custody pursuant to a detainer constitutes a new arrest under the Fourth Amendment that must be supported by probable cause and that probable cause is lacking when a detainer is based on investigation of violations only).

[32] *See infra* notes 49—77 and accompanying text (discussing recent policy revisions and splits among courts).

[33] *See, e.g.*, Lunn v. Commonwealth, 477 Mass. 517, 532–37 (2017); Cisneros v. Elder, No. 18-CV-30549, 2018 Colo. Dist. LEXIS 3388, at *2 (Dist. Ct. Colo. El Paso Cty. Dec. 6, 2018); *see also* Roy v. Cty. of L.A., No. CV 12-09012-BRO (FFMx), 2017 U.S. Dist. LEXIS 138911 (C.D. Cal. June 12, 2017); People *ex rel*. Wells v. DeMarco, 88 N.Y.S.3d 518 (App. Div. 2018).

[34] Several authors have explored the implications of the landmark detainer decision on state law, Lunn v. Commonwealth. *See generally* Sean Turley, *Death by Fifty Cuts*: *Exporting Lunn v. Commonwealth to Maine and the Prospects for Waging A Frontal Assault on the Ice Detainer System in State Courts*, 70 ME. L. Rev. 235, (2018); *Immigration Law—*

This article addresses that void by examining for the first time the historical statutes and judicial decisions discussing state and local authority to arrest people on behalf of the federal government. In the process, it surveys the responses by states and territories to federal pleas for local cooperation from more than a century ago. It further reviews other historical limits placed on local law enforcement officers arrest authority and state constitutional protections. The article lays out a comprehensive examination of the common confines present in state law. Together, these sources demonstrate that arrests by state and local officers require a court-issued document for civil violations or probable cause of criminality, and that the right to liberty pending trial persist in state law today. Consequently, state law often independently precludes local officers from carrying out the arrests and detentions immigration detainers request, even if federal law permits it.

The Trump administration has urged states to alter these historical constraints and expand local law enforcement authority, as Texas has.[35] But this break with history is not without significant costs. Here, the article builds on the scholarship in immigration federalism to surface the particular harms associated with placing discretion over enforcing immigration detainers in the hands of state and local officers.[36] The article concludes that

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Local Enforcement—Massachusetts Judicial Court Holds that Local Law Enforcement Lacks Authority to Detain Pursuant to ICE Detainers—Lunn v. Commonwealth*, 78 N.E. 3d 1143 (Mass. 2017)*, 131 HARV. L. REV. 666 (2017).

[35] Kevin Johnson, *Sessions Urges Cities to Comply with Immigration Detainers*, USA TODAY (Mar. 17, 2017), https://www.usatoday.com/story/news/politics/2017/03/27/sessions-urges-cities-comply-immigration-detainers/99696814/ [https://perma.cc/UDA7-XLMR].

[36] Scholarship on immigration federalism examines the role of state and local governments in regulating immigration. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 788 (2008); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) (defining the term "immigration federalism" as "states and localities play[ing] a role in making and implementing law and policy relating to immigration and immigrants"); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997);. This literature includes an adamant debate over whether state and local governments can and should regulate certain aspects of immigration. *Compare* Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1400-01 (2006) (raising concerns about racial profiling and abuse of authority and proposing a balancing test for local and federal interests) *and* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 521–27 (2001) (reviewing state restrictions on public benefits for noncitizens) *with* Jeff Sessions & Cynthia Haden, *The Growing Role for State & Local Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 324 (2005); *see also* Cristina Rodriguez, Comment, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571–75 (2008) (describing states and localities as powerful agents for integration and asserting the value of a power-sharing model). Though the scholarship outlines the competing interests at play when some areas of immigration regulation are devolved to the states, the literature does not address historical constraints on state and local police power that limit detainer enforcement nor the dangers of pursuing policies that would overcome these limitations.

traditional constraints on state police power should be preserved and enforced to limit the reach of abusive tactics, locate responsibility and accountability for immigration enforcement with the federal government, guard against state-by-state variation, and protect the rights of immigrants.

Part I of this article describes the nature of the immigration detainer and the decade of litigation that has shaped it. This Part concludes by examining the uncertainty surrounding future federal claims and the corresponding move to look elsewhere for constraints on local enforcement. Part II takes stock of the increasing stakes associated with enforcing immigration detainers under the Trump administration throughout the criminal justice system and through litigation over federal attempts to force local cooperation in immigration enforcement. Part III unearths states' historical responses to federal requests for their cooperation in jailing people; this Part demonstrates that long-standing constraints on local arrest authority preclude enforcement of immigration detainers. It concludes that these constraints are necessary to prevent the further erosion of immigrants' safety and civil rights.

I. FEDERAL REQUESTS FOR LOCAL COOPERATION THROUGH IMMIGRATION DETAINERS

Today, detainers ask local law enforcement officers to hold individuals an additional forty-eight hours to facilitate the transfer of immigrants from criminal custody to immigration custody.[37] Federal immigration agents have issued detainers to local law enforcement officers for over sixty years.[38] For the past decade, however, the Department of Homeland Security (DHS) has faced a series of claims that detainers violate the Tenth Amendment by commandeering state and local officers to do the work of federal agents and that they violate the Fourth Amendment's protections against unreasonable seizure.[39] Courts

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[37] ICE Policy Directive 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers (Dep't Homeland Sec. 2017), https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf [https://perma.cc/9XVH-Z755].

[38] *See* Slavik v. Miller, 89 F. Supp. 575, 576 (W.D. Pa. 1950); Rinaldi v. United States, 484 F. Supp. 916, 916 (S.D.N.Y 1977); Matter of Lehder, 15 I. & N. Dec. 159, 159 (B.I.A. 1975) (interim decision); *see also* ICE Policy No. Directive 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers 1 (Dep't Homeland Sec. 2017), https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf [https://perma.cc/9XVH-Z755] (explaining that INS first started using the detainer form as early as 1952).

[39] The Tenth Amendment sets out the principle of anti-commandeering and prohibits the federal government from compelling states to enforce federal law. U.S. CONST. amend. X.; *see also* Printz v. United States, 521 U.S. 898, 935 (1997) ("The federal government may neither issue directives requiring the [s]tates to address particular

have often agreed, forcing the executive branch to revise its policies.[40] This back and forth has shaped the key features of today's detainers and winnowed down the range of future challenges arising out of federal law.

Historically, federal agents used immigration detainers only to request notification of the release of an immigrant from criminal custody.[41] Detainers did not seek the ongoing detention of an immigrant in state custody. This policy shifted with the creation of regulations following the passage of the first and only statute to address detainers.[42] In 1986, Congress passed the Anti-Drug Abuse Act, which included a provision on the use of detainers as part of a series of reforms that expanded immigration consequences for drug crimes.[43] The 1986 detainer statute allows an agent of DHS[44] to issue a detainer for an immigrant arrested for a controlled substance violation upon the request of the law enforcement officer.[45] It further provides that if a DHS employee issues a detainer, then federal immigration officers "shall effectively and expeditiously take custody of the alien."[46] Though nothing in the statute provided for continued custody of an immigrant based on a detainer, the

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problems, nor command the [s]tates' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). The Fourth Amendment prohibits unreasonable search and seizure and was incorporated to the states by *Mapp v. Ohio*. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961). Under the Fourth Amendment, a search or seizure is reasonable if conducted with a valid warrant supported by probable cause or falls within an exception to the warrant requirement. U.S. CONST. amend. IV.

[40] *See* KATE MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 7 (2015) (discussing history of detainer litigation and policy changes through the Obama administration); *see also Immigration Detainers Litigation Update*, IMMIGR. LEGAL RES. CTR., (July 2018) https://www.ilrc.org/sites/default/files/resources/immig_detainer_legal_update-20180724.pdf [https://perma.cc/T777-LACL].

[41] *See, e.g.*, Prieto v. Gulch, 913 F.2d 1159, 1164 (6th Cir. 1990); Vargas v. Swan, 854 F.2d 1028, 1035 (7th Cir. 1988) (appendix including 1983 version of the detainer form that requests notification only of an immigrant's projected date of release from criminal custody); Chung Young Chew v. Boyd, 309 F.2d 857, 860 (9th Cir. 1962); Dearmas v. INS, No. 92 Civ. 8615 (PKL), 1993 WL 213031, at *6 (S.D.N.Y. 1993); Slavik v. Miller, 89 F. Supp. 575, 576 (W.D. Pa. 1950); *see also* Brief for Immigration Legal Academics as Amici Curiae at 21, Lunn v. Commonwealth, 477 Mass. 517 (2017) (No. SJC-12276).

[42] MANUEL, *supra* note 40, at 5–6.

[43] *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, § 1751(d) (1986).

[44] The Immigration and Nationality Service (INS) located within the Department of Justice had responsibility for immigration enforcement until the creation of the Department of Homeland Security in 2003. Though many of the immigration statutes continue to refer to "the Service" and "the Attorney General," The Homeland Security Act of 2002 provides that the Department of Homeland Security assumed the enforcement responsibilities of the Service and the Attorney General such that statutory references to the Service should be understood now to refer to the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. 107-296, § 451(b), 116 Stat. 2135, 2196 (2002); *see also* 8 U.S.C. § 1103(a)(1) (2018).

[45] 8 U.S.C. § 1357(d) (2018).

[46] *Id.*

implementing regulation, created in 1988, did.[47] That regulation extends the use of detainers beyond drug crimes, and states that once a detainer is filed, the law enforcement agency "shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department."[48]

More than a decade of detainer litigation based on the Fourth and Tenth Amendments has generated the key characteristics of today's immigration detainer policy. Courts recognize detainers as requests, not commands, to local officials.[49] Detainers call for a maximum of forty-eight hours of additional detention.[50] Custody pursuant to a detainer constitutes an arrest.[51] The immigration arrest must be supported by probable cause of removability.[52] Detainers require warrants or probable cause of

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[47] Rule Implementing Amendments from Anti-Drug Abuse Act and IRCA of 1986, 53 Fed. Reg. 9281, 9281-84 (Mar. 22, 1988). Scholars have highlighted this discrepancy and argued that the regulation is *ultra vires* as a result. *See* Lasch, *Enforcing the Limits*, *supra* note 30, at 191–93; Lasch, *Federal Immigration Detainers*, *supra* note 30, at 681–95. A federal district court in California reviewed a challenge to DHS's detainer regulations and concluded that they are a reasonable application of the authority delegated to the agency by Congress. Comm. for Immigr. Rights of Sonoma Cty. v. Sonoma Cty., 644 F. Supp. 2d 1177, 1186, 1198 (N.D. Cal. 2009). No other district courts or U.S. courts of appeals has ruled on the issue.

[48] 8 C.F.R. § 287.7(d) (2018). The regulation further makes clear that DHS will not pay for the costs associated with this extended detention. *Id.* § 287.7(e).

[49] Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014). By the time the Third Circuit considered whether detainers were a request or a command, the Department of Homeland Security had revised its detainer form to change the language from requiring that local law enforcement maintain custody to requesting this. *Id.* at 642; *see also Understanding Immigration Detainers: An Overview for State Defense Counsel*, U.S. DEP'T OF HOMELAND SEC., (Mar. 2011), https://nationalimmigrationproject.org/pdfs/practitioners/practice_advisories/crim/2011_may_understand-detainers.pdf [https://perma.cc/3LQS-2AKN] (Appendix B-Sample I-247 Immigration Detainer Forms); Miranda-Olivares v. Clackamas County, No. 3:12-CV-02317, 2014 WL 1414305, at *7 (D. Or. Apr. 11, 2014).

[50] Beginning in 2008, a series of lawsuits were filed challenging detention that far exceeded the forty-eight-hour period referenced in the form and regulation. *Issue Brief: Immigration Detainers & Local Discretion*, AM. CIV. LIB. UNION N. CAL. 1, 5-7 (Apr. 2011), https://www.aclunc.org/sites/default/files/detainers_issue_brief.pdf [https://perma.cc/8BA6-7CPA]. In 2011, DHS revised the form to emphasize that custody should not exceed forty-eight hours beyond the time the person would otherwise be released. U.S. DEP'T OF HOMELAND SEC., Immigration Detainer – Notice of Action, Form I-247 (rev'd June 2011), on file with author. The detention request exempted Saturdays, Sundays, and holidays from that forty-eight hour period until the Obama administration's 2015 revisions. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETAINER-REQUEST FOR VOLUNTARY ACTION DHS FORM I-247D (rev'd May 2015), https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF [https://perma.cc/8NTG-2HCD].

[51] Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015); *see also* Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1247–48 (E.D. Wash. 2017).

[52] Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015).

escape.[53] Finally, they enforce civil, not criminal, violations of the Immigration and Nationality Act (INA).[54]

The Trump administration issued a new detainer policy in March 2017 that reflects these core features.[55] One of the policy's explicit goals was that "ICE's [law enforcement agency] partners may honor detainers."[56] It eliminated the three separate detainer forms created by the Obama administration and created a single new detainer form.[57] The new form asserts that ICE agents have probable cause that the person is removable and requires the detainer to be accompanied by either an administrative warrant of arrest or an administrative warrant of removal/deportation.[58] It further instructs ICE officers to assume custody as closely as possible to the time at which the person would otherwise be released. The form also states that a detainer should be cancelled if officers cannot assume custody within forty-eight hours of that time.[59] The contents of the detainer form require "probable cause" of removability and request ongoing detention for up to forty-eight hours without exceptions for weekends and holidays.[60] The new

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[53] Moreno v. Napolitano, 213 F. Supp. 3d 999, 1003 (N.D. Ill. 2016)(advocates brought a class action challenging all detainers issued by ICE's Chicago field office aimed at the warrantless arrests detainers effected); Buquer v. City of Indianapolis, No. 1:11-CV-00708, 2013 WL 1332158, at *10 (S.D. Ind. Mar. 28, 2013) (describing detainers as requesting warrantless arrests). Congress authorized warrantless arrests by ICE agents but only if agents have a "reason to believe that the [person] . . . is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2) (2018). Courts have interpreted the statute's phrase "reason to believe" to equate to probable cause in order to meet the Fourth Amendment's reasonableness standard. Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L. J. 1563, 1608, 1608 n.229 (2010). The court in *Moreno* concluded that ICE agents lacked probable cause that the subjects of detainers were likely to escape. Class members were already in custody and thus *unlikely* to escape before a warrant could be obtained. ICE could not rely on a categorical assessment of flight risk for the class either. *Moreno*, 213 F. Supp. 3d at 1005. Based on this determination, the district court ruled that detainers that were not accompanied by an administrative warrant or a charging document exceeded their statutory authority. *Id.* at 1002, 1009 (certifying the class as individuals subject to a detainer that was not accompanied by a warrant of arrest, warrant of deportation, or charging document used to initiate removal proceedings). The effect of the ruling was to invalidate nearly all detainers lodged in Illinois, Indiana, Wisconsin, Missouri, Kentucky, and Kansas. *See Enforcement and Removal Operations Field Offices*, IMMIGR. & CUSTOMS ENF'T (Jan. 3, 2018), https://www.ice.gov/contact/ero [https://perma.cc/BA2S-H8M4](listing the area of responsibility of the Chicago Field Office).

[54] *See* Lunn v. Commonwealth, 477 Mass. 517, 518 (2017); Cisneros v. Elder, No. 18-CV-30549, 2018 Colo. Dist. LEXIS 3388, at *22 (El Paso Cty. Dec. 6, 2018); *see also* Arizona v. United States, 567 U.S. 387, 396 (2012) ("Removal is a civil, not criminal matter").

[55] ICE Policy No. 10074.2, *supra* note 37, at 1 (citing Moreno v. Napolitano, 213 F. Supp. 3d 999, as supporting authority).

[56] *Id.*

[57] *Id.*

[58] *Id.* at 2.

[59] *Id.* at 3.

[60] *Id.* at 3–4. The administrative warrant of arrest accompanying the detainer form under this policy, however, asserts probable cause of removability based only on the existence of a charging document or pending proceedings. A charging document is not reviewed by an immigration judge or, in many cases, even an ICE attorney to determine its validity before it

form also eliminates the choice between requesting notification of release or maintaining detention and instead asks law enforcement agencies to do both.[61] The policy concludes that any detainers declined by law enforcement agencies should be documented in ICE's database.[62]

This evolution of the administration's detainer policy means that the range of federal claims has narrowed. Fourth Amendment challenges remain due to the nature of administrative immigration warrants and the civil violations they enforce.[63] By regulation, an immigration warrant of arrest can be issued only by designated federal officials after a mandated training course[64] if the agent has reason to believe that the person named is in the United States illegally.[65] Unlike in the criminal context, a neutral magistrate does not review this statement of probable cause and these warrants are not issued by judicial officers.[66] Nor do detainers indicate commission of a crime.

Challenges rooted in the scope of the authorizing statute and regulations also remain. Immigration arrests are governed by a detailed regulatory scheme, which does not include state and local law enforcement officers.[67] Only designated immigration agents are authorized to "execute warrants of arrest for administrative immigration violations."[68] These designated officers must also complete a basic training course in immigration law enforcement before they can make civil arrests.[69] Accordingly, administrative arrest warrants and administrative warrants of removal are directed only to those officers identified in the federal regulations.[70]Attaching an administrative warrant to an

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is filed in the immigration court and thus the existence of a charging document or a pending proceeding does not necessarily equate to probable cause of removability.

[61] DEP'T OF HOMELAND SEC., IMMIGRATION DETAINER – NOTICE OF ACTION, FORM I-247A (Mar. 2017), https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf [https://perma.cc/P42J-K3ZJ].

[62] ICE Policy No. 10074.2, *supra* note 37, at 5.

[63] *See, e.g.*, Lena Graber & Ann Benson, *Immigration Enforcement Authority for Local Law Enforcement Agents*, IMMIGR. LEGAL RES. CTR. (2014), https://www.ilrc.org/sites/default/files/resources/lea_immig_faqs_20150318.pdf [https://perma.cc/G7TQ-LDU3].

[64] 8 C.F.R. §§ 287.5(e), 236.1(b)(1) (2018); *see also* 8 U.S.C. § 1226(a) (2012 & Supp. V 2018).

[65] 8 C.F.R. § 287.8(c)(2) (2018).

[66] Coolidge v. New Hampshire, 403 U.S. 443, 553 (1971) (finding a warrant issued by the Attorney General to be invalid because he was not a neutral magistrate); Johnson v. United States, 333 U.S. 10, 14 (1948) (the Fourth Amendment's requirement for reasonableness means that "inferences [must] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

[67] Arizona v. United States, 567 U.S. 387, 407–08 ("The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process.").

[68] 8 C.F.R § 287.5(e)(3) (2018); *accord*, 8 C.F.R. 236.1(b)(1) (2018).

[69] 8 C.F.R. §§ 287.5(c)(1), (e)(3), 287.1(g) (2018) (defining the required training).

