



# COSTS AND CONSEQUENCES:

## The High Price of Policing Immigrant Communities

A Report by the ACLU of Northern California

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# EXECUTIVE SUMMARY

Local police and sheriffs are facing some of the most difficult fiscal constraints in decades. At the same time, federal immigration law and policy have not kept pace with our nation's workplace needs and other global causes of migration. The federal immigration failure creates both pressures and incentives for local police and sheriff's deputies to act as immigration agents, but it also creates additional costs and burdens for local peace officers and agencies who want to stay out of the immigration enforcement business.

This report explores the costs and consequences of local enforcement of federal immigration law. It addresses both purposeful collaboration between local law enforcement agencies (LLEAs) and the U.S. Immigration and Customs Enforcement (ICE), and the incidental costs incurred by LLEAs through discretionary enforcement decisions that particularly impact immigrant communities. Because most LLEAs in northern California have policies against enforcing civil immigration laws, our primary goal is to provide practical guidance to further those policies and minimize the fiscal and social costs of *incidental* immigration enforcement.

The report begins with an overview of the immigration landscape in California, with myth-busting facts about immigrants and an overview of the social and fiscal costs of local immigration enforcement. The price—often hidden—of local police practices that lead to civil immigration enforcement is quite high: scarce resources are diverted from pressing public safety needs, immigrant victims and witnesses fear reporting crime to the police, criminal investigations are undermined by a lack of trust between police and immigrant community members, and sometimes the rights of individuals (including U.S. citizens) are violated.

We also examine how every stage of police officers' everyday interactions with individuals—from responding to a 911 call or conducting a traffic stop to questioning an arrestee during booking—can lead to immigration consequences, with an attendant cost to local agencies. Personal stories illustrate some of the dynamics at play, legal analyses are provided, and proposals for local action suggest ways in which police can limit their hand in federal immigration enforcement to redirect resources and enhance public safety. Proposals are embedded in the body of the report. Detailed recommendations are available as a free-standing summary.

There can be no doubt that California residents have a responsibility to abide by the laws of the state and the country at large and that local police and sheriffs play an essential role in protecting the public safety of all communities. By considering new ways in which police and community members can move ahead together in a climate of great fiscal and social pressures, we can more accurately gauge and control the costs of local policing in immigrant communities and direct our efforts toward public safety priorities that are cost-effective, helpful to crime-fighting, and fair to all.

## METHODOLOGY AND CONTRIBUTIONS

We are indebted to many people and communities for helping us to gather the information and personal stories and develop the analysis and proposals that form this report. Through meetings with immigrant community members and leaders, service providers, and immigrants' rights advocates, we have learned of policing trends and collected stories that describe the impact certain police practices have on immigrants, as well as suggestions for improving interactions between immigrant communities and local law enforcement agencies (LLEAs). We are especially grateful to the immigrant community members and leaders whose courage and personal experiences helped us illustrate the need to develop proposals for improving public safety and protecting civil rights.

We are also indebted to the men and women who devote their careers to keeping our communities safe—both for their ongoing daily work and for sharing the experiences and perspectives that inform the practices we discuss in this report. Law enforcement agencies have played an integral role in the development of our proposals. Over twenty local agencies have shared information with us through meetings, conversations, and responses to our Public Records Act requests. In response to our inquiries, many local law enforcement leaders opened their doors to dialogue and to building relationships with immigrant community members. Law enforcement leaders and associations have published much on this topic, providing important insights that support many of our proposals. Police and local law enforcement leaders have diverse perspectives on these issues, and we have learned from their experience even when we disagree. Special thanks to Alameda County Sheriff's Department, Gilroy Police Department, Rancho Cordova Police Department, Sacramento County Sheriff's Department, Sacramento Police Department, Santa Clara County Counsel, Santa Rita Jail, Santa Rosa Police Department, San Francisco Police Department, San Francisco Sheriff's Department, San Mateo Sheriff's Office, Tehama County Sheriff's Office and Truckee Police Department.

The financial cost analysis of local police practices found throughout the report is based on a number of sources. The Sacramento County Sheriff's Office provided arrest data that included information such as arresting agency, race, violations charged, and whether immigration detainers were placed on arrestees. Sacramento County, representing a moderately large and diverse population, illustrates the costs of incidental immigration enforcement and potential savings available through the adoption of alternative policies.

Cost calculations throughout the report are based on the following: Sacramento County sheriff deputy hourly rate of \$31.72 from the Sacramento County Department of Personnel Services; per diem jail costs of \$88 from the Sacramento County Office of Inspector General Jail Staffing Study; booking costs of \$250 provided in an interview with Santa Rita Jail Lieutenant Garrett O. Holmes<sup>1</sup>; checkpoints operation estimated at \$12,000 in Los Angeles Police Department mini-grant application to the Office of Traffic Safety.<sup>2</sup> Comparable booking and jail costs were provided through our interviews with local law enforcement agencies throughout northern California. We used an estimate of three days for the average length of holds based on immigration detainers.<sup>3</sup>

# THE IMMIGRATION LANDSCAPE



In 2008, almost 30 percent of California's 37 million residents were foreign born.

Of these, 45 percent had become naturalized U.S. citizens.<sup>4</sup>

California is home to about 24 percent of the nation's undocumented population—about 2.6 million people as of January 2009.<sup>5</sup>

75 percent of non-citizen Latinos and about 60 percent of Asian non-citizens lived in “mixed status” households with U.S. citizens.<sup>6</sup>

Almost half of California's children have at least one immigrant parent.<sup>7</sup>

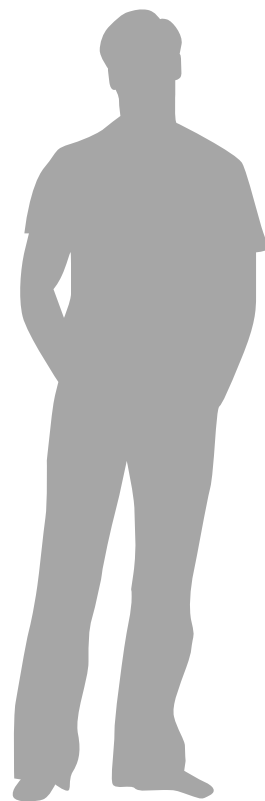
On average, immigrants pay \$539 more taxes per household than U.S.-born households (a total of \$5.2 billion in state taxes in 2009).<sup>8</sup>

Immigrants comprise more than one-third of California's labor force (34 percent).<sup>9</sup>

Immigrants contribute 32 percent of the state's Gross Domestic Product, particularly in core industries such as farming, fishing, forestry and textile production.<sup>10</sup>

Immigrants are more than one and a half times more likely to be self-employed.<sup>11</sup>

More than half of California's 10.3 million immigrants became homeowners after 18 years of residence in the United States.<sup>12</sup>





## GRAPPLING WITH IMMIGRATION TRENDS AND POLICIES

Law enforcement officials, immigration advocates, and regular Californians can agree that our country's immigration policy has not kept pace with America's workforce needs or the family-based factors that draw immigrants to our nation. The Pew Hispanic Center reported that undocumented workers occupied 9.9 percent of California's labor force and 5.4 percent of the nation's labor force in 2008.<sup>13</sup> California is home to about 24 percent of the nation's undocumented population—about 2.6 million as of January 2009 according to the Department of Homeland Security (DHS).<sup>14</sup> Yet the opportunities for legal migration are limited: visas to the United States for family members of naturalized citizens from Mexico and the Philippines, for example, are subject to backlogs of 18 and 17 years respectively.<sup>15</sup> Market demands for both low- and highly-skilled immigrant labor often go unmet by current employment-based visa programs.<sup>16</sup>

The large population of undocumented immigrants in the U.S.—an estimated 11.8 million in 2007—led President George W. Bush and the U.S. Chamber of Commerce to support a bipartisan bill that would have combined tough border and workplace enforcement with a path to citizenship for certain undocumented immigrants.<sup>17</sup> The bill did not pass.

