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SOVEREIGN RESISTANCE TO FEDERAL IMMIGRATION ENFORCEMENT IN STATE COURTHOUSES

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The federal government has maintained its supremacy over the enactment of immigration laws for over a century. Enforcement of those laws, however, is increasingly a matter of cooperative federalism – or uncooperative, as the case may be. In response to a recent trend of state and local resistance to President Trump's stepped-up enforcement regime, immigration authorities have a new strategy: Storm the courts. Increasingly, federal immigration agents are targeting state courthouses, typically in plain clothes, without identification and without warrants, to carry out largely civil apprehensions of unauthorized immigrants. This unprecedented practice, in some cases involving unconstitutional tactics, impairs the ability of immigrant litigants, witnesses and their families to seek and pursue justice in state courts. An unusual alliance of district attorneys and Legal Aid lawyers are speaking out and walking out of courts in protest. Activists and scholars together are looking for legal strategies to curb the practice. This article identifies the normative underpinnings of maintaining courthouses as sensitive locations and illuminates the Constitutional claims that states and individuals may explore to resist or restrain federal immigration authorities from state courts.

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One of President Trump's first acts in office was to sign an executive order that empowered Immigration and Customs Enforcement (ICE) to undertake

an unprecedented effort to identify, detain and remove *any* of the 11 million immigrants *alleged* to be unlawfully present in the United States or otherwise removable.[1] As a result, immigration enforcement in the interior of the United States increased 37% in the first six months of the Trump presidency.[2] The increased enforcement efforts outpaced the hiring of ICE agents, leading to relaxed background checks for new recruits, including drug screening.[3] Meanwhile, ICE is targeting immigrants at hospitals, schools and other places in violation of a longstanding Department of Homeland Security (DHS) policy against enforcement actions in "sensitive locations," creating fear and mistrust of police in many immigrant communities.[4]

One of the most disruptive enforcement trends involves increased ICE presence inside and outside of state and local courthouses. In New York State alone, reports of ICE agents appearing in courthouses, including family and housing courts, increased 1,100% in 2017.[5] Even if ICE were honoring the sensitive location policies, DHS has recently excluded courthouses from protection.[6] Subsequently, DHS created a separate directive to address enforcement actions in courthouses, claiming to "codify" the practice.[7] The policy limits courthouse arrests to specific targets and shields friends, family and

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1. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (emphasis added).

2. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 11-12 (2017).

3. The Office of the Inspector General (OIG) released a report in early 2017 detailing the staffing, training and management problems within the Department of Homeland Security. That report is no longer publicly available, but news outlets reported on its contents. Tal Kopan, *Report: ICE Deportations Hindered by Internal Disorganization*, CNN (Apr. 20, 2017, 5:08 PM), https://www.cnn.com/2017/04/20/politics/ice-deportations-inspector-general/index.html (reporting that the OIG's report cited to deportation officers' 'overwhelming' caseloads and lack of 'well-defined policies and procedures'). In a subsequent memo, the OIG expressed concerns about relaxing background requirements for hiring the 15,000 new officers called for by President Trump. U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-17-98-SR, SPECIAL REPORT: CHALLENGES FACING DHS IN ITS ATTEMPT TO HIRE 15,000 BORDER PATROL AGENTS AND IMMIGRATION OFFICERS (2017); *see also*, Todd Gillman & Caroline Kelly, *Call for 15,000 More Border Officers Raises Concerns With Homeland Security's Internal Watchdog*, DALLAS NEWS (Aug. 1, 2017), https://www.dallasnews.com/news/politics/2017/08/01/goal-adding-15000-border-immigration-force-prompts-doubts-homeland-security-watchdog (reporting that members of Congress, immigrant advocacy groups and immigration policy experts expressed concern over the contents of the report and the relaxation of polygraph and drug screening hiring requirements in order to speed up the process).

4. Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement, to Field Office Directors, Special Agents in Charge, and Chief Counsel, U.S. Immigration & Customs Enforcement, Enforcement Actions at or Focused on Sensitive Locations (Oct. 23, 2011), https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf [hereinafter Morton Memo].

5. Nancy Morawetz & Lindsay Nash, *Get ICE out of N.Y.'s Courtrooms*, N.Y. DAILY NEWS (Jan. 25, 2018, 5:00 AM), http://www.nydailynews.com/opinion/ice-n-y-s-courtrooms-article-1.3777389.

6. Screenshots from the ICE.gov website in January 2017 and March 2017, chronicle the evolution of ICE's increasingly limited position. *Improving Relationships with ICE: Resource Center*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/Topics/Courthouse-Facilities/Improving-Relationships-with-ICE/ICE.aspx (last visited Feb. 11, 2018); *FAQ on Sensitive Locations and Courthouse Arrests*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/ero/enforcement/sensitive-loc (last visited Feb. 4, 2018).

7. DEP'T OF HOMELAND SEC., DIRECTIVE NO. 11072.1, CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES 2 (Jan. 10, 2018) [hereinafter DIRECTIVE NO. 11072.1]; *FAQ on Sensitive Locations and Courthouse Arrests*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/ero/enforcement/sensitive-loc (last visited Feb. 4, 2018) (Answering the question of "Why has ICE issued a policy on enforcement actions inside courthouses?" with, "ICE felt it was appropriate to more formally

witnesses absent "special circumstances."[8] Many observers expect that the new policy makes it even more likely that courthouse arrests will proliferate nationwide.[9]

Led by lawyers and judges, protests against these policies are reverberating around the country. A number of state judges have spoken out against courthouse apprehensions for a variety of reasons, including that the courthouses should be accessible and safe for all litigants, witnesses and victims, regardless of immigration status. In the most strongly-worded rebuke from the bench, California Chief Justice Tani Cantil-Sakauye accused DHS of using the courthouses as "bait" to "stalk" immigrants who "pose no risk to public safety."[10] In August of 2017, the American Bar Association House of Delegates "overwhelmingly approved" a resolution urging federal immigration officials, "to treat courthouses as sensitive locations and to only conduct such arrests there 'upon a showing of exigent circumstances' [and with supervisory approval]."[11] Hundreds of Legal Aid lawyers in Brooklyn and the Bronx have staged walkouts to protest the ICE practice, calling on the New York court system to keep ICE out.[12] The new policy released by ICE in January 2018 falls far short of that call to action.[13] The novelty of the issue, paired with the intensity of the debate over its legality, is forcing state and

codify its practices in a policy directive that its law enforcement professionals and external stakeholders can consult when needed.").

8. DIRECTIVE NO. 11072.1, *supra* note 7.

9. Reception of the new DHS courthouse arrest policy has been mixed. Some stakeholders posit that it is "a good start," while others view it as a self-serving gesture by DHS that affords little added protection or comfort to immigrants accessing the court system. Scott Martelle, *A New ICE Directive Limiting Arrests in Courthouses is a Small Silver Lining in a Dark Cloud*, L.A. TIMES (Feb. 1, 2018, 11:35 AM), http://www.latimes.com/opinion/opinion-la/la-ol-ice-courts-arrests-deportations-20180201-story.html (quoting the response from California Chief Justice Tani Cantil-Sakauye). My conversations with activists and attorneys in New York have revealed deep skepticism regarding whether and how this new policy will be enforced at all.

10. Press Release, *Chief Justice Cantil-Sakauye Objects to Immigration Enforcement Tactics at California Courthouses*, CAL. CTS. NEWSROOM (Mar. 16, 2017), https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses.

11. AM. BAR ASS'N, RESOLUTION 10C (2017), https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/10C.pdf. The New York Bar Association's House of Delegates also approved a resolution that urges ICE "to include courthouses as a 'sensitive location' in its Sensitive Locations Policy" and "urges Congress to pass the 'Protecting Sensitive Locations Act' and to amend Section 287 of the immigration and nationality Act to codify the Sensitive Locations Policy and to include courthouses as a sensitive location therein." *See* N.Y. BAR ASS'N, NYSBA STAFF MEMORANDUM, HOUSE OF DELEGATES AGENDA ITEM #7 (Jan. 26, 2018); *see also*, Colby Hamilton, *State Bar Association Adopts Domestic Violence, Immigration Positions*, N.Y.L.J. (Jan. 26, 2018), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/01/26/state-bar-association-adopts-domestic-violence-immigration-positions/.

12. Noah Hurowitz & Felipe de la Hoz, *Legal Aid Lawyers Stage Walkout After Yet Another ICE Court Arrest*, VILLAGE VOICE (Nov. 28, 2017), https://www.villagevoice.com/2017/11/28/legal-aid-lawyers-stage-walkout-after-yet-another-ice-court-arrest/; Gwynne Hogan, *Public Defenders Walk Out of Bronx Courthouse After College Student Detained By ICE*, WNYC (Feb. 8, 2018), https://www.wnyc.org/story/public-defenders-walk-out-bronx-courthouse-after-college-student-detained-ice/.

13. DIRECTIVE NO. 11072.1, *supra* note 7. The Directive asks that "ICE officers and agents should generally avoid enforcement actions in courthouses" and requires that "[p]lanned civil immigration enforcement actions inside courthouses [to] be documented and approved," including documentation of "the physical address of planned civil immigration enforcement actions in accordance with standard procedures for completing operational plans, noting that the target address is a courthouse."

local officials to examine whether and to what extent states or individuals can restrict or enjoin ICE agents in or near courthouses.

Increasingly questionable enforcement tactics are triggering veritable courtroom brawls. Some examples from New York and Denver are especially stark. ICE agents are forcefully taking individuals into custody without a warrant, probable cause or even reasonable suspicion.[14] In some cases, plain-clothed ICE agents stake out their targets in the courthouses and question other people in the courthouse who they believe to be undocumented about their identification, giving rise to allegations of racial profiling.[15] In many states, immigrant advocates report that the presence of ICE in the courthouse has created adversarial relationships between elected officials, lawyers, judges and court personnel, and has impeded access to justice for many immigrants, including domestic violence victims.[16]

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14. Steve Coll, *When a Day in Courts is a Trap for Immigrants*, NEW YORKER (Nov. 8, 2017), https://www.newyorker.com/news/daily-comment/when-a-day-in-court-is-a-trap-for-immigrants; THE FUND FOR MODERN COURTS, PROTECTING THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE: IMPACT OF ICE ARRESTS ON NEW YORKERS' ACCESS TO STATE COURTHOUSES (2017); Julie Gonzales, *04. 28.2017 ICE Arrest in Denver Courthouse, 1 of 3*, YOUTUBE (May 9, 2017), https://www.youtube.com/watch?v=h2ewKWPJCLI (showing a man pinned to the ground by ICE agents during an arrest); *see also* Everton Bailey, Jr., *Oregon Lawmakers Demand Investigation, Apology Over Mistaken ICE Stop*, OREGONIAN (Sept. 20, 2017), http://www.oregonlive.com/hillsboro/index.ssf/2017/09/oregon_lawmakers_demand_invest.html (documenting the racial profiling of a United States citizen and county employee exiting the Washington County Courthouse).

15. Deborah Sontag & Dale Russakoff, *Who Polices the Immigration Police?* PROPUBLICA (Apr. 16, 2018) ("An investigation by ProPublica and the Philadelphia Inquirer found numerous cases in which ICE agents and police officers allegedly engaged in racial profiling, conducted warrantless searches, detained people without probable cause, fabricated evidence, and, in one extreme instance, solicited a bribe."), https://www.propublica.org/article/pennsylvania-ice-who-polices-the-immigration-police; Andrea Castillo, *'Collateral arrests' by ICE Amount to Racial Profiling, Violate Immigrants' Rights, Lawyers Say*, L.A. TIMES, (Feb. 4, 2018, 5:00 AM), http://www.latimes.com/local/lanow/la-me-ice-collateral-arrests-20180204-story.html; Leon Neyfakh, *Secret Police: ICE Agents Dressed in Plainclothes Staked out a Courthouse in Brooklyn and Refused to Identify Themselves*, SLATE (Sept. 15, 2017, 4:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/09/plainclothes_ice_agents_in_brooklyn_refused_to_identify_themselves.html; Devlin Barrett, *DHS: Immigration Agents may Arrest Crime Victims, Witnesses at Courthouses*, WASH. POST (Apr. 4, 2017), https://www.washingtonpost.com/world/national-security/dhs-immigration-agents-may-arrest-crime-victims-witnesses-at-courthouses/2017/04/04/3956e6d8-196d-11e7-9887-1a5314b56a08_story.html?utm_term=.ae7e5bc1dd30.

16. Chief Justices in California, Washington, Oregon and New Jersey have sent letters to the Trump Administration protesting the practice. Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J.F. 410, 413 nn.15-18 (2017). (Lasch also documents the news coverage of ICE enforcement actions in courthouses in Denver, Colorado, Massachusetts and Connecticut). In New York, a particular incident involving an altercation between ICE officers, court officers and the Legal Aid lawyer of the individual targeted resulted in a walkout of over 100 Legal Aid attorneys in Brooklyn. Hurowitz & de la Hoz, *supra* note 12. Other reports have documented incidents in Massachusetts, Texas, Michigan and Vermont. NE. SCH. OF LAW IMMIGRANT JUSTICE CLINIC, BLOCKING THE COURTHOUSE DOORS: ICE ENFORCEMENT AT MASSACHUSETTS COURTHOUSES AND ITS EFFECTS ON THE JUDICIAL PROCESS 3-4 (2018); *Undocumented Transgender Woman Filing Domestic Violence Claim Arrested at El Paso Courthouse by ICE, Official Says*, CBS NEWS (Feb. 16, 2017, 5:35 AM), https://www.cbsnews.com/news/undocumented-transgender-woman-filing-domestic-violence-claim-arrested-at-el-paso-courthouse-by-ice-official-says/; Kathleen Masterson, *ICE Agents Arrest Dairy Worker En Route To Burlington Courthouse*, VT. PUBLIC RADIO (Mar. 16, 2017), http://digital.vpr.net/post/ice-agents-arrest-dairy-worker-en-route-burlington-courthouse#stream/0; Sarah Cwiek, *Father Arrested by Immigration Agents at Oakland County Custody Hearing*, MICH. RADIO (Mar. 30, 2017), http://michiganradio.org/post/father-arrested-immigration-agents-oakland-county-custody-hearing; *see also* James Queally, *Fearing Deportation, Many Domestic Violence Victims are Steering Clear of Police and Courts*, L.A. TIMES (Oct. 9, 2017, 5:00 AM), http://www.latimes.com/local/lanow/la-me-ln-undocumented-

Citing the safety of enforcement agents, the cost-saving ease of targeting individuals at the courthouse and the lack of cooperation in sanctuary jurisdictions where local law enforcement is not cooperating with federal immigration officials, ICE defends activities in courthouses as a matter of public safety and requires that such actions "be conducted in collaboration with court security staff, and utilize the court building's non-public entrances and exits."[17] Thus, the current narrative pits the access-to-justice concerns of immigrants' attorneys and state judiciaries against the federal executive's claim to immigration enforcement power. This narrative is incomplete, as the issue is rife with federalism questions concerning the role of states in the enforcement of federal immigration laws.