[70] U.S. DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENF'T, FORM I-200: WARRANT FOR ARREST OF ALIEN (2017), https://www.ice.gov/sites/default/files/documents/

immigration detainer therefore does not clearly convey additional federal enforcement authority to local officers. Instead, immigration advocates argue that the regulatory structure precludes arrests by local officials notwithstanding the presence of an administrative arrest warrant because that warrant can only be executed by certain federal officials.

Courts are split, however, on the Fourth Amendment and regulatory claims. The United States District Court for the Southern District of Indiana invalidated a state law that would have authorized local officers to arrest immigrants based on detainers alone.[71] The court held that the law was invalid under the Fourth Amendment because it authorized officers to perform warrantless arrests for violations that are not crimes.[72] Though an administrative warrant must now accompany a detainer, that change does not alter the civil nature of the violations underlying detainers nor address the significant differences between criminal and administrative warrants. The United States Court of Appeals for the Fourth Circuit similarly invalidated the arrest by local officers of a woman waiting to start her shift at work on the basis of an immigration warrant.[73] The court reasoned that the lack of probable cause of criminality or specific authorization for the police officers to act as immigration agents meant that the arrests lacked any lawful basis.[74] The United States Court of Appeals for the Fifth Circuit, however, overruled two district court decisions that had invalidated detainers for lack of criminal probable cause.[75] Other courts have rejected similar Fourth Amendment claims.[76]

Document/2017/I-200_SAMPLE.PDF [https://perma.cc/5QQJ-Y5W3] [hereinafter *Form I-200*]; U.S. DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENF'T, FORM I-205: WARRANT OF REMOVAL/DEPORTATION, https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF [https://perma.cc/PZ9W-A27G] [hereinafter *Form I-205*]; *see also* 8 C.F.R. § 241.2(b) (2018).

[71] Buquer v. City of Indianapolis, No. 1:11-CV-00708, 2013 WL 1332158, at *10–11 (S.D. Ind. Mar. 28, 2013).

[72] *Id.* at *10–11.

[73] *See* Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 465–66 (4th Cir. 2013) (finding that a local arrest based on only civil immigration warrant, absent federal direction or authorization, violated the Fourth Amendment); *see also* People *ex rel.* Swenson v. Ponte, 46 Misc. 3d 273, 278 (N.Y. Sup. Ct. 2014) ("There is no allegation that the Department has actually obtained a removal order and, if in fact they had, there is still no authority for a local correction commissioner to detain someone based upon a civil determination, as immigration removal orders are civil, not criminal, in nature.").

[74] *Santos*, 725 F.3d at 465–66.

[75] City of El Cenizo v. Texas, 890 F.3d 164, 188 n.22 (5th Cir. 2018) (abrogating Mercado v. Dallas Cty., 229 F. Supp. 3d 501, 512–13 (W.D. Tex. 2017) and Santoyo v. United States, No. 5:16-CV-885, 2017 WL 2896021 (W.D. Tex. June 5, 2017)).

[76] *See, e.g.*, United States v. Gomez-Robles, No. CR-17-0730-TUC-CKJ (JR), 2017 WL 6558595, *4 (D. Ariz. Nov. 28, 2017) (finding that probable cause of removability based on a prior removal order was sufficient under the Fourth Amendment to support the enforcement of a detainer by the Pima County Sheriff's Department in Arizona), *appeal docketed*, No. 18-10477 (9th Cir. Dec. 14, 2018); *see also* Orellana v. Nobles Cty., 230 F.

Likewise, claims that state officials lack authority to enforce detainers because they are not designated in the statutory and regulatory scheme have been met with mixed success.[77]

None of these disputes, however, addresses the parallel issue of whether civil immigration arrests by state and local officers are permitted under that state's law. In light of this vulnerability, the Trump administration has taken an additional step to protect the enforceability of immigration detainers in the courts and with local law enforcement agencies. In Florida, DHS is piloting a policy proposed by a Florida county sheriff to the National Sheriff's Association and Major County Sheriffs of America.[78] The pilot adds basic agreements between DHS and local jails to house immigrants on a short-term basis and includes a formal Order to Detain with the detainer and administrative warrant.[79] The theory is that sheriffs are never effecting an immigration arrest but rather acting under the service agreement to detain the person such that ICE becomes the custodian of the inmate when the detainer, administrative arrest warrant, and Order to Detain are filed.[80]

Supp. 3d 934, 945 (D. Minn. 2017) (finding the reasons underlying the detainer to provide sufficient probable cause to support the enforcement of a detainer by county sheriff but concluding that the absence of likelihood of flight did not allow for a warrantless arrest); Mendoza v. Osterberg, No. 8:13-CV-65, 2016 WL 6238605, at *13 (D. Neb. Mar. 3, 2016) (finding detainer based on probable cause of removability to be sufficient under the Fourth Amendment); Smith v. State, 719 So. 2d 1018, 1022 (Fla. Dist. Ct. App. 1998); Chery v. Sheriff of Nassau Cty, No. 8100/15, 2015 WL 13665005, at *3 (N.Y. Sup. Ct. Dec. 3, 2015); People v. Xirum, 45 Misc. 3d 785, 789 (N.Y. Sup. Ct. 2014).

[77] *See, e.g.*, Abriq v. Hall, 295 F. Supp. 3d 874 (M.D. Tenn. 2018) (finding that detention by state officers for immigration violations, absent an express agreement, conflicts with Congress's regulatory scheme) later reversed following the Fifth Circuit's ruling *City of El Cenizo*, Abriq v. Metro. Gov't of Nashville, 333 F. Supp. 3d 783, 787 (M.D. Tenn. 2018) *appeal dismissed sub nom.* Abriq v. Hall, No. 18-6124, 2019 WL 319826 (6th Cir. Jan. 17, 2019). Lopez-Aguilar v. Marion Cty. Sheriff's Dep't, 296 F. Supp. 3d 959, 969–70 (S.D. Ind. 2017) *with* United States v. Gomez-Robles, No. CR-17-0730-TUC-CKJ (JR), 2017 WL 6558595, at *3 (D. Ariz. Nov. 28, 2017), *appeal docketed*, No. 18-10477 (9th Cir. Dec. 17, 2018) (rejecting arguments that local officials did not have authority to make immigration arrests under the regulatory structure and reasoning that the detainer regulations provide that authority).

[78] Memorandum from Sheriff Bob Gaultieri, Pinellas County, Fla., to Sheriff Greg Champagne, President, Nat'l Sheriffs' Ass'n, and Sheriff Sandra Hutchens, President, Major Cty. Sheriffs of Am. On Immigration Detainer Issues and Solution (June 22, 2017) (on file with author) [hereinafter *Gaultieri Memo*] (describing the ongoing concerns regarding the limited nature of the administrative warrants and the Fourth Amendment concerns surrounding local arrests for civil violations); *Sheriffs from 17 Florida Counties Unveil Plan to Work Together with Immigration Officials*, NBC MIAMI (Jan. 18, 2018, 7:24 AM), https://www.nbcmiami.com/news/local/Sheriffs-From-17-Florida-Counties-Unveil-Plan-to-Work-Together-With-Immigration-Officials—469904193.html [https://perma.cc/MD5Z-LFRW].

[79] *Sheriffs from 17 Florida Counties Unveil Plan to Work Together with Immigration Officials*, *supra* note 78.

[80] *Id.*; *see also Gaultieri Memo*, *supra* note 78, at 3; Caitlin Dickerson, *Trump Administration Moves to Expand Deportation Dragnet to Jails*, N.Y. TIMES (Aug. 21, 2017), https://www.nytimes.com/2017/08/21/us/sheriffs-immigration-jails.html [https://

Opponents counter that these payment agreements and processing orders are insufficient to make the ICE agent, rather than the local sheriff, the person performing the arrest.[81] This latest policy is being challenged in court as well.[82]

The next Part describes why the current contests over immigration detainers matter so much to so many. The article then examines laws common to many states that provide independent prohibitions on local detainer enforcement.

II. THE GROWING STAKES OF THE DETAINER DEBATE

The consequences flowing from detainer requests are wide-reaching and severe. For individuals, detainers adversely affect the outcomes of criminal proceedings. They result in longer pre-trial detention, convictions for more serious crimes, and imposition of stiffer sentences. For communities, they erode trust in law enforcement, reduce crime reporting, and increase the likelihood of racial profiling.

The direct effects detainers have on criminal justice outcomes begin with the extended pre-trial detention they provoke. Local officials often refuse to accept bond in the criminal proceeding for someone subject to an immigration detainer and thus require the person to remain detained pending the disposition of his or her criminal case.[83] According to one study, individuals subject to immigration detainers were in custody three times longer than other similarly situated inmates.[84] For instance, Enrique Uroza, a college student in Utah, posted bail ten minutes after it was set by the Utah criminal court.[85] Nonetheless, county officials held him for another thirty-nine days based on an immigration detainer before a state court ordered his immediate release.[86] Remaining in

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perma.cc/EK5F-KMMY] (describing the policy's goal of protecting sheriffs from Fourth Amendment claims).

[81] *See, e.g.*, *FAQ on ICE's New "Enforcement Partnerships" in Florida*, AM. CIV. LIB. UNION, https://www.aclu.org/fact-sheet/faq-ices-new-enforcement-partnerships-florida [https://perma.cc/94ZG-V3T9] (last visited Aug. 10, 2018).

[82] *See* Complaint at 2–3, Brown v. Ramsay, No. 4:18-CV-10279-KMM, (S.D. Fla. Dec. 3, 2018), 2018 WL 6340578.

[83] *See, e.g.*, Morales v. Chadbourne, 793 F.3d 208, 213 (1st Cir. 2015); Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1251–52 (E.D. Wash. 2017*), appeal dismissed as moot sub nom*. Sanchez-Ochoa v. Campbell, 716 F. App'x 741 (9th Cir. 2018); First Amended Complaint at 6, Padilla-Arredondo v. Canyon Cty., No. 1:18-CV-00025-EJL-CWD (D. Idaho Apr. 23, 2018), ECF No. 14.

[84] ANDREA GUTTIN, AMER. IMMIGR. COUNCIL, THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS, 1, 12 (2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/Criminal_Alien_Program_021710.pdf [https://perma.cc/DV54-EFAM].

[85] Uroza v. Salt Lake County, No. 2:11-CV-713-DAK, 2014 WL 4457300, at *1 (D. Utah Sept. 10, 2014).

[86] *Id.* at *1–2.

pretrial custody, in turn, increases the likelihood of conviction[87] by more than ten percent and increases the severity of the sentence two- to three-fold.[88] An immigration detainer can also significantly affect the conditions of criminal custody by limiting the availability of work opportunities while in jail, participation in rehabilitative programs, and eligibility for work release.[89]

Immigration detainers can also lead to criminal convictions that could otherwise be avoided through diversion programs. These programs provide rehabilitation services in return for dismissal of the criminal charge upon completion, but they generally require non-custodial settings.[90] A detainer precludes eligibility for diversion programs because it signals that upon release of the criminal charge the person will be transferred directly into immigration custody and thus not able to complete the conditions of the diversion program.[91] For example, police arrested a man in Miami-Dade County for driving with a suspended license.[92] ICE lodged a detainer on him.[93] As a result, the man was not placed in a diversion program that would have avoided a conviction altogether and was not released from county jail after posting his bail of two dollars.[94] Instead, he was

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[87] Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 203 (2018), https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20161503 [https://perma.cc/YP8V-G3HU] (stating that individuals released from detention pretrial were 14% less likely to be convicted of a crime).

[88] CHRISTOPHER T. LOWENKAMP ET AL., ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES, 1, 11 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf [https://perma.cc/Z689-8XSS].

[89] These consequences are not mandated by the detainer but are a common effect in how they are enforced. *See, e.g.*, Lucatero v. Haynes, No. 1:14-CV-255, 2014 WL 6387560, at *1 (W.D.N.C. Nov. 14, 2014); Comm. on Criminal Justice Operations, *Immigration Detainers Need Not Bar Access to Jail Diversion Programs*, N.Y.C. BAR 1, 3 (June 2009), http://www.nycbar.org/pdf/report/NYCBA_Immigration%20Detainers_Report_Final.pdf [https://perma.cc/2BN5-KZPS].

[90] For example, in Broward County, Florida, the Domestic Violence Misdemeanor Program is non-custodial, specifying that compliance requires attendance of a 26-week Batterer's Intervention Program and that any other arrest or charge for any criminal offense will terminate participation. *Domestic Violence Misdemeanor Diversion Program*, OFFICE OF THE STATE ATTORNEY, SEVENTEENTH JUDICIAL CIRCUIT, http://www.sao17.state.fl.us/assets/dvmdp.pdf [https://perma.cc/EE4J-Q7C5]. In Minnesota, Pretrial Diversion Programs are statutorily required in counties participating in the state's Community Corrections Act, with the goal of providing "eligible offenders with an alternative to confinement and a criminal conviction[.]" MINN. STAT. § 401.065 (2019); *see also Pretrial Diversion*, NAT'L CONF. ST. LEGIS. (Sept. 28, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx [https://perma.cc/99LF-792H].

[91] Comm. on Criminal Justice Operations, *supra* note 89; *see also* Complaint at 9, Sanchez Ochoa v. Campbell, No. 17-CV-03124 (E.D. Wash. July 17, 2017), ECF No. 1.

[92] Complaint at 4, 14-15, C.F.C. et al. v. Miami-Dade Cty., No. 18-CV-22956 (S.D. Fla. July 20, 2018), ECF No. 1.

[93] *Id.* at 14–15.

[94] *Id.*

held for more than five weeks solely on the immigration detainer.[95] Due to his ongoing detention, he had to close his landscaping business and fire his dozen employees.[96]

Given the immigration consequences that flow from many criminal convictions, detainers can have the perverse effect of eliminating legal avenues to immigration that would have been available absent that conviction. In Hennepin County, Minnesota, for example, first-time offenders for low-level drug possession charges can participate in chemical-dependency assessments, community service, and regular check-ins to prove rehabilitation and avoid a drug conviction.[97] Drug convictions, in turn, trigger deportability and mandatory immigration detention.[98] Hennepin County public defenders, however, cannot make use of this alternative to conviction for clients who are subject to immigration detainers because these individuals will not be released to a community setting as the program requires.

Ms. Anotich, for example, the mother of a young child and the victim of trafficking, was unable to avoid a conviction for drug possession through the county's diversion program, even though citizen defendants charged with the same crime could. Instead, she pled guilty to the charge to limit her time away from her daughter and moved to immigration court where she had to fight her removal based on the very drug conviction the detainer caused.[99]

The costs to communities of detainer enforcement are significant as well. Numerous studies show that local immigration enforcement coincides with race-based policing. In Irving, Texas, the use of detainers motivated local law enforcement officers to make race-based arrests so that ICE can screen individuals for deportability.[100] Those studies have also documented the profound effect those practices have on the relationship between local law enforcement and immigrant

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[95] *Id.*

[96] *Id.* at 14.

[97] *See Adult Diversion*, HENNEPIN CTY. ATTY'S OFF. (2019), https://www.hennepinattorney.org/about/adult-diversion/adult-diversion [https://perma.cc/752R-2537].

[98] 8 U.S.C. § 1227(a)(2)(B)(i) (2008) (providing that a conviction for any controlled substance offense of any state is a ground of removal, with a limited exception for some marijuana-related offenses); *see also* 8 U.S.C. § 1226(c)(1)(B) (1996) (subjecting convictions for controlled substance offenses to mandatory immigration detention).

[99] Email from Kathy Moccio, Visiting Clinical Professor, University of Minnesota School of Law, to Kate Evans, Associate Professor of Law & Immigration Clinic Director, University of Idaho College of Law (DATE) (on file with author).

[100] Trevor Gardner & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, WARREN INST. 1, 4 (2009), https://www.motherjones.com/files/policybrief_irving_FINAL.pdf [https://perma.cc/WW3Y-YDQ3].

communities, resulting in lower rates of reporting crime and growing reluctance to participate in prosecution.[101]

Consider the case of Mr. Garcia, who saw a routine traffic stop turn into a deportation proceeding even though no criminal charges were ever filed.[102] A deputy sheriff in Idaho stopped Mr. Garcia for a "bad axel" and arrested him for driving without a license, something he could not obtain in Idaho based on his unauthorized status.[103] The arresting officer then contacted ICE and ICE issued a detainer for him.[104] The state criminal charge for driving without a license was never filed; instead, Mr. Garcia was transferred to immigration detention and placed in removal proceedings.[105] The experience of Mr. Garcia illustrates how immigration detainers invite racial profiling. The detainer allowed the sheriff's deputy to convert a traffic stop into immigration detention and a lengthy removal proceeding. For Mr. Garcia, the policy of Idaho sheriffs to enforce detainers appears to have motivated a pretextual stop given that no state criminal charges were ever pursued.

Detainers also amplify the impact of racial bias. A national study of county sheriffs published in 2017 shows that the size of the Latinx population in the sheriff's jurisdiction is associated

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[101] *See, e.g.*, AMADA ARMENTA, PROTECT, SERVE, AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT 31 (2017); KATHERINE BECKETT & HEATHER EVANS, UNIV. WASH. IMMIGRATION DETAINER REQUESTS IN KING COUNTY, WASHINGTON: COSTS AND CONSEQUENCES, i (Mar. 26, 2013), http://nwirp.org/documents/pressreleases/BeckettXEvans_ICE_Detainer_Report_FINAL.pdf [https://perma.cc/584D-4356]; *see also* RANDY CAPPS ET AL., MIGRATION POL'Y INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT, 28 (2011), https://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf [https://perma.cc/TF78-SXFH]; CRISTINA RODRIGUEZ ET AL., MIGRATION POL'Y INST., A PROGRAM IN FLUX, NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) 7–8 (2010), https://www.migrationpolicy.org/sites/default/files/publications/287g-March2010.pdf [https://perma.cc/7JEY-JRSU] (reporting that one sheriff used the 287(g) agreement with his county to identify and arrest large numbers of immigrants with no criminal activity);; NIK THEODORE, DEP'T OF URBAN PLANNING AND POL'Y, UNIV. OF ILL. AT CHI., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT, 5–6 (2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF [https://perma.cc/TPW2-6D4R] ("Survey results indicate that the greater involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police . . . exacerbating their mistrust of law enforcement authorities."); Queally, *supra* note 8 ("Los Angeles Police Chief Charlie Beck said Tuesday that reports of sexual assault and domestic violence made by the city's Latino residents have plummeted this year amid concerns that immigrants in the country illegally could risk deportation by interacting with police or testifying in court.").

[102] *See* I-213 SUBJECT ID: 355703651, U.S. DEP'T OF HOMELAND SEC. (May 19, 2016) (on file with the author). The DHS form details the nature of the police encounter and ICE's involvement. The individual's name has been changed to protect his identity.

