

# SECURE COMMUNITIES, SANCTUARY LAWS, AND LOCAL ENFORCEMENT OF IMMIGRATION LAW: THE STORY OF LOS ANGELES

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## I. INTRODUCTION

Despite campaign promises to deliver comprehensive immigration reform,<sup>1</sup> in 2010 the Obama Administration removed<sup>2</sup> more than 392,000 unauthorized aliens, the largest number in our nation's history.<sup>3</sup> These removals took place in a dizzying array of federal, state, and local immigration regulation. For example, Arizona's Senate Bill 1070 would have required law enforcement agencies to determine the immigration status of lawfully stopped individuals "where reasonable suspicion exist[ed] that the person" was an unauthorized alien had the law not been preliminarily enjoined;<sup>4</sup> Congress nearly passed the Development, Relief and Education for Alien Minors Act ("DREAM Act"), which would have provided conditional permanent residency status to certain college students and military

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<sup>1</sup> Arian Campo-Flores, *Keeping Obama to His Word*, NEWSWEEK, Dec. 6, 2010, at 36.

<sup>2</sup> "Removed" is the new "deported".

<sup>3</sup> Press Release, U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement, Secretary Napolitano Announces Record-Breaking Immigration Enforcement Statistics Achieved Under the Obama Administration (Oct. 6, 2010), [http://www.dhs.gov/ynews/releases/pr\\_1286389936778.shtm](http://www.dhs.gov/ynews/releases/pr_1286389936778.shtm) [hereinafter DHS Dec. 6, 2010 Press Release].

<sup>4</sup> 2010 Ariz. Sess. Laws 113, *amended by* 2010 Ariz. Sess. Laws 211, *invalidated by* Order Granting Prelim. Inj., *United States v. Arizona*, No. 10-1413 (D. Ariz. July 28, 2010).

personnel;<sup>5</sup> and Los Angeles Police Department (“LAPD”) Chief of Police Charlie Beck reaffirmed his department’s commitment to complying with Special Order 40,<sup>6</sup> which limits the ability of the LAPD to inquire into a person’s immigration status.<sup>7</sup>

But really, at the bottom of the record-breaking number of removals and layered immigration regulation stand two controversial federal initiatives that blend immigration enforcement across federal, state, and local levels. First, section “287(g) Agreements” allow local law enforcement officers in twenty-four different states to operate under the authority of the Immigration and Customs Enforcement (“ICE”) and, in differing capacities, interrogate, detain, process, and prepare charging documents against unauthorized aliens in their custody, usually before formally charging or convicting them of any crime.<sup>8</sup> A few jurisdictions, however, have altered the normal framework. For example, in Los Angeles, Sheriff’s Department officers acting under 287(g) authority only inquire into an individual’s immigration status *post-conviction*.<sup>9</sup> Second, ICE’s Secure Communities initiative enhances local law enforcement’s role in immigration enforcement through what is predominantly a data-sharing scheme that cross-references biometric data, such as fingerprints obtained at the booking of an arrested individual, in Federal Bureau of Investigation (“FBI”) and U.S. Department of Homeland Security (“DHS”) databases to purportedly locate and remove dangerous criminal aliens.<sup>10</sup> Los Angeles County She-

<sup>5</sup> Lisa Mascaro & James Oliphant, *111th Congress: Immigration and Arms Control*, L.A. TIMES, Dec. 19, 2010, at A27.

<sup>6</sup> Frank Stoltze, *LAPD Chief Releases PSA over Concern About Immigration Rhetoric*, 89.3KPCC (Jan. 27, 2011) <http://www.scpr.org/news/2011/01/27/lapd-chief-beck-concerned-about-immigration-rheto/> [hereinafter *LAPD Releases PSA*].

<sup>7</sup> OFFICE OF THE CHIEF OF POLICE, SPECIAL ORDER NO. 40, UNDOCUMENTED ALIENS (1979) [hereinafter SPECIAL ORDER 40], available at [www.lapdonline.org/assets/pdf/SO\\_40.pdf](http://www.lapdonline.org/assets/pdf/SO_40.pdf).

<sup>8</sup> See U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa> (last visited Feb. 4, 2012) [hereinafter *287(g) Fact Sheet*].

<sup>9</sup> Memorandum of Agreement between U.S. Dep’t of Homeland Sec., Immigration and Customs Enforcement, and Los Angeles County Sheriff’s Department, app. D (Oct. 12, 2010), [http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r\\_287losangelescountysheriffsoffice101012.pdf](http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287losangelescountysheriffsoffice101012.pdf); see RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 28 (2011), available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf> [hereinafter MPI DELEGATION AND DIVERGENCE].

<sup>10</sup> U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, 1ST QUARTERLY STATUS REPORT (APRIL–JUNE 2008) FOR SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 6–10 (Aug. 2008), avail-

riff's Department and LAPD both participate in Secure Communities and transmit biometric information upon booking an arrested individual.<sup>11</sup>

Yet, to what extent is Los Angeles's involvement in these federal programs desirable? In 1979, then-LAPD Chief of Police Daryl Gates issued Special Order 40,<sup>12</sup> in what many commentators credit as the first immigrant "sanctuary" law that purportedly provides a sanctuary for unauthorized aliens from immigration enforcement.<sup>13</sup> Special Order 40 states that "undocumented alien status in itself is not a matter for police action" and precludes officers from "initiat[ing] police action with the objective of discovering the alien status of a person."<sup>14</sup> Special Order 40 was issued to "encourage the willing cooperation of all persons in programs designed to enhance community-police cooperation."<sup>15</sup> This notion is supported and advanced by many prominent law enforcement officials.<sup>16</sup> For example, the Major Cities Chiefs Association ("MCC"), an organization comprised of sixty-three heads of local law enforcement, shares LAPD's concern regarding the consequences of local enforcement of federal immigration

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able at <http://www.ccrjustice.org/files/3.%201st%20Quarterly%20Status%20Report%20april-june%202008.pdf>; see also U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement, Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens (Jan. 2010), <http://www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf> ("ICE is improving public safety by working to better identify, detain and ultimately remove dangerous criminal aliens from your community.").

<sup>11</sup> U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTIONS (Dec. 28, 2011), <http://www.ice.gov/doclib/securecommunities/pdf/sc-activated.pdf>. ICE records deployment at the county level, thus deployment in Los Angeles County is also effectively deployment in Los Angeles City; see Press Release, U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement, New ICE Initiative Uses Biometrics to Enhance Identification and Removal of Dangerous Criminal Aliens from Los Angeles County (Aug. 26, 2009), <http://www.ice.gov/news/releases/0908/090826losangeles.htm> [hereinafter U.S. ICE Press Release] (stating all law enforcement agencies in Los Angeles County use the county-run Los Angeles County Regional Identification System electronic booking machines, which gained Secure Communities functionality on August 26, 2009).

<sup>12</sup> SPECIAL ORDER 40, *supra* note 7.

<sup>13</sup> See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 Iowa L. Rev. 1449, 1469 (2006) ("The first state or local immigration law sanctuary policy was apparently Special Order 40.").

<sup>14</sup> SPECIAL ORDER 40, *supra* note 7.

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., M.C.C. IMMIGRATION COMM. MEMBERS, M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICY AGENCIES, MAJOR CITIES CHIEFS 5-6 (2006) [hereinafter M.C.C. RECOMMENDATIONS], [http://www.houstontx.gov/police/pdfs/mcc\\_position.pdf](http://www.houstontx.gov/police/pdfs/mcc_position.pdf) (stating its position that immigration enforcement by local police would negatively affect and undermine the level of trust and cooperation between local police and immigrant communities).

laws on the erosion of trust between law enforcement and immigrant communities.<sup>17</sup>

However, despite LAPD's commitment to Special Order 40 and co-operation with immigrant communities, as a result of Los Angeles County's Secure Communities integration, more and more immigrants see police interactions as the first step towards a removal proceeding.<sup>18</sup> As many as 1899 *non-criminal* unauthorized aliens have been removed from Los Angeles County through the Secure Communities initiative alone since its inception in August 2009,<sup>19</sup> a staggering number given the program's primary focus on dangerous criminals.<sup>20</sup> This high rate of Secure Communities-related removals and its transformative effect on LAPD's role in immigration efforts have inhibited the Department's ability to meet its policy objectives under Special Order 40, and strained relations between law enforcement agencies and immigrant communities.<sup>21</sup>

Accordingly, this Note argues that Los Angeles County should opt-out of Secure Communities because it is inconsistent with Los Angeles County and City policy, as embodied in the County's limited 287(g) Agreement and the City's Special Order 40. Given that critics of sanctuary laws, such as Special Order 40, argue that such laws are illegal and invalid

<sup>17</sup> *Id.*

<sup>18</sup> Leslie Berestein Rojas, Does Secure Communities Undermine L.A.'s Special Order 40, MULTI-AMERICAN (Aug. 17, 2011, 3:03 PM), <http://multiamerican.scpr.org/2011/08/does-secure-communities-undermine-the-intent-of-l-a-s-special-order-40/>.

<sup>19</sup> U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, APRIL 2010 CUMULATIVE DATA BY COUNTY 1 (2010), available at <http://www.ccrjustice.org/files/2a.%20April%202010%20Cumulative%20Data%20by%20County.pdf> (last visited Feb. 4, 2012) [hereinafter APRIL 2010 ICE COUNTY REPORT]. Subsequent statistics released by ICE show a curious reduction in the cumulative number of non-criminal removals from Los Angeles County. *Id.*; see, e.g., U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES NATIONWIDE INTEROPERABILITY BY CONVICTION REPORT 1 (2010), available at [http://www.ccrjustice.org/files/nationwide\\_interoperability\\_conviction-july.pdf](http://www.ccrjustice.org/files/nationwide_interoperability_conviction-july.pdf) (showing 1498 cumulative removals of non-criminals through July 31, 2010, some 401 less cumulative removals later in time). ICE attributes this drop in cumulative figures to a manual audit after April 2010 figures that revealed many removed individuals actually did have a criminal record. Shankar Vedantam, Disparities in Deportation Program Raise Questions, WASH. POST, Dec. 21, 2010, at B1. Nevertheless, others remain skeptical of these figures. CTR. FOR CONSTITUTIONAL RIGHTS, IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) AGENCY'S SPIN CANNOT OBSCURE THE TRUTH ABOUT THE SECURE COMMUNITIES PROGRAM: RIGHTS GROUPS' ADVOCACY LEADS TO CRITICAL ICE ADMISSIONS AND BREAKTHROUGHS RELATED TO THE FLAWED PROGRAM 3 (2010), <http://ccrjustice.org/files/CCR%20NDLON%20Cardozo%20Response%20to%20ICE%20Spin%209-1-10%20FINAL.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* Part VI.

exercises of local government authority, Part II examines federal authority to regulate immigration, and provides background for the sanctuary movement and its enduring validity, which I subsequently discuss in Part III. Part IV addresses Congress's response to the sanctuary movement in 1996 with its legislation aimed to preempt sanctuary laws and delegate immigration enforcement to local law enforcement agencies. Part V introduces the history and mechanics of Secure Communities and argues that Secure Communities is unsound policy, as applied across the United States, because it: (1) undermines the sound legal and policy judgments of the sanctuary movement; (2) injects local law enforcement into immigration enforcement at the expense of local budgets; (3) could enable heightened levels of racial and ethnic profiling; and (4) induces overreliance by local law enforcement on an incomplete database to the detriment of public safety. Part VI analyzes Los Angeles County and City immigration enforcement efforts under the 287(g) program, Secure Communities, Special Order 40, and highlights the inherent tension among them.