The U.S. Congress's failure to act added to the pressure felt by state and local governments to address the reality of unauthorized immigration. A staggering 206 laws related to immigration were passed in 2008 alone.<sup>18</sup> Many of the laws were punitive, from limiting drivers' licenses and public benefits for undocumented immigrants to making employers and landlords accountable to check for immigration status. Other laws have been passed to protect undocumented immigrants from arbitrary enforcement, such as the initiation of municipal ID card programs in Oakland and San Francisco.

Perhaps the best-known local attempt to grapple with immigration was the signing of SB 1070 in Arizona in the spring of 2010. Over objections by local law enforcement leaders, Arizona's SB 1070 mandates the participation of local officers in federal immigration enforcement.

SB 1070 has been challenged by both civil rights groups and the federal government and spurred a heated debate in California over whether local law enforcement agencies should engage in immigration enforcement.

### A LITTLE LEGALESE

Unlawful *presence* in the United States is not a crime, and illegal *entry* is not a felony offense and therefore cannot form the basis for an arrest by state or local police after it has been completed.<sup>20</sup>



“Although illegal immigration has an undeniable impact on Arizona, requiring local police already strapped for resources to act as immigration agents is not the answer.”

—Tucson Police Chief Roberto Villaseñor, Arizona Daily Star, July 27, 2010<sup>19</sup>

## THE CRIMINALITY MYTH

Proponents of increased policing of immigrant communities frequently allude to the “illegality” of undocumented immigrants, confusing unlawful presence with criminality. Take for example the following statements by Fox News personality Glenn Beck: “Every single illegal immigrant is guilty of a crime, every single one... Every undocumented worker is an illegal immigrant, a criminal and a drain on our dwindling resources.”<sup>21</sup>

The reality—and the law—is that **unlawful presence in the United States is not a crime**. While illegal entry is a federal misdemeanor, nearly half of our nation’s undocumented immigrants arrived on a valid visa and violate no criminal laws by overstaying.<sup>22</sup> Many of California’s undocumented residents were brought to the United States as young children. They are not responsible for the decision to enter illegally or overstay their visas, and have no other country they could truly consider home.

Available data also fails to support a nexus between immigrants and criminal activity in the United States. As cities have experienced increases in immigrant populations, crime rates have fallen. Violent crimes, including homicides, rape and robbery, dropped by 55 percent and property crimes decreased by 29 percent between 1991 and 2008.<sup>23</sup> U.S.-born men are institutionalized for crimes at a rate ten times higher than that of foreign-born men in California.<sup>24</sup> These trends are consistent throughout California, even in border regions touted as being the most dangerous. In fact, El Paso, Texas, with its large immigrant population and close proximity to the border, was recently named the second safest city with 500,000 or more people in the United States.<sup>25</sup>

The stereotype of the immigrant as criminal also conflicts with the serious repercussions that criminal detention and prosecution have for immigrants. The stakes are high for undocumented immigrants who commit crimes. Criminal convictions, and sometimes just suspicion alone, can lead to their deportation and the loss of jobs, families, and local investments. For many, deportation also means a return to countries they do not know, whose language they do not speak, or where they face persecution or death at the hands of a government or groups that motivated their flight to the United States. Without immigration reform, few, if any, avenues exist to allow undocumented immigrants to regularize their status and become fully responsible participants in civil society.

## FEDERAL FAILURE, LOCAL CHOICES

Given the failure of immigration reform, both localities and federal immigration authorities must make choices about how to address our large undocumented population. From the federal perspective, it would be logical to begin by establishing enforcement priorities rather than taking on the unworkable and costly alternative of deporting millions of people *en masse*.

In a 2010 memo, U.S. Immigration and Customs Enforcement (“ICE”) director John Morton did just that. He noted that ICE “only has resources to remove approximately 400,000 aliens per year, less than four percent of the estimated illegal alien population in the United States.”<sup>26</sup> Morton’s memo described ICE’s highest enforcement priority as arresting and removing noncitizens “who pose a danger to national security or a risk to public safety.” “Recent illegal entrants” and persons who have already been ordered deported were listed as the next two priorities, respectively.<sup>27</sup> However, statistics reveal a failure to follow these priorities. Between 2008 and 2010, of all those deported nationwide under a new DHS program called “Secure Communities” (S-Comm), only 28 percent were convicted of crimes under ICE’s “Level 1 Priority” group and 25 percent were “non-criminals.”<sup>28</sup>

While some local law enforcement officials seek to help ICE deport all immigrants, regardless of ICE’s stated enforcement priorities, others refuse to play any role in immigration enforcement, citing public safety and resource concerns.

Given that at least 50 percent of California residents are Asian or Latino and 9.9 million are foreign-born, police and sheriff’s departments that participate in federal immigration enforcement risk isolating large portions of the population through unlawful racial profiling. Determining a person’s immigration status is “indisputably complex,” and officers who are not trained as immigration agents all too often rely on skin color, foreign-sounding accents, or other unlawful and unreliable predictors of immigration status to make unnecessary stops and arrests in the hopes of identifying undocumented immigrants.<sup>29</sup>

## IMMIGRATION ENFORCEMENT: A FEDERAL RESPONSIBILITY

States and localities are generally preempted from engaging in civil immigration enforcement, but Congress has carved out limited exceptions. The Criminal Alien Program (CAP) allows ICE to identify and apprehend immigrants in state and county detention facilities. Section 287(g), added to the Immigration and Nationality Act in 1995, creates an opportunity for local agencies to train with and be certified by ICE to enforce immigration laws on the streets and in the jails.<sup>31</sup> The program has been harshly criticized as leading to racial profiling and other constitutional violations by participating LLEAs. In March 2010, the U.S. Office of the Inspector General audited the 287(g) program. The Inspector General noted widespread problems and recommended that ICE establish data collection and reporting requirements to address civil rights concerns.<sup>32</sup>

Local law enforcement agencies across the country have heavily criticized ICE for entangling them in the dirty business of immigration enforcement and in some cases rescinded agreements with ICE that implemented the 287(g) program. Only 71 out of 17,876 state and local law enforcement agencies in the fifty United States participate in the program, despite the fact that ICE's funding related to 287(g) has grown from \$5 million to \$68 million over the last 4 years.<sup>33</sup>

There are no 287(g) agreements in northern California. Federal law prohibits state and local police from enforcing civil immigration violations without such an agreement, and state law prohibits LLEAs from arresting individuals for civil immigration violations like unauthorized presence. LLEAs nevertheless experience considerable pressure from ICE to assist in civil immigration enforcement, and local law enforcement practices are severely impacted by the legal limbo in which so many community members live.

This tendency toward racial profiling is supported by statistics: the Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity at Berkeley Law School found that immediately after the initiation of a local immigration screening program at the Irving, Texas jail, officers in the field began to arrest Hispanics for low-level offenses at increased rates.<sup>30</sup> Even with intensive training, officers can still make critical mistakes that lead to the deportation of wrongfully targeted individuals, as in the case of Peter (Pedro) Guzman, a U.S. citizen who was wrongfully deported through the Los Angeles Sheriff's Department's collaboration with ICE.

