CONNECTICUT
LAW REVIEW

VOLUME 47 NOVEMBER 2014 NUMBER 1

Article

Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement

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Secure Communities, though little-known outside law-enforcement circles, is one of the most powerful of the federal government's immigration enforcement programs. Under Secure Communities, fingerprints collected by state and local law enforcement and provided to the Federal Bureau of Investigation for criminal background checks are automatically shared with the Department of Homeland Security, which checks the fingerprints against its immigration database. In the event of a match, an immigration detainer can be issued and an individual held after they would otherwise be entitled to release. Originally designed as a voluntary program in which local governments could choose to participate, the Department of Homeland Security now mandates local participation in Secure Communities. Though admittedly an efficient mechanism to check immigration status, the program and its local implementation create a variety of tensions. Many local police are concerned that community trust, often essential to effective policing, is eroded when the police operate as an arm of immigration enforcement. In some jurisdictions, the program may encourage racial profiling and, in others, jail budgets are stretched as localities absorb the costs of housing those with immigration holds. And, as pointed out by many localities, despite being touted as a program that prioritizes the removal of those who pose a danger to national security or public safety, data shows that approximately two-thirds of the detainers issued targeted individuals with either no record of conviction or conviction for minor offenses. In this Article, I examine Secure Communities from the perspective of state and local governments and individuals seeking to defy mandatory program participation. I explore this local defiance from the stage at which immigration enforcement is set in motion, the sharing of fingerprints information by localities with the federal government. I first analyze the implications for state and local governments by balancing preemption and anti-commandeering concepts in the context of state and local defiance of the federally mandated program. I then analyze the implications for individuals by exploring the tensions between privacy and efficiencies inherent in government information sharing, and address whether the Federal Privacy Act protects individuals from improper fingerprint disclosure. I resolve that a number of legally viable options exist to enable state and local government defiance, as well as individual defiance, but that each option has limitations. I conclude that the Secure Communities mandate overlooks constitutional, statutory, and practical considerations and that the sharing requirement should be voluntary rather than compulsory.

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I. INTRODUCTION

In the absence of comprehensive immigration reform, states, localities, and the federal government continue to struggle over the parameters of immigration enforcement. The role of state and local governments in immigration enforcement shifted to the national stage when states, including Arizona,[1] Alabama,[2] Georgia,[3] Indiana,[4] and Utah,[5] sought to pass local measures to enhance the federal government's immigration

* Professor of Law, Associate Dean for Research and Faculty Development, Vermont Law School. Thanks to Christopher Lasch, Doug Smith, Chris Newman, Sonia Lin, Jenny Roberts, Ramzi Kassem, Amna Akbar, Richard Boswell, Stacy Caplow, Jason Cade, Laila Hlass, Bernard Perlmutter, Shoba Wadhia, and all of the NYU Clinical Writers' Workshop participants. Thanks to my colleagues at Vermont Law School for their support of this Article and to the library staff who helped with resources in a pinch. A special thanks to Jessica West for her feedback and support. All errors are mine alone.

[1] Support our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, 41 (2013)), *amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070, (*invalidated in part by* Arizona v. United States, 132 S. Ct. 2492 (2012)), http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf.

[2] Beason-Hammon Alabama Taxpayer and Citizen Protection Act, No. 2011-535, 2011 Ala. Acts 888 (codified as amended at ALA. CODE §§ 31-13-1 to -35 (2013)). This statute has been partially enjoined. *See* United States v. Alabama, 813 F. Supp. 2d 1282, 1351 (N.D. Ala. 2011) (enjoining §§ 11(a), 13, 16, and 17) (codified at ALA. CODE §§ 31-13-11(a), -13, -16, -17), *aff'd in part, rev'd in part, dismissed in part*, 691 F.3d 1269 (11th Cir. 2012). On appeal, the Eleventh Circuit affirmed the injunction against §§ 11(a), 13(a), 16, and 17, and concluded that sections 10, and 27 should also be enjoined. *Alabama*, 691 F.3d at 1301.

[3] Illegal Immigration Reform and Enforcement Act of 2011, 2011 Ga. Laws 794 (codified in scattered sections of GA. CODE ANN. tits. 13, 16, 17, 35, 36, 42, 45, 50 (2013)). This statute was enjoined in *Georgia Latino Alliance for Human Rights v. Deal*, 793 F Supp. 2d 1317, 1321–22 (N.D. Ga. 2011), *aff'd in part, rev'd in part and remanded sub nom.* Ga. Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012).

[4] Act of May 10, 2011, Pub. L. No. 171-2011, 2011 Ind. Acts 1926 (codified in scattered sections of IND. CODE. tits. 4, 5, 6, 11, 12, 22, 34, 35 (2013)). Two provisions of this statute have been enjoined. *See* Buquer v. City of Indianapolis, 797 F. Supp. 2d 905, 925 (S.D. Ind. 2011) (enjoining Pub. L. No. 171-2011, sec. 20, § 1(a)(11)-(13)) (codified at IND. CODE ANN. § 35-33-1-1(a)(11) to -(13)); Pub. L. No. 171-2011, sec. 18, §§ 1–2 (codified at IND. CODE ANN. § 34-28-8.2-1 to -2)).

[5] Illegal Immigration Enforcement Act, ch. 18, 2011 Utah Laws 260 (codified in scattered sections of UTAH CODE ANN. tits. 76, 77 (2013)), *amended by* Act of Mar. 15, 2011, ch. 18, 2011 Utah Laws 228.

enforcement scheme. The Supreme Court stepped into the debate in *Arizona v. United States*,[6] finding many of the states' legislative provisions preempted by federal immigration authority.[7] At the same time, numerous states and localities are seeking to limit the reach of federal immigration enforcement by resisting compliance with federal immigration detainers. With the issue still hotly contested, much of the scholarship thus far has focused on the validity of the two conflicting approaches. Do state and local government attempts to enhance federal immigration enforcement pass constitutional muster,[8] and are state and local government attempts to defy the enforcement of immigration detainers permissible?[9] Instead, this Article focuses on the question of federal versus state and local control at an earlier point in time—namely, the moment at which states and localities share fingerprint information with the federal government and set the immigration enforcement machine in motion.

In the immigration enforcement context, a program known as Secure Communities (S-Comm) creates an automatic biometric data sharing mechanism between the Federal Bureau of Investigation (FBI) and the Department of Homeland Security (DHS).[10] Pursuant to S-Comm, upon arrest for a local offense, fingerprints that are typically shared by local law enforcement with the FBI for criminal purposes are also automatically sent to DHS to check against an immigration database.[11] If the check reveals

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[6] 132 S. Ct. 2492 (2012).

[7] *Id.* at 2510. It is ironic that the Department of Justice (DOJ) argued that Arizona's attempts to enhance immigration enforcement should be preempted, since the DOJ has overseen an unprecedented expansion of deportations associated with the expansion and mandated participation of states and localities in the Secure Communities Program. *See* Sarahi Uribe, *The Two Faces of Obama on Immigration*, THE GUARDIAN (Aug. 29, 2011), http://www.theguardian.com/commentisfree/cifamerica/2011/aug/29/obama-immigration-secure-communities (noting that S-Comm has led to an "unprecedented level of deportations").

[8] *See generally* Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 1–15 (2011) (providing an overview of the context leading up to S.B. 1070); Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 47–51 (2010) (discussing the structural and substantive constitutional issues created by Arizona Senate Bill 1070); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 27–36 (2007) (contending that "state, county, and local ordinances aimed at regulating general immigration functions are unconstitutional as a function of exclusive federal preemptory powers").

[9] *See generally* Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 281, 293–94 (2013) [hereinafter Lasch, *Preempting Immigration*] (discussing the preemption of detainer enforcement as civil immigration enforcement in the context of Arizona's S.B. 1070); Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629, 636–40 (2013) [hereinafter Lasch, *Federal Immigration*] (examining immigration and immigration detainers as civil rights issues).

[10] *See Secured Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Feb. 1, 2014) [hereinafter *Secured Communities*] (describing the S-Comm program).

[11] *Id.*

that the individual is unlawfully present in the United States or is otherwise removable due to a criminal conviction, Immigration and Customs Enforcement (ICE) can issue a detainer to local law enforcement officials.[12] The detainer operates as a formal request to hold the individual in custody for up to an additional forty-eight hours in order to facilitate the transfer of custody to ICE.[13]

S-Comm was originally designed as a voluntary program in which local governments chose whether to participate.[14] However, early in S-Comm's deployment, the DHS moved away from making agreements with

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[12] 8 C.F.R. § 287.7(a) (2013). Whether ICE will issue a detainer in a specific circumstance is a complicated question. In 2010, ICE issued interim guidance on the issue suggesting that immigration officers could only issue a detainer if there was "reason to believe" the individual was "subject to ICE detention for removal or removal proceedings." Lasch, *Preempting Immigration*, *supra* note 9, at 302–03 n.95. However, the detainer form used by federal immigration officials included a provision that allowed federal immigration officials to issue a detainer merely if they wanted to "initiate an investigation." *Id.* at 303 n.96. Prior to December 2012, there was no clear guidance and immigration detainers could be issued if immigration officials wanted to investigate a prisoner's status. *Id.* at 302 n.94. In light of the practice of issuing detainers for investigative purposes only, a challenge was filed in 2012 alleging detainer illegalities. *Id.* at 303 n.97. In December 2012, ICE issued detainer guidance expressly identifying the circumstances in which ICE will issue detainers and revised Form I-247. *Id.* at 303 n.99. The 2012 revisions clarified that detainers should generally be issued only where there is "reason to believe" that the individual is an immigration violator and meets a list of identified criteria. *Id.* at 304. The "investigation initiated" checkbox has been removed from the form. *Id.* at 305.

[13] 8 C.F.R. §§ 287.7(a), (d) (2013). The meaning of a "request" has been a matter of some confusion and debate. *See* Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 205–09 (2013) [hereinafter Lasch, *Rendition Resistance*] (describing the ambiguous language consistently used by ICE regarding whether a detainer is a request or a command).

[14] Nat'l Day Laborer Org. Network. v. Immigration & Customs Enforcement, 811 F. Supp. 2d 713, 730–31 (S.D.N.Y. 2011). The district found that:

> Initially, federal government officials suggested that the program was voluntary, in that states or localities could choose not to participate. As a result, a number of states and localities took steps to remove themselves from the program's planned deployment. However, while the instant litigation was pending, the federal government appeared to reverse course. On October 6, 2010, Janet Napolitano, the Secretary of DHS, stated during a press conference that "DHS 'does not view [Secure Communities] as an opt-in, opt-out program.'" Since that time, the federal government has consistently asserted that there is no way for localities to opt out of the program, and that the program will be mandatory by 2013.

Id. (internal citations omitted); *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: "SETTING THE RECORD STRAIGHT" 6–7 (Aug. 17, 2010), *available at* http://www.scribd.com/doc/38563566/Ice-Setting-the-Record-Straight-Brainwash [hereinafter SETTING THE RECORD STRAIGHT] (disputing claims that ICE has been ambiguous in determining whether the programs are mandatory or voluntary). ICE states:

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

Id.

local police and began operating at the state level.[15] This created a perception that localities had limited rights to refuse participation in the program.[16] However, this new approach did not stop localities from raising objections about S-Comm. Police expressed concern that community trust might be eroded if the public perceived the police to be an arm of the federal immigration enforcement regime.[17] Community activists exposed evidence of unscrupulous police officers using S-Comm to facilitate and conceal racial profiling.[18] Local jails experienced an increase in budgets due to extended holds of individuals on ICE detainers.[19] Some politicians

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[15] *See* U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, 1ST QUARTERLY STATUS REPORT (APRIL–JUNE 2008) FOR SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 9, app. 3, at 32 (Aug. 2008) (ICE FOIA 10-2674.000095) (on file with author) ("ICE will aim to establish as many [Memoranda of Understanding] as possible at the state level instead of with each county or [Law Enforcement Agency] to shorten deployment schedules and encourage state-wide support and coordination."); *see also* Letter from David J. Venturella, Exec. Dir., Secure Comm., to Linda Denly, Bureau of Criminal Identification & Info., Cal. Dep't of Justice (Jan. 23, 2009), *available at* http://www.ice.gov/doclib/foia/secure_communities-moa/california-sc-moa.pdf ("Deployment at the local level requires a signed Statement of Intent (SOI) by participating agencies that oversee booking locations to ensure those agencies understand and adhere to the principles set forth in the MOA and a set of Standard Operation Procedures.").

[16] Letter from Michael Hennessey, Sheriff, City and Cnty. of S.F., to Edmund G. Brown, Jr., Att'y Gen., Cal. Dep't of Justice (May 18, 2010), *available at* http://www.sfgate.com/opinion/article/Secure-Communities-destroys-public-trust-2373213.php (asking to opt out of S-Comm because the program "conflicts with local law"); Letter from Zoe Lofgren, Chairwoman, Subcomm. on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law, to Janet Napolitano, Sec'y of Homeland Sec., Dep't of Homeland Sec., and Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice (July 27, 2010), *available at* http://uncoverthetruth.org/resources/docs-reports/july-27-2010-letter-from-representative-zoe-lofgren/ (noting that "there appears to be significant confusion about how local law enforcement agencies may 'opt out' of participating in Secure Communities").

[17] AM. FRIENDS SERV. COMM. ET AL., RESTORING CMTY: A NAT'L CMTY ADVISORY REPORT ON ICE'S FAILED "SECURE COMMUNITIES" PROGRAM 5–8 (2011) [hereinafter RESTORING COMMUNITY], *available at* http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf; *Law Enforcement Officials Take a Stand Against Secure Communities and SAFE Act*, AM. VOICE ONLINE (Sept. 4, 2013), http://americasvoice.org/blog/law-enforcement-officials-take-a-stand-against-secure-communities-and-safe-act/.

[18] While S-Comm is publicized as an immigration enforcement tool, its actual reach is much broader. Because all fingerprints are shared, regardless of whether there exists a basis to believe the fingerprints are those of an undocumented immigrant, law enforcement officers can use the program as an investigatory tool by stopping individuals they suspect might lack proper immigration status. In jurisdictions where S-Comm is activated, unscrupulous police officers can stop and arrest people based upon their appearance, assuming that those individuals will be deported, even if they were wrongfully arrested and never convicted. *See* CTR. FOR CONSTITUTIONAL RIGHTS, BRIEFING GUIDE TO "SECURE COMMUNITIES"—ICE'S CONTROVERSIAL IMMIGRATION ENFORCEMENT PROGRAM NEW STATISTICS AND INFO. REVEAL DISTURBING TRENDS AND LEAVE CRUCIAL QUESTIONS UNANSWERED 3–4 (2010) [hereinafter BRIEFING GUIDE], *available at* http://ccrjustice.org/files/Secure%20Communities%20Fact%20Sheet%20Briefing%20guide%208-2-2010%20Production.pdf (finding indicia of racial profiling by comparing the average, nationwide percentage of non-criminal S-Comm deportations, which is 26%, with dramatically increased percentages in minority counties—specifically, 82% in Travis, Texas; 79% in St. Lucie, Florida; 74% in Yavapai, Arizona, and down to 54% in Maricopa, Arizona).

[19] *Immigrants Behind Bars: How, Why, and How Much?*, NAT'L IMMIGRATION FORUM, 10–14 (2011) [hereinafter *Immigrants Behind Bars*], http://www.immigrationforum.org/images/uploads/2011

expressed concern about the evisceration of the line between policing and immigration enforcement.[20] Others identified the potential for ICE detainers to be issued in error,[21] and the potential for unequal treatment of U.S. citizens and non-citizens whose immigration status is in question.[22]

The problems with S-Comm are not limited to state and local governments; individuals are also impacted. Despite being touted as a program that prioritizes the removal of those who pose a danger to national security or public safety,[23] ICE data reveal that less than 15% of the detainers issued in FY 2012–13 targeted those individuals who pose a danger to national security or public safety.[24] Further, the data show that

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/immigrants_in_local_jails.pdf (explaining that Secure Communities, and other immigration enforcement programs, have increased costs associated with detention for local governments).

[20] *Local Detainer Ordinances: An Overview*, TURNING THE TIDE, http://altopolimigra.com/wp-content/uploads/2011/12/Local-Detainer-Ordinances.pdf (last visited Feb. 3, 2014) ("What we are saying in this legislation is we want to maintain the bright line between what federal immigration officials do and what our local department does. We have worked for years to ensure that there is such a bright line." (quoting Council Member Graham, Sponsor of Washington, D.C. Bill)).

[21] *Id.* Commissioner Jesus Garcia (sponsor of the Cook County, Illinois, Bill) stated:

> In America, we don't detain people without probable cause . . . . But these detainers are not based on probable cause and they have been imposed on US citizens, including veterans, by mistake . . . . This Ordinance . . . provides a simple, clear rule that would be easy to implement, and it eliminates any potential risk of liability to the County that would arise from continuing to comply with ICE detainer requests.

Id. (internal quotation marks omitted).

[22] *Id.* Supervisor Shirakawa, sponsor of the Santa Clara, California bill, stated:

> What this policy does is ensure that everyone in our system is treated equally. United States citizens charged with crimes are released on bail every day. There is no justifiable reason to treat people's criminal cases differently just because they are suspected of having civil immigration issues. The country has no authority to enforce civil immigration laws. Immigration enforcement is ICE's job.

Id. (internal quotation marks omitted).

[23] *See* Memorandum from John Morton, Assistant Secretary, U.S. Immigration. & Customs Enforcement, to All ICE Employees (June 30, 2010), *available at* http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf [hereinafter Morton Memo] (outlining the way ICE prioritizes removals); *see, e.g.*, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION & CUSTOM ENFORCEMENT, SECURE COMMUNITIES: STATE IDENTIFICATION BUREAU DEPLOYMENT BRIEFING, NEW YORK STATE 5 (2009) (ICE FOIA 10-2674.000800) ("ICE will focus initially on identifying removable criminal aliens charged with or convicted of a Level 1 offense . . . . Level 1 offenses include [t]hreats to national security [and] [h]omicide . . . .").

[24] *Few ICE Detainers Target Serious Criminals*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Sept. 17, 2013), http://trac.syr.edu/immigration/reports/330/ [hereinafter *Few ICE Detainers*]; *see also* U.S. DEP'T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: IDENT/IAFIS INTEROPERABILITY, MONTHLY STATISTICS THROUGH JUNE 30, 2010, at 2, 8 (2010) (ICE FOIA 10-2674.000079) (on file with author) [hereinafter INTEROPERABILITY REPORT 2010]. The vast majority (79%) of those deported due to S-Comm are non-criminals or those who are picked up for low level offenses (Level II and Level III), such as traffic offenses or juvenile mischief). *Id.* This statistic reflects the number of individuals deported through S-Comm from October 2008 through June 2010. *Id.* at 2. The cumulative number of individuals deported through S-Comm

approximately half of the individuals subject to an ICE detainer had no criminal history, not even minor traffic violations.[25] If the data are expanded to include traffic violations and marijuana possession, then two-thirds of all detainers issued targeted individuals with no record of conviction.[26]

Undocumented immigrant parents who have U.S. citizen children have additional fears that if they are deported, their children will end up in foster care.[27] Victims of domestic violence often do not reach out to local law enforcement for fear that doing so will result in immigration consequences.[28] In addition to specific communities that are greatly impacted by S-Comm, unwitting U.S. citizens have been improperly swept up in the system, unlawfully detained,[29] and presumed to be undocumented immigrants due to data errors.[30]

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during that time period was 46,929, while the total number of non-criminals and low level (Level II and Level III) offenders deported through S-Com was 37,098. *Id.*

[25] *Few ICE Detainers*, *supra* note 24; *see also* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 89 (2013) (evaluating the S-Comm roll-out data). The authors conclude that:

> [T]he data undermine the government's claim that Secure Communities is principally about making communities more secure from crime. High-crime areas were, surprisingly, not a priority in the rollout. It is very difficult to square the lack of any meaningful correlation between early activation and local crime rates with the government's putative desire to target immigration enforcement resources in a manner designed to reduce the incidence of serious crime by noncitizens.

Id. at 89.

[26] *Few ICE Detainers*, *supra* note 24, fig. 1. The data historically follows the same trend. INTEROPERABILITY REPORT 2010, *supra* note 24, at 2. These statistics reflects the number of individuals administratively arrested or booked into ICE custody through S-Comm from the program's initiation in October 2008 through June 2010. *Id.* The cumulative number of individuals administratively arrested or booked into ICE custody through S-Comm was 89,019, while the total number of non-criminals administratively arrested or booked into ICE custody through S-Comm was 24,706. *Id.*

[27] *See* APPLIED RES CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 6, 27 (2011), *available at* http://arc.org/shatteredfamilies (reporting that in "in jurisdictions where local police aggressively participate in immigration enforcement (e.g. 287(g) and Secure Communities), children are more likely to be separated from their parents and face barriers to reunification.").

[28] *See* Nomi Dave & Leslye E. Orloff, *Identifying Barriers: Survey of Immigrant Women and Domestic Violence in the D.C. Metropolitan Area*, POVERTY & RACE, July/Aug. 1997, at 9–10 (conducting a survey among Latina immigrants in the Washington, D.C. area and finding that 83% of battered immigrant women interviewed did not contact law enforcement about the abuse and one-fourth of the battered immigrant women survey participants listed a fear of being reported to immigration as their primary reason for remaining in an abusive relationship).

[29] *See, e.g.*, Complaint at 1, Roy v. L.A. Cnty., No. 2:12-cv-9012-RGK-FFM (C.D. Cal. Oct. 19, 2012) (alleging that the County of Los Angeles and L.A. county sheriff denied bail and held people in county jail for more than 48 hours on the basis of ICE holds).

[30] *See* Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. TIMES, Dec. 14, 2011, at A20 ("In a spate of recent cases across the country, American citizens have been confined in local jails after federal immigration agents, acting on flawed information from Department of Homeland

As problems with S-Comm continued to grow, so too did the number of local governments seeking to opt-out of participation.[31] Faced with non-participation by some localities, the DHS shifted its strategy. The agency reversed its earlier position that localities could opt-out, to unilaterally imposing S-Comm on all states and localities.[32] Without the localities ability to formally opt-out, governmental and individual voices of resistance emerged. Localities that pushed back against federal enforcement efforts include: Santa Clara County, California;[33] Alameda County, California;[34] Champaign County, Illinois;[35] Cook County, Illinois;[36] Milwaukee County, Wisconsin;[37] and Multnomah County,

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Security databases, instructed the police to hold them for investigation and possible deportation."); *see also, e.g.*, Complaint at 3–4, Makowski v. Holder et al., No. 1:12-cv-05265 (N.D. Ill. Jul. 3, 2012) [hereinafter Makowski Complaint] (alleging that ICE held a U.S. Citizen and a U.S. Marine in custody for two months because of an error in the records kept by federal agencies).

[31] *See, e.g.*, Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES, May 6, 2011, at A18 (discussing Illinois' withdrawal from the Secure Communities program and the hesitancy of other states to participate).

[32] As of the end of 2013, all jurisdictions were required to participate. *See Secure Communities: Get the Facts*, U.S. DEP'T HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT, https://www.ice.gov/secure_communities/get-the-facts.htm (last visited June 27, 2014) (noting that "[s]tate and local jurisdictions cannot opt out of Secure Communities").

[33] BD. OF SUPERVISORS, CNTY. OF SANTA CLARA, CAL., BD. OF SUPERVISORS' POLICY MANUAL ch. 3, § 3.54 (2014), *available at* http://www.sccgov.org/sites/bos/Legislation/BOS-Policy-Manual/Documents/BOSPolicyCHAP3.pdf.

[34] Resolution Regarding Civil Immigration Detainer Requests, Bd. Of Supervisors of Cnty. Of Alameda, Cal., Res. No. R-2013 (2010) *reprinted in* Letter from Richard Valle, Supervisor, Dist. 2, to Board Supervisors, Alameda Cnty. (Apr. 17, 2010) [hereinafter Valle Letter], *available at* https://immigrantjustice.org/sites/immigrantjustice.org/files/Almeda%20Cty%20CA%20Detainer%20resolution.pdf. Local commentators have described the resolution as symbolic and non-binding on the sheriff. Steven Tavares, *Alameda County Supervisors Discourage Sheriff From Detaining Undocumented Residents*, EBCITIZEN.COM (Apr. 23, 2013), http://www.ebcitizen.com/2013/04/alameda-county-supervisors-discourage.html. In adjacent Contra Costa County, the sheriff is reported to be finalizing a policy that would limit detainer compliance. Malaika Fraley, *Contra Costa County Softening Policies on Immigrant Deportations*, CONTRA COSTA TIMES, May 24, 2013.