## II. FEDERAL AUTHORITY TO REGULATE IMMIGRATION

Settled Supreme Court precedent vests the authority to regulate immigration, particularly with respect to the admission and removal of aliens, in the federal government.<sup>22</sup> The Constitution, however, fails to expressly grant Congress authority to regulate immigration in precise terms, so the Supreme Court has anchored this authority in a disparate set of constitutional clauses:<sup>23</sup> the Naturalization Clause,<sup>24</sup> the Commerce Clause,<sup>25</sup>

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<sup>22</sup> See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.”); Kittrie, *supra* note 13, at 1458–59.

<sup>23</sup> *Chae Chan Ping*, 130 U.S. at 604 (“The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers.”).

<sup>24</sup> U.S. CONST. art. I, § 8, cl. 4 (“To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”); see Kittrie, *supra* note 13, at 1458.

the War Clause,<sup>26</sup> and the Migration and Importation Clause.<sup>27</sup> Additionally, the Court has held this authority to originate from the federal government's inherent power as a sovereign<sup>28</sup> and the related power to conduct foreign affairs.<sup>29</sup> Nevertheless, despite this patchwork of constitutional authority, Congress is recognized to enjoy far-reaching plenary power to regulate immigration.<sup>30</sup>

However, the federal government has not always exclusively regulated immigration, and the states have played an active role in regulation.<sup>31</sup> States in the early republic had their own inspection laws and imposed duties on migrants,<sup>32</sup> as Congress opted to stay out of immigration regulation.<sup>33</sup> It wasn't until 1882 that Congress enacted its first significant immi-

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<sup>25</sup> U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); *Edye v. Robinson*, 112 U.S. 580, 600 (1884) ("Congress [has] the power to pass a law regulating immigration as a part of commerce of this country with foreign nations."); THOMAS A. ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 200–02 (6th ed. 2008).

<sup>26</sup> U.S. CONST. art. I, § 8, cl. 11 ("To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.").

<sup>27</sup> U.S. CONST. art. I, § 9, cl. 1 ("The Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to Year one thousand eight hundred and eight."). Many scholars agree this was a compromise between the Founding Fathers regarding the future of slavery in the United States. See ALEINIKOFF ET AL., *supra* note 25, at 202. The language of the clause, though, in terms of migration and importation of persons seems to be applicable to immigration regulation as well as regulation of the slave trade. *Id.* Therefore, by denying Congress this power until 1808, this clause implicitly grants Congress the power to regulate the migration and importation of persons after 1808. *Id.*

<sup>28</sup> *Chae Chan Ping*, 130 U.S. at 609 ("The power of exclusion of foreigners begin an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."); ALEINIKOFF ET AL., *supra* note 25, at 205–06.

<sup>29</sup> *Chae Chan Ping*, 130 U.S. at 604 ("[T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."); ALEINIKOFF ET AL., *supra* note 25, at 203.

<sup>30</sup> See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

<sup>31</sup> Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 569 (2008).

<sup>32</sup> *Id.*

<sup>33</sup> Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1628 ("[U]ntil the end of the nineteenth century, immigration (both interstate and international) was the subject of state-level regulation in the face of a federal legislative vacuum.").

gration law,<sup>34</sup> which subsequently led courts to prohibit states from regulating immigration.<sup>35</sup> Hereafter Congress established its preemptive power in immigration regulation and began regulating immigration in earnest.<sup>36</sup> This effort culminated in the 1952 enactment of the Immigration and Nationality Act (“INA”), which set the modern legal framework for the admission and removal of immigrants, as well as most other immigration-regulated matters.<sup>37</sup>

Fast forward several years and a multitude of amendments to the INA later, the legal authority underlying our immigration regulation has changed very little. Yet even with Congress’s unchanging exclusive legal authority to regulate immigration, state and local governments have enacted, ordered, resolved, and issued a number of “laws”<sup>38</sup> that at least tangentially overlap with Congress’s authority.<sup>39</sup> One such law is Special Order 40.<sup>40</sup> However, before addressing the legality of Special Order 40 and the effect that Secure Communities has on it, some background into state and local immigration regulations is in order.

### III. THE SANCTUARY MOVEMENT

One of the most prominent state and local immigration regulation efforts in recent history relates to the so-called “sanctuary movement” and local government measures designed to support it. As war spread through Central American countries such as Guatemala and El Salvador in the 1980s, nationals of those countries fled en masse to the United States.<sup>41</sup>

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<sup>34</sup> Kittrie, *supra* note 13, at 1458.

<sup>35</sup> See, e.g., *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 786 (C.D. Cal. 1995).

<sup>36</sup> Kittrie, *supra* note 13, at 1458.

<sup>37</sup> Immigration and Nationality Act of 1952, 8 U.S.C. § 101 (2011) (also known as the McCarran-Walter Act).

<sup>38</sup> For clarity and simplicity, this Note refers to local ordinances, orders, resolutions, and other local creation of law as “laws.” For example, Special Order 40 was *ordered* by the LAPD Chief of Police; however, this Note refers to it as a “law,” much as if it had been enacted by City Council.

<sup>39</sup> See *ESCONDIDO, CAL., ORDINANCE NO. 2006-38R* (2006) (penalizing landlords for renting apartments to undocumented immigrants), *permanently enjoined* Order Re: Stipulated Final Judgment and Permanent Injunction, *Garrett v. City of Escondido*, No. 06-CV-2434 (S.D. Cal. 2006); Legal Arizona Workers Act, 2008 Ariz. Sess. Laws ch. 152 (prohibiting employers from knowingly or intentionally hiring undocumented aliens and requiring employers to utilize the DHS “E-Verify” system to verify a prospective employee’s immigration status).

<sup>40</sup> SPECIAL ORDER 40, *supra* note 7.

<sup>41</sup> Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary*

Yet, notwithstanding the United States's interventionism and objectives furthered in the Guatemalan and El Salvadoran wars, Congress and the Immigration and Naturalization Service ("INS") did little to accommodate these apparent political refugees.<sup>42</sup> One federal court even held that the INS proactively coerced and misled Salvadoran immigrants into waiving their rights to apply for asylum and accepting voluntary departure by waiving their right to a deportation hearing.<sup>43</sup> In response to this perceived injustice, churches and other private institutions began offering "sanctuary" in the form of food, shelter, legal services, and other basic needs to undocumented aliens.<sup>44</sup> State and local governments joined the movement and established laws that expressly recognized the "substantial numbers of people from different ethnic and sociological backgrounds" entering their communities.<sup>45</sup> As of 2008, at least four states and approximately seventy localities had implemented sanctuary laws.<sup>46</sup>

The modern legal definition of a "sanctuary law" is broad and inclusive of all laws that "limit government employees, particularly local police officers, from inquiring or disseminating information about the immigration status of immigrants whom they encounter."<sup>47</sup> Within this definition academics have identified three distinct forms of sanctuary laws. "Don't ask" laws prohibit government employees from inquiring about the immigration status of an individual;<sup>48</sup> "don't tell" laws prohibit government

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Laws by the Inclusion of Immigration Records in the National Crime Information Center Database, 97 CAL. L. REV. 567, 572 (2009).

<sup>42</sup> *Id.*; see also Christopher Carlberg, Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments, 77 GEO. WASH. L. REV. 740, 744 (2009). Under the Refugee Act of 1980, political asylum seekers needed to show a "well-founded fear of persecution" to qualify for asylum, which is a difficult standard to meet for immigrants fleeing civil war. *Id.* Some have even suggested that asylum seekers who appeared to be qualified for asylum were rejected for political and economic reasons. *Id.*

<sup>43</sup> *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1494 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990); see also Linton Joaquin, Court Upholds Nationwide Injunction of Immigration Detention and Removal Processing Abuses, NAT'L IMMIGRATION LAW CTR. (Oct. 5, 2007), <http://www.nilc.org/injunction-detention-07.html>.

<sup>44</sup> Huyen Pham, The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power, 74 U. CIN. L. REV. 1373, 1382–84 (2006).

<sup>45</sup> SPECIAL ORDER 40, *supra* note 7.

<sup>46</sup> Nat'l Immigration Law Ctr., Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities (Dec. 2008), [www.nilc.org/document.html?id=203](http://www.nilc.org/document.html?id=203).

<sup>47</sup> Rose Cuison Villazor, *What is a 'Sanctuary'?*, 61 SMU L. Rev. 133, 148 (2008).

<sup>48</sup> Kittrie, *supra* note 13, at 1455; see, e.g., New Haven, Conn., Dept' of Police Service, General Order 06-2 (2007), available at <http://www.democracyinaction.org/dia/organizations/ORG/NILC/images/New%20Haven.pdf>. ("Police Officers shall not inquire about a person's



employees from disclosing or communicating an individual's immigration information to the federal government;<sup>49</sup> and "don't enforce" laws prohibit government employees, usually police officers, from enforcing certain immigration laws.<sup>50</sup> Many sanctuary laws are a blend of these three forms.<sup>51</sup>

The wars in Central America ended years ago, but as many as twelve million unauthorized immigrants are estimated to reside in the United States today,<sup>52</sup> which ensures the relevancy of these sanctuary laws. Proponents of sanctuary laws identify four predominant, albeit partially overlapping, justifications for sanctuary laws.

First, sanctuary laws encourage community cooperation and engagement with law enforcement, which increases public safety.<sup>53</sup> Trust is key to effective law enforcement, and immigrants who fear deportation are less likely to approach law enforcement as victims and witnesses of criminal activity.<sup>54</sup> Without this trust, unauthorized immigrants are more vul-

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immigration status unless investigating criminal activity.").

<sup>49</sup> Kittrie, *supra* note 13, at 1455; *see, e.g.*, Chi., Ill., Code 2-173-030 (2006) ("Except as otherwise provided under applicable federal law, no agent or agency shall disclose information regarding the citizenship or residency status of any person unless required to do so by legal process or such disclosure has been authorized in writing by the individual to whom such information pertains, or if such individual is a minor or is otherwise not legally competent, by such individual's parent or guardian.").

<sup>50</sup> Kittrie, *supra* note 13, at 1455; *see e.g.*, S.F., Cal., Admin. Code § 12H.2 (2009) ("No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by Federal or State statute, regulation or court decision."). Logically, "don't enforce" laws are derivative of and overlapping with "don't ask" laws because enforcement of immigration law is not possible without having the authority to at least indirectly inquire into an individual's immigration status.