Collaboration between ICE and LLEAs undermines both federal immigration and local criminal enforcement priorities. Practices by LLEAs such as sharing information and joining operations with ICE, enabling ICE access to jails or checkpoints, stops for the purpose of investigating drivers' licenses, and arrests for citable infractions, indirectly result in the deportation of individuals who pose no threat to public safety. Since 2008, ICE has deported 30,000 immigrants stopped by LLEAs for common traffic violations.<sup>34</sup>

Many local law enforcement leaders call for federal immigration reform as they push back against pressures to engage in immigration enforcement. Los Angeles Police Department's (LAPD) ex-Chief William J. Bratton explained, "Americans want a solution to our immigration dilemma, as do law enforcement officials across this nation. But the solution isn't turning every local police department into an arm of Immigration and Customs Enforcement."<sup>35</sup> Bratton agrees with an April 2009 Police Foundation report conclusion that "to optimize public safety, the federal government must enact comprehensive immigration reform."<sup>36</sup> Many California county and city ordinances and resolutions as well as LLEAs' internal policies, like those in San Francisco, Santa Clara, Richmond, Berkeley, and Oakland, call for fair and humane immigration reform and instruct officers to refrain from spending local resources to enforce civil immigration laws.<sup>37</sup>





Peter Guzman and his mother, Maria Carbajal. Peter, a U.S. citizen with cognitive limitations, was mistakenly identified as a deportable immigrant by Los Angeles County Sheriff and federal ICE personnel pursuant to a 287(g) agreement. The government then wrongfully deported him to Mexico where he wandered for months and barely survived given his mental limitations. Following his deportation and his mother's months-long search for him in Mexico, Peter filed a civil rights lawsuit for damages against the Los Angeles Sheriff's Department and ICE and won a favorable settlement.

“We need to remember that there are at least 12 million people out there who are unauthorized to be in this country, and they’re our neighbors. ... We need to start putting faces and names to these 12 million people because this is not an issue where you can deport people away. It doesn’t solve the issue.”

—Sacramento Police Chief Rick Brazier<sup>38</sup>

# COSTS ASSOCIATED WITH LOCAL POLICING OF IMMIGRANT COMMUNITIES

## FINANCIAL COSTS

Local law enforcement agencies engage in policing of immigrant communities mostly on their own dime. The Major Cities Chiefs Police Association (MCC) explained that “[s]ince the creation of the Homeland Security Department, federal funding for major city police departments has been greatly reduced.” “Local communities and agencies have even fewer resources to devote to such an effort than the federal government given all the numerous other demands on local police departments.”<sup>39</sup> MCC asserts that “[e]nforcement of federal immigration laws would be a burden that most major police agencies would not be able to bear under current resource levels.”<sup>40</sup>

Meanwhile, many LLEAs continue to suffer budget cuts and decreases in officer hours and staffed positions. The International Police Chiefs Association (IACP) wrote in 2007 that more than 76 percent of all police agencies in the United States had twenty-five or fewer sworn officers for populations of up to 25,000.<sup>41</sup> With a statewide \$25.4 billion budget deficit, LLEAs are cutting staff and sometimes shutting down.<sup>42</sup> In the City of Oakland, where crime rates are among the highest in the country, the Police Department laid off 80 officers, almost a 10 percent cut in its workforce, in July 2010.<sup>43</sup>

Even the many LLEAs in northern California who claim *not* to engage in immigration enforcement incur costs through policy choices that incidentally assist in the identification and detention of individuals believed—sometimes wrongly—to be illegally present. One key to these costs is the immigration detainer, or “hold,” which ICE issues to LLEAs to request that the jail maintain custody of certain detainees beyond when they would otherwise be released from local custody—solely for civil immigration enforcement purposes. The existence of the detainer relationship also impacts policing decisions in the field, making some patrol officers more likely to arrest a person believed to be undocumented. The costs associated with incidental immigration enforcement include patrol resources and overtime associated with stopping, arresting, and booking individuals who are targeted based on their immigrant appearance or who lack state-issued identification. Finally, counties incur extended detention costs—including food and medical services—for arrestees whose detention is extended for the purpose of immigration enforcement, all without federal reimbursement.<sup>44</sup>

ICE provides limited reimbursement only for immigrant detainees who have been *convicted* of one felony or two misdemeanor offenses and who are held for at least 4 consecutive days.<sup>45</sup> Therefore, available reimbursements do not cover the actual costs of holding pre-conviction immigration detainees. In Sacramento County, screening and arraignment, including pretrial jail booking and incarceration, averaged \$1,948 per arrestee in 2005 and 2006.<sup>46</sup> Santa Rita Jail in Alameda County estimates a cost of approximately \$100 per day to hold inmates and charges \$250 for booking individuals in its facilities.<sup>47</sup> While localities expect to cover these hefty costs for most of their inmates, agencies that choose to respond to ICE detainers for inmates not convicted of a felony (or two misdemeanors) must bear the additional cost.

“My officers can’t prevent or solve crimes if victims or witnesses are unwilling to talk to us because of the fear of being deported. . . . When officers can speak freely with victims and witnesses, it goes a long way toward making every American neighborhood much safer.”<sup>48</sup>

—Ex-Chief William Bratton, Los Angeles Police Department

## CASE IN POINT: DOMESTIC VIOLENCE SURVIVORS

During a party, Veronica had a serious argument with her brother when he refused to let her leave a party with her daughter. Veronica called the police and waited outside for officers to arrive. The police questioned Veronica briefly and then arrested her. The officers would not tell her why they were arresting her. At the jail, they fingerprinted and held her for 3 hours. A fingerprint check indicated that she had legal status in the U.S. and no charges were pressed. Veronica says that she would never call the police again, even if she were in an accident.

Hun, a Japanese national, called 911 for help after one of many physical altercations with her husband. When the police arrived, Hun could not speak English and defend herself when her husband accused her of instigating the fight. The police arrested Hun and turned her information over to ICE. While Hun was in ICE custody, her one-year-old daughter was placed in foster care.

“Since the creation of the U Visa . . . my office has been successful in prosecuting many violent criminals with the cooperation of undocumented immigrant victims who had the courage to come forward and assist in the detection, investigation or prosecution of these crimes.”

—Kamala Harris, then-District Attorney of San Francisco, in a letter dated October 23, 2007 to U.S. Citizenship and Immigration Services.<sup>59</sup>

## PUBLIC SAFETY COSTS

Public safety suffers when local police and sheriffs isolate the immigrant community.<sup>49</sup> IACP warns that “law enforcement simply cannot function adequately without the support and cooperation of the populations it serves. An adequate law enforcement outreach and response to prevent fear, crime and disorder requires cooperation and understanding of all.”<sup>50</sup> Community policing models that depend on fostering relationships of trust between immigrant groups and law enforcement agencies, are undercut by the underreporting of crimes by immigrant victims and witnesses who fear their interactions with police officers may lead to deportation.<sup>51</sup> Mayor Phil Gordon of Phoenix, Arizona, connects Maricopa County’s investment in immigration enforcement to its failure to investigate crimes and the corresponding increase in the county’s crime rates.<sup>52</sup> Gordon’s jurisdiction, which limits involvement with ICE, has achieved a decrease in crime rates.<sup>53</sup>

When immigrant domestic violence victims believe that local officers act as immigration officers, their distrust and fear destroy relationships developed through community policing efforts. When the victim of a crime is arrested with the perpetrator and ends up in immigration proceedings, community members learn from the incident and think twice before making a call to the police.

Congress understood the important role undocumented victims and witnesses play in crime fighting. The Violence Against Women Act of 1994 and the Victims of Trafficking and Violence Protection Act of 2000 created visa programs, including the U Visa, for such victims in order to “strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of [crimes] while offering protection to victims.”<sup>54</sup> The FBI predicted that these programs would increase the apprehension of violent criminals, reduce recidivism crimes, and save police resources.<sup>55</sup> Many LLEAs also understand the role that these visa programs play in their own ability to fight crime<sup>56</sup>, and support victims by certifying to the U.S. Citizenship and Immigration Services that they cooperated in the investigation or prosecution of a crime.<sup>57</sup> But, even incidental local immigration enforcement creates a climate of fear for immigrant communities that thwarts the intent of such programs.<sup>58</sup>

## LOCAL LIABILITY

Local immigration enforcement may lead to abuses of power, corruption, and extortion, and incite anti-immigrant prejudice and discrimination among officers. When individuals fear deportation of themselves or household members, they are less likely to complain about an officer's misconduct, leaving such cases unchecked.<sup>60</sup> The Warren Institute found that shortly after the initiation of CAP in Irving, Texas, Latino arrests for petty offenses began a "steady upward trend" and that CAP "tacitly encourage[d] local police to arrest Hispanics for petty offenses."<sup>61</sup> In the city of Maywood in Southern California, then-Attorney General Jerry Brown found evidence of police abuse and unlawful conduct by Maywood police officers, including stopping drivers without probable cause and impounding their vehicles in violation of the law.<sup>62</sup> In Sonoma County, the Sheriff's Department has faced litigation since 2008 for working with ICE to arrest and detain individuals without a criminal basis and solely on the suspicion of undocumented status.