[103] IDAHO CODE § 49-303(14) (2019) (providing that individuals "not lawfully present in the United States" may not be licensed).

[104] *Id.*

[105] *Id.*

with the degree of bias toward immigration: the larger the Latinx population in the county, the more negative the sheriff's views.[106] The negative views persisted regardless of the growth rate of the immigrant population or their immigration status.[107] Further, the more negative the attitude of the sheriff, the more frequently their office checks the immigration status of people who are stopped for traffic violations or interact with the office as witnesses to crime.[108] Moreover, the views of the county's residents with respect to immigration policy and enforcement did not mediate the sheriff's practices.[109] Rather, the sheriff's personal attitude toward immigration was the primary factor affecting the office's immigration enforcement actions.[110] The study's findings mean that the larger the Latinx population in a county, the more likely it is that the sheriff's office will check immigration status during any interaction, regardless of the political preferences of the electorate. Immigration detainers then link bias-driven status checks to deportation proceedings.

The Trump administration has expanded the number of people experiencing the consequences of detainers at both the individual and community levels. Though immigration officials have issued detainers for the past sixty years, the practice did not become widespread until 2007. That year, the use of detainers jumped by over four hundred percent from fifteen thousand to more than seventy-six thousand.[111] This increase coincided with the development of Secure Communities, which automatically routes the results of a fingerprint check in the Federal Bureau of Investigations (FBI) database upon arrest by local law enforcement through ICE's databases to identify immigration violations.[112] The new screening mechanism meant that ICE could issue a flood of detainers with little effort or review.[113] As a result, the number of detainers issued continued to increase through 2011 when federal

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[106] Emily M. Farris & Mirya R. Holman, *All Politics is Local? County Sheriffs and Localized Policies of Immigration Enforcement*, 70 POL. RES. Q. 142, 149 (2017).

[107] *Id.*

[108] *Id.* at 151.

[109] *Id.* at 152.

[110] *Id.*

[111] *See Latest Data: TRAC*, *supra* note 25.

[112] *See* Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 2 (2015); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1095–1101 (2004) (describing Department of Justice's attempts to add many different types of immigration information into its main criminal database, the National Crime Information Center ("NCIC") and arguing that federal statutes do not allow this); *Secure Communities: Overview*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/secure-communities [https://perma.cc/MLA3-8K28].

[113] *See* Lasch, *Federal Immigration Detainers*, *supra* note 30, at 677 (discussing the effect of linking FBI fingerprint checks with DHS databases to allow rapid increase in use of detainers).

officials filed nearly 310,000 of them for immigrants across the country.[114] The rate then declined throughout the remainder of the Obama administration as President Obama established a priority enforcement system that made certain criminal or immigration history a prerequisite for a detainer.[115] The use of detainers reversed course with the inauguration of President Trump.[116] During its first year, the Trump administration issued over 142,000 detainers—an increase of sixty-six percent over the prior fiscal year.[117]

States and localities assume the costs of federal immigration policy when they enforce detainers. These costs can be staggering: Texas counties, for example, spent $72 million in 2017 enforcing immigration detainers as mandated by the new state law.[118] A 2012 report estimated that Colorado paid $13 million per year to enforce federal immigration laws.[119] The costs to Miami-Dade County in 2017 topped $12 million.[120] These numbers do not account for the damages that must be paid by counties for wrongful arrests in enforcing detainers.[121] States and localities must account for these costs when enacting policies to enforce detainers.

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[114] *Latest Data: TRAC*, *supra* note 25. The number of detainers is aggregated by fiscal year, which begins on October 1 and ends on September 30 so that the data for 2011 cover detainers issued between October 1, 2010 and September 30, 2011. *See About the Data: TRAC*, *supra* note 25.

[115] *See Further Decrease in Detainer Use*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Aug. 28, 2015), http://trac.syr.edu/immigration/reports/402/ [https://perma.cc/A2DN-6DCB] [hereinafter *Further Decrease in Detainer Use, TRAC*]; *see also supra* notes 24–25 and accompanying text.

[116] *See Latest Data: TRAC*, *supra* note 25; *see also Further Decrease in Detainer Use, TRAC*, *supra* note 115.

[117] *Latest Data: TRAC*, *supra* note 25. This increase is actually an underestimate in the use of detainers under Trump because it includes four months of the Obama administration in the 2017 fiscal year (Oct. 2016–Jan. 2017). The Trump administration is now refusing to release data on detainers sought by TRAC through FOIA requests.

[118] Gus Bova, *ICE Issues More Detainers in Texas, Withholds Crucial Data*, TEX. OBSERVER (May 7, 2018, 1:05 PM), https://www.texasobserver.org/ice-issues-more-detainers-in-texas-withholds-crucial-data/ [https://perma.cc/QU5H-PN7T].

[119] KATHY A. WHITE & LUCY DWIGHT, COLO. FISCAL INST., MISPLACED PRIORITIES: SB90 & THE COSTS TO LOCAL COMMUNITIES 1, 11 (2012), https://www.coloradofiscal.org/wp-content/uploads/2013/05/2013-3-1-v.2-SB90-Misplaced-Priorities-Ed.pdf [https://perma.cc/GMT9-Z2PA].

[120] Jerry Iannelli, *Miami-Dade Blew $12.5 Million Holding ICE Detainees in 2017, Rights Groups Say*, MIAMI NEW TIMES (Feb. 5, 2018), https://www.miaminewtimes.com/news/miami-dade-ice-detainers-cost-125-million-in-2017-10058788 [https://perma.cc/4FEX-EWVM].

[121] *See, e.g.*, Morales v. Chadbourne, 996 F. Supp. 2d 19 (D. R.I.), *aff'd on appeal*, 793 F.3d 208 (1st Cir. 2015); Miranda-Olivares v. Clackamas Cty., No. 12-02317, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014); Galarza v. Szalczyk, No. 10-6815, 2012 WL 1080020, at *10, *13 (E.D. Pa. Mar. 30, 2012) (unpub.), rev'd on other grounds, 745 F.3d 634 (3d Cir. 2014); Harvey v. City of New York, 07 Civ. 0343 (NG) (LB) (E.D.N.Y.) ($145,000 settlement for damages upon being held for a month on an expired detainer); Arroyo v. Spokane Cty. Sheriff's Office, Claim No. 10-0046 (June 2010) ($35,000 settlement from county for damages upon being held for 20 days on immigration detainer); *Galarza*, 2012 WL 1080020 ($95,000.00 settlement for wrongful imprisonment of U.S. citizen).

On the other hand, the Trump administration has raised the stakes for states, counties, and local law enforcement agencies that refuse to enforce detainers by threatening them with sanctions and lawsuits. President Trump took his first shot across the bow of "sanctuary jurisdictions" during his first week in office.[122] Executive Order 13,768 announced that "sanctuary jurisdictions" would be ineligible to receive federal grants and that the Attorney General would take enforcement actions against any entity "which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."[123] This included refusals to enforce detainers.[124] President Trump called the order "a weapon" against jurisdictions that do not cooperate with ICE;[125] additionally, then-Attorney General Jeff Sessions initially warned these jurisdictions that he would withhold grants, bar future grants, and claw back money from previous awards.[126]

Further, the Trump administration has engaged in a public opinion campaign to vilify jurisdictions that do not enforce detainers and has threatened raids of their residents if they do not capitulate. For example, one section of the Executive Order, which is not enjoined, requires public reporting of any criminal charge against an immigrant who had been subject to a detainer that a local enforcement agency declined to enforce.[127] As part of this

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[122] *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801 (Jan. 25, 2017).

[123] *Id.*

[124] Attorney General Jeff Sessions, Remarks on Sanctuary Jurisdictions (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions [https://perma.cc/K8SQ-XB4R].

[125] The O'Reilly Factor (Fox News Broadcast, Feb. 5, 2017), transcribed in *President Trump Talks Travel Ban, Putin, Mexico; Could Trump Pull Federal Funds from California?; Trump Says There Could Be Tax*, CNN (Feb. 5. 2017, 6:00 PM), http://transcripts.cnn.com/TRANSCRIPTS/1702/05/cnr.05.html [https://perma.cc/99DX-LT5Q].

[126] Jeff Sessions, U.S. Att'y Gen., Remarks on Sanctuary Jurisdictions (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions [https://perma.cc/K8SQ-XB4R]. Litigation in San Francisco, Santa Clara, Chicago, Philadelphia, and Los Angeles has resulted in preliminary or permanent injunctions against the order's enforcement, but the litigation continues. *See* City of S. F. v. Trump, 897 F.3d 1225 (9th Cir. 2018) (affirming permanent injunction halting implementation of § 9(a) of the January 25 EO, but vacating nationwide scope and remanding for additional fact-finding for scope of injunction); City of Chi. v. Sessions, 321 F. Supp. 3d 855 (N.D. Ill. July 27, 2018) (entering permanent injunction with nationwide scope) *appeal dismissed*, Order, City of Chicago v. Sessions, No. 17-CV-5720 (7th Cir. Oct. 22, 2018) (dismissing appeal of permanent injunction until nationwide scope narrowed and clarified); City of Phila. v. Sessions, No. 17-3894, slip op. at 84–90 (E.D. Pa. June 6, 2018) (entering declaratory judgment and mandamus); City of L.A. v. Sessions, No. 2:18-CV-07347 (C.D. Cal. Feb. 15, 2019) (order granting partial summary judgment and permanently enjoining imposing conditions on funding programs).

[127] Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801 (Jan. 25, 2017). The "Declined Detainer Outcome Report" mandated by the Executive Order was beset by inaccuracies and has been suspended. *See* Nikita Biryukov, *ICE Suspends Weekly 'Sanctuary City' Report Over Accuracy Concerns*, NBC NEWS (Apr. 11, 2017, 5:07 PM), https://www.nbcnews.com/news/us-news/ice-suspends-weekly-sanctuary-city-report-over-accuracy-concerns-n745246 [https://perma.cc/JD8X-

reporting requirement, DHS publishes a list of jurisdictions with policies it has determined restrict cooperation with ICE.[128] Likewise, President Trump stated on national television that sanctuary cities "breed crime" and went on to say, "If we have to we'll defund, we give tremendous amounts of money to California . . . California in many ways is out of control."[129] However, study after study demonstrate that immigration does not "breed crime" but in fact correlates to reductions in crime.[130] The rhetoric influences public opinion nonetheless.[131]

Though the cities, counties, and states trying to separate local law enforcement resources from federal immigration enforcement have been successful so far,[132] the continuing legal battles have raised the financial and political stakes of these policies substantially. For immigrants, their families, and their communities, eliminating local detainer enforcement is necessary to ensure fairness in criminal

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4EK3]; *Declined Detainer Outcome Report: Overview*, IMMIGR. & CUSTOMS ENF'T (Apr. 13, 2017), https://www.ice.gov/declined-detainer-outcome-report#tab0 [https://perma.cc/826R-XTPF].

[128] *See* ENFORCEMENT AND REMOVAL OPERATIONS, WEEKLY DECLINED DETAINER OUTCOME REPORT FOR RECORDED DECLINED DETAINERS JAN. 8–FEB. 3, 2017, U.S. CUSTOMS & IMMIGR. ENF'T (2017), https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf [https://perma.cc/2H6P-7APW]; *DHS Releases U.S. Immigration and Customs Enforcement Declined Detainer Outcome Report*, U.S. IMMIGR. & CUSTOMS ENF'T (Mar. 20, 2017), https://www.ice.gov/news/releases/dhs-releases-us-immigration-and-customs-enforcement-declined-detainer-outcome-report [https://perma.cc/DV73-TFU8]. Because of pervasive errors in the report, its publication has been temporarily suspended.

[129] Cty. of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1209 (N.D. Cal. 2017) (omission in original).

[130] *See generally* Benjamin Gonzalez O'Brien, et al., *The Politics of Refuge: Sanctuary Cities, Crime, and Undocumented Immigration*, 55 URB. AFF. REV. 3 (2017); *see also* Anna Flagg, *The Myth of the Criminal Immigrant*, N.Y. TIMES (Mar. 30, 2018), https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html [https://perma.cc/QDC8-2XAB]; Mike Males, *Refuting Fear: Immigration, Youth, and California's Stunning Declines in Crime and Violence*, CTR. ON JUV. & CRIM. J. 1, 1 (2017), http://www.cjcj.org/uploads/cjcj/documents/refuting_fear_-_immigration_youth_and_californias_stunning_declines_in_crime_and_violence.pdf [https://perma.cc/JDD4-M6PC]; Tom K. Wong, *Sanctuary Cities Don't 'Breed Crime.' They Encourage People to Report Crime*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/24/sanctuary-cities-dont-breed-crime-they-encourage-people-to-report-crime/?utm_term=.a737cf32dc28 [https://perma.cc/8L9P-2D96].

[131] *See Immigration Historical Trends*, GALLUP, https://news.gallup.com/poll/1660/immigration.aspx [https://perma.cc/VKD9-CRHK].

[132] *See* San Francisco v. Trump, 897 F.3d 1125, 1231 (9th Cir. 2018) (concluding that any attempt to withhold federal grants for failure to enforce immigration detainers or otherwise cooperate with federal officials would violate the principles of Separation of Powers and the Constitution's Spending Clause); United States v. California, 314 F. Supp. 3d 1077, 1109-10 (E.D. Cal. 2018) (holding that California's laws prohibiting local resources from being used to enforce federal immigration laws were not preempted by federal law); City of Chicago v. Sessions 321 F. Supp. 3d. 855, 881 (N.D. Ill. 2018) (issuing permanent injunction of all immigration conditions to JAG funds on anti-commandeering and statutory grounds), *aff'd* 888 F.3d 272, 293(7th. Cir. 2018); City of Phila. v. Sessions, 309 F. Supp. 3d 289, 331 (E.D. Pa. 2018) (finding that the conditions violated the Tenth Amendment and constitutional principle of separation of powers); *see also* Lai & Lasch, *supra* note 9, at 553 n.87 (discussing numerous unsuccessful attempts to pass anti-sanctuary legislation in Congress).

proceedings, freedom from racial profiling, and a focus on keeping them safe. As efforts to limit local immigration policing progress, state law has taken on new significance.[133]

III. STATE LAW'S HISTORICAL CONSTRAINTS

Detainers ask a local law enforcement officer to hold the person identified in the local jail based on the allegation that he or she is removable under the federal civil immigration laws. As described in Part I, courts consider this a new arrest.[134] While the federal statutory and constitutional authority for these arrests remains in dispute,[135] state law can provide an independent barrier to detainer enforcement. Because detainers ask local law enforcement officers to arrest and detain immigrants for federal civil violations, state law must authorize officers to perform these arrests.

An examination of the long-standing limits on local arrest and detention authority reveals a bulwark against local immigration enforcement. This Part reviews state laws concerning the sheriff's arrest authority, state officials' obligation to take custody of federal inmates, the right to bail pending state charges, and other state constitutional protections. For more than a century, state statutes have predicated arrest and detention on criminal offenses and judicial review. Constitutional provisions in many states establish additional checks on local law enforcement power. Historical state laws therefore provide crucial support for policies that separate local resources from federal immigration enforcement.

To eliminate state law barriers to detainer enforcement, most states would need to repeal the traditional constraints on law enforcement officers and enact broader law enforcement powers, as the state of Texas did.[136] The final section of Part III outlines the costs of expanded arrest authority to political

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[133] *See, e.g.*, City of El Cenizo v. Texas, 890 F.3d 164, 173 (5th Cir. 2018); Tenorio-Serrano v. Driscoll, 324 F. Supp. 3d 1053, 1060–64 (D. Ariz. 2018);; Creedle v. Miami-Dade Cty., No. 17-Civ-22477, 2018 WL 6427713, at *22 (S.D. Fla. Nov. 9, 2018); C.F.C. v. Miami-Dade Cty, 349 F. Supp. 3d. 1236, 1262–63 (S.D. Fla. 2018); Cisneros v. Elder, No. 18-CV-30549, 2018 WL 7142016, at *7–8 (Colo. Dist. Ct. Dec. 6, 2018) (order granting summary judgment); Lunn v. Commonwealth, 78 N.E.3d 1143, 1160 (Mass. 2017); Esparza v. Nobles Cty, No. 53-CV-18-751, 2018 WL 6263254, at *10 (Minn. Dist. Ct. Oct. 19, 2018) (order granting a temporary restraining order and injunction); Valerio-Gonzalez v. Jarret, 390 Mont. 427 (2017) (denying writ of habeas corpus),); People *ex rel*. Wells v. DeMarco, 88 N.Y.S.3d 518, 529–30 (App. Div. 2018); Nathan Brown, *Jerome Commissioners Say it's ICE's Move on Jail Contract*, MAGIC VALLEY (July 30, 2017), https://magicvalley.com/news/local/govt-and-politics/jerome-commissioners-say-it-s-ice-s-move-on-jail/article_e9cf1682-f1a3-5d41-afa5-889187a93d24.html [https://perma.cc/SR2Z-74SR].

[134] *See* discussion *supr*a Part I note 51.

[135] *See supra* Part I notes 64–77 and accompanying text.

[136] *See* S.B. 4, 2017 Leg., 85th Sess. (Tex. 2017); *see also El Cenizo*, 890 F.3d at 173 (holding S.B. 4, "with one exception" facially valid).

accountability, community safety and trust, policy uniformity, and individual's civil rights.

A. State Laws Limiting Local Arrest Authority

Because immigration detainers and the accompanying administrative warrants ask local law enforcement officers to hold individuals for a new purpose, state and federal courts have concluded that their enforcement constitutes a new arrest.[137] Federal law authorizes federal agents to arrest individuals for immigration violations. Indeed, the administrative warrants attached to detainers are directed exclusively to federal agents.[138] But detainers ask local law enforcement officers, rather than federal officials, to perform the arrests. Consequently, these officers must have the power to do so. Federal statutes do not supply this arrest authority.[139] Instead, state law governs the powers and duties of local law enforcement officers. Historically, these laws and their common law sources have circumscribed this authority in ways that exclude arrests for federal civil violations. Accordingly, state law commonly precludes local officials from performing the immigration arrests that detainers request.

1. Common Law Arrest Power

Responsibility for maintaining the custody of individuals in local jails usually falls to county sheriffs.[140] Immigration detainers ask local officers to maintain custody of noncitizens in local jails for up to forty-eight hours.[141] Thus, the scope of the

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[137] *See, e.g.*, Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015); Roy v. Cty. of L.A., No. CV 12-09012-AB, 2018 WL 914773, at *23 (C.D. Cal. Feb. 7, 2018); Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1249–50 (E.D. Wash. 2017); *Cisneros*, 2018 WL 7142016, at *5–6; *Lunn*, 78 N.E.3d. at 1153; *DeMarco*, 88 N.Y.S.3d at 526.