<sup>51</sup> *See, e.g.*, OAKLAND, CAL., OAKLAND CITY COUNCIL RES. NO. 80584 (2007) ("City employees, including members of the Oakland Police Department, shall not enforce federal civil immigration laws, nor use city monies, resources, or personnel to investigate, question, detect or apprehend persons whose only violation is or may be a civil violation of immigration law."). Note that this resolution is a combination don't enforce and don't tell sanctuary law.

<sup>52</sup> JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 1 (2006) ("Based on analysis of other data sources that offer indications of the pace of growth in the foreign-born population, the Center developed an estimate of 11.5 to 12 million for the unauthorized population as of March 2006.").

<sup>53</sup> M.C.C. RECOMMENDATIONS, *supra* note 16, at 5–6. Empirical evidence supports this notion. *See* Sullivan, *supra* note 41, at 580–81. For example, officials in Austin, Texas, launched a marketing campaign to encourage undocumented immigrants to report crime by assuring them that local police officers would not ask any immigration related questions. *Id.* As a result of this campaign, officials in Austin witnessed a sustained drop in crime rates. *Id.*

<sup>54</sup> M.C.C. RECOMMENDATIONS, *supra* note 16, at 6.

nerable to criminal activity and society as a whole is less safe because criminals, unknown to law enforcement, remain on the street.<sup>55</sup> Directly on point, former LAPD Assistant Chief and current San Francisco District Attorney George Gascon told the *Los Angeles Times* that “if an undocumented woman is raped and doesn’t report it, the suspect who raped that woman . . . could be the suspect who rapes someone else’s sister, mother or wife later.”<sup>56</sup>

Second, limited public resource allocations to local law enforcement are insufficient to effectively address the shortcomings of our federal immigration system.<sup>57</sup> The costs associated with training personnel and maintaining facilities to enforce federal immigration law against twelve million undocumented immigrants would be staggering.<sup>58</sup> Moreover, after the attacks on September 11, the focus on terrorism has drained local and national resources.<sup>59</sup> Local law enforcement agencies became the first line of defense against terrorist attacks and are left to address crimes traditionally covered by the federal government, such as white collar crime and bank robberies, both of which require advanced training and preparation.

Third, violations of complex immigration law are different in nature than typical wrongdoings investigated by local law enforcement, such as murder, assault, robberies, and narcotics.<sup>60</sup> Enforcing a complex body of law could lead to civil liability for municipalities for improper enforcement.<sup>61</sup>

Lastly, under-trained law enforcement with readily available access to immigration databases could lead to racial profiling.<sup>62</sup> This problem is

<sup>55</sup> *Id.*; see Carlberg, *supra* note 42, at 748–49 (referring to undocumented immigrants as “walking A.T.M.’s” because they are so easily and frequently the subjects of criminal activity due to their reluctance to report crime).

<sup>56</sup> Richard Winton & Daniel Yi, *Police Split on Plan for Migrant Checks: Orange County Efforts to Learn Suspects’ Status Are Lauded by Foes of Illegal Immigration, but Not by L.A. County’s Law Enforcement Leadership*, L.A. TIMES, Jan. 23, 2006, at B1.

<sup>57</sup> M.C.C. RECOMMENDATIONS, *supra* note 16, at 6–7.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.* at 8.

<sup>62</sup> See HANNAH GLADSTEIN ET AL., MIGRATION POLICY INST., *BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002–2004*, at 4 (2005), [http://www.migrationpolicy.org/pubs/MPI\\_report\\_Blurring\\_the\\_Lines\\_120805.pdf](http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf) (“[Local law enforcement access to immigration records through an expanded National Crime Information Center database] mostly indiscriminate arrests of Mexican and other Latin America nationals.”); TREVOR

especially acute in jurisdictions with 287(g) Agreements and Secure Communities functionality.<sup>63</sup> A recent report on ICE's Criminal Alien Program<sup>64</sup> supports this notion by showing a suspiciously strong correlation between the increased number of discretionary arrests of Hispanics in Irving, Texas, and gaining twenty-four hour access to ICE officers via remote video consultations.<sup>65</sup>

These justifications for sanctuary laws are persuasive. Nevertheless, in 1996, the Republican-controlled 104th Congress took issue with the increasing popularity of sanctuary laws by enacting legislation to preempt such laws and provide for local enforcement of immigration laws via 287(g) Agreements.<sup>66</sup>

#### IV. 1996 LEGISLATION AND CONTINUING LEGAL VIABILITY OF SANCTUARY LAWS

Through the enactment of section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWOR")<sup>67</sup> and section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),<sup>68</sup> Congress intended to both open the line of communication between federal agencies and local law enforcement subject to don't tell sanctuary laws and provide a framework for permissible local enforcement of immigration law through 287(g) Agreements.<sup>69</sup> The former was accomplished by section 434 of the PRWOR and section 642 of the IIRIRA, which both provide nearly identical language that proscribes state and local governments from "prohibit[ing], or in any way restrict[ing], any government entity or official from sending to, or receiving from, the Im-

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GARDNER II & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM, 8 (2009), [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf) [hereinafter WARREN INSTITUTE REPORT] (finding a strong correlation between Irving Police Department's 24/7 access to ICE officers via remote consultation and the rise of discretionary and petty misdemeanor-related arrest of Hispanics, suggesting racial profiling by the Irving police officers).

<sup>63</sup> See *infra* Part V.C.

<sup>64</sup> U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, *Fact Sheet: Criminal Alien Program* (Mar. 29, 2011), <http://www.ice.gov/news/library/factsheets/cap.htm>.

<sup>65</sup> WARREN INSTITUTE REPORT, *supra* note 62, at 8.

<sup>66</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>67</sup> *Id.* § 434.

<sup>68</sup> Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3309.

<sup>69</sup> Pham, *supra* note 44, at 1384.

migration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”<sup>70</sup> In the one principal application of this statute *vis-à-vis* a don’t tell sanctuary law, the statute was upheld as valid and succeeded in invalidating the don’t tell law at issue.<sup>71</sup>

#### A. APPLICATION OF SECTIONS 434 AND 642

In 1999, the Second Circuit through *City of New York v. United States* invalidated New York City’s Executive Order 124, which generally barred “any city officer or employee from transmitting information regarding the immigration status of any individual to federal immigration authorities.”<sup>72</sup> In this case, the City brought an action to facially challenge sections 434 and 642 as violative of the Tenth Amendment’s anti-commandeering doctrine.<sup>73</sup> Yet the court distinguished the requirements of these enactments from the requirements at issue in cases such as *Printz v. United States*<sup>74</sup> and *New York v. United States*,<sup>75</sup> which “affirmatively conscripted states, localities, or their employees into the federal government’s service.”<sup>76</sup> Here, in *City of New York*, the Second Circuit held that sections 434 and 642 do nothing more than prohibit bans on the voluntary exchange of information with the federal government and, therefore, are valid against a facial challenge to their constitutionality.<sup>77</sup> However, this does not foreshadow the doom of sanctuary laws for two reasons.

First, the holding in *City of New York* applies only to don’t tell sanctuary laws. For example, in *Sturgeon v. Bratton*, a 2009 California state court action, the Second District Court of Appeal held that LAPD’s Special Order 40 did not violate sections 434 and 642.<sup>78</sup> In so holding, the court distinguished sanctuary laws that restrict the obtainment of an individual’s immigration status from those that restrict the communication of

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<sup>70</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>71</sup> *City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999).

<sup>72</sup> *Id.* at 31.

<sup>73</sup> *Id.* at 32–33.

<sup>74</sup> 521 U.S. 898, 935 (1997) (holding that Congress cannot circumvent the Tenth Amendment limitations on compelling state action by conscripting the state’s officers directly).

<sup>75</sup> 505 U.S. 144, 161 (1992) (“[The Tenth Amendment prohibits Congress from regulating by] directly compelling [states] to enact and enforce a federal regulatory program.”).

<sup>76</sup> *City of New York*, 179 F.3d at 35.

<sup>77</sup> *Id.*

<sup>78</sup> *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 730–31 (Ct. App. 2009).

an individual's immigration status, with only the latter violating sections 434 and 642.<sup>79</sup> There is no reason to believe a federal court would rule differently. Thus, don't ask and don't enforce sanctuary laws are not preempted under the reasoning of *City of New York* and *Sturgeon*.

Second, the federal government has yet to proactively challenge a single don't tell sanctuary law.<sup>80</sup> While *City of New York* led to the invalidation of New York City's Executive Order 124, it was the City that initiated the action and not the federal government.<sup>81</sup> There are still several localities with don't tell sanctuary laws on their books, suggesting the continued presence of such laws throughout the country.<sup>82</sup>

Therefore don't tell sanctuary laws, such as New York City's Executive Order 124, are vulnerable yet unlikely to be subject to federal legal challenge. On the other hand, Special Order 40 and other don't ask or don't enforce sanctuary laws have fared well in litigation and are valid state and local actions.

#### B. 287(G) AGREEMENTS

As noted above, in 1996, Congress' push to increase local enforcement of immigration law was not limited to putting certain sanctuary laws in legal jeopardy.<sup>83</sup> The IIRIRA also added section 287(g) to the INA, which provides opportunity for state and local actors to enforce federal immigration laws with official sanction from the federal government, by entering into a memorandum of agreement ("MOA") with ICE.<sup>84</sup> Indeed, Republican Senator Charles Grassley sponsored the legislation to allow

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<sup>79</sup> *Id.* at 731 ("Section [642] prohibits local entities from restricting government entities from *maintaining* immigration information and exchanging such information with any other entity. Clearly, if Congress had wanted to prohibit restrictions on local entities obtaining such information, it could have expressly so legislated.").

<sup>80</sup> Sullivan, *supra* note 41, at 576. The federal government under the Obama Administration has, however, shown a willingness to legally challenge other state and local laws related to immigration. *See, e.g.,* United States v. Arizona, No. 10-1413 (D. Ariz. Jul. 28, 2010) (federal government suing Arizona to enjoin controversial SB 1070); United States v. Alabama, 2011 U.S. Dist. LEXIS 112362 (N.D. Ala. Sept. 28, 2011).

<sup>81</sup> *City of New York*, 179 F.3d at 31.

<sup>82</sup> *See* BERKELEY, CA, CITY COUNCIL RES. 63,711-NS (05/07); S.F., CA, CODE § 12H.2 (2009); Memorandum (01-06) from John F. Timoney, Comm'r, on Departmental Policy Regarding Immigrants to the Phila. Police Dep't (May 17, 2001), *available at* [http://www.friendsfw.org/Immigrant/Police/Phila\\_Police\\_Memo\\_01-06.pdf](http://www.friendsfw.org/Immigrant/Police/Phila_Police_Memo_01-06.pdf).

<sup>83</sup> *See supra* Part IV.

<sup>84</sup> *See* 287(g) Fact Sheet, *supra* note 8.