[35] *See* Letter from Dan Walsh, Champaign Cnty. Sheriff, to U.S. Immigration & Customs Enforcement (March 8, 2012) [hereinafter Walsh Letter], *available at* http://d3n8a8pro7vhmx.cloudfront.net/progressivemajorityaction/pages/92/attachments/original/1369418919/Champaign__IL_Policy_Letter.pdf?1369418919 (refusing to "to hold inmates on a routine detainer").

[36] *See* COOK CNTY., ILL., CODE OF ORDINANCES § 46-37(a) (2011), *available at* http://library.municode.com/index.aspx?clientId=13805 ("The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed.").

[37] *See* A Resolution Establishing Milwaukee County Policy with Respect to Honoring Detainer Requests from U.S. Department of Homeland Security—Immigration & Customs Enforcement, Milwaukee Cnty. Bd. of Supervisors, Res. File No. 12-135 (adopted June 4, 2012), *available at* https://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=1124069&GUID=3D583485-4F01-4B43-B892-D6FFE5D327BF (adopting a resolution limiting when detainer requests from Immigrations and Customs Enforcement will be honored).

Oregon.[38] In addition, towns and cities including: Amherst;[39] Berkeley;[40] Chicago;[41] Los Angeles;[42] Newark;[43] New Orleans;[44] New York;[45] and San Francisco;[46] as well as the District of Columbia.[47] California[48] and

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[38] Resolution in Support of Multnomah County Sheriff's Office Revised Plan for 1-247 Immigration Detainers, Bd. of Cnty. Comm'rs, Multnomah County, Or., Res. 2013-032 (adopted Apr. 4, 2013), *available at* http://multnomah.granicus.com/MetaViewer.php?view_id=3&clip_id=593&meta_id=37732.

[39] Henry Epp, *Amherst Votes To Opt-Out Of Controversial Secure Communities*, NEW ENGLAND PUB. RADIO (May 22, 2012), http://nepr.net/news/2012/05/22/amherst-votes-opt-out-controversial-secure-communities/.

[40] *See* ANNOTATED AGENDA, BERKELEY CITY COUNCIL MEETING (2012), *available at* http://www.ci.berkeley.ca.us/Clerk/City_Council/2012/10Oct/Documents/10-30_Regular_Meeting_Annotated_Agenda.aspx (voting that "the Berkeley Police Department will not honor requests by the United States Immigration and Customs Enforcement (ICE) to detain a Berkeley jail inmate for suspected violations of federal civil immigration law"); *see also* Letter from Christine Daniel, City Manager of Berkeley, Cal., to Mayor and Members of the City Council (Oct. 30, 2012) [hereinafter Daniel Letter], *available at* http://www.ci.berkeley.ca.us/Clerk/City_Council/2012 /10Oct/Documents/2012-10-30_Item_19_Consideration_of_Revisions.aspx (outlining draft revisions to the City of Berkeley's policy with regards to immigration detainers in the Berkeley jail).

[41] *See* CHI., ILL., CODE § 2-173-042 (2013) (mandating, for example, that no city agency or agent shall "arrest, detain or continue to detain a person solely on the belief that the person is not present legally in the United States").

[42] *See* Editorial, *Baca's Sensible Shift on Immigration—Illegal Immigrants Won't be Detained for Minor Offenses*, L.A. TIMES, Dec. 6, 2012, at A18 (praising decisions by the L.A. county sheriff and L.A. city police chief to cease cooperating with Secure Communities as "[c]ompliance is optional" and "it isn't appropriate for police or deputies to act as immigration agents").

[43] *See* James Queally, *Newark Police First in N.J. to Refuse to Detain Undocumented Immigrants Accused of Minor Crimes*, NJ.COM (Aug. 15, 2013, 9:05 PM), http://www.nj.com/essex/index.ssf/2013/08/newark_police_first_in_nj_to_refuse_to_detain_illegal_immigrants_accused_of_minor_crimes.html (last updated Aug. 15, 2013, 9:05 PM) (chronicling Newark's decision to "opt out of the most controversial part of the 'Secure Communities' program").

[44] *See* Campbell Robertson, *New Orleans and U.S. in Standoff on Detentions*, N.Y. TIMES, Aug. 13, 2013, at A10 (detailing a policy limiting detainer compliance that "came about for a variety of reasons, including a lawsuit filed in federal court in 2011 by two men who had spent months in Orleans Parish Prison on expired detention requests").

[45] *See* N.Y.C., N.Y., ADMIN. CODE § 9-131 (2013) *available at* http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$ADC9-131$$@TXADC09-131+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=27866463+&TARGET=VIEW (requiring extensive reporting on the numbers of civil-immigration detainees transferred to the custody of federal immigration officials).

[46] *See* Brent Begin, *San Francisco County Jail Won't Hold Inmates for ICE*, S.F. EXAMINER (May 6, 2011), http://www.sfexaminer.com/sanfrancisco/san-francisco-county-jail-wont-hold- inmates-for-ice/Content?oid=2174504 (describing a policy adopted by San Francisco sheriff Michael Hennessey to begin releasing low-level offenders over objections of federal agents notified through S-Comm).

[47] *See* Immigration Detainer Compliance Amendment Act of 2012, D.C. Act 19-442, 59 D.C. Reg. 10153, 10153–55 (2012) (stating that Washington, D.C. "is authorized to comply with civil detainer requests from the United States Immigration and Customs Enforcement" but will henceforth "exercise discretion regarding whether to comply with the request[s]," cooperating only if the detainee has been convicted of a "dangerous crime").

[48] The California "TRUST (Transparency and Responsibility Using State Tools) Act," aimed at limiting the state's compliance with federal immigration detainers, was signed into law on October 5, 2013. *See* Assemb. B. 4, 2013–2014 Reg. Sess. (Cal. 2013) (codified at CAL. GOV'T. CODE §§ 7282,

Connecticut[49] sought legislative solutions—known as TRUST Acts—limiting the obligation of states to comply with federal immigration detainers. Similar legislation has been proposed in Florida,[50] Massachusetts,[51] and Washington.[52] To date, state and local resistance has centered on legislation and policies designed to thwart compliance with the federal immigration detainer. No state or local government has yet to legislate or address issues involving the automatic sharing of fingerprints. In instances where individuals were harmed, groups representing their interests organized[53] and individuals themselves sought remedies by filing suit.[54]

Do states, localities, or individuals have any ability to defy the fingerprint sharing that occurs as a matter of course through the S-Comm program? From the government perspective, S-Comm's fingerprint sharing scheme raises federalism questions regarding the appropriate role of federal, state, and local governments in the context of federal immigration enforcement. From the individual perspective, S-Comm's fingerprint-sharing scheme raises questions about the appropriate balance between sharing information to protect the public and protecting individuals' right to privacy.

When states and localities seek to defy the mandate, the analysis is

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7282.5 (West 2014)), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20130624_amended_sen_v97.pdf; *see also AB-4 State Government: Federal Immigration Policy Enforcement*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB4 (last visited May 17, 2014) (providing the bill's history).

[49] In June 2013, the Connecticut General Assembly passed, and the governor signed into law, a bill that will expand the limitations on detainer compliance beyond the Department of Correction to other state and local law enforcement agencies. H.B. 6659, 2013 Gen. Assembly., 2013 Conn. Acts 13-155 (Reg. Sess.) (codified at CONN. GEN. STAT. § 54-192(h) (2014)), *available at* http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00155-R00HB-06659-PA.pdf.

[50] S.B. 730, 2013 Reg. Sess. (Fla. 2013). The bill, which would have limited detainer compliance to cases involving specified "serious offense[s]," *id.* at 4, died in committee in May 2013. S, 730, OPEN STATES, http://openstates.org/fl/bills/2013/S730/ (last visited July 6, 2014).

[51] H.B. 1613, 188th Gen. Court., Reg. Sess. (Mass. 2013), *available at* https://malegislature.gov/Bills/188/House/H1613. The bill was described as an "Act relative to restore community trust in Massachusetts law enforcement," and would severely restrict state participation in immigration enforcement. *Id.*

[52] H.B. 1874, 63rd Leg., 2013 Reg. Sess. (Wash. 2013), *available at* http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/House%20Bills/1874.pdf.

[53] *See* APPLIED RESEARCH CTR., *supra* note 27, at 3 (detailing the results of the Applied Research Center's study, which was the first investigation into the harmful implications of immigration policy on families); Dave & Orloff, *supra* note 28 (reporting the results of a study on the harmful repercussions of immigration policy on Latina female domestic violence victims, which would influence the passage of the Violence Against Women Act).

[54] *See, e.g.*, Complaint at 3–4, Makowski v. Holder et. al., No. 1:12-cv-05265 (N.D. Ill. July 3, 2012), ECF No. 1 (alleging that ICE held a U.S. citizen and a U.S. Marine in custody for two extra months because of an error in the records kept by federal agencies). Some of the individual resistance used litigation as a tool to address fingerprint sharing. *E.g.*, *id.* at 1–2 (arguing that the sharing of fingerprints from the FBI to DHS violated the Federal Privacy Act).

complex, in part because of the potential overlap of immigration enforcement and local policing. Typically, the duty to police a community lies with state and local officials.[55] Federal officials are responsible for enforcing the nation's immigration system that includes potential civil and criminal violations of law.[56] In the context of S-Comm, where the federal government seeks to utilize state and local police to enhance its enforcement tools, Tenth Amendment commandeering concerns arise.[57] The question of commandeering in the context of S-Comm is sufficiently nuanced that DHS itself changed its position on potential Tenth Amendment implications.[58] Part of the rationale behind DHS initially launching S-Comm as an opt-in program was the agency's own internal analysis indicating that forced participation might raise Tenth Amendment commandeering concerns.[59] DHS was later directed to "rewrite" the memo.[60] Thus, on October 2, 2010, the Deputy Principal Legal Advisor of

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[55] *See, e.g.*, Raucci v. Town of Rotterdam, 902 F.2d 1050, 1055 (2d Cir. 1990) ("[A] municipality's duty to provide police protection is owed to the public at large.").

[56] There is ongoing debate, however, as to whether state and local officials can arrest individuals for federal immigration crimes. *See* Lasch, *Preempting Immigration*, *supra* note 9, at 291–313 (attempting to resolve the debate).

[57] *See* Connie Choi & Angela Chan, *Saying No to ICE's S-Comm Program*, ASIAN AMERICANS ADVANCING JUST. (Nov. 9, 2010), http://www.advancingjustice-alc.org/news-media/blog/uncategorized/saying-no-ice%E2%80%99s-s-comm-program ("The core legal issues underriding the opt out question include whether S-Comm violates the 10th Amendment and the anti-commandeering doctrine.").

[58] *See infra* note 190 and accompanying text (discussing the change in position).

[59] One FOIA disclosure discusses the issue:

> [Secure Communities'] position that participation in the "Secure Communities initiative" is voluntary is supported by applicable case-law. Under the Tenth Amendment, "[t]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." Similarly, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States" officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." Although SC defines itself as a "plan," "strategy," or "initiative," and not a "program" in official documents, ICE created SC to address programmatic changes to the manner in which ICE identifies and removes criminal aliens, and the public perceives it as an ICE program. Moreover, although the currently CJIS requirement that the LEA perform a ministerial task may be very minor, and involve no local costs, the Supreme Court in *Printz* held that Congress cannot force state officials to even perform 'discrete, ministerial tasks' to implement a federal regulatory program. Therefore, even though ICE may not truly consider SC a "program[,]" . . . a court may find that SC's infrastructure, purpose, and activities mark it a program and, thus, could find that ICE cannot compel LEAs to participate."

"Opt Out" Background (2010) [hereinafter "Opt Out" Background] (citations omitted) (quoting Printz v. United States, 521 U.S. 898, 925, 929–30, 935 (1997)), http://ccrjustice.org/files/Opt-Out-Background.pdf

[60] A Briefing Guide to the Secure Communities October 2, 2010 "Mandatory Memo", CTR. FOR CONSTITUTIONAL RIGHTS 1 (2012), http://ccrjustice.org/files/1-9-12-Briefing-Guide-Oct-2-Mandatory-

ICE issued a new memo reversing positions and finding that participation in S-Comm could be made mandatory by the end of 2013 without violating the Tenth Amendment.[61]

In the absence of a state or local government challenge to the fingerprint-sharing protocol, no court has directly addressed the federalism issues raised by S-Comm's provision for the automatic sharing of information from the FBI to the DHS.[62] Tenth Amendment jurisprudence in the commandeering context makes a distinction between actively engaging in the provision of administrative services, and simply sharing information—the former being prohibited and the latter being acceptable. Examining where S-Comm falls along this continuum, this Article concludes that there are unique features of the S-Comm program that make it more than just an information-sharing program. Even if it is construed as a program that requires only information-sharing, such a narrow interpretation of anti-commandeering limitations in the immigration enforcement context would be unwise. This Article then proposes that state and local governments could test the limits of the Tenth Amendment anti-commandeering principle by drafting legislation expressly stating that state and local resources, in the form of police work resulting in fingerprint gathering, cannot be used for immigration enforcement purposes. Alternatively, state and local governments could share fingerprints on the express condition that the federal government does not violate the Federal Privacy Act[63] when sharing the state and locally-supplied fingerprints. While such legislative proposals raise preemption issues, this Article attempts to navigate between these two constitutional concepts—anti-commandeering and preemption—in the context of state and local government defiance of S-Comm's mandate.

The balance is also complex for individuals who are harmed by S-Comm's reach. The complexity stems from the government's need to effectively balance the desire to share information against the need to protect individuals' right to privacy. The protection-of-public rationale for

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Memo.pdf ("Gibson directed ICE attorneys to 'rewrite' an earlier memo that had supported opt-out and raised constitutional concerns about making S-Comm mandatory.").

[61] *See* Email from Section Chief, Enforcement Law Section, U.S. Immigration & Customs Enforcement to Peter S. Vincent (Sept. 29. 2010, 3:22 PM) (ICE FOIA 10-2674.0003726) (on file with author); *see also* Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement, 827 F. Supp. 2d 242, 247 (S.D.N.Y. 2011) ("I understand that we are rewriting our memo to OPLA to argue for the 'mandatory' participation in 2013 . . . .").

[62] While I found no court decision that addresses whether the Secure Communities Program's forced information-sharing violates the anti-commandeering rule of the Tenth Amendment, one decision addresses general information-sharing of immigration data under other programs. *See* City of New York v. United States, 179 F.3d 29, 34–35 (2d Cir. 1999) (rejecting the city's claim that congressional statutes had commandeered city officials into providing immigration data to the federal law enforcement agencies).

[63] Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified at 5 U.S.C. § 552(a) (1974)).

sharing information might be more supportable if the program successfully deported dangerous criminals. Instead, ICE's own data reveal that the majority of individuals being deported are not criminals at all.[64] Additionally, while U.S. citizens and lawful permanent residents are entitled to seek remedies under the Federal Privacy Act for the improper sharing of information,[65] the federal government's position is that disclosure from the FBI to DHS of biometric information amounts to a "routine use" under the Federal Privacy Act and is thus excepted from liability.[66] Whether the "routine use" exception should be construed so broadly in the S-Comm context is a question not yet answered by the courts. This Article explores the balance between protecting the public and individuals' rights to privacy in the context of S-Comm, as well as the Federal Privacy Act's legislative history, concluding that the "routine use" exception should not be construed so broadly as to allow the FBI to automatically, and indiscriminately share the biometric information of all individuals.[67] Instead, this Article proposes an interpretation that limits the sharing of information and strikes a more appropriate balance between the rights of the government to share information and the rights of individuals to privacy protection.

Part II of this Article explores the S-Comm program in-depth, beginning with the historical documentation of increasing state and local government involvement in immigration enforcement. This Part proceeds to describe S-Comm's actual implementation and concludes with an examination of S-Comm's evolution from an opt-in program in which state and local governments could choose to participate, to a program that now mandates participation by all localities. Many state and local governments willingly participate in S-Comm, while others do so only reluctantly. Part III examines the problems associated with the implementation of S-Comm along with the state, local, and individual responses to those problems. Part IV explores issues of federalism that arise when state and local governments seek to defy participation in S-Comm.[68] This Part analyzes

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[64] *Few ICE Detainers*, *supra* note 24 (showing that half of those deported have no criminal record).

[65] 5 U.S.C. § 552a(g)(1) (2012).

[66] 5 U.S.C. § 522a(3) (2012).

[67] Since the remedies afforded under the Federal Privacy Act are limited to U.S. citizens and lawful permanent residents, there may be some constitutional arguments to protect against the overbroad information sharing that is mandated under the S-Comm program. While such an exploration is beyond the scope of this Article, others have addressed this topic in related contexts. *See, e.g.*, Lasch, *Federal Immigration*, *supra* note 9, at 2695–978 (arguing that Fourth Amendment concerns are raised by prolonged detention); *see also* Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 408–10, 415–17 (2012) (analyzing both statutory and constitutional issues that arise in the context of remote biometric identification (RBI) surveillance).

[68] *See* Donohue, *supra* note 67, at 440 ("The federalization of local information impacts the relationship of local and state authorities to the federal government."). State and local governments

the interplay of the Tenth Amendment anti-commandeering and preemption concepts in the context of defiance against S-Comm. Part V addresses the impact upon individuals swept up in S-Comm's enforcement and examines the appropriate balance between protecting the public and protecting individual privacy rights.

This Article recognizes that any successful comprehensive immigration reform effort will likely include the enhancement of federal immigration enforcement at the U.S. border and within the U.S. border. As more resources are provided for new enforcement programs, existing programs such as S-Comm will continue to play a critical role in the enforcement of federal immigration laws. While state and local governments and individuals have some opportunities to defy S-Comm compliance, it is unclear how courts will navigate the complex questions concerning the roles of federal, state, and local governments in immigration enforcement. State and local governments that continue to disregard ICE detainers represent only a partial solution. Localities can consider passing legislation to address the FBI's indiscriminate sharing of fingerprints collected by state and local law enforcement authorities—for example, prohibiting the use of state and local resources for federal immigration enforcement or, alternatively, only sharing fingerprints on the express condition that the Federal Privacy Act not be violated. However, whether such legislation would survive preemption challenges is questionable. U.S. citizens and lawful permanent residents, who are harmed by S-Comm's broad reach can seek relief under the Federal Privacy Act, but the statute does not provide protection for undocumented immigrants or immigrants who have applications pending. This Article concludes that the Secure Communities mandate overlooks constitutional, statutory, and practical considerations, and the sharing requirement should be voluntary rather than compulsory.

II. SECURE COMMUNITIES

Although the S-Comm program[69] was first introduced in 2008, state

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provide information to the federal government and the federal government then provides information back to state and local governments—"blurring the federalism divide." *Id.* at 461. "State and local governments are thus both active participants in building federal biometric databases as well as consumers of federal initiatives." *Id.*

[69] There is some question as to what to call Secure Communities:

> Although [S-Comm] defines itself as a "plan," "strategy," or "initiative," and not a "program," its staff is located in the "Program Management Office," DHS and ICE has called SC a "program" in official documents, ICE created SC to address programmatic changes to the manner in which ICE identifies and removes criminal aliens, and the public perceives it as an ICE program.

"Opt Out" Background, *supra* note 59.

and local governments began playing an increasing role in immigration enforcement prior to that time.[70] This Part will describe the evolution of state and local governments' increasing role in immigration enforcement and examine the structure of the S-Comm program. This Part will conclude by detailing S-Comm's evolution from an opt-in program to a mandatory participation program.

A. *Increasing Role of State and Local Governments in Immigration Enforcement*

The U.S. Constitution provides broad powers to the federal government to regulate immigration.[71] Federal legislators decide U.S. immigration policy and federal agencies administer immigration admissions and removals. However, because there are both civil[72] and criminal[73] violations of immigration law, enforcing immigration laws is complex. Because of this complexity, it was generally accepted that state and local police do not have the authority to enforce federal civil immigration laws. While state and local police worked with federal agents on criminal matters, they generally avoided civil immigration enforcement. This demarcation of authority continued until the late 1990s, when the roles of federal and state governments in immigration enforcement became less clearly defined.

In 1996, the Department of Justice (DOJ) issued a memo detailing the limits of state and local authority to enforce immigration laws and concluded that state and local officials did not have the authority to enforce

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[70] *See* Aarti Kohli et al., Secure Communities By the Numbers: An Analysis of Demographics and Due Process, CHIEF JUSTICE EARL WARREN INSTIT. ON LAW AND SOC. POL'Y 1 (2011), http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf (reporting that "annual deportations have increased over 400% since 1996 and more than a million people have been removed from this country since the beginning of the Obama administration . . . .").

[71] The Federal Government has broad power over immigration, derived from numerous Constitutional sources including: the power to establish a "uniform Rule of Naturalization," U.S. CONST. art. I, § 8, cl. 4; Congress's power "[t]o regulate commerce with foreign nations, and among the several states," *id.* at art. I, § 8, cl. 3; Congress's power to declare war, which authorizes the exclusion and expulsion of enemy aliens, *id.* at art. I, § 8, cl. 11; and the Implied Foreign Affairs Powers, *see* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (stating that the Foreign Affairs Power is the foundation for all federal control over immigration).

[72] Civil violations include illegal presence and failure to depart after the expiration of a temporary visa. 8 U.S.C. § 1324d (2012).

[73] Criminal violations include illegal entry, re-entry after deportation, and failure to depart after an order of removal. 8 U.S.C. § 1326 (2012). Criminal violations are more complicated by the fact that in order to be criminally liable for the failure to depart after an order of removal, the government must show that the individual "willfully" failed to depart. 8 U.S.C. § 1253 (a) (2012). Many removal orders are entered in abstentia, making it hard to show that the failure was "willful." If the government is unable to show a "willful" failure to depart, the offense is a civil, rather than criminal, violation. *See Backgrounder: Immigration Law Enforcement by State and Local Police*, NAT'L IMMIGRATION FORUM 1 (rev. 2007), *available at* http://immigrationforum.org/images/uploads/Backgrounder-StateLocal Enforcement.pdf [hereinafter *Backgrounder*].

civil immigration laws.[74] Based upon this interpretation, a state or local police officer could not detain a non-citizen without independent authorization, because the immigration violation was a mere civil violation, not a criminal offense. However, the 1996 Congressional session saw the passage of several laws that began to expand the power of state and local law enforcement officials to enter the immigration enforcement realm in certain defined circumstances. The Antiterrorism and Effective Death Penalty Act expanded the power of state and local law enforcement over immigration by authorizing state and local law enforcement officers to arrest and detain unlawfully present noncitizens who had "previously been convicted of a felony in the United States."[75] The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) empowered the Attorney General (now the Secretary of DHS) to authorize local officials to enforce civil immigration laws when "an actual or imminent mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response."[76] The Act also added section 287(g) to the Immigration and Nationality Act, which allows the Attorney General to delegate immigration enforcement authority to state and local police pursuant to a formal agreement between the state or local agency and the DOJ, provided that the state or local officers have undergone adequate training to enforce immigration laws.[77]

Congress also passed two measures designed to enhance cooperation between the federal government, states, and localities. A provision of the IIRIRA mandates that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[78] And, a provision of the 1996 Welfare Reform Act, known as the Personal Responsibility Work Opportunity Reconciliation Act, states that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful,

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[74] Memorandum from Teresa Wynn Roseborough, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Alan Bersin, U.S. Att'y, S. Dist. of Cal. (Feb. 5, 1996) (on file with author) (opining that state police lack the authority to arrest aliens on the basis of civil deportability).

[75] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C. § 1252c(a) (2012).

[76] 8 U.S.C. § 1103(a)(10) (2012).

[77] Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g) (2012). Such agreements are often referred to as "287g agreements."