[138] *Form I-200: Warrant for Arrest of Alien*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF [https://perma.cc/5QQJ-Y5W3] [hereinafter *Form I-200*]; *Form I-205: Warrant of Removal/Deportation*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF [https://perma.cc/PZ9W-A27G] [hereinafter *Form I-205*]; *see also* 8 C.F.R. § 241.2(b).

[139] *See e.g.*, Brief of Amici Curiae, Esparza v. Nobles Cty., Br. Law Scholars, Amici Curiae, (Minn. Ct. App.) (filed Mar. 13, 2019) (describing statutory structure that authorizes immigration arrests by local law enforcement in specific circumstances that do not include detainer enforcement); Arizona v. United States, 567 U.S. 387, 408–09 (2012) (describing detailed federal regulatory scheme that precludes inherent immigration arrest authority in state and local law enforcement officers).

[140] DAVID R. STRUCKHOFF, THE AMERICAN SHERIFF, 49, 54 (Justice Research Inst. 1994) (listing states in which sheriffs have responsibility for operating the jails by statutes and stating the 89% of all sheriffs' departments operate jails in their counties).

[141] ICE Policy No. 10074.2, *supra* note 37, at 3-4. Form I-247A https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf [https://perma.cc/Q63A-GQZH].

sheriff's authority determines whether immigration detainers are enforceable in most jurisdictions. An examination of the traditional role of the sheriff demonstrates their lack of common law authority to perform these arrests.

The office of the sheriff was imported to the American colonies alongside English common law.[142] The role of the sheriff in England was to serve process, preserve the peace, administer and enforce the laws, carry out the mandates of the courts, and administer the county prisons.[143] These responsibilities were described as "three-fold custody": (1) "custody of justice" through serving process and returning jurors to hear trials; (2) "custody of the law" through "execut[ing] [the courts'] decisions in civil and criminal cases;" and (3) "custody of the commonwealth" through keeping the peace.[144] English sheriffs were also appointed by the sovereign and responsible for tax collection.[145]

The role of the sheriff in the United States retained a number of these core responsibilities, but it also evolved to reflect the principles motivating the American Revolution.[146] Most state constitutions recognized the office of the sheriff.[147] By 1890, breaking with English tradition these state constitutions made the sheriff accountable to the residents of their jurisdictions through popular election in nearly every state.[148] At the time the office of the sheriff was incorporated into state constitutions, their roles were defined in common law.[149] The sheriff had the power and duty to execute the mandates of the courts; to serve as the conservator of the peace in his county, with authority to command

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[142] *Id.* at 22; WILLIAM L. MURFEE, A TREATISE ON THE LAW OF THE SHERIFFS AND OTHER MINISTERIAL OFFICERS § 1 (Eugene McQuillin ed., St. Louis, Gilbert Book Co. 2d ed. 1890); 1 WALTER H. ANDERSON, TREATISE ON THE LAW OF SHERIFFS, CORONERS AND CONSTABLES § 1 (1941).

[143] 1 ANDERSON, *supra* note 142, § 6; *accord* MURFEE, *supra* note 142, § 2; Steve Gullion, *Sheriffs in Search of a Role*., 142 NEW L. J. 1156, 1157 (1992) (recounting the history of the office of sheriff in England, Scotland and the United States).

[144] David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*., 104 J. CRIM. L. & CRIMINOLOGY 761, 787–88 (2015) (citing EDWARD COKE, 2 THE FIRST PART OF THE INSTITUTES OF LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON 168(A) (Book 3, ch. 1, § 248) (London 1823) (1628)); *accord* MURFEE, *supra* note 142, § 2.

[145] STRUCKHOFF, *supra* note 140, at 9; VERN L. FOLLEY, AMERICAN LAW ENFORCEMENT: POLICE, COURTS, AND CORRECTIONS 33 (Holbrook Press 1976). Until the Magna Carta, English sheriffs had judicial functions, exercising jurisdiction over civil and criminal cases in their towns. Gullion, *supra* note 143, at 1157.

[146] James Tomberlin, Note, *"Don't Elect Me": Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113, 121–22 (2018); MURFEE, *supra* note 142, § 7.

[147] Tomberlin, *supra* note 146, at 121; MURFEE, *supra* note 142, §§ 7, 43.

[148] MURFEE, *supra* note 142, § 7; Kopel, *supra* note 144, at 786–87(stating that the only exceptions are Alaska, which has no counties, and Hawaii, Rhode Island, and Connecticut).

[149] MURFEE, *supra* note 142, §§ 40–42 (stating that when the sheriff was recognized as a constitutional officer by a state, the sheriff possessed all of the powers pertaining to that office at common law).

the manpower of the county through *posse comitatus*;[150] and to keep securely in confinement all such prisoners committed to his charge "by civil or criminal process emanating from courts of adequate jurisdiction."[151]

Common law limited the sheriff's arrest authority associated with each of these duties. The sheriff's obligation to execute all process delivered to him, as a custodian of the courts, included the power to arrest.[152] But this power came with constraints. Sheriffs generally lacked authority to arrest individuals on initial process in civil cases due to state statutes prohibiting debtor arrests.[153] Arrests on intermediate and final process in civil matters were authorized at common law[154] with certain restrictions on time and place.[155] The sheriff's authority to effect a civil arrest, however, depended on possessing process directing him to do so.[156] This requirement generates two barriers to enforcing immigration detainers. First, under common law, process meant "something issuing out of a court or from a judge."[157] The term was commonly used to encompass "the writs issuing out of any court to bring the party to answer, or for execution" including civil and criminal proceedings.[158] Courts, however, do not issue immigration detainers or administrative warrants so that neither form fits within the common law definition of "process." Second, sheriffs had no power at common law "to execute process unless it was directed to him or to the class of officers to which

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[150] Kopel, *supra* note 144, at 761 (explaining that "[*p*]*osse comitatus* is the legal power of sheriffs and other officials to summon armed citizens to aid in keeping the peace").

[151] MURFEE, *supra* note 142, § 40.

[152] *Id.* § 40, 100–01.

[153] *Id.* § 140.

[154] *Id.* § 118a (describing the *capias ad respondendum* authorizing arrest for contempt of court in English common law); *see also id.* § 205 (describing state statutes authorizing and limiting arrests in civil matters which circumscribe common law arrest authority for civil matters); 1 ANDERSON *supra* note 142, § 116(describing the *capias ad respondendum* as intermediate process (before final judgment) under which a civil arrest could be made under common law in the United States); MURFEE *supra* note 142, §§ 340–62 (describing other forms of civil intermediate process that authorize arrest); 1 ANDERSON *supra* note 142, § 242 (describing the *capias ad satisfaciendum* as the writ authorizing a sheriff to take custody of someone to satisfy a final judgment). The same conditions apply to final civil process as apply to intermediate civil process. 1 ANDERSON *supra* note 142, § 244; MURFEE, *supra* note 142, § 293.

[155] MURFEE, *supra* note 142, §§ 149–50 (discussing time limitations); § 156–58 (discussing one's protection from civil arrest in one's home); § 161 (discussing limitation to sheriff's county, excluding courthouses and property whose jurisdiction is vested with the United States).

[156] *Id.* § 151.

[157] *Id.* § 117a; *see also* 1 ANDERSON, *supra* note 142, § 104 n.76a (including papers authorized by statute in foreclosure of chattel mortgages and citing Idaho decision describing process as "any writ, precept, warrant, or mandate issuing from a court, tribunal, or person possessing judicial powers" (citing Blumaue-Frank Drug Co. v. Branstetter, 43 P. 575 (Idaho 1895)).

[158] MURFEE, *supra* note 142, § 117a.

he belong[ed]."[159] Though the detainer form is addressed to local officials, the actual administrative warrant for arrest is directed only to federal officers. At common law, an arrest on civil process was void if an officer not named in the process executes it.[160] Additionally, a sheriff was liable for enforcing process he knows lacks jurisdiction or is otherwise invalid.[161] Finally, though common law allowed sheriffs to detain an individual subject to writs from other parties in order to answer those writs, that power is contingent upon possessing a valid writ.[162] "Process and writs" however "are synonymous terms" and are issued by a court, tribunal, or person possessing judicial power.[163] Immigration detainers, therefore, do not qualify as writs in common law. Consequently, the sheriff's common law arrest authority accompanying his duty to execute civil process does not include the power to arrest individuals based on immigration detainers and their underlying administrative warrants.

Sheriffs also had arrest authority under common law in order to fulfill their duty to keep the peace. This authority, though broader than the power associated with executing process, was still constrained in ways that exclude enforcement of immigration detainers. This duty concerned criminal offenses and obligated the sheriff to make arrests for breaches of the peace or to prevent the commission of offenses that breach the peace, and then to maintain custody of prisoners pending trial and upon conviction.[164] As "conservator of the peace," he was also required "to suppress riots, mobs, and insurrections."[165] In addition, state statutes often mandated that the sheriff "take proper charge of vagrants, disorderly persons, paupers, and lunatics" as well as enforce laws against gambling and drinking establishments.[166]

The conditions of a lawful arrest for breaches of the peace under common law incorporated centuries of English jurisprudence. William Blackstone described this authority in 1775.[167] Lawful arrests fell into four categories: "1. By warrant: 2. By an officer without warrant: 3. By a private person also without warrant: 4. By a hue and cry."[168] Blackstone described arrests in this context as "the apprehending or restraining of one's person, in order to be

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[159] *Id.* § 115a(describing an exception to this rule recognized by a Massachusetts court if the officer who served the process otherwise had the authority to do so and the process simply omitted the words that reflected that authority); 1 ANDERSON, *supra* note 142, § 101.

[160] MURFEE, *supra* note 142, § 151.

[161] *Id.* § 105.

[162] *Id.* § 159 (describing detainer authority).

[163] 1 ANDERSON, *supra* note 142, § 103.

[164] MURFEE, *supra* note 142, § 1160.

[165] *Id.*

[166] *Id.*; 2 ANDERSON *supra* note 142, § 624.

[167] 3 WILLIAM BLACKSTONE, COMMENTARIES *289 (7th ed. 1775).

[168] *Id.*

forthcoming to answer an alleged or suspected crime."[169] Warrantless arrests were lawful for felony offenses or breaches of peace committed in the officer's presence.[170] Private persons could likewise arrest without a warrant but only for felony offenses committed in their presence.[171] Similarly, English common law recognized arrests in cases of "hue and cry raised upon a felony committed."[172] This category of lawful arrest consisted of townspeople "pursuing with horn and with voice, all felons, and such as have dangerously wounded another."[173]

Following the English common law's constraints on the arrest authority of the sheriff, common law in the United States demanded that sheriffs arrest anyone committing an offense in his presence without requiring a warrant.[174] Sheriffs could also arrest without a warrant if the person was suspected of committing a felony offense.[175] All other criminal arrests required warrants.[176] Vagrancy, disorderly conduct, and prostitution are examples of non-felony breach of peace offenses requiring legal process to authorize arrest.[177] A warrant, in turn, must be issued by a justice with jurisdiction over the offense and must clearly set out the criminal charge facing the defendant.[178] Arrests on immigration detainers lack both the criminal predicate and legal process required at common law. Nor do they involve mobs, riots, and insurrections; state statutes on vagrancy, disorderly conduct, or insanity; or legislation directed at suppressing "immoral conduct" such as gambling, drinking, and prostitution.

The common law power of the sheriff, borrowed from England, did indeed include inherent arrest authority. This authority was contingent though on the need to quell a mob, legal process issuing from a court, or a criminal offense. No inherent arrest power thus exists at common law to support local sheriffs in enforcing immigration detainers.[179]

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169 *Id.*

170 *Id.* at *292.

171 *Id.* at *292–93.

172 *Id.* at *293.

173 *Id.*

174 MURFEE, *supra* note 142, § 1161.

175 *Id.*

176 *Id.*; *see also*; Elk v. United States, 177 U.S. 529, 537–38 (1900); Kurtz v. Moffitt, 115 U.S. 487, 498–99 (1885) (explaining that at common law a warrant would be required for misdemeanors that had already been completed by the time the arresting officer appeared on the scene); William Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 774, 792 n.44 (1993) (describing the common law standard and citing nineteenth century cases concerning felonies).

177 MURFEE, *supra* note 142, § 1161a.

178 *Id.* § 1162.

179 The Solicitor General's office has taken a contrary position on the sheriff's common law authority but does not account for the specific historical limits on civil arrest power. *Cf.*

A landmark case discussing the state law constraints on local arrest authority confirms that common law powers do not permit local immigration detainer enforcement.[180] Mr. Lunn sued the Commonwealth of Massachusetts and the Sheriff of Suffolk County for his detention at the Boston Municipal Court on the basis of an immigration detainer after the state criminal charges against him were dismissed.[181] The Massachusetts Supreme Court reviewed that state's common law governing the authority of local law enforcement officers.[182] Recognizing that warrantless arrest authority there stems from the English common law requirement of a "breach of the peace" or felony offense, the court reviewed the type of offenses constituting a breach of peace.[183] The court concluded that common law created no arrest authority for civil violations.[184] A civil immigration violation did not meet these common law requirements.[185] Nor did the state's statutes supply authority for these arrests.[186] The Massachusetts Supreme Court concluded that "[t]he prudent course is not for this court to create, and attempt to define, some new authority for court officers to arrest that heretofore has been unrecognized and undefined."[187] Rather, the court decided, "the better course is for us to defer to the Legislature to establish and carefully define that authority if the Legislature wishes that to be the law of this Commonwealth."[188] Given their common source in English common law and their consistency across the United States documents in nineteenth century treatises, the limits found by the Massachusetts Supreme Court on the common law arrest powers of local law enforcement officers are likely present in many, if not all, states.

2. Common Law Limits Are Codified by the States and Reinforced in State Constitutions

During the late nineteenth century, many states codified these common law principles thereby constraining the sheriff's arrest authority accordingly. Reviewing the sheriff's arrest

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Amicus Brief of United States in Esparza (MN); Amicus Brief of United States in Ramon (MT) (asserting inherent common law arrest authority of sheriffs to enforce immigration detainers); Brief of the United States as Amicus Curiae in Support of Neither Party at 27, Lunn v. Commonwealth, 78 N.E.3d 1143 (Mass. 2017) (No. SJC-12276), 2017 WL 1240651.

180 Lunn v. Commonwealth, 78 N.E.3d 1143 (Mass. 2017).

181 *Id.* at 1148.

182 *Id.* at 1154–55.

183 *Id.* at 1154–55, 1155 n.20.

184 *Id.* at 1155.

185 *Id.*

186 *Id.* at 1156.

187 *Id.* at 1158.

188 *Id.*

power under the statutes of all states is beyond the scope of this article. A series of decisions addressing the state statutory authority of local law enforcement officers to enforce immigration detainers, however, indicate that it is often lacking. This section examines the statutes in several states in which challenges to the local enforcement of immigration detainers is ongoing or in which a high number of detainers are lodged. These states have similar provisions that limit criminal and civil arrest authority and exclude immigration detainer enforcement.

In Colorado, which ranks seventh in total number of detainers received,[189] two state residents challenged the El Paso County Sheriff's refusal to release them on pre-trial bond because they were subject to immigration detainers.[190] The plaintiffs claimed their state constitutional right against unreasonable search and seizure[191] were violated because the sheriff was holding them without legal authority.[192]

Like most states, Colorado set out the standards for lawful, and therefore constitutional, arrests in its territorial laws.[193] These laws codified the common law arrest powers and are now the exclusive source of this authority.[194] Colorado's statutes hew closely to their common law source and require sheriffs to have a warrant for arrest, to be present when the crime is committed, or to have probable cause that an offense was committed and that the person arrested committed that offense.[195]

The plaintiffs were successful on their claims of unlawful arrest under state law.[196] The constraints on officers' arrest authority,[197] and the statutory definitions of an "offense" as a crime[198] and a "warrant" as judicially issued[199] combined to support summary

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189 *Latest Data: TRAC*, *supra* note 25.

190 Class Action Complaint for Declaratory and Injunctive Relief and Individual Claim for Damages at 3, 5, 11–12, Cisneros v. Elder, No. 18-CV-30549 (Colo. Dist. Ct. Feb. 27, 2018), 2018 WL 5284263 [hereinafter Cisneros Complaint].

191 COLO. CONST. art. II, § 7.

192 Cisneros Complaint, *supra* note 190, at 12; Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 17, Cisneros v. Elder, No. 18-CV-30549 (. Colo. Dist. Ct. Feb. 27, 2018), https://acluco-wpengine.netdna-ssl.com/wp-content/uploads/2018/02/2018-02-27-El-Paso-TRO-PI-Motion.pdf [hereinafter Cisneros Motion for Preliminary Injunction].

193 An Act Concerning Criminal Jurisprudence, sec. 158, 1861 Colo. Terr. Sess. Laws 290, 326; *see also* TEX. CODE CRIM. PROC., arts. 226–31, 232–58 (1879) (describing arrests without warrants and arrests under warrant, respectively).

194 Order Granting Summary Judgment at *7–10, Cisneros v. Elder, No. 2018-CV-30549 (Colo. Dist. Ct. Dec. 16, 2018), 2018 WL 7142016; People v. Hamilton, 666 P.2d 152, 154 (Colo. 1983); Colorado Att'y Gen. Op., No. 99-7, 1999 WL 33100121, at *3–4 (Sept. 8, 1999).

195 COLO. REV. STAT. § 16-3-102 (2018).

196 Order Granting Summary Judgment, *supra* note 194, at *7–10.

197 COLO. REV. STAT. § 16-3-102 (2018).

198 *Id.* § 18-1-104(1).

199 *Id.* § 16-1-104(18).

judgment.[200] Further, the state court found that no inherent authority existed to fill the gaps left by state statute.[201] In light of these limits, the state judge enjoined the sheriff from "refusing to release [people] who post bond, complete their sentences, or otherwise resolve their criminal cases" due to immigration detainers and administrative warrants based on Colorado's statutory and constitutional limitations on arrest.[202] The laws in Georgia—fifth highest in number of detainers lodged[203]—share the same roots[204] and reflect the same constraints.[205]

A class action pending in Florida, fourth in the volume of detainers,[206] likewise asserted that local enforcement of immigration detainers violates the state's constitutional and statutory protections against unreasonable arrests.[207] The federal district court found that plaintiffs alleged plausible state statutory and constitutional violations and denied the county's motion to dismiss these claims.[208] In a similar suit, the federal district court also denied the county's motion to dismiss that plaintiff's false imprisonment claim for holding him without legal authority.[209]

Litigation underway in Minnesota involves similar claims that the state's constitutions, statutes, and common law fail to authorize the civil arrests associated with immigration detainers and administrative warrants.[210] Minnesota's state courts have concluded that the sheriff's warrantless arrest authority is now

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[200] Order Granting Summary Judgment, *supra* note 194, at *8.