### A Sample of Cases Against Local Agencies for Actions Related to Immigration Enforcement

***Barrera v. Boughton***, U.S. District Court, Connecticut, 2010, challenging joint operation between police and ICE targeting Latino day laborers.

***Cerrillo v. Buck***, Colorado Supreme Court, 2009, challenging county deputies' search and seizure of tax preparer's records in relation to investigation targeting undocumented immigrants for potential violations of state identity theft or criminal impersonation laws.

***Committee for Immigrant Rights of Sonoma County et al. v. County of Sonoma et al.***, U.S. District Court, Northern District of California, 2008, challenging sheriff department's joint operations with ICE for racial profiling, Fourth Amendment violations, and detainer violations.

***Daniel T. v. Bd. of County Commissioners of Otero***, U.S. District Court, New Mexico, 2007, challenging sheriff's department raids of Latino homes for immigration enforcement purposes.

***Melendez Rivas v. Martin***, U.S. District Court, Northern District of Indiana, 2010, challenging county's failure to release young mother from custody more than 48 hours after beginning of immigration detainer period.

***Santos v. Jenkins***, U.S. District Court, Maryland, 2009, challenging discriminatory arrest by county deputies for immigration enforcement purposes.

***Villegas v. Metro. Gov't of Davidson County/Nashville***, U.S. District Court, Middle District of Tennessee, 2009, challenging county deputies' immigration-based detention and shackling of pregnant woman after arrest for driving without a license.

# LEGAL LIMITS AND AVOIDABLE COSTS: FROM TRAFFIC STOPS TO JAIL BUDGETS

The ongoing failure of the federal government to reform the immigration system has put pressure on LLEAs to examine their enforcement priorities in light of their need to conserve resources and maintain relationships with vulnerable communities. This section provides legal background and police practices proposals for each point of contact officers have with members of the public, from the beginning of a traffic or pedestrian stop through booking and detention. Many of these proposals are already reflected in the policies of police and sheriff's departments in northern California, and all are supported by the goal of targeting limited law enforcement resources to public safety goals.

## EFRAIN'S STORY

Efrain, a twenty-year-old Mexican national, came to the United States as a young boy with his family. He works with his father as a mechanic and is finishing courses to get his GED. His family had applied for U Visas (available under federal law for crime victims) after suffering a violent incident.



One afternoon Efrain and his father drove to a friend's house to pick up a car part they needed that day. As Efrain pulled out of his friend's driveway, a police car turned around and began to follow them closely, pulling them over after a mile. When Efrain parked the car, the officer rushed to Efrain's window with his gun drawn. The officer handcuffed and searched Efrain and asked him for his license. Efrain explained that he did not have a license and had left his ID at home. When six more officers arrived as back-up, Efrain overheard the arresting officer tell the others he had stopped Efrain for driving without a license. Although Efrain's sister and husband arrived to identify Efrain as their family member and offered to get his ID only 2 blocks away, the officer refused. Efrain was arrested, booked, and eventually released after receiving citations for driving without a license, having an "obstructed view," and damaged registration tags.



## STOPS AND ARRESTS: UNNECESSARY, SOMETIMES UNLAWFUL

Patrol officers have discretion to stop cars for a wide range of traffic infractions and suspected criminal conduct. California's state law prohibiting undocumented immigrants from obtaining drivers' licenses adds to the burden on LLEAs and has led to many discretionary arrests of safe, but unlicensed, drivers. By limiting stops that do not further local priorities, departments can conserve public safety resources and minimize their participation in civil immigration enforcement—a burden that should not be borne by local communities.

Sometimes, as with Efrain, the most plausible explanation for a stop is that the driver or passengers “look” undocumented and may therefore be unlicensed.<sup>63</sup> Immigrant community members regularly report being targeted for minor mechanical violations such as having items hanging from their rearview mirrors or burnt out license plate lights.<sup>64</sup>

California's choice, since 2003, to require proof of legal residency on driver's license applications means that even drivers who are licensed in other states or countries cannot obtain a valid state driver's license. Individuals continue to drive out of necessity to go about their daily lives—attending school, going to work, and caring for their families—particularly in areas with poor or non-existent public transportation. LLEAs are burdened with enforcing traffic laws without a local solution to the driver's license issue.

Police practices that target people for “driving while undocumented” raise serious concerns about racial profiling and other constitutional violations. Traffic and pedestrian stops for minor mechanical matters (or for the unstated purpose of investigating immigration status) are unnecessary and costly, and undermine community policing efforts. Even greater resources are expended when people are arrested instead of cited, based on a lack of state-issued identification.



### THE LAW—UNLICENSED DRIVING

While driving without a license is a violation of state law, the California Vehicle Code prohibits officers from stopping a vehicle “for the sole reason of determining whether the driver is properly licensed.”<sup>65</sup> The Vehicle Code also provides that “a peace officer may not detain or arrest a person solely on the belief that the person is an unlicensed driver, unless the officer has reasonable cause to believe the person driving is under the age of 16 years.”<sup>66</sup>

### PROPOSAL FOR LOCAL ACTION: CREATE ENFORCEMENT PRIORITIES

- Limit stops for minor mechanical violations unless there are also moving violations or reasonable suspicion of criminal activity.
- Adopt a policy against questioning individuals in the field about their origin, immigration status, or citizenship.
- Train officers that California law prohibits stops for the purpose of verifying that a driver is licensed except when there is reason to believe the driver is under 16 years of age.<sup>67</sup>

Personal opinion and political positions on immigration differ widely among individual officers, and LLEAs must provide clear training and procedures to ensure uniform application of department policies. LLEAs should monitor compliance with enforcement priority policies by tracking indicators including the name of the arresting officer, the place of the stop or arrest, the stated reason for the stop, the violation charged or ticketed, the race of arrestee, and the disposition of charge to ensure the uniform application of its priorities and guidelines.

“Without effective enforcement priorities, discretionary arrests for citable infractions or other pretextual reasons will continue to divert taxpayers' money from programs that would effectively provide for public safety.”

—Retired Sacramento Police Chief Art Venegas<sup>68</sup>



## THE LAW—TO ARREST OR NOT TO ARREST?

The California Supreme Court noted in 1972 that the Vehicle Code “presumes that in the vast majority of cases the violator will not be taken into custody.”<sup>69</sup> With limited exceptions, Vehicle Code violations are infractions for which an officer must issue a citation and release a person, rather than make a custodial arrest.<sup>70</sup>

While the majority of Vehicle Code violations should result in a ticket rather than an arrest, another provision of the Vehicle Code allows officers to arrest individuals for citable offenses when the person does not present a driver’s license or other “satisfactory” evidence of identity.<sup>71</sup> Officers may use any reliable information—including eyewitness testimony—to verify a driver’s identity for purposes of issuing a citation.<sup>72</sup>

## PROPOSAL FOR LOCAL ACTION: VERIFY IDENTITY THROUGH AVAILABLE EVIDENCE

- Expand the definition of “satisfactory evidence of identity” to include foreign and out-of-state identity documents; school, employer, and business membership cards; municipal ID, library, or other local government-issued cards; and testimony of witnesses.
- Prohibit the use of a foreign identity document as proof or evidence of an individual’s immigration or citizenship status for other departmental purposes.