“local law enforcement officers to investigate, apprehend, and detain illegal aliens.”<sup>85</sup> The first 287(g) Agreement was signed in 2002.<sup>86</sup> ICE statistics show that seventy-one law enforcement agencies in twenty-five states had 287(g) Agreements as of October 29, 2010.<sup>87</sup>

There are three principal models of 287(g) Agreements. The first and most prominent model<sup>88</sup> is the “detention” model,<sup>89</sup> which gives correctional officers in detention facilities authority to act in the capacity of an ICE officer by interrogating, charging, serving arrest warrants, administering oaths, taking evidence, issuing immigration detainers,<sup>90</sup> and detaining and transporting immigrants.<sup>91</sup> Another, dubbed the “task force” model, permits local law enforcement to identify, process, and detain individuals in the field while on the beat, much as an ICE officer would do.<sup>92</sup> Lastly, the “hybrid” model consists of both a detention and task force arrangement.<sup>93</sup> Under all three models, local law enforcement with 287(g) authority must undergo extensive training administered by ICE, be citizens of the United States, clear a background check, have a minimum of two years experience in his or her current position, and not have any disciplinary actions pending.<sup>94</sup> Since January 2006, ICE claims to have identified 185,000 potentially removable aliens through the 287(g) program with the help of 1213 trained local law enforcement officers acting under its authority.<sup>95</sup>

Civil rights groups lambasted the 287(g) program, and its perceived

<sup>85</sup> Mimi E. Tsankov & Christina J. Martin, *Measure Enforcement: A Policy Shift in the ICE 287(g) Program*, 31 U. LA VERNE L. REV. 403, 413 (2010).

<sup>86</sup> *Id.* at 416.

<sup>87</sup> 287(g) *Fact Sheet*, *supra* note 8.

<sup>88</sup> *See id.*; CAPPS ET AL., *supra* note 9, at 21. In the first ten months of FY 2010, pure detention models accounted for roughly ninety percent of all 287(g) activity as gauged by the number of ICE detainers issued. *Id.*

<sup>89</sup> The detention model is also referred to in ICE literature as the “Jail Enforcement” model. *See, e.g., 287(g) Fact Sheet*, *supra* note 8. As used in this Note, the two terms are interchangeable.

<sup>90</sup> An immigration detainer is a request made by ICE to the law enforcement agency in custody of a potentially removable alien to hold that individual for up to forty-eight hours and notify ICE when, and if, that alien will be released from law enforcement so that ICE can assume custody. 8 C.F.R. § 287.7 (2003).

<sup>91</sup> Tsankov & Martin, *supra* note 85, at 417.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> 287(g) *Fact Sheet*, *supra* note 8.

<sup>95</sup> *Id.*

shortcomings are well-documented.<sup>96</sup> For example, critics of 287(g) Agreements complain that local law enforcement commit racial profiling; that there is a lack of resources to adequately fight crime and immigration; that there is a chilling effect on crime reporting by immigrants fearing deportation; that incomplete databases provide incorrect information; that there is a lack of transparency in the training program; and that there is inadequate oversight of 287(g) officers by ICE.<sup>97</sup> Many of these criticisms were substantiated by a 2009 U.S. Government Accountability Office report<sup>98</sup> that led the Obama Administration to re-evaluate and modify the 287(g) program.<sup>99</sup> Proponents of 287(g) Agreements posit that high levels of unauthorized immigrant removals will yield greater public safety through a system of “attrition through enforcement” in which immigrants self-deport out of fear of government action.<sup>100</sup> These arguments are extremely important to the respect of civil rights and public safety in our communities. However, the majority of these debates relate to the task force model<sup>101</sup> and, given that Los Angeles County has a detention model,<sup>102</sup> fall outside the scope of this Note.

The above background on the sanctuary movement and the 1996 congressional legislation is intended to show that local enforcement of immigration laws has shifted dramatically over the past quarter century. The local sympathy for war refugees gave an early rise to the sanctuary movement and its subsequent support from local governments, only to be later met by threats of federal preemption and now the pervasive 287(g) apparatus. Still, the most recent and, as this Note will argue, the most ex-

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<sup>96</sup> See, e.g., Tsankov & Martin, *supra* note 85, at 427.

<sup>97</sup> *Id.*

<sup>98</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (Jan. 2009), <http://www.gao.gov/new.items/d09109.pdf>.

<sup>99</sup> The GAO report prompted the Obama Administration to reconsider the 287(g) framework, which led to an announcement by DHS Secretary Janet Napolitano in July 2009 that the program would be governed by a new standardized MOA that emphasized oversight, accountability, and a renewed focus on removing dangerous criminals. CAPPS ET AL., *supra* note 9, at 11. Despite these changes to the 287(g) program, however, critics point out that since the MOA template still permits enforcement against non-criminals and minor offenders, the modifications to the program are limited in their effect. *Id.* at 12.

<sup>100</sup> See Jessica M. Vaughan, *Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population*, CTR. FOR IMMIGRATION STUDIES (April 2006), <http://www.cis.org/articles/2006/back406.pdf>.

<sup>101</sup> Tsankov & Martin, *supra* note 85, at 419 (“The majority of these criticisms [are] lodged against the Task Force Model enforcement efforts . . . .”); CAPPS ET AL., *supra* note 9, at 6.

<sup>102</sup> See *infra* Part VI.

pansive movement of immigration enforcement to local law enforcement agencies was caused by the focus of the next section: Secure Communities.

## V. SECURE COMMUNITIES

At its core, Secure Communities is an information sharing initiative that leverages technological advances to cross-reference FBI and DHS databases and inject a “virtual ICE presence” into jails and booking locations across the country.<sup>103</sup> The scope and speed at which this program is being implemented is staggering. Its impact on our communities deserves an in-depth look into its history, functionality, and merits.

### A. HISTORY OF SECURE COMMUNITIES

In December 2007, President George W. Bush signed into law FY 2008 appropriations that included \$200 million to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States once they are judged deportable.”<sup>104</sup> However, prior to appropriating part of the budget to DHS, Congress asked for a plan that would identify every criminal alien in a prison, jail, and correction facility, provide for their immediate removal upon release from custody, prioritize the removal of criminal aliens convicted of a crime, and define “activities, milestones, resources, and performance measures.”<sup>105</sup> In April 2008, DHS submitted such a plan to Congress entitled *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens*, which laid out the framework for today’s Secure Communities program.<sup>106</sup>

Armed with this sizeable budget appropriation, ICE swiftly and, at

<sup>103</sup> U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: QUARTERLY REPORT, FISCAL YEAR 2010 REPORT TO CONGRESS SECOND QUARTER 3 (MAY 14, 2010), available at [http://www.ccrjustice.org/files/10.%202nd%20Quarter%20FY2010%20Report%20to%20Congress%20\(part%201%20of%202\).pdf](http://www.ccrjustice.org/files/10.%202nd%20Quarter%20FY2010%20Report%20to%20Congress%20(part%201%20of%202).pdf) [hereinafter MAY 2010 ICE QUARTERLY REPORT].

<sup>104</sup> U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, 1ST QUARTERLY STATUS REPORT (APRIL–JUNE 2008) FOR SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 1 (AUG. 2008), available at <http://www.ccrjustice.org/files/3.%201st%20Quarterly%20Status%20Report%20apriljune%202008.pdf>.

<sup>105</sup> *Id.* at 2–7.

<sup>106</sup> *Id.* at 7.



times, covertly deployed the program throughout the United States.<sup>107</sup> In October 2008, Houston, Texas became the first jurisdiction with a Secure Communities program.<sup>108</sup> Shortly thereafter in November 2008, 7 jurisdictions were deployed,<sup>109</sup> which rose to 50 in May 2009,<sup>110</sup> 105 in November 2009,<sup>111</sup> 197 in May 2010,<sup>112</sup> 567 in August 2010,<sup>113</sup> and 1080 in March 2011.<sup>114</sup> As these numbers indicate, there has been an aggressive implementation effort by ICE, highlighting a roughly 915% increase in jurisdictional coverage in the last year from February 2010 to March 2011.<sup>115</sup> ICE expects Secure Communities to be “nationwide” by 2013.<sup>116</sup>

Similarly, the number of transmissions of biometric data from local law enforcement through the Secure Communities system has increased exponentially. In November 2008, 11,905 transmissions were made,<sup>117</sup> which rose to 79,861 in May 2009,<sup>118</sup> 171,089 in November 2009,<sup>119</sup>

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<sup>107</sup> For example, in Arlington, Virginia, Sheriff Beth Arthur was first notified that Secure Communities would be rolled out in her jurisdiction the night before it was activated. Decl. of Sarahi Uribe in Support of Plaintiff’s Motion for Preliminary Injunction at ¶ 12, *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement*, No. 10-2705 (2010); see also Letter from Melissa Keaney, Nat’l Immigration Law Ctr., to Richard L. Skinner, DHS Inspector General (Oct. 6, 2010), available at <http://uncoverthetruth.org/wp-content/uploads/Ltr-to-OIG-on-S-COMM-CAP-FINAL.pdf> (stating that two out of five New Mexico jurisdictions with Secure Communities interoperability were not even aware of the program’s existence).

<sup>108</sup> Muzzaffar Chishti & Claire Bergeron, *ICE to Expand New Immigration Program in Local Jails*, MIGRATION POLICY INST. (Jun. 15, 2009), <http://www.migrationinformation.org/USFocus/display.cfm?ID=732>.

<sup>109</sup> U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, IDENT/IAFIS INTEROPERABILITY MONTHLY STATISTICS THROUGH OCTOBER 31, 2009, at 2 (Dec. 4, 2009), available at <http://www.ccrjustice.org/files/2.%20IDENT%20Interoperability%20Statistics.pdf> [hereinafter SECURE COMMUNITIES OCTOBER 2009 STATISTICS].

<sup>110</sup> *Id.*

<sup>111</sup> U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, IDENT/IAFIS MONTHLY STATISTICS THROUGH AUGUST 31, 2010, at 4 (Sept. 7, 2010), available at <http://www.ccrjustice.org/files/nationwideinteroperabilitystatsaug10.pdf> [hereinafter SECURE COMMUNITIES AUGUST 2010 STATISTICS].

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Press Release, U.S. Dep’t of Homeland Sec., Immigration and Customs Enforcement, 5 Additional Iowa Counties Next to Benefit from ICE Strategy to Use Biometrics to Identify and Remove Aliens Convicted of a Crime (March 9, 2011), <http://www.ice.gov/news/releases/1103/110309cedarapids.htm> [hereinafter March ICE Press Release].

<sup>115</sup> Representing an increase from 118 jurisdictions to 1080 jurisdictions.

<sup>116</sup> March ICE Press Release, *supra* note 114.

<sup>117</sup> SECURE COMMUNITIES OCTOBER 2009 STATISTICS, *supra* note 109, at 2.