Whether and to what extent states can regulate immigration enforcement is a relatively new inquiry that has emerged in the last seventeen years – an era that scholars have dubbed "a new period of immigration federalism."[18] Novel questions of constitutional authority abound: How exclusive is the federal ability to enforce immigration law when the states have been conscripted in the effort? If an untrained, unqualified ICE agent violates the Constitution while making an apprehension in a state courthouse, is there a constitutional tort remedy? Can a state sue ICE in federal court for injunctive relief barring them from state court properties? Could a state pass a law to achieve the same aims, and, if so, is it vulnerable to a federal preemption challenge? Does an unlawfully arrested immigrant have standing to sue ICE, and if so, in state or federal court – or both?

This article surveys the wide range of possible legal avenues that states and individuals may pursue to curb or stop ICE from arresting immigrants in state courthouses. It builds on recent scholarship that elucidates a common-law privilege against civil arrests in courthouses. First, by identifying the normative expressions that DHS's sensitive locations policy embodies, which are rooted in the common law privilege. Next, Part Two explores the legal theories of federalism that inform the ability of state governments to resist immigration enforcement actions. Part Three examines individual rights that may be violated when ICE carries out an action in a courthouse and questions whether those violations could serve as a basis for state litigation *parens patriae* or alternatively, for individual litigation that would survive a qualified immunity challenge. In sum, this article identifies the federal government's

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crime-reporting-20171009-story.html (documenting chilling effect on domestic violence victims, in particular); Liz Robbins, *A Game of Cat and Mouse With High Stakes: Deportation*, N.Y. TIMES (Aug. 3, 2017), https://www.nytimes.com/2017/08/03/nyregion/a-game-of-cat-and-mouse-with-high-stakes-deportation.html (detailing efforts by court lawyers and judges to discourage ICE from making arrests in courthouses).

17. DIRECTIVE NO. 11072.1, *supra* note 7, at 2; *FAQ on Sensitive Locations and Courthouse Arrests*, *supra* note 7.

18. PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 3 (Cambridge Univ. Press 2015) ("To put the answers from our analysis most simply, we find that the post-2001 period is, indeed, a new phase in immigration federalism, with subfederal activities that have accelerated in the past decade.").

rationale for exercising restraint in carrying out ICE arrests, contemplates how state governments might proactively constrain the practice, and exposes a liability to both state and federal actors for allowing ICE arrests in state courts to continue in violation of individual rights. What follows is not meant to be an exhaustive list of legal theories, but rather a starting point for further critique, exploration and experimentation by scholars, jurists, legislators, and activists alike.

I. PRIVILEGE FROM ARREST AND SENSITIVE LOCATIONS

Arrest in the immigration context can be confusing. Largely a civil matter, immigration law does contain limited criminal grounds for arrest.[19] Additionally, the intersection of criminal law and immigration (commonly referred to as "crimmigration") is replete with overlapping and conflicting individual rights and federal and state obligations to respect them.[20] As such, to refer to an "arrest" or even a "civil arrest" in the immigration context lends an element of criminality to the person targeted for enforcement and credibility to the agency and its action – neither of which may be accurate.

However, the courts have not been consistent in how they define arrests. Reading all of the jurisprudence together, a reasonable working definition of arrest is, "any detention exceeding the permissible bounds of a stop."[21] Immigration arrests in particular require that, prior to the arrest, an agent possess:

> a *reasonable suspicion*, based on specific articulable facts involving more than the mere appearance of the individual being of Hispanic descent, that the individual is either illegally in the United States or is guilty of committing an offense against the Immigration Laws of the United States for which the [DHS] has jurisdiction.[22]

The contours of what constitutes a "reasonable suspicion" are undefined, but precedent expressly prohibits apprehensions based solely on

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19. There are four crimes in the Immigration and Nationality Act: (1) Failure to depart after a final order of removal entered/willful failure to abide by terms of release on order of supervision; (2) Helping others enter without authorization or harboring; (3) Entry of alien at improper time or place and immigration fraud; and (4) reentry after deportation. 8 U.S.C. §§ 1253, 1324, 1325, 1326 (2012).

20. *See* Lasch, *supra* note 16, at 415 n.25, (citing Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367, 378 (2006)); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137 (2009); *see also* Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 599 (2015); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1459 (2014).

21. *See* Thomas K. Clancy, *What Constitutes an Arrest within the Meaning of the Fourth Amendment*, 48 VILL. L. REV. 129, 193 (2003).

22. Murillo v. Musegades, 809 F. Supp. 487, 503 (W.D. Tex. 1992) (emphasis added) (granting plaintiffs' petition for preliminary injunction to bar Border Patrol agents from "harassing" residents of a Texas school district based on their appearance).

the appearance of the individual targeted (i.e. racial profiling).[23] Because the term "arrest" implies criminal activity, because only a low threshold of "reasonable suspicion" is required to take an immigrant into custody, and because of the practice of ICE in depriving individuals of basic rights that would otherwise be respected if the arrest were criminal in nature, the more accurate term in most cases is "apprehension."[24] For the purposes of this article, references to immigration apprehensions includes all detentions or deprivations of liberty made by ICE agents or other DHS agents, exceeding the permissible bounds of a stop, whether the predicate for the apprehension was of a criminal or civil nature.

In the first scholarly examination of the subject of the new phenomenon of civil immigration apprehensions in state courthouses, Christopher Lasch makes the case that the well-settled common-law doctrine of "privilege from arrest" limits the ability of law enforcement to undertake an arrest in or near a courthouse.[25] The privilege, he says, "receded from the body of modern law as the practice of commencing civil litigation with an arrest fell by the wayside . . . . *Arrests* under circumstances in which the privilege would apply all but disappeared."[26] The recent, dramatic rise in immigration apprehensions in courthouses, he argues, gives the privilege modern application.[27] Lasch identified "two distinct strands" of the privilege: One protects the individual accessing the court and another protects the place and vicinity of the court itself.[28]

Another modern development can be found in federal immigration enforcement policies that were enacted long after the privilege was established, which direct immigration agents to avoid certain places in carrying

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23. *Id*. at 500. Additional discussion of the legality of ICE arrests under the Fourth and Fifth Amendments is discussed *infra*.

24. Notably, immigration enforcement agencies also used the term "apprehension" to describe taking an individual into custody for immigration violations as late as 2013. Memorandum from David V. Aguilar, Deputy Commissioner, U.S. Customs & Border Patrol, to Assistant Commissioner, Office of Air and Marine, Assistant Commissioner, Office of Field Operations, Assistant Commissioner, Office of Internal Affairs, Chief, Office of Border Patrol, Chief Counsel, U.S. Customs & Border Patrol, U.S. Customs and Border Protection Enforcement Actions at or Near Certain Community Locations (Jan. 18, 2013), https://foiarr.cbp.gov/docs/Policies_and_Procedures/2013/826326181_1251/1302211111_CBP_Enforcement_Actions_at_or_Near_Certain_Community_Locations_%7BSigned_M.pdf [hereinafter Aguilar Memo]; *see also* Memorandum from Julie L. Myers, Assistant Secretary, U.S. Immigration & Customs Enforcement, to All Field Office Directors & All Special Agents in Charge, U.S. Immigration & Customs Enforcement, Field Guidance on Enforcement Actions or Investigative Activities At or Near Sensitive Community Locations (July 3, 2008) [hereinafter Myers Memo] (quoting Memorandum from James A. Puleo, Acting Associate Commissioner of the Office of Operations, U.S. Immigration & Nationality Serv., to District Directors & Chief Patrol Agents, U.S. Immigration & Nationality Serv., Enforcement Activities at Schools, Places of Worship or at Funerals or Other Religious Ceremonies, HQ 807-P (May 17, 1993), http://library.niwap.org/wp-content/uploads/2015/IMM-Memo-SensLocationsEnforce.pdf [hereinafter Puleo Memo]). However, the most recent report from DHS uses the language "administrative arrest" to describe immigration apprehensions, reflecting the normative trend toward the government's criminalization of immigration violations. DEP'T OF HOMELAND SEC., *supra* note 2, at 1.

25. Lasch, *supra* note 16.

26. *Id*. at 411, 442 (emphasis added).

27. *Id*. at 411.

28. *Id*.

out apprehensions. As discussed in the next section, those policies do not take into consideration the common law privilege against arrest in or near a courthouse, but they do make a connection between apprehensions in certain places and erosion of the public trust in ways that are consistent with "the interests underlying the privilege – the administration of justice and the vindication of individual rights."[29] Because many of the state's rights and individual rights claims to challenge the practice rely on a balancing of governing powers and individual liberties, it is important to examine the development of existing policies in light of the privilege in considering resistance strategies.

A. *The Origins of the "Sensitive Locations Memo"*

In 1993, the enforcement arm of the former Immigration and Naturalization Services ("INS," now the DHS) enacted the first policy explicitly restricting immigration enforcement actions in "sensitive locations" (the "Puleo Memo").[30] Churches, hospitals, and schools were identified by immigration enforcement leadership as locations where the occurrence of immigration enforcement would unnecessarily alarm or harm communities.[31] The Puleo Memo required INS to "attempt to avoid apprehension of persons and to tightly control investigative operations on [those] premises."[32] Short of banning enforcement activities in these places, it required advance written approval from a District Director if the operation was "likely to involve apprehensions."[33] Factors that District Directors were asked to consider in determining whether to approve an enforcement action at a sensitive location included: (a) "the availability of alternative measures;" (b) "the importance of the enforcement objective in the context of Service priorities;" (c) "measures . . . to minimize the impact on the operation of the school or place of worship;" and (d) "whether the action has been requested or approved by managers of the institution involved."[34] That last factor contemplates a modicum of community agency in immigration policing that no longer exists.

The genesis of the policy appears to have been errant enforcement actions in several churches and at least one school in the late 1980s and early 1990s.[35] The INS/DHS conducted an internal review of enforcement policies

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29. Complaint, *In re C. Doe, D. Doe, F. Doe, K. Doe, O. Doe, T. Doe, Y. Doe, and J. Doe, Commonwealth of Massachusetts Supreme Judicial Court for Suffolk County* (filed Mar. 15, 2018, on file with the author).

30. *See* Puleo Memo, *supra* note 24, at 1.

31. *Id.*

32. *See id.*

33. *See id.*

34. *See id.* at 2.

35. *INS Sets New Standards for Enforcement Activities at Schools, Religious Places*, 70.25 INTERPRETER RELEASES 870 (July 2, 1993) (noting that, "INS enforcement activities at schools and places of worship have always been controversial," citing to the December 1992 *Murillo* injunction *supra* against questioning residents of a Texas school district and a 1988 arrest of "several undocumented aliens during a Roman Catholic mass").

following an incident known as "La Purisma" in 1988, during which a Border Patrol agent arrested seven parishioners during morning mass.[36] The internal review led to a change in enforcement policy that prohibited agents from following targeted individuals into churches absent "exceptional circumstances."[37] About a year later, immigration authorities raided a church-run shelter in Brownsville, Texas, in connection with a tip that terrorists with Iraqi connections were at the shelter.[38] Previously, the INS had maintained a hands-off policy with the shelter, Casa Romero, because it considered it a church.[39] Immigration authorities apprehended thirty-five people that day, but zero suspected terrorists.[40] Within the next three years, INS leadership began formalizing the internal policies with regard to sensitive locations, issuing the first recorded memo in 1993.[41]

In retrospect, it is curious that courthouses were not originally included in the earliest of the sensitive locations policy, especially in light of the long-standing common law privilege against arrest. Is it possible that no government offices were included because it was assumed that they were inherently sensitive and therefore unnecessary to include? If so, does this speak to the depth to which the common law privilege was implicitly absorbed in our collective democratic conscience? Or does it speak to the degree to which the government is simply ignorant or dismissive of the existence of the privilege? Or perhaps as Lasch posits, "The need to resort to ancient authority stands not as evidence of weakness in the doctrine, but rather as an attestation to how aberrational courthouse immigration arrests are."[42]

Over the next twenty years, the INS/DHS continued to revise the sensitive locations policy, expanding the protected categories to include the sites of

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36. Accounts of the event differ between INS agents and witnesses. According to parishioners, the agent asked several people in the back two pews of the church if they had papers, those who didn't were taken away. According to Border Patrol, the agent was "in hot pursuit" of two men who went inside the church; when the officer identified himself, the two men stepped outside, along with five others in the same pew. Bob Schwartz, *Border Control Criticized for Arrests in Church*, L.A. TIMES, at 21, Sept. 28, 1988, NEWSROOM, 1988 WLNR 1764218. The INS regional commissioner expressed some regret over the incident, but ultimately defended the actions of the officer stating, "I am not going to say to our agents that if someone runs to any particular building, with a cross on it or not, that it's 'olly olly ox in free.'" Bob Schwartz, *INS Chief Calls Arrests in Church 'Regrettable'*, L.A. TIMES, at 38, Sept. 29, 1988, NEWSROOM, 1988 WLNR 1768176. During a press conference, the INS Chief said he planned to refine INS policy to ensure a raid like the one in La Purisma does not happen again. Stephen Braunt, *Priests Probed Over Alleged Aid to Aliens*, L.A. TIMES, at 1, Sept. 30, 1988, NEWSROOM, 1988 WLNR 1773289. Another article a year later mentioned La Purisima and said that the INS reviewed its policy and instructed agents not to follow undocumented individuals into churches unless there are exceptional circumstances. Bob Schwartz, *Immigrant Workers Pack Hall to Oppose Job-Hunting Curbs*, L.A. TIMES, at 3, Sept. 7, 1989, NEWSROOM, 1989 WLNR 2681917.

37. Bob Schwartz, *Immigrant Workers Pack Hall to Oppose Job-Hunting Curbs*, L.A. TIMES, at 3, Sept. 7, 1989, NEWSROOM, 1989 WLNR 2681917.

38. *Agents Raid Shelter After Terrorist Tip*, HOUS. CHRON., at A1, Sept. 28, 1990, NEWSROOM, 1990 WLNR 4234053.

39. *Id.*

40. Joel Williams, *Border Patrol Finds No Terrorists in Church Shelter Raid*, DALL. MORNING NEWS, at 12F, Sept. 29, 1990, NEWSROOM, 1990 WLNR 4269427.

41. *See* Puleo Memo, *supra* note 24.