[78] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 642, 8 U.S.C. § 1373 (2012). The statute also specifies that "no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity" from "[m]aintaining" or "[e]xchanging . . . with any other Federal, State, or local government entity" information regarding any person's "immigration status, lawful or unlawful." 8 U.S.C. § 1373(b) (2012).

of an alien in the United States."[79]

An even larger shift occurred after the tragedy of September 11, 2001. With a different administration in place and a new fear of uncontrolled terrorism, more expansive interpretations of the extent of state and local law enforcement official involvement in immigration enforcement took hold. Internally, the executive branch pronouncements were less than clear about the new shift. The Office of Legal Counsel in the Justice Department, under Attorney General John Ashcroft, revised the 1996 memorandum regarding the role of state and local police in immigration enforcement, concluding that state and local law enforcement had "inherent authority" to arrest and detain immigration violators, including civil violators.[80] The memo was not immediately released. Instead, then White House Counsel Alberto Gonzales issued a 2002 letter to the Migration Policy Institute suggesting a more moderate position than the unconstrained "inherent authority" position taken by the Office of Legal Counsel.[81] Gonzales' memo indicated that state and local police had authority "to arrest and detain persons who are in violation of immigration laws and whose names have been placed in the National Crime Information Center."[82] Even this more moderate position indicated an expansion of state and local police power, because in 2002, absent Congressional authorization, the Justice Department began to enter certain civil immigration violations into the National Crime Information Center.[83] This lack of clarity created a great deal of confusion among state and local police officers, including some who began to participate in immigration enforcement in a variety of forms.

B. *Interoperability and The Secure Communities Program*

In 2002, Congress passed the Enhanced Border Security and Visa Entry Reform Act.[84] The Act instructed the executive branch to develop and implement an interoperable electronic data system between law

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[79] 8 U.S.C. § 1644 (2012).

[80] Memorandum from Jay S. Bybee, Assistant Att'y Gen. to John Ashcroft, Att'y Gen. 3, 13 (Apr. 3, 2002), *available at* https://www.aclu.org/FilesPDFs/ACF27DA.pdf (reversing a prior opinion and concluding that "states have inherent power, subject to federal preemption, to make arrests for violations of federal law").

[81] Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Inst. (June 24, 2002), *available at* https://web.archive.org/web/20030315103114/http://www.migrationpolicy.org/files/whitehouse.pdf.

[82] *Id.*

[83] *See* Backgrounder, *supra* note 73, at 5 ("In 2002—without Congressional authorization—the Justice Department began to enter certain other *civil* immigration violations in the NCIC.").

[84] Pub. L. No. 107-173, 116 Stat. 548 (May 14, 2002) (codified at 8 U.S.C. §§ 1701–1778 (2012)).

enforcement and immigration officers.[85] While the DOJ developed initial interoperability plans prior to the September 11th attack,[86] it was not until the passage of the 2002 Act that meaningful progress was made.[87] The plain meaning of the Enhanced Border Security and Visa Entry Reform Act and its legislative history demonstrate that Congress intended ICE to have ready access to the FBI's records whenever ICE is confronted with an immigration enforcement decision against an individual.[88] To meet that objective in accordance with the statute, the FBI and DHS originally planned a more limited disclosure of fingerprints. As set forth in the Secure Communities Memorandum of Understanding, DHS would place in a database, accessible to the FBI, fingerprint images and related data for "high priority subjects," as selected by DHS.[89] After signing that original

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[85] Specifically, the EBSA instructed that the President "shall develop and implement an interoperable electronic data system to provide current and immediate access to information in databases of Federal law enforcement agencies and the intelligence community that is relevant to determine whether to issue a visa or to determine the admissibility or deportability of an alien . . . ." 8 U.S.C. § 1722(a)(2) (2012). Immigration was one of many areas in which Congress passed legislation reinforcing the importance of information sharing among federal agencies. *See, e.g.*, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No 108-458, § 7402, 118 Stat. 3638, 3850 (codified as amended at 6 U.S.C. § 112(f) (2012)) (increasing the authority of the Department of Homeland Security to utilize private sector resources that would assist it in preventing, or responding to, terrorist acts); Homeland Security Act of 2002, Pub. L. No. 107-296, § 102(a), (b)(3), 116 Stat. 2135, 2142–43 (codified as amended at 6 U.S.C. §§ 112(a), (b)(3) (2012)) (creating the position of Secretary of Homeland Security and requiring the Secretary to "take reasonable steps to ensure that information systems and databases of the Department [of Homeland Security] are compatible with each other and with appropriate databases of other [federal] Departments"); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 701, 115 Stat. 272, 374 (codified as amended at 42 U.S.C. § 3796h(4) (2012)) (authorizing the establishment of enhanced information-sharing systems between federal, state, and local law enforcement agencies).

[86] *See* DEP'T OF HOMELAND SEC., IDENT/IAFIS INTEROPERABILITY 2 (2005), [hereinafter IDENT/IAFIS INTEROPERABILITY 2005] *available at* http://www.dhs.gov/xlibrary/assets/foia/US-VISIT_IDENT-IAFISReport.pdf (describing how the DOJ developed this interoperability plan to coordinate efforts between DHS and the FBI in March of 2000).

[87] *See* Donohue, *supra* note 67, at 457 ("But it was not until after the attacks that INS (and its successor, DHS), together with DOJ and DOS, made substantial progress."); *see also* IDENT/IAFIS INTEROPERABILITY 2005, *supra* note 86, at 2–3 (outlining the progress of IDENT/IAFIS interoperability after the September 11th attacks).

[88] *See* 8 U.S.C. § 1722(a)(2) (2012) (outlining the accessibility of the information in the electronic data system); 147 CONG. REC. S12247-05 (daily ed. Nov. 30, 2001) (statement of Sen. Edward Kennedy) (explaining that a main purpose of the national security legislation is to ensure that anti-terrorism personnel "have access to important intelligence information"); 147 CONG REC. H10465-01 (daily ed. Dec. 19, 2001) (summarizing the measures in the EBSA for achieving adequate interagency information sharing); 148 CONG. REC. H2137-01 (daily ed. May 7, 2002) ("[T]here is an exigent need for the equipment, related items, or services in order to support interagency information sharing under this title . . . .").

[89] Memorandum of Understanding among the Department of Homeland Security, the Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, and the Department of State Bureau of Consular Affairs for Improved Information Sharing Services 5 (July 1,

memorandum, the FBI and ICE changed positions, deciding to interpret Congress's grant of authority to allow for the development of a real-time electronic flow of records and information between the two agencies regardless of an individual's immigration status.[90] Thus, the fingerprints of U.S. citizens and non-removable lawful permanent residents are indiscriminately exchanged, along with the fingerprints of undocumented immigrants.

The program designed to effectuate this interoperability, S-Comm, was introduced by the Bush administration in March 2008 and piloted in fourteen jurisdictions beginning in October of that year.[91] Under President Obama, the program has expanded dramatically. As of August 2012, 3,074 of the total 3,181 jurisdictions were activated in S-Comm, representing a 97% activation rate.[92] ICE plans to have the program active in all jurisdictions in the United States by the end of September 2014.[93]

S-Comm mobilizes local law enforcement agencies' resources to enforce federal civil immigration laws. Pursuant to S-Comm's Standard Operating Procedures, once a state or local jurisdiction is activated under S-Comm/Interoperability, all fingerprints submitted by local law enforcement to the FBI's criminal background database—known as the Integrated Automated Fingerprint Identification System—are automatically transmitted from the FBI to DHS's immigration database—known as the Automated Biometric Identification System.[94] The FBI thus

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2008), *available at* http://www.ice.gov/doclib/foia/secure_communities/dhsfbiinteroperabilitymoujuly2008.pdf (internal quotation marks omitted).

[90] See Donohue, *supra* note 67, at 457–58, for a thorough discussion of how the interoperable system was phased in.

[91] In 2006, two counties (Suffolk County, Massachusetts, and Dallas County, Texas) participated in the "interim Data Service Model (iDSM)" pilot project that was the precursor to Secure Communities. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECOND CONGRESSIONAL STATUS REPORT COVERING THE FOURTH QUARTER FISCAL YEAR 2008 FOR SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 8–9 (Nov. 7, 2008) (ICE FOIA 10-2674.000143–10-2674.000144), *available at* http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy084thquarter.pdf. In 2007 and 2008, five more jurisdictions were added to the pilot: Harris County, Texas; Wake County, North Carolina; Henderson County, North Carolina; Buncombe County, North Carolina; and Gaston County, North Carolina. *Id.* These jurisdictions were also some of the first participants in the expanded interoperability program known as Secure Communities. *See id.* at 10 ("As explained in the Q3 CSR, Secure Communities used five main criteria to establish the first 47 jurisdictions to participate in the Interoperability rollout."); *see also* Kohli et al., *supra* note 70, at 1 (describing the implementation and expansion of the Secure Communities initiative).

[92] IMMIGRATION AND CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., ACTIVATED JURISDICTIONS i (Aug. 22, 2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf.

[93] *Id.*

[94] *See* U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) SECURE COMMUNITIES (SC) STANDARD OPERATING PROCEDURES (SOP), §§ 1.0, 2.1, at 3–4, *available*

initiates immigration reviews against the Automated Biometric Identification System, based upon information obtained by local law enforcement authorities, without the consent of the individual being investigated or the state and local law enforcement agencies.

After the FBI makes the initial disclosure of fingerprints and records to DHS, the FBI receives the results of the search in the Automated Biometric Identification System database.[95] As S-Comm/Interoperability was initially conceived, if the fingerprints matched a record in the Automated Biometric Identification System database, the FBI would then disclose the individual's fingerprints and record to the ICE Law Enforcement Support Center through the transmittal of an Immigration Alien Query.[96] The ICE Law Enforcement Support Center, in coordination with the appropriate ICE field office, would then determine whether to follow up with immigration enforcement and whether it should issue an immigration detainer.[97] In October 2008, however, the FBI approved a change in its policy whereby it would automatically send an Immigration Alien Query to the ICE Law Enforcement Support Center for any fingerprints that did not match a record in the Automated Biometric Identification System database (a "no match") and that belonged to an individual born outside of the United States.[98] Immigration detainers are issued by the ICE field office and instruct local law enforcement to detain the individual for an additional forty-eight hours after local authority expires so that ICE can assume physical custody of the individual.[99] Immigration detainers remain in effect even if an individual is transferred to a different facility. "Unlike arrest warrants and criminal detainers, immigration detainers may be issued by border patrol agents [including aircraft pilots], special agents, deportation officers, immigration inspectors, and other employees of ICE," and they may be issued "without the review of a judicial officer and without meeting traditional evidentiary standards."[100]

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at http://epic.org/privacy/secure_communities/securecommunitiesops93009.pdf (last visited June 26, 2014) (describing the process of sending fingerprints from the FBI to IDENT).

[95] *See id.* at 3 ("[C]riminal bookings occurring subsequent to an initial arrest in NFF states result in transmission of a Criminal Print IDENT (CPI) file maintenance message to the FBI CJIS Division.").

[96] *See id.* at 4 ("If there is a positive fingerprint match in IDENT, FBI CJIS will send an automatic Immigration Alien Query (IAQ) to the ICE Law Enforcement Support Center (LESC).").

[97] *See id.* at 4–5 (providing the standard operating procedures for the LESC to issue an immigration detainer).

[98] *See* First Amended Complaint Exh. H, Makowski v. Holder et. al., No. 1:12-cv-05265 (N.D. Ill. Jul 3, 2012) (alleging that the FBI "automatically transmitted" fingerprints to the DHS).

[99] Lasch, *Rendition Resistance*, *supra* note 13, at 154–58 (discussing whether an immigration detainer is a request or a command).

[100] 8 C.F.R. § 287.7(b) (2012). KAMALA D. HARRIS, OFFICE OF THE CAL. ATT'Y GEN., INFORMATION BULLETIN NO. 2012-DLE-01, RESPONSIBILITIES OF LOCAL LAW ENFORCEMENT AGENCIES UNDER SECURE COMMUNITIES 2 (2012), *available at* https://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf ("Unlike arrest warrants and criminal detainers, however,

ICE specifically states that the S-Comm program is designed to remove non-citizens based upon a system of priorities.[101] In a memorandum issued by ICE Director John Morton in June 2010, ICE outlined its removal priorities. ICE's primary focus was on dangerous criminal aliens; convicted criminals, aggravated felons in particular; those who pose a danger to national security or public safety; and fugitives who have already been ordered removed by an immigration judge.[102]

Despite this clear pronouncement of priorities, S-Comm has not been implemented as described.[103] According to ICE's own statistics, as of May 2011, more than 8.4 million fingerprints were submitted through S-Comm and checked against DHS's immigration database.[104] Of the 8.4 million submitted, just over 560,000 matched an immigration record and more than 260,000 were detained in ICE's custody.[105] The S-Comm program has led to the arrest by ICE of more individuals with no criminal history than any other category, amounting to a total of 61,234 arrests since the program began.[106] As S-Comm has expanded, so too has the number of individuals with no criminal history targeted by ICE under S-Comm.[107] Particular

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immigration detainers may be issued by border patrol agents, including aircraft pilots, special agents, deportation officers, immigration inspectors, and other employees of ICE, without the review of a judicial officer and without meeting traditional evidentiary standards.").

[101] *See* 2010 Morton Memo, *supra* note 23 ("For purposes of prioritizing the removal of aliens convicted of crimes, ICE personnel should refer to the following new offense levels defined by the Secure Communities Program, with Level 1 and Level 2 offenders receiving principal attention.").

[102] *Id.*

[103] *See* SECURE COMMUNITIES, NAT'L IMMIGRATION FORUM, 1 (2011), http://www.immigrationforum.org/images/uploads/2011/SecureCommunitiesPolicyAnalysis.pdf [hereinafter SECURE COMMUNITIES] (stating that the program has not "perform[ed] as advertised"). This report states:

> Many states and localities have expressed confusion, frustration and outrage as DHS's explanations of Secure Communities have shifted, as jurisdictions have been added to the program without public awareness, and as DHS has backtracked on the voluntary nature of the program. But far louder have been the objections that Secure Communities does not perform as it was advertised. Although the program is touted by ICE as focusing on the removal of "dangerous criminal aliens," in fact it has identified and led to removal proceedings for hundreds of thousands of non-citizens, a substantial number of whom have no criminal record at all, or who were simply detained for a traffic violation or minor offense.

Id.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 3.

[107] *See id.* (noting that individuals with no criminal history comprise the largest group targeted by Secure Communities). This report states:

> In total, ICE has arrested more than 61,000 individuals with no criminal records who were nonetheless identified by a local jail under Secure Communities. Another 52,000 were convicted of only minor offenses, such as traffic violations. Total Level 1 arrests since the program's inception closely follow this, with 58,000, but represent a decreasing proportion of ICE actions. This decrease indicates that ICE is

jurisdictions have even more alarming rates of arrests of non-criminals. In Louisiana, for example, since S-Comm was adopted in November of 2009, "69.9% of individuals arrested had no criminal record, and another 15.6% were convicted of only minor offenses," resulting in 85.5% of the individuals swept up in S-Comm having no criminal record or only a minor offense.[108]

More recent numbers show that as of August 31, 2012, the FBI has disclosed 19,891,149 fingerprints to DHS under S-Comm Interoperability, of which ICE has identified 1,087,881 for possible immigration enforcement.[109] Thus, 18,803,268 (or 95%) of the fingerprints disclosed by the FBI to DHS likely belong to U.S. citizens or lawful permanent residents who have not committed offenses that would make them removable. Pursuant to ICE Director John Morton's guidance, since ICE cannot assert its civil immigration enforcement authority over U.S. citizens, individuals who claim to be U.S. citizens or lawful permanent residents should be prioritized in processing.[110]

C. *S-Comm: From An Opt-In to a Mandatory Program*

To support this change of position, the Deputy Principal Legal Advisor for ICE drafted a memo, dated October 2, 2010, that concluded that participation in S-Comm would be mandatory by 2013 because it did not create legitimate Tenth Amendment concerns of unconstitutional compulsion of states in a mandatory federal program.[111] Based upon that legal advice, around October 7, 2010, DHS Secretary Janet Napolitano confirmed the agency's view that S-Comm was not intended to be

> in fact not improving their targeting of more serious offenders, but instead rounding up broader numbers of low-priority immigrants.

Id. at 3 n.7.

[108] *Id.* at 3.

[109] *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES MONTHLY STATISTICS THROUGH AUGUST 31, 2012 IDENT/IAFIS INTEROPERABILITY 2 (2012), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf (reporting the cumulative amount of Alien IDENT Matches and immigration enforcement cases).

[110] ICE Director John Morton asserted: "As a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a [United States citizen]. Consequently, investigations into an individual's claim to U.S. Citizenship should be prioritized . . . ." Memorandum from John Morton, Assistant Sec'y, U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement, to all Immigration and Customs Enforcement Field Office Directors, on Superseding Guidance on Reporting and Investigating Claims to United States Citizenship (Nov. 19, 2009), *available at* http://www.ice.gov/doclib/detention-reform/pdf/usc_guidance_nov_2009.pdf.

[111] Memorandum from Riah Ramlogan, Deputy Principal Legal Advisor, U.S. Dept. of Homeland Sec., to Beth N. Gibson, Assistant Deputy Dir., Immigration and Customs Enforcement 9 (Oct. 2, 2010) [hereinafter Ramlogan Memo], *available at* http://ccrjustice.org/files/Mandatory-in-2013-Memo.pdf.

voluntary.[112] ICE then "unilaterally revoked its S-Comm Memoranda of Agreement with individual states in August 2011 and declared its intention to expand S-Comm nationwide by 2013."[113]

Touted as a tool to improve public safety by deporting dangerous criminal aliens, ICE first introduced S-Comm on a county-by-county basis with voluntary participation.[114] The original decision to adopt the program as optional stemmed from the possibility that mandated participation might run afoul of the Tenth Amendment's anti-commandeering concepts.[115] Given the option, several counties expressed a desire to opt-out.[116] As late as August 2010, ICE and the DOJ asserted that removing a jurisdiction

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[112] *See* Shankar Vedantam, *Federal Immigration Program Is Applied Inconsistently in Region*, WASH. POST (Feb. 26, 2011, 7:28 PM), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/26/AR2011022603582.html (noting that an ICE spokesperson indicated that every jurisdiction in the country would be expected to participate in S-Comm by 2013).

[113] A Briefing Guide to the Secure Communities October 2, 2010 "Mandatory Memo", CTR. FOR CONSTITUTIONAL RIGHTS ET AL., 1 (2012), *available at* http://ccrjustice.org/files/1-9-12-Briefing-Guide-Oct-2-Mandatory-Memo.pdf.

[114] *See Department of Homeland Security Appropriations for 2010: Hearing on Priorities Enforcing Immigration Law Before the H. Comm. on Appropriations, Subcomm. on Homeland Sec.*, 111th Cong. 1238 (2009) (noting that a locality could opt out from Secure Communities program); *see also Newly Released Secure Communities Documents Signal Opening for Local Opt-Out*, UNCOVER THE TRUTH: ICE AND POLICE COLLABORATIONS (Feb. 17, 2011), http://uncoverthetruth.org/featured/newly-released-secure-communities-documents-signal-opening-for-local-opt-out/ (noting that opt-outs were available to local authorities).

[115] *See* "Opt Out" Background, *supra* note 59. This memo states:

> [A]lthough the current [Criminal Justice Information Services Division that manages the IAFIS database] requirement that the [law enforcement authority] perform a ministerial task may be very minor, and involve no local costs, the Supreme Court in *Printz* held that Congress cannot force state officials to even perform "discrete, ministerial tasks" to implement a federal regulatory program . . . . Therefore, even though ICE may not truly consider SC a "program" in the same manner as, e.g., CAP, a court may find that SC's infrastructure, purpose, and activities mark it a program and, thus, could find that ICE cannot compel LEAs to participate.

Id. (citing Printz v. United States, 521 U.S. 898, 929–30 (1997)).

[116] During the summer of 2010, the Washington D.C. City Council persuaded Chief of Police Lanier to rescind the S-Comm agreement with ICE and withdraw the District of Columbia from the program. *See* Letter from Cathy Lanier, Chief of Police, Gov't of the Dist. of Columbia Metro. Police Dept., to Phil Mendelson, Chairman, Comm. on Pub. Safety and the Judiciary Council of the Dist. of Columbia, (July 22, 2010), *available at* http://uncoverthetruth.org/wp-content/uploads/2010/07/SUBMITTED _Follow-up_Secure-Communities_07-22-10.pdf (indicating that the Chief of Police had rescinded the S-Comm agreement and expressing opposition to legislation). San Francisco, California and Arlington County, Virginia also sought to opt-out, but got caught up in the agency's attempt to reverse course. *See* Memorandum from Barbara M. Donnellan, Cnty. Manager, Arlington Cnty., to Cnty. Bd. (Nov. 5, 2010), *available at* http://news.arlingtonva.us/releases/arlington-officials-meet-with-191775 (noting that Arlington County would remain as a participant in Secure Communities); Sandip Roy, *ICE Comes Clean—S.F., Other Cities Can Opt Out of S-COMM After All*, NEW AM. MEDIA (Sept. 2, 2010), http://newamericamedia.org/2010/09/ice-comes-cleansf-other-cities-can-opt-out-of-s-comm-after-all.php (detailing San Francisco's vindication at ICE's acknowledgement of S-Comm's voluntariness).

from Secure Communities deployment was an option, and was technologically feasible.[117] Concerned that an escalating number of jurisdictions might seek to opt-out, the federal government began a process of retrenchment that started with an explanation that since memoranda of agreement were signed at the state level, localities in that state would not be able to opt-out.[118] Unsatisfied with the statewide interpretation, ICE then suggested a new definition of what opt-out meant. Under the new interpretation, the jurisdiction opting-out could choose not to receive the information from the ICE Law Enforcement Support Center, but fingerprint data would still be shared between the FBI and DHS.[119] Then in October 2010, DHS explained that while they would meet and negotiate the timing of S-Comm implementation at the local level, the program ultimately involved information sharing between federal agencies, and localities did not have an option regarding participation.[120]

The memorandum reversing course supports the position that the decision to make S-Comm mandatory was a policy choice as opposed to a legal directive. The memorandum does not argue that Congress required S-Comm to be mandatory, but instead argues that it authorizes ICE to make S-Comm mandatory if it so chooses.[121] While the memorandum identifies three statutes that form the basis of possible mandatory imposition of S-Comm, none of the statutes mention S-Comm or any of its relevant components.[122] None of the cited authority requires ICE to deny requests to

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[117] SECURE COMMUNITIES (2011), *supra* note 103, at 5 (citing SETTING THE RECORD STRAIGHT, *supra* note 14); *see also* Letter from Janet Napolitano, Secretary, U.S. Dept. of Homeland Sec., to Zoe Lofgren, Chairwoman, Subcomm. on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law (Sept. 7, 2010) (on file with author) ("If a local law enforcement agency chooses not to be activated in the Secure Communities deployment plan, it will be the responsibility of that agency to notify its local ICE field office of suspected criminal aliens."); Letter from Ronald Weich, Assistant Att'y Gen., U.S. Dept. of Justice, to Zoe Lofgren, Chairwoman, Subcomm. on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law (Sept. 8, 2010) (on file with author) (noting that a local law enforcement agency can opt out of the Secure Communities program but that it must formally notify ICE and the appropriate state identification bureau).

[118] See RESTORING COMMUNITY, *supra* note 17, at 25–28, for a detailed exploration of the opt-out controversy.

[119] Vedantam, *supra* note 112.

[120] *Id.*

[121] *See id.* ("The Memo does not—and cannot—argue that Congress required S-Comm to be mandatory. Instead, it argues—employing dubious, glib, and shallow legal reasoning—that Congress *authorized* ICE to make S-Comm mandatory if it so chose.").

[122] Ramlogan Memo, *supra* note 111, at 1 (citing 28 U.S.C. § 534 (2006); 42 U.S.C. § 14616 (2006); 8 U.S.C. § 1722 (2012)). The first, section 534, was enacted in the 1960s and provides the Attorney General the authority to collect and exchange "criminal identification, crime, and other records" with "authorized" federal officials. Pub. L. No. 89-554, § 4(c), 80 Stat. 378, 616, (codified at 28 U.S.C. §§ 534(a)(1)–(2) (1966)) (current version at 28 U.S.C. §§ 534(a)(1), (a)(4) (2006)). The second, the National Crime Prevention and Privacy Compact, was enacted in 1998 and establishes a "cooperative" framework for states and the federal government to exchange criminal history information for non-criminal justice purposes. Crime Identification Technology Act of 1998, Pub. L.

opt-out, nor do any of the statutes require that all individual fingerprints be run through the interoperable system. Reversing its earlier analysis, ICE's memorandum concludes that mandatory imposition of S-Comm upon unwilling jurisdictions likely does not violate the Tenth Amendment.[123] This conclusion is directly contrary to the conclusion reached in the earlier memo by the same office and exposes the reality that there are arguments on both sides of the Tenth Amendment debate.