Any documents bearing a photograph and/or physical description of the person, a signature, a current mailing address, and/or a serial number should be included as possible sources of identity evidence. A utility bill, car registration, insurance card, and other documents with the individual’s name and address can confirm the accuracy of less traditional ID cards. Only when the officer doubts the veracity of such alternative forms of identification, or discovers evidence of fraud, should an arrest take place to verify identity.<sup>73</sup> Officers can and should use an individual’s thumbprint on the infraction as proof that he or she will appear at a hearing within 10 days of the infraction or notice to avoid arrest in the field.<sup>74</sup>

## COSTS AND CONSEQUENCES

Our proposals for action—follow law enforcement priorities and verify identification to avoid unnecessary or unlawful arrests—would have had a clear impact on Efrain’s situation. Here’s how:

### \$ Budgetary Costs

- The initial stop for suspected unlicensed driving was improper under Vehicle Code Section 14607.6 and would have been avoided with clear local law enforcement priorities. **Cost:** (7 officers x 1 hour) **\$222.04.**
- Efrain was booked and jailed needlessly after the improper stop, and after officer’s failure to use available evidence to verify identity. **Cost:** (Booking costs (\$250) + per diem jail costs (\$88)) **\$338.**
- **Total savings if no stop had been made:** (7 officers x 1 hour (\$222.04) + booking costs (\$250) + per diem jail costs (\$88)) **\$560.04.**
- **Total cost to cite and release:** (1 officer x 30 minutes) **\$15.86.**
- **Total savings if cited and released:** (\$560.04 – \$15.86) **\$544.18.**

### ☹ Human Consequences

- Precious public safety resources were squandered. Without the initial stop, the six officers called for back-up would have been free to pursue actual threats to public safety or to investigate criminal activity.
- This and similar incidents reinforce immigrant community members’ fear and distrust of local police, jeopardizing the effectiveness of local law enforcement agencies.

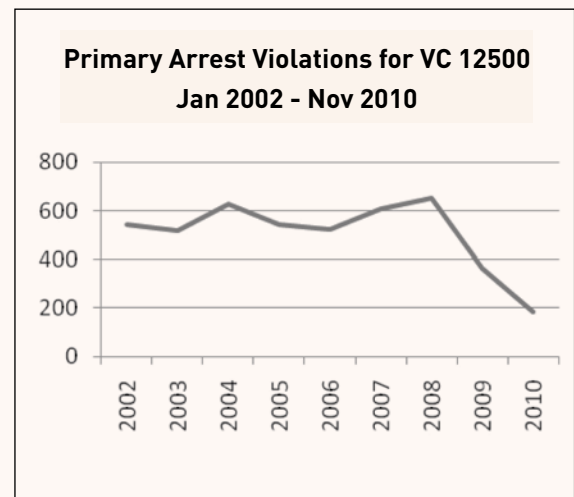
## CASE STUDY: LIMITING COSTS IN SACRAMENTO COUNTY

Sacramento County law enforcement agencies have responded wisely to recent budget constraints, tightening enforcement priorities by arresting fewer individuals for citable infractions. Since January 2002 driving without a license, a citable infraction listed under California Vehicle Code Section 12500 ("VC 12500"), has been the second most frequent citable offense leading to the arrest of Latinos since January 2002. These arrests have averaged 480 arrests per year and resulted in more than 160 immigration holds since January 2002.

In the last couple of years, arrests for unlicensed driving have dropped significantly. Sacramento County Sheriff's Office reported that only 185 individuals were booked in its jail when arrested primarily for a VC 12500 violation between January and November 2010. The county's notable decrease of VC 12500 arrests from an average of 503 per year between 2002 and 2009 saved the county and its tax payers over \$168,000. Citing and releasing all VC 12500 violations in 2010 would have saved the County an additional \$95,000.

In the past year alone, 40 immigration holds were placed on individuals arrested primarily for VC 12500 violations. These immigration holds, based on an average 3-day period after local charges were dismissed, increased costs to the County by nearly \$11,000 in 2010, and by an average of \$5,000 per year between 2002 and 2009.

VC 12500 Arrests	Cite and Release:	Stop and arrest:
Officer Salary *	\$15.86	\$190.32
Booking costs **	\$0	\$250
Jail costs (est.)***	\$0	\$88/day
<b>TOTAL</b>	<b>\$15.86</b>	<b>\$528.32</b>
* Sacramento County Sheriff's Office Deputy Sheriff hourly rate of \$31.72, Sacramento County Dept. of Personnel Services. ** Estimate provided by Alameda County Santa Rita Jail. *** Office of Inspector General, Sacramento County Jail Staffing Study, June 22, 2010		



Driving Without a License Arrests (Jan - Nov)	COSTS		SAVINGS	
	ACTUAL: Arrests for 2010 (185 arrests)	YEARLY AVERAGE: Arrests for 2002 - 2009 (503 arrests)	ACTUAL: Arrests 2010 (318 fewer arrests)	UNREALIZED: Cite and Release for 2010 (185 arrests)
Officer Salary	\$35,209.20	\$95,730.96	\$60,521.76	\$32,275.10
Booking costs (est.)	\$46,250	\$125,750.00	\$79,500.00	\$46,250
Jail costs (est.)	\$16,280	\$44,264.00	\$27,984	\$16,280
Sub-total	<b>\$97,739.20</b>	<b>\$265,744.96</b>	<b>\$168,005.76</b>	<b>\$94,805.10</b>
Immigration Holds	\$10,560.00	\$5,359.20	unknown	\$10,560.00
<b>TOTAL</b>	<b>\$108,299.20</b>	<b>\$271,104.16</b>	<b>\$178,565.76</b>	<b>\$105,365.10</b>

# VEHICLE CHECKPOINTS AND FORFEITURES: HUMAN COSTS AND COMPANY PROFITS

## CHECKPOINTS

Vehicle checkpoints have taken on new meaning for California's immigrant communities, which increasingly report the presence of ICE agents, car impoundments for sober drivers stemming from drivers' license checks, and the seemingly strategic location of "sobriety" checkpoints in immigrant communities, near churches and community events.

### EBER'S STORY

Driving home late one night, Eber approached a sobriety checkpoint. The officer motioned for the car in front of him to keep moving and then motioned for Eber to stop and roll down his window. The officer asked Eber for his license and registration. In return, Eber asked whether the officer thought he was driving under the influence. The officer told Eber that although he did not appear to be impaired he still needed to show his license.

When Eber refused, citing his constitutional right to be free from unreasonable searches and seizures, a second officer told Eber, "You don't have any constitutional rights here." The officers ordered Eber to pull off to a secondary inspection area, where they again asked him for his license and also opened Eber's car door. Afraid of what might happen next, Eber stepped out of the car and gave the officers his license.

The officers placed Eber in handcuffs and searched his car and trunk without his consent. When Eber objected to this improper search, the officers arrested him and kept him at the county jail for four hours. A naturalized U.S. citizen with no criminal history, Eber was charged with misdemeanor crimes of resisting arrest, interfering with an officer, and obstructing officer duty.