<sup>118</sup> *Id.*

318,175 in May 2010,<sup>120</sup> and 456,435 in August 2010.<sup>121</sup> The latest cumulative figures released by ICE show a total of 3.3 million transmissions made since the inception of Secure Communities in October 2008.<sup>122</sup> These transmissions have led to the removal of over 50,000 undocumented aliens since 2008, at least 13,000 of which were non-criminals.<sup>123</sup>

## B. MECHANICS OF SECURE COMMUNITIES

Prior to Secure Communities, a majority of local law enforcement did not seek to determine the immigration status of individuals in their custody.<sup>124</sup> This was in part due to don't tell sanctuary laws<sup>125</sup> and perhaps the time consuming nature of manual searches, which required communication with the ICE Law Enforcement Support Center ("LESC") in the form of an Immigrant Alien Query ("IAQ").<sup>126</sup> If the LESC found a match in their database for the individual in local law enforcement custody, they responded with an Immigrant Alien Response ("IAR") detailing the individual's immigration history.<sup>127</sup> Quite apparent in the structure of the pre-Secure Communities system, law enforcement and their officers had discretion to determine the immigration status of an individual, subject to local laws.<sup>128</sup> In effect, Secure Communities usurps this discretionary role played by local officials and digitally checks the immigration status of all individuals in law enforcement custody.<sup>129</sup> What follows is a detailed de-

<sup>119</sup> SECURE COMMUNITIES AUGUST 2010 STATISTICS, *supra* note 111, at 4.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, NATIONWIDE INTEROPERABILITY BY CONVICTION REPORT 1 (AUG. 17, 2010), *available at* [http://www.ccrjustice.org/files/nationwide\\_interoperability\\_conviction-july.pdf](http://www.ccrjustice.org/files/nationwide_interoperability_conviction-july.pdf).

<sup>123</sup> *Id.*

<sup>124</sup> MAY 2010 ICE QUARTERLY REPORT, *supra* note 103, at 2 ("[Prior to Secure Communities, d]etermining immigration status, which most LEAs did not pursue, was a separate, manual process using biographic information submitted by LEA to the ICE Law Enforcement Support Center (LESC)." (emphasis added)).

<sup>125</sup> See *supra* Part III (defining don't tell laws).

<sup>126</sup> MAY 2010 ICE QUARTERLY REPORT, *supra* note 103, at 2-3.

<sup>127</sup> *Id.*

<sup>128</sup> For example, when an officer arrested an individual suspected of being an undocumented immigrant, she could either file a manual IAQ or choose to take no action, assuming, of course, that LEA policy provides for such discretion. In contrast, jurisdictions with Secure Communities interoperability automatically send information to LESC upon the booking of all individuals.

<sup>129</sup> See MAY 2010 ICE QUARTERLY REPORT, *supra* note 103, at 3.

scription of the mechanics of Secure Communities, which is necessary to fully develop an understanding of why Los Angeles should opt-out of the program.

When an individual is booked in a Secure Communities jurisdiction, the booking law enforcement agency submits the individual's fingerprints to the State Identification Bureau ("SIB").<sup>130</sup> From there, the SIB routes the fingerprint information to the FBI for comparison to biometric data contained in the FBI Criminal Justice Information Services ("CJIS") database and its corresponding catalogue of biometric data, the Integrated Automated Fingerprint Identification System ("IAFIS").<sup>131</sup> The IAFIS database is the "FBI's national central repository for biometric-based criminal identification information submitted by local, state, federal, and tribal law enforcement agencies," which also includes biometric data for wanted persons and known or suspected terrorists.<sup>132</sup> Under the pre-2008 framework, the above steps were taken to inquire into the criminal history of the individual being booked.<sup>133</sup>

Secure Communities builds on this framework by creating "interoperability,"<sup>134</sup> between the IAFIS database and the DHS United States Visitor and Immigrant Status Indicator Technology ("US-VISIT") database and its corresponding catalogue of biometric data in its Automated Biometric Identification System ("IDENT").<sup>135</sup> IDENT is "DHS'[s] central repository for biometric identification information on international travelers to the United States who are enrolled through US-VISIT as well as known or suspected terrorists, criminals, immigration violators, and others."<sup>136</sup> Thus, the foundation of Secure Communities is known as IDENT/IAFIS Interoperability and facilitates the cross-referencing of all biometric data sent by law enforcement to be checked against the IAFIS.<sup>137</sup>

If the fingerprints match records in the IDENT database, the FBI CJIS is electronically notified and automatically issues an IAQ.<sup>138</sup> The

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> 287(g) *Fact Sheet*, *supra* note 8.

<sup>133</sup> MAY 2010 ICE QUARTERLY REPORT, *supra* note 103, at 2.

<sup>134</sup> "Interoperability" is the term of art in Secure Communities parlance referring to the technical ability to cross-reference the IDENT and IAFIS databases. *See* 287(g) *Fact Sheet*, *supra* note 8.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

IAQ is then transmitted to the LESC, much like how a manual IAQ prior to 2008 or in a non-Secure Communities jurisdiction would be transmitted.<sup>139</sup> The IAQ contains a unique identifier for law enforcement, referred to as the Originating Agency Identifier (“ORI”).<sup>140</sup> Up until this point, there has not been a determination of immigration status; that is only determined by LESC staff after looking into the individual’s records to identify prior removals, expired visas, and the like.<sup>141</sup> IAQs that do not result in an LESC determination that the individual is in violation of immigration laws are routed back to the law enforcement agency via the CJIS and SIB in a document called an IDENT Data Response (“IDR”).<sup>142</sup> Conversely, if the LESC determines that an individual is in violation of immigration laws, it generates two IARs, one that is routed to the law enforcement agency and another that is sent to an ICE field office responsible for the law enforcement jurisdiction.<sup>143</sup> In sum, assuming the system accomplishes what it purports to do,<sup>144</sup> an undocumented alien’s status, to the extent the person has a record in the IDENT database,<sup>145</sup> will likely be brought to the attention of not only the law enforcement agency maintaining custody of the individual, but also the ICE field office in the jurisdiction.<sup>146</sup> From there, ICE may or may not issue a detainer for the individual in custody, depending on the level of offense for which the individual has been ar-

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<sup>139</sup> MAY 2010 ICE QUARTERLY REPORT, *supra* note 103, at 3 (detailing the steps of matching fingerprints against IDENT database and the subsequent creation of the IAQ); U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES STATE IDENTIFICATION BUREAU DEPLOYMENT BRIEFING NEW YORK STATE 17 (June 17, 2009), available at <http://www.ccrjustice.org/files/17.%20State%20Identification%20Bureau%20Deployment%20Briefing.pdf> [hereinafter NY STATE DEPLOYMENT BRIEFING] (describing assignment of unique identifier, ORI, for each LEA with interoperability). To see a sample non-immigrant response, or a sample IAQ with an ORI, visit <http://www.ccrjustice.org/files/1.%20Sample%20IAQs%20and%20IARs.pdf>.

<sup>140</sup> NY STATE DEPLOYMENT BRIEFING, *supra* note 139, at 17.

<sup>141</sup> U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 10, at 7 (“Although Interoperability will provide positive identification of the subject, ICE technicians [in LESC] will still be required to manually compile and analyze information from nine systems to respond to each status determination request.”).

<sup>142</sup> NY STATE DEPLOYMENT BRIEFING, *supra* note 139, at 13 (showing flow chart illustrating routing of IDR to the originating LEA).

<sup>143</sup> *Id.*

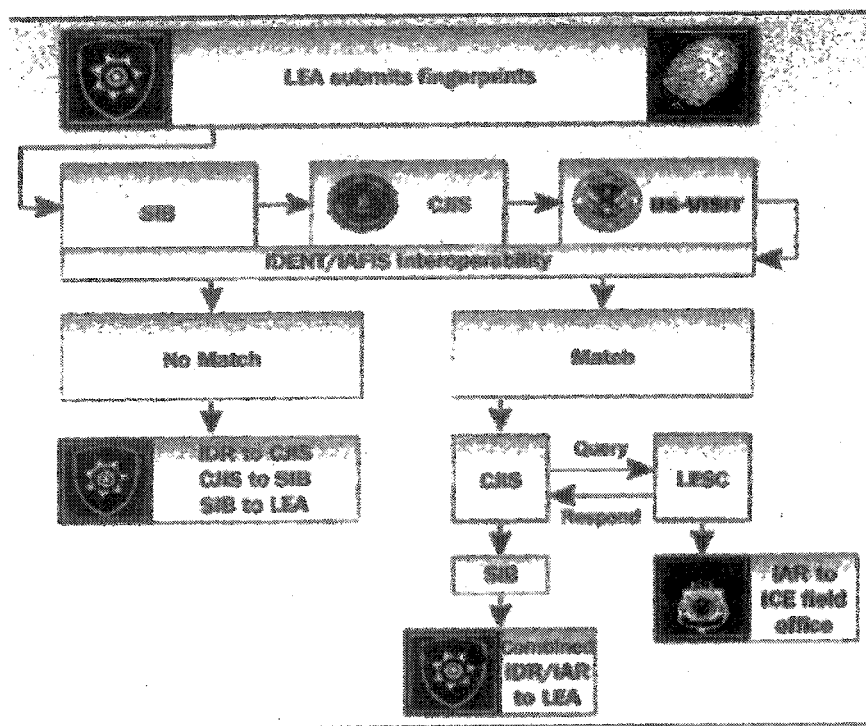
<sup>144</sup> This system is only as useful as its DHS databases are accurate and current. However, DHS databases are incomplete and not comprehensive. See *infra* Part V.C.

<sup>145</sup> See *id.* (questioning merit of Secure Communities because it relies on an incomplete database that only contains records for a subset of all undocumented immigrants).

<sup>146</sup> *Id.*

rested.<sup>147</sup>

The following image on the next page demonstrates the flow of an individual's fingerprints that originate in a jurisdiction with IDENT/IAFIS Interoperability.<sup>148</sup>



The upshot of this system is that sanctuary laws are largely circumvented.<sup>149</sup> For example, don't ask laws are obviated because computer databases are, in fact, investigating every arrested individual's immigration status and notifying local law enforcement of the results.<sup>150</sup> Similarly,

<sup>147</sup> U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 103, at 3 (describing ICE enforcement prioritization).

<sup>148</sup> U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: DETENTION AND REMOVAL OPERATIONS FIELD OFFICE DEPLOYMENT BRIEFING NEW YORK CITY 6 (May 21, 2009), available at <http://www.ccrjustice.org/files/18.%20ICE%20DRO%20Field%20Office%20Deployment%20Briefing%20NYC.pdf>.

<sup>149</sup> See *infra* Part V.C. (explaining how Secure Communities diminishes the effects of sanctuary laws).

<sup>150</sup> See *supra* Part V.B. (explaining the mechanics of Secure Communities).

don't tell policies are eviscerated because every individual booked for—not convicted of—a crime that is determined to be an immigration violator by LESC is brought to the attention of ICE.<sup>151</sup> In addition, don't enforce policies are likewise largely obviated because local law enforcement action facilitates the enforcement of immigration law against individuals in its custody.<sup>152</sup> Unsurprisingly, the same community actors praising local sanctuary laws are the ones denouncing Secure Communities.