III. PROBLEMS WITH SECURE COMMUNITIES AND RESPONSES BY STATES, LOCAL GOVERNMENTS, AND INDIVIDUALS

Because S-Comm has been operational since 2008 and is now mandated in all jurisdictions, there is sufficient participation and passage of time to evaluate the effects that the program is having on state and local governments and individuals. This Section identifies problems with S-Comm's implementation and describes the impact of the program upon state and local governments and individuals who are swept up in S-Comm's reach. As problems are illuminated in various localities and as individual lives are impacted, state and local governments and individuals, along with their respective communities, seek to push back. These stories of resistance conclude this Section.

A. *Problems with Secure Communities*

The impact S-Comm has on state and local governments, as well as on individuals, varies. S-Comm has a negative impact upon community trust in police that leads to an overall decrease in public safety. If community members perceive the police in the dual role of both a protector of the community, as well as an enforcer of immigration laws, victims of crime or witnesses to crimes may be less likely to seek help from law enforcement. Documented and undocumented immigrants, as well as U.S. citizens with immigrant family members, are more hesitant to contact the police for assistance or to report a crime if doing so places family members at risk of immigration consequences.[124] The police's dual role can have dire

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No. 105-251, § 217, 112 Stat. 1870, 1877 (current version at 42 U.S.C. § 14616 (2006)). Finally, the last statute, a provision of the Enhanced Border Security and Visa Entry Reform Act of 2002, requires that DHS and FBI databases be interoperable. Pub. L. No. 107-173, § 202, 116 Stat. 543, 548–50 (codified at 8 U.S.C. § 1722(a) (2012)).

[123] Ramlogan Memo, *supra* note 111, at 9.

[124] SECURE COMMUNITIES (2011), *supra* note 103, at 4. The report states:

> As the Secure Communities program has expanded and rapidly become a leading method of immigration enforcement, it has exacerbated the problems of mingling immigration and local law enforcement. It has also generated enormous controversy among municipal, county, and state elected officials, members of Congress, and the public. A particularly intractable problem with the Secure Communities program is

consequences for victims of domestic violence. Depending upon the jurisdiction, victims may be arrested in the context of a domestic violence incident either because of mandatory arrest policies or actions taken in self-defense.[125]

If victims of crime, particularly of domestic violence, fail to seek police protection for fear that they, or their family, will be caught up in S-Comm and placed in removal proceedings,[126] the effectiveness of the police function will decrease.[127] When decreased effectiveness is combined with the fact that spending time on immigration enforcement in a world of limited resources means that there are less resources to spend on general policing the police department's ability to protect the public safety decreases even further.[128]

The ever-expanding use of immigration detainers[129] greatly impacts the criminal justice system.[130] Detainers limit the subject's rights throughout the entire criminal justice process, effectively creating a second tier of the criminal justice system for non-citizens.[131] On its face, S-Comm's

> its negative impact on community trust in police. Victims of crime, particularly of domestic violence, have called for police protection only to find themselves in removal proceedings as a result of Secure Communities. Legal and illegal immigrants, as well as U.S. Citizens with immigrant family members, are much more hesitant to contact the police to seek assistance or report a crime when it may put them or their family at risk. This makes it more difficult for police to solve crimes and decreases public safety for everyone.

Id. (citation omitted).

[125] *See, e.g.*, CONN. GEN. STAT. § 466-38B (2013) (mandating the arrest of anyone suspected of family violence, which can include the victim).

[126] *See id.* (reporting on domestic violence).

[127] *See* Albert Sabaté, *TRUST Act Moves Forward and Could 'Force' Fed's Hand on Immigration*, FUSION (April 10, 2013, 3:41 PM), http://fusion.net/abc_univision/news/story/trust-act-moves-forward-california-copied-connecticut-florida-18293#.UeVh2-DR3ww (describing the story of Jirayut Latthivongskorn, an undocumented immigrant who was robbed at gunpoint outside of his apartment when he was a student at U.C. Berkeley but did not report the crime out of fear of coming into contact with police).

[128] *See* Edgar Aguilasocho et al., *Misplaced Priorities: The Failure of Secure Communities in Los Angeles County* 15 (U.C. Irvine School of Law Research Paper No. 2013-118, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012283 ("Moreover, the increase in deportation rates through Secure Communities has had the unintended consequence of decreasing public safety: immigration duties drain police time and resources, and local immigration enforcement undermines police-community relationships and discourages crime reporting.").

[129] "An immigration detainer is a piece of paper issued by immigration officials that purports to command other law enforcement officials to maintain in their custody a prisoner who otherwise would be released, and deliver that person to federal immigration officials." Christopher Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOYOLA L. REV. 4–5 (2013).

[130] SECURE COMMUNITIES (2011), *supra* note 103, at 5 ("The increased use of immigration detainers has resulted in widespread violations of legal rights, as well as heavy costs to local budgets that pay for the increased custody of noncitizens who are held for ICE." (citing *Immigrants Behind Bars*, *supra* note 19)).

[131] *See* AM. CIVIL LIBERTIES UNION ET AL, COMMENTS ON U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT DRAFT DETAINER POLICY 10–12 (2010), *available at* http://cliniclegal.org/sites/default/

exchange of fingerprints should not itself impact the due process rights of individuals who end up in immigration proceedings.[132] However, since the program was implemented, the number of individuals entering deportation proceedings has dramatically increased[133] and what little evidence exists as to what happens to these individuals once in ICE custody is troubling.[134] Despite the fact that deportation is at issue for individuals apprehended and detained under S-Comm, not all detainees have access to an immigration judge.[135] A greater percentage of individuals apprehended through S-Comm (83%) were booked into an ICE detention facility compared with (62%) for all DHS immigration apprehensions.[136] Immigration detention is similar to criminal incarceration but detainees are not provided lawyers,[137] many of them are denied bond,[138] and many of them are not guaranteed a trial in the venue where they were arrested.[139] Given the large number of individuals swept up under the S-Comm program with little procedure or due process protections, the commission of policing errors is more destructive and costly.[140]

Another problem stems from the complex nature of immigration law and the lack of a clearly defined role for state and local governments. The rapid expansion of S-Comm has led to confusion and misunderstanding on the part of local officials who at times overreach.[141] In 2007, the Office of Inspector General did a survey and found a "widespread willingness to

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files/NGO%20Detainer%20Comments%20Final%2010%2001%202010.pdf (describing how detainer practices violate due process rights).

[132] Kohli et al., *supra* note 70, at 6.

[133] *See* Janet Napolitano, U.S. Sec'y of Homeland Sec., Remarks at American University on Smart Effective Border Security and Immigration Enforcement (Oct. 5, 2011), *available at* http://www.dhs.gov/ynews/speeches/20111005-napolitano-remarks-border-strategy-and-immigration-enforcement.shtm (discussing the "record-breaking enforcement" that has coincided with the implementation of the S-Comm program).

[134] *See* Kohli et al., *supra* note 70, at 6 ("[L]ittle is known about what happens to these individuals once they are in ICE custody.").

[135] *See id.* at 7 fig.1 (finding that only 52% of people identified through S-Comm had the opportunity to appear before an immigration judge following their S-Comm apprehension).

[136] *Id.* at 7 n.73.

[137] *Id.* at 7.

[138] *Id.*

[139] *See id.* at 7, 12 fig.9 (finding that only 2% of individuals arrested under Secure Communities were granted relief from deportation while 63% were removed or ordered to be removed).

[140] *See, e.g.*, *id.* at 6–8 (discussing reasons that the lack of due process in immigration proceedings is more destructive to than its criminal counterpart).

[141] *See* SECURE COMMUNITIES (2011), *supra* note 103, at 4 ("As the Secure Communities program has expanded and rapidly become a leading method of immigration enforcement, it has exacerbated the problems of mingling immigration and local law enforcement."). One local sheriff initially thought that illegal immigrants were felons who must be turned over to the DHS until he learned that immigration violations were only civil offenses. *Id.* The sheriff then started looking into how many people in his community were being deported before trial and he "became very uncomfortable contacting ICE for nonviolent offenders." *Id.* (internal citation and quotation marks omitted).

accept detainers from ICE."[142] Construing their role as broader than it is and acting as immigration enforcement officers not only creates problems for local law enforcement but also leads to mistrust by community members.[143]

State and local governments are impacted by increased economic costs.[144] Local law enforcement budgets increase as a result of the rise in number of non-citizens held in custody on ICE detainers.[145] Because of specific limitations on which detainees state and local governments are eligible to claim reimbursement for, the federal government ends up reimbursing local governments for only a tiny fraction of the costs of detention.[146] In addition to the direct costs, state and local governments may also incur indirect costs associated with litigation resulting from claims for unlawful detention[147] and with the administration of foster care programs for American children whose parents are deported.[148]

For state and local governments that do not support S-Comm, the program requires that the state advance federal policies that the state or its constituents may deem objectionable.[149] By placing state and local officials on the front line of immigration enforcement on behalf of the federal government, the lines of political accountability become blurred. State and local officials might be unfairly blamed for providing information to federal officials and perceived as supporting federal immigration policy. In order to counteract this perception, some state and local governments in this position have adopted sanctuary policies that prohibit local officials

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[142] AUDIT DIV., U.S. DEP'T OF JUSTICE, AUDIT REPORT NO. 07-07, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 15 (2007), *available at* http://www.justice.gov/oig/reports/OJP/a0707/final.pdf ("Ninety–four of the 99 [jurisdictions responding] reported that they accept such detainers and the 3 that responded negatively added comments indicating that they may have misinterpreted the question as asking about the lodging of ICE prisoners.").

[143] *See* Aguilasocho et al., *supra* note 128, at 16 (noting that S-Comm "discourages immigrant communities from interacting with local police because of [the immigrants'] fear of deportation").

[144] *See id.* at 15 (discussing the different costs local governments incur due to the implementation of the S-Comm program).

[145] *See id.* (discussing the budget strains local communities face due to the high cost of compliance with the S-Comm program).

[146] *See id.* (finding that the federal government only reimburses local governments for the costs of jailing certain criminal aliens for four or more consecutive days leaving local governments to cover the remaining costs).

[147] *See id.* (stating that local law enforcement agencies incur "costs associated with compensating victims of civil rights violations" as a result of their compliance with the S-Comm program).

[148] *See* APPLIED RES. CTR., *supra* note 27, at 6 (finding that nationally at least 5,100 children currently live in foster care due to the deportation of their parents and estimating that based on current detention and deportation rates, the number will grow to 15,000 in the next five years). *See also* Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 134–35 (2011) (discussing "systematic weaknesses [in] the child welfare system").

[149] *See* Aguilasocho et al., *supra* note 128, at 4–5 (discussing the idea that communities may not "opt-out" of the S-Comm program).

from providing information on immigration or other city services that would assist ICE in tracking down, detaining, and deporting suspected undocumented aliens.[150]

Individuals are impacted by S-Comm most significantly through the overbroad nature of the information sharing and the potential in the system for biased and discriminatory police practices.[151] Because the FBI shares all fingerprints with DHS, U.S. citizen and lawful permanent resident fingerprints, as well as the fingerprints of individuals with minor criminal histories, are shared with ICE.[152] In an analysis of S-Comm data as of 2011, it was found that 1.6% of cases analyzed were U.S. citizens and all were apprehended by ICE, which, when extrapolated, leads to the conclusion that approximately 3,600 U.S. citizens were apprehended by ICE between 2008 and April of 2011.[153]

The composition data of those arrested, booked into jails, and then screened through S-Comm evidences a pattern of biased or discriminatory police practices.[154] The data indicates that 93% of the people identified for deportation through S-Comm are from Latin-American countries, while the data on foreign-born persons in the U.S. indicates that 53%, or 77% if the unauthorized population is counted, are from Latin America.[155] By either number, the overwhelmingly large number of Latin-Americans identified

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[150] A variety of scholars have provided information about sanctuary cities. *See, e.g.*, Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1455 (2006) (discussing different ways from which local authorities are precluded from actions that could contribute to the deportation of "unauthorized aliens"); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382–91 (2006) (discussing the sanctuary movement of the 1980s and the post-9/11 sanctuary resurgence); Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133, 148 (2008) (discussing New York City and Takoma Park, Maryland as two cities with a "non-cooperation" sanctuary policy).

[151] *See* BRIEFING GUIDE, *supra* note 18, at 3 ("[P]reliminary data suggests . . . S-Comm facilitates and conceals racial profiling."); Kohli et al., *supra* note 70, at 1 (describing how local law enforcement agencies automatically share data from S-Comm communities with the FBI, who then forwards the information to DHS).

[152] *See* Kohli et al., *supra* note 70, at 1–2 (explaining that fingerprint data originating in Secure Communities is transferred to the FBI, to the DHS, and then to ICE). By ICE's own acknowledgement, there might be "IDENT matches, or hits, for US citizens for a number of reasons, including that naturalization data has not been updated in its databases." *Id.* at 4; *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES, IDENT/IAFIS INTEROPERABILITY MONTHLY STATISTICS THROUGH APRIL 30, 2011 50 (2011), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdf (explaining why U.S. citizen fingerprints are in the IDENT system); *see also* Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550, 574 (2004) (indicating that anti-terrorism prosecutions led to the conviction of some U.S. citizens); BRIEFING GUIDE, *supra* note 18, at 3 (suggesting that U.S. citizens may end up in the IDENT system as a result of racial profiling).

[153] Kohli et al., *supra* note 70, at 4.

[154] *See id.* at 5 ("Latinos are disproportionately impacted by Secure Communities.").

[155] *Id.* at 5–6.

for deportation through S-Comm raises doubts as to the unbiased nature of the program's implementation. Although the program is touted by ICE as focusing on the removal of dangerous criminal aliens, it has in fact identified and led to removal proceedings against hundreds of thousands of non-citizens, a substantial number of whom have no criminal record at all, or who were simply detained for a traffic infraction or other minor offense.[156] As one report noted, "[a]necdotes about racial profiling, combined with the massive numbers of arrests for minor traffic offenses, suggest that ICE's partnership with local law enforcement agencies has led to widespread discrimination against Latinos and people suspected of being in the U.S. unlawfully."[157]

B. *Stories of Resistance and Defiance*

In the face of these problems, state and local governments, as well as communities speaking on behalf of individuals, stood up in defiance and sought to resist the implementation of S-Comm.[158] In the summer of 2010, the Washington D.C. city council, with community support, convinced the Chief of Police to rescind a previously signed agreement with ICE to implement S-Comm.[159] Other local governments, including San Francisco, California, and Arlington County, Virginia, also decided to opt-out of S-Comm, but in response, ICE reversed course and denied these communities the opportunity to opt-out.[160]

ICE's pronouncement that the program would be mandatory did not stop the resistance.[161] In early 2011, the Congressional Hispanic Caucus, the Congressional Progressive Caucus, and the Los Angeles Congressional Delegation called for a national moratorium on S-Comm.[162] U.S. Representative Zoe Lofgren asked the Inspector General to conduct an official investigation into "false and misleading statements to local governments, the public, and Members of Congress in connection with the deployment of the Secure Communities program."[163]

Local and state governments responded in different ways, but all

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[156] *See* SECURE COMMUNITIES (2011), *supra* note 103, at 2 (noting that Secure Communities targets everyone brought into jail, including those booked for minor offenses and non-citizens with no convictions on their record).

[157] *See id.* at 4.

[158] *See id.* at 5 (explaining the choice of some state and local governments to opt-out of the S-Comm program).

[159] *See id.* (indicating that Washington D.C. withdrew from the S-Comm program in 2010).

[160] *See id.* ("But when San Francisco, California, and Arlington County, Virginia, also tried to take ICE up on the opt-out option, the agency reversed course.") (citation omitted).

[161] Marco, *Briefing Guide to ICE's Minor "Secure Communities" Modifications*, TURNING THE TIDE (June 23, 2011), http://altopolimigra.com/2011/06/23/briefing-guide-to-ice%E2%80%99s-minor-%E2%80%9Csecure-communities%E2%80%9D-modifications/.

[162] *Id.*

[163] *Id.*

responses focused on the detainer issue. Localities—including Santa Clara County, California;[164] Alameda County, California;[165] Champaign County, Illinois;[166] Cook County, Illinois;[167] Milwaukee County, Wisconsin;[168] and Multnomah County, Oregon.[169] In addition, towns and cities including Amherst, Massachusetts; [170] Berkeley, California;[171] Chicago, Illinois;[172] Los Angeles, California;[173] Newark, New Jersey;[174] New York, New York;[175] New Orleans, Louisiana;[176] San Francisco, California;[177] and the District of Columbia[178] passed measures or enacted policies designed to stymie compliance with immigration detainers. California[179] and

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[164] *See* SANTA CLARA CNTY. BD. OF SUPERVISORS' POLICY MANUAL, *supra* note 33 (establishing a policy honoring ICE detainer requests, but with discretion).

[165] *See* Resolution Regarding Civil Immigration Detainer Requests, Bd. of Supervisors, Res. No. R-2013 (2010), *reprinted in* Valle Letter, *supra* note 34 (declining to enforce ICE detainer requests).

[166] *See* Walsh Letter, *supra* note 35 ("This office [Champaign County Sherriff's Office] will not hold inmates based on a routine detainer.").

[167] COOK CNTY., ILL., CODE OF ORDINANCES § 46-37(a) (2012), *available at* http://library.municode.com/index.aspx?clientId=13805 ("The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed.").

[168] Milwaukee Cnty Bd. of Supervisors., Res. 12-135 2012 Bd. (Wis. 2012), *available at* http://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=1124069&GUID=3D583485-4F01-4B43-B892-D6FFE5D327BF (establishing a policy with respect to ICE detainer requests).

[169] Bd of Cnty. Comm'rs for Multnomah County, Or., Res. 2013-032 (2013), *available at* http://web.multco.us/sites/default/files/2013-032.pdf (establishing a policy only recognizing specific ICE detainer requests).

[170] Yoojin Cho, *Amherst to opt out of Secure Communities—Resolution to Opt Out of Immigration Law Passed*, WWLP.COM (May 22, 2012), http://www.wwlp.com/news/local/hampshire/amherst-1st-town-to-opt-out-of-secure- communities-law (indicating that Amherst opted out of the S-Comm program, thus denying enforcement of ICE detainer requests).

[171] *See* ANNOTATED AGENDA, *supra* note 40, at 6 (showing the adoption of a new policy regarding immigration detainers in the Berkeley jail system); *see also* Daniel Letter, *supra* note 40 (recommending a review of the amended policy on immigration detainers).

[172] CHI., ILL., MUN. CODE § 2-173-042(a)(1) (2013).

[173] *See Baca's Sensible Shift*, *supra* note 42 (discussing the Los Angeles County Sheriff's decision not to detain illegal immigrants arrested for minor offenses).

[174] *See* Queally, *supra* note 43 (discussing Newark's official decision to opt out of Secure Communities).

[175] N.Y.C., N.Y., ADMIN. CODE § 9-131(b) (2013).

[176] *See* Robertson, *supra* note 44, at A10 (detailing New Orleans policy limiting detainer compliance that "came about for a variety of reasons, including a lawsuit filed in federal court in 2011 by two men who had spent months in Orleans Parish Prison on expired detention requests[]").

[177] *See* Begin, *supra* note 46 (describing policy adopted by San Francisco Sheriff Michael Hennessey).

[178] Immigration Detainer Compliance Amendment Act of 2012, D.C. Act 19-442, D.C. CODE § 24-211.07 (2012).

[179] The California "TRUST (Transparency and Responsibility Using State Tools) Act," aimed at limiting the state's compliance with federal immigration detainers, was signed into law by California's governor on October 5, 2013. *See* Assemb. B. 4, 2013–2014 Reg. Sess. (Cal. 2013), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20130916_enrolled.pdf (providing that the bill would prohibit law enforcement officers from detaining individuals pursuant to

Connecticut[180] also sought legislative solutions, known as TRUST Acts,[181] limiting the obligation of states to comply with federal immigration detainers. Similar legislation has been proposed in Florida,[182] Massachusetts,[183] and Washington.[184] For example, ordinances in the District of Columbia, Santa Clara, California, and Cook County, Illinois declare that their respective law enforcement officers shall not enforce any immigration detainers without a written agreement from the federal government promising to pay the full cost of the detainer.[185] While in Chicago, Mayor Rahm Emanuel introduced his "Welcoming City" anti-detainer ordinance that bars compliance with detainers, except in cases involving major crimes, outstanding criminal warrants, or gang members.[186]

Individuals, and communities that support these efforts, are also taking

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ICE holds when such individuals had only been convicted of committing minor crimes); *see also AB-4 State Government*, *supra* note 48 (providing the bill's history).

[180] In June 2013, the Connecticut General Assembly passed, and the governor signed into law, a bill that will expand the limitations on detainer compliance beyond the Department of Correction to other state and local law enforcement agencies. H.R. 6659, 2013 Leg., Reg. Sess. (Conn. 2013), *available at* http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00155-R00HB-06659-PA.pdf (providing, in relevant part, that law enforcement officers shall not comply with civil immigration detainers unless certain conditions are met).

[181] Karthick Ramakrishnan & Pratheepan Gulasekaram, *Understanding Immigration Federalism in the United States*, AM. PROGRESS (Mar. 24, 2014), http://www.american progress.org/issues/immigration/report/2014/03/24/86207/understanding-immigration-federalism-in-the-united-states/ ("California and Connecticut have passed TRUST Acts, which limit state cooperation with federal immigration officials . . . .").

[182] S.B. 730, 2012–2013 Leg., Reg. Sess. (Fla. 2013). The bill would have limited detainer compliance to cases involving specified "serious offense[s]." *Id.* at 4. It died in committee in May 2013. *See SB 730: Federal Immigration Detainer Requests*, THE FLA. SENATE, http://www.flsenate .gov/Session/Bill/2013/0730 (last visited June 25, 2014) (providing the bill's history and noting that the bill died in the Senate on May 3, 2013).

[183] H.B. 1613, 188th Gen. Court., Reg. Sess. § 10(b)(1) (Mass. 2013). The bill was described as an "Act relative to restore community trust in Massachusetts law enforcement," and would severely restrict state participation in immigration enforcement. *Id.*

[184] H.B. 1874, 63d Leg., Reg. Sess. § 2(1) (Wash. 2013) (providing that law enforcement officers shall not detain individuals pursuant to federal immigration detainers where the individuals were merely convicted for minor offenses).

[185] PHIL MENDELSON, CHAIRMAN, COMM. ON THE JUDICIARY, REPORT ON BILL 19-585, "IMMIGRATION DETAINER COMPLIANCE AMENDMENT ACT OF 2012" at 6, 11–12 (2012) (noting that the District of Columbia bill requires Department of Correction holds pursuant to ICE detainers to be executed only where ICE agreed to reimburse the Department); Santa Clara, Cal., Policy Res. 2011-504, 2011 Bd. Of Supervisors (Cal. 2011) (resolving to decline compliance with immigration detainers unless the federal government agreed to pay the costs of detention, and then only if the prisoner were convicted of a serious crime and not a juvenile); COOK COUNTY, ILL., CODE § 46-37(a) (2011) (enacted by Cook County, Ill., Ordinance No. 11-O-73 (2011)).