42. Lasch, *supra* note 16.

public religious ceremonies and public demonstrations, but still not to courthouses or any other government building.[43] Notably, the most recent memorandum does not limit restrictions and pre-clearance protocol to "arrests" only, but also includes interviews, searches and surveillance conducted by ICE agents at the specified locations.[44] If enforced and followed to the letter, it would be a remarkable example of government self-restraint. As noted in a 2008 sensitive locations memo, "Such restraint strikes a balance between our law enforcement responsibilities and the public's confidence in the way ICE executes its mission."[45] Based on the government's own normative balancing, concern regarding public confidence in ICE legitimacy drove the expansion and development of the policy. It is that same balancing that demands inclusion of courthouses today.

B. *What Makes a Location "Sensitive"?*

As noted above, the sensitive location designation is, at minimum, a recognition by the government that enforcement in certain places and during certain activities may be disproportionately damaging in contrast to the interest of justice served by an apprehension. Interestingly, parts of the designation are limited to physical place (a school, a church, a hospital), as opposed to the types of human activity that occur on the premises (education and childcare, worship and ceremony, healthcare).[46] Other parts of the designation are focused on human activity, irrespective of where it occurs (funerals, weddings, religious ceremonies and public demonstrations).[47] When government officials compiled this list, what was informing their thoughts about what to include and what to exclude? Because the policy is an internal one with no discernible record of deliberation, it is difficult to say. Is there any consistency to be found or did less thought go into the policy than one might assume?

1. *Loci of Public Trust and Vulnerability*

Designating certain locations as "off-limits" to law enforcement activity invoke the following questions: Does an apprehension in a particular location either positively or negatively impact the individuals who witness it? Does an apprehension either positively or negatively impact how people feel about using that space in the future? Does the choice of law enforcement to apprehend someone in that space impact public perceptions of the legitimacy, morality or justice of the law? Does that choice speak to the legitimacy or morality of law enforcement tactics or the judgment of its personnel? The answers to these questions may vary depending on the location designated,

43. *See* Morton Memo, *supra* note 24.
44. *Id.*
45. *See* Myers Memo, *supra* note 24.
46. *See* Morton Memo, *supra* note 24.
47. *See id.*

but examining them reveals characteristics of places so essential to certain human experiences that they must rarely, if ever, host a deprivation of liberty by the state.

Some places are regulated in ways that do not depend on the human activities that take place on-site: wilderness designations, natural hazards, uninhabitable locations. But in the case of apprehension, the human presence is implied, and so the place and activity combine to inform the idea of a sensitive location. Depending on the place, there may be witnesses who may or may not have their own emotional, spiritual, or practical connection to the place and/or the individual. And depending on who owns the place, there are different protections that attach to the individual. For example, an enforcement action in a home or made pursuant to a call from a local officer conducting a traffic stop invokes different legal protections than one made in a shopping mall or a public park.

Turning to the sensitive location policy and schools, hospitals and churches specifically, the list includes locations where marginalized populations gather and where non-marginalized individuals exercise their First Amendment rights. Children, the sick and the elderly are all deemed worthy of protection in this list, as well as people enjoying their First Amendment freedoms, including mourning the dead. But what about other marginalized populations? What about the falsely accused, the developmentally disabled, the chronically ill, the hungry, the homeless? Could a child be safe from apprehension while at school, but then be taken into custody at the shelter where he lives? And is it just for the victim of a crime to be protected in seeking hospitalization to treat their injuries, but fear pursuing justice against the perpetrator in the courts?

Law enforcement sometimes takes into consideration the place of apprehension in crafting effective enforcement policies, depending on the goals of the enforcement action (e.g. deterrence/high visibility versus covert/low visibility). Place is assessed not only with regard to the individual targeted, but also the impact on other people, known or unknown to that individual. When law enforcement actions are carried out in places open to the public, regardless of who owns the space, it is likely that other people will be impacted. Even when they are not physically present at or near the place of apprehension, when the apprehension and the report of the place of the apprehension are made public, individuals with a connection to that place may have a reaction to the fact that someone was apprehended there. When the place is one that marginalized populations frequent with an expectation of safety or security, the apprehension can erode those expectations.

In some places, law enforcement may do more harm than good by making an apprehension there. When the erosion of public trust outweighs the value of the apprehension at a particular location, and because effective law enforcement relies on establishing, accumulating and maintaining public trust, policy sensitive to location dictates postponing the apprehension until

such time as the individual is in a more appropriate place. In rare exceptions, the value of the apprehension is so high as to warrant an immediate apprehension irrespective of place. For example, in cases of an impending terrorist attack or some other imminent threat to public safety, it may be appropriate to argue that law enforcement should not be inhibited by place-based restrictions. In those extreme cases, it is likely that the value of the apprehension outweighs the risk of eroding public trust, assuming the enforcement activity was valid and necessary.

As such, places where public trust is a cornerstone to access of critical services by vulnerable populations should be the controlling factor in whether they are included as sensitive. The current policy is incomplete insofar as it purports to protect the places where immigrants seek critical services. The omission of places where individuals seek access to justice, access to information (libraries), welfare assistance and childcare outside of the school system (daycare facilities and Head Start, for example) are all missing. Perhaps it is not the place alone then, but the human activity taking place there that lies at the heart of the sensitive location.

2. *Do Activities Make a Location Sensitive?*

It seems unlikely that DHS is designating certain locations as sensitive because of the human experience or emotion involved. If that were true, then immigration policy would be more respectful of human relationships, in particular, the parent-child relationship and the best interests of the child.[48] Children would not witness the apprehension of their parents on their way to school,[49] domestic violence victims would not be deported for a failure to protect their children from abuse,[50] and the state would not confiscate newborns at birth because of an immigration violation pending against the mother.[51]

Rather, it is the human activity that appears worthy of protection in the policy. Demonstrations, rallies and religious observances are protected by the

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48. *See* Sarah Rogerson, *Lack of Detained Parents' Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship*, 47 FAM. L.Q. 141 (2013); Bridgette Ann Carr, *Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009); David Thronson, *Toward A More Child-Centered Immigration Law*, 58 VA. J. SOC. POL'Y & L. 58, 68 (2006); David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 49 (2005).

49. Amy B. Wang & Maria Sacchetti, *A Chemistry Professor Got His Kids Ready for School. Then ICE Arrested Him on His Front Lawn.*, WASH. POST (Feb. 5, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/04/a-chemistry-professor-got-his-kids-ready-for-school-then-ice-arrested-him-on-his-front-lawn/?utm_term=.bd46798f680e.

50. *See generally*, Sarah Rogerson, *Unintended and Unavoidable: The Failure to Protect Rule and its Consequences for Undocumented Parents and their Children*, 50 FAM. CT. REV. 580 (2012).

51. Villegas v. Metro. Gov't of Nashville, 709 F.3d 563 (6th Cir. 2013) (immigrant mother who was arrested for driving without a license went into labor while being detained. Her legs were shackled before, during and after giving birth and her son was removed from her care shortly after birth without notice or a hearing.).

First Amendment.[52] It makes sense that the government requires supervisory approval prior to an immigration apprehension at any of these activities, because the government is worried about running afoul of some of the most cherished rights and privileges protected by the Constitution. Courts also have held that states cannot discriminate against immigrant children, documented or undocumented, in the public education system, and federal immigration agents cannot racially profile immigrant students on their way to school.[53] As such, it also makes sense that schools would be included in the sensitive locations policy to avoid a lawsuit. The standout in this assessment is the hospital. It could be that the human activity of healing and being healed is sufficient to supplant the necessity of any constitutional rights guarantee prior to an apprehension.[54]

These are all places that could potentially cause the government to suffer negative public relations fallout and damage the public trust as a result of an enforcement action taking place there. Perhaps the issue is simply not generating enough negative political pressure to force the inclusion of courts in the policy. Maybe the value of the public's trust in courthouses is subordinated to the government's interest in immigration enforcement. Hopefully, some of the ideas put forth in this article can help to change that.

3. *A Different Methodology to Identify a Sensitive Location*

Identifying a sensitive location requires an assessment beyond a list of places or activities, which considers the public trust value and layers of individual vulnerability embedded in particular places and activities. As mentioned previously, immigration enforcement is largely a civil, rather than criminal, undertaking. As such, criminal law enforcement justifications against the expansion of sensitive locations policies should be irrelevant because the state's "public safety" justification for pursuing an unauthorized immigrant is more diffuse and tied to a claim of plenary power to regulate immigration rather than specific concerns that the state may have regarding that individual. Jennifer Chacón characterizes the DHS justification that courthouse apprehensions are necessary due to the failure of sanctuary jurisdictions to cooperate in immigration policing in the criminal justice system as "one big non sequitur," in part because "federal agents are perfectly comfortable using

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52. *See* Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 537 (1980) (citing Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) and Cox v. Louisiana, 379 U.S. 536, 580-81 (1965)); *see also* David B. Schwartz, *The NLRA's Religious Exemption in a Post-Hobby Lobby World: Current Status, Future Difficulties, and a Proposed Solution*, 30 AM. BAR ASS'N J. LAB. & EMP. L. 227, 230 (2015).

53. Plyler v. Doe, 457 U.S. 202 (1982); *see also* Murillo v. Musegades, 809 F. Supp. 487, 500-01 (W.D. Tex. 1992).

54. Recent major exceptions to this have included cases involving mothers shackled to beds while giving birth and immigrant detainees being refused treatment for a brain tumor. *See* Villegas v. Metro. Gov't of Nashville, 709 F.3d 563 (6th Cir. 2013); Tom Dart, *Salvadoran asylum seeker with brain tumor seized from Texas hospital*, GUARDIAN (Feb. 24, 2017), https://www.theguardian.com/us-news/2017/feb/24/sara-beltran-hernandez-texas-detention-brain-tumor.

courthouse enforcement tactics in addition to, not in lieu of, jail enforcement."[55] Elsewhere, she has pointed out that this kind of false justification is part of what has given rise to the over-criminalization of immigrant conduct as a predicate for excessive and aggressive enforcement more generally.[56]

Paradoxically, although conduct of immigrants is criminalized, the statutory reality of immigration regulation as civil administrative law permits the federal government to exercise its plenary power to limit the constitutional protections available.[57] Although the federal government does not afford equal constitutional protections to citizens and non-citizens, it does hold the states accountable to non-discrimination under the Fourteenth Amendment, which will be discussed in more detail later in this article.[58] In practice, the federal government has used the plenary power to justify the disparate treatment of immigrants:

> In a famous statement, Supreme Court Justice John Paul Stevens admitted that plenary power effectively upholds a double standard: 'in the exercise of its broad power over naturalization and immigration, Congress regularly make rules that would be unacceptable if applied to citizens.'[59]

Accepting this as it is, however unjust, what other types of norms and standards should inform guidance regarding the places in which civil immigration apprehensions should occur?

Ideally, such guidance would consider the activity underway, the place where the activity is taking place and the other individuals present. Consider the presence of similarly-situated Americans in the places deemed to be sensitive locations. In a school, church, public ceremony or demonstration, there are surely hundreds if not thousands of individuals whose citizenship or immigration status are legally recognized and who are receiving services and/or engaging in protected activities. At a hospital, however, there are additional concerns regarding patient safety and the possibility of further disturbing people who are likely already facing difficult situations at all different stages

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55. Jennifer Chacón, California v. DOJ on Immigration Enforcement, TAKE CARE (Apr. 11, 2017), https://takecareblog.com/blog/california-v-doj-on-immigration-enforcement [https://perma.cc/PS4T-V9JF] ("But the facts on the ground in California and elsewhere force the conclusion that DHS authorizes its agents to carry out public arrests in locations of concern to state and local officials . . . regardless of whether DHS has some form of access to individuals detained in state prisons and jails.").

56. For other examples of the over-criminalization of immigration violations and the militarization of immigration enforcement, see Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); *see also* Barbara E. Armacost, *"Sanctuary" Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197 (2016) (specifically regarding immigration policing and racial profiling).

57. *See* Chacón, *supra* note 55; Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012).

58. *See infra* Part II(C).

59. TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES 7-8 (Monica W. Varsanyi ed., Stanford Univ. Press 2010).

of life and life events. If hospitals are protected, then why not other similar locations – for example, a domestic violence shelter, a mental health facility, a homeless shelter, food pantries, a public library or a courthouse?

Domestic violence, in particular, has been a focal point of the advocacy to exclude ICE enforcement actions from all courthouses; family, criminal, trafficking, or housing, domestic violence results in cases in all of these jurisdictions. Notably, the Immigration Code explicitly, albeit inadequately, acknowledges the sensitivity of the courthouse apprehension in the domestic violence context. A few little-known provisions of the Immigration Code, enacted pursuant to the Violence Against Women Act (VAWA) prohibit the initiation of enforcement actions based *solely* on a tip from an abuser, and require DHS to make a special certification stating that they did not violate the prohibition if an apprehension is made at a domestic violence shelter or a courthouse where the individual is appearing at a hearing regarding abuse or related child custody matters.[60] During her confirmation testimony before Congress in 2007, DHS ICE Assistant Secretary Julie Myers revealed that at minimum, ICE agents may face personal liability for violating the policy.[61] Although the certification requirement is "systematically violated" by ICE officers and the DHS, and although it has not prevented apprehensions in these exact scenarios, it is an acknowledgement that enforcement actions involving domestic violence victims deserve an additional layer of scrutiny, and it may also serve as a normative concession to agent liability for enforcement actions carried out in contravention of agency policies.[62] This possibility will be discussed further in Part III of this article.

Given that the Immigration and Nationality Act already contemplates certain place- and activity-based considerations for restricting immigration policing, a sensitive location cannot solely be viewed from the individual vulnerability of the person targeted, the activity they are engaged in, or the physical place where the individual is located, but is best defined by considering all three. Sensitive locations are places where the administration of justice, including the effectiveness of law enforcement, would be negatively

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60. 8 U.S.C. § 1367 (2016) (emphasis added) (prohibiting actions initiated solely on abuser tip); 8 U.S.C. § 1229(e)(2)(A)-(B) (2016) (requiring certification for an apprehension "[a]t a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community based organization [or] [a]t a courthouse . . . if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty . . . .").

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> Failure to complete a certificate of compliance may subject the officer and ICE to liability for violating the confidentiality provisions. In practical terms, prior to any enforcement action at any of the sensitive locations, ICE officers/agents have been trained to check with their Office of Chief Counsel (OCC) about the various legal ramifications of such actions.

Nomination of Hon. Julie L. Myers: *Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 110th Cong. 131 (Sept. 12, 2007).

62. *See* Dan Kesselbrenner, *Practice Advisory: Remedies to DHS Enforcement at Courthouses and Other Protected Locations*, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD (Apr. 12, 2017) (explaining the certification requirement in detail and articulating a belief as to its systematic violation).

impacted by the act of making an apprehension in that place against a vulnerable person. This is the stated purpose of the official DHS sensitive locations policy,[63] but it is completely inadequate if it fails to take into account all of the other places where vulnerable communities of citizens and non-citizens gather for critical assistance. What is needed is legislation or a judicial decree that would build on the common law "privilege from arrest" doctrine[64] in courthouses, and an expansion of the privilege to other individuals situated in places normatively deemed to be off-limits to law enforcement absent an extraordinary and exceptionally unusual public safety justification overriding the risk of undermining faith in the justice system.

