

How ICE Uses Local Criminal Justice Systems to Funnel People Into the Detention and Deportation System

MARCH 2014

The U.S. Department of Homeland Security (DHS) has come to rely heavily on state and local criminal justice systems in order to find non-U.S. citizens who may be deportable and push them into the detention and deportation process. This collaboration is a complex and ill-defined entanglement consisting of a web of unregulated and overlapping Immigration and Customs Enforcement (ICE) programs and mechanisms whose parameters and operations easily mutate, that are not restrained by formal regulations or mechanisms of accountability, that operate with little transparency, and that do not closely monitor or hold accountable the criminal justice systems that arrest and detain the people who end up in ICE custody. One particularly alarming result of this entanglement is that it is becoming more common for [citizens](#), too, to be swept into the detention-deportation system.¹

This is now a deeply embedded and institutionalized scheme that will not disappear if our immigration system is ever substantially overhauled. The process ignores individuals' guilt or innocence, whether arrests were the result of [racial profiling](#)² (indeed, the programs themselves create an [incentive](#) for racial profiling³), and whether the noncitizens swept into the detention-deportation system are adequately represented, or understand the immigration consequences of a criminal conviction, or face prolonged detention because of an ICE immigration hold request.

DHS's use of state criminal justice systems also depends on the application of legal rules that are unacceptable in other areas of law, such as searching out for removal people who were convicted of crimes—minor or major—that were not grounds of deportation when they were committed. And it depends on characterizing as a ["criminal alien"](#) anyone with a criminal conviction,⁴ regardless of the severity of the conviction or the existence of compelling equities in the person's favor, even when the conviction was not the basis of the removal order.

How the Entanglement With State Criminal Justice Systems Works

ICE relies on state and local criminal justice systems through:

- **Programs that give ICE access to jails**, either physically or technologically.

¹ <https://www.aclu.org/blog/immigrants-rights/yes-us-wrongfully-deports-its-own-citizens>.

² www.justice.gov/opa/pr/2012/September/12-crt-1125.html.

³ www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

⁴ www.fas.org/sgp/crs/homesecc/R42057.pdf.

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- [Criminal Alien Program](#) (CAP).⁵ The largest and oldest program, in which ICE agents identify, review the records of, or interview people in jail who are accused or convicted of crimes ranging from minor to major. CAP works in conjunction with the Secure Communities and 287(g) programs (see below).
- [Secure Communities](#) (S-Comm).⁶ Fingerprints of arrested individuals—regardless of their guilt or innocence or the seriousness of the charge against them or their criminal history—are checked against DHS databases to identify people with an immigration history.
- [287\(g\)](#).⁷ Section 287(g) of the Immigration and Nationality Act allows an actual shift of authority from the federal government to state and local law enforcement officers to enforce immigration laws. This is now the least significant of the programs, since currently it is available only in jails and the other two programs do not require the training and supervision that a shift of authority necessitates.
- **Inclusion of immigration information in the [National Crime Information Center](#) (NCIC) system**,⁸ which allows law enforcement officers to check immigration databases through the NCIC. NCIC provides immigration status–related information about people whom local or state police officers stop and question, although the officers do not have the authority to enforce immigration law and may even be subject to local laws or policies that limit the extent to which they may be involved in immigration enforcement.
- **Informal and wholly unmeasured [collaboration](#) between state and local law enforcement and ICE**,⁹ such as police officers calling ICE when they question a driver who does not have a driver’s license; ICE agents accompanying police officers in their work, participating in law enforcement traffic checkpoints, or acting as interpreters for local law enforcement; jail personnel turning over lists of foreign-born arrestees to ICE; or ICE agents encouraging local prosecutors to obtain convictions that can be a basis for deportation.

ICE [claims](#) that the named programs are voluntary partnerships meant to help state, local, and tribal law enforcement agencies.¹⁰ But ICE’s or ICE officers’ relationships with state and local law enforcement agencies are often not based on requests from localities and not the subject of official agreements. Instead, they are based on meeting ICE’s needs and may be imposed despite strong opposition from local communities, as has happened when states and communities have [resisted](#) S-Comm.¹¹

⁵ www.legalactioncenter.org/litigation/criminal-alien-program-cap.