[186] CHI., ILL. MUN. CODE § 2-173-042(c) (2012). The Mayor claimed that it would "prevent law abiding Chicagoans from being unfairly detained and deported . . . ." John Presta, *Mayor Emanuel Introduces Ordinance to Make Chicago an Immigrant-Friendly City*, EXAMINER.COM (July 11, 2012), http://www.examiner.com/article/mayor-emanuel-aims-to-make-chicago-most-immigrant-friendly-city-the-country (quoting Mayor Emanuel).

a stand against S-Comm. Advocates for victims of domestic violence and advocates for U.S. citizen children, who often end up in foster care after their parents are deported,[187] are publicizing the plight of these communities. And finally, the large numbers of U.S. citizens who are incorrectly included in ICE's database are pushing back through litigation.[188]

IV. FEDERALISM CONCERNS: THE LEGAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS THAT SEEK TO DEFY MANDATORY PARTICIPATION IN SECURE COMMUNITIES

Immigration is among the hotly contested political issues that raise complex questions about the relationship between state and federal policies.[189] As the federal government appears unable to reach consensus on immigration reform, states are stepping in to fill the void. While many states seek to enhance immigration enforcement efforts, others seek to defy participation in the immigration enforcement regime. This defiance raises questions regarding the appropriate role of federal, state, and local

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[187] Dave & Orloff, *supra* note 28 (finding that, in a survey conducted among Latina immigrants in the Washington, D.C. area, 83% of battered immigrant women interviewed did not contact law enforcement about the abuse); Letter from Asian/Pacific Islander Domestic Violence Resource Project, et al., to Councilmember Phil Mendelson, Chairman, Comm. on Pub. Safety & the Judiciary (Feb. 25, 2010), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source =web&cd=1&ved =0CCAQFjAA&url=http%3A%2F%2Fwww.dccadv.org%2Fimg%2Ffck%2FSecure%2520Communities%2520letter%2520to%2520Mendelson%25203%252010%252010%2520Letterhead_Logo_FIN.doc &ei=W6MAVL-bAYymggT6xYLADg&usg=AFQjCNFd MUIKsYUs G9x-yZeqG6NstSLPoQ&sig2 =1ejtGpHbiBkM1bEa5E4juQ&bvm=bv.74115972,d.eXY (arguing that "[t]he Secure Communities program is just one more . . . barrier for victims in desperate need of assistance," and arguing that "[t]he program puts communities at a heightened risk for domestic violence and domestic violence fatalities"); APPLIED RES. CTR., *supra* note 27, at 6 (showing that an estimated 5,100 children currently living in foster care have detained or deported parents and nearly 15,000 more children are expected to be in the foster care system in the next five years).

[188] For example, Makowski v. Holder et al. and the two lawsuits filed on behalf of mentally ill and wrongfully deported U.S. citizens in the S-Comm data report from Berkley. Complaint at 3–4, Makowski v. Holder et. al., No. 1:12-cv-05265 (N.D. Ill. July 3, 2012), ECF No. 1; Kohli, et. al., *supra* note 70, at 5 n.43.

[189] As the federal government appears paralyzed, states are stepping in to fill the void on issues such as: public health insurance, *see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606–07 (2012) (opinion of Roberts, C.J.) (finding that the Affordable Care Act's Medicaid expansion, that conditions the continuation of Medicaid funding on a broad extension of program benefits, unconstitutionally commandeers state governments for a federal purpose); marijuana, *see* COLO. CONST. art. XVIII, § 16, *amended by* COLO. CONST. amend. LXIV (legalizing marijuana use in Colorado); marriage, *see* ME. REV. STAT. tit. 19-A, § 650-A (2013) (authorizing same-sex marriage by codifying marriage as "the legally recognized union of 2 people"); and physician-assisted suicide, *see* OR. REV. STAT. § 127.805 (West 2012) (permitting physician-assisted suicide by allowing a capable, terminally ill patient to "make a written request for medication for the purpose of ending his or her life in a humane and dignified manner").

governments in federal immigration enforcement.[190]

The appropriate role of local, state, and federal governments in the context of immigration enforcement depends in part upon the defiance scheme invoked by state and local governments. At one end of the continuum, state and local officials could decline to provide the fingerprints to the FBI from the outset, thus stopping the trigger that initiates the S-Comm program.[191] While there is no legal obligation upon state and local governments to share fingerprints, no locality has pursued this option and it is unlikely that any will. The failure to check arrestees' fingerprints against the FBI crime database risks officer safety and lessens the ability to identify and detain fugitives who may have fled other jurisdictions.[192]

In the middle of the continuum, a number of states and localities have passed measures providing authority to law enforcement officials to

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[190] The Tenth Amendment question is sufficiently ambiguous that ICE itself changed its position with respect to potential Tenth Amendment concerns. When ICE initially launched S-Comm as an opt-in program, part of the rationale behind voluntary participation was the agency's own internal analysis that forced participation might raise Tenth Amendment commandeering concerns:

> [Secure Communities'] position that participation in the "Secure Communities initiative" is voluntary is supported by applicable case-law. Under the Tenth Amendment, "[t]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). Similarly, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id*. at 935. Although SC defines itself as a "plan," "strategy," or "initiative," and not a "program" . . . in official documents, ICE created SC to address programmatic changes to the manner in which ICE identifies and removes criminal aliens, and the public perceives it as an ICE program. Moreover, although the currently [sic] CJIS requirement that the LEA perform a ministerial task may be very minor, and involve no local costs, the Supreme Court in *Printz* held that Congress cannot force state officials to even perform "discrete, ministerial tasks" to implement a federal regulatory program. *Id*. at 929–30. Therefore, even though ICE may not truly consider SC a "program" . . . a court may find that SC's infrastructure, purpose, and activities mark it a program and, thus, could find that ICE cannot compel LEAs to participate.

"Opt Out" Background, *supra* note 59 (citations omitted) (citing Printz v. United States, 521 U.S. 898, 925, 929–30, 935 (1997)). Then on October 2, 2010, the Deputy Principal Legal Advisor of ICE drafted a memo reversing that position and finding that participation in Secure Communities can be made mandatory by 2013 without violating the Tenth Amendment. Ramlogan Memo, *supra* note 111, at 1.

[191] Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1126–27 (2013) (explaining that while states are not required by federal law to submit fingerprints to the FBI, all states voluntarily do).

[192] HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 11 (2011) ("[F]rom a practical standpoint, local police have no choice but to . . . forward[] arrestees' fingerprints to the FBI in order to obtain information that is critically important for crime-fighting purposes.") (emphasis omitted).

decline to honor immigration detainers issued by ICE.[193] An analysis of the propriety of this approach initially hinges on the question of whether immigration detainers constitute federal mandates or merely requests. This question continues to create confusion, but there are arguments that the legislative history, statutory and regulatory language, and initial court decisions, support the conclusion that detainers are requests from ICE to local law enforcement and local law enforcement can then choose whether to comply.[194] Further, in light of current Tenth Amendment anti-commandeering jurisprudence, construing the S-Comm immigration detainer provision as mandatory creates the very problems—state and local governments bearing the costs, both direct and indirect, of administering a federal initiative[195] and states and local governments being politically

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[193] *E.g.*, CAL. GOV'T CODE § 7282.5 (West 2014); CONN. GEN. STAT. § 54-192h(b) (2014); CHI., ILL., MUN. CODE § 2-173-040 (2014).

[194] There is controversy regarding the question of whether immigration detainers are mandatory orders that states and localities must comply with or if they are requests by ICE that local and state authorities may decline to enforce. The confusion stems from a convoluted legislative history and ICE's own shifting and ambiguous position on the issue. *See* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 165–66 (2008) for a detailed analysis of Congress's grant of detainer authority to federal immigration officials and the Executive Branch's subsequent attempts to expand that authority through regulations. There is some support for the conclusion that detainers are not mandatory orders, but merely requests that state and local law enforcement can choose to decline. In addition to the statutory and regulatory scheme and admission by ICE itself that detainers are merely requests and not orders, courts that have construed the nature of the detainer have declined to find it to be an order of custody and instead have found it to be a voluntary request. *See* United States v. Female Juvenile, A.F.S., 377 F.3d 27, 35 (1st Cir. 2004) ("[A]n INS detainer is not, standing alone, an order of custody. Rather, it serves as a request that another law enforcement agency notify the INS before releasing an alien from detention so that the INS may arrange to assume custody over the alien."); Buquer v. City of Indianapolis, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011) ("A detainer is not a criminal warrant, but rather a voluntary request . . . ."); State v. Montes-Mata, 208 P.3d 770, 771 (Kan. Ct. App. 2009) (finding that an immigration detainer "merely expressed ICE's intention to seek future custody of Montes-Mata and requested that Lyon County provide notice to ICE before terminating his confinement."). *But see* Lasch, *Preempting Immigration*, *supra* note 9, at 330–31 (arguing that states and localities may not have discretion over immigration detainers).

[195] *See* 8 C.F.R. § 287.7(d) (2006) ("Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed forty-eight hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department."). In addition to the costs of paying for this additional incarceration, there are administrative resources involved in receiving, maintaining, and effectuating these requests. *See* BRIEFING GUIDE, *supra* note 18, at 2–3 (finding previously unreleased correspondence between local law enforcement officials in Florida that indicate the administration of the program does present costs in addition to the extended detention). Pursuant to implementation of Secure Communities, the costs to state and local officials are greater than mere dollars. There is the indirect increase in local costs due to the impact that immigration detainers have on bail and post conviction decisions. *See Am. Civil Liberties Union*, ISSUE BRIEF: IMMIGRATION DETAINERS AND LOCAL DISCRETION 5 (2011), https://www.aclunc.org/sites/default/files/detainers_issue_brief.pdf (supporting the finding that average incarceration periods for individuals with detainers is significantly longer than for those without immigration detainers, and the issuance of an immigration detainer prevents individuals from being able to post bail, and having access to rehabilitative programs and other alternatives to incarceration). S-Comm can also influence police practices in the field as

accountable for a federally created initiative[196]—that the anti-commandeering provision was designed to protect against.

At the other end of the continuum, and the focus of this Section, is the argument that no state or locality has yet advanced—namely, that the forced sharing of state or local government information in the form of citizens' fingerprints runs afoul of the anti-commandeering concepts of the Tenth Amendment. States or localities could test the contours of the Tenth Amendment protections by drafting legislation expressly stating that state and local resources, in the form of police work resulting in fingerprint gathering, cannot be used for immigration enforcement purposes. Alternatively, state and local governments could condition the sharing of fingerprints on an express condition that the federal government not violate the Federal Privacy Act when sharing the state and locally supplied fingerprints. This Section will examine whether states and localities have

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immigration screening programs in local jails can lead to racial profiling and increased arrests of persons perceived to be undocumented immigrants. *Id.* States and localities can also experience an increase in legal costs where local agencies knowingly or unknowingly violate federal laws regarding immigration detainers. This liability can take many forms including holding an immigrant in excess of the forty-eight hour limit, honoring wrongfully issued detainers and due process concerns due to failure to provide adequate notice. *E.g.*, Complaint for Injunctive and Declaratory Relief and Monetary Damages, Morales v. Chadbourne, C.A. No. 12-301 M (D.R.I. Apr. 24, 2012) (citing federal regulations preventing law enforcement officers from detaining an alien for more than forty-eight hours); First Amended Complaint for Declaratory Judgment and Monetary Damages, Uroza v. Salt Lake Cnty., No. 11-0713, (D. Utah Mar. 26, 2012) (alleging that law enforcement officials deprived an alien of due process and violated federal regulations by detaining him for twenty-four hours even after he posted bail); Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, Brizuela v. Feliciano, No. 3:12-cv-00226-JBA (D. Conn. Feb. 13, 2012) (alleging that the petitioner's due process rights were violated because he was not able to challenge his detainment by immigration officials); Complaint for Injunctive and Declaratory Relief and Petition for Writ of Habeas Corpus, Jimenez Moreno v. Napolitano, No. 1:11-cv-05452, (N.D. Ill., Aug. 11, 2011) (alleging that the issuance of immigration detainers without a notice requirement violates the Due Process Clause of the Fifth Amendment); Complaint, Galarza v. Szalczyk, No. 510CV06815 (E.D. Pa. Nov. 19, 2010) (alleging that ICE and local police unlawfully detained the petitioner). Further, public safety can also be impacted as undocumented immigrants who are either the victims of or witnesses to crimes are discouraged from reporting to local police who they perceive to be immigration enforcers. *See* Kittrie, *supra* note 150, at 1476–77 ("Deportation of unauthorized aliens who report crimes to the police is described as harming relations between the police and those citizens and legal aliens who may be family members or associates of the deported alien." (citation omitted)); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 604 (2008) (suggesting that local sanctuary laws can increase cooperation between immigrant populations and the police to help provide police information they need to effectively do their jobs).

[196] There are political costs associated with mandated compliance with S-Comm. State and local governments that fully participate in the S-Comm program are forced to support a federal program and policy that they and their constituents may oppose. In the immigration context, this concern is evident in earlier efforts by local governments to adopt sanctuary policies that prohibit local officials from providing information about immigration status that would assist ICE in identifying, detaining and eventually deporting suspected undocumented immigrants. *See* Rodriguez, *supra* note 195, at 600–05 (providing an overview of the sanctuary law movement). If the community views state and local law enforcement as arms of federal immigration enforcement then state and local governments will be in the position of having to defend the program and take blame for its potential defects. *See* Printz v. United States, 521 U.S. 898, 930 (1997) (finding it problematic that the sheriffs in *Printz* were "put in the position of taking the blame for [the program's] burdensomeness and its defects").

the legal authority to decline participation in S-Comm by passing laws that hinder the federal government's ability to share citizens' fingerprints with ICE that state and local governments obtain in the ordinary course of policing.

"The Constitution created a Federal Government of limited powers,"[197] and ratification of the Tenth Amendment made express what the enumeration of powers implied: "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."[198] Despite this explicit mandate, ascertaining the constitutionally permissible line in the context of an actual controversy can be difficult. The complex questions of balancing authority can be examined in two ways. Inquiry can focus on whether an act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution[199] or whether an act of Congress invades the province of state sovereignty reserved by the Tenth Amendment.[200] Each position is the flip side of the other, implicating identical concerns of federalism and the rights of the states.[201]

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[197] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[198] U.S. CONST., amend. X. For a discussion of another potential Tenth Amendment claim not addressed in this Article, "that the Tenth Amendment immunizes essential state governmental functions—in this case, the keeping of confidential records by state agencies—from any federal regulation," see Robert A. Mikos, *Can the States Keep Secrets From the Federal Government?*, 161 U. PA. L. REV. 103, 135–37 (2012). Mikos goes on to find that "[t]he . . . claim that the Tenth Amendment insulates state functions from federal regulation altogether has been discredited since *Garcia v. San Antonio Metropolitan Transit Authority* overruled *National League of Cities v. Usery*." *Id.* at 135 (citation omitted). The Court in *Garcia* rejected "as unsound in principle and unworkable in practice" the rule articulated in *National League of Cities* that turned on judicial appraisal of whether a particular government function is "integral" or "traditional." *Id.* (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985)). Since the decision in *Garcia*, lower courts have dismissed state Tenth Amendment challenges to demands for state records and have relied upon the Supremacy Clause to uphold federal demands for a variety of confidential records from states including state juvenile courts, a state attorney general, state tax agencies, state medical boards, state probation offices, and other records privileged by state law for use in federal criminal and civil cases. *Id.* at 135–36.

[199] *See, e.g.*, Perez v. United States, 402 U.S. 146, 146–57 (1971) (considering whether Congress had the power under the Commerce Clause to regulate "loan shark[ing]"); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 331 (1819) (considering whether Congress had the power under the Necessary and Proper Clause to create a national bank).

[200] *See, e.g.*, *Garcia*, 469 U.S. at 535–36 (weighing the Tenth Amendment against Congress's power to regulate public-mass transit systems); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 75–81 (1869) (explaining the relationship of power between the States and Federal Government).

[201] *See* New York v. United States, 505 U.S. 144, 155–56 (1992) (citing United States v. Oregon, 366 U.S. 643, 649 (1961)) (stating that if a power is expressly delegated to Congress it is no longer a power reserved to the States, and "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress"); Case v. Bowles, 327 U.S. 92, 102 (1946) (stating that Congress has the power "to accomplish the full purpose of a granted authority" as long as it does not act in a manner inconsistent with other parts of the Constitution); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941) (explaining that if powers are delegated to Congress in the Constitution, the Tenth Amendment does not reserve that power to the States and if a power is one of state sovereignty reserved by the Tenth Amendment

In this system of dual sovereignty, both the national and state governments have elements of sovereignty that the other is bound to respect.[202] Given this concurrent sovereign framework, it is inevitable that laws may at times conflict with or undermine others. When a conflict exists, the Constitution makes clear, pursuant to the Supremacy Clause, that federal law "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."[203] Pursuant to the concept of supremacy, Congress has the power to preempt state law.[204]

S-Comm raises fundamental questions of whether the federal government's implementation of the program can disempower state and local policing efforts. On the one hand, state and local governments are afforded general police powers to regulate behavior and enforce laws for health, safety, and general welfare.[205] On the other hand, the federal government has plenary power over immigration that includes the ability to determine and enforce who is eligible to remain in the U.S. and who is not.[206] In the context of S-Comm, these two purposes may be in conflict. It is unclear where the appropriate balance of power should lie.

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then the Constitution has not conferred it upon Congress). State sovereignty and concepts of federalism are designed to protect citizens by diffusing sovereign power and by moving governance decisions away from the federal level and bringing them closer to the people who are governed. *New York*, 505 U.S. at 181–82; THE FEDERALIST NO. 45, at 316–18 (James Madison) (Tudor Publishing Co. ed., 1947).

[202] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (highlighting the structure of the system of dual sovereignty); *Gregory*, 501 U.S. at 457 (1991) (stating that the Constitution establishes a system of dual sovereignty whereby states possess sovereignty concurrent with the Federal Government except as limited by the Supremacy Clause).

[203] U.S. CONST. art. VI, cl. 2.

[204] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210–11 (1824) (stating that the Constitution is the supreme law of the land and that all inconsistent laws must yield to it).

[205] City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000) (plurality opinion); *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.").

[206] Constitutional sources of Congress's power to legislate immigration include: the Naturalization Clause, U.S. CONST. art. I, § 8, cl. 4 (providing that Congress has the power to establish a "uniform Rule of Naturalization"); the Commerce Clause, *id.* art. I, § 8, cl. 3, (providing that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States"), the War Power, *id.* art. I, § 8, cl. 11 (providing that Congress has the power to declare war); Implied Sovereign Powers, The Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. 581, 505 (1889) (stating that the federal government has "power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all of which are forbidden to the state governments); and the Foreign Affairs Power, Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (stating that Congress has the power to exclude or expel aliens because it is a power affecting international relations).

In *Printz v. United States*[207] the Supreme Court held that the anti-commandeering principles mandated by the Tenth Amendment prohibit the federal government from commandeering state and local governments' resources to enact federally created regulatory programs and enforce federal regulatory schemes.[208] As interpreted through Supreme Court precedent, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[209]

Unlike the mandatory detainer example, where the costs are direct and obvious, the constitutional analysis is less clear if states and localities seek to prohibit the FBI from sharing fingerprint information that they collect through local law enforcement efforts with ICE. In this context, state and local governments investigate, collect, assemble, and share information that they obtain as part of their policing function. Localities deploy resources to effectively collect this information and rely upon community trust to be effective.[210] The fingerprints are then forwarded by state and local governments to the FBI in order to further this police purpose namely to find out if the individual has a criminal background or poses a risk to the community. If the FBI only used fingerprints for criminal background checks, the goals of the state and local government and the federal government would align. However, under S-Comm, the FBI turns the prints over to the DHS for an entirely different purpose, immigration enforcement.[211] This transformation of purpose creates a tension. State and local governments share the information with the FBI to enhance their policing powers. The FBI, pursuant to its plenary power over immigration, uses the fingerprint information for immigration enforcement purposes and in so doing not only proceeds without the consent of individuals, but also undermines the very effort for which the fingerprints were initially gathered. In the end, the federal government's use of state and local information for federal immigration purposes undermines the state and local governments' efforts to police their communities effectively.

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[207] 521 U.S. 898 (1997).

[208] *Id.* at 935 ("Congress cannot compel the States to enact or enforce a federal regulatory program.").

[209] *Id.* (finding an interim provision of the Brady Handgun Violence Prevention Act that commanded state and local law enforcement officials to conduct background checks on prospective handgun purchasers unconstitutional pursuant to the Tenth Amendment anti-commandeering rule); New York v. United States, 505 U.S. 144, 161 (1992) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)) ("Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'").

[210] RESTORING COMMUNITY, *supra* note 17, at 5–8.

[211] *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Aug 26, 2014).

Under our constitutional system of dual sovereignties, do state and local governments have the ability to prohibit the federal government from sharing the fingerprint information that they collected? States and localities could approach this issue either reactively or proactively. First, state and local governments could simply argue that the FBI's indiscriminate sharing of the fingerprint information violates their Tenth Amendment anti-commandeering rights.[212] Second, state and local governments could affirmatively draft legislation expressly stating that state and local resources, in the form of police work resulting in fingerprint gathering, cannot be used for immigration enforcement purposes. Alternatively, state and local governments could condition the sharing of fingerprints on an express condition that the federal government not violate the Federal Privacy Act by sharing the fingerprints.[213]

Pursuant to Tenth Amendment anti-commandeering principles, the federal government does not have the power to force the state or local governments to enforce a federal regulatory scheme.[214] Does the FBI's sharing of fingerprint information force state and local governments to enforce federal immigration regulation? If one relies exclusively upon lower court opinions on this question, the current answer would likely be no.[215] Professor Mikos has categorized lower court decisions in this area and found that lower courts have consistently upheld information sharing between state and local governments and the federal government on the grounds that information sharing is different from other problematic commandeering in two respects.[216] First, some courts find that providing information about violations of federal law does not amount to assisting in the administration or enforcement of federal law.[217] These courts

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[212] U.S. CONST. amend. X.

[213] Privacy Act § 3418, Pub. L. No. 93-579, reprinted in LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974, at 16–17, *available at* www.loc.gov/rr/frd/Military_Law/pdf/LH_privacy_act-1974.pdf [hereinafter LEGISLATIVE HISTORY].

[214] Printz v. United States, 521 U.S. 898, 935 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program.").

[215] This may be changing as a recent Supreme Court anti-commandeering case saw seven of the Justices join on the controlling reasoning. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2666–67 (Scalia, Kennedy, Thomas & Alito, J., dissenting) ("Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional.").

[216] Mikos, *supra* note 198, at 139–44.

[217] *See, e.g.*, Freilich v. Upper Chesapeake Health, Inc. (*Freilich II*), 313 F.3d 205, 214 (4th Cir. 2002) (finding that a requirement to submit reports to the Board of Medical Examiners is insufficient to "offend" the Tenth Amendment); City of New York v. United States, 179 F.3d 29, 34–35 (2d Cir. 1999) (rejecting the city's claim that congressional statutes had commandeered a city official into providing immigration data to the federal law enforcement agencies by relying upon a distinction in *Printz* between federal demands for state information and federal directives to participate in a regulatory program); United States v. Brown, No. 07 Cr. 485(HB), 2007 WL 4372829, at *6 (S.D.N.Y. Dec. 12, 2007), *aff'd* 328 F. App'x 57 (2d Cir. 2009); Freilich v. Bd. of Dirs. of Upper Chesapeake

distinguish between simply sharing information about federally regulated activities and actively bearing some administrative burden, finding that simply sharing information does not amount to enforcing federal law.[218] Second, other courts argue that demands for information alone do not implicate the important structural harms at the core of the Tenth Amendment's anti-commandeering inquiry—namely, economic and political costs that commandeering imposes upon the states.[219] These lower courts found that sharing information was not a burden in the same way[220] because the federal government is demanding that states provide information that they already have and as such does not require the allocation of additional resources.[221] In cases where courts acknowledge the nuanced costs of sharing information, the courts still conclude that whatever minimal costs that do exist for states and localities are outweighed by the federal government's interest in obtaining

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Health, Inc. (*Freilich I*), 142 F. Supp. 2d 679, 694–96 (D. Md. 2001) (finding the federal requirement to be constitutional), *aff'd sub nom. Freilich II*, 313 F.3d 205.

[218] This distinction grew from a portion of Justice Scalia's majority opinion in the *Printz* case in which he distinguished between statutes "which require only the provision of information to the Federal Government" and those that force participation of the States' executives in the actual administration of a federal program. *Printz*, 521 U.S. at 918. For examples of this distinction, see *Freilich I*, 142 F. Supp. 2d at 697 ("The federal government has not compelled the states to enact or enforce a federal regulatory program—rather, the government is asking the states to provide information regarding their own state administered regulatory programs. This has never been held to violate the Tenth Amendment.") and *Brown*, 2007 WL 4372829, at *6 ("[T]he Act only requires states to provide information rather than administer or enforce a federal program."); *Freilich I*, 142 F. Supp. 2d at 697 ("The federal government has not compelled the states to enact or enforce a federal regulatory program—rather, the government is asking the states to provide information regarding their own state administered regulatory programs. This has never been held to violate the Tenth Amendment.").

[219] Mikos, *supra* note 198, at 140.