New York Congressman Andriano Espaillat introduced HR 1815 in the United States House of Representatives on March 30, 2017.[65] The bill would codify the sensitive locations policy, would provide a remedy to individuals apprehended in violation of the policy and would expand the locations covered to include: courthouses, additional healthcare sites, any school-related activity (even if it occurs off of school property), school buses, emergency relief locations (food banks and homeless shelters included), domestic violence shelters, and state offices including those operated by the state (e.g.: Department of Motor Vehicles).[66] Notably, the "Protecting Sensitive Locations Act" includes both protected locations deemed to be sensitive and related protected human activities occurring off-location. In addition to being a more inclusive and forward-looking definition of sensitive location, the proposed statute, if enacted, would be stronger than any internal policy at DHS.

There are approximately 11 million undocumented individuals residing in the United States.[67] The vast majority of them would not evade ICE detection because of an expanded and robust (i.e. statutory) sensitive locations policy. The disruption to the efficiency of ICE operations against vulnerable individuals is minimal considering the democratic norms against executive overreach at stake.[68] The next two sections explore some of the legal bases for state governments or individuals to limit ICE overreach and the negative impacts that will inevitably result from ICE's most recent courthouse enforcement policy.

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63. *See* Morton Memo, *supra* note 4.

64. *See* discussion *supra*, Part I.

65. Protecting Sensitive Locations Act, H.R. 1815, 115th Cong. (2017). Connecticut Senator Richard Blumenthal also introduced a bill in the Senate on April 5, 2017, which proposes an amendment to the Immigration and Nationality Act that would not only include courthouses themselves as sensitive locations but would also include the area within one thousand feet of a courthouse. Protecting Sensitive Locations Act, S. 845, 115th Cong. (2017).

66. H.R. 1815.

67. "In 2015, there were 11 million unauthorized immigrants in the U.S., accounting for 3.4% of the nation's population." Gustavo Lopez & Kristen Bialik, *Key Findings About U.S. Immigrants*, PEW RES. CTR. (May 3, 2017), http://www.pewresearch.org/fact-tank/2017/05/03/key-findings-about-u-s-immigrants/.

68. For a compelling argument regarding how the erosion of the normative values undergirding checks and balances in the federal government enables authoritarianism and, ultimately, destroys democracy, see STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (Crown 2018).

II. BEYOND NONCOOPERATION: EXPERIMENTS IN SOVEREIGN RESISTANCE TO ICE APPREHENSIONS IN STATE COURTHOUSES

For over a century, the federal government has claimed the exclusive authority to "regulate" immigration; what is much less clear is to what extent the federal government can "enforce" immigration regulations and/or coerce or incentivize state governments to participate in enforcement efforts.[69] Non-cooperation strategies started in faith-based communities long before the states began to consider their role in resisting overzealous immigration enforcement efforts.[70] Churches were among the first to take on the role of creating so-called "sanctuary" spaces among communities of faith; state and local governments followed soon thereafter with their own version of sanctuary, which involved a substantial amount of non-cooperation with federal immigration officials.[71] Although the federal government restricted state non-cooperation through Congressional amendments to the INA in 1996, some states continue to restrict the information flow to the federal government to the maximum extent allowed by law.[72]

In addition, a number of states have engaged in a positive law approach and created paths for unauthorized immigrants to receive state-issued benefits, including law licenses, state identification cards, state welfare benefits, and more.[73] This trend illuminates the pro-integration possibilities of decentralized immigration enforcement regulation, which until 2012 had been used as a sword against immigrants, rather than a shield.[74] This section identifies the myriad resistance strategies potentially available to states seeking to move beyond limiting their participation in the federal immigration deportation scheme and into actively shielding immigrants present in their state from aggressive immigration enforcement strategies. From legislation to court policies to executive orders, each branch of state government has tools at its disposal to experiment in moving beyond non-cooperation. Alternatively, the state can pursue litigation to defend its sovereignty, including the novel idea of creating a path to holding federal agents accountable in state courts. This section explores each of these options.

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69. Huyen Pham, *The Constitutional Right Not to Cooperate – Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381-82 (2006); TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES, *supra* note 59, at 6-8.

70. *See* Gregory A. Loken Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 132-34 (1993); *see also* Michael Scott Feeley, Towards the Cathedral: Ancient Sanctuary Represented in the American Context, 27 SAN DIEGO L. REV. 801, 806-10 (1990) (describing the origins of sanctuary in early Christendom).

71. *See* Rose Cuison Villazor, *What is a "Sanctuary"?*, 61 SMU L. REV. 133, 138-43 (2008) (describing the history of the sanctuary movement).

72. MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RES. SERV., R43457, STATE AND LOCAL "SANCTUARY" POLICIES LIMITING PARTICIPATION IN IMMIGRANT ENFORCEMENT 10 (2015).

73. Villazor, *supra* note 71; *see also* GULASEKARAM & RAMAKRISHNAN, *supra* note 18, at 127-40.

74. Discussed infra. at Part II(B)(1); *see also* Jessica Bulman-Pozen and Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258-59, 1281 (2009) (identifying immigration enforcement as an example of uncooperative federalism in practice, within a larger normative and doctrinal discussion of the concept of this particular form of state resistance to federal law).

A. *The Shield of Active Resistance*

State non-cooperation may provide a legally sound way to curb the practice of ICE enforcement in the courthouse. In the last six years, states have enacted a record number of pieces of legislation and administrative policies that disfavor state cooperation with immigration enforcement and/or encourage the integration of immigrants as state citizens, affording them by legislation and state administrative policies with as many rights and privileges as can be justified under state law.[75] Some states are experimenting in more aggressive non-cooperation strategies, modeling the precedent of state law enforcement agencies refusing to honor immigration detainers for so-called "criminal aliens,"[76] and articulating policies defining the boundaries of cooperation between state court officials and immigration agents.[77] So far, California has passed the strongest legislation articulating the boundaries of state cooperation with federal immigration officials.[78] The California Values Act, signed into law on October 5, 2017, "states that local authorities will not ask about immigration status during routine interactions," "bans unconstitutional detainer requests," and "prohibits the commandeering of local officials to do the work of immigration agents."[79] By characterizing detainer requests as unconstitutional and explicitly prohibiting the commandeering of state resources, California may be anticipating a need to defend the law, using precedent developed in the last decade to do so.

In New York, after statewide data revealed a major uptick in ICE enforcement actions in state courthouses, the governor issued an executive order limiting state cooperation with immigration officials.[80] The order prohibits state agencies "from inquiring about or disclosing an individual's immigration status unless required by law or necessary to determine eligibility for a benefit or service" and prohibits law enforcement officers "from inquiring about

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75. GULASEKARAM & RAMAKRISHNAN, *supra* note 18, at 119-49 (explaining the rise of pro-integration state policies and attributing the shift to the year 2012, when President Obama introduced DACA, Republican Presidential Candidate Mitt Romney lost the election due to a lack of support among Latinx populations and the Supreme Court struck down aggressively restrictionist immigration legislation in Arizona).

76. *See* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008) (for a comprehensive description of immigration detainers, how sanctuary cities have challenged their enforceability and how the Department of Homeland Security regularly overreaches in issuing them).

77. *See, e.g.*, Office of the Chief Admin. Judge, N.Y. Unified Court Sys. Policy and Protocol Governing Activities in Courthouses by Law Enforcement Agencies (Apr. 26, 2017), https://www.nycourts.gov/whatsnew/pdf/2017_law_enforcement_activities.pdf.

78. S.B. 54, 2017-18 Leg., Reg. Sess. (Cal. 2017), signed into law by the Governor on October 5, 2017.

79. State of California, Office of the Governor, SB 54 Signing Message (Oct. 5, 2017).

80. *ICE in New York State Courts Survey*, IMMIGRANT DEF. PROJECT, https://www.immdefense.org/ice-courts-survey/ (last visited Feb. 4, 2018) (reporting results of a June 2017 survey of over 200 legal service providers regarding the impact of the presence of ICE in courts on their clients); State of New York, Exec. Chamber, Exec. Order No. 170, *State Policy Concerning Immigrant Access to State Services* (Sept. 15, 2017).

immigration status unless investigating illegal criminal activity."[81] It is unclear whether the policy applies to court officers and employees, who are regulated by New York's Office of Court Administration.[82] The ambiguity has been exploited by ICE, which continues to recruit court officers and other court staff in enforcement actions inside and immediately outside state courthouses.[83] Even if court staff were restrained in an effective manner, non-cooperation only goes so far. Because immigration authorities do not necessarily need to obtain information from state employees to apprehend someone, and because apprehensions occur with or without the assistance of courthouse personnel, the only way to eliminate the possibility of such an action is to exclude those seeking to apprehend.

This requires states to take affirmative, positive law steps beyond non-cooperation. It is reasonable to assume that one of the main concerns of states and state actors seeking to curb immigration enforcement in state courthouses is the fear of retaliation by the federal government in the form of litigation or the withdrawal of related federal funding. That fear is justified, particularly with regards to the Trump administration. Most recently, the Department of Justice has threatened retaliation against sanctuary cities which refuse to honor immigration detainers.[84] Threats range from withholding federal transportation dollars to actual criminal prosecution of mayors for harboring, aiding and abetting undocumented immigrants to conceal them from immigration

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81. State of New York, Exec. Chamber, Exec. Order No. 170, *State Policy Concerning Immigrant Access to State Services* (Sept. 15, 2017).

82. Advocates are in the process of seeking clarification on this issue, particularly in light of ICE's new courthouse enforcement policy.

83. Last November, Ishmael Garcia-Velasquez was apprehended by ICE in Brooklyn Criminal Court. "Several court officers helped usher him into a private elevator reserved for inmates and out of the courthouse." Felipe de la Hoz & Emma Whitford, *Court Officers are Aiding in Immigration Arrests, Lawyers Say*, VILLAGE VOICE (Nov. 16, 2017), https://www.villagevoice.com/2017/11/16/court-officers-are-aiding-in-immigration-arrests-say-lawyers/. Also in November, Genaro Rojas-Hernandez was apprehended by ICE in Brooklyn Criminal Court. The Judge in the case instructed court officers to allow the attorney to speak with her client, but the sergeant took the client into a restricted area and impeded communications between the attorney and Rojas-Hernandez. Christina Currega, *Defense attorneys protest outside Brooklyn courthouse after ICE cuffs one lawyer's client*, DAILY NEWS (Nov. 28, 2017, 2: 51 pm), http://www.nydailynews.com/new-york/brooklyn/defense-attorneys-protest-client-ice-arrest-brooklyn-article-1.3663018

84. *See* Lisa Fernandez, *San Francisco Becomes First City to Sue President Donald Trump After Filing Federal Immigration Lawsuit*, NBC BAY AREA (Jan. 31, 2017, 9:41 AM), https://www.nbcbayarea.com/news/local/San-Francisco-Major-Civil-Litigation-Federal-Immigration-Policy-Sanctuary-412298953.html; *Federal Ruling in Chicago Sanctuary City Case Protects Immigrants*, Nat'l Immigrant Justice Ctr. (Sept. 16, 2017), https://www.immigrantjustice.org/press-releases/federal-ruling-chicago-sanctuary-city-case-protects-immigrants; Amanda Fries, *Feds Demand More Documents from 'Sanctuary Cities,' Including Albany*, TIMES UNION (Jan. 24, 2018), https://www.timesunion.com/news/article/Feds-demand-more-documents-from-sanctuary-cities-12521792.php. *See also* Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017), reconsideration denied, 267 F. Supp. 3d 1201 (N.D. Cal. 2017); City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017), *reconsideration denied*, No. 17 C 5720, 2017 WL 5499167 (N.D. Ill. Nov. 16, 2017) (both of these cases held that the federal government may not withhold U.S. Department of Justice Grants from localities for sanctuary policies). *See* Gregory Korte & Kevin Johnson, *In Speech to Mayors, Trump says Sanctuary Cities are the 'Best Friends of Gangs and Cartels'*, USA TODAY (Jan. 24, 2018), https://www.usatoday.com/story/news/politics/2018/01/24/mayors-may-boycott-trump-meeting-infrastructure-because-sanctuary-cities-move/1061742001/.

authorities.[85] Thus far, none of the retaliatory measures threatened have found legal footing and most scholars take the position that they are unlikely to be successful.[86]

Going beyond noncooperation takes a leap of faith, but some states are experimenting. State judges have been joined by attorneys general, district attorneys and other law enforcement agents to resist the increased presence of ICE in courthouses. They have enacted policies that require ICE agents to make their presence and purpose known to court administrators prior to carrying out an action.[87] A number of district attorneys have vocally and publicly decried the practice of ICE apprehensions in the courthouse, noting the negative impact on their ability to prosecute cases and secure witnesses.[88] A statewide effort to document the "chilling effect" on immigrants and others (most notably, domestic violence victims), is underway in the state of New York.[89] Some state officials have crafted administrative policies to regulate ICE through the thin veil of regulating how law enforcement actions are conducted inside courthouses generally. Others have resorted to procedural loopholes.

In a recently documented collaborative effort, judges, court officers and defense attorneys have worked together in New York to shield immigrant victims from becoming targets in the courthouse.[90] An Office of Court Administration protocol regarding law enforcement in New York state courthouses requires ICE agents to identify themselves in the courthouse so that court officers can alert the judge.[91] Once the judge received the alert, he or she would set a bond in order to make sure that the state retains physical custody of the defendant. Whereas the April 2017 policy prohibits law

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85. *See* Tanya Snyder, *Trump's 'Sanctuaries' Crackdown Imperils Transportation projects*, Politico (Feb. 18, 2017, 7:40 AM), https://www.politico.com/story/2017/02/trump-sanctuary-cities-crackdown-transportation-projects-235158; Nicole Rodriguez, *Trump Administration Wants to Arrest Mayors of 'Sanctuary Cities'*, NEWSWEEK (Jan. 16, 2018, 5:21 PM), http://www.newsweek.com/trump-administration-wants-arrest-mayors-sanctuary-cities-783010.'

86. *See* Richie Bernardo, *Economic Impact of Immigration by State*, WALLETHUB (Jan. 30, 2018), https://wallethub.com/edu/economic-impact-of-immigration-by-state/32248/.