In February 2010, reporter Ryan Gabrielson of California Watch, a project of the Center for Investigative Reporting, conducted extensive data gathering about checkpoints in a number of California counties and concluded:

- Sobriety checkpoints frequently screen traffic within, or near, Hispanic neighborhoods. Cities where Hispanics represent a majority of the population are seizing cars at three times the rate of cities with small minority populations.
- In 2009, officers impounded more than 24,000 cars and trucks at checkpoints. That total is roughly seven times higher than the 3,200 drunk driving arrests at roadway operations. The percentage of vehicle seizures has increased 53 percent statewide compared to 2007.
- Departments frequently overstaff checkpoints with officers, many of whom earn overtime. The Moreno Valley Police Department in Riverside County averaged 38 officers at each operation last year, six times more than federal guidelines recommend. Nearly 50 other local police and sheriff's departments averaged 20 or more officers per checkpoint—operations that averaged three DUI arrests a night.
- Police do not typically seize the cars of motorists arrested for drunken driving, meaning the owners can retrieve their vehicles the next day, according to law enforcement officials.
- California has more than doubled its use of sobriety checkpoints in the past three years.
- In 2009, towing fees and police fines generated an estimated \$40 million in revenue that cities divided with towing companies.<sup>75</sup>

“Sobriety checkpoints in California are increasingly turning into profitable operations for local police departments that are far more likely to seize cars from unlicensed motorists than catch drunken drivers.”

—Ryan Gabrielson, California Watch,  
February 13, 2010<sup>76</sup>



## THE LAW—CONSTITUTIONAL LIMITS ON CHECKPOINTS

State and local law enforcement agencies are permitted and funded to perform vehicle checkpoints specifically to enforce driving-under-the-influence (“DUI”) laws. Under U.S. and California Supreme Court cases however, the stop and seizure of individuals and their vehicles at sobriety checkpoints must be limited to only a reasonable intrusion on individuals’ liberty, and checkpoints may not be valid if their primary purpose is something other than protecting highway safety.<sup>77</sup>

Investigating a crime or the immigration status of drivers are not permissible purposes for vehicle checkpoints. An officer may question the driver and passengers as long as it does not prolong the stop beyond the intended purpose of the checkpoint.<sup>78</sup> As noted in the previous section, California law prohibits peace officers from stopping vehicles for the sole purpose of determining whether a driver is licensed.<sup>79</sup> Given statistics that suggest checking for licenses is a primary aspect of what are touted as DUI checkpoints, a good number of checkpoints may be on shaky legal ground.



## **PROPOSAL FOR LOCAL ACTION: TARGET DANGEROUS DRIVERS**

LLEAs should opt out of conducting sobriety checkpoints. While well-publicized checkpoints can have a deterrent effect,<sup>80</sup> they also subject individuals to detention without individualized suspicion of illegal activity.

LLEAs that continue to use sobriety checkpoints should follow guidelines supported by state and federal case law and the California Office of Traffic Safety:

- Supervising officers must plan and approve a designated checkpoint with a neutral pattern for stopping vehicles so that a particular class or group is not disproportionately targeted.<sup>81</sup>
- Checkpoints should occur at night, in areas where drunk driving is more likely to take place, and where the checkpoint is highly visible for approaching drivers without causing significant intrusion to drivers on the highway.<sup>82</sup> LLEAs must post advance notice of the checkpoint and may not detain drivers who safely turn away to avoid a checkpoint.<sup>83</sup>
- The California Highway Patrol recommends only 30 seconds for the initial stop.<sup>84</sup> Only if the officer finds signs of impairment should the officer ask the driver to pull into a secondary screening zone where the officer can request a driver's license, registration, and proof of insurance.<sup>85</sup>
- Only in the near vicinity of an international border can Border Patrol officers conduct fixed immigration checkpoints.<sup>86</sup>
- To best implement these policies, LLEAs should provide language assistance to limited English proficient (LEP) individuals they encounter at checkpoints when necessary.



## CHRONICLES OF VEHICLE CONFISCATIONS

**THE YOUNG GARCIA FAMILY**, upon starting their two-hour journey home after a long day at work and school, were stopped by a local police officer for a broken license plate light. The officer found that the driver did not have a valid driver's license and ordered the vehicle impounded. The driver offered to leave the van parked safely on the side of the road or to call someone to pick it up. The officer refused. The family gathered its belongings—baby seats, tools from work, and groceries—and piled them on the side of the road. The family's two young boys wrapped themselves in the blanket to shield themselves from the 45-degree night air. When they asked the officer to help them get home, he said it was not his problem and left them on the side of the road.

**LUIS** was driving with his daughter, a disabled adult, in a specially modified mini-van. The van was towed when he could not produce a driver's license. The officers did not offer assistance, and the father was forced to carry his daughter down a busy road.

**JOSÉ AND MARIBEL** had just parked in front of their home when an officer approached the driver's window. The officer told the driver he had driven through the stop sign at the corner in front of the home and asked for a driver's license. When Jose failed to produce a license, the officer ordered a thirty-day impound of the vehicle, despite the fact that it was parked in a safe place.

The fees for the impoundment amounted to almost \$2,000. This was more than the value of the car and more than José or his family could afford. Although the tow company promptly auctioned the vehicle, claiming most of the profit, the company continues to harass José by repeatedly attempting to recover the \$500 impoundment fee.



## VEHICLE IMPOUNDMENT

Several California law enforcement leaders have recently reformed their impoundment policies in light of the administrative burden to their departments as well as the practical burden on individuals and families. San Jose and Berkeley police chiefs decided to limit 30-day impoundments to unlicensed drivers with prior serious driving convictions with the purpose of “balanc[ing] safety and a reasonable level of law enforcement.”<sup>87</sup> These law enforcement leaders understand that many cannot afford to pay the towing and impoundment fees, leading to a virtual forfeiture of their vehicles. Berkeley City Manager Phil Kamlarz said in a memo to city staff that “[t]his policy will prevent those who simply cannot get a driver’s license, in many cases due to their immigration status, from having their vehicles impounded ...”<sup>88</sup> Other departments allow drivers to park the vehicle in a safe place, to call a validly licensed driver to take the car from the place of the stop or the tow lot, or to instruct the tow company to tow the car to the owner’s home.<sup>89</sup>



### THE LAW—LEGAL LIMITS ON VEHICLE IMPOUNDMENT

Officers have some discretion to impound a vehicle when its driver is unable or unauthorized to drive it away. However, there are several limits to that discretion that are frequently disregarded by LLEAs in northern California. Under the U.S. Constitution’s “community caretaking” doctrine, officers may impound a vehicle only where 1) the vehicle presents a traffic or public safety concern, and 2) the driver cannot lawfully operate the vehicle to move it to a safe location.<sup>90</sup> The need to deter a driver’s unlawful conduct is by itself insufficient to justify a tow under the Fourth Amendment’s protection against unreasonable seizures.

Despite its broad use, California’s mandatory 30-day impoundment provision targets only the most dangerous drivers: those who have had their licenses suspended or revoked and persons who have never been issued a license. Under the California Vehicle Code, the term “driver’s license” includes licenses issued by California and other state or foreign jurisdictions.<sup>91</sup> A 30-day impoundment is improper if the driver was *ever* issued a driver’s license (and the license was not revoked or suspended) by any jurisdiction.<sup>92</sup>

“I... felt people were being treated unduly harshly for minor traffic offenses . . . . If someone has never been arrested, but got stopped and lost their car for a month, I felt that was harsh, and did not make our city any safer.”<sup>93</sup>

—Berkeley Police Chief Michael Meehan

## PROPOSAL FOR LOCAL ACTION: GUIDELINES FOR FAIRNESS IN SECURING VEHICLES

Adopt policies that minimize the unjust and disproportionate impact on certain members of the community:

- Give drivers an opportunity to secure the vehicle in a safe place or to relinquish the vehicle to a licensed driver already on the scene or one who can arrive in a reasonable period of time before initiating a tow.<sup>94</sup>
- Permit drivers the opportunity to direct a vehicle's tow to the owner's home or other safe location, rather than an impoundment lot.<sup>95</sup>
- 30-day impoundments should be limited to cases in which the driver has never been issued a driver's license in any state or country, or is being arrested for driving with a suspended or revoked license, has been convicted of serious driving violations, and is the owner of the vehicle.<sup>96</sup>
- As required by the Vehicle Code, provide notice of a tow hearing that offers a fair opportunity to present mitigating circumstances to an impartial magistrate in the language the owner speaks and understands.<sup>97</sup>
- Waive or significantly reduce fees if the owner demonstrates financial hardship or significant impact on the owner's household.<sup>98</sup>

## COSTS AND CONSEQUENCES

LLEAs receive grants to conduct sobriety checkpoints, but targeting safe drivers who are not impaired comes with a price—both in terms of limited law enforcement dollars, and in disruptions to the daily life of a community.