### C. MERITS OF SECURE COMMUNITIES

Understandably, the injection of local law enforcement officials into immigration enforcement by Secure Communities<sup>153</sup> and the simultaneous spike in alien removals from the United States<sup>154</sup> have made the program fodder for highly political debate.<sup>155</sup> Likewise, immigrants' rights groups have sued ICE under the Freedom of Information Act<sup>156</sup> for information related to Secure Communities.<sup>157</sup> This political debate and legal action have birthed a contentious and salient issue in the United States, the substance of which is still emerging as more information on the Secure Communities program becomes publicly available.

ICE focuses on five main points when advocating for the expansion of Secure Communities: (1) "[i]ncreased accuracy of immigration status determination[s] made by ICE;" (2) "[r]educe[d] racial and ethnic profiling"; (3) "24/7 coverage commitment to support LEA [(law enforcement

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<sup>151</sup> *Id.*

<sup>152</sup> See *supra* Part III (defining don't enforce laws).

<sup>153</sup> See *supra* Part V.B. (discussing how local LEA implement Secure Communities); see generally U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 148 (detailing instructions for local law enforcement officials in New York City to enforce Secure Communities).

<sup>154</sup> DHS Dec. 6, 2010 Press Release, *supra* note 3.

<sup>155</sup> See, e.g., Joseph Boven, *Denver Mayoral Candidates Mejia and Linkhart Question Need for Secure Communities*, THE COLO. INDEP., Feb. 16, 2011, <http://coloradoindependent.com/74271/denver-mayoral-candidates-mejia-and-linkhart-question-need-for-secure-communities> (illustrating the politics of Secure Communities and how local enforcement of federal immigration laws plays an influential role in local political races).

<sup>156</sup> 5 U.S.C. § 552 (2011).

<sup>157</sup> ICE has not issued any regulations or implementation guidelines related to Secure Communities, so details and policies are difficult to come by, short of seeking them through the judicial process. For example, the National Day Labor Organizing Network (NDLON) filed suit against ICE under the Freedom of Information Act, which has led to the release of several internal ICE documents. *Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enforcement Agency*, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) (opinion withdrawn upon agreement of the parties).

agencies)]]; (4) “[f]ocused efforts on high-threat criminals increases community safety and reduces risks to officers”; and (5) “[i]mplementation requir[ing] little or no change to current procedures.”<sup>158</sup> While these purported benefits of Secure Communities may sound appealing in the abstract, in practice they are largely illusory.

First, Secure Communities diminishes the effect of sanctuary laws.<sup>159</sup> These laws are legal, legitimate exercises of local government authority,<sup>160</sup> and facilitate public safety through community policing.<sup>161</sup> Therefore contrary to ICE’s assertion, Secure Communities decreases community safety. Similarly, although ICE states that it focuses on high-threat criminals to increase public safety, data released by ICE indicates the contrary. For example, approximately seventy-eight percent of individuals deported through Secure Communities were non-criminals or low-level offenders.<sup>162</sup>

Second, while it is true that Secure Communities does not change current law enforcement procedures, it amplifies the role these procedures play in the day-to-day activities of officers and imposes additional costs on local governments, straining already small coffers.<sup>163</sup> For example,

<sup>158</sup> 287(g) *Fact Sheet*, *supra* note 8.

<sup>159</sup> *See supra* Part V.B.

<sup>160</sup> *See supra* Part IV.A.

<sup>161</sup> *See supra* Part III; *see also* L.A., CAL., CITY COUNCIL RES. NO. 65 (2007) (“[T]hese local regulations . . . are an affirmation that the best approach to guarding public health and safety is not to ask about immigration status when people report crimes that in no way relate to their immigration status.”).

<sup>162</sup> CTR. FOR CONSTITUTIONAL RIGHTS, PRELIMINARY BRIEFING GUIDE: NEWLY RELEASED DOCUMENTS CHRONICLE AGENCY’S DECEPTION ABOUT OPTING-OUT OF ‘SECURE COMMUNITIES’ PROGRAM 4 (Feb. 17, 2011), *available at* <http://uncoverthetruth.org/wp-content/uploads/Uncover-the-Truth-FOIA-Briefing-Guide-2-17-111.pdf> [hereinafter CCR PRELIMINARY BRIEFING GUIDE]. ICE does not attempt to define “non-criminals” in its data reporting. However, non-criminals likely refers to the subset of aliens that are arrested, but never formally charged or convicted of the offense for which they were arrested. “Low-level offenders” here includes both Level 2 and Level 3 offenders in the Secure Communities prioritization system. *See* MAY 2010 ICE QUARTERLY REPORT, *supra* note 103, at 3 (explaining the three threat level determinations in the Secure Communities prioritization system). Level 2 offenses “include minor drug offenses and property offenses such as burglary, larceny, fraud and money laundering,” while Level 3 offenses are a catch-all category that “consist[s] of less severe criminal offenses.” *Id.* The third and last remaining category of offenses, Level 1, “includes threats to national security; violent crimes such as murder, manslaughter, rape, robbery and kidnapping; and drug offenses resulting in sentences greater than 1 year.” *Id.*

<sup>163</sup> *See* Letter from Miguel Marquez, Santa Clara Cnty. Counsel, to David Ventruella, Exec. Dir. of Secure Communities 3 (Aug. 16, 2010), *available at* <http://www.ccrjustice.org/files/10-cv-3488%20Exhibits%20to%20Kessler%20Declaration.pdf> [hereinafter Marquez Letter] (“As you know, local governments are faced with increasing financial difficulties, and holding indi-

when ICE lodges a detainer against a person, law enforcement must detain him or her for up to forty-eight hours to facilitate transportation to ICE custody.<sup>164</sup> Accordingly, local law enforcement bear all the costs of detaining these individuals, until “actual assumption of custody” by ICE.<sup>165</sup> Therefore, costs associated with detainers will continue to rise in tandem with escalating numbers of detainers lodged by ICE through the Secure Communities program.

Third, it is not apparent that Secure Communities will reduce racial and ethnic profiling. Studies suggest that increased availability of immigration records and enforcement by local police could lead to, rather than discourage, racial profiling.<sup>166</sup> For example, a recent study by the Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity<sup>167</sup> in Irving, Texas, found a sharp rise in discretionary arrests of Hispanics for the least serious misdemeanors (e.g. traffic violations) after local law enforcement gained around-the-clock access to ICE officials via video conference as part of CAP.<sup>168</sup> ICE argues that Secure Communities will result in less racial profiling because everyone, not just those suspected of being undocumented, is checked against DHS databases.<sup>169</sup> However, this position fails to account for pretextual arrests that could be tainted by racial profiling by the arresting officer, a possibility against which Secure Communities does not safeguard.<sup>170</sup>

viduals pursuant to immigration detainers incurs costs and creates the risk of liability.”).

<sup>164</sup> 8 C.F.R. § 287.7(d) (2003) (“Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours . . .”).

<sup>165</sup> 8 C.F.R. § 287.7(e) (2003); see Marquez Letter, *supra* note 163, at 3.

<sup>166</sup> See WARREN INSTITUTE REPORT, *supra* note 62, at 8; Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 Ariz. L. Rev. 113, 119–21 (2007) (discussing “Chandler Roundup” local immigration enforcement program and the resulting racial profiling that stemmed from the program).

<sup>167</sup> See *supra* note 64 (describing ICE’s Criminal Alien Program).

<sup>168</sup> WARREN INSTITUTE REPORT, *supra* note 62, at 8.

<sup>169</sup> U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, SETTING THE RECORD STRAIGHT 3 (Aug. 17, 2010), available at <http://www.aila.org/content/default.aspx?docid=33041> [hereinafter ICE SETTING THE RECORD STRAIGHT].

<sup>170</sup> U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES STANDARD OPERATING PROCEDURES 3 (May 21, 2009), available at <http://www.ccrjustice.org/files/18.%20ICE%20DRO%20Field%20Office%20Deployment%20Briefing%20NYC.pdf> [hereinafter SECURE COMMUNITIES SOP]. Moreover, ICE has not issued any regulations related to Secure Communities that would, at least in theory, define appropriate and inappropriate race-related police action. However, the Secure Communities Standard Operating Procedure contains language warning against racial and ethnic profiling. *Id.* at 3. But still, ICE doesn’t require local law enforcement agencies to official agree to the terms of the SOP so,



Fourth, DHS databases are flawed, and therefore could lead to dangerous over-reliance by local law enforcement.<sup>171</sup> The DHS IDENT database does not contain biometric information for all immigration violators, but only those who are violating a visa, are fugitives, or who have been caught crossing the border illegally in the past.<sup>172</sup> This means that undocumented immigrants that entered the country surreptitiously and have never encountered law enforcement are not in the database. Moreover prior to 2005, not all fingerprints were taken digitally, and many of the pre-2005 fingerprints have not been added to the IDENT database.<sup>173</sup> Thus, there are gaps in a database that is billed as being comprehensive.<sup>174</sup> These gaps can be dangerous, as the case of Salvador Portillo-Saravia sadly demonstrates.<sup>175</sup> Portillo-Saravia, a native of El Salvador, is an undocumented immigrant who was deported earlier in 2003, and then subsequently illegally reentered the United States.<sup>176</sup> Years later, he was arrested in Loudoun County, Virginia, on charges of public intoxication and, because the Secure Communities failed to identify him as an undocumented alien, he was released after twelve hours in custody.<sup>177</sup> Four weeks later, he raped an eight-year-old girl.<sup>178</sup> Secured Communities failed because Portillo-Saravia's fingerprints taken during his 2003 removal were never entered into the IDENT electronic database. Accordingly, the IDR was returned to the Loudon jail as a "no match" and Portillo-Saravia was released.<sup>179</sup> Stories such as this one are bound to happen so long as DHS databases remain incomplete and ICE pitches Secure Communities as the comprehensive tool it clearly is not.<sup>180</sup>

For these reasons, many localities understandably have attempted to

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in effect, they have little value.

<sup>171</sup> See Chishti & Bergeron, *supra* note 108, at 2.

<sup>172</sup> Vedantam, *supra* note 19, at 2.

<sup>173</sup> Jeanne Meserve, *Virginia Case Reveals Hole in Federal Fingerprint Program*, CNN.COM (Feb. 8, 2011, 4:17 p.m.), [http://www.cnn.com/2011/CRIME/02/07/us.secure.communities/index.html?is\\_LR=1](http://www.cnn.com/2011/CRIME/02/07/us.secure.communities/index.html?is_LR=1).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*; see generally SECURE COMMUNITIES SOP, *supra* note 170, at 3 ("Through IDENT/IAFIS Interoperability, a single query by a participating local law enforcement agency (LEA) checks both systems and confirms the identity and immigration status of a subject being processed during incarceration booking.").

opt-out of Secure Communities; some with success and others with nothing but frustration caused by ICE obfuscation.<sup>181</sup> Before addressing why Los Angeles should opt-out of Secure Communities, it is necessary to address the voluntary—or involuntary—nature of the program.

#### D. IS SECURE COMMUNITIES VOLUNTARY FOR LOCAL GOVERNMENTS?

At least four localities have attempted to opt-out of the Secure Communities program: Arlington, Virginia;<sup>182</sup> San Francisco, California;<sup>183</sup> Santa Clara, California;<sup>184</sup> and the District of Columbia.<sup>185</sup> Thus far, only the District of Columbia has been successful.<sup>186</sup> A bit more information about the Secure Communities framework and history is needed to understand why localities cannot easily opt-out of the program.