87. District Attorneys and/or Attorneys General in New York, Maine, California, Washington and Maryland have all publicly opposed ICE courthouse apprehensions. The National Center for State Courts is keeping a tally on their website. *Improving Relationships with ICE: Resource Center*, *supra* note 6; *see also*, Press Release, New York Attorney General Eric T. Schneiderman, New York AG Eric Schneiderman and Acting Brooklyn DA Eric Gonzalez Call For ICE To End Immigration Enforcement Raids In State Courts (Aug. 3, 2017), https://ag.ny.gov/press-release/new-york-ag-eric-schneiderman-and-acting-brooklyn-da-eric-gonzalez-call-ice-end.

88. *See Improving Relationships with ICE: Resource Center*, *supra* note 6; Press Release, *supra* note 87.

89. *See Letter from over 150 legal aid and access to justice organizations to New York State Chief Judges re: negative impact on litigants and witnesses seeking justice in the courts due to ICE activity*, IMMIGRANT DEF. PROJECT, https://www.immigrantdefenseproject.org/wp-content/uploads/Letter-to-Judges-DiFiore-and-Marks-05042017.pdf (last visited Feb. 11, 2018).

90. Robbins, *supra* note 16.

91. Office of the Chief Administrative Judge, New York State Unified Court System, POLICY AND PROTOCOL GOVERNING ACTIVITIES IN COURTHOUSES BY LAW ENFORCEMENT AGENCIES (Apr. 26, 2017) (requiring any law enforcement officer, not specifically ICE, to follow certain procedures prior to carrying out an action in a courthouse and requiring the court security personnel to document every enforcement action taken in a New York State courthouse).

enforcement officers from making apprehensions inside of a courtroom, once under state custody the individual defendant was then taken by court personnel through an internal network of hallways and passageways not open to the public and transported to a holding cell, bypassing the ICE agents waiting outside and avoiding the apprehension.[92] However, ICE agents do not always identify themselves and increasingly wait outside of the courthouse to make the apprehension. The April 2017 policy is only as effective as the court security personnel tending to it, or not.

Outside of New York, one sub-federal court in New Mexico has created a new policy restricting certain law enforcement and press activities in state court houses.[93] Effective November 2017, the Second Judicial District Court of New Mexico regulates everything from courthouse arrests, to after-hours access of the building, to body cameras and other electronic devices.[94] Like New York's union policy, New Mexico's court policy applies equally to all law enforcement officers and sets forth certain protocol, preclearance and documentation requirements for a wide range of law enforcement activities.[95]

Well-intentioned though they are, these policies have been and will continue to be inadequate in meaningfully curbing the frequency of courthouse arrests. They all rely on the self-identification of ICE and other law enforcement agents and by not taking a stand with respect to ICE in particular, they all assume the legitimacy of the presence of all law enforcement to begin with, including ICE. None of the policies enacted to date exclude ICE from the premises entirely. The ideal scenario from the perspective of some judges, most advocates and certainly litigants, would be to exclude ICE from all state courthouses and to impose an injunction prohibiting them from lingering within a certain distance of the courthouse – a sort of constitutional curtilage.[96] Why exclude ICE from the building if they can apprehend someone on the front steps? Of course, there are legitimate reasons why other law enforcement agencies should and would be permitted to access the state courthouse for the purposes of facilitating apprehensions. Are the tactics used by federal immigration agents different enough to warrant special scrutiny?

Attempting to address the issue more directly, at least eight states have introduced legislation to limit the ability of ICE to carry out enforcement

92. Robbins, *supra* note 16.

93. New Mexico Judicial Branch, Second Judicial District Court, COURTHOUSE ACCESS POLICY (SJDC Policy No. 2017-SJDC-010) (Nov. 20, 2017).

94. *Id*.

95. *Id*.

96. A recent lawsuit filed in Massachusetts takes a similar approach, but instead of protecting the courthouses, the remedy would protect the litigants. The suit relies heavily on the common law privilege from civil arrest in courthouses (see Lasch, *supra* note 16) and petitions the Massachusetts courts to "issue an order protecting anyone having business with the courts from civil arrest, including ICE arrest." Press Release, Civil Rights, Indigent Defense Groups Ask Supreme Judicial Court to Block Immigration Arrests at Massachusetts Courthouses (Mar. 15, 2018, 4:49 p.m.); see also Complaint, *In re C. Doe, D. Doe, F. Doe, K. Doe, O. Doe, T. Doe, Y. Doe, and J. Doe*, Commonwealth of Massachusetts Supreme Judicial Court for Suffolk County (filed Mar. 15, 2018, on file with the author).

activities in state courthouses and other sensitive locations, including public libraries.[97] So far, none of them have been signed into law. Additionally, each of them relies on the existence of the federal government's sensitive locations policy, parroting its language and expanding it to explicitly include courthouses and other locations. Linking state restrictions to the sensitive locations policy without a Congressional codification of the policy in the Immigration and Nationality Act only incentivizes the federal government to terminate the policy. Whether DHS would honor a state-defined sensitive locations policy is an open question. Under the current presidential administration, it is unlikely. However, could the state enjoin the federal government from violating it? The rest of this section explores that question.

B. *State Litigation: A Note on Standing*

At a time when the judiciary is tasked with challenging the executive on a number of issues, many of which are related to immigration policy, it is often the state sovereign who brings the action either in tandem with, or independent of, similar lawsuits brought by individuals. In the last year, individuals, classes of individuals and states themselves all have made the case successfully for their day in court to sue the federal government for damages alleged as the result of federal immigration policies.[98] Ray Brescia documents the upward trend of state standing in so-called "public law litigation" and posits that the last decade has witnessed an "emergence of a new frontier and a new climate for state standing" in which states stand *parens patriae* on behalf of their residents, but allege private law harms.[99]

In this new standing climate, if a state can make a good faith assertion that the aggregate impact of a particular policy will cause harm that is quantifiable in economic terms (e.g. tuition revenue, tourism, commerce), then they are likely to clear an increasingly relaxed standing hurdle to reach the merits of the challenge. Loss of revenue in the form of court fees, increased demands on court staff facing a challenging pending caseload, and the cost of added personnel required to ensure the safety of other litigants and patrons of the court when ICE makes an apprehension all would seem to qualify to bring a challenge to court. This brings us to the merits.

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97. S. Res. 22, 2017-18 Leg., Reg. Sess. (Cal. 2016); H.B. 1407, 2017 Leg., Reg. Sess. (Fla. 2017); S.B. 1674, 2017 Leg., Reg. Sess. (Fla. 2017); H.B. 1362, 2017 Leg., 437th Sess. (Md. 2017); S.B. 835, 2017 Leg., 437th Sess. (Md. 2017); H.F. 1576, 90th Leg., Reg. Sess. (Minn. 2017); S.F. 1110, 90th Leg., Reg. Sess. (Minn. 2017); A.B. 4611, 217th Leg. 2d Ann. Sess. (N.J. 2017); H.B. 3464, 79th Leg., Reg. Sess. (Or. 2017); S.B. 997, 85th Leg. Reg. Sess. (Tex. 2017); H.B. 1985, 65th Leg., Reg. Sess. (Wash. 2017); and S.B. 5689, 65th Leg. Reg. Sess. (Wash. 2017).

98. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017); Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017); Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017); Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017).

99. Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. (forthcoming 2018) (identifying an upward trend in states asserting standing *parens patriae* in the face of a larger jurisprudence trending towards narrowing standing requirements) (on file with the author).

C. *The Tenth Amendment*

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[100]

Traditionally a tool of conservative jurists and policymakers alike, the mantel of "states' rights" sits uneasily on the shoulders of civil rights activists.[101] States raising immigration issues largely have done so to enable and support restrictionist policies. Until the 1870s, "states and localities were practically the only source of immigration regulation"[102] during what Gerald Neuman famously called the "lost century of immigration law."[103] In the late 19th century, both the Supreme Court and Congress reserved plenary power to regulate immigration for the federal government and extinguished the early era of ad hoc state regulation.[104]

The federal government largely retained control of immigration regulation through the 20th century, restricting state action or mandating state compliance through pre-emption and equal protection.[105] After 9/11, states with an anti-immigrant voting base began enacting housing, employment and law enforcement policies that were hostile to immigrants and intended to enhance federal immigration enforcement efforts.[106] This continued until 2012 when, as will be discussed in detail later in this section, restrictionist states lost key battles in courts and pro-integration states seized on the opportunity to exert their influence regarding the regulation of immigration enforcement.[107] Pro-integration states' rights arguments are on the rise in the Trump era and may ultimately renovate the reputation of the Tenth Amendment among civil rights activists.

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100. U.S. CONST. amend. X.

101. "Consider, for example, the Burger Court. Rallying under flags of federalism, the Justices pushed back remedies for segregation in public schools, denied relief to citizens threatened by racially discriminatory police brutality, cut back federal habeas corpus for state prisoners convicted in tainted trials, and forced lower federal courts to dismiss a broad range of suits challenging unconstitutional state conduct." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426 (1987) (internal citations omitted). For a more modern example, it was a successful Tenth Amendment challenge that struck down the coverage formula used to determine the applicability of preclearance provisions of the Voting Rights Act, which required states to demonstrate to the federal government that proposed changes to their voting laws were not discriminatory. Shelby County v. Holder, 570 U.S. 229, (2013). Critiques of the decision and attempts to imagine preclearance provisions to restore voting rights immediately followed. NAACP LEGAL DEF. FUND, DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-*SHELBY COUNTY, ALABAMA V. HOLDER* (2016); s*ee also* Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CALIF. L. REV. 1123 (2014) (studying the causal relationship between anti-black stereotyping and votes for a white candidate based on modern voting data and suggesting a new preclearance scheme justified by racism today).

102. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 65 (Oxford Univ. Press 2014).

103. *Id*.

104. *Id*. at 65-67.

105. Discussed Parts II(B)(2) & (C) *infra*.

106. MOTOMURA, *supra* note 10, at 73-81.

107. *See infra*, Part II(B)(1).

Experiments in pro-integration Tenth Amendment arguments are already underway in initial litigation concerning immigration enforcement in state courthouses. Legal theories advanced in one of the first cases to formally protest courthouse apprehensions by ICE support the position that the practice violates the Tenth Amendment because: (1) the practice interferes with the state's right to form its own government by interfering with state court operations; (2) that by enlisting state court personnel in effectuating apprehensions, the federal government is engaging in unconstitutional commandeering of state resources; and (3) the practice violates individual rights that have been held to be implicated when the state's rights are so violated.[108] The first two arguments relate to the cooperative federalist doctrines[109] and anti-commandeering doctrines established in the foundational cases in Tenth Amendment jurisprudence.[110] The third involves the relatively novel application of tenth amendment protections to individuals, discussed *infra*.[111]

The argument that ICE's presence unduly interferes with the state's right to operate its own court system is based on several ideas. The first is that the chilling effect of ICE in the courts deters would-be litigants, claimants and witnesses from bringing violations of state law to the court authorities. This has been the tactic of many advocacy efforts thus far, but have so far been unpersuasive to stakeholders, including the judicial system.[112] Even if those stakeholders could maintain that there is no chilling effect (which is becoming harder to do as evidence mounts), the state has a sovereign interest in

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108. Brief Amicus Curiae filed by the Immigrant Defense Project and the New York University School of Law Immigrant Rights Clinic, Washington Square Legal Services in the New York, New York Immigration Court in a pending matter in which the individual was apprehended in a courthouse [hereinafter Advocates Brief] (available at: https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-NYU-amicus-brief-motions-to-terminate-courthouse-arrests.pdf). The brief's authors also assert that the Immigration Court is the proper venue for such a challenge because it is within the context of an allegedly unlawful apprehension as a predicate for individual removal proceedings. Essentially, it is a fruit of the poisonous tree argument, asserting that removal proceedings must be terminated in that particular case because of the way that the apprehension was carried out.

109. For an overview of the current state of cooperative federalism in the context of immigration law and policy, *see*, Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL'Y REV. 87 (2016).

110. New York v. United States, 505 U.S. 144, 145 (1992) ("Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program[.]"); Texas v. White, 7 Wall. 700, 725 (1869) ("The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."); Younger v. Harris, 401 U.S. 37, 44-45 (1971) ("the national Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."); *see also* Printz v. United States, 521 U.S. 898 (1997) (holding that requiring state and local law enforcement officers to process background check information, including whether a gun purchaser was in lawful immigration status, as an interim measure of the Brady Handgun Violence Prevention Act violated the Tenth Amendment to the Constitution).

111. *See infra*, Part III(B).

112. The Immigrant Defense Project in New York, in particular, has submitted hundreds of affidavits from legal service providers documenting this trend, but the court system has yet to be persuaded to act. Additionally, the recent case in Massachusetts petitioning the court for a writ of protection for individuals presenting themselves in state courts relies heavily on the idea that the presence of ICE officers has a chilling effect on access to justice.

conducting the business of administering justice without rogue immigration agents wandering about, nabbing litigants and witnesses at will.

Another part of the undue interference claim is that when an individual is taken into custody by ICE, particularly as they are entering the court rather than leaving it, they become unavailable for prosecution or other matters pending before state courts to which they are an indispensable party. As a result, federal immigration practices interfere with the states' rights to administer justice in their own courts. The separation of litigants and state courts is a persistent problem resulting from the manner in which ICE enforces immigration law. Primarily, the problem is a lack of communication between the federal immigration authorities and state judiciaries. Families have been torn apart in state family courts when a parent is detained in federal immigration custody and therefore unable to appear, but no one informs the judge or any other party to the matter.[113] When this communication does occur, there are a number of ways for individuals to appear in person or remotely in state courts. The problem of immigrant litigant availability in state courts has less to do with the location of an immigration apprehension (inside a courthouse) than the post-apprehension communication between federal immigration authorities and state judiciaries. However, the issue is brought into sharp relief when an individual is literally removed from the state judicial process in the very same place where justice is meant to be administered.

State court stakeholders have not been persuaded by either of these arguments, as raised by advocates. However, the commandeering claim may hold more promise. The DHS Courthouse Directive explicitly provides for the involvement of court personnel in effectuating apprehensions, directing that apprehensions "be conducted in collaboration with court security staff," which falls short of a federal mandate of court security involvement.[114] However, as the numbers of apprehensions increase, the demands on state court personnel, including court security staff, are likely to increase as well. State court officer time spent on federal immigration apprehensions is paid for by state budgets. Depending on the frequency of arrests and level of involvement by state court personnel, there may be an argument that ICE is unlawfully commandeering state court employees in the enforcement of federal immigration law.