### Budgetary Costs

- Sobriety checkpoints operation. **Cost:** About **\$12,000**.<sup>99</sup>
- Unnecessary secondary screening after Eber showed no signs of impairment. **Cost:** (2 officers x 1 hour) **\$63.44**.
- Unnecessary arrest based on Eber's objection to searches of his vehicle and after satisfactory evidence of identity was provided. **Cost:** (Booking costs (\$250) + per diem jail costs (\$88)) **\$338**.

### Human Consequences

While impounding vehicles can be a money-making enterprise for private tow companies and local jurisdictions, the costs to individuals and communities at large are immense.

- Search and arrest of Eber was unnecessary and violated his Fourth Amendment right to be free from unreasonable searches and seizures.
- Officers' dismissal of Eber's constitutional rights, as conveyed by the statement "you have no rights here," came at significant cost to Eber's dignity and sense of belonging in his new country of citizenship.
- Precious public safety resources were squandered.
- Families and individuals face up to \$2,500 in fees to the city and the tow lot to retrieve their vehicle.<sup>100</sup> Without the money to pay the costs, they forfeit their vehicle.

- Families and individuals are left on open highways without safe transportation home.
- Parents and young children are forced to face the impossible task of finding transportation in a rural area to take them to school and work. In case of an emergency, they are left stranded.
- These and similar incidents reinforce immigrant community members' fear and distrust of local police, jeopardizing the effectiveness of local law enforcement agencies.

## COSTLY JAIL PRACTICES – IDENTIFYING AND HOUSING FEDERAL DETAINEES

Routine processing and housing of arrestees in jail cost state and local governments significant resources and money. Booking costs alone, for example, are about \$250 per detainee.<sup>101</sup> But even on top of the costs necessary to a county's own law enforcement work, many jails take on additional and unnecessary costs to enforce civil immigration laws. The key to incidental immigration enforcement is the immigration detainer or "hold"—a form ICE sends to a local jail to request that the jail continue to hold detainees for up to four or five days after they would otherwise be released. With limited exceptions, the prolonged detention is on the county's own dime, and many LLEAs mistakenly believe that detainers are mandatory. There are several points in the jail booking and detention process in which jail practices create opportunities for ICE to issue immigration detainers. In this section, we review several opportunities to minimize the *issuance* of detainers. We also urge LLEAs to limit their *acceptance* of detainers as appropriate to further local public safety concerns and safeguard their limited resources.

### STEP BY STEP BOOKING PROCESS

1. Once arrested on a criminal charge or traffic infraction, the arrestee is taken to a jail or booking station.
2. Jail personnel must identify, fingerprint, and search the arrestee, check for any pressing medical conditions, and provide any needed care.
3. The officer either releases the arrestee with a citation *or* holds him or her for further investigation and/or probable cause hearing.
4. Detainees must be read their rights and given the opportunity to call family to arrange for the care of children, to access an attorney and their consulate, and to arrange their finances and post bail, if available.
5. Booking and jail officers may check for gang affiliation, prior criminal history and prior stays in the jail to make housing determinations for the safety of the jail staff and inmates.
6. Language assistance is provided for non-English speaking arrestees.



## UNNECESSARY BOOKING QUESTIONS

According to research and interviews conducted by the ACLU, most jails' booking processes include a question about the arrestee's country of birth. Many LLEAs report that the purpose of this question is to allow officials to comply with their duties under the Vienna Convention, an international treaty that assures foreign nationals access to their consulates when they are arrested in the United States.<sup>102</sup> In practice, many LLEAs also turn over the names of foreign-born arrestees to ICE, leading to the issuance of immigration detainers. The benevolent intention of the treaty turns into a double-edged sword. On the one hand, it helps foreign nationals receive the guidance and protection of their consular officials; on the other, it exposes arrestees to civil immigration enforcement and increases detention costs if an immigration detainer is issued and accepted by the jail. Forced disclosure of citizenship information can also lead to human rights concerns outside the scope of the Vienna Convention, such as indefinite detention in immigration custody or retaliation against persons seeking asylum from their home countries.



## THE LAW—CONSULAR NOTIFICATION

Under the Vienna Convention, related treaties, and state law, LLEAs' obligation begins once the arresting officer has knowledge of the arrestee's nationality. Before that point, the arresting officer is under no binding obligation to perform the terms of the convention or inquire into an arrestee's nationality.<sup>103</sup>

## PROPOSAL FOR LOCAL ACTION: PROVIDE NOTICE OF CONSULAR RIGHTS TO ALL INMATES

- Alert arrestees of their right to consular access without affirmatively inquiring into their immigration status.

Notice of arrestees' consular rights can be given briefly, succinctly, and with little disruption to current arrest and booking procedures by posting a form notice in intake and booking areas and a statement in the booking process for all arrestees that foreign nationals have the right to contact their consulates. LLEAs should assist individuals to contact their consulates upon request and may document their compliance with the Vienna Convention through an acknowledgment form that each inmate signs.<sup>104</sup>



## ICE ACCESS TO LOCAL ARRESTEES

Through a variety of ICE programs, as well as informal arrangements, many jails allow ICE agents special access to inmate information, which allows ICE to expand its reach into local communities and target individuals outside federal immigration enforcement priorities. Many jurisdictions that do not participate in formal programs, like the 287(g) and CAP programs discussed above, nevertheless allow ICE agents to keep a desk at the jail, review booking records of persons identified as foreign born, and interview inmates for the purpose of determining whether to issue an immigration detainer. Sometimes ICE agents do not identify themselves to inmates or provide notice of the arrestee's right to remain silent. In the coercive environment of a jail, inmates often share information that is later used against them in immigration proceedings. ICE agents in the jail sometimes pressure immigrant inmates to waive their constitutional right to a hearing prior to removal from the United States.



## THE LAW—SHARING INFORMATION WITH ICE

California Health and Safety Code Section 11369 requires LLEAs to notify DHS when officers reasonably believe that an individual arrested for any of fourteen specified drug offenses is not a U.S. citizen. But neither state nor federal law requires that LLEAs affirmatively inquire into an arrestee's immigration status or nationality. Penal Code Section 834b, which would have required immigration inquiries and reporting by LLEAs, is preempted by federal law and has been struck down by the courts.<sup>105</sup> And while two federal statutes restrict any government entity or official from prohibiting the sharing of information regarding "citizenship or immigration status" with ICE or other agencies, cities and counties have successfully 1) limited their own gathering of immigration status-related information and 2) limited the use of public funds to assist in immigration enforcement, all to the benefit of public safety and community policing practices.<sup>106</sup>

## PROPOSAL FOR LOCAL ACTION: LIMIT ICE ACCESS TO INMATES AND JAIL RECORDS

- Do not provide ICE access to inmate records reflecting surnames, race or ethnicity, language abilities, or place of birth.
- In the event ICE agents seek access to inmates, the jail personnel will first:
  - Notify the inmate that the officer seeking access is an immigration agent, and that anything the inmate says can be used against him in immigration or other proceedings;
  - Inform the inmate that she or he may decline to participate in the interview; and
  - Secure the inmate's written consent to participate in the interview with the ICE agent.