Localities, and other political subdivisions of states, do not enter into an agreement with ICE or DHS to participate in Secure Communities.<sup>187</sup> In fact, some localities were not aware of the roll out of Secure Communities in their jurisdiction until the night before implementation<sup>188</sup> or, in at least one case, after the program was implemented.<sup>189</sup> Instead, ICE and the state sign an MOA that formalizes the relationship between the SIB and

<sup>181</sup> See generally Decl. of Sarahi Uribe, *supra* note 107.

<sup>182</sup> Arlington County, VA, Resolution Promoting Community Safety In Accordance With Constitutional Principles, at 1 (Sept. 28, 2010).

<sup>183</sup> See Brent Begin, *San Francisco to Defy Secure Communities Immigration Program*, THE EXAMINER (May 5, 2011, 3:21 PM), <http://www.sfexaminer.com/local/2011/05/sanfrancisco-defy-secure-communities>.

<sup>184</sup> Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction Compelling Defendant's to Produce Limited "Opt-Out" Records Responsive to Plaintiff's FOIA Requests, at 2, ND LON v. ICE, No. 10-3488 available at <http://www.ccrjustice.org/files/NDOLN%20v%20ICE%20%20Memorandum%20of%20Law%20-%20ECF.pdf> [hereinafter Memo Re: Preliminary Injunction].

<sup>185</sup> Letter from Cathy Lanier, Washington, D.C., Chief of Police, to David Venturella, Executive Director of Secure Communities (June 23, 2010), available at <http://www.ccrjustice.org/files/10-cv-3488%20Exhibits%20to%20Kessler%20Declaration.pdf> (last visited Jan. 14, 2012).

<sup>186</sup> See Memo Re: Preliminary Injunction, *supra* note 183, at 8.

<sup>187</sup> Letter from David Venturella, Executive Director of Secure Communities, to Miguel Marquez, Santa Clara County Counsel (undated), available at <http://www.ccrjustice.org/files/10-cv-3488%20Exhibits%20to%20Kessler%20Declaration.pdf>. Originally ICE stated that prior to deployment of Secure Communities Interoperability in a locality, that locality needed to agree to the terms of and sign a Statement of Intent. *Id.* However, ICE later characterized their prior requirement as an "oversight" and confirmed that "ICE does not require local jurisdictions to sign . . . any . . . document to participate in Secure Communities." *Id.*

<sup>188</sup> See Decl. of Sarahi Uribe, *supra* note 107, at 4.

<sup>189</sup> *Id.*

ICE. This MOA serves as the foundation for Secure Communities deployment in the state.<sup>190</sup> As a result, only the state can formally terminate the relationship with ICE, subject to the provisions of the MOA.<sup>191</sup> Therefore, a locality's attempt to opt-out is likely to include issues of state law and politics, in addition to federal law and politics.<sup>192</sup>

Notwithstanding the above, Secure Communities has been characterized by ICE and DHS as a voluntary program for localities.<sup>193</sup> For example in August 2010, ICE announced a procedure by which local jurisdictions could opt-out of the Secure Communities program.<sup>194</sup> This prompted San Francisco and Arlington to try to exercise this right.<sup>195</sup> Subsequent to these requests, however, DHS Secretary Janet Napolitano quickly dispelled the notion of Secure Communities being a voluntary program.<sup>196</sup> ICE then attempted to re-cast a strained definition of the word "voluntary" to mean a locality could "opt-out" of receiving IARs regarding the immigration status of an individual in their custody, even though the individu-

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<sup>190</sup> NY STATE DEPLOYMENT BRIEFING, *supra* note 139, at 20.

<sup>191</sup> Memorandum of Agreement Between U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement, and State Identification Bureau 4–6, [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesmoatemplate.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf) [hereinafter Standard MOA] (providing for termination with 30 days notice). This contracting at the state level explains, at least in part, why the District of Columbia was able to terminate its MOA.

<sup>192</sup> See, e.g., Letter from Richard Gordon, President of San Mateo County Board of Supervisors, to Edmund Brown, California Attorney General 2 (July 21, 2010) (referencing then-Attorney General Brown's rejection of San Francisco Sheriff Hennessey's request to opt-out of the Secure Communities program).

<sup>193</sup> See Letter from Zoe Lofgren, Chairwoman of House Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, to Janet Napolitano, Secretary of Homeland Sec., and Eric Holder, Attorney General of the United States, 1 (July 27, 2010) *available at* <http://www.ccrjustice.org/files/10cv3488%20Exhibits%20to%20Kessler%20Declaration.pdf> ("As we discussed, Secure Communities is a *voluntary* program that relies upon the resources of both of your agencies in order to provide State, local, and federal law enforcement agencies with information related to the immigration status of persons booked into our nation's jails and prisons." (emphasis added)); ICE SETTING THE RECORD STRAIGHT, *supra* note 171, at 6; CCR PRELIMINARY BRIEFING GUIDE, *supra* note 164, at 1–2.

<sup>194</sup> ICE SETTING THE RECORD STRAIGHT, *supra* note 169, at 6 ("If a jurisdiction does not wish to activate on its scheduled date in the Secure Communities deployment plan, it must formally notify its state identification bureau and ICE in writing (email, letter or facsimile). Upon receipt of that information, ICE will request a meeting with federal partners, the jurisdiction, and the state to discuss any issues and come to a resolution, which may include adjusting the jurisdiction's activation date in or removing the jurisdiction from the deployment plan.").

<sup>195</sup> See *supra* notes 182–83.

<sup>196</sup> See, e.g., Shankar Vedantam, *Immigration Authorities at Odds on Local Participation in Enforcement Problem*, WASH. POST, Feb. 17, 2011, at A4 (quoting Secretary Napolitano saying that Secure Communities is not an "opt-in" "opt-out" program).

al's status would still be sent to the local ICE field office, which could still lodge a detainer.<sup>197</sup> Documents released by ICE pursuant to court order demonstrate the changing definition of the word "voluntary" and ICE's attempt to use their strained definition to avoid confrontation about the implementation of the program.<sup>198</sup> Despite, or perhaps because of, this history, localities should not be obligated to share the biometric information of individuals in their custody with ICE through Secure Communities.

First and foremost, localities should be permitted to opt-out of Secure Communities because DHS officials misrepresented the voluntary nature of the program to Congress and state actors.<sup>199</sup> Second, as noted above, Secure Communities imposes additional costs on localities, which they should be able to control if local politics so dictate.<sup>200</sup> Third, nothing in the model MOA states that localities must participate in Secure Communities.<sup>201</sup> Fourth, ICE has little to no legal basis for imposing a mandatory program on local jurisdictions.<sup>202</sup> And lastly, ICE employees have confirmed that fingerprints sent from certain jurisdictions could be screened from being cross-referenced against the DHS IDENT database, making it technologically practical to opt-out.<sup>203</sup>

Thus representations made by ICE, language in the MOAs, a locality's authority to manage its own fiscal condition, and technological per-

<sup>197</sup> CCR PRELIMINARY BRIEFING GUIDE, *supra* note 162, at 1–2.

<sup>198</sup> See Email from Randi Greenberg, Secure Communities Program Outreach and Communication Director, to Various ICE Officials 1 (Aug. 26, 2009), *available at* <http://ccrjustice.org/files/Uncover-the-Truth-FOIA-Briefing-Guide-2-17-111.pdf> ("The SC initiative will remain voluntary at both the State and Local level. Once activated, 30-days written notice will be required in order to suspend or terminate the information-sharing. *Until such time as localities begin to push back on participation, we will continue with this current line of thinking.*" (emphasis added)); CCR PRELIMINARY BRIEFING GUIDE, *supra* note 162, at 1.

<sup>199</sup> See Lofgren Letter, *supra* note 192, at 1.

<sup>200</sup> CTR. FOR CONSTITUTIONAL RIGHTS, ICE AGENCY'S SPIN CANNOT OBSCURE THE TRUTH ABOUT THE SECURE COMMUNITIES PROGRAM: RIGHTS GROUPS' ADVOCACY LEADS TO CRITICAL ICE ADMISSIONS AND BREAKTHROUGHS RELATED TO THE FLAWED PROGRAM 2, <http://ccrjustice.org/files/CCR%20NDLON%20Cardozo%20Response%20to%20ICE%20Spin%209-1-10%20FINAL.pdf>.

<sup>201</sup> See Standard MOA, *supra* note 190, at 1–10.

<sup>202</sup> See ICE Legal Memorandum, "Opt-Out" Background (Sept. 20, 2010), *available at* <http://uncoverthetruth.org/wp-content/uploads/ICE-FOIA-10-2674.0002912-0002976.pdf> (finding that "a court may find that SC's infrastructure, purpose, and activities mark it a program and, thus, could find that ICE cannot compel LEA's to participate.").

<sup>203</sup> Email (author and recipients redacted), at 1 (Aug. 23, 2010), *available at* <http://uncoverthetruth.org/wp-content/uploads/FBI-SC-2169-2171.pdf> ("Under our current infrastructure it is technically possible for a SC participating site (ORI) to be deactivated from the search of IDENT . . .").

missibility all support permitting localities to opt-out of Secure Communities.

## VI. LOCAL IMMIGRATION ENFORCEMENT EFFORTS IN LOS ANGELES

Los Angeles has for years been a popular destination for immigrants, documented and undocumented alike. The story of local immigration enforcement unfolding in Los Angeles is indicative of the frustration that many jurisdictions are experiencing across the United States. As detailed below, Los Angeles has a sanctuary law, limited 287(g) Agreement, and fully deployed Secure Communities interoperability. This all provides an interesting look at the complicated immigration enforcement apparatus employed across the country.

To say the least, the history of the LAPD's interactions with immigrant communities has been tumultuous.<sup>204</sup> After the LAPD's founding in 1877, law enforcement in Los Angeles and immigrants were tightly knit, perhaps too much so, which led to allegations that the LAPD was colluding with immigrant groups in the drug trade.<sup>205</sup> This relationship soon turned sour, however, and around the time of the Great Depression the LAPD collaborated with the federal government in deporting immigrants en masse.<sup>206</sup> Similarly, after the so-called Zoot Suit Riots of 1943, LAPD was alleged to have been involved in wide-spread hostility and violence against Hispanic communities in Los Angeles.<sup>207</sup> This sentiment and strained relationship continued in the 1970s as captured by the statements of then-Chief of Police Daryl Gates: "We used to go down to the railroad stations and pick 'em up by the dozens."<sup>208</sup>

Ironically, this same Gates sought to repair relations with immigrant groups in Los Angeles after decades of turmoil. He ultimately authored Los Angeles' sanctuary law, Special Order 40.<sup>209</sup> Substantively, the Order

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<sup>204</sup> See Theodore Maya, *To Serve and Protect or to Betray and Neglect?: The LAPD and Undocumented Immigrants*, 49 UCLA L. REV. 1611 (2002) (documenting the historical relationship between the LAPD and immigrant communities in Los Angeles).