[220] *See In re* Special Apr. 1977 Grand Jury, 581 F.2d 589, 595 (7th Cir. 1978) (denying a motion to quash or modify grand jury subpoenas duces tecum served on five members of an Illinois state official's staff); *In re* Grand Jury Subpoena for N.Y. State Income Tax Records, 468 F. Supp. 575, 577 (N.D.N.Y. 1979) (finding that a grand jury subpoena did not constitute a "proper judicial order" within the meaning of a New York statute making it unlawful to divulge information disclosed in tax returns except in accordance with proper judicial order, but nevertheless, compliance with a federal grand jury subpoena was mandated by the supremacy clause of United States Constitution).

[221] Mikos, *supra* note 198, at 141 ("In economic terms, the information sought is a nonrivalrous public good. The federal government's use of the information does not detract from the state's use of it."). For arguments by scholars who support this view, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 933–34 (1998) (arguing that information sharing should be exempted from the anti-commandeering rule), and Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2253–54 (1998) (arguing that "relatively minor recordkeeping, record-checking, or information-providing" are distinguishable from "more substantial imposition on state resources involving matters that . . . come close to the core of legislative responsibilities.").

information.[222]

Despite these lower court opinions, Professor Mikos persuasively argues that the distinction that these courts draw between demands for information and demands for other types of administrative services has no obvious basis, and are formally and functionally indistinguishable from other forms of prohibited commandeering.[223] If one were to follow the logic of the rule set forth in *Printz v. United States*, commandeering information by either compelled gathering or compelled reporting would violate the anti-commandeering rule.[224]

In the context of the S-Comm program, it is arguable that not only is the bright line anti-commandeering rule offended, but also the underlying premise for the rule, that states and localities will bear the real and political costs associated with effectuating a federal program, is offended. The costs of sharing information, while less direct, are no less real than the costs associated with complying with ICE issued detainers. Knowing that local law enforcement will share information with federal immigration enforcement officials will decrease the willingness of undocumented immigrants to report crimes either as witnesses or victims.[225] If those

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[222] *See* City of New York v. United States, 179 F.3d 29, 31–32, 34–35 (2d Cir. 1999) (challenging provisions that gave the INS access to confidential state records concerning the immigration status of residents and applying a balancing test pitting the city's interest in confidentiality against the federal government's apparent need for the information).

[223] Mikos, *supra* note 198, at 107–08. He negates this relied upon distinction as a descriptive matter, and as a matter of precedent, history, and underlying purpose of the anti-commandeering rule. Descriptively, he argues that the majority of what law enforcement agents do is to gather and report information about regulated activities. *Id.* at 39. As a matter of precedent, the distinction violates the very holding in the Supreme Court's seminal anti-commandeering case, *Printz*, which found that a regulatory program imposed upon the state that required searching and analyzing state criminal records databases to determine if a prospective gun purchaser was barred from making the purchase under federal law violated the anti-commandeering rule. *Id.* at 140–43. Despite the fact that this did not amount to a great burden and that it required the sharing of information, the court found that commandeering is prohibited no matter how insignificant the burden. *Id.* Historically, the distinction does not take into account that the methods now used to commandeer state secrets were unknown to the framers and only relatively recently developed. And finally, reliance upon the distinction makes state and local law enforcement official tools of federal law enforcement, the very harm the anti-commandeering rule was intended to address. *Id.* at 144. In addition to the flaws identified above, he argues more fundamentally that allowing states to keep information from the federal government allows states to engage in passive resistance by refusing to participate in federal programs that they chose to defy. *Id.* at 137–44.

[224] Anthony Johnstone, *Commandeering Information (and Informing the Commandeered)*, 161 U. PA. L. REV. ONLINE 205, 208 (2013), http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-205.pdf; *see also* Printz v. United States, 521 U.S. 898, 932–33 (1997) (adopting a bright line rule as opposed to a balancing test).

[225] *See* Kittrie, *supra* note 150, at 1476–77 ("Deportation of unauthorized aliens who report crimes to the police is described as harming relations between the police and those citizens and legal aliens who may be family members or associates of the deported alien."); Rodriguez, *supra* note 195, at 604 (suggesting that local sanctuary laws can increase cooperation between immigrant populations and the police to help provide police with the information that they need to do their jobs effectively).

closest to the community do not produce information for law enforcement, law enforcement will be less effective and will have to get the information from other sources increasing their overall costs. However, the argument is not as clear as it is when local law enforcement directly allocates resources to effectuate a federal mandate. In the context of the S-Comm program, there are two potential counter arguments. First, the causal connection is more attenuated because whether to report is the witness' or victim's choice as opposed to the local law enforcement official. Second, witness-reported crimes represent only a subset of cases. Arrests made as a result of traffic stops or police observation are not likely to be impacted because of the potential immigration consequences, at least not in a way that would limit the arrests.

Politically, if local government is seen as the enforcement arm of the federal immigration system, states and localities will be blamed for problems and will be seen as complicit in a system that the local community may oppose. While the fingerprint information collected by local law enforcement is collected for the purpose of running a criminal background check, once the FBI shares this information with DHS, the purpose for which the information was originally shared changes and local law enforcement will be viewed as complicit in the immigration enforcement process. These are the very costs that the anti-commandeering rule is designed to avoid and they are no less real simply because they stem from information sharing as opposed to other forms of administrative assistance. Thus, the requirement that states and localities participate in a federal immigration enforcement scheme that utilizes fingerprints collected with state and local law enforcement resources and then indiscriminately turns them over to ICE for immigration purposes arguably infringes upon the core of state sovereignty reserved by the Tenth Amendment.

A second approach would be for state and local governments to draft legislation expressly stating that state and local resources, in the form of police work resulting in fingerprint gathering, cannot be used for immigration enforcement purposes. Alternatively, state and local governments could condition the sharing of fingerprints on an express condition that the federal government not violate the Federal Privacy Act in sharing the state and locally supplied fingerprints.[226] This approach is more complex and raises express and conflict preemption concerns. The federal government has broad powers over immigration and the Supremacy Clause gives Congress the power to preempt state law either through

[226] For an interesting and comprehensive analysis of data control and privacy theory, see Kalhan, *supra* note 191, at 1146–51 (arguing that there is a tension between the longstanding view that the FBI does not own the fingerprint records it collects and is not in a position to alter those records and the principle of free information sharing with the DHS).

express preemption,[227] field preemption,[228] or conflict preemption.[229] Field preemption can occur in two ways. First, Congress may indicate its intention to replace state law entirely by implementing a "framework of regulation 'so pervasive . . . that Congress [leaves] no room for the States to supplement it.'"[230] Alternatively, a "federal interest [can be] . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[231] Conflict preemption can also occur in two ways. There can be an actual conflict where compliance with both federal and state laws are physically impossible. Or, the challenged state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[232] If the state statute is found to be an obstacle to the federal law, then preemption will invalidate the state statute. Any attempt by state and local government to enact a prohibition of federal information sharing will need to address preemption arguments.

In 1996, Congress passed two pieces of legislation that limit government agencies from prohibiting the sharing of information to or from the Immigration and Naturalization Service (ICE's predecessor agency).[233] The legislative provisions state that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[234]

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[227] A statute may contain an express preemption provision. *See, e.g.*, Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1977 (2011) ("[The Immigration Reform and Control Act expressly preempts States from imposing 'civil or criminal sanctions' on those who employ unauthorized aliens.").

[228] States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance. Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. 88, 115 (1992) (Souter, J., dissenting). Intent can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[229] State laws are preempted when they conflict with federal law, including when they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[230] Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[231] *Id.* at 2501 (quoting *Rice*, 331 U.S. at 230; English v. Gen. Electric Co., 496 U.S. 72, 79).

[232] *Id.* (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000); *Hines*, 312 U.S. 52 at 67; *Crosby*, 530 U.S. at 373).

[233] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.); Personal Responsibility and Worker Opportunity Reconciliation Act of 1996 (PWORA), Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C, 8 U.S.C., 21 U.S.C., 25 U.S.C., and 42 U.S.C.).

[234] 8 U.S.C. § 1373(a) (2012). Section 1373 also specifies that "no person or agency may prohibit, or in any way restrict, a Federal, state or local government entity" from "maintaining" or "exchanging . . . with any other Federal, State, or local government entity" information regarding any

Additionally, S-Comm was created pursuant to a provision of the Enhanced Border Security Act, requiring the federal government to create an interoperable system to share information between ICE and the FBI or other federal agencies.[235] As originally conceived, Congress intended ICE to have access to the FBI's records when confronted with an immigration enforcement decision against an individual.[236] Pursuant to original S-Comm implementation, the DHS would place images for individuals they deemed "'high priority' subjects" into a database accessible to the FBI[237] This discriminate sharing protocol changed and the federal government implemented indiscriminate bi-directional sharing of information between the FBI and ICE.[238]

If state and local governments pass legislation prohibiting the FBI from sharing fingerprints with ICE for immigration screening purposes, the federal government could argue that such a provision was expressly preempted. However, states and localities could argue that since the information of all arrested individuals is shared from the FBI to ICE the purpose of the sharing is overbroad and not limited to sharing for immigration purposes. Thus, the federal government cannot have it both ways. The federal government could narrow its information sharing processes by returning to the original S-Comm protocol where the DHS

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person's "immigration status, lawful or unlawful." 8 U.S.C. § 1373(b) (2012). And the section of the Personal Responsibility and Work Opportunity Reconciliation Act entitled "Communication between State and local government agencies and the Immigration and Naturalization Service" is essentially repetitive of parts of IIRIRA's section 1373. 8 U.S.C. §§ 1373, 1644 (2012). This provisions states that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. §§ 1373, 1644 (2012)). Neither section 1373 of the IIRIRA nor section 1644 of PWORA specifies a sanction for a violation. *See* 8 U.S.C. §§ 1373, 1644 (2012) **(**discussing communication between government agencies and Immigration and Naturalization Services without mentioning sanctions).

[235] 8 U.S.C. § 1721 (2012).

[236] *See* 8 U.S.C. § 1722(a)(2) (2012) (instructing the President to develop and implement an interoperable electronic data system to provide current and immediate access to information); 147 Cong. Rec. S12247 (daily ed. Nov. 30, 2001) (statement of Sen. Kennedy), (discussing the creation of an electronic data system to enhance decision making regarding the visa screening process); 147 CONG. REC. H10465 (daily ed. Dec. 19, 2001) (statement of Rep. Sensenbrenner) (discussing the establishment of a Commission on Interoperable Data Sharing) 148 CONG. REC. H2137 (daily ed. May 7, 2002) (statement of Rep. Sensenbrenner), (discussing the "Chimera system," an interoperable electronic data system).

[237] MEMORANDUM OF UNDERSTANDING AMONG THE DEP'T OF HOMELAND SEC., FED. BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFO. SERVICES DIV., AND THE DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS FOR IMPROVED INFO. SHARING SERVICES 5 (2008), *available at* http://www.ice.gov/doclib/foia/secure_communities/dhsfbiinteroperabilitymoujuly2008.pdf.

[238] U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE INTERIM DATA SHARING MODEL (iDSM) FOR THE AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM (IDENT)/INTEGRATED AUTOMATED FINGERPRINT IDENTIFICATION SYSTEM (IAFIS) INTEROPERABILITY PROJECT 3 (2006), *available at* https://www.dhs.gov/xlibrary/assets/privacy /privacy_pia_usvisit_idsm.pdf.

only sought fingerprints from the FBI to determine the admissibility or deportability of specific aliens. In the context of a more limited exchange of information, the express preemption argument might be stronger. If the federal government continues with the indiscriminate and automatic sharing of information, the argument that the state or local government is preempted is not as strong.

The federal government could also argue that the state or local ordinance could be struck down on the grounds of obstacle preemption. The question for the courts would be whether "the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . .'"[239] Pursuant to the federal government's revised and indiscriminate sharing approach, a state or local ordinance that prohibits the sharing of fingerprints could be viewed as an obstacle to the federal government's interpreted rights under the mandate for an interoperable sharing system.

State and local governments that do not want to engage in cooperative immigration enforcement can argue that the forced sharing of fingerprint information that state and local governments collect through the allocation of their own resources violates Tenth Amendment anti-commandeering principles. State and local governments can also act more affirmatively and draft legislation expressly stating that state and local resources, in the form of police work resulting in fingerprint gathering, cannot be used for immigration enforcement purposes. Alternatively, state and local governments could condition the sharing of fingerprints on an express condition that the federal government not violate the Federal Privacy Act in sharing the state and locally supplied fingerprints. However, any state or local legislative initiatives would be subject to preemption arguments, the result of which is difficult to predict.

V. INDIVIDUAL PRIVACY CONCERNS: BALANCING INDIVIDUAL PRIVACY EXPECTATIONS AGAINST AGENCY INFORMATION SHARING

While implementation of S-Comm raises federalism concerns for local, state, and federal governments, individuals are also impacted by questions of how to balance individual privacy against agency desires to share information. Pursuant to S-Comm's current practice,[240] the FBI indiscriminately sends the fingerprints of all arrestees to the DHS prior to knowing if the fingerprints are those of U.S. citizens, lawful permanent

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[239] Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000)).

[240] This Article does not explore the larger questions that are implicated when governments use remote biometric identification (RBI). For a detailed discussion of these issues, see Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINNESOTA L. REV. 407 (2012).

residents, immigrants with pending applications for adjustment of status, or undocumented immigrants.[241] Is the FBI permitted to share the fingerprints of U.S. citizens, lawful permanent residents, immigrants with applications pending for adjustment of status, and undocumented immigrants with the DHS without first obtaining permission from the individuals impacted? Is there a line beyond which the sharing of information infringes upon individuals rights to privacy?[242] If so, who may avail themselves of protection? This Section explores the existence of federal statutory protections for individuals whose fingerprints are unwittingly shared between the FBI and the DHS and proposes alternatives based upon the articulated policies behind the Federal Privacy Act.[243]

In 1974, Congress passed the Federal Privacy Act in an attempt to comprehensively address the appropriate balance between the government's need to effectively and efficiently collect and share information against individuals' privacy rights.[244] There was growing concern that in the absence of legislation, the unchecked institutional interests of the federal government would override individual privacy

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[241] *See Secured Communities*, *supra* note 10 (discussing how "[f]or "decades, local jurisdictions . . . shared the fingerprints of individuals who [had been] arrested or booked . . . with the FBI).

[242] While beyond the scope of this Article, I acknowledge that there may be constitutional procedural due process arguments to be made regarding the indiscriminate and overbroad sharing of fingerprints.

[243] This Section is specifically focused on the potential statutory remedy while other scholars have addressed S-Comm's implementation through technology, surveillance, and privacy-based frameworks. *See* Kalhan, *supra* note 191, at 1134–51.

[244] Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (current version at 5 U.S.C. § 552a (2012)). In the Act, Congress found that:

> (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
>
> (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;
>
> (3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;
>
> (4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and
>
> (5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

Id.

interests.[245] In the end, the final version of the Act, resulting from a last minute compromise between Senate and House bills,[246] did adopt a more conservative approach to protecting individual privacy, providing for easier access and distribution for the government and less protection for individual privacy rights.[247]

Those critical of the legislation found that the bill lacked internal consistency, clear legislative intent, and rigorous privacy protections.[248] As

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[245] *See* STAFF OF HOUSE COMM. ON GOV'T OPERATIONS, 98TH CONG., WHO CARES ABOUT PRIVACY? OVERSIGHT OF THE PRIVACY ACT OF 1974 BY THE OFFICE OF MANAGEMENT AND BUDGET AND BY THE CONGRESS 36 (Comm. Print 1983) ("Privacy interests frequently conflict with other important governmental interests such as economy and efficiency. As a result, there is a constant risk that privacy concerns will not be fully or fairly considered by federal agencies."); OFFICE OF TECHNOLOGY ASSESSMENT, ELECTRONIC SSES AND INDIVIDUAL PRIVACY 6 (1986) (citing The President's Annual Report on the Agencies' Implementation of the Privacy Act of 1974, CY 1982-1983 118 (Dec. 4, 1985)) (noting a change in executive branch focus from privacy-related concerns to interest in efficiency, management, and budget).

[246] The Senate passed S. 3418 on November 21, 1974 on the same day, the House passed H.R. 16,373. The House took up S. 3418, but retained only the enacting clause. After substituting the House language, the House passed S. 3418 on December 11, 1974. Because insufficient time remained in the session to submit the competing versions to a conference committee, an informal process was adopted to reconcile the bills. See 120 Cong. Rec. 40,405-09, 40,881-83 (1974), *reprinted in* STAFF OF S. COMM. ON GOV'T OPERATIONS & STAFF OF H. COMM. ON GOV'T OPERATIONS, 94th CONG., LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974, SOURCE BOOK ON PRIVACY at 858–68, 987–94 (1976), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/LH_privacy_act-1974.pdf [hereinafter SOURCE BOOK ON PRIVACY] 94 (the legislative history consists of a brief analysis of the compromise amendments entitled "Analysis of House and Senate Compromise Amendments to the Federal Privacy Act").

[247] *See* Todd Roberts Coles, *Does the Privacy Act of 1974 Protect Your Right to Privacy? An Examination of the Routine Use Exemption*, 40 AM. U. L. REV. 957, 969–75 (1990) (discussing the legislative compromises that led to adoption of a more conservative version of the bill).

[248] *See* JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 20:3 (2013) (noting flaws in the Privacy Act as a piece of compromise legislation, questioning the existence of congressional intent due to the hurried nature in which the bill was passed, and suggesting that statements from Congressman Moorhead show that "expedient action on privacy legislation was to be achieved at all costs . . . and expedient action necessarily has some costs in rationality of the lawmaking process"); *id.* at § 20:2 (footnote omitted) ("Privacy Act legislative history is to be read cautiously; suggestions in a report of one house, prior to the compromise that produced the final wording, are not determinative."); *Oversight Committee of the Privacy Act of 1974: Hearings Before a Subcomm. of the H. Comm. on Gov't Operations*, 98th Cong. 231 (1983) (statement of Ronald Plesser, former counsel to the Privacy Protection Study Commission), *available at* http://babel.hathitrust.org/cgi/pt?id=pst.000020244873 ;view=1up;seq=1 (stating that the Privacy Act is "its own worst enemy"). As one commentator remarked:

> The consequence of this hasty and haphazard legislative process is an internally inconsistent statute with no reliable indication of congressional intent. The original committee reports are of limited value in interpreting the final statute. The only reliable legislative history consists of a rather skimpy staff analysis . . . . Consequently, courts are likely to have great difficulty interpreting the Act and vigorous enforcement may be impossible.

ROBERT E. BOUCHARD & JUSTIN D. FRANKLIN, GUIDEBOOK TO THE FREEDOM OF INFORMATION ACT 45 (1980).

part of the compromise, the Senate conceded on oversight, remedies, and the creation of a broad exemption provision.[249] The Senate version of the bill originally included a Privacy Commission that was authorized to investigate and enforce provisions of the Act.[250] In its effort to reach a compromise and pass the bill, the Senate agreed to replace the powers afforded the Privacy Commission with a Privacy Protection Study Commission, which was "stripped of investigatory and enforcement powers, [and] was [instead] directed to study and [examine the federal agency protection] of personal information."[251] The original Senate bill included the opportunity for broad damages, injunctive relief, and a provision for the recovery of punitive damages.[252] Instead, the compromise limited recovery of damages to "willful or intentional" agency action, "eliminated punitive damages, limited injunctive relief, and restricted recovery of reasonable costs and attorney fees."[253] Finally, while absent in the original Senate bill, the compromise adopted a "routine use" exemption to the nondisclosure provision of the statute.[254]

The potential import of these compromises and the overall limitations of the Federal Privacy Act are illustrated when applied to those seeking to defy S-Comm's reach. While state and local governments may have concerns that the information they provided to the FBI was not intended for use by the DHS, state and local governments are unlikely to have derivative standing to litigate statutory claims under the Federal Privacy Act.[255] Furthermore, the Act's protections are only afforded to certain

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[249] *See* O'REILLY, *supra* note 248, at § 20:3 (footnotes omitted) ("Principal changes made in the Senate version [for the compromise bill], in favor of a more conservative House text, were the 'use' provision, the study of additional issues by an advisory body, and the elimination of application of privacy requirements for criminal data banks and private and nonfederal government data banks.").

[250] Coles, *supra* note 247, at 973.

[251] *Id.* at 973–74 (footnote omitted). Coles argues:

> The compromise clearly favored the House bill and revealed a preference for the government's right to gather and to use personal information over the individual's right to privacy. By adopting a higher standard of proof for actual damages while limiting the availability of other damages, the compromise restricted access to civil remedies and diminished the role of private enforcement. Furthermore, under the compromise, the advisory authority of the Study Commission was substituted for the investigatory and enforcement powers of the Privacy Commission. Finally, adoption of the routine use language freed federal agencies from strict adherence to the nondisclosure provision and introduced a means to circumvent the Privacy Act. Only the active support and oversight of Congress and the executive branch could redress the imbalance.

Id. at 975 (footnotes omitted).

[252] *Id.* at 972–73.

[253] *Id.* at 974 (internal quotation marks omitted).

[254] *Id.* (internal quotation marks omitted).

[255] Privacy Act rights are personal to the individual who is the subject of the record, and others cannot assert rights derivatively. *See, e.g.*, Parks v. IRS, 618 F.2d 677, 684–85 (10th Cir. 1980)

individuals. The statute defines a protected individual as "a citizen of the United States or an alien lawfully admitted for permanent residence . . . ."[256] While there are four separate and distinct civil causes of action under the Federal Privacy Act, two of which provide for injunctive relief and two of which provide for damages,[257] individuals seeking relief

(holding that a union lacked standing to sue for damages suffered by its members); Dresser Indus. Inc. v. United States, 596 F.2d 1231, 1238 (5th Cir. 1979) (holding that a company lacks standing to litigate employees' Privacy Act claims); Word v. United States, 604 F.2d 1127, 1129 (8th Cir. 1979) (holding that a criminal defendant lacked standing to allege Privacy Act violations regarding use at trial of medical records concerning third party); Raley v. Astrue, No. 2:11cv555-WC, 2012 WL 2368609, at *8 (M.D. Ala. June 21, 2012) ("Plaintiff brings a claim on behalf of the individuals whose information she received and Plaintiff lacks standing to do so."); Lorenzo v. United States, 719 F. Supp. 2d 1208, 1215–16 (S.D. Cal. 2010) (holding that the plaintiff lacked standing to pursue a claim for recovery for adverse effects she suffered based on the disclosure of her husband's record because only individuals identified in a record can request the record and subsequently state a claim for a violation of the Privacy Act); Research Air, Inc. v. Kempthorne, 589 F. Supp. 2d 1, 11 (D.D.C. 2008) (holding that an individual's attorney has no Privacy Act rights to request documents relating to his client absent the client's consent); Sirmans v. Caldera, 27 F. Supp. 2d 248, 250 (D.D.C. 1998) ("[Plaintiffs] may not object to the Army's failure to correct the records of other officers."); Shulman v. Sec'y of the Dep't of Health and Human Servs., No. 94 CIV.5506, 1997 WL 68554, at *1, 3 (S.D.N.Y. Feb. 19, 1997) (holding that the plaintiff had no standing to assert any right that might have belonged to former spouse), *aff'd*, 122 F.3d 1057 (1997) (unpublished opinion); Harbolt v. U.S. Dep't of Justice, No. A-84-CA-280, slip op. at 2 (W.D. Tex. Apr. 29, 1985) (establishing that the prisoner lacked standing to assert Privacy Act claims of other inmates regarding disclosure of their records to him); Abramsky v. U.S. Consumer Prod. Safety Comm'n, 478 F. Supp. 1040, 1041–42 (S.D.N.Y. 1979) (holding that a union president cannot compel release of records pertaining to an employee's termination); Attorney Gen. of the United States v. Irish N. Aid Comm., No. 77-700, 1977 U.S. Dist. LEXIS 13581, at *12 (S.D.N.Y. Oct. 7, 1977) (holding that the committee lacked standing to sue in representative capacity). *But see* Nat'l Fed'n of Fed. Employees v. Greenberg, 789 F. Supp. 430, 433 (D.D.C. 1992) (holding that the union has associational standing because members whose interests the union seeks to represent would themselves have standing), *vacated on other grounds*, 983 F.2d 286 (D.C. Cir. 1993).

