

# Policy Recommendations for Minimizing Costs of Incidental Immigration Enforcement at the Local Level

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Police officers' interactions with individuals, from responding to a 911 call to conducting a traffic stop, sometimes incidentally funnel individuals into the immigration system. Local law enforcement agencies ("LLEAs") play an essential role in protecting the public safety of all communities, and residents have a responsibility to abide by the laws of our state. Police practices and policies that lead to immigration consequences damage relationships with immigrant communities, waste scarce public safety resources, and sometimes violate the rights of individuals. At each point of contact, LLEAs can limit their hand in immigration enforcement and improve their practices and policies to focus resources on enhancing public safety.

The following policy recommendations begin with booking and detention practices in jail—the place where the federal immigration system most clearly impacts LLEAs through issuance of immigration detainers and programs like "Secure Communities." Next, we provide recommendations for checkpoints and impoundment of vehicles, issues of great concern to local communities. Finally, we recommend the implementation of enforcement priorities to limit field officers from targeting individuals based on perceived immigration status, and offer suggestions for dealing with community members who lack state-issued identification. Our proposals are within LLEA discretion and supported by cited authorities as well as policy considerations, such as fiscal and social costs to LLEAs and community members. Additional background for these proposals is available through our accompanying report, *Costs and Consequences: the High Price of Policing Immigrant Communities*.

## A. BOOKING AND JAIL PRACTICES

At the point of booking, officers often inquire about and record personal information—including country of birth—and use fingerprints to investigate an individual's criminal and immigration background through various federal and state database systems. LLEAs can comply with their obligations regarding consular access to foreign nationals under international treaties and California Penal Code § 834c without exposing arrestees to civil immigration enforcement and increasing detention costs for holding individuals on immigration detainers.<sup>1</sup>

### Proposals:

1. Apply Vienna Consular notification requirements:
  - Provide a form notice that alerts all arrestees that foreign nationals have a right to access their consulates without requiring individuals to provide immigration status or country of birth.
  - Make consular contact information available to all arrestees and assist any arrestee who seeks support in contacting his or her consulate.
  - Contact country's consular officials if the LLEA learns that an inmate is from a mandatory notification country. Cal. Penal Code § 834c(d).
  - Document compliance through an acknowledgment form that each inmate signs.
2. Prohibit all inquiries into immigration status, citizenship, and country of birth information.
3. Prohibit the use of a foreign identity document as proof or evidence of an individual's immigration or citizenship status for any purpose other than establishing identity.
4. In the event ICE agents seek access to inmates, the LLEA should first:
  - Notify the inmate that the officer seeking access is an immigration agent, that anything the inmate says can be used against him in immigration or other proceedings, and that the inmate may decline to participate in the interview or condition his/her participation on first securing representation by an attorney (at the inmate's own expense); and
  - Secure the inmate's written consent to participate in the interview with the ICE agent.
5. Seek consent from or request the presence of a parent or legal guardian of a juvenile detainee or the guardian *ad litem* of mentally impaired inmates in ICE interviews.

## B. IMMIGRATION HOLDS

ICE issues detainers to request that LLEAs hold inmates for an additional period of time after they would otherwise be released from local custody. 8 U.S.C. § 1357. LLEAs are not authorized to hold inmates pursuant to detainers beyond 48 hours (excluding weekends and holidays) under any circumstances. 8 C.F.R. § 287.7. Reasons for the immigration hold may be due to a prior order of removal or present convictions that make the individual removable from the United States. However, ICE often issues detainers based on nothing more than an unconfirmed suspicion that an individual is undocumented. Because the detainer is merely a request, LLEAs have discretion *not* to enforce them. There is no federal reimbursement for costs associated with detainers for inmates who have not been convicted of a felony or two misdemeanors, or who are not held for at least four consecutive days.