Commandeering jurisprudence is less than fifty years old, the first cases arising from federal environmental regulations of auto emissions, mining and radioactive waste disposal.[115] In assessing the outcomes and reasoning in

113. Sarah Rogerson, *supra* note 50.

114. DIRECTIVE NO. 11072.1, *supra* note 7, at 2.

115. The auto emissions regulations were challenged in courts and ultimately withdrawn and amended by the government to avoid commandeering issues. Maryland v. EPA, 530 F. 2d 215, 226 (4th Cir. 1975); Brown v. EPA, 521 F. 2d 827, 838-42 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971, 994 (D.C. Cir. 1975); EPA v. Brown, 431 U.S. 99 (1977) (per curiam). The mining regulations were upheld after the courts found that the statutes in question "did not require the States to enforce federal law." Printz v. U.S., 521 U.S. at 926 (citing FERC v. Mississippi, 456 U.S. 742 (1982); Hodel v. Virginia

these early cases, Neil S. Siegel argues that the Courts' commandeering legacy, "has more to do with a symbolic and judicially manageable gesture in the direction of 'states' rights' than with the substance of federalism as constitutional law intended to safeguard state autonomy."[116] He proposes an alternative framework that may be instructive on the issue of ICE in the courts:

> [I]nstances of commandeering should carry a presumption of unconstitutionality when preemption is not a feasible alternative in the short run, the federal mandate is unfunded and expensive, and the federal government makes little effective effort to alleviate reasonable accountability concerns. Only a substantial governmental interest should suffice to overcome this presumption. By contrast, commandeering should be held constitutional as far as the Tenth Amendment is concerned when preemption constitutes a feasible alternative in the short run and such preemption would reduce state regulatory control relative to the commandeering at issue, the federal mandate is fully funded or relatively inexpensive to carry out, and the federal government takes effective measures to maintain lines of accountability (or accountability is for some other reason not seriously threatened).[117]

Given that federal preemption of immigration enforcement (unlike immigration regulation) is far from unsettled, unless Congress explicitly reserves immigration policing to DHS the Tenth Amendment will continue to be triggered when state court personnel are asked to participate in effectuating an apprehension. Under this assessment, to the extent that the "collaboration" with court security staff becomes onerous to the state, remains federally unfunded and/or accountability of ICE officers and state court officers are unclear, anti-commandeering principles may serve as a justification for states seeking to limit participation.

Importantly, anti-commandeering doctrine as applied to the immigration context is nascent.[118] There has been much debate over whether federal immigration detainers are permissive rather than mandatory, thus eluding scrutiny under anti-commandeering doctrine.[119] However, no court has taken up

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Surface Mining & Reclamation Assn., 452 U.S. 264 (1981)). Forcing states to take title of their own radioactive waste if they failed to comply with federal regulations was held unconstitutional under the Tenth Amendment in, *New York v. United States*, 505 U.S. 144 (1992).

116. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1634 (2006) (examining in-depth the commandeering doctrine and its relationship to preemption); compare with, Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1250-54 (2004) (looking to the Federalist Papers to support the connection of anti-commandeering doctrine to individual rights).

117. *Id*. at 1635.

118. Aside from a 1999 case from New York City, discussed *infra* at Part II(C)(1), cases brought under the anti-commandeering doctrine are relatively novel and have focused on whether state and local officials' involvement in effectuating immigration detainers constitutes commandeering. *See, e.g*., Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014).

119. *See* Christine Cimini, *Hands Off Our Fingerprints: State, Local and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101 (2014) (examining state and local defiance of

the issue of whether the use of court officers, clerks, officials and other staff in effectuating an immigration apprehension, with or without a detainer, constitutes an unlawful commandeering of state resources. Presumably the outcome may differ depending on the state's willingness to allow its state officials to participate in that manner. Should state courts explicitly prohibit their employees from participating in the civil apprehensions of immigrants in courthouses (either by providing information or by contributing to the deprivation of individual liberties), an interesting question is whether a command from a federal agent to assist violates the anti-commandeering doctrine.

1. *The Guarantee Clause*

Related, but distinct from Tenth Amendment jurisprudence, another potential justification for state efforts to curb federal immigration apprehensions is found in the body of the Constitution itself. The Guarantee Clause promises each state a "Republican Form of Government" including federal protection against foreign or domestic intrusion.[120] Until 1994, federal courts declined to hear most cases arising under the Guarantee Clause as political questions.[121] One such case involved efforts by the Mayor of New York City to curtail immigration enforcement by instructing its employees to refrain from sharing immigration information with federal authorities.

In 1997, New York City Mayor Rudy Giuliani fought to defend longstanding Mayoral Executive Order 124,[122] which barred city employees and agencies from providing information regarding an individual's immigration status to the federal authorities, unless given permission in writing or if the individual was suspected of a crime.[123] He did so in a lawsuit challenging the Personal Responsibility and Work Opportunity Act (a.k.a. The Welfare Reform Act) of 1996, which curtailed the main function of the Order by decreeing that, "no state or city could prohibit its employees from sending information about the status of an illegal alien to the Federal Government's Immigration and Naturalizations Service."[124] Without reaching a substantive Tenth Amendment analysis, the Court summarily rejected Giuliani's

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the Secure Communities federal immigration enforcement program through the lens of preemption and anti-commandeering doctrines).

120. U.S. CONST. article IV, § 4.

121. For an extensive discussion of the Guarantee Clause, political question and the justiciability of such issues by federal courts, *see* Erwin Chemerinsky, *Why Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

122. Originally signed by predecessor Ed Koch and reissued by David Dinkins. City of New York, Office of the Mayor, *City Policy Concerning Aliens*, Exec. Order No. 124 (1989), http://www.nyc.gov/html/records/pdf/executive_orders/1989EO124.PDF

123. *Id*.

124. David Firestone, *Mayoral Order on Immigrants is Struck Down*, N.Y. TIMES (July 19, 1997), http://www.nytimes.com/1997/07/19/nyregion/mayoral-order-on-immigrants-is-struck-down.html. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 434, 110 Stat. 2105 (1996). A report was attached to the bill explaining that, "immigration law enforcement was as high a priority as any other form of law enforcement." Firestone, *supra*.

challenge of the Welfare Reform Act, holding that the "effect on local policy is not the type of intrusion that is sufficient to violate the Tenth Amendment or principles of federalism."[125] With respect to the Guarantee Clause claim asserted as a basis for the injunction, the court demurred citing political question doctrine.

The issue of ICE in state courts is distinguishable in several ways that may survive the political question exclusion from a Guarantee Clause challenge. First, the state's right to establish and maintain a functioning judiciary is vastly more central to a state governmental function than an Executive Order issued by an elected city official, or even than the administration of state benefits systems. Second, it is the activity of federal agents at the direction of the executive and authorized by Congress that is the primary focus of the legal inquiry. State actors are incidental to the primary action of federal immigration enforcement tactics. As such, the activities are particularly appropriate for federal court review.

In the Giuliani case, the action in question was that of the state actor – city employees providing information regarding immigration status to federal officials. States seeking to restrict the presence of ICE in the Courts may look to curtail the sharing of information by state employees or to prevent state court officials from assisting in apprehensions, but those issues are ancillary to the larger goal: restricting the ability of federal ICE agents to carry out federal law enforcement activity in or near state courthouses. As Erwin Chemerinsky urges, "the political question doctrine should be reserved for instances where there is a special reason for the judiciary not to be involved and a reason for confidence that the provision will be interpreted and enforced by Congress and/or the President."[126] On the issue of ICE in the courts, the problem very much is the President's interpretation of the Congressionally-delegated immigration enforcement power. There is no special reason for the federal judiciary to refrain from intervening where Congress cannot or will not when the failure to act has less to do with immigration policy and more to do with a partisan deadlock.

Federal courts are not the only appropriate venue for Guarantee Clause claims, however. State courts should be unencumbered by a political question exclusion as well. Given that courts have taken up questions regarding the limits on the state power to regulate the *enforcement* of immigration law, and given that those limits to the extent that they have been identified are fluid and largely unsettled, it is possible that this emerging area of law will survive political question exclusion because ICE's actions directly impinge upon the central tenant of the Guarantee Clause itself: the inability of states to administer justice and to provide access to justice and due process to residents

125. City of New York v. United States, 971 F. Supp. 789, 795-98 (S.D.N.Y. 1997); *aff'd*, 179 F.3d 29 (2d Cir. 1999).

126. Chemerinsky, *supra* note 121, at 853.

through its judiciary as a result of overly aggressive immigration enforcement tactics. A claim with potential under the Guarantee Clause will make the case that the disruptive presence of federal ICE agents in its courthouses undermines the federal promise to allow states a republican form of government.[127] Much like the Tenth Amendment argument that ICE courthouse apprehensions interfere with states' rights to form their own government, arguments invoking a violation of the principles of federalism enshrined in the Guarantee Clause will depend on the impact of these arrests on the critical functions of state courts. If a state is seeking to justify legislative action limiting the presence of ICE in state courts, the Guarantee Clause may be added to the list.

2. *The Supremacy Clause*

What the Guarantee Clause and Tenth Amendment giveth, the Supremacy Clause taketh away. The field and conflict pre-emption doctrines that have developed from the Supremacy Clause[128] present a potential pitfall for states to avoid in crafting polices to curb ICE enforcement in state courts. Federal preemption challenges to states that enact their own regulatory immigration schemes have largely been successful.[129] Most recently, the doctrine has been invoked in challenges to state statutes attempting to regulate the employment of unauthorized immigrants, the provision of rental housing to undocumented persons, and the state criminalization of certain immigration violations.[130]

The state is not seeking to regulate the federal government's behavior in any of these cases, rather, they are all directed toward the actions of the immigrant, which gives rise to the federal conflict pre-emption arguments. It is possible, as will be discussed Part III(F), to craft state legislation that sets

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127. César Cuauhtémoc García Hernández passionately argues this point in a recent New York Times Op-Ed, urging, "The pursuit of justice depends on getting the parties in the same room. That's why courts have the power to drag in unwilling participants with subpoenas. They can compel witnesses to testify or risk contempt charges. Courts rely on their hard-earned legitimacy as the rightful locations for resolution of disagreements." César Cuauhtémoc García Hernández, *ICE's Courthouse Arrests Undercut Democracy*, N.Y. TIMES (Nov. 27, 2017), https://www.nytimes.com/2017/11/26/opinion/immigration-ice-courthouse-trump.html.

128. U.S. CONST. art. VI, § 3, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.").

129. *See, e.g.*, ACLU v. County of Hudson, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002) (state disclosure laws could not compel the release of the names of secret immigration detainees).

130. *See, e.g.*, Arizona v. United States, 567 U.S. 387 (2012) (invalidating as unconstitutional Arizona Law S.B. 1070, which among other things: (a) created state crimes for certain immigration violations and required state police to verify immigration status during stops, detentions and arrests; and (b) authorized state police to arrest any person that the officer had probable cause to believe that they had committed a crime rendering them removeable under federal immigration law); Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013) (invoking both field and conflict pre-emption to invalidate state laws punishing landlords renting to undocumented individuals as "harboring" and laws creating state penalties for the employment of undocumented individuals); *see also* United States v. South Carolina, 906 F. Supp. 2d 462 (D.S.C. 2012) (preemption of state statutes criminalizing conduct assisting undocumented immigrants); Utah Coalition of La Raza v. Herbert, 26 F. Supp. 3d 1125 (D. Utah 2014) (preempting certain sections of Utah's "Illegal Immigration Enforcement Act").

reasonable boundaries for federal immigration authorities intended to preserve the state's republican form of government as a defense to the overreach of ICE in its enforcement of the law, rather than changing the federal enforcement authority itself. If drafted carefully, these types of state legislation, though related to immigration enforcement, may survive a Supremacy Clause challenge due to their limited scope. The drafting challenge is to avoid actual or apparent conflict with the specific enforcement authority explicitly authorized by Congress in the Immigration and Nationality Act.

Looking at trends in preemption arguments of failed restrictionist attempts to regulate immigration on the state level, and more recent pro-integration successes, Gulasekaram and Ramakrishnan argue that federalism is a tool, rather than a dogma, and urge courts to move away from traditional preemption analysis in order to address the underlying inequities that can result when federal immigration policies receive the exclusive privilege of deference as a matter of law:

> [I]nvocations of subfederal variegation, experimentation, and sovereignty are conjured primarily to achieve immigration policy goals unrelated to addressing pressing problems of public policy, state autonomy, or governmental competency. Rather, federalism has become the convenient rhetorical and constitutional hook for a multi-level, multi-jurisdictional partisan contest over immigration policy. . . Continued reliance on preemption analysis, we argue, suppresses judicial attention to the discrimination and equality concerns that should be motivating courts' consideration of subfederal immigration regulations.[131]

As a sign of the shift away from preemption (or perhaps a symptom of what the authors identify as use of federalism as a "guise"), compare this argument with Michael Wishnie's persuasive article urging in 2001 against the devolution of federal immigration authority to the states.[132] Such devolution, he argued, had resulted in state-based discrimination against immigrants in the administration of welfare benefits.[133] In that context and at that time, many pro-immigrant scholars and activist would agree – particularly when the state restrictionist movement gathered momentum over the next decade.

However, the civil rights resistance movements of that decade also successfully challenged those state measures in court, effectively limiting the legality and enforceability of restrictionist policies. Beginning in 2012, progressive states saw opportunity in the precedent of state activism, but reversed course, expanding the rights of immigrants to the extent allowable under state law and enacting non-cooperation policies with regard to

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131. GULASEKARAM & RAMAKRISHNAN, *supra* note 18, at 153.

132. Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U.L. REV. 493 (2001).

133. *Id.*

immigration enforcement.[134] At present, a turn toward devolution for the sake of non-discrimination in the mode and manner of federal immigration policing may be an effective way for states to curtail immigration enforcement tactics in state courthouses.

D. *Converse § 1983: A New Way Forward?*

> *Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.*[135]

Aside from a *Bivens* claim, actions against federal agents for constitutional violations of immigrant rights are limited.[136] And the remedies created by 42 U.S.C. § 1983, apply only to actions of state officials, not federal. States that are serious about discouraging federal ICE agents from making apprehensions in courthouses could create a state right of action against federal agents who engage in policing practices that violate the Constitution.[137] So-called "Converse § 1983" actions have yet to be enacted in any state or tested in practice,[138] but have been subjected to academic and intellectual scrutiny over the past forty years.[139] Akhil Reed Amar introduced the legal theory in the 1980s,[140] and his brother, Vikram David Amar, noted its unique suitability to federal immigration enforcement overreach post-9/11, an era that has ushered

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134. "[A]s restrictionist fervor had begun to wane . . . a countertrend was beginning to emerge, and a growing number of states began passing pro-integration legislation." GULASEKARAM & RAMAKRISHNAN, *supra* note 18, at 119.

135. THE FEDERALIST NO. 28, at 180-81 (Alexander Hamilton) (C. Rossiter ed., 1961).

136. *See, e.g.*, Doe v. Neveleff, No. 1:11-cv-00907, 2013 WL 489442, *8 (W.D. Tex. Feb. 8, 2013) (*Bivens* claim recognized against federal employees who were responsible for monitoring private prison used to house detainees who were abused by prison employees); *see also* Farmer v. Brennan, 511 U.S. 825 (1994) (allowing *Bivens* claim for deliberate indifference of prison officials to risk of harm posed between prisoners), *but see*, Minneci v. Pollard, 132 S. Ct. 617, 626 (2012) (limiting the ability of prisoners to recover through Bivens for Eighth Amendment violations, "where that conduct is of a kind that typically falls within the scope of traditional state tort law").