[256] Privacy Act of 1974, 5 U.S.C. § 552a(a)(2) (2012). Compare this definition with the Freedom of Information Act's much broader "any person" definition. 5 U.S.C. § 552(a)(3) (2012); *see also* Fares v. U.S. Immigration & Naturalization Serv., No. 94-1339, 1995 WL 115809, at *4 (4th Cir. Mar. 20, 1995) (per curiam) ("[T]he [Privacy] Act only protects citizens of the United States or aliens lawfully admitted for permanent residence."); Raven v. Panama Canal Co., 583 F.2d 169, 170–71 (5th Cir. 1978) (comparing use of the word "individual" in the Privacy Act with the word "person," as more broadly used in the FOIA); Rojas-Vega v. Cejka, No. 09CV2489, 2010 WL 1541369, at *3 (S.D. Cal. Apr. 15, 2010) (dismissing an access claim brought by a plaintiff whose "lawful U.S. resident alien status was revoked" because the plaintiff "cannot state a claim for a benefit that he is clearly not entitled to under the Privacy Act" and because "Congress purposely limited the Privacy Act in this manner, in contrast to FOIA"); Cudzich v. U.S. Immigration & Naturalization Serv., 886 F. Supp. 101, 105 (D.D.C. 1995) (holding that a plaintiff whose permanent resident status had been revoked "is not an 'individual' for the purposes of the Privacy Act," but might nevertheless be entitled to information under the FOIA).

[257] The statute provides for four separate and distinct civil causes of action. 5 U.S.C. § 552a(g) (2012). Two of these provide for injunctive relief: amendment lawsuits under section 552a(g)(1)(A) (if the agency makes a determination not to amend an individual's record after request) and access lawsuits under section 552a(g)(1)(B) (when the agency refuses to comply with an individual request to get access to his records). *Id.* §§ 552a(g)(1)(A), (B). Two provide for compensatory relief in the form of monetary damages: damages lawsuits under section 552a(g)(1)(C) (for failure to maintain any record of an individual resulting in an adverse action against the individual) and damages lawsuits under

from S-Comm's overbroad sharing provisions will likely base their claim on a violation of the disclosure prohibition.

The disclosure prohibition bars an agency from disclosing any record "contained in a system of records" to another person or agency unless the individual provides written consent.[258] In order to succeed on a claim under the disclosure prohibition, an individual must prove that: the disclosed information is a "record" contained in a "system of records";[259] that the agency disclosed the information;[260] that the disclosure had an adverse effect on the individual;[261] and that the disclosure was willful or intentional.[262] Moreover, even if the individual is able to prove each of these elements, there is a set of express exemptions, one of which involves disclosures made pursuant to a "routine use" as defined in the statute.[263] In the context of a U.S. citizen or LPR claiming that the disclosure of fingerprints from the FBI to the DHS violated his/her rights under the Federal Privacy Act, some of these elements will be at issue.

The first two elements will not likely be at issue. The statute clearly states that a "record" includes fingerprints and a "system of records" is

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section 552a(g)(1)(D) (for failure to comply with any other provision of the act in a way that has an adverse effect on the individual). *Id.* §§ 552a(g)(1)(C), (D).

[258] *Id.* § 552a(b) ("No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . .").

[259] *Id.* §§ 552a(a)(4)–(5).

[260] *Id.* § 552a(b).

[261] *See* Doe v. Chao, 540 U.S. 614, 624 (2004) ("'[A]dverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue."); Shearson v. U.S. Dep't of Homeland Sec., 638 F.3d 498, 505–06 (6th Cir. 2011) ("[Plaintiff's] request to pursue a claim under § 552a(e)(4) was properly denied because she failed to allege or show the requisite 'adverse effect' from Defendants' alleged failure to provide notice specifically regarding the [system of records] at an earlier date."); McCready v. Nicholson, 465 F.3d 1, 20 (D.C. Cir. 2006) (remanding the case to the district court to determine whether the plaintiff suffered an "adverse effect" by being denied a bonus).

[262] 5 U.S.C. § 552a(g)(4) (2012). The statute provides that:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of . . . actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000.

Id. § 552a(g)(4)(A).

[263] *See id.* § 552a(a)(7) (defining "'routine use' . . . with respect to the disclosure of a record" as "the use of such record for a purpose which is compatible with the purpose for which it was collected"); *id.* § 552a(b)(3) (prohibiting an agency from disclosing any record in a system of records without the written consent of the individual the record pertains to unless the disclosure of the record would be "for a routine use"); *id.* § 552a(e)(4)(D) (requiring agencies that maintain systems of records to publish a notice in the Federal Register, which describes the system and includes "each routine use of the records contained in the system, including the categories of users and the purpose of such use").

defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying . . . particular assigned to the individual."[264] Additionally, there is not an issue about whether a disclosure was made as the statute expressly prohibits the disclosure of a record from a system of records from one agency to another.[265] However, the questions of whether the individual can show an "adverse effect," whether the disclosure was intentional and/or willful, and whether the government has a defense under the "routine use" exception will be controversial.

The "adverse effect" element serves as a jurisdictional standing requirement.[266] An "adverse effect" is not limited to monetary damages,

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[264] *Id.* §§ 552a(a)(4)–(5) (defining "record" as "any item . . . including, but not limited to . . . a finger or voice print" and defining a "system of record" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual").

[265] *Id.* § 552a(b).

[266] *See, e.g.*, Doe v. Chao, 540 U.S. 614, 624 (2004) ("'[A]dverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue."); Shearson v. U.S. Dep't of Homeland Sec., 638 F.3d 498, 505–06 (6th Cir. 2011) ("[Plaintiff's] request to pursue a claim under § 552a(e)(4) was properly denied because she failed to allege or show the requisite 'adverse effect' from Defendants' alleged failure to provide notice specifically regarding the [system of records] at an earlier date."); McCready v. Nicholson, 465 F.3d 1, 20 (D.C. Cir. 2006) (remanding the case for the district court to determine whether the plaintiff suffered an "adverse effect" by being denied a bonus); Quinn v. Stone, 978 F.2d 126, 135 (3d Cir. 1992) (citation omitted) ("[T]he adverse effect requirement of (g)(1)(D) is, in effect, a standing requirement."); Mata v. McHugh, No. SA-10-CV-838-XR, 2012 WL 2376285, at *6 (W.D. Tex. June 22, 2012) (granting the defendant's motion for summary judgment because the plaintiff failed to allege facts that establish that the disclosure of a record had an adverse effect on him); Mauldin v. Napolitano, No. 10-12826, 2011 WL 3113104, at *3 (E.D. Mich. July 26, 2011) (holding that "[e]ven if the Court exercised subject matter jurisdiction, this case would be dismissed because [the plaintiff] has failed to properly state a claim upon which relief can be granted" by failing to establish that an agency disclosed information and that such disclosure had an adverse effect on him); Conley v. United States, No. 2:10-cv-444, 2011 WL 1256611, at *7 (S.D. Ohio Mar. 31, 2011) (dismissing the case on the additional ground that the plaintiff failed to "allege a valid adverse determination or adverse effect"); Shope v. Dep't of Navy, No. 1:CV-09-2400, 2010 WL 2766638, at *3 (M.D. Pa. July 13, 2010) ("First, as mentioned previously, the effect requirement is a standing requirement."); Sieverding v. U.S. Dep't of Justice, 693 F. Supp. 2d 93, 106 (D.D.C. 2010) (dismissing claims brought because the plaintiff did not allege any adverse effects caused by the defendants' "supposed violations of 5 U.S.C. § 552a(c), and [the plaintiff] cannot sue for any such violations"), *aff'd*, No. 10-5149, 2010 WL 4340348 (D.C. Cir. Oct. 19, 2010); Ciralsky v. Cent. Intelligence Agency, 689 F. Supp. 2d 141, 155–56 (D.D.C. 2010) (noting that the definition of "actual damages" under the Privacy Act remains unclear, but that it "is undisputed that if a plaintiff can show neither pecuniary or emotional damages, then there is no injury upon which a court can grant monetary relief under the Privacy Act"); Sutera v. Transp. Sec. Admin., 708 F. Supp. 2d 304, 318–19 (E.D.N.Y. 2010) (dismissing the plaintiff's Privacy Act claim because it was not ripe because the plaintiff only alleged a speculative fear that its reputation would be damaged which does not satisfy the injury-in-fact and causation requirements for standing); Goodwin v. Johnson, No. 8:10CV40, 2010 WL 1500872, at *3 (D. Neb. Apr. 14, 2010) (holding that the plaintiff failed to show that the defendant failed to "elicit information from her to the greatest extent practicable" or that the defendant's "violation adversely impacted her" but allowing the plaintiff to amend her complaint);

but also includes nonpecuniary, nonphysical harm, such as mental distress, embarrassment, or emotional trauma.[267] The initial standing requirement to

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Doe v. U.S. Dep't of Justice, 660 F. Supp. 2d 31, 49–50 (D.D.C. 2009) (holding that the "plaintiff's claim to relief under the Privacy Act must be rejected" because the plaintiff failed to show that he suffered actual damages or that the disclosure had an adverse effect on him); Hass v. U.S. Air Force, 848 F. Supp. 926, 932 (D. Kan. 1994) (granting summary judgment because the plaintiff's "claim fails on the causation element, which requires the plaintiff to show that the disclosure caused an adverse decision to be made"); Swenson v. U.S. Postal Serv., No. S-87-1282 MLS, 1994 U.S. Dist. LEXIS 16524, at *29 (E.D. Cal. Mar. 10, 1994) ("To maintain a suit for damages under the [Privacy] Act's catch-all provision, plaintiff must next establish that the violation had an 'adverse effect' on her . . . . The adverse effect element has two components: standing and causation."); Green v. U.S. Postal Serv., No. 88 Civ. 0539 (CES), 1989 U.S. Dist. LEXIS 6846, at *8 (S.D.N.Y. June 19, 1989) (holding that the plaintiff "failed to state a claim either for amendment or damages under the Privacy Act" by failing to allege adverse determination as a result of a failure to maintain records); Harper v. United States, 423 F. Supp. 192, 196–97 (D. S.C. 1976) (establishing that "[i]n order to obtain jurisdiction for an injunction or for damages under the Privacy Act, a plaintiff must in effect allege that the disclosures of which he complains have caused him 'an adverse effect'" and holding that the plaintiff failed to plead any circumstances that would show causation or adverse effect, and "[t]herefore, plaintiff has failed to plead adequately either the 'adverse effect' required by the Privacy Act . . . or the 'fair notice of actual wrong' required by Rule 12(b) of the Federal Rules of Civil Procedure"); *see also* Raley v. Astrue, No. 2:11cv555-WC, 2012 WL 2368609, at *7 (M.D. Ala. June 21, 2012) ("Plaintiff presents no evidence to establish that receiving someone else's information did in fact adversely affect her.").

[267] *See, e.g.*, Speaker v. U.S. Dep't Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371, 1382–83 (11th Cir. 2010) (indicating that the plaintiff "alleged numerous injuries sufficient to satisfy . . . the 'adverse' effect element of the Privacy Act" including "damage to his personal and professional reputation" and "grave mental anguish and emotional distress"); Doe v. Chao, 306 F.3d 170, 185, 187 (4th Cir. 2002) (Michael, J., dissenting) (indicating that Judge Michael, would "also agree that emotional distress can qualify as an adverse effect."), *aff'd*, 540 U.S. 614 (2004); *Quinn*, 978 F.2d at 135–36 (indicating that "stress and emotional anguish" and "suffer[ing]" as a result of "occupational losses" are "sufficient to satisfy the Privacy Act's adverse effect standing requirement"); Englerius v. Veterans Admin., 837 F.2d 895, 897 (9th Cir. 1988) (indicating that "[a]t least two circuits have construed 'adverse effect' to include emotional trauma"); Albright v. United States, 732 F.2d 181, 186 (D.C. Cir. 1984) (stating that the court "agree[d] with the appellants' argument that emotional trauma alone is sufficient to qualify as an 'adverse effect'"); Usher v. Sec'y of Health & Human Servs., 721 F.2d 854, 856 (1st Cir. 1983) (asserting that "since the only damages alleged are those owing to a wrongful reduction of benefits, there remains no possibility of plaintiff's suffering any 'adverse effect'"); Parks v. U.S. Internal Revenue Serv., 618 F.2d 677, 682–83 n.2 (10th Cir. 1980) (indicating "an adverse effect upon the aggrieved individual" was shown in the form of psychological harm); Iqbal v. FBI, No. 3:11-cv-369-J-37JBT, 2012 WL 2366634, at *6 n.10 (M.D. Fla. June 21, 2012) (stating that "emotional trauma is sufficient" for "the 'adverse affect' requirement"); Kvech v. Holder, No. 10-cv-545 (RLW), 2011 WL 4369452, at *4 (D.D.C. Sept. 19, 2011) (quoting *Albright*, 732 F.2d at 186) (stating that "emotional trauma alone is sufficient to qualify as an 'adverse effect'"); Rice v. United States, 245 F.R.D. 3, 6 (D.D.C. 2007) (indicating that "[p]laintiffs have satisfied this burden . . . by submitting declarations with their reply brief . . . claim[ing] to have suffered 'anger, dismay, anxiety, and fear about what has occurred and what could happen'" and that the declarations "are sufficient to establish plaintiffs' standing under the Privacy Act"); Lechliter v. Dep't of Army, No. 04-814-KAJ, 2006 WL 462750, at *5 (D. Del. Feb. 27, 2006) (stating that "[a]llegations of mental distress or increased emotional trauma have been held to be sufficient adverse effects"); Schmidt v. U.S. Dep't of Veterans Affairs, 218 F.R.D. 619, 632 (E.D. Wis. 2003) (indicating that "it is well-established that emotional trauma, which can take the form of stress, embarrassment, and emotional anguish, constitutes an adverse effect") (citations omitted); Romero-Vargas v. Shalala, 907 F. Supp. 1128, 1134 (N.D. Ohio 1995) (suggesting that "[t]he better reasoned view, taken by the overwhelming majority of courts, is that emotional distress caused by the fact that the plaintiff's

plead "adverse effect" is distinct from the requirement of "actual damages."[268] A showing of causation is also required; specifically, the injured party needs to show that the violation of the Privacy Act caused an adverse effect and that the violation caused actual damages.[269] Case law

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privacy has been violated is *itself* an adverse effect," instead of a "restrictive approach" where "a plaintiff must show actual pecuniary loss in order to have standing to bring a claim under the Privacy Act"); *cf.* Tarullo v. Def. Contract Audit Agency, 600 F. Supp. 2d 352, 354, 359 (D. Conn. 2009) (granting summary judgment where "the disclosures of the [p]laintiff's [social security number] had [no] adverse effect on [him] other than the displeasure he felt because these disclosures were against his wishes"); Clark v. Bureau of Prisons, 407 F. Supp. 2d 127, 131 (D.D.C. 2005) ("Nothing in the record . . . connects the alleged adverse effect, *i.e.*, plaintiff's maltreatment, with the disclosure at issue."); Doyon v. U.S. Dep't of Justice, 304 F. Supp. 2d 32, 35 (D.D.C. 2004) ("assum[ing] without deciding that the Federal Bureau of Prisons' decision 'to restrict [plaintiff] from a transfer and many Institutional programs' . . . is an adverse determination," but finding the claim to have been rendered moot) (footnote omitted) (citations omitted). *But see* Risch v. Henderson, 128 F. Supp. 2d 437, 441 (E.D. Mich. 1999) (conflating the concepts of "adverse effect" and "actual damages," and stating that even assuming that there had been a violation of the Privacy Act for the maintenance of alleged "secret files," because plaintiff claimed only "extreme mental anguish and mental concern and worry," she had "failed to demonstrate" an "adverse effect"), *aff'd*, Risch v. U.S. Postal Serv., 244 F.3d 510 (6th Cir. 2001).

[268] *See, e.g.*, Fort Hall Landowners Alliance, Inc. v. Bureau of Indian Affairs, 407 F. Supp. 2d 1220, 1225 (D. Idaho 2006) ("It is important not to confuse this standing requirement with the entirely separate element that requires proof of actual damages . . . . Thus, to satisfy the Privacy Act's adverse effect and causation requirements, plaintiffs need not show actual damages from the disclosure, but must merely satisfy the traditional 'injury-in-fact and causation requirements of Article III.'"). As one district court has explained, "[t]he requirement of an 'adverse effect' requires more" than a "statement of 'damages' [that] merely summarizes the alleged violations of law." Foncello v. U.S. Dep't of the Army, No. 3:04-CV-604 (JCH), 2005 WL 2994011, at *4 (D. Conn. Nov. 7, 2005). The distinct nature of these two elements is demonstrated by the Supreme Court's review in *Fed. Aviation Admin. v. Cooper*, No. 10-1024, slip op. at 4–9 (March 28, 2012), of an opinion by the Court of Appeals for the Ninth Circuit, *Cooper v. Fed. Aviation Admin.*, 622 F.3d 1016, 1035 (9th Cir. 2010) (holding that for actual damages, "Congress clearly intended that when a federal agency intentionally or willfully fails to uphold its record-keeping obligations under the Act, and that failure proximately causes an adverse effect on the plaintiff, the plaintiff is entitled to recover for both pecuniary and nonpecuniary injuries"). In *Cooper*, the Ninth Circuit, in construing the Privacy Act to allow for the recovery of nonpecuniary damages, reasoned that because mental distress or emotional harm is sufficient to constitute an adverse effect, a construction of the Act that allowed a plaintiff to establish standing for an injury that results in nonpecuniary harm, but that would not allow the plaintiff to seek actual damages for such a nonpecuniary injury, would "frustrate the intent of Congress." *Cooper*, 622 F.3d at 1021. The Ninth Circuit majority went on to state that "[i]n contrast, our opinion is true to the overall objective of the Act, allowing a plaintiff who demonstrates a nonpecuniary adverse effect to have the opportunity to recover nonpecuniary damages." *Id.* However, on writ of certiorari a majority of the Supreme Court reversed the Ninth Circuit's opinion and held that the Privacy Act does not authorize damages for nonpecuniary injuries such as mental or emotional distress. *Fed. Aviation Admin.*, No. 10-1024, slip op. at 19. The Supreme Court did not so much as consider the separate issue of "adverse effect" in its ruling. *See id.* at 12 (asserting that "any doubt about the plausibility of construing 'actual damages' in the Privacy Act synonymously with 'special damages' is put to rest by Congress' refusal to authorize 'general damages'" and stating that "we held that it was 'beyond serious doubt' that general damages are not available for violations of the Privacy Act").

[269] *See, e.g.*, Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 558 (6th Cir. 2010) (concluding that "the Plaintiffs [were] unable to prove causation" and that "by extension . . . also cannot prove that the disclosure would cause any future 'out-of-pocket losses.'"); Sweeney v. Chertoff, 178 F. App'x 354,

also makes it clear that the injury must be distinct from the violation of the act itself.[270]

In the context of S-Comm's overbroad fingerprint sharing protocol, it is inevitable that the fingerprints of some U.S. citizens and lawful permanent residents will be shared with the DHS. Because of inaccurate records and misinformation or administrative error, some of these U.S. citizens and lawful permanent residents have been unlawfully detained on immigration holds despite the fact that they are either citizens or lawfully permitted to remain in the United States.[271] If the sharing of information from the FBI to the DHS results in an individual's unlawful incarceration, the showing of an adverse effect does not seem difficult to prove. The FBI's sharing of the information caused the DHS to improperly issue an immigration detainer and hold a U.S. citizen or LPR unlawfully.

In order to succeed in a claim for damages, the agency must have acted in an "intentional or willful" manner.[272] The terms "intentional" and

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357–58 (5th Cir. 2006) (concluding that the plaintiff's "injury is sufficiently attenuated from any violation of the Act's requirements to preclude a finding of causation" and "failed to show that any violation caused the injury of which he complains."); Mandel v. U.S. Office of Pers. Mgmt., 79 F. App'x 479, 481–82 (2d Cir. 2003) (concluding that the "causation between . . . disclosures and the adverse effects alleged is too attenuated to prove a violation of the Privacy Act" where the witnesses who reviewed the plaintiff's records were the plaintiff's previous supervisors who were "already well-acquainted with the circumstances of [the plaintiff's] prior employment" and further asserting that "[i]n order to establish the requisite causal connection, a plaintiff must demonstrate a close nexus between the disclosure and the adverse effects alleged."); Orekoya v. Mooney, 330 F.3d 1, 10 (1st Cir. 2003) (asserting that "the plaintiff would have to show a causal connection between the Privacy Act violation and the emotional distress damages," agreeing with the district court in determining that plaintiff's "claim of emotional distress 'lacks credibility,'" and further asserting that "[e]ven if [the plaintiff] could have proven emotional distress, there was nothing but speculation to link it to a Privacy Act violation."); *Quinn*, 978 F.2d at 135 (stating that "to state a claim under the Act, the plaintiff must . . . allege a causal connection between the agency violation and the adverse effect."); Hewitt v. Grabicki, 794 F.2d 1373, 1379–80 (9th Cir. 1986) (asserting that "[t]he Privacy Act requires a causal connection between the allegedly erroneous agency record and an adverse determination made against the individual" and concluding that the plaintiff's "resignation from the Veterans Administration involved a dispute concerning his health and ability to return to work, and was not causally related to the contents of the proficiency report.").

[270] Schmidt v. U.S. Dep't of Veterans Affairs, 218 F.R.D. 619, 632 (E.D. Wis 2003); *see also* Doe v. Chao, 306 F.3d 170, 185, 186 (4th Cir. 2002) (Michaels, J., dissenting) ("The causal prong makes it especially clear that an adverse effect must be something distinct from the intentional and willful violation itself. For if a violation of the Privacy Act was sufficient to constitute an adverse effect, there could be no question of whether the violation *caused* the adverse effect, and hence the causal prong would be superfluous.").

[271] For a detailed analysis of the dangers associated with the S-Comm automation system, including false negatives and positives, see Kalhan, *supra* note 191, at 1135–41.

[272] 5 U.S.C. § 552a(g)(4) (2012) ("In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of . . . actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000 . . . .").

"willful" under the Federal Privacy Act are terms of art.[273] As revealed by the Act's legislative history, the "intentional" or "willful" standard is "[o]n a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct," and "is viewed as only somewhat greater than gross negligence."[274] Either the agency committed the act without grounds for believing it to be lawful or by flagrant disregard for the rights of others. While the standard does not require premeditated malice,[275] it is a difficult,[276] but not impossible,[277] standard to meet.

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[273] White v. Office of Pers. Mgmt., 840 F.2d 85, 87 (D.C. Cir. 1988) (per curiam).

[274] 120 CONG. REC. 40, 406 (1974), *reprinted in* SOURCE BOOK ON PRIVACY, *supra* note 246 at 858, 862.

[275] Parks v. IRS, 618 F.2d 677, 683 (10th Cir. 1980).

[276] *See, e.g.*, Luster v. Vilsack, 667 F.3d 1089, 1098 (10th Cir. 2011) ("[G]iven the lack of any authority in support of [plaintiff's] contention that it is a violation of the Privacy Act to transmit confidential materials (all but one of which was covered by a transmittal cover sheet) to an unsecured fax machine, we agree with the district court that [plaintiff] has not demonstrated that any actual disclosure by [defendant] was willful and intentional."); Campbell v. Soc. Sec. Admin., 446 F. App'x 477, 479, 481 (3d Cir. 2011) (per curiam) (upholding the district court's conclusion that "there was no record evidence to support an assertion of willful or intentional conduct" where the district court found that the plaintiff's "assertion that his wife discovered some documents in her SSA file that should have been in *his* file, if true, established nothing more than negligence"); Maydak v. United States, 630 F.3d 166, 179–82 (D.C. Cir. 2010) (holding that, "assum[ing], without deciding, that BOP's review and retention of the duplicate photos [of prisoners] constituted a 'system of records,'" BOP did not intentionally or willfully commit Privacy Act violations because, among other reasons, "the photographs . . . were used only for legitimate law enforcement purposes" and, "[n]otwithstanding the court's critical discussion of the review and retention policies" in prior opinions, "BOP officials were still never placed on clear notice that their practices violated the Act"); Wilkerson v. Shinseki, 606 F.3d 1256, 1268 (10th Cir. 2010) (holding that the standard was not met where a VA physician accessed the plaintiff's medical records because the physician testified that "he thought he could access the record so long as he had a 'need to know'" and, "given that [plaintiff's] health records were relevant to whether he could continue working at the VA, [that] belief was reasonable"); Powers v. U.S. Parole Comm'n, 296 F. App'x 86, 87 (D.C. Cir. 2008) (holding that, where the plaintiff "claim[ed] only that the Commission acted 'intentionally'" in "'not maintain[ing] correct records'" and that "its 'negligence' violated his Privacy Act rights," his complaint "imputes at most 'gross negligence' to the Commission with regard to its maintenance and use of inaccurate records"); Puerta v. U.S. Dep't Health & Human Servs., No. 99-55497, 2000 WL 863974, at *3 (9th Cir. June 28, 2000) (holding that, where the agency, upon the advice of its general counsel's office, disclosed documents in response to a grand jury subpoena, the agency "may have intentionally produced [the] documents, but it does not necessarily follow that [it] intentionally violated . . . the Privacy Act"); Scrimgeour v. IRS, 149 F.3d 318, 325–26 (4th Cir. 1998) (holding that the plaintiff did not "demonstrate the higher standard of culpability required for recovery under the Privacy Act" where the court had already determined that the IRS's release of his tax returns did not meet the lower standard of gross negligence for recovery under the provision of the Internal Revenue Code).