<sup>205</sup> *Id.* at 1615.

<sup>206</sup> *Id.* at 1617.

<sup>207</sup> *Id.* at 1618 ("During these riots, white servicemen, joined by civilians and police officers, searched out and beat young men of primarily Mexican descent wearing oversized 'zoot suits.'").

<sup>208</sup> *Id.* at 1620.

<sup>209</sup> *Id.*

removed two sections of the LAPD manual: one that required officers to contact the INS when an individual suspected of a crime, but not charged, was believed to be an unauthorized alien; and another that required officers to report to the INS all available information on the identity and location of individuals suspected of illegal entry into the United States.<sup>210</sup> The additional text, later added to the LAPD Manual,<sup>211</sup> is simple: “ENFORCEMENT OF UNITED STATES IMMIGRATION LAWS. Officers shall not initiate police action with the objective of discovering the alien status of a person. Officers shall not arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry).”<sup>212</sup> In 2007, the Los Angeles City Council passed a resolution reaffirming its commitment to Special Order 40 and other “local ordinances and regulations that create important distinctions between local police and federal immigration.”<sup>213</sup> The City Council added that such ordinances and regulations “have proven to be an effective way to protect the health and safety of our communities.”<sup>214</sup> Moreover, it unequivocally stated that “[f]ederal action should not be used to take away this effective local tool.”<sup>215</sup> Thus, both the LAPD and the Los Angeles City Council today stand committed to abiding by Special Order 40’s language and spirit.<sup>216</sup>

Los Angeles County’s position towards undocumented immigrants as embodied by its 287(g) Agreement with ICE deviates slightly from Los Angeles City’s policy of engagement toward undocumented immigrants as stated in Special Order 40. It is important to note that Los Angeles County provides a large share of short-term detention services for Los Angeles City and LAPD officers book individuals arrested in the City in both LAPD and Los Angeles County jail facilities.<sup>217</sup> Thus, with respect to the detention of arrested individuals, the City and the County often operate as one integrated entity, which may give rise to residents of the City being subjected to the County’s 287(g) Agreement.

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<sup>210</sup> *Id.* at 1621.

<sup>211</sup> LOS ANGELES POLICE DEPARTMENT MANUAL § 4/264.50 (2011).

<sup>212</sup> SPECIAL ORDER 40, *supra* note 7.

<sup>213</sup> L.A. CITY COUNCIL RESOLUTION NO. 65, *supra* note 161.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* (emphasis added).

<sup>216</sup> LAPD Releases PSA, *supra* note 6.

<sup>217</sup> Records and Identification Bureau, L.A. CNTY. SHERIFF’S DEP’T, [http://www.la-sheriff.org/divisions/tsdiv/record\\_id/ri\\_ovrview.html](http://www.la-sheriff.org/divisions/tsdiv/record_id/ri_ovrview.html) (last visited Jan. 13, 2012).

Los Angeles County Sheriff's Department, with the backing of the Los Angeles County Board of Supervisors, entered into a 287(g) Agreement in 2005, which was extended by a unanimous vote of the Board of Supervisors in October of 2010.<sup>218</sup> Yet, unlike nearly all other 287(g) Agreements that authorize trained local officers in the detention model to investigate an individual's immigration status *prior* to being convicted of a crime, the Los Angeles County's Agreement only authorizes 287(g) trained officers to inquire into an individual's immigration status *after* being convicted of, not merely booked for or charged with, a crime.<sup>219</sup> In reflecting on this decision, Sheriff's Department Lieutenant Margarito Robles stated, "We're targeting criminal aliens, not the general public, not the hardworking guy who's here trying to make a living for his family."<sup>220</sup> A Los Angeles County Sheriff's Department spokesperson added, "The sheriff does not want local law enforcement to enforce federal law" as a reason for adopting the limited 287(g) Agreement.<sup>221</sup> This gives residents of Los Angeles less reason to believe common interactions with the police or mistakes could lead them into a removal proceeding. Therefore, this policy is largely consistent with the community engagement and policy objectives of Special Order 40.

On the other hand, the deployment of Secure Communities in Los Angeles is in strong tension with the provisions and spirit embodied by Los Angeles's 287(g) Agreement and Special Order 40. Secure Communities was officially deployed in Los Angeles County on August 26, 2009, and thereby established interoperability at more than forty state and local law enforcement agencies located within Los Angeles County.<sup>222</sup> For example, LAPD booking locations gained interoperability at the same time

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<sup>218</sup> MPI DELEGATION AND DIVERGENCE, *supra* note 9, at 54 (Los Angeles County signed original MOA in 2005); Robert Faturechi, *Program to ID Illegal Migrants in Jails Extended: Sheriff's Custody Assistants Will Keep Sharing Their Findings with U.S. Officials*, L.A. TIMES, Oct. 13, 2010, at AA-5.

<sup>219</sup> See MPI DELEGATION AND DIVERGENCE, *supra* note 9, at 54; Faturechi, *supra* note 217; Letter from Lee Baca, Los Angeles County Sheriff, to Los Angeles County Board of Supervisors (Oct. 12, 2010) available at [http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r\\_287losangelescountysheriffsoffice101012.pdf](http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287losangelescountysheriffsoffice101012.pdf) ("This MOA will allow the department to continue assisting ICE in identifying inmates convicted of a crime, who are serving time in the County jail and about to be released back into the community, when they should be held by ICE for review of their immigration status.").

<sup>220</sup> Eleanor Stables, *State and Local Enforcement—287(g) Program*, MIDWEST COALITION FOR HUMAN RIGHTS, <http://www.midwesthumanrights.org/state-and-local-enforcement-287-g-program> (quoting Margarito Robles).

<sup>221</sup> Faturechi, *supra* note 217.

<sup>222</sup> U.S. ICE Press Release, *supra* note 11.

when Los Angeles County Sheriff's Department's booking locations gained interoperability.<sup>223</sup> Thus, most individuals booked by the LAPD, either at an LAPD booking location or a Los Angeles County booking location, are now passed through the Secure Communities system.<sup>224</sup>

In discussing the merits of the Los Angeles 287(g) Agreement, Supervisor Zev Yaroslavsky characterized the Board's view that they "would be part of [the 287(g)] program as long as [they] were not participating in a system whereby people who were arrested but not convicted of a crime would be deported."<sup>225</sup> He emphasized "that was not what we were getting into this thing to do."<sup>226</sup> Yet this is precisely what both Los Angeles City and County are doing through the Secure Communities initiative, which has led to large-scale removals of *non-criminal*, undocumented aliens.<sup>227</sup> For example, in Los Angeles County as much as thirty-nine percent of all individuals removed via Secure Communities were non-criminals.<sup>228</sup> According to the ICE Assistant Deputy Director, Beth Gibson, this number may represent the cross-section of apprehended individuals that are removed from the United States "before legal proceedings were completed against them."<sup>229</sup> But still, it is difficult to imagine how the deportation of thousands of individuals not convicted of a crime, resulting largely from LAPD action, can be consistent with Special Order 40's policy "that undocumented alien status in itself is not a matter for police action."<sup>230</sup> If an individual is removed from the United States for an immigration violation and is never formally charged with or convicted of a crime, in the eyes of the community it was the police action related to this individual's immigration status that led to the removal.

One recent incident in Los Angeles highlights the broad sweep of Secure Communities and colors the tension it creates with Special Order 40 and community engagement. In September 2010, in the predominantly

<sup>223</sup> *Id.* (noting that all LEA within Los Angeles County using the Los Angeles County Regional Identification System at booking—LAPD being one of them—gained interoperability at the same time).

<sup>224</sup> *Id.*

<sup>225</sup> Transcript of Meeting of the Los Angeles County Board of Supervisors at 92, Oct. 12, 2010.

<sup>226</sup> *Id.*

<sup>227</sup> See APRIL 2010 ICE COUNTY REPORT, *supra* note 19.

<sup>228</sup> *Id.* (April 2010 figures released by ICE indicate that of the 4925 individuals removed through Secure Communities from Los Angeles County 1899 were "non-criminals.").

<sup>229</sup> Vedantam, *supra* note 20.

<sup>230</sup> SPECIAL ORDER 40, *supra* note 7.



Central American neighborhood of Westlake, Los Angeles, Guatemalan day laborer Manuel Jamines was shot and killed by LAPD officers after allegedly lunging at them and wielding a knife.<sup>231</sup> The LAPD officers reportedly ordered Mr. Jamines to drop the knife in both English and Spanish, but he refused and quickly found himself on the wrong side of what many witnesses claim was an excessive use of force by the LAPD.<sup>232</sup> Protests swept the neighborhood for days on end, which culminated with the arrest of several immigrants.<sup>233</sup> One account conveys a broad sweep of the streets and indiscriminate arrests of anyone in the area, including a Guatemalan man leaving church and a Mexican man leaving a local market.<sup>234</sup> Even though these individuals were not convicted of any crime, because of the reach of Secure Communities, ICE was notified of their presence in LAPD custody, lodged a detainer against them, and initiated removal proceedings.<sup>235</sup> This LAPD action cannot be divorced from immigration enforcement.

## VII. CONCLUSION

Secure Communities is unsustainably at odds with Special Order 40 and the policy objectives embodied by the Los Angeles County 287(g) Agreement. For this reason alone, Los Angeles County should move to opt-out of Secure Communities. However, as shown above,<sup>236</sup> there are several other reasons to reject Secure Communities and its effect on local enforcement of federal immigration laws; namely, it diminishes the effect of sanctuary laws, injects local law enforcement into the enforcement and associated costs of immigration regulation, is susceptible to racial profiling, and induces over-reliance on incomplete databases. These flaws in Secure Communities, which are applicable across the United States, and the tension Secure Communities creates with local policy judgments here in Los Angeles, demonstrate that Secure Communities is a poor fit for the Los Angeles public safety model. Much to the chagrin of the Los Angeles

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<sup>231</sup> Colleen Flynn, *L.A. Chapter Defends Arrestees in Wake of Police Killing of Westlake Day-Laborer*, NAT'L LAWYERS GUILD LOS ANGELES CHAPTER, Fall 2010, at 3, 8.

<sup>232</sup> *Id.*

<sup>233</sup> Hector Becerra & Kate Linthicum, *Protest of LAPD Draws Varied Crowd: Some Were There 'to Support a Friend,' Others Wore Socialist and Communist Garb*, L.A. TIMES, Sept. 19, 2010, at A41.

<sup>234</sup> Flynn, *supra* note 230, at 8.

<sup>235</sup> *Id.*

<sup>236</sup> *See supra* Part V.C.

City Council, Secure Communities is taking away the “effective local tool” known as Special Order 40.<sup>237</sup> Just the same, Los Angeles County is participating in a program that is deporting non-criminals, contrary to the Board of Supervisors’s stated interest. Accordingly, Los Angeles County should move to opt-out of Secure Communities.

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<sup>237</sup> L.A. CITY COUNCIL RESOLUTION NO. 65, *supra* note 161.