[201] *Id.* at *9–10 (citing Douglass v. Kelton, 610 P.2d 1067, 1069 (Colo. 1980)). *But see* Order Denying Prelim. Injunction at *5–6, Salinas v. Mikesell, No. 18-CV-30057, (Colo. Dist. Ct. Aug. 19, 2018) (finding that the sheriff's inherent authority to keep the peace may include making civil immigration arrests); Tenorio-Serrano v. Driscoll, 324 F. Supp. 3d 1053, 1060–62 (D. Ariz. 2018) (same).

[202] Order Granting Summary Judgment, *supra* note 194, at *15.

[203] *Latest Data: TRAC*, *supra* note 25.

[204] *See* GA. CONST. art. I, § 1, ¶ 13; Porter v. State, 52 S.E. 283, 285–86 (Ga. 1905) ("Section 896 of our Penal Code [then] is a codification of the common law on the subject of arrest, with perhaps a slight enlargement of the power of arrest. . . . Under the citation from Hale, the power to arrest for such a minor offense, without a warrant, did not exist at common law. Therefore it must depend upon statute; and there is no statute, of which we are aware, authorizing a municipal police officer to make an arrest save in compliance with the terms of the above-cited section of our Penal Code.").

[205] *See* Thomas v. State, 18 S.E. 305, 305 (1892) ("The policeman had no warrant, nor was the offence committed in his presence. This being so, he had no legal authority to make any arrest, unless it was reasonably proper to do so in order to prevent a failure of justice for want of an officer to issue a warrant. Code, § 4723."); GA. CODE ANN. § 17-4-40 (2018) (requiring warrants to be issued by a judge or officer with the powers of a magistrate).

[206] *Latest Data: TRAC*, *supra* note 25.

[207] Class Action Complaint for Injunctive Relief, Declaratory Judgment, and Money Damages at 30–32, C.F.C. v. Miami-Dade Cty., No. 1:18-CV-22956-JLK, 349 F. Supp. 3d 1236 (S.D. Fla. 2018), ECF No. 1.

[208] C.F.C. v. Miami-Dade Cty., 349 F. Supp. 3d 1236, 1255–65 (S.D. Fla. 2018)

[209] Creedle v. Miami-Dade Cty., 349 F. Supp. 3d 1276, 1312 (S.D. Fla. 2018).

[210] Class Action Complaint and Request for Injunctive and Declaratory Relief, Esparza v. Nobles Cty., No. 53-CV-18-751, (Minn. Dist. Ct. Aug. 16, 2018), 2018 WL 6430573.

found in statute, which codified the common law power.[211] Minnesota law further establishes that this authority is limited to criminal violations.[212]

The Oregon Supreme Court expressly considered whether an administrative warrant for an immigration violation rendered an arrest reasonable under its state constitution.[213] The case arose after federal immigration officials arrested a man identified in an administrative warrant while accompanied by local police officers who found firearms in the house in violation of state criminal law.[214] The court first determined that the state's constitutional guarantee against unreasonable search and seizure governed the actions of local officers even if the arrest by federal immigration officials was lawful under the Fourth Amendment.[215] The state conceded that the administrative warrant lacked the oath or affirmation required by the Oregon's constitution.[216] Ultimately, the court assumed that the seizure did not fall within an exception to the warrant requirement and that the arrest was therefore illegal, but ruled against the defendant on other grounds.[217] Though the court did not make a final ruling on the validity of administrative warrants under Oregon's constitution, the decision indicates that these warrants may well fall short of that state's independent constitutional requirements.

The attorney general of New York took a similar view of its constitutional protection against unreasonable search and seizure.[218] This constitutional right was implemented through state statutes, passed more than one hundred years ago,[219] setting out the circumstances in which New York's law enforcement

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[211] Wahl v. Walton, 16 N.W. 397, 397–98 (Minn. 1883) (stating that Minnesota warrantless arrest statute "seems to be a re-enactment of the common-law rule," and noting expanded arrest authority for officers under statutory as compared to common law); Hilla v. Jensen, 182 N.W. 902, 903 (Minn. 1921) ("The circumstances under which peace officers may arrest without a warrant are *defined in the statutes of the state*." (emphasis added)).

[212] Witte v. Haben, 154 N.W. 662, 663–64 (Minn. 1915) (finding warrantless arrest to be unlawful under the statute providing arrest authority for public offenses where no crime and occurred or was suspected); MINN. STAT. § 630.18(7) (stating that a criminal indictment "shall be dismissed by the court . . . when the facts stated do not constitute a public offense"). Minnesota case law further supports that "public offense" has long been and remains synonymous with "crime" under Minnesota law. *See* State v. Lee, 13 N.W. 913, 914 (Minn. 1882); Johnson v. Morris, 453 N.W.2d 31, 36 (Minn. 1990) ("Public offense includes both misdemeanors and felonies, and need not *involve* a breach of peace.").

[213] State v. Rodriguez, 854 P.2d 399 (Ore. 1993).

[214] *Id.* at 400–01.

[215] *Id.* at 402–04, 407–09.

[216] *Id.* at 402 n.7.

[217] *Id.* at 406–07.

[218] ERIC T. SCHNEIDERMAN, N.Y. OFF. OF ATTY GEN. GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS 5 (Jan. 19, 2017, suppl. Mar. 12, 2017) https://ag.ny.gov/sites/default/files/guidance_and_supplement_final3.12.17.pdf [https://perma.cc/N9X9-MTDQ].

[219] *See* 1889 N.Y. Laws 430, ch. 342, tit. V, § 6.

officers are permitted to make warrantless arrests.[220] These circumstances are limited to crimes or "offenses," which the state in turn defines as conduct that carries a penalty of imprisonment or a fine.[221] Because immigration detainers and administrative warrants reflect probable cause of a civil violation, New York's attorney general concluded that local officers should enforce detainers only if "they are accompanied by a judicial warrant" that would render the arrest reasonable or when "there is probable cause to believe a crime has been committed."[222] A New York state court recently sustained a writ of habeas corpus filed by a noncitizen held in custody after completing his criminal sentence for criminal contempt based on an immigration detainer.[223] The court concluded that the state's statutes codified the traditional common law arrest authority[224] and these statutes do not permit the warrantless arrest of individuals for civil immigration violations.[225] ICE's administrative warrants did not satisfy the state's standard for warrants because they are not issued by a judicial or quasi-judicial officer of the court.[226] Further, no residual arrest power inhered in local law enforcement officers given the courts' reliance exclusively on state statutes to determine this authority.[227] New York received the sixth largest volume of detainers,[228] yet the protections in state law preclude their enforcement with or without an administrative warrant.

The arrest authority of local law enforcement officers has been constrained by state statutes, constitutions, and common law since the birth of this country. These limits balance the need for broad police powers to maintain the peace and safety of residents as well as for safeguards to protect those residents from abusive and harassing enforcement. These safeguards require legal process for civil arrests or probable cause of a crime. State law therefore generally fails to supply sheriffs and other local law enforcement with the arrest authority required to enforce immigration detainers.

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[220] N.Y. CRIM. PROC. LAW §§ 140.05–140.55 (McKinney 2018).

[221] N.Y. PENAL LAW § 10.00(1) (McKinney 2018); *see also* N.Y. CRIM. PROC. LAW § 1.20 (McKinney 2018).

[222] SCHNEIDERMAN, *supra* note 218, at 5.

[223] People *ex rel.* Wells v. DeMarco, 88 N.Y.S.3d 518, 536 (App. Div. 2018).

[224] *Id.* at 531.

[225] *Id.*

[226] *Id.* at 528–29.

[227] *Id.* at 530.

[228] *Latest Data: TRAC*, *supra* note 25.

B. State Laws Regulating Cooperation Between Federal and State Law Enforcement Agencies

Between the push of the Trump administration's attempt to crack down on "sanctuary" jurisdictions and the pull of immigrant communities, sheriffs in some states have sought ways to comply with detainers that shield them from political responsibility and legal liability.[229] This includes reliance on laws dating back nearly two centuries, enacted in response to Congress's initial attempt to govern cooperation between federal and local officials.[230] These laws required sheriffs to take custody of federal detainees and remain in effect in most states today.[231]

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[229] Order Granting Plaintiff's Motion for Preliminary Injunction, Cisneros v. Elder, 18-CV-30459, 2018 WL 5284263, at *9 (Colo. Dist. Ct. Mar. 19, 2018); *Gaultieri Memo*, *supra* note 78 (proposing the use of federal contracts and detention orders to require ongoing custody of immigrants in state jails); *see also* Brown, *supra* note 133 (quoting Vaughn Killeen, executive director of the Idaho Sheriffs Association, as pointing to Idaho Code § 20-615 and stating that "[i]mmigration holds are federal prisoners and you really don't need a contract . . . just house them and bill ICE $75 a day. Without the contract the controversy goes away, or at least the significant issue causing the demonstrations" (omission in original)).

[230] *See* Tenorio-Serrano v. Driscoll, 324 F. Supp. 3d 1053, 1060–63 (D. Ariz. 2018); Order Granting Summary Judgment, *supra* note 194, at *9; Brown, *supra* note 133; *see also* Creedle v. Miami-Dade Cty., 349 F. Supp. 3d 1276, 1306–08 (S.D. Fla. 2018); C.F.C. v. Miami-Dade Cty., 349 F. Supp. 3d. 1236, 1259–62) (S.D. Fla. 2018); Valerio-Gonzalez v. Jarret, 390 Mont. 427 (Mont. 2017) (denying writ of habeas corpus).

[231] *See* ALA. CODE § 14-6-4 (2018) (enacted as early as 1852); ARIZ. REV. STAT. ANN. § 31-122 (2019) (enacted as early as 1887 as § 2447); ARK. CODE ANN. § 12-41-503(g) (2019) (1837); CAL. PENAL CODE § 4005 (Deering 2018) (enacted as early as 1872 as § 1601); COLO. REV. STAT. ANN. § 17-26-123 (2018) (enacted as early as 1877 as § 1400); CONN. GEN. STAT. ANN. § 18-91 (West 2018) (enacted as early as 1949); FLA. STAT. ANN. § 950.03 (West 2018) (enacted as early as 1847); GA. CODE ANN. § 42-4-9 (West 2019) (enacted as early as 1863 as § 334); HAW. REV. STAT. ANN. § 353-101 (West 2018) (enacted 1959); IDAHO CODE ANN. § 20-615 (2018) (enacted as early as 1864 as § 31); 730 ILL. COMP. STAT. ANN. 125/4 (West 2019) (enacted as early as 1827 as "An Act Concerning Jails and Jailers"); IOWA CODE ANN. § 356.1 (West 2019) (enacted as early as 1839 as "An Act for the Appointment and Duties of Sheriff"); KAN. STAT. ANN. § 19-1930 (West 2019) (enacted as early as 1868); KY. REV. STAT. ANN. § 441.035 (West 2019) (enacted as early as 1873 as "Jail and Jailers," Article I, §§ 4–5); LA. STAT. ANN. § 15:707 (2018) (enacted as early as 1870); ME. REV. STAT. ANN. tit. 30-A, § 1554 (2019) (enacted as early as 1821); MICH. COMP. LAWS ANN. § 801.101 (West 2019) (enacted 1846); MINN. STAT. ANN. § 641.03 (West 2019) (enacted as early as 1851); MISS. CODE ANN. § 19-25-81 (West 2019) (enacted 1848); MO. ANN. STAT. § 221–270 (West 2018) (enacted as early as 1824); NEB. REV. STAT. ANN. § 83-420 (West 2019); NEV. REV. STAT. ANN. § 211.060 (West 2019) (enacted 1861 as "An Act In Relation to Common Jails, and the Prisoners Thereof"); N.H. REV. STAT. ANN. § 30-B:16 (2018) (enacted 1988); N.J. STAT. ANN. § 30:8-2 (West 2019) (enacted as early as 1877); N.M. STAT. ANN. § 33-3-16 (West 2019) (enacted as early as 1865); N.Y. CORRECT. LAW § 612 (McKinney 2018) (enacted as early as 1929); N.C. GEN. STAT. ANN. § 162-34 (West 2019) (1790); OHIO REV. CODE ANN. § 341.21 (West 2019) (as early as 1806); OKLA. STAT. ANN. tit. 57, § 16a (West 2019) (enacted as early as 1890); OR. REV. STAT. ANN. § 169.540 (West 2019) (enacted as early as 1854); 11 R.I. GEN. LAWS ANN. § 11-25-13 (2018) (as early as 1925); S.C. CODE ANN. § 24-5-60 (2018) (enacted 1790); S.D. CODIFIED LAWS § 24-11-6 (2019) (enacted as early as 1862 as part of the Dakota Territories); TENN. CODE ANN. § 41-4-105 (West 2019) (enacted 1801); TEX. LOC. GOV'T CODE ANN. § 351.043 (West 2018) (enacted 1856); UTAH CODE ANN. §§ 17-22-

In 1789, the First Congress—even before it proposed the Bill of Rights—enacted a law requesting that the states pass statutes requiring the keepers of their jails to receive and maintain custody of "all prisoners committed under the authority of the United States."[232] The goal was to fix a basic problem: the federal government had created courts to apply federal law and U.S. marshals to enforce it, but had nowhere to put its prisoners.[233] In response to Congress's plea, every state, with the exception of Georgia, complied.[234] Within a few decades, some states withdrew their commitment—possibly in response to the federal government's failure to make good on its promise to pay for the space in state jails.[235] Nonetheless, thirty-nine states continue to have laws in effect that stem from this early act of Congress and require some degree of cooperation between state

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9, 17-22-10 (West 2018) (enacted as early as 1876); VA. CODE ANN. § 53.1-79 (West 2018) (as early as 1789); W. VA. CODE ANN. § 7-8-8 (West 2018) (adopted from Virginia law when West Virginia separated from Virginia in 1861 and joined the Union in 1863); WYO. STAT. ANN. § 18-6-305 (West 2019) (enacted 1869 as "An Act Concerning Jails").

[232] Act of Sept. 23, 1789, ch. 27, 1 Stat. 96 (1789). The full text provided:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it be recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of the gaols, to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in the case of prisoners committed under the authority of such States respectively; the Unites States to pay for the use and keeping of such gaols, at the rate of fifty cents per month for each prisoner that shall, under their authority, be committed thereto, during the time such prisoner shall be therein confined; and also to support such of said prisoners as shall be committed for offences.

Id.

[233] LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 402 (1948).

[234] *Id.* at 402 n.44; *see also* Printz v. United States, 521 U.S. 898, 909-10 (1997) (discussing Congress's assumption in this Act that it could not command into service the states' executive powers and emphasizing that Congress's response to Georgia's refusal was to rent its own jails rather than force compliance).

[235] *See* 16 Annals of Cong. 1193–94 (1821) (discussing move by Ohio to refuse federal prisoners and proposed resolution to rent jail space in those states refusing to take custody of federal prisoners), 1830–31 (resolution so providing); *see also* 1821 Ohio Laws 1185 ("An Act to Withdraw from the Bank of the United States the Protection and Aid of the Laws of this State, In Certain Cases") (discussing the federal government's failure to pay hundreds of dollars in costs for the use of the state's jails to house federal prisoners). *Cf.* Wesley Campbell, *Commandeering and Constitutional Change*, 122 YALE L. J. 1104, 1110 (2013) (proposing that the Act of Sept. 23, 1789 had less relevance to the Founders' understanding of the federal power to commandeer state resources than the *Printz* majority ascribed in light of restrictions on how payment for state jail space could be made); Ronald Chen, *State Incarceration of Federal Prisoners After September 11: Whose Jail is it Anyway?* 69 BROOK. L. REV. 1335, 1346–52 (2004) (discussing New Jersey's "take custody" law, enacted in 1877, and concluding that sheriffs remain accountable to state law and an inmate's custody is governed by state law even in the case of prisoners held under federal law on behalf of the federal government).

and federal law enforcement officers. The "take custody" statutes do not explicitly provide arrest authority; nonetheless, county sheriffs have relied on them as a basis for continuing to hold immigrants at the federal government's request. These claims are making their way through state and federal courts.[236]

Though the law in each state varies somewhat, the "take custody" provisions fall into four broad categories. To develop these categories, state statutes that exist in all fifty states were reviewed to identify key phrases common to many of these laws that set out the conditions for state cooperation with federal law enforcement. From there, the statutes were grouped into four separate strains based on these key phrases; the cases citing each state statute were further evaluated. Because this case law is sparse, state court opinions were also assessed to determine how the key phrases in other settings were interpreted. The findings of this survey are discussed here; the statutory text and citing references are set out in the appendix.[237] The section concludes that neither immigration detainers nor the administrative warrants that accompany them comply with the core requirements contained in state "take custody" provisions. These state statutes therefore do not authorize local law enforcement officers to arrest a state resident for violating federal civil laws, as detainers request.

1. "Take Custody" Statutes Limited to Criminal Offenders

These laws fall into four broad categories. The first group of statutes limits the obligations of state jailers to taking custody only of individuals detained for criminal offenses. The provisions in Nebraska and Ohio refer specifically to criminal charges and

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[236] *Compare* Creedle v. Miami-Dade Cty., 349 F. Supp. 3d 1276, 1307 (S.D. Fla. 2018) (rejecting take custody statute as providing arrest authority) *and* C.F.C. v. Miami-Dade Cty, 349 F. Supp. 3d. 1236, 1262(S.D. Fla. 2018) *and* Cisneros v. Elder, No. 18-CV-30549, 2018 WL 7142016, at *8–9 (Colo. Dist. Ct. Dec. 6, 2018) (same) *with* Tenorio-Serrano v. Driscoll, 324 F. Supp. 3d 1053, 1060–63 (D. Ariz. 2018) (stating that the equivalent state law may authorize arrests pursuant to detainers and administrative warrants) *and* Valerio-Gonzalez v. Jarret, 390 Mont. 427 (Mont. 2017) (concluding that the equivalent state law does authorize detainers with administrative warrants).

[237] Credit for the fifty-state survey and state case law interpreting the key phrases goes to research assistant Naomi Doraisamy. Naomi's insights into how state courts have applied the terms "process," "duly committed," and "under the authority of the United States" were instrumental in identifying the core requirements for state cooperation. To be clear, Part III of this article focuses on two principal sources of the sheriff's authority common to most states: arrest authority and duty to keep the jails. It does not purport to present an exhaustive review of the arrest authority of local law enforcement officers in every state. The scope of a sheriff's powers and obligations in a given state may be further defined by state statutes and court decisions not reviewed here.

criminal convictions.[238] Laws in New Hampshire, Colorado, and Alabama refer to people held for "offenses against the United States."[239] Colorado statute defines the term "offense" to refer only to violations of criminal law,[240] while Alabama's state law refers to "any criminal charge or offense."[241] New Hampshire's Supreme Court has likewise made clear that the terms "offense" and "crime" are interchangeable.[242] An opinion by the Illinois attorney general also interpreted that state's statute to require a state or federal criminal charge.[243] Immigration detainers and administrative warrants, issued for alleged civil violations, clearly do not meet this requirement.[244]

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[238] NEB. REV. STAT. ANN. § 83-420 (West 2019) ("The Director of Correctional Services shall receive, safely keep, and subject to the discipline of the Department of Correctional Services, any criminal convicted of any crime against the United States, and sentenced to confinement therein by any court of the United States sitting within this state, until such sentence is executed or until such offender is discharged by due course of law. The United States shall support such offender and pay the expenses of executing his sentence."); OHIO REV. CODE ANN. § 341.21 (West 2019) (stating, in relevant part: "The board of county commissioners may direct the sheriff to receive into custody prisoners charged with or convicted of crime by the United States, and to keep those prisoners until discharged. The board of the county in which prisoners charged with or convicted of crime by the United States may be so committed may negotiate and conclude any contracts with the United States for the use of the jail as provided by this section and as the board sees fit").