137. Such a right could be established through state Constitutional amendment, by statute, or through common law precedent. Akhil Reed Amar, *supra* note 101, at 1426.

138. Spencer E. Amdur, *supra* 107 (no state has established a Converse § 1983 right of action).

139. See, *e.g.*, John F. Preis, *The False Promise of the Converse-1983 Action*, 87 IND. L.J. 1697 (2012) (expressing deep skepticism about the viability and legitimacy of Converse § 1983); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2246 (2003) (questioning whether Converse § 1983 would be duplicative of *Bivens*, and asserting that it would be preempted under the Supremacy Clause, in any event); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1458 (1999) (identifying Converse § 1983 as an example of federalism that protects individual liberty rather than state dignity).

140. *See* Amar, *supra* note 101; Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159 (1993); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229 (1994).

in massive encroachments on individual and civil liberties in the name of national security.[141]

The practices involved in federal immigration policing in state courts is a near perfect factual predicate upon which to test the thesis of Converse § 1983 for three reasons. First, the types of overreach occurring when ICE enters a courthouse to make an apprehension are much further detached from the heavy counterweight of national security than issues related to the war on terror – particularly when most of the individuals targeted have committed no crime. Additionally, the New Immigration Federalism has gifted federal power to enforce immigration law, which muddles the government's Supremacy Clause preemption challenge.[142] Finally, the unlawful acts of the federal agents are occurring in the physical space of the state judiciary. There is no question that the state has the authority to regulate how justice is administered in its own courts. The issue could not be more apt for Converse § 1983 experimentation. But before a state makes such a potentially litigious gamble, stakeholders will likely ask: Could it work?

Nothing prohibits a state from creating a cause of action against federal agents for violations of the Constitution by statute, precedent or state constitutional amendment.[143] Such an experiment embraces the idea of federalism as a protector of individual liberties, rather than a defender of states' rights.[144] As Vikram Amar observes, the act of states holding federal immigration agents accountable for their violations of individual due process rights is a matter of constitutional loyalty:

> The Constitution itself draws lines – identifies impermissible means – so that the federal government cannot argue, for instance, we need to deny persons 'due process' in order to better and more efficiently regulate immigration. There are many things a government might have a sincere and laudable reason for wanting to do; the Constitution tells us not only what the federal government can want to do, but also how the government can go about doing it.[145]

A statute articulating a cause of action when government crosses those lines could be as simple as a general statute creating a cause of action for unconstitutional conduct by law enforcement agents in or near state

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141. Vikram David Amar, *Converse 1983 Suits in Which States Police Federal Agents: An Idea Whose Time Has Arrived*, 69 BROOK. L. REV. 1369, 1378 (2004).

142. Akhil Amar asserts that Converse § 1983 would not violate the Supremacy Clause, but would enforce it, i.e., it places the federal Constitution above federal actors, empowering states to hold them accountable to the supreme law of the land. Amar, *supra* note 140, at 163.

143. Waxman & Morrison, *supra* note 139, would quarrel with this point, arguing that the establishment of qualified immunity for federal agents preempts such an act by the states, but until it is tested, such an objection is speculative prediction.

144. "[I]f states are necessary to guard the people against federal tyranny, state constitutions provide additional checks on the guards." Schapiro, *supra* note 139, at 1458.

145. Amar, *supra* note 141, at 1395.

government buildings, or it could be specific to a cause of action for individuals whose constitutional rights have been violated by federal immigration authorities. Akhil Amar suggests the following language:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of the United States, subjects or causes to be subjected, any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the [United States] Constitution, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[146]

Note the "privileges and immunities" language echoing the Tenth Amendment and the language expanding standing from citizen to persons, which would allow injured unauthorized immigrants to assert a claim. Akhil takes the language one step further, justifying its application only to federal agents and not state agents as well, which he argues, is in agreement with the founders' conceptualization of federalism as a means by which individuals "conquer government power by dividing it."[147]

Vikram Amar notes that such a statute or amendment is more likely to survive a collateral federal challenge if the remedy is injunctive relief – for example, barring ICE agents from coming within a certain distance of any state courthouse, rather than monetary damages.[148] This comports with qualified immunity exceptions and the narrowing of *Bivens* actions, both of which occurred post-conceptualization of Converse § 1983, which bodes well for the theoretical durability of a Converse § 1983 attempt.[149]

Despite its potential vulnerabilities to federal challenges, Converse § 1983 offers states an opportunity to send a bold, unequivocal message to ICE: train up, or get sued. Although it does not accomplish the ultimate goal of banning ICE agents from courthouses altogether, it offers a compromise to avoid the veritable revolt led by lawyers on both sides of the courtroom who represent immigrants in courthouses everyday across the country. When lawyers walk out of the very halls of justice to which they owe alliance as officers of the court, when individuals are disappeared by plain clothes officers with the assistance of low-level court security personnel, and when well-settled individual rights such as the right to counsel, the right to remain silent and the right to be free from excessive use of force comes into question, we find ourselves in exactly the predicament the founders anticipated when setting up this federalist form of government. Converse § 1983 is the ultimate federalist resistance, but it depends on the individual claims for relief.

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146. Amar, *supra* note 140, at 160.
147. *Id*. at 168-70.
148. Amar, *supra* note 141, at 1395.
149. Discussed *supra* Part III(A).

III. INDIVIDUAL RIGHTS AT STAKE

The litigants, witnesses, victims and other individuals who enter a state courthouse do not leave their constitutional rights at the door. Neither does law enforcement become unmoored from the Constitution when it enters a court building. More specifically, immigrants – authorized or unauthorized – have stronger due process rights in state courts than in immigration courts.[150] When those rights are trampled by federal authorities, particularly the right to counsel, the right to communication with counsel, the right to remain silent, protections from deadly or excessive force, including false imprisonment and the right to be free from unreasonable searches and seizures, the Constitution affords a remedy.[151] In addition, immigration regulations contain statutory limits on ICE conduct in effectuating apprehensions with and without a warrant.[152] Whatever power ICE has to enforce immigration law, their actions must be guided by their own policies and Congressional intent to ensure that enforcement activities be carried out in a lawful manner.

It is well-documented that ICE is understaffed, undertrained and underqualified for the enforcement ramp-up demanded by the Trump Administration.[153] This type of undisciplined police force with nearly unlimited discretion and authority, emboldened by the President and their superiors creates an environment in which it is not hard to imagine an officer acting in a way that would abrogate his qualified immunity - a fertile ground for lawsuits against individual ICE officers and the DHS. When classes of individuals who have suffered violations at the hands of federal officials are heard through public law litigation, one of the outcomes is a chilling effect on the errant federal practices.[154] As such, it is worth exploring the various individual rights implicated when ICE endeavors to make a courthouse apprehension, particularly when they do so in violation of their own policies and in contravention of the Constitution.

A. *Individual Litigation: A Note on Qualified Immunity*

Congress has severely limited the extent to which an individual or a class of individuals can seek review of discretionary immigration enforcement

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150. For example, an unauthorized immigrant alleged to have committed a crime would be entitled to a public defender, there is no such guarantee in immigration court, even for unaccompanied children. C.J.L.G. v. Sessions, 880 F.3d 1122, (9th Cir. 2018) (denying immigrant children the right to counsel in removal proceedings before an immigration judge). Other due process rights remain, as discussed, *supra* Part II (c).

151. Discussed *infra* Part III(c).

152. Under the regulations, when ICE conducts a warrantless arrest, the individual taken into custody must be advised of the reasons for their arrest, and advised of their right to be represented by counsel. 8 C.F.R. § 287.8(a)(1)(iii) (2017); 8 C.F.R. § 292.5(b) (2017). Additionally, officers are required to identify themselves, "state that the person is under arrest and the reason for the arrest," use the minimum nondeadly force necessary to effectuate the arrest. 8 C.F.R. § 287.8(a)(1)(iii) (2017); 8 C.F.R. § 287.8(c)(2)(vii) (2017). ICE is further prohibited from using "threats, coercion, or physical abuse" to "induce a suspect to waive his or her rights or to make a statement." 8 C.F.R. § 287.8(c)(2)(vii) (2017).

153. *See, e.g.*, *supra* note 3.

154. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (describing concept of public law litigation).

actions in federal courts. The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the INA to include jurisdiction-stripping provisions.[155] However, the REAL ID Act restored some jurisdiction over "constitutional claims or questions of law" to the federal courts of appeals.[156] As such, there is a body of jurisprudence developing regarding the contours and limits of federal qualified immunity in the immigration context. Several cases recently decided in various federal courts have successfully challenged the federal government's claim to qualified immunity in cases in which allegedly unconstitutional ICE misconduct resulted in injury.[157]

Qualified immunity is not an absolute bar to relief against federal or state officials, particularly when injunctive or declaratory relief is sought.[158] The cases decided to date evidence an erosion of the power of qualified immunity to shield states when the conduct of the officers involved exceeds the bounds of what a reasonable officer would deem to be lawful conduct. In the courthouse apprehension context, to the extent that state court officers are participating in ICE apprehensions, they too should weigh the cost/benefit of such participation vis-à-vis whether they will be entitled to immunity, particularly when the conduct of ICE violates its own policies and the Constitution.

B. *Tenth Amendment Claims By Individuals*

Individuals have standing in certain circumstances to assert Tenth Amendment challenges to federal law enforcement actions exceeding the scope of its enumerated powers. In 2010, the Supreme Court granted standing to Carol Anne Bond, who was charged with a federal crime established by legislation enacted pursuant to a treaty to which the United States was a signatory.[159] The Justices were unanimous in determining that the legislation establishing the crime exceeded the federal government's authority to implement treaties and therefore violated states' rights.[160] Justice Kennedy reasoned that the counterweight to federal law enforcement overreach in a federalist system

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155. INA § 242(a)(2)(B).

156. INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D). "Ten Courts of Appeals have unanimously held that § 242(a)(2)(B)(i) does not apply to non-discretionary questions of statutory eligibility for the enumerated immigration benefits." MARY KENNEY, AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: FEDERAL COURT JURISDICTION OVER DISCRETIONARY DECISIONS AFTER REAL ID: MANDAMUS, OTHER AFFIRMATIVE SUITS AND PETITIONS FOR REVIEW 6 (Apr. 5, 2006).

157. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (finding that the special factors test for determining whether a new *Bivens* claim had arisen in the immigration detention context should have been considered in determining whether the damages suit would proceed); Hernandez v. Mesa, 137 S. Ct. 2003 (2017), *aff'g sub nom.*, Hernandez v. United States, 757 F.3d 249 (5th Cir. 2014) (shooting death of Mexican child in the border zone by a border patrol agent violated the child's Fifth Amendment rights and qualified immunity did not shield the agent from liability due to the unreasonableness of the agent's conduct); Morales v. Chadbourne, 793 F.3d 208 (1st Cir. 2015) (no qualified immunity when supervisor knew that his subordinate issued an immigration detainer without probable cause).

158. The Circuit Courts are nearly unanimous on this issue. *See* 1 Ivan E. Bodensteiner & Rosalie Levinson, State and Local Government Civil Rights Liability, § 2:6 n.4 (Supp. Nov. 2017).

159. Bond v. United States, 564 U.S. 211 (2011).

160. *Id.*

is the state police power, which protects individual liberty.[161] The Court specifically found that the federal power to enforce the treaty did not contemplate interior enforcement of treaty provisions.[162]

Applying this precedent to question the federal authority to enforce immigration law on the interior of the United States (authority that is implied in the federal plenary power to regulate immigration) illuminates a potential individual claim for relief. If ICE agents violate a constitutionally-protected individual liberty while carrying out an apprehension, could the immigrant targeted assert standing to bring a Tenth Amendment challenge to their deportation based on an unlawful federal apprehension, arguing that the state has a police power interest in the safety of individuals legitimately present in the courthouse? Could injunctive relief also be issued to prevent future harms? The federal power to regulate immigration certainly does not contemplate violations of individual liberties in enforcing its own laws. It seems a reasonable extension of Justice Kennedy's logic: Who better to police the police than the states when the police are acting in the state's house of justice?

C. *Sixth Amendment Right to Counsel*

When an individual targeted by ICE is represented, but is refused access to their attorney in criminal court, the Sixth Amendment right to counsel may be violated.[163] Some of the most egregious examples of ICE policing courthouses involve agents separating immigrants accused of crimes from their criminal defense counsel. In November 2017, Legal Aid Attorneys in Brooklyn staged a walkout after an immigrant defendant was taken into custody by ICE agents who physically separated the immigrant from his attorney in the courthouse with the assistance of court officers and prevented her from advising her client, who subsequently made damaging statements outside of the attorney's presence.[164] Reporting on the incident presented two very different accountings of what happened, with a witness and the attorney involved stating that law enforcement physically separated her from her client over her objection on the one hand, and on the other the Union President suggesting that the attorney attempted to assist her client in evading apprehension, physically assaulted court officers and ICE, and required the officers to use physical force

161. *Id*. at 222.
162. *Id*.
163. The Sixth Amendment provides that,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.
164. Hurowitz & de la Hoz, *supra* note 12.

with her.[165] The incident led to the court officer Union President threatening to "lock up" any Legal Aid Attorney who "puts their hand on" court officers.[166]

Did the ICE officers or the court officers violate the individual's Sixth Amendment right to counsel in this case? The Supreme Court has held that the right to counsel attaches at "all 'critical' stages of the criminal proceedings."[167] Effective assistance of counsel has been extended to immigrants, most notably in *Padilla v. Kentucky*,[168] which requires attorneys representing criminal defendants to advise their clients of the potential collateral immigration consequences of a guilty plea. By extension, a criminal defense lawyer cannot render effective assistance if ICE separates her from her client. Notably, in this circumstance, the Due Process Clause may also be violated by the separation.[169] ICE interference with the attorney-client relationship may trigger not only the right to counsel, but as will be discussed in the next section, a bevy of First Amendment rights as well.

D. *First Amendment Rights of Attorneys and their Clients*

When ICE separates a represented individual from their attorney during an apprehension, they also trigger a body of First Amendment jurisprudence regarding the lawyer-client relationship and privilege.[170] This relatively recent development in First Amendment application to the attorney-client relationship, born of the Civil Rights movement[171], involves three perspectives: (1) the attorney-client relationship itself as an association worthy of protection; (2) attorney advice as speech; and (3) protections of attorney-client privilege as both freedom of association and speech.