⁶ www.nilc.org/scomm-no-rules-of-road-2011-03-04.html.

⁷ www.ice.gov/news/library/factsheets/287g.htm.

⁸ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316327.

⁹ www.usatoday.com/story/news/nation/2013/02/14/immigration-criminal-deportation-targets/1919737/.

¹⁰ www.ice.gov/access/.

¹¹ www.nytimes.com/2011/05/06/us/06immigration.html.

ICE hold requests

ICE hold requests, or “[detainers](#),”¹² are the lynchpin of ICE operations in state and local jails. A detainer is a request from ICE to a jail to continue holding a prisoner for 48 hours (excluding weekends and holidays) after he or she would otherwise be released from custody, so that ICE can take custody of the person.

- In December 2012, ICE issued a [memo](#) setting priorities and procedures for issuing detainers.¹³ Nevertheless, ICE hold requests [continue](#) to focus on people who do not pose a threat to public safety or national security,¹⁴ despite ICE promises to the contrary. And ICE has not completed a promised evaluation of its new policies.
- Hold requests are [costly](#) to communities.¹⁵ But because local jurisdictions can decide whether or not to comply with particular ICE hold requests, they are the points at which communities can [impose limits](#) on collaboration with ICE.¹⁶

Lack of transparency

ICE does not voluntarily release information about S-Comm, CAP, its use of detainers, and its relationships with state and local criminal justice systems. Much of the information that is available is the result of [Freedom of Information Act \(FOIA\)](#)¹⁷ and state public records act requests and litigation (see also the information at these links: [S-Comm](#),¹⁸ and [CAP](#)¹⁹). And S-Comm is connected to a much larger initiative, the FBI’s [Next Generation Identification](#) (NGI),²⁰ a huge database of personal and biometric information, though neither the [S-Comm](#)²¹ nor [FBI](#)²² description of the programs mentions this.

Failure to address deficiencies

ICE has proposed woefully inadequate, after-the-fact solutions to deficiencies in these enforcement programs:

¹² www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

¹³ www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

¹⁴ <http://trac.syr.edu/immigration/reports/333/>.

¹⁵ www.weareoneamerica.org/sites/weareoneamerica.org/files/BeckettXEvans_ICE-Detainer-Report_FINAL.pdf.

¹⁶ www.nilc.org/document.html?id=673.

¹⁷ <http://trac.syr.edu/immigration/reports/333/>.

¹⁸ www.ccrjustice.org/secure-communities.

¹⁹ www.legalactioncenter.org/litigation/criminal-alien-program-cap.

²⁰ <https://www.eff.org/deeplinks/2011/07/fbis-next-generation-identification-database>.

²¹ www.ice.gov/secure_communities/.

²² www.fbi.gov/about-us/cjis/fingerprints_biometrics/ngi.

- The exercise of [prosecutorial discretion](#),²³ which has resulted in administrative closure of [few cases](#)²⁴ and treats arrests and convictions, no matter how they were obtained, as factors warranting deportation.
- [Statistical monitoring](#) to measure “anomalies” that might indicate racial profiling²⁵—a monitoring system that has never seen the light of day.
- A limited [complaint system](#)²⁶ that is largely unknown to jail inmates, is not confidential, and does not protect them from retaliation.

How Immigrants and Communities Have Fought Back

Immigrants and their communities have paid a high price for the entanglement between ICE and local criminal justice systems, including deportations, family separations, detrimental effects on public safety, erosion of trust in law enforcement, and expenditure of scarce funds at ICE’s behest. Here are some ways they are fighting back.

Limits on detainers

As the federal government has come to rely more heavily on state and local law enforcement to find people to deport, a number of states and localities, concerned about the negative impact that deportations are having on their communities, have instituted new measures to [limit their compliance](#) with ICE’s detainer requests.²⁷ These include:

- State laws such as the California [TRUST Act](#).²⁸ Any ICE hold request will be honored only if the person who is the subject of the request has been convicted of a serious crime, as defined by the act.
- City and county ordinances and resolutions such as:
 - King County, Washington, [ICE Detainer Requests Ordinance 2013-0285](#).²⁹ Hold requests will be honored only when the subject of the request has been convicted of serious, violent, sex, or gun crimes within the past 10 years, and hold requests will not be honored for persons under 18.
 - Miami Dade County Board of County Commissioners [resolution](#) providing that ICE detainers will be honored only if the federal government has agreed to reimburse the county.³⁰ If there is such a reimbursement agreement, the county

²³ www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

²⁴ <http://trac.syr.edu/immigration/reports/339/>.