[239] ALA. CODE § 14-6-4 (2018) ("The sheriff or jailer must, if the jail of the county is sufficient, receive into his custody any person committed under any criminal charge or offense against the United States and safely keep such prisoner, according to the order or process of commitment, until duly discharged by law; and he is liable to the same penalties for the escape of such prisoner as for the escape of a prisoner committed under the authority of this state."); COLO. REV. STAT. ANN. § 17-26-123 (2018) ("It is the duty of the keeper of each county jail to receive into the jail every person duly committed thereto for any offense against the United States, by any court or officer of the United States, and to confine every such person in the jail until he is duly discharged, the United States paying all the expenses of the confinement, safekeeping, and custody of such person, including the keeper's fees, at the rate established by the board of county commissioners of the county where such jail is situated."); N.H. REV. STAT. ANN. § 30-B:16 (2018) ("The superintendent of the county department of corrections may receive and keep every person duly committed thereto for any offense against the United States paying all expenses for the confinement and safekeeping of such person, at a rate established by the county commissioners of the county where such facility is located.").

[240] COLO. REV. STAT. § 18-1-104(1) (2019) ("The terms 'offense' and 'crime' are synonymous.").

[241] ALA. CODE § 14-6-4 (2019). Alabama statutes also define "offense" only within the criminal code. *See* ALA. CODE § 13A-1-2(10) (2019).

[242] State v. Miller, 115 N.H. 662, 664 (N.H. 1975) ("Until the enactment of the Criminal Code all 'offenses' were either misdemeanors or felonies and the term 'crimes' and 'offenses' were synonymous. *Thus in the statutes outside of the Criminal Code 'crimes' are 'offenses' and 'offenses' are 'crimes.'*") (emphasis added).

[243] 730 ILL. COMP. STAT. 125/4 (2018); *See generally* Letter from William J. Scott, Ill. Att'y Gen.to Frank X. Yackley, State's Attorney La Salle Cty. (July 26, 1977), illinoisattorneygeneral.gov/opinions/1977/S-1284.pdf [https://perma.cc/MZX9-BW3P].

[244] *See* Cisneros v. Elder, No. 18-CV-30549, 2018 WL 7142016, at *8–9 (Colo. Dist. Ct. Dec. 6, 2018).

2. "Take Custody" Statutes Explicitly Requiring Direction from the Federal Courts

The second category consists of laws that explicitly require an order or some other action by federal courts. The laws in Iowa, Michigan, Mississippi, New York, Oregon, and Utah comprise this group.[245] These statutes explicitly require review or direction by a U.S. court in order to take custody of the subject of that document. Typical of this category is Mississippi's requirement of "legal process from the officers of the courts of the United States."[246] Iowa permits the use of its county jails only to "persons detained or committed by authority of the courts of the United States[.]"[247] Both Michigan and New York require direction from "a court of record instituted under the authority of the United States."[248] These states, except Iowa and Utah, also include the requirement of process—"civil process" in Michigan and New York,[249] "legal process" in Mississippi,[250] and "civil or criminal process" in Oregon. The term "process" also incorporates the requirement of direction from a court, as described in the next category of statutes, but the states in the second category make that condition explicit through referencing court action directly in the text.

In these states, this explicit requirement of U.S. court involvement is not met by immigration detainers and administrative warrants. As discussed in Part I, immigration detainers and administrative warrants are issued by federal immigration enforcement agents. They are not directed by a court or reviewed by a judicial officer.[251] Accordingly, "take custody" statutes in these states cannot provide the affirmative authority required for sheriffs and other local officers to enforce immigration detainers.

Utah's law also references federal courts but in a way that limits the scope of the statute to individuals in custody for proceedings before the federal judiciary, not administrative adjudicators. That state law requires sheriffs to take custody only

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[245] IOWA CODE ANN. § 356.1 (West 2019); MICH. COMP. LAWS § 801.101 (2018); MISS. CODE ANN. § 19-25-81 (2018); N.Y. CORRECT. LAW § 612(1) (McKinney 2018); ORE. REV. STAT. § 169.530 (2018) UTAH CODE ANN. § 17-22-9. *See* Appendix for text of the statutes. New York receives the sixth most detainers of any state in the country. *See Latest Data: TRAC*, *supra* note 25. New York's requirement for a federal court order thus eliminates this statute as a potential source of authority to enforce thousands of detainers.

[246] MISS. CODE ANN. § 19-25-81 (2019).

[247] IOWA CODE ANN. § 356.1 (West 2019).

[248] MICH. COMP. LAWS § 801.101 (2019); N.Y. CORRECT. LAW § 612(1) (McKinney 2019) (emphasis added).

[249] MICH. COMP. LAWS § 801.101 (2019); N.Y. CORRECT. LAW § 612(1) (McKinney 2019).

[250] MISS. CODE ANN. § 19-25-81 (2019).

[251] *See* 8 C.F.R. §§ 287.5(e), 236.1(b)(1), 287.8(c)(ii) (2018); *see also* 8 U.S.C. § 1236(a) (2012 & Supp. V 2018); *supra* notes 64–66 and accompanying text.

of "[p]ersons convicted of crime in any of the courts of the United States in the state of Utah as well as prisoners held to answer before such courts for a violation of any of the laws of the United States."[252] Because the custody mandate is limited to individuals subject to courts with jurisdiction to convict individuals of federal crimes, detained immigrants, who are under the jurisdiction of administrative immigration courts, fall outside the statute.

3. "Take Custody" Statutes Requiring "Process"

The laws of eleven states refer specifically to legal process or a specific legal instrument that authorizes detention as a condition for local custody of federal prisoners.[253] Many of these laws contain similar language so that case law interpreting a statute in one state can inform the meaning of its equivalent in another state. California's law, for example, provides that

> the sheriff shall receive, and keep in the county jail, any prisoner committed thereto by process or order issued under the authority of the United States, until he or she is discharged according to law, as if he or she had been committed under process issued under the authority of this state.[254]

Arizona, Idaho, Minnesota, Oklahoma, and South Dakota have nearly identical provisions.[255] Statutes in Florida, New Mexico, Utah, Virginia, and West Virginia vary somewhat but still condition cooperation on "process."[256] State courts have rarely been called on to interpret these laws, and when they have, disputes have centered primarily on the payment requirements.[257] The California Supreme Court, however, issued the only decision applying a "take custody"

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[252] UTAH CODE ANN. § 17-22-9.

[253] ARIZ. REV. STAT. ANN. § 31-122 (2019); CAL. PENAL CODE § 4005 (Deering 2018); FLA. STAT. ANN. § 950.03 (West 2018); IDAHO CODE ANN. § 20-615 (2018); MINN. STAT. ANN. § 641.03 (West 2019); N.M. STAT. ANN. § 33-3-16 (West 2019); OKLA. STAT. ANN. tit. 57, § 16a (2018); S.D. CODIFIED LAWS § 24-11-6 (2019); UTAH CODE ANN. §§ 17-22-9, 17-22-10 (West 2018); VA. CODE ANN. § 53.1-79 (West 2018); W. VA. CODE § 7-8-8 (West 2018).

[254] CAL. PENAL CODE § 4005 (Deering 2018).

[255] ARIZ. REV. STAT. ANN. § 31-122 (2019); IDAHO CODE ANN. § 20-615 (2018); MINN. STAT. ANN. § 641.03 (West 2019); OKLA. STAT. ANN. tit. 57, § 16a (West 2019); S.D. CODIFIED LAWS § 24-11-6 (2019).

[256] FLA. STAT. ANN. § 950.03 (2018); N.M. STAT. ANN. § 33-3-16 (West 2019); S.D. CODIFIED LAWS § 24-11-6 (2019); UTAH CODE ANN. §§ 17-22-9, 17-22-10 (West 2018); VA. CODE ANN. § 53.1-79 (West 2018); W. VA. CODE ANN. § 7-8-8 (West 2018).

[257] *See, e.g.*, Sonoma v. Santa Rosa, 102 Cal. 426 (1894) (discussing process and commitment authority in discussion of whether Sonoma County or the City of Santa Rosa was liable for costs for a prisoner committed by a city recorder); Richter v. St. Paul, 29 Minn. 198 (1882) (discussing whether municipality bore liability for prisoner committed by municipal court); *see also* Avery v. Pima Cty., 7 Ariz. 26 (1900) (discussing whether sheriff or county was entitled to payment from the federal government for housing federal prisoners); Cty. of L.A. v. Cline, 185 Cal. 299 (1921) (same); Bd. of Comm'rs v. Mars, 117 P.2d 129 (Okla. 1941) (same, collecting cases).

provision to detained immigrants before sheriffs began invoking them in defense of detainer enforcement in 2018.[258]

In 1891, the California Supreme Court considered the meaning of California's "take custody" mandate as applied to immigrants detained under the Chinese Exclusion Act.[259] Mr. Ah Teung was accused of assisting another Chinese immigrant, Lee Yick, with escaping from the Alameda county jail.[260] The question for the court was whether the custody of Lee Yick was lawful; if not, Mr. Ah Teung could not be guilty of the crime of assisting in his escape.[261] Lee Yick had been confined to the county jail based on the declaration of a U.S. court commissioner that Mr. Yick was present in the country in violation of the Chinese Exclusion Act.[262] U.S. court commissioners supported federal courts in a role that became the position of U.S. magistrate judge.[263] No formal judgment for Mr. Yick, however, was ever issued based on the commissioner's finding, nor did a U.S. commissioner or judge of the court issue an order for Mr. Yick to be held in the Alameda county jail.[264]

The California Supreme Court examined the question of whether the U.S. commissioner's finding alone satisfied the requirement for "process or order" to require the county jailer to take custody of Mr. Yick as a federal prisoner.[265] The court's response was, "We think not."[266] Consequently, the county deputy sheriff had no authority to detain Mr. Yick without a formal judgment from a U.S. district court or designated court commissioner.[267] Only a "certified copy of the judgment" from the U.S. court or its commissioner could serve as the "process or order" that the California law required.[268]

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[258] Only one case applies this law to detained immigrants. *See* People v. Ah Teung, 28 P. 577, 577(Cal. 1891); *see also* Appendix (outlining citing references to each state statute).

[259] *Ah Teung*, 28 P. at 577.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] Four years after the Judiciary Act of 1789, Congress "drawing on the English and colonial tradition of having local magistrates and justices of the peace serve as committing officers, . . . authorized federal circuit courts to appoint 'discreet persons learned in the law' [and] to accept bail for them." *See* Peter G. McCabe, A Guide to the Federal Magistrate Judge System 3, 3 n.9 (Fed. Bar Ass'n White Paper (Aug. 2014) (citing Act of Mar. 2, 1793, ch. 22, § 4, 1 Stat. 334 (1793)). These individuals absorbed more duties—accepting bail, issuing arrest and search warrants, and holding people for trial—as their role developed into the commissioner system. The system was reconstituted through the Act of May 28, 1896 and U.S. commissioners became U.S. magistrate judges. *Id.* at 3 n.11. For an example of a declaration of a U.S. commissioner, see generally United States *ex. rel*. Scott v. Burdick, 46 N.W. 572 (Dakota 1875).

[264] *Ah Teung*, 28 P. at 577.

[265] *Id.*

[266] *Id.*

[267] *Id.* at 577–78.

[268] *Id.* at 577; *see also* Bruner v. Superior Court of S.F. 92 Cal. 239, 247 (1891) (holding that process embraces everything ordered by any court or judge which has to be executed by an officer).

Laws from other states with identical or similar provisions requiring "process" also reflect the need for a court-issued document before sheriffs can take custody of federal prisoners. The state of Idaho adopted California's "take custody" law in 1864 and interpreted the meaning of process several years later.[269] The Supreme Court of the Territory of Idaho explained, "Strictly speaking 'process,' as its etymology shows, is something issuing out of, or from a court or judge."[270] Indeed, in 1887, Idaho's law included the caption: "Sheriff must receive prisoners committed by U.S. courts."[271] Idaho's territorial legislature provided an accompanying definition in its first code of civil procedure.[272] "Process" was defined as "a writ or summons issued in the course of judicial proceedings" and "writ" was, in turn, defined as "an order or precept in writing, issued in the name of the people, or of a Court or judicial officer."[273] Nearly one hundred and fifty years later, Idaho's Supreme Court confirmed that the term "process" means judicial orders and the authority to compel compliance with the enumerated duties delegated to sheriffs.[274]

The Dakota Territory and then later North Dakota had a nearly identical "take custody" statute. The law has been withdrawn but the North Dakota Supreme Court provided an extensive definition for "process" a century ago.[275] The court explained that "process"

> comprehends all the acts of the court, from the beginning of the proceeding to its end. In a narrower sense, it is the means of compelling a defendant to appear in court, after suing out the original

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[269] *See* John F., Compiler MacLane. Rev. Codes of Idaho, tit. 3, § 8529 (1908) (historical notes); Compiled Statutes of Idaho, Ch. 337, Sec. 9419 (1919); An Act Concerning Sheriffs, ch. 129, art. 6, § 41 (Apr. 29, 1851), S. GARFIELDE & F.A. SNYDER, COMPILERS, COMPILED LAWS OF THE STATE OF CALIFORNIA (Boston, Franklin Printing House 1853 Apr.). The historical notes to Idaho's statute also cite an analogous law in North Dakota, adopted in 1877, which requires sheriffs and jail officials to receive into custody any person "sent or committed, by virtue of legal process issued by or under the authority of the United States . . . as if such prisoners had been committed to their custody by virtue of legal process issued under the authority of this territory." *See* Compiled Statutes of Idaho, ch. 337, § 9419 [8529] (1919) (historical notes); 1914 N.D. Laws Compiled Laws of the State of North Dakota, 1913, N.D. Cent. Code § 11346 (1914); George H., Editor Hand. Revised Codes of the Territory of Dakota, Comprising the Codes and General Statutes Passed at the Twelfth Session of the Legislative Assembly, and all other General Laws Remaining in Force § 648 (1877).

[270] People v. Nash, 1 Idaho 206, 210 (Idaho Terr. 1868).

[271] 1887 Idaho Sess. Laws 880; *see also* IDAHO CODE § 5875 (1901).

[272] 1881 Idaho Sess. Laws 3.

[273] *Id.* at 2.

[274] *See* Hart v. Idaho State Tax Comm'n, 301 P.3d 627, 630 (Idaho 2012) (citing *Nash*, 1 Idaho at 210).

[275] Blair v. Maxbass Sec. Bank, 176 N.W. 98, 100 (N.D. 1919). North Dakota's "take custody" statute was still in effect in 1905, but was no longer by the 1913 compilation. *See* N.D. CENT. CODE § 10455 (1905); N.D. CENT. CODE §§ 3518–19 (1913) (setting fees for housing United States prisoners, but no equivalent "take custody" statute).

> writ in civil, and, after indictment, in criminal, cases. In every sense, it is the act of the court.[276]

Likewise, the Minnesota Supreme Court rejected a broader interpretation and limited the term to court-issued documents:

> "Process," in a large acceptation, is nearly synonymous with "proceedings," and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. In this last sense it is manifestly used in the [Minnesota] constitution, and when used in this sense we believe it only applies to judicial instruments issued by a court or other competent jurisdiction and returnable to the same.[277]

In Arizona, courts also equate legal process with warrants or other court-issued orders.[278] The term "process," thus embodies the bedrock requirements of a sworn statement of probable cause, reviewed and approved by a neutral magistrate, or a court order mandating custody in order to carry out some other judicial proceeding.[279]

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[276] *Blair*, 176 N.W. at 17 (continuing, "Any means of acquiring jurisdiction is properly denominated process. The term is sufficiently comprehensive to include an attachment, garnishment, or execution. A writ is process and process is a writ, interchangeably.").

[277] Hanna v. Russell, 12 Minn. 80, 86 (1866) (citations omitted).

[278] *See, e.g.*, Walsh v. State, 450 P.2d 392, 398 (Ariz. 1969) (court referred to a detainer filed by California pursuant to a warrant of arrest issued by California as removal "by legal process"); Platt v. Greenwood, 69 P.2d 1032, 1035 (Ariz. 1937) (sheriff defending against civil suit for false imprisonment and unlawful arrest could not show that an alleged misdemeanor had occurred in his presence to justify the underlying warrantless arrest and thus acting without the "necessary legal process or authority"); Christiansen v. Weston, 284 P. 149, 153 (Ariz. 1930) ("proper process" to arrest a person was to file complaint and obtain a court order for commitment).

[279] *See, e.g.*, *Ex parte* Cameron, 14 So. 97, 98 (Ala. 1893) (a warrant of commitment issued by a Justice of the Peace, "irregular and illegal upon its face, and based upon an affidavit which charged no offense," could be corrected by the Justice of the Peace and thus become legal warrant); Collins v. Lean, 9 P. 173, 174-75 (Cal. 1885) (search warrant was proper because it was issued by a justice of the peace and based on affidavit conforming to "both constitutional and statutory requirements"); Jefferson v. Sweat, 76 So. 2d 494, 501–02 (Fla. 1954) (holding that a warrant of commitment had to be supported by probable cause, which could not "be determined by the Justice of the Peace without a trial" to measure if there was "competent proof independent of admissions, confessions, and presumptions that a public offense had been committed"); Watkins v. Baird, 6 Mass. (5 Tyng) 506, 511–12 (Mass. 1810) (addressing requirements for valid legal process to authorize arrest and liability for providing false testimony to the process-issuing court); State *ex rel*. Zugschwerd v. Holm, 34 N.W. 748, 749 (Minn. 1887) (required process for relator to be re-arrested was the same for requirement to be arrested in the first place: complaint in writing, subscribed and sworn to by the complainant before the justice stating the relator had committed it, and justice approval); Lenski v. O'Brien, 232 S.W. 235, 238 (Mo. Ct. App. 1921) ("[T]he magistrate ought to have before him the oath of the real accuser presented either in the form of an affidavit or taken down by himself by personal examination, inserting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded. The magistrate can then judge for himself and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant."); State v. Wimbush, 9 S.C. 309, 314 (S.C. 1878) (requiring new trial when trial justice issued

Consequently, immigration detainers—even when accompanied by administrative warrants—do not include the imprimatur of a court, as the terms "process" and "order" require. A warrant signed by an immigration enforcement agent[280] simply cannot satisfy these statutes' historical demands. This is true for the administrative warrants of arrest and warrants of deportation/removal alike. Though the warrant of removal/deportation is based on a final order of removal that may be issued by an immigration adjudicator (though not necessarily),[281] the warrant itself is signed by an enforcement agent without any review by a judge in any court to verify its validity or the probability of removal notwithstanding the passage of time and potential bases for reopening the order. Regardless of the type of administrative warrant attached to the detainer, at bottom, a state law enforcement officer is performing the civil arrest without a directive from a court. These state laws do not authorize such arrests.