## FEDERAL INTERFERENCE WITH LOCAL PUBLIC SAFETY: ICE'S "SECURE" COMMUNITIES PROGRAM

### PERLA'S STORY



On a Friday evening, California Highway Patrol officers stopped 22-year-old naturalized U.S. citizen and university student, Perla, for making an incomplete stop. The officers asked where she was born and then arrested her for driving under the influence of alcohol. At the county jail, officers fingerprinted Perla, took a blood alcohol test, and told her she would be released in a few hours.

However, after a few hours, Perla was informed she could not be released due to an "ICE hold." Perla's sister presented Perla's U.S. passport to the jail officials two times that weekend, but the officers refused to release her.

Finally, Perla's sister spoke to an ICE officer Monday afternoon who said that the new DHS fingerprinting system showed her status as "pending." Upon presentation of Perla's passport to the ICE officer, Perla was released—nearly three days after she would have been released from the traffic-related arrest. The Department of Motor Vehicles returned her license a few weeks later indicating that she had been driving within the legal blood-alcohol limit.

In a growing number of jurisdictions, the DHS program "Secure Communities" (S-Comm), now provides ICE access to the fingerprints of every person booked into jail. Normal jail background checks through the California Department of Justice now lead to fingerprint searches through DHS's Automated Biometric Identification System, which contains records from visa and asylum applications and other contacts individuals may have had with the immigration system. Based on the result, ICE decides whether to issue a detainer. Despite Congressional intent to target the "most serious criminal aliens," the program's dragnet resulted in the arrest and deportation of 19,109 individuals in the first year of its implementation in California, 25 percent of whom were never convicted of any offense.<sup>107</sup> Errors in the database lead to detainers being issued for U.S. citizens, lawful permanent residents, and others who, like Perla, may unjustly be forced to spend days in jail at the county's expense.<sup>108</sup>

I think Secure Communities is like gill netting.  
Gill netting is when you throw a big net into the ocean  
that is looking for a certain type of fish but you pick up  
everything with it.

—San Francisco Sheriff Mike Hennessey.<sup>109</sup>

Since October 2008, ICE has been rolling out S-Comm throughout the United States through Memoranda of Agreements (“MOA”) signed mostly with state governments. Despite language in the cover letter to California’s MOA stating that local jurisdictions would sign “statements of interest” prior to participating, ICE has flip-flopped on whether localities have a say. In some states, ICE has gone so far as to initiate the program without agreement from the *state*.<sup>110</sup> Concerned about the program’s threat to community policing, San Francisco and Santa Clara County both sought to withdraw from participation. Apparently dismissive of local law enforcement leaders’ expertise in assessing how their participation in immigration enforcement would impact local public safety needs, DHS Secretary Janet Napolitano announced in a press conference on October 2010 that the program does not require the cooperation of state or local agencies and that localities could not opt out of the program.<sup>111</sup>

## IMMIGRATION DETAINERS

Based on information gathered through S-Comm, a jail’s booking records, or contact from a LLEA, ICE may issue an immigration detainer (Form I-247). The form indicates that the basis for the detainer may be that ICE is simply initiating an “investigation” of the individual for possible immigration violations.

As in the case of Perla and others held without criminal convictions in California, taxpayers are responsible for officers’ salaries and other costs of detention related to the hold. Federal reimbursement for detention of immigrants is provided under the State Criminal Alien Assistance Program for undocumented immigrants who 1) are detained for four or more consecutive days, and 2) who have been convicted of a felony or two misdemeanors.<sup>112</sup> **No federal funding is available to pay for prolonged detention based on immigration detainers at the arrest stage.** In fact, California Penal Code Section 4005, which allows jails to hold federal detainees only with compensation from the federal government, may prohibit local jails from accepting these immigration detainers without federal reimbursement.<sup>113</sup> LLEAs have also incurred costs in litigation for failing to release individuals after the detainer period has ended.<sup>114</sup>

In December 2010, San Miguel County, New Mexico, changed its detainer policy to *only* honor detainers where federal reimbursement is available. In January of this year, Taos County, New Mexico, adopted policies prohibiting inquiry into national origin or facilitating telephone interviews between ICE and inmates. Nor will the county honor detainers for inmates for whom the county will not receive federal reimbursement.<sup>115</sup> Santa Clara County in California is considering similar limitations.



## THE LAW – IMMIGRATION DETAINERS

Under the federal regulation governing detainers, the LLEA may detain an individual for a period of time not to exceed forty-eight hours (excluding weekends and holidays) after the individual would otherwise be released from criminal custody.<sup>116</sup> While the Immigration and Nationality Act authorizes ICE’s use of immigration detainers in cases where controlled substance violators are held by a LLEA, ICE frequently issues detainers for suspected noncitizens who are charged with offenses not included in the Act, including minor traffic violations.<sup>117</sup>

In August 2010, ICE Director John Morton issued a policy clarification that detainers “shall not” be issued “unless an LEA has exercised its independent authority to arrest the alien.”<sup>118</sup> Morton also clarified that immigration detainers are only “requests,” as did a letter from David Venturella, Director of S-Comm.<sup>119</sup> These statements have helped to make clear that LLEAs’ have discretion *not* to hold arrestees beyond the time that they would otherwise be released from local custody —a subject of confusion for years due to mandatory language found in the I-247 form itself.<sup>120</sup>



## PROPOSAL FOR LOCAL ACTION: EXERCISE DISCRETION

- Consider enforcement priorities and resources in light of federal guidance that detainers are voluntary at the local level.
- Counties can adopt a range of options such as:
  - Hold individuals pursuant to detainers only when federal reimbursement is available; or
  - Hold individuals pursuant to detainers only when there is probable cause to believe the arrestee has committed a serious and violent crime or the person has been convicted of a serious crime in the last five years.
- Monitor the amount of time an individual is held and strictly adhere to time limitations for immigration holds.
- Release individuals held on detainers if LLEA receives evidence of U.S. citizenship.
- Provide information about the limits and significance of immigration detainers to those for whom ICE issues a detainer, including an opportunity to contest the detainer.

## COSTS AND CONSEQUENCES

### \$ Budgetary Costs

- Officer should have cited and released Perla for the stated reason for the stop (stopping too close to a pedestrian walkway). **Cost:** (1 officer x 30 minutes) **\$15.86.**
- Unnecessary arrest, presumably related to inappropriate question regarding country of origin: **Cost:** (Booking Cost (\$250) + 2 officers x 3 hours (\$190.32) + per diem jail costs (\$264)) **\$704.32.**
- Officers should have released Perla once satisfactory evidence of her U.S. citizenship was provided by her U.S. passport. **Cost:** (per diem jail cost (\$88) for 2 extra days in jail) **\$176.**

### ☹ Human Consequences

- Precious public safety resources were squandered.
- Perla spent three days in jail based on mistaken assumptions about her immigration status, severely impacting her dignity and sense of belonging in her new country of citizenship.
- This and similar incidents reinforce immigrant community members’ fear and distrust of local police, jeopardizing the effectiveness of local law enforcement agencies.



## CONCLUSION

Countless decisions in the daily operations of a police or sheriff's department can result in costs associated with incidental immigration enforcement. Critically, these decisions build on one another. Detainer practices and immigration screening programs in jails incentivize racial profiling and arrests for citable offenses in the field. Addressing any part of these police-community interactions can significantly affect LLEA costs and budgets. Even more important, by focusing on local priorities, LLEAs can wisely use resources to fight crime with the help and cooperation of all the communities they seek to protect.

Many cities and counties in northern California and beyond have recognized the social and fiscal costs borne by community members and LLEAs due to our nation's failure to reform the immigration system. They have adopted policies and practices limiting officers from inquiring into immigration status, impounding vehicles, and holding individuals on federal immigration detainers without reimbursement. These policies preserve public safety resources for real crime fighting, and they reflect the following understanding, shared by law enforcement leaders throughout the country: when immigrant community members feel safe reporting crime, local police and sheriffs will be more effective, and this makes all of us safer.



# ENDNOTES

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