²⁵ www.ice.gov/doclib/secure-communities/pdf/sc-statistical-monitoring.pdf.

²⁶ www.ice.gov/doclib/secure-communities/pdf/complaintprotocol.pdf.

²⁷ <https://cliniclegal.org/resources/articles-clinic/states-and-localities-limit-compliance-ice-detainer-requests-dec-2013>.

²⁸ <http://legiscan.com/CA/text/AB4/id/885660>.

²⁹ www.defensenet.org/immigration-project/immigration-resources/immigration-detainers-and-ice-enforcement-actions/King%20Co%20ICE%20Detainer%20Requests%20Ordinance%2012-2-13.pdf/view.

³⁰ www.miamidade.gov/govaction/legistarfiles/Matters/Y2013/132196.pdf.

Department of Corrections and Rehabilitation can honor a detainer request only if the person has a forcible felony conviction or has been charged with a nonbondable offense under Florida law.

Limits on ICE access to jails and prisoners

City ordinances or policies, such as:

- A Chicago [ordinance](#) prohibiting ICE agents from accessing jails and inmates unless they act pursuant to a legitimate law enforcement purpose that is unrelated to enforcement of a civil immigration law.³¹
- A [policy](#) instituted at New York City's Rikers Island jail complex that requires ICE officers operating within the complex to wear uniforms and identify themselves, and provides that immigrants may choose whether or not to speak with an ICE officer by signing a form before they do so.³²
- A Santa Fe, New Mexico, jail [policy](#) of denying ICE access to prisoner lists and prisoners.³³

Lawsuits challenging jail practices

- [Cacho v. Gusman](#). A settlement of a lawsuit on behalf of two workers who were unlawfully held in Orleans Parish Prison for many months because of ICE detainers. The settlement agreement requires the prison to decline ICE hold requests except for specific serious crimes, prohibits the sheriff from investigating an individual's immigration status, and prohibits ICE from conducting, in the parish prison, investigations into civil violations of immigration law.³⁴
- [Harvey v. City of New York](#). A \$145,000 settlement for the wrongful detention of a prisoner based on an expired ICE detainer.³⁵

Challenges in immigration court to underlying arrest

- [Moving to terminate](#) removal proceedings because state or local law enforcement officers committed Fourth Amendment violations during the arrest that led to immigration enforcement activity.³⁶

³¹ www.immigrationpolicy.org/sites/default/files/docs/SO2012-4984.pdf.

³² www.nationalimmigrationproject.org/community/CAP_Advocacy_Guide.pdf.

³³ www.nationalimmigrationproject.org/community/CAP_Advocacy_Guide.pdf.

³⁴ www.nilc.org/nr081313b.html.

³⁵ www.legalactioncenter.org/sites/default/files/docs/lac/Harvey%20v.%20City%20of%20NY%20Stip%20Dismissal%20and%20Settlement.pdf.

³⁶ www.legalactioncenter.org/practice-advisories/motions-suppress-removal-proceedings-cracking-down-4th-amendment-violations.

Limits on the circumstances in which a stop or arrest can trigger the detention and deportation process

- Expanding access to driver's licenses, such as through [AB 60](#) in California,³⁷ so that a person's not having a license does not trigger an arrest or immigration enforcement activity, paired with limiting police officers' ability to infer a driver's immigration status or discriminate against a driver because of the kind of license he or she has.

Conclusion

NILC's issue brief "[What DHS Can Do Right Now](#)" lists the practical steps DHS could take to ensure that its detention and deportation system does not split families apart and remove from our communities people who would benefit from immigration reform.³⁸ But even if DHS were to take these steps, this would not dismantle the infrastructure that allows ICE to mine state criminal justice systems for detention and deportation purposes. It will be critical to continue to support communities in their efforts to untangle themselves from ICE's detention-deportation web.

³⁷ <http://legiscan.com/CA/text/AB60/2013>.

³⁸ www.nilc.org/whatDHScando.html.