4. "Take Custody" Statutes Requiring "the Authority of the United States"

The statutes in the last category require only that the person is detained under the "authority of the United States."[282] These laws

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warrants to search and arrest, but information upon which warrants were founded were not given under oath but consisted of mere unsworn written statement); Wells v. Jackson, 3 Munf. 458, 482 (Va. 1811) (holding that warrant was illegal when prosecutor summarily erased name of subject of already-sworn arrest warrant and wrote appellant's name instead, stating, "It is illegal, unconstitutional, and void because it leaves [the identity of the subject] to the discretion and judgment of the officer"); *see also* Martin v. State, 199 So. 98, 102 (Miss. 1940) (circuit clerks themselves do not have authority to issue warrants).

[280] 8 C.F.R. § 287.5(e)(2) (2018) (listing positions within the Department of Homeland Security authorized to issue immigration warrants).

[281] *See* Form I-205 https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF [https://perma.cc/E3H6-B73E].

[282] GA. CODE ANN. § 42-4-9 (West 2019); ME. REV. STAT. ANN. tit. 30-A, § 1554 (2019); MO. ANN. STAT. § 221-270 (West 2018); NEV. REV. STAT. ANN. § 211.060 (West 2019); N.J. STAT. ANN. § 30:8-2 (West 2019); N.C. GEN. STAT. ANN. § 162-34 (West 2019); 11 R.I. GEN. LAWS ANN. § 11-25-13 (2018); S.C. CODE ANN. § 24-5-60 (2018); TENN. CODE ANN. § 41-4-105 (West 2019); *accord* KAN. STAT. ANN. § 19-1930 (West 2019). Kentucky's current statutory language requires receipt and confinement of "persons committed under the laws of the United States"; the original version, enacted February 3, 1798, required receipt of "any prisoner or prisoners who may be from time to time committed to his charge, under the authority of the United States." *See* An Act for the Safe-Keeping of Prisoners Committed under the Authority of the United States into Any of the Jails of This Commonwealth, sec. 1, ch. 35, 1798 Ky. Sess. Laws 57. In 1893, a statute with the current language "persons committed under the laws of the United States" was enacted in its place. *See* An Act Concerning Jailers, ch. 181, art. 1, sec. 2, 1893 Ky. Sess. Laws 751, 752. The state's courts have relied on the original statutory text for its meaning. In 1830, the Kentucky Supreme Court addressed the original statutory language in Johnson v. Lewis, 31 Ky. 182, 183 (1833); *see also* Bank of the United States v. Tyler, 29 U.S. 366, 388 (1830) (citing Kentucky's statute). In 1933, after the change to the statutory text, the Kentucky

can be found in Georgia, Kansas, Kentucky, Maine, Missouri, Nevada, New Jersey, North Carolina, Rhode Island, South Carolina, and Tennessee.[283] Years of judicial review have defined this phrase to incorporate the requirement of process. State courts elaborated what was required for someone to be held in custody "under the authority of the United States" principally through habeas challenges brought by soldiers arrested for desertion by federal officers, held in state jails, and filed in state court.[284]

A crisis was emerging in the lead up to the Civil War as President Lincoln's suspension of the writ of habeas corpus in federal courts—first regionally, then nationwide—left state and lower federal courts to struggle with the effects.[285] In the 1850s, some state courts were invalidating the decisions of federal courts applying federal laws, depending on that state's particular position on slavery and secession.[286]

Court of Appeals interpreted this statute in the context of who retained payment for housing the federal prisoner and relied on the state supreme court's prior decision in *Johnson v. Lewis*, stating, "A jailer of Kentucky is bound to receive persons committed by authority of United States and keep them until discharged in due course by the laws of the United States." *See* Holland v. Fayette County, 240 Ky. 37, 41–42 (1931).

[283] GA. CODE ANN. § 42-4-9 (West 2019); KAN. STAT. ANN. § 19-1930 (West 2019); KY. REV. STAT. ANN. § 441.035 (West 2019); ME. REV. STAT. ANN. tit. 30-A, § 1554 (2019); MO. ANN. STAT. § 221-270 (West 2018); NEV. REV. STAT. ANN. § 211.060 (West 2019); N.J. STAT. ANN. § 30:8-2 (West 2019); N.C. GEN. STAT. ANN. § 162-34 (2019); 11 R.I. GEN. LAWS ANN. § 11-25-13 (2018); S.C. CODE ANN. § 24-5-60 (2018); TENN. CODE ANN. § 41-4-105 (2018).

[284] *See, e.g.*, *In re* Farrand, 8 F. Cas. 1070, 1073 (D. Ky. 1867) (Kentucky district court ordered release of a commander held in contempt of state court for refusing to comply with habeas proceedings for underage soldier held for desertion: "[A]fter the return [to habeas corpus] is made, and the state judge or court is judicially apprized that the party is in custody under the authority of the United States, they can proceed no further."); *Ex parte* Merryman, 17 F. Cas. 144, 151–52 (C.C.D. Md. 1861); *In re* Ferguson, 9 Johns. 239, 239–41 (N.Y. 1812) (Supreme Court of Judicature of New York denied writ of habeas corpus for lack of jurisdiction when underage soldier argued he should have been released and discharged from the United States Army—the federal courts had jurisdiction because the soldier was an officer of the U.S. Army); *see also Ex parte* Hill, 5 Nev. 154, 158 (Nev. 1869); *In re* Hopson, 40 Barb. 34, 55 (N.Y. 1863); *Ex parte* Pool, 4 Va. (2 Va. Cas.) 276, 278 (Va. 1821).

[285] *See* MARK E. NEELY, JR., LINCOLN AND THE TRIUMPH OF THE NATION: CONSTITUTIONAL CONFLICT IN THE AMERICAN CIVIL WAR 161–234 (2011). In *Ex parte Merryman*, Chief Justice Taney in the Circuit Court of Maryland challenged President Lincoln's constitutional capacity to suspend the writ of habeas corpus. *See Merryman*, 17 F. Cas. at 144; CHARLES GROVE HAINES & FOSTER H. SHERWOOD, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1835-1864, at 454–66 (1957); This drama—largely ignored by President Lincoln and leading to an unenforced writ of attachment for contempt against him—reflected the deep uncertainty in the judiciary regarding the President's novel exercise of executive power. Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1688 (1997).

[286] *See* HAINES & SHERWOOD, *supra* note 285, at 230–35, 237–38. Wisconsin's antislavery position caused the Wisconsin Supreme Court to determine that the federal Fugitive Slave Act of 1850 was unconstitutional. The Wisconsin Supreme Court thus discharged on habeas corpus a man convicted under its provisions in federal court. *In re* Booth 3 Wis. 1, 2 (Wis. 1854) *rev'd sub nom.* Ableman v. Booth, 62 U.S. (21 How.) 506, 507–08 (1858). *See also generally In re* Bryan, 60 N.C. 1 (N.C. 1863) (North Carolina Supreme Court insisted on concurrent jurisdiction for habeas corpus proceedings for North Carolinians charged with desertion from the Confederate Army).

The initial question arising in these habeas petitions was whether state courts had jurisdiction over claims that a prisoner's custody under federal law was illegal. To resolve this fundamental aspect of a federalist government, the U.S. Supreme Court stepped in with its decision in *Ableman v. Booth*,[287] holding that state courts lacked jurisdiction once the federal officer in charge of the petitioner's custody informed the state judge that the petitioner was detained "under the authority of the United States."[288] In this situation, the prisoner had to challenge the lawfulness of his detention under federal law in the federal courts.[289]

The next question for the state courts was what evidence was sufficient to demonstrate that a prisoner was held under the authority of the United States—thereby stripping the state court of jurisdiction over the prisoner's habeas claim.[290] Here, state courts generally read in a requirement for legal process. An order by a court or judicial officer was clearly sufficient.[291] Courts were less certain when a commissioner of the United States issued the process.[292] Though U.S. commissioners were appointed by a court to support the functioning of the court,[293] they did not pass independent

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[287] Ableman v. Booth, 62 U.S. (21 How.) 506, 515–17 (1858).

[288] *Id.* at 523 ("[A]fter the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further.").

[289] *Id.* at 523.

[290] *Farrand*, 8 F. Cas. at 1074–75 ("What the return of the marshal or other person should contain in order to properly inform the state court that the prisoner is in custody under authority of the United States, the supreme court do not say.").

[291] *Id.* at 1075; *Hill*, 5 Nev. at 158 ("[I]n every case where process, regular on its face, has been issued from a court of the United States having power to issue process of such a nature, the officer acting thereunder is fully protected against any interference from a State court, while so acting; and that such court, when judicially informed of the existence of the process, cannot go behind the same to make any further inquiry."); Ohio & M.R. Co. v. Fitch, 20 Ind. 498, 506 (1863) ("[W]e observe, neither the constitution of the United States nor any act of Congress gives to the Federal Courts, in terms, exclusive jurisdiction in such cases as have been mentioned; and Judge Nelson, of the United States Supreme Court, in 1851, seems to rule that a holding under the authority of the United States, to exclude the jurisdiction of the State Courts, must be a holding under legal process. He says: 'In such a case, that is, when the prisoner is in fact held under process issued from a Federal tribunal[.]'"(quoting Norris v. Newton, 5 McLean 92 (C.C.D. Ind. 1850)); *Hopson*, 40 Barb. 34, 55 (N.Y. Sup. Ct. 1863) ("No lawyer at this date will for a moment question the utter incompetency of a state court to sit in judgment upon, and review and reverse a solemn adjudication of a court of the United States.").

[292] *Hopson*, 40 Barb. at 57–58 ("I deny that the commissioner was in any sense a judicial officer, or if he was, that his warrant partook in any respect of the nature of a judicial process. He had passed no judicial judgment, he had exercised no judicial function."); *Ex parte* Pool, 4 Va. (2 Va. Cas.) 276, 284–85 (Va. 1821) (acknowledging the authority of federal judicial officers but documenting a split among the courts about the nature of the act of commitment by non-judicial officers, and whether this stripped state courts of jurisdiction to review on *habeas*).

[293] *See* McCabe, *supra* note 263, at 3–5; *see also Court Officers and Staff: Commissioners*, FED. JUDICIAL CTR., https://www.fjc.gov/history/administration/court-officers-and-staff-commissioners [https://perma.cc/8S89-VY53].

judgment on the validity of a warrant for arrest.[294] In the context of the Civil War, some courts accepted proof that prisoners were subject to the Civil War Military Draft Act of 1863 issued by special federal marshals and U.S. commissioners.[295] The particularly high stakes of the Civil War, which threatened the existence of the sovereign, persuaded these courts to accept a statement from the officer authorized by the federal military law.[296] This exception to the requirement of a formal warrant or judicial process was, however, specific to the extreme circumstances of the Civil War.[297]

In the context of immigration detainers, even this broadest group of statutes fails to authorize those civil arrests. As with all of the "take custody" statutes, they address only the power of local law enforcement officers to detain federal inmates; they do not supply authority to arrest them. In addition, state courts have traditionally read in a requirement for process to find that a detainee is held under "the authority of the United States."[298] Administrative warrants fall short as they are not reviewed by any judicial officer.[299] The exception made by some states to allow for documents issued by specially authorized

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[294] *Hopson*, 40 Barb. at 57 ("[The commissioner] had passed no judicial judgment, he had exercised no judicial function. The warrant issued by him was merely the formal authority by which another officer was directed to effect the arrest, and to deliver over the prisoner to be thereafter dealt with according to law.").

[295] *Id.* (arguing that the result in *Ableman v. Booth* would have been "precisely the same if the marshal had arrested Booth without any warrant as with it. The warrant was the mere machinery by which he was subjected to the action of a tribunal charged with executing the law, or rather punishing for its violation. Is that of higher validity than the act of congress that defined and created the offense? Here the law in one sense is self-executing, or rather acts directly on the subject by authorizing the officer *ex proprio vigore* to make the arrest, instead of creating an intermediate agency by which, on application, a formal warrant or process might be issued, clothing the officer with a paper or parchment authority deriving its whole vitality from the law itself."); *Farrand*, 8 F. Cas. At 1070–71 (U.S. provost-marshal returned a statement that petitioner was in custody as a duly enlisted Union soldier, in addition to "a copy of the enlistment of the soldier, which shows that he was duly and regularly enlisted as a soldier in the army of the United States."); State v. Zulich, 29 N.J.L. 409, 410 (N.J. 1862) (U.S. marshal returned statement that petitioner, an alleged underage soldier, was in custody as a duly enlisted Union soldier, in addition to copies of the "special military orders" that directed the U.S. marshal to take the petitioner into custody); Erwin v. United States, 37 F. 470, 486 (S.D. Ga. 1889) ("In regard to commitments to await trial, it has been held that it is proper for a commissioner to issue a writ of commitment on sending a prisoner to jail pending an examination. . . . And it has been held that every writ of commitment must show sufficient cause on its face to justify the jailer in holding the prisoner.").

[296] *Hopson*, 40 Barb. at 60–63 (Justice Bacon, writing about the need to trim back state sovereignty in the face of so many other states being "[driven] in erratic courses out of their true orbits . . . into bewildering chaos," considered this concession to federal power to be a necessity while "[t]he good ship of state [was] in the midst of a terrible tempest," but that "[w]hen we have outrode the storm, and are once more in a safe and quiet harbor, there will be time enough to reconstruct the fallen masts, repair the tattered sails, and restore all that is needful of the precious cargo," *i.e.*, the restoration of the age-old writ of habeas corpus.).

[297] *Id.*

[298] *See supra* notes 284–297 and accompanying text.

[299] *See supra* notes 64–66 and accompanying text.

marshals during the exigency of the Civil War is hard to square with routine local enforcement of immigration detainers. This exception occurred during an existential threat to the country. Those courts that were willing to forego the normal requirement for judicial process did so only in that context.[300] Immigration law already includes a provision that authorizes local law enforcement agencies to administer federal immigration law when the country is faced with a mass influx—a situation arguably analogous to the crisis presented by the Civil War.[301] State courts' default position that judicial process is necessary for custody to be "under the authority of the United States" cannot be set aside in the name of routine immigration enforcement. Were there an immigration emergency, local enforcement powers are provided by federal law. Consequently, there is no basis to abandon the historical requirement for judicial process in these state custody statutes.

Several states have idiosyncratic versions of these centuries-old laws. Arkansas, Connecticut, Hawaii, Louisiana, Montana, Texas, and Wyoming each have unique statutes governing the custody of federal inmates in state and county jails.[302] These statutes do not contain the phrases that implicitly or explicitly require court action. Though the detention statutes in these seven states are broad, they are still limited to receiving federal prisoners and provide no additional arrest authority. Indeed, Arkansas' statute makes the requirement of an arrest by federal officers explicit.[303] Montana's legislative and statutory history also demonstrates that the legislature retained the core requirements of legal process despite changes to the statute's text.[304]

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[300] *See id.*

[301] 8 U.S.C. § 1103(a)(10) (2012 & Supp. V 2018).

[302] ARK. CODE ANN. § 12-41-503(g) (2019); CONN. GEN. STAT. ANN. § 18-91 (West 2019); HAW. REV. STAT. ANN. § 353-101 (West 2019); LA. STAT. ANN. § 15:707 (2018); MONT. CODE. ANN. § 7-32-2203 (2019); TEX. GOV'T CODE ANN. § 351.043 (West 2018); WYO. STAT. ANN. § 18-6-305 (West 2019). *See* Appendix for the text of these statutes.

[303] ARK. CODE ANN. § 12-41-503(g) (2018) ("Jails shall accept prisoners of the United States Government provided space and staffing are available and *the delivering government agency* agrees to pay a per diem charge not to exceed the actual costs, including capital costs." (emphasis added)).

[304] Until 1989, Montana's take-custody statute remained largely the same since 1895 and providing that jail officials "must receive, and keep in the county jail, any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this State; provision being made by the United States for the support of such prisoner." 1895 Montana Penal Code, p. 1221, sec. 3026; M.C.A. § 7-32-2206 (1987). Montana's code also referenced California's decision on what constituted sufficient process. *See* Mont. Rev. Code 1907, p. 900, sec. 9763 (citing to *People v. Ah Teung*) In 1989, an overhaul of the detention center statutes was passed with the legislative purpose only of making uniform the various payment systems involving different political subdivisions. *See* An Act Generally Revising the Laws Relating to Jails, Jail Administrators, and Inmates,

As a whole, the state statutes regulating cooperation of local law enforcement in detaining individuals are silent with respect to authorizing their arrests. As a threshold matter, they thus fail to authorize the civil arrests detainers request. Further, most of these "take custody" provisions contain key phrases that can be traced back more than a century. State courts have in turn interpreted these phrases to signify judicially issued documents. Consequently, this collection of state laws conditions local cooperation in holding federal prisoners on a court's imprimatur—something immigration detainers and administrative warrants cannot deliver.

C. Additional State Constitutional Protections

Federal constitutional challenges have driven much of the evolution in DHS's detainer policy. As described in Part I, potential federal statutory and Fourth Amendment claims remain, but courts are increasingly divided on whether the revised detainer policy runs afoul of these provisions.[305] State constitutions, however, provide their own protections that are often broader than those set out in the federal one. The rights established by state constitutions are therefore important sources of authority that can prohibit local enforcement of immigration detainers even if the federal constitution does not.

In California, for example, the state constitution guarantees the right to release pending trial on state criminal charges, with several exceptions.[306] This right is then reflected in the state's statutes creating a system of uniform countywide bails that allow a defendant to leave custody after posting bail without waiting to see a judge.[307] In practice, however, local law enforcement agencies often enforce detainers in a way that prevents release on the bail set by a state's criminal rules or criminal courts.[308] California receives the most detainer requests of any state; therefore enforcing detainers in a manner that prevents defendants from posting bond would violate the state constitutional rights of tens of thousands of individuals.[309] Indeed, a group of immigrants in Los Angeles brought a class action to challenge the county sheriff's enforcement of detainers because it

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Ch. 461, L. 1989 (Mont. Apr. 5, 1989); Minutes, Mon. Senate Cmte on Judiciary, at 8–9 (Feb. 17, 1989). The new iteration of the take-custody statute was moved to M.C.A. § 7-32-2242(1). In the context of this statutory and legislative history, Montana's modern take-custody statute has not abandoned its long-standing requirement for "process or order."