[277] Several District Court decisions have found "intentional or willful" violations of the statue. *See, e.g.*, Carlson v. Gen. Servs. Admin., No. 04 C 7937, 2006 WL 3409150, at *5 (N.D. Ill. Nov. 21, 2006) (finding no willful violation when an agency employee's supervisor sent an email to other agency personnel and to individuals outside the agency regarding the plaintiff's termination settlement agreement, which included "unnecessary details concerning [employee's] personal information" and which supervisor encouraged recipients to disseminate); Johnson v. Bureau of Prisons, No. 03-2047, slip op. 11–12 (D. Colo. June 17, 2005) (finding no willful violation of BOP regulations and policy, when BOP health systems specialist made statements regarding medical privacy); Doe v. Herman, No.

Individuals harmed by improper information sharing could argue that the continuous pattern of overbroad sharing and the knowledge of imperfect records make the indiscriminate sharing intentional or willful.

CIV.A.297CV00043, 1999 WL 1000212, at *13–14 (W.D. Va. Oct. 29, 1999) (magistrate's recommendation) (finding a willful violation based on unnecessary disclosure of a claimant's social security number on a multi-captioned hearing form to twenty other claimants, coal companies, and insurance companies), *adopted in part & rev'd in part*, No. Civ.A. 2:97CV00043, 2000 WL 34204432 (W.D. Va. July 24, 2000), *aff'd in part, rev'd in part, & remanded*, Doe v. Chao, 306 F.3d 170 (4th Cir. 2002), *aff'd*, 540 U.S. 614 (2004); Stewart v. FBI, No. 97-1595, slip op. at 5–8 (D. Or. Mar. 12, 1999) (finding no willful violation of subsections (b) and (e)(6) based on the dissemination of an incorrect report containing criminal allegations concerning plaintiff), *withdrawn by stipulation as part of settlement*, No. 97-1595-HA, 2000 WL 739253 (D. Or. May 12, 2000); Tomasello v. Rubin, No. 93-1326, slip op. at 17–19 (D.D.C. Aug. 19, 1997) (finding no willful violation based on disclosure to "60 Minutes" and all 4,500 ATF employees of details concerning plaintiff's EEO complaint), *aff'd on other grounds*, 167 F.3d 612 (D.C. Cir. 1999); *Porter*, No. CV595-30, slip op. at 22–23 (S.D. Ga. July 24, 1997) (finding no willful violation / willful violation based on disclosure by Postmaster to USPS personnel who had no "need to know" of plaintiff's two-week suspension for impersonating a postal inspector); Romero-Vargas v. Shalala, 907 F. Supp. 1128, 1133–34 (N.D. Ohio 1995) (finding a willful violation based on telephonic verification or non-verification of plaintiffs' social security number provided by the agency to their employers in violation of regulations and agency employee manual). However, only two courts of appeals—the court of Appeals for the Sixth and Ninth Circuits—have found "intentional or willful" violations of the statue. *See* Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 552–53 (6th Cir. 2010) (upholding the district court in determining that the agent "willfully violated the Privacy Act by flagrantly disregarding the . . . employees' rights under the Act" in "leaving the unmarked folder in an inmate-accessible area"); Louis v. U.S. Dep't of Labor, 19 F. App'x 487, 489 (9th Cir. 2001) (stating that the Department of Labor's "disregard of both the district court's prior decision . . . and its own assurance that it would annotate the memo in its files 'to reflect that it is not to be considered in any future action related to [the plaintiff's] claim' constitutes a willful failure on the part of the government to abide by its obligations" and holding that the plaintiff "is entitled to . . . damages" as a result of the court's "strong[] dissapprov[al] of the DOL's attempts to circumvent the Privacy Act."); Wilborn v. U.S. Dep't of Health & Human Servs., 49 F.3d 597, 602–03 (9th Cir. 1995) (holding that "the agency acted in a manner that was intentional and willful . . . under the Privacy Act" as a result of the agency including "inappropriate" language in a published decision despite the attorney advisor's assessment that "the language at issue was inappropriate and should not be included in the decision"); Covert v. Harrington, 876 F.2d 751, 755–57 (9th Cir. 1989) (determining that there was "no legitimate basis for the government's failure to comply with § [552a](e)(3)(C)," a provision concerning "an Agency collecting information," and "conclud[ing] that the violation was intentional or willful for the purposes of the damage award"); *cf.* Oja v. U.S. Army Corps of Eng'rs, 440 F.3d 1122, 1125, 1136 (9th Cir. 2006) (concluding that "it was clear . . . that the [agency's] disclosures were intentional or willful" where the agency posted information about a former employee on its website, but determined that the provision's "tolling provisions are entirely inapposite to [the] claims"). *But see generally* Downie v. City of Middleburg Heights, 301 F.3d 688, 697–99 (6th Cir. 2002) (stating, in the course of ruling that a remedial scheme of the Privacy Act barred *Bivens* action, that "[w]hile the Privacy Act does not provide a *separate* damages remedy for the intentional or willful creation, maintenance, or dissemination of false records in retaliation for an individual's First Amendment rights, we believe that retaliation on any basis clearly constitutes intentional or willful action"); Toolasprashad v. Bureau of Prisons, 286 F.3d 576, 581, 584, 586 (D.C. Cir. 2002) (reversing and remanding the case where the district court had found that the record would not support a finding of intentional and willful action, and stating that, "[i]f proven, retaliatory fabrication of prison records would certainly meet [our] definition [as articulated in *Deters*] of a willful or intentional Privacy Act violation").

Additionally, if the individual can show that the records were incorrect, for example, by identifying the person as a non-citizen, then he or she could argue that the repeated failure to correct erroneous records constitutes intentional and willful behavior.

Even if the harmed individual meets all of the elements, the government has a series of exemptions that might provide a defense. In the context of S-Comm implementation, the "routine use" exemption provides the government just such a defense.[278] The definition's potential breadth makes this provision of the Act controversial.[279] The legislative history adopting the "routine use" exemption illustrates some of the dangers associated with the provision.[280] The purpose of the "routine use" exemption was to allow for orderly and efficient government functioning by allowing federal agencies to routinely exchange information for "housekeeping measures"[281] but not to allow the government to indiscriminately circumvent the nondisclosure provision of the Act. Aware of this distinction, the legislative history makes explicit the distinction between sharing information for "housekeeping" purposes and other sharing of information that has the potential to result in unnecessary and

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[278] *See* Coles, *supra* note 247, at 975 (asserting that "adoption of the routine use language freed federal agencies from strict adherence to the non-disclosure provision and introduced a means to circumvent the Privacy Act").

[279] *See* PRIVACY PROT. STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 517–18 (1977), *available at* http:/epic.org/privacy/ppsc1977report.

[280] Coles, *supra* note 247, at 977. Coles states:

> Where the Senate bill would have placed tight restrictions upon the transfer of personal information between or outside Federal agencies, the House bill, under the routine use provision, would permit an agency to describe its routine uses in the Federal Register and then disseminate the information without the consent of the individual or without applying the standards of accuracy, relevancy, timeliness or completeness so long as no determination was being made about the subject.

Id. at 977 n.131 (quoting LEGISLATIVE HISTORY, *supra* note 213, at 859).

[281] *Id.* at 976 (citing LEGISLATIVE HISTORY, *supra* note 213, at 859); Privacy Act Implementation Guidelines and Responsibilities for Office of Management and Budget, 40 Fed. Reg. 28,948, 28,953 (July 9, 1975), *reprinted in* LEGISLATIVE HISTORY, *supra* note 213, 1030 (noting that the routine use exemption was introduced in recognition of the corollary purposes to which collected information may be "appropriate and necessary" for "efficient conduct of government" and "in the best interest of both the individual and the public"). Representative Moorhead explained the rationale of the exemption:

> It would be an impossible legislative task to attempt to set forth all of the appropriate uses of Federal records about an identifiable individual. It is not the purpose of the bill to restrict such ordinary uses of the information. Rather than attempting to specify each proper use of such records, the bill gives each Federal agency the authority to set forth the 'routine' purposes for which the records are to be used under the guidance contained in the committee's report.

LEGISLATIVE HISTORY, *supra* note 213, at 957.

potentially damaging disclosures.[282]

In an attempt to limit the breadth of the exception, the statute requires the government to meet two separate requirements in order for the "routine use" exemption to apply. First, it requires Federal Register publication of "each routine use of the records contained in the system, including the categories of users and the purpose of such use . . . ."[283] Second, it requires compatibility—"the use of such record for a purpose which is compatible with the purpose for which it was collected . . . ."[284]

Despite these requirements, the S-Comm disclosure process from the FBI to the DHS illustrates the breadth of the exception and the opportunities for misuse.[285] In terms of the publication requirement, the Government can argue that pursuant to 5 U.S.C. § 552a(e)(4)(D), the DOJ has published in the Federal Register a notice of the existence of its systems of records and the routine uses of the records. Specifically, the

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[282] Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, 120 CONG. REC. 40,881 (1974), *reprinted in* SOURCE BOOK ON PRIVACY, *supra* note 274, at 987–88.

> This act is not intended to impose undue burdens on the transfer of information to the Treasury Department to complete payroll checks, the receipt of information by the Social Security Administration to complete quarterly posting of accounts, or other such housekeeping measures and necessarily frequent interagency or intra-agency transfers of information. It is, however, intended to discourage the unnecessary exchange of information to other persons or to agencies who may not be as sensitive to the collecting agency's reasons for using and interpreting the material.

Id.

[283] 5 U.S.C. § 552a(e)(4)(D) (2012).

[284] *Id.* § 552a(a)(7) (2012). In addition, the Ninth Circuit created a third requirement of actual notice of the "routine use" at the time the information is collected from the individual. Covert v. Harrington, 876 F.2d 751, 754–56 (9th Cir. 1989); *accord* Puerta v. Dep't Health & Human Servs., No. 99-55497, 2000 WL 863974, at *1–*2 (9th Cir. June 28, 2000) (indicating that "the agency invoking the routine use exception must have informed the individual on the form used to collect information or on a separate form that can be retained by the individual the routine uses that may be made of the information"); *cf.* Stafford v. Soc. Sec. Admin., 437 F. Supp. 2d 1113, 1119 (N.D. Cal. 2006) (explaining that notice need not "anticipate and list every single potential permutation of a routine use in order to invoke this exception"). Subsequently, the Court of Appeals for the District of Columbia Circuit cited this aspect of *Covert* with approval stating, "[a]lthough the statute itself does not provide, in so many terms, that an agency's failure to provide employees with actual notice of its routine uses would prevent a disclosure from qualifying as a 'routine use,' that conclusion seems implicit in the structure and purpose of the Act." U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, 9 F.3d 138, 146 (D.C. Cir. 1993). *But cf.* Thompson v. Dep't of State, 400 F. Supp. 2d 1, 16–17 (D.D.C. 2005) (indicating that the statute "does not require the level of specificity in disclosure of the routine uses that plaintiff desires" and that "[a]lthough the warning did not explicitly mention 'routine uses,' '[n]othing in the Privacy Act requires agencies to employ the exact language of the statute to give effective notice'").

[285] This potential for misuse was the very reason the "routine use" exemption was not in the Senate version of the Privacy Act proposed bill. The authors of the Senate Bill rejected such a provision because of the potential misuse by government. S. REP. NO. 98-1183, at 69 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 213, at 222.

DOJ has published several Blanket Routine Uses that apply "to every existing FBI Privacy Act system of records."[286] Specifically, Blanket Routine Use 6 provides that a record may be disclosed "[t]o such recipients and under such circumstances and procedures as are mandated by Federal statute or treaty."[287]

In the context of S-Comm, section 1722(a)(2) of the Enhanced Border Security Act mandates that:

> the President shall develop and implement an interoperable electronic data system to provide current and immediate access to information in databases of Federal law enforcement agencies and the intelligence community that is relevant to determine whether to issue a visa or to determine the admissibility or deportability of an alien.[288]

The statute specifically states that the federal government's interoperable database should be "readily and easily accessible" to federal immigration officials "responsible for determining an alien's admissibility . . . or deportability."[289] The language does not clearly authorize the indiscriminate transfer of all fingerprint records, regardless of the concern about an individual's admissibility or deportability.[290] Furthermore, other provisions of the Act specify that the use and dissemination of information shared by federal law enforcement agencies with immigration officials should be "used solely to determine whether to issue a visa to an alien or to determine the admissibility or deportability of an alien to the United States" and "to protect any privacy rights of individuals who are subjects of such information."[291] While the government can argue that the legislation requires the FBI and the DHS to share any information that is relevant to immigration decisions as soon as such information is received by either agency and that interoperable means bi-directional sharing of

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[286] 66 Fed. Reg. 33,559 (June 22, 2001).

[287] *Id.*

[288] 8 U.S.C. § 1722(a)(2) (2012).

[289] *Id.* § 1722(a)(5) (2012).

[290] Kalhan, *supra* note 191, at 1130–31. On this point, Kalhan writes:

> [W]hile the Visa Reform Act seems to clearly authorize access to FBI records when immigration or consular officials need to make particular decisions about visa issuance, admissibility, or deportability, it is less clear that the provision authorizes the routine bulk transmission to DHS of *all* state and local identification records in its possession—on an ongoing basis as it receives them—of both U.S. citizens and noncitizens in the absence of specific, pending immigration-related decisions for which DHS needs that information.

Id.

[291] 8 U.S.C. § 1721(c)(3)(B) (2012).

information,[292] the original design of the S-Comm program was for the DHS to request information from the FBI when necessary to make an informed decision on admissibility or deportability.[293] If the decision to adopt a policy of indiscriminate transfer of all records was done for convenience sake, then it seems the balance sought through passage of the Federal Privacy Act has been upended. The government can also argue that the statute requires access to all *relevant* information and that any information in the federal database might impact an immigration decision regarding "admissibility or deportability."[294] Despite these arguments, the statutory authority relied upon is vague and general.[295] And, the Attorney General's criminal recordkeeping authority is limited to "authorized" federal officials, leaving open the question of whether the DHS is an "authorized" federal official.[296]

In terms of the requirement of compatibility, there are additional concerns with the indiscriminate sharing of fingerprints under S-Comm. The fingerprints are taken by local law enforcement upon arrest and shared

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[292] Congress envisioned bi-directional sharing of information between FBI and DHS databases, stating that it wanted to "achieve real time interoperability between the two-fingerprint Automated Biometrics Identification System (IDENT), which is used by the Border patrol and US–VISIT, and the FBI's 10-fingerprint Integrated Automated Fingerprint Identification System (IAFIS)." H.R. REP. NO. 109-79, at 20 (2006); *see* H.R. REP. NO. 106-479, at 151 (1999) (directing AAG "to submit a plan by November 1, 1999, to integrate the INS IDENT and the FBI IAFIS systems").

[293] *See* Memorandum of Understanding Among the Dep't of Homeland Sec., the Dep't of Justice, Fed. Bureau of Investigation, Criminal Justice Info. Servs. Div. and the Dep't of State Bureau of Consular Affairs for Improved Info. Sharing Servs. (July 1, 2008) *available at* http://www.ice.gov/doclib/foia/secure_communities/dhsfbiinteroperabilitymoujuly2008.pdf. (discussing policies and procedures for parties to contact each other).

[294] 8 U.S.C. § 1722(a)(2) (2012).

[295] Kalhan, *supra* note 191, at 1162–63. Kalhan points out:

> The main statutes upon which federal authorities have relied to implement these programs provide only vague and general support for these initiatives, with one having been enacted in 1930 to provide general authority for the FBI's maintenance of identification and criminal history records and the other having been adopted in the wake of the 2001 terrorist attacks to enable immigration officials to access information in federal intelligence and law enforcement databases that may be relevant when issuing visas or making admissibility or deportability determinations.

Id. (citing 8 U.S.C. § 1722 (2012); 28 U.S.C. § 534 (2012)).

[296] *Id.* at 1130–31. The author explains:

> [T]he authority cited by DHS is not unambiguous. The Attorney General's general criminal recordkeeping authority—whose 'very general nature' long had prompted the FBI to act 'cautiously' in how it maintained and disseminated state and local records in its possession—limits sharing of those records to 'authorized' federal officials, leaving unanswered the extent of any authority to disseminate FBI-maintained fingerprint records to DHS.

Id. (citing Menard v. Mitchell, 328 F. Supp. 718, 722 (D.D.C. 1971); *Menard*, 328 F. Supp. at 722 (noting that "control of what arrest or criminal data remain in the [FBI's] files rest in every case . . . with the local arresting authority").

with the FBI for law enforcement purposes. The FBI then discloses the fingerprints to the DHS for the purposes of immigration enforcement. There are several arguments that compatibility must fail in this context.

First, the collection of fingerprint data for criminal justice purposes is distinct from the collection of fingerprint data for civil immigration purposes.[297] Both the individuals whose fingerprints are taken and the local governments that collect them are collecting them for criminal justice purposes. The federal government then transforms that purpose by sharing that data with the DHS for civil immigration purposes without the permission of the individual whose fingerprints were taken. Informational privacy theory identifies context and purpose as fundamental principles that help analyze the extent to which information appropriately should be shared.[298] Context relates to the particular setting of personal information, what type of information is considered sensitive may vary among individuals and the willingness to share information may vary upon who and when you are sharing it. Purpose relates to the specific intended use of the information.[299] A governance concern in this area is that information collected for legitimate public purposes, in this context criminal background checks, might be re-used or re-constituted in an "unacceptable" fashion, indiscriminately shared with the DHS to check against immigration databases.[300]

Second, there is an argument that the compatibility prong must fail when the subject of the fingerprints is a U.S. citizen because the DHS has no immigration enforcement authority against a U.S. citizen. As such, the

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[297] Kalhan, *supra* note 191, at 1144 (arguing that Secure Communities repurposes the biometric records already maintained by the FBI by using them not only for criminal background purposes, but also for immigration purposes and creates an expansive biometric data base that has many potential future uses). *See also* Chad DeVeaux, *A Tale of Two Searches: Intrusive Civil Discovery Rules Violate the Fourth Amendment*, 46 CONN. L. REV. 1083, 1086–92 (2014) (arguing that civil discovery rules can violate the Fourth Amendment's prohibition against unreasonable searches).

[298] David Lazer & Viktor Mayer-Schonberger, *Statutory Frameworks for Regulating Information Flows: Drawing Lessons for the DNA Data Banks from Other Government Data Systems*, 34 J.L. MED & ETHICS 366, 368 (2006).

[299] *Id.* These authors explain that:

> The principle of purpose has led to a number of enormously useful rules of thumb in the field of informational privacy. It requires that the purpose of use of personal information be made explicit and clear, for example through a precise statutory mandate. Similarly, the purpose cannot be changed retroactively without disobeying the principle of purpose, except if those affected agree, and personal information that is no longer necessary for the intended purpose must be deleted. It also leads to the conclusion that statutes ought only to require collecting, storing, and sharing that personal information which is necessary to fulfill the purpose. Collecting information just in case it may become useful at some future date or for some future purpose would be contrary to the purpose principle.

Id.

[300] *Id.*

government would lack any statutory or regulatory authority to disclose such information for the purposes of determining admissibility or deportability. The government might argue that the disclosure of "a record that indicates a violation or potential violation of law to the appropriate agency charged with the responsibility of investigating or prosecuting such violation or charged with enforcing such law" is a compatible disclosure.[301] However, such an argument would lead to a very broad interpretation of this exception. In effect, the FBI would be permitted to disclose the information for investigative purposes only because they have no way of knowing when they transmit the fingerprints who is a U.S. citizen, a lawful permanent resident, an alien with a pending application for adjustment of status, or an undocumented immigrant. If the government's position were accepted, then the FBI would be required to send DHS every fingerprint that they obtain in the event that some of the people might be aliens. However, 8 U.S.C. §1722 does not permit Blanket Routine Use 6 to be used as a means of investigation; rather, it merely provides for the transmission of information to determine whether to issue a visa or to determine admissibility or deportability.[302]

In sum, U.S. citizens and lawful permanent residents that are improperly caught up in S-Comm's reach have a potential remedy under the Federal Privacy Act. However, in order to be successful, individuals harmed would have to argue that the overbroad and indiscriminate sharing of fingerprints, in light of the FBI's knowledge that some of the fingerprints will be of U.S. citizens and LPRs, constitutes intentional and willful disclosure by the federal government. Additionally, they will have to argue that S-Comm's disclosure is not a valid "routine use" because the information was collected for one purpose, criminal investigation, and then disclosed for an entirely different purpose, immigration enforcement. In discerning the appropriate reach of the "routine use" exemption, examination of the legislative history and policy behind the exemption support a limited interpretation of the exemption's reach in the context of S-Comm. The exemption was designed to allow for efficient and effective sharing of information among federal agencies for "housekeeping" purposes while at the same time recognizing and supporting individual interest in privacy protection. If the government's broad interpretation were accepted, however, then all records that "might be relevant" would be disclosed and the very protections of the Federal Privacy Act would be

[301] *See* Freeman v. EPA, No. 02-0387, 2004 WL 2451409, at *7 (D.D.C. Oct. 25, 2004) (making such an argument).

[302] *See* 8 U.S.C. § 1722(a)(2) (2012) (containing no provision regarding the use of Blanket Routine Use 6 to be used as a means of investigation).

eviscerated.[303]

Thus, in order to strike the balance identified in the Privacy Act's legislative history and to support basic concepts of informational privacy, it would be most appropriate if the FBI were not permitted to indiscriminately share fingerprints with the DHS for immigration purposes. Alternatively, it would be more appropriate if the FBI could only disclose fingerprints after a relevant inquiry was made from the DHS or if the FBI were only entitled to send the fingerprints of a person they know or believe to be an alien. Providing these limited alternative protections against the indiscriminate sharing of information strikes a balance between the rights of the government to share information and the rights of individuals to privacy protection that is at the core of the Federal Privacy Act.

VI. CONCLUSION

No matter what, if anything, comprehensive immigration reform delivers, one thing is certain. Federal immigration enforcement at the border and inside the border will be enhanced. As more resources are provided for new enforcement programs, existing programs such as S-Comm will continue to play a critical role in the enforcement of federal immigration laws. With the shift from an optional to a mandatory program, state and local governments that do not want to participate in federal immigration enforcement efforts through the S-Comm program have several options to abstain from participation, but each option raises a series of complex questions related to federalism and the proper role of state and local governments in federal immigration enforcement. Individuals harmed by the improper application of S-Comm to their particular circumstances may have remedies as well. However, the broad sweep of exceptions under the Federal Privacy Act and limitations on the protections of U.S. citizens and lawful permanent residents make the questions of statutory analysis nuanced. This Article explores these avenues and concludes that a number of legally viable options exist to enable states and localities to defy participation and to provide compensation for injured individuals. However, each of these options is limited. Given the inherent tension between the rights of state and local governments to effectively police their communities and the rights of the federal government to enforce the

[303] Kalhan, *supra* note 191, at 1156–59. Kalhan argues that free information sharing at all times is not necessarily always a good thing and offers concrete ideas to restore balance back in local control. *Id.* Ideas could include enabling states and localities to choose whether or not their officers receive immigration records when making routine NCIC queries, or modifying S-Comm to enable states and localities to choose whether to share fingerprint records for immigration enforcement purposes, or even to refine the flow of fingerprint records from the FBI to the DHS more generally—for example, by enabling the DHS to access FBI information in the context of specific, pending immigration-related decisions for which the Department needs the information. *Id.*

nation's immigration laws, S-Comm should be returned to a voluntary opt-in program and Congress should move swiftly to address immigration reform in a comprehensive and sustainable manner.