### Proposals:

1. Recognize immigration detainers as non-mandatory requests from ICE, which provides the LLEA with discretion on whether to honor the detainer request. ICE Interim Policy No. 10074.1: Detainers, issued August 2, 2010.
2. Exercise discretion not to enforce immigration detainers where federal reimbursement is not available (i.e. where the arrestee has not been convicted of a felony or two misdemeanors or will not be held for four consecutive days). Penal Code § 4005; Bureau of Justice Assistance, State Criminal Alien Assistance Program guidelines, <http://www.ojp.usdoj.gov/BJA/grant/scaap.html>.
3. Exercise discretion not to enforce immigration detainers if the person's criminal history and charges do not raise public safety concerns, including where the district attorney declines to file charges or a judge has ordered the person released, such as release on bail.
4. Do not honor detainers for minors in state or county custody.
5. Release the inmate without further delay if the LLEA receives information (such as a U.S. passport or other proof of U.S. citizenship) that an inmate's hold is improper under an immigration detainer.
6. Adhere to time limitations for immigration holds (48 hours excluding weekends and holidays) and closely track the amount of time an individual is held on an immigration detainer from time when the individual would otherwise be released from criminal custody. 8 C.F.R. § 287.7.
7. Provide inmates and their attorneys with information regarding their immigration hold including:
  - A copy of the detainer and explanation of the grounds for the detainer, if known;
  - Notice of the nature of a detainer and that it only authorizes extending the inmates detention for 48 hours (excluding weekends and holidays);
  - The time at which the 48-hour (excluding weekends and holidays) period began or will begin and when the immigration hold will end;
  - A clear and practical mechanism for individuals to contact ICE to challenge the immigration hold (including during weekends and holidays);
  - Information regarding a person's rights in the immigration system including the right to a hearing or credible fear interview prior to removal from the United States, the right to be represented by an attorney (at no expense to the government) in any immigration proceedings, and the right to a bond determination before a judge in order seek release from federal custody before and during immigration proceedings.
8. Treat all inmates fairly without regard to immigration hold, including an inmate's access to bail or bond and educational, healthcare, or other programs and services offered to inmates in the state or local facility.

## C. SOBRIETY CHECKPOINTS

LLEAs should consider opting out of conducting sobriety checkpoints, which subject individuals to detention without individualized suspicion of illegal activity. However if LLEAs continue to implement these checkpoints, the agency should ensure that the checkpoints are minimally intrusive and do not disproportionately impact particular communities of color. Checkpoints may not be used for the sole purpose of checking drivers' licenses. Cal. Veh. Code § 12801.5(e).

### Proposals:

1. Provide for an objective site and time selection process based on research indicating high volumes of alcohol or drug-related accidents and employ neutral patterns of stopping individuals to ensure the checkpoints are minimally intrusive. *Ingersoll v. Palmer*, 43 Cal.3d 1321 (1987).
2. Publish advance notification of checkpoints in English press and multilingual press sources. California Office of Traffic Safety, (“OTS”) 2008-09 Sobriety Checkpoint Program: Pre Operational Training, <http://www.tsc.berkeley.edu/checkpointminigrants/dec2008/SobrietyCPtrainingVer.2ppt.pdf>.
3. Do not stop individuals who voluntarily make legal turns away from the checkpoint unless they are driving erratically. *Ingersoll v. Palmer*.
4. Establish and maintain a predetermined frequency or pattern of stopping vehicles, and do not make exceptions for reasons unrelated to impaired driving. *Ingersoll v. Palmer*.
5. Provide for language assistance when needed.
6. Limit secondary screening to drivers who are suspected of being impaired.
7. Request a driver’s license, registration, or proof of insurance only at the secondary screening stage of the stop.
8. Implement a systematic procedure for data collection and monitoring, including number of stops, secondary screenings, arrests and impoundments with indicators of race/ethnicity and charges made. OTS Pre Operational Training, Sample OTS Form 137, p. 26, <http://www.tsc.berkeley.edu/checkpointminigrants/dec2008/SobrietyCPtrainingVer.2ppt.pdf>.
9. Prohibit the use of any foreign identity document obtained as proof or evidence of an individual’s immigration or citizenship status for any purpose other than establishing identity.

## D. VEHICLE CONFISCATIONS

Officers have limited discretion to tow a vehicle, which is a substantial investment and essential daily resource for most individuals. Officers are never required to confiscate a vehicle for thirty days. As a matter of constitutional and statutory law, car tows and thirty-day impoundments should be limited to very specific instances.

### Proposals:

1. Initiate a tow only in limited circumstances:
  - the vehicle presents a traffic or public safety hazard; OR
  - the driver cannot produce a valid license AND the driver cannot park the vehicle in a safe location or find a licensed driver to retrieve the vehicle within a reasonable period of time. *Miranda v. City of Cornelius*, 429 F.3d 858 (9<sup>th</sup> Cir. 2005).
2. Initiate a thirty-day impound in the officer’s discretion, but only if the driver is arrested AND:
  - the driver has never been issued a driver’s license in any state or country, has been convicted of serious traffic violations, and is the owner of the vehicle; OR
  - the driver is cited for driving with a suspended or revoked license. Cal. Veh. Code §14602.6.
3. In the event that a tow would be appropriate under these proposals, the officer should:
  - Provide the driver with the option to have a validly-licensed driver retrieve the vehicle within a reasonable time period and allow the driver to sign a waiver releasing the LLEA from liability;
  - Allow the driver to have the vehicle towed to the owner’s home instead of a tow lot whenever possible; and
  - Make a reasonable attempt to account for the safe travel of the vehicle’s occupants and belongings. *See* San Francisco and Berkeley Police Department impoundment policies.