[305] *See supra* notes 63–77 and accompanying text.

[306] CAL. CONST. art. I, § 12.

[307] CAL. PENAL CODE §§ 1269b, 1295(a) (Deering 2018).

[308] *See supra* Part II, notes 83–96 and accompanying text.

[309] *See Latest Data: TRAC*, *supra* note 25.

interfered with their right to pre-trial release under the California constitution.[310] A federal district court granted summary judgment to a sub-class on their state law bail claims, paving the way for damage awards.[311]

California is not alone in establishing a right to pre-trial release on bail for most state criminal charges. Seven of the ten states receiving the highest volume of immigration detainers provide their residents with similar guarantees.[312] Twenty-four states in all constitutionalize the right to pre-trial release on bail.[313] In these states, local law enforcement officers cannot prolong the custody of residents after they have posted bail on their criminal charges without violating their state constitutions. Holding defendants pending trial on the basis of an immigration detainer once bail has been posted would do just that. State constitutional guarantees to pre-trial release thus provide an independent safeguard against detainer enforcement where local officers refuse to accept or honor the bond set in the criminal case.

State corollaries to the Fourth Amendment can also affect the ability of local officers to make civil immigration arrests. The Pennsylvania and Idaho Supreme Courts, for instance, have interpreted the rights of state residents against unreasonable searches and seizures that go further than the Fourth Amendment by rejecting the "good faith" exception to the exclusionary rule.[314] This exception provides that evidence obtained based on a warrant that turns out to be invalid is nonetheless admissible if the officer who was executing the warrant was acting in good faith.[315]

Even if Pennsylvania and Idaho law permitted local officials to enforce civil administrative warrants, the states' constitutions contain additional safeguards. In these states, county

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[310] *See* Roy v. Cty. of Los Angeles, CV 12-09012-BRO (FFMx), CV 13-04416-BRO (FFMx), 2017 WL 2559616 (C.D. Cal. June 12, 2017).

[311] *See* Order re: Defendants' Motion to Dismiss and Motion for Partial Summary Judgment at 43–44, Roy v. Cty. of L.A., CV 2:12-09012-AB, (C.D. Cal. Feb. 7, 2018). https://www.aclusocal.org/sites/default/files/aclu_socal_roy_20180208_order_re_msjs.pdf [https://perma.cc/3CN2-U8FT].

[312] Of the top ten states with the highest number of detainers lodged, seven provide a right to bail in their constitutions. *See*, in declining order of the state's detainer volume, CAL. CONST. art. 1, § 12; TEX. CONST. art. I, § 11; ARIZ. CONST. art. II, § 22; FLA. CONST. art I. § 14; COLO. CONST. art. II, § 19; PENN. CONST. art. I § 14; ILL. CONST. art. I, § 9; *see also Latest Data: TRAC*, *supra* note 25.

[313] Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 969–96 (2013). West Virginia also protects the right to bail through statute; Georgia, New Hampshire, Massachusetts, New York, Virginia, and Hawaii, *inter alia*, have provided through statute some form of right to bail. *Id.* at 927–31.

[314] *See* Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991); State v. Guzman, 842 P.2d 660, 661 (Idaho 1992).

[315] Herring v. United States, 555 U.S. 135 (2009).

sheriffs and other officers who seize an individual based on a defective warrant cannot rely on their good faith in the warrant's validity to avoid the consequences of an unlawful search or seizure.[316] This more protective interpretation is significant in the context of immigration detainers because DHS repeatedly errs in who it detains and deports.[317] A recent investigation into the common practices of ICE field offices in issuing detainers revealed that thousands of detainers are likely invalid.[318] Yet local law enforcement officers have no way to discern which detainers comply with federal requirements.[319] Pennsylvania ranks ninth in the number of detainers lodged; together Pennsylvania and Idaho have received over fifty-six thousand detainers.[320] If local officers cannot rely in good faith on the validity of administrative warrants and detainers, they instead become liable for DHS's errors.

In sum, with a narrowing set of federal law claims, the salient obstacle to local civil immigration arrests has become these historical limitations on local arrest and detention power. With a federal statutory scheme that permits, but cannot require, detainer enforcement, the ability of local resources to carry out federal policy depends on century-old provisions that

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[316] *Guzman*, 842 P.2d at 666. Idaho's Constitution offers broader protection to citizens than the Bill of Rights in the federal Constitution in more than just the Fourth Amendment search-and-seizure context. *See generally* Byron J. Johnson, *The Shah of Persia v. the Pope's Decree: Can the Shah of Persia (The United States Supreme Court) Interfere with the Pope's Decree (The Idaho Constitution) As Interpreted by the Idaho Supreme Court?*, 31 IDAHO L. REV. 391 (1995) (discussing Idaho's historical Constitution provisions and comparable Bill of Rights provisions).

[317] These errors include wrongly detaining and deporting U.S. citizens. On average, one hundred and fifty Americans are mistakenly detained for deportation proceedings every year, but—alongside noncitizens—are not constitutionally entitled to counsel. Steve Coll, *When ICE Tries to Deport Americans, Who Defends Them?*, NEW YORKER (Mar. 21, 2018), https://www.newyorker.com/news/daily-comment/when-ice-tries-to-deport-americans-who-defends-them [https://perma.cc/W99A-VPRN]; *see also* Esha Bhandari, *U.S. Citizen Wrongfully Deported to Mexico, Settles His Case Against the Federal Government*, AM. CIV. LIB. UNION (Oct. 5, 2012), https://www.aclu.org/blog/speakeasy/us-citizen-wrongfully-deported-mexico-settles-his-case-against-federal-government [https://perma.cc/KM9L-EEDD]; Camila Domonoske, *U.S. Citizen Who Was Held by ICE for 3 Years Denied Compensation by Appeals Court*, NAT'L PUB. RADIO (Aug. 1, 2017), https://www.npr.org/sections/thetwo-way/2017/08/01/540903038/u-s-citizen-held-by-immigration-for-3-years-denied-compensation-by-appeals-court [https://perma.cc/5K76-AZBK]; Wendy Feliz, *United States Agrees to Settle Lawsuit Alleging Wrongful Deportation*, AM. IMMIGR. COUNCIL (July 2, 2015), https://www.americanimmigrationcouncil.org/news/united-states-agrees-settle-lawsuit-alleging-wrongful-deportation [https://perma.cc/ER4Z-MLQZ]; Joel Rubin & Paige St. John, *How a U.S. Citizen Was Mistakenly Targeted for Deportation. He's Not Alone*, L.A. TIMES (Nov. 29, 2017), http://www.latimes.com/local/lanow/la-me-ice-citizen-arrest-20171129-story.html [https://perma.cc/M9MC-QB4A]; *U.S. Citizen Sues Government After Being Detained by Immigration Officials for 7 Months*, RUSSIA TODAY (Oct. 22, 2013), https://www.rt.com/usa/ice-complaint-yost-lawsuit-558/ [https://perma.cc/898A-NMW3].

[318] Bob Ortega, *ICE Supervisors Sometimes Skip Required Review of Detention Warrants, Emails Show*, CNN (Mar. 13, 2019), https://www.cnn.com/2019/03/13/us/ice-supervisors-dont-always-review-deportation-warrants-invs/index.html [https://perma.cc/78U3-HP9Z].

[319] *Id.*

[320] *Latest Data: TRAC*, *supra* note 25.

define state law enforcement authority and protect residents from its abuse. In most states, these laws make clear that enforcing federal civil statutes without a judicial order falls outside the scope of local law enforcement authority. Two conclusions result. First, state law is an increasingly effective source of challenge to detainer enforcement. Second, to enforce detainers, states would need to depart from convention and pass laws that enlarge the role of local law enforcement.

D. In Praise of the Status Quo

Expanding the scope of local law enforcement authority has the effect of placing control over federal immigration enforcement in the hands of the state or local officer encountering the immigrant.[321] Federal officials may be lodging the detainers, but the real enforcement decision is made by a line-level officer serving a different sovereign. It is the deputy sheriff's decision to stop someone, investigate status, arrest him or her, and enforce an ensuing detainer that sets the process of immigration prosecution in motion. The historical limits in state law preclude this exercise of discretion by local law enforcement. This section argues that maintaining state law's long-established constraints is necessary for uniformity, transparency, and accountability in federal immigration enforcement policy. More importantly, these historical limitations guard against the civil rights violations the Trump administration's policies promote.

Local discretion over immigration enforcement comes at a cost. On a systemic level, locating control over detainer enforcement with states erodes the values of a federalist structure.[322] By eliminating the divide between federal and local enforcement authority, individuals lose "one of the Constitution's structural protections of liberty."[323] Dividing power between these two political entities reduces "the risk of tyranny and abuse from either front."[324] When this separation of authority collapses with state and local officers performing front-line immigration arrests,

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[321] *See* Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1275 (2015) (describing how "[t]he combination of the unrestricted use of the law enforcement databases and the immigration detainer created a double devolution of discretion to line immigration agents and police officers" with "a de facto delegation of priority-setting power from the top of the executive branch all the way down to the lowest level of the federal and state law enforcement hierarchy").

[322] Murphy v. Nat'l Collegiate Athletic Assn., 138 S. Ct. 1461, 1475 (2018).

[323] *Id.* at 1477 (quoting Printz v. United States, 521 U.S. 898, 921 (1997) (internal quotation marks omitted)).

[324] *Id.* (quoting New York v. United States, 505 U.S. 144, 182–82 (1992) (internal quotation marks omitted)).

individual liberty suffers. The Trump administration's express goal is to increase the number of arrests and prosecutions for immigration violations by employing state and local officials. [325] Residents in cooperating jurisdictions face the risk of arrest not only by the federal agents charged with enforcing immigration law but also by the much larger force of state and local officers. These state and local officials then multiply the rate of abuse and error already prevalent in federal enforcement efforts.[326] Restricting federal immigration enforcement to federal officials creates a structural limit on the number of people subjected to arrest, detention, and their accompanying abuse.

Eliminating state law constraints likewise hinders political accountability for immigration policy. State and local officers become the face of the federal government's commitment to mass deportation. Consequently, "responsibility for the benefits and burdens of the regulation" cannot be readily assigned.[327] Immigration enforcement by local officers obscures the role of federal policymakers in arresting and deporting long-term residents. Voters dissatisfied with the loss of discretion and priorities in current immigration policy must differentiate those responsible for creating the policy from those responsible for implementing it. While policymakers at both levels bear responsibility for these choices, enacting state laws that allow local officers to enforce federal immigration law makes it more difficult for voters to know whom to hold accountable.

The loss of traditional limitations in state law also enables a system of piecemeal immigration enforcement. Such a system undermines uniformity and federal supremacy in immigration law. If some local law enforcement officers are empowered by new state laws to make immigration arrests, immigrants in the jurisdictions that employ those powers are far more likely to get funneled into the

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[325] Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,799–80 (Jan. 25, 2017) (stating that one of the goals of the order was to "direct executive departments and agencies [] to employ all lawful means to enforce the immigration laws of the United States[,]" by "empower[ing] State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law"); Kelly Memo, *supra* note 1. *See* Naomi Doraisamy, *Erasing Presence through Reasonable Suspicion:* Terry *and its Progeny as a Vehicle for State Immigration Enforcement*, 54 IDAHO L. REV. 410, 410 n.2 (2018) (describing the function of local law enforcement in detecting unauthorized immigration: "The solution is to create 'virtual choke points' . . . . [like] firewalls in computer systems, that people could pass through only if their legal status is verified. The objective is not mainly to identify illegal aliens for arrest (though that will always be a possibility) but rather to make it as difficult as possible for illegal aliens to live a normal life here.") (quoting Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition through Enforcement*, CTR. FOR IMMIGR. STUD. 5 (May 2005), https://www.cis.org/sites/cis.org/files/articles/2005/back605.pdf [https://perma.cc/ZAV3-J684].

[326] *See* discussion *supra* Part II notes 118–121, 317–319 and accompanying text.

[327] *Murphy*, 138 S. Ct. at 1477.

deportation system than immigrants in other parts of the country. The scope of immigration enforcement would thus vary state by state. Furthermore, enacting state laws to promote immigration arrests by state and local officers repudiates the role of Congress in establishing the scope of immigration enforcement.[328] Detainers arise from a resource gap that Congress created and controls. The Trump administration relies on detainers to compensate for the limited capacity of his 5,800 ICE agents. Though President Trump has sought additional resources for enforcement, Congress has refused to fully fund his request.[329] Congress's decision not to act in an area of law over which it has exclusive authority reflects legislative intent as much as a decision to act. Amending state law to permit local officers to enter the breach subverts this federal system. The result is, in effect, border control by the states—a system squarely rejected by the U.S. Supreme Court.[330]

Finally, the costs of expanded local law enforcement authority on immigrant families and those perceived to be immigrants are especially great. Though federal officials issue the detainers, local officers make the decisions to trigger and enforce them.[331] This delegation of discretion comes with few mechanisms for oversight.[332] Indeed, mounting evidence shows that local immigration enforcement authority results in racial-profiling, longer pre-trial detention, more severe criminal convictions, and stiffer penalties.[333] Further, the larger the Latinx population, the more likely they will experience these effects, notwithstanding the political will of the electorate.[334] Faced with a patchwork of state laws, immigrant families must navigate their way through friendly and hostile jurisdictions to avoid these consequences.[335]

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[328] *Arizona v. United States*, 567 U.S. 387, 395 (2012) ("The federal power to determine immigration policy is well settled . . . . It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.").

[329] Jeff Stein & Mike DeBonis, *Senate Approves Deal on Disaster Aid, Leaves out Border Money Trump Demanded*, WASH. POST (May 23, 2019), https://www.washingtonpost.com/business/economy/house-lawmakers-to-leave-washington-with-billions-in-emergency-aid-stuck-in-gridlock/2019/05/23/b40652a8-7cd8-11e9-8ede-f4abf521ef17_story.html [https://perma.cc/8UYB-LAWY].

[330] *Arizona v. United States*, 567 U.S. 387, 417-24 (2012) (Scalia, J. concurring in part and dissenting in part) (asserting that the power to regulate immigration is not exclusive to the federal government).

[331] *Cf.* Stumpf, *supra* note 321, at 1262.

[332] *See id.*

[333] *See* discussion *supra* notes 90–117 and accompanying text.

[334] *See* discussion *supra* notes 113–117.

[335] *Cf.* VICTOR HUGO GREEN, THE NEGRO MOTORIST GREEN BOOK (1936). The guide described places and services friendly to African American drivers trying to travel amid state and local discrimination policies. The *Green Book* became "the bible of black travel during Jim Crow" by identifying places that would serve them along the road. J. Freedom du Lac, *Guidebook That Aided Black Travelers During Segregation Reveals*

State limitations on local law enforcement authority, which preclude immigration arrests, provide a historical basis to limit detainer enforcement and protect the civil rights of immigrants. To be effective, however, states must not only preserve these constraints but also enforce them. State laws that break from history and allow local immigration arrests are the anomalies.[336] Yet local law enforcement officers in jurisdictions throughout the country routinely enforce detainers despite state law to the contrary.[337] A growing body of cases, though, reveal the power of these laws to confine local and federal enforcement resources to their respective spheres.[338] By enforcing state laws that prohibit immigration arrests, local policymakers, courts, and advocates can restore the proper balance between federal and local law enforcement authority. In doing so, these actors can protect the liberty interests of immigrant residents, promote political accountability for federal immigration policy, and locate responsibility for enforcement resources with Congress. Moreover, preserving the traditional scope of local police power avoids the widespread abuses local immigration enforcement entails.

CONCLUSION

Immigration detainers are on the rise as the Trump administration pursues every available resource for immigration enforcement. Their effect is to turn any contact with local law enforcement officers into a gamble on one's future in the United States. Consequently, detainer enforcement remains a touchstone of disputes over local control and federal power. At the same time, a decade of court battles has created a detainer policy that may prove resilient to future federal law challenges. A series of recent decisions, however, illustrate the emerging significance of state law. An in-

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Vastly Different D.C., WASH. POST (Sept. 12, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/11/AR2010091105358.html [https://perma.cc/B6W9-E63L].

[336] *See* Ariz. S.B. 1070, Support Our Law Enforcement and Safe Neighborhoods Act (2010); S.B. 4, 85th Leg. Sess. (Tex. 2017); *see also* Iowa S.F. 481, An Act Relating to the Enforcement of Immigration Laws and Providing Penalties and Remedies, Including the Denial of State Funds to Certain Entities (2018) (requiring compliance with detainers and prohibiting sanctuary policies); Tenn. H.B. 2315, An Act to Amend Tennessee Code Annotated, Title 4; Title 7; Title 8; Title 9; Title 38; Title 39 and Title 40, Relative to Immigration (2018) (codified at Pub. Ch. 973) (same).

[337] *National Map of Local Entanglement with ICE*, IMMIGR. LEGAL RES. CTR., https://www.ilrc.org/local-enforcement-map [https://perma.cc/WWC7-VZFQ].

[338] *See, e.g.*, Cisneros v. Elder, No. 18-CV-30549, 2018 Colo. Dist. LEXIS 3388, at *2 (Dist. Ct. Colo. El Paso Cty. Dec. 6, 2018); C.F.C. v. Miami-Dade Cty, 349 F. Supp. 3d. 1236, 1245 (S.D. Fla. 2018); Creedle v. Miami-Dade Cty., 349 F. Supp. 3d 1276, 1286 (S.D. Fla. 2018); Lunn v. Commonwealth, 78 N.E.3d 1143, 1146 (Mass. 2017); Esparza v. Nobles Cty, No. 53-CV-18-751, 2018 WL 6263254 (Minn. Dist. Ct. Oct. 19, 2018); People *ex rel.* Wells v. DeMarco, 88 N.Y.S.3d 518, 522 (App. Div. 2018).

depth review of provisions common in state law and their historical interpretations demonstrates that traditional state law constraints on local law enforcement authority should preclude the use of detainers. Some states, such as Texas, have overcome those limits by expanding the authority of state and local officers to include immigration arrests. The accompanying costs are substantial.

In an era in which every immigration violation is a priority for prosecution, expanding the scope of local law enforcement has the effect of delegating discretion over federal immigration enforcement to state and local officers. The benefits to individual liberty, political accountability, and resource control that flow from separating state and federal policy are therefore lost. Moreover, in jurisdictions that authorize local immigration enforcement, immigrant communities are more likely to experience racial-profiling, more likely to be screened for status in every law enforcement encounter, and less likely to trust law enforcement officers to keep them safe. Retaining the traditional constraints on law enforcement power that are contained in state law can and should provide an important safeguard against this discrimination. Their true power, though, requires states, counties, and localities to respect these long-standing limitations and restrain their officers from participating in the further erosion of immigrants' civil rights.