1. *Freedom of Association*

The bedrock of the legal profession is the ability to associate with a client by entering into an attorney-client relationship. This ability is not unlimited. For example, without concluding whether the attorney-client relationship is protected by freedom of association, the Supreme Court held in *Holder v. Humanitarian Law Project (HLP)*, that Congress can prohibit an attorney from entering into an attorney-client relationship with a foreign terrorist

165. *See id.*
166. *Id.*
167. *See* Montejo v. Louisiana, 556 U.S. 778, 786 (2009); *see also* Missouri v. Frye, 132 S. Ct. 1399 (2012).
168. 559 U.S. 356 (2010).
169. Although the Immigration Code explicitly prohibits the appointment of counsel at the government's expense to individuals in removal proceedings, individuals facing criminal prosecution who are separated from their legal counsel as a result of civil immigration law enforcement may have a separate right to counsel under the Due Process Clause. *See*, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544 (2007).
170. Another First Amendment claim raised in the Advocates Brief, *supra* note 108, at 18-19, addresses the right to petition the government by initiating an action in court. Asserted as an access to justice argument, this argument could be persuasive.
171. The first case to recognize the "freedom of association" under the First Amendment was in 1958. NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449 (1958).

organization, even if the representation was limited to the group's nonviolent activities.[172] The holding of that case was limited to the Court's deference to a State Department determination serving as the basis for law that the benign could not be separated from the terror when the representation was provided to such organizations. The representation of immigrants, although no more popular among nationalists and zealots, is far less controversial.

In Margaret Tarkington's critique of the *HLP* case and it's "cursory" rejection of the attorneys' freedom of association claims, she draws attention to another case that may draw more apt comparisons to the issue of representing immigrants.[173] She refers to the *Button* case, in which the NACCP Legal Defense Fund challenged the Virginia legislature's attempt to curb civil rights litigation by expanding common-law definitions of legal ethical violations concerning the manner through which attorneys developed civil rights cases. The Supreme Court linked civil rights litigation to political expression, identifying the freedom of association between lawyer and client as the crux.[174]

Similarly, the representation of immigrants, particularly those who are undocumented is a political act. Without the intervention of an attorney in many immigration cases, the result is ultimately deportation.[175] To seek justice on behalf of undocumented individuals or to defend them from the misapplication of the law, is to take a stand, sometimes against popular opinion and nearly always against the current President. Given the adversarial position of the federal executive toward immigrants, the attorney-client relationship may be the only mechanism by which the constitutional and statutory rights of immigrants are honored.

Perhaps the most visible example of the power of the attorney-client relationship is the first case filed in the litigation of President Trump's first executive order implementing a travel ban for individuals from Muslim-majority countries.[176] If the lawyers in that case were not permitted to form an attorney-client relationship with two Iraqi immigrants on a plane en route to the United States when the initial ban was issued, there would not have been such an

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172. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (citing the statutory "material support bar" in holding against the formation of an attorney-client relationship); for an extensive critique of the case and its treatment of the attorney-client relationship under the freedom of association, see Margaret Tarkington, *Freedom of Attorney-Client Association*, 2012 UTAH L. REV. 1071.

173. Tarkington, *supra* note 172, at 1118.

174. "For attorneys wishing to remedy injustice against minority and unpopular groups, as did the NAACP, 'association for litigation may be the most effective form of political association." *Id*. at 1117 (citing NAACP v. Button 371 U.S. 415, 429 (1963)).

175. INGRID EAGLY & STEVEN SHAFER, AMERICAN IMMIGRATION COUNCIL, SPECIAL REPORT: ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016) (finding that "immigrants with attorneys fare better at every stage of the court process", for example, detained immigrants with attorneys were twice as likely to obtain relief than their unrepresented counterparts and non-detained immigrants with attorneys were five times more likely to prevail than those without counsel).

176. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Petition for Writ of Habeas Corpus & Complaint for Declaratory and Injunctive Relief, Darweesh v. Trump, No. 1:17-cv-00480-CBA, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017), 2017 WL 393446.

immediate and swift recalibration of executive authority by the judiciary. Just as important, Hameed Khalid Darweesh and Haider Sameer Abdulkhaleq Alshawi would have been unnecessarily deprived of their liberties and freedoms, detained for an unknown period of time without legal justification, and potentially killed upon return to their home country.[177]

Absent a compelling concern regarding the material support of terrorism, ICE agents and court officers should not be permitted to interfere with such a fundamental relationship as that of the attorney and client. In the Brooklyn case, that would mean that ICE agents would not separate the individual targeted for enforcement from their lawyer, would allow the attorney to remain present for any questioning of their client, and would not interfere with the request of the attorney to visit with the detained client in order to ensure that her client's rights would not be eroded by executive overreach. Arguably, attorneys and clients who have been so separated, even if not to the client's detriment, have a claim under the freedom of association against the federal agents and/or the state court officers, depending on who was involved.[178]

2. *Attorney Advice as Speech*

Beyond the existence of the attorney-client relationship is the actual process of providing legal representation. Some scholars assert that current Supreme Court jurisprudence regarding attorney speech provides strong protection for attorney advice-giving.[179] Although this type of speech is necessarily predicated on the participation of another person in the speech, this particular type of participation (where a client receives and responds to the attorney's advice and the exchange is interdependent) arguably makes both the attorney's advice and the client's response or reaction a form of speech. Notable exceptions include when the advice is "mistaken, immoral or illegal."[180] Absent a finding that an attorney is engaging in any of those types of advice-giving, the First Amendment protects not only the ability to represent clients, but also to provide them with legal advice through speech.

3. *Privilege as Speech and Association*

If the ability to form an attorney-client relationship is grounded in the freedom of association, and the advice that an attorney gives constitutes speech, is the ability to maintain the privilege of those communications some

177. Both of the Petitioners in that case were entering pursuant to humanitarian and family-based visas that were issued as a result of threats to their lives in Iraq. Petitioner's Memorandum of Law in Support of Motion for Emergency Stay of Removal, *Darweesh*, No. 1:17-cv-00480-CBA, 2017 WL 388504, https://law.yale.edu/system/files/area/clinic/document/6-1_memorandum_in_support_of_motion_to_stay.pdf.

178. For a detailed discussion of how actions that constitute Constitutional torts are exceptions to qualified immunity in the federal and state context see Part Part III(A) *infra*.

179. Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639 (2011) (Discusses the impact of three notable Supreme Court cases on attorney advice giving along with other scholarly commentary on the subject).

180. *Id*. at 705.

combination of the two? Few courts have weighed in on this issue. Among the first was the Seventh Circuit in *Denius v. Dunlap*, which involved a public school administrator who conditioned an employment contract on the would-be employee's execution of a waiver of attorney-client privilege.[181] The court in *Denius* held that "absent appropriate justification the state cannot compel the revelation of privileged attorney-client communications."[182] The state could not justify the requirement, but given the lack of precedent on the issue, the state official demanding the waiver of the privilege was afforded qualified immunity.[183] In a case where privilege is broken as a result of ICE officers demanding information of an individual outside of the presence of their lawyer, one possible recourse would be to allege this third type of First Amendment violation, particularly when the ICE agents knew or should have known that the person was represented by counsel.

These First Amendment challenges are largely untested in the specific context of immigration enforcement, but may serve as the basis for any lawsuits envisioned by attorneys separated from their clients by ICE agents in the courtrooms and/or state bar associations/governments concerned with protecting the integrity of the attorney-client relationship.[184] It may be the only basis under which attorneys themselves can claim an individual right to remain with their clients during an apprehension.

E. *Fourth and Fifth Amendments*

Immigration agents have the statutory authority to stop and question any individual about his or her immigration status without a warrant and make an arrest if they have "reason to believe" that the individual apprehended is in the United States unlawfully and likely to escape.[185] Regardless of whether an immigration interrogation or apprehension is civil or criminal in nature, the search and seizure restraints of the Fourth Amendment apply.[186] ICE

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181. Denius v. Dunlap, 209 F.3d 944 (7th Cir. 2000).

182. *Id.* at 955.

183. *Id.*

184. Attorney and judicial ethics and related jurisprudence is also implicated in the issue of ICE agents separating attorneys and clients in the courtroom. Whether and how an attorney is obligated to question the authority of immigration enforcement agents and what duty is owed by judges to litigants denied entry to their courtroom on account of their immigration status are just a few examples of questions with which ethics rules grapple. However, since the rules regarding attorney conduct can vary state-to-state, I leave a deeper analysis of those arguments to future scholarly endeavors. For a recent commentary on the judicial ethics implicated, *see* Marla N. Greenstein, *The Ethics of a Sanctuary Courthouse*, JUDGES' J., Summer 2017, at 40, https://www.americanbar.org/groups/judicial/publications/judges_journal/2017/summer/ethics-sanctuary-courthouse.html.

185. 8 U.S.C.A. § 1357(a)(1) (West 2017).

186. United States v. Vendrell-Pena, 700 F. Supp. 1174 (D.P.R. 1988) (statements made by undocumented taxi driver after arrest, but before *Miranda* warnings were given, held to be inadmissible); *but see* United States v. Guerrero-Hernandez, 95 F.3d 983 (10th Cir. 1996) (plainclothes immigration officer asked for name and immigration status in a public place, outside, *Miranda* warnings not required); *see also* Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008) (exploring the privacy rights implicated by interior immigration enforcement tactics at the federal, state and local levels of law enforcement).

officers cannot question individuals without a reasonable suspicion that they are not United States citizens and may not arrest individuals without a warrant and without probable cause.[187] Furthermore, unless the person continues to be suspected of a crime, it is not reasonable to prolong the stop in order to make an inquiry regarding immigration status.[188]

Additionally, stops made solely on the basis of a racial and ethnic appearance violate the Fifth Amendment.[189] An individual being questioned by ICE may refuse to answer questions without triggering an inference of guilt.[190] And an officer must have a reasonable suspicion of misconduct in order to make an apprehension.[191] The Fifth Amendment also safeguards certain substantive due process rights of immigrants in federal immigration custody.[192]

Both federal and state courts have held that local law enforcement agents do not have the authority to arrest an individual for a civil immigration infraction, and further, that to do so violates the Fourth Amendment.[193] Litigation regarding these so-called "immigration detainers" has established some helpful precedent for holding local law enforcement agents liable for warrantless arrests.[194] This relatively new line of cases have created a legal distinction between a justified state-based arrest and a detention for immigration purposes beyond what is justified by state law – the latter is considered a new (in most cases warrantless) arrest, triggering Fourth Amendment protections anew.[195] "Only in three limited circumstances does the statute authorize state and local officers to engage in such arrests and detentions", a point that the government has conceded.[196]

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187. Zepeda v. U.S. Immigration & Naturalization Serv., 753 F.2d 719 (9th Cir. 1983) (enjoining immigration policing practices in violation of the Fourth Amendment).

188. Muehler v. Mena, 544 U.S. 93 (2005).

189. Murillo v. Musegades, 809 F. Supp. 487 (W.D. Tex. 1992).

190. *Id*.

191. *Id*.

192. Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (qualified immunity does not apply to officials who violated 5th Amendment substantive due process rights of detainees accused of terrorism).

193. AM. IMMIGRATION COUNCIL, ASSUMPTION OF RISK: LEGAL LIABILITIES FOR LOCAL GOVERNMENTS THAT CHOOSE TO ENFORCE FEDERAL IMMIGRATION LAWS 4 n.2 (2018) (identifying the legal deficiencies and potential legal exposure to local law enforcement agents undertaking an arrest pursuant to ICE detainers) (citing, Roy v. County of Los Angeles, No. 2:12-cv-09012-AB, 2018 WL 914773 (C.D. Cal., Feb. 7, 2018)), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/assumption_of_risk_legal_liabilities_for_local_governments_that_choose_to_enforce_federal_immigration_laws.pdf; Lunn v. Commonwealth, 477 Mass. 517 (2017).

194. Chris Lasch has written extensively on the legal deficiencies of immigration detainers themselves and in enforcing them. *Cf*. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008); Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629 (2013); Lasch, *Rendition Resistance*, 92 N.C.L. REV. 101 (2013).

195. *See id*. at 3-4 (citing Morales v. Chadbourne, 793 F.3d 208 (1st Cir. 2015); Ochoa v. Campbell, 266 F. Supp. 3d 1237 (E.D. Wash. 2017); Miranda-Olivares v. Clackamas Cty., No. 3:12-cv-02317-ST, 2014 WL 141305 (D. Or. Apr. 11, 2014).

196. ASSUMPTION OF RISK, *supra* note 193 at 4 n.10 (citing 8 U.S.C. § 1103(a)(1) ("an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, present[ing] urgent circumstances requiring an immediate Federal response"); 8 U.S.C. § 1252c (unlawful reentry after a deportation predicated on a felony offense); 8 U.S.C. § 1357(g) (local law enforcement by explicit agreement with the federal government)).

Additionally, overly aggressive immigration policing by federal immigration agents in violation of the due process rights enshrined in the Fourth and Fifth Amendments may give rise to an individual *Bivens*[197] action for monetary damages.[198] To the extent that state court security personnel are assisting in the types of aggressive tactics that would trigger a violation, the state is also vulnerable to individual Constitutional claims under § 1983 claims. As such, state courts may find it advisable to limit court security involvement in ICE enforcement actions to avoid liability, and to further restrain ICE officers from the premises based on the reports of unconstitutional conduct, lest they become co-defendants in an individual claim for money damages or injunctive relief. As individuals come forward with these claims, a strategy of suing both federal and state law enforcement may be the most effective way to curb courthouse arrests by increasing the cost of collaboration.

CONCLUSION

Courthouses bear witness to some of the worst suffering a human can endure: homelessness, domestic violence, child abuse, human trafficking, rape, torture, and murder. They are inherently sensitive locations by virtue of the necessary, but often difficult work of justice performed by the judges, lawyers, court personnel, litigants and families therein. They are not the appropriate loci of aggressive and unconstitutional immigration enforcement tactics. If there were ever a time for states to explore an increased role in defining the boundaries of federal immigration policing in state courthouses, this would be it. Bold experiments using new legal theories and dormant pieces of the Constitution, intended to maintain the balance of federalism, may be necessary to prevent ICE from eroding individual rights and undermining states' rights and obligations. Originally a post-9/11 weapon of restrictionist states, the New Immigration Federalism, born of nationalist, discriminatory policies, may prove to be the flag bearer of sanctuary movements and sovereign resistance.

197. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (a federal court may create a remedy for an unconstitutional act of a federal agent, even where Congress has remained silent, if the court has jurisdiction over the matter).

198. *See, e.g.*, Comm. for Immigrant Rights v. County of Sonoma, 644 F. Supp. 2d 1177 (N.D. Cal. 2009) (*Bivens* claim allowed to pursue, arising out of allegations of discriminatory animus motivating the stops, searches, detentions and denials of due process committed by ICE agents and local law enforcement).