## E. LIMITING UNNECESSARY AND IMPROPER STOPS THROUGH ENFORCEMENT PRIORITIES

Personal opinion and political positions on immigration differ widely among individual officers. LLEAs should create enforcement priorities to limit stops that may be used as pretexts for racial profiling or immigration enforcement purposes. Data collection and oversight of officer stop records are necessary to ensure that enforcement priorities are followed.

### Proposals:

1. Limit stops for minor mechanical violations unless there are also moving violations or reasonable suspicion of criminal activity.
2. Adopt a policy against questioning individuals in the field about their place of birth, national origin, immigration status, or citizenship.
3. 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. Cal. Veh. Code § 12801.5(e).

## F. CITE AND RELEASE INFRACTIONS

California law provides local law enforcement officers with a wide range of discretion to stop, detain, and cite or arrest an individual suspected of committing an offense under the Penal or Vehicle Codes as well as city or county ordinances. The best use of an LLEA's resources is to issue citations and release individuals who are stopped for committing infractions or misdemeanors when no other circumstances require an arrest. California Penal Code §§ 853.5 and 853.6 provide that an officer who stops an individual for a traffic infraction or a non-violent, misdemeanor offense, including violations under the California Vehicle Code and city or county ordinances, should issue a citation and subsequently release the individual without initiating a custodial arrest unless circumstances arise that require an arrest.<sup>2</sup> It is the responsibility of the courts to track individuals, issue warrants and take other proper measures when individuals fail to pay their citations or appear in court.

### Proposals:

1. Use an individual's thumbprint on the citation as proof that he or she will appear at a hearing within 10 days of the infraction or notice. Cal. Veh. Code § 40303.
2. Provide a warning and/or cite and release an individual unless the officer discovers an outstanding arrest warrant or other circumstances that require an arrest, the individual refuses to provide a signature or thumbprint on the citation, or the officer reasonably determines there is a risk that the individual will not appear before a magistrate or pay the fine. Cal. Penal Code §§ 853.5, 853.6.
3. Use any reasonably reliable evidence to establish identity in order to avoid an arrest under Vehicle Code § 40302. See Proposals for Identifying Individuals below.
4. When arresting an individual to verify identity pursuant to Vehicle Code § 40302, bring the individual to a magistrate as promptly as possible and without going through a routine booking procedure. *People v. Superior Court*, 7 Cal.3d 186, 209 (1972).
5. Assist an individual with access to a sobering center or a hospital if the officer determines that the individual is intoxicated or in need of medical attention unless one of the reasons above otherwise requires an arrest.

## G. IDENTIFYING INDIVIDUALS

Officers have wide discretion to use information available to them to establish an individual's identity for purposes of issuing a citation, even when the driver does not carry a driver's license. With "other satisfactory evidence" of the individual's identity, the officer can cite and release the individual and avoid the costs to the individual and the LLEA that accompany an arrest. Cal. Veh. Code § 40302.

### Proposals:

1. Accept any state or municipally-issued document that is reasonably verifiable by the arresting officer. Documents should be accepted if they bear a name and any combination of the following: photograph, physical description, signature, current mailing address, bar code and/or serial number. *People v. Monroe*, 12 Cal. App. 4th 1174, 1187 (1993).
2. Verify an individual's identification using name, date of birth, and other identifying information; testimony of witnesses; alternative forms of ID (see #3 below); other available documents (e.g. utility bills, car registration, insurance cards), or information provided by individual when no other identifying documents are available and the officer does not reasonably suspect fraud.
3. Accept the following additional documentation to verify an individual's identity unless the officer has a reasonable suspicion of fraud: out-of-state, foreign or international driver's license or identification card; consulate or embassy-issued identification card (see East Palo Alto Resolution No. 2079); U.S. or foreign passport; university or school identification card; library card or any other kind of government-issued membership card; private business membership card (i.e. bank or credit card or store membership); and/or; employer-issued identification card.
4. Prohibit asking about an individual's immigration status or nationality unless required by law. (See City of Richmond Q&A on checkpoints; LAPD Special Order 40; San Francisco Admin. Code Chapter 12H.)
5. Ensure privacy and limited disclosures of an individual's immigration or citizenship status unless there is written authorization or such disclosure is required by law.

## ENDNOTES

1 California Penal Code § 834b, which would have required LLEAs to inquire into immigration status, was struck down in a federal court challenge to California's Proposition 187. Health & Safety Code § 11369—the only law that requires LLEAs to report known undocumented arrestees—is limited to controlled substances offenses and does not require or authorize LLEAs to seek immigration or citizenship information.

2 Cal. Penal Code §§ 853.5(a), 853.6(a)(1).

