2017

A Framework for Understanding Subfederal Enforcement of Immigration Laws

Huyen Pham

Texas A&M University School of Law, hpham@law.tamu.edu

Follow this and additional works at: https://scholarship.law.tamu.edu/facscholar

Part of the Immigration Law Commons

Recommended Citation

Available at: https://scholarship.law.tamu.edu/facscholar/1150

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact sphillips64@law.tamu.edu.
A Framework for Understanding Subfederal Enforcement of Immigration Laws

HUYEN PHAM*

I. INTRODUCTION

When thirty-two-year-old Kate Steinle was randomly shot during broad daylight on San Francisco’s Pier 14, the initial public reaction was one of shock. When the shooter was determined to be an unauthorized immigrant who had been deported five times, and had been recently released by the San Francisco Sheriff’s Department despite an extensive criminal record, that shock turned to outrage.1 Politicians across the country railed against San Francisco’s “sanctuary policy,” which limited cooperation between the city’s law enforcement agencies (LEAs) and Immigration and Customs Enforcement (ICE), resulting in the immigrant’s release. Senator David Vitter (R-LA) introduced legislation—ultimately unsuccessful—to strip federal funding from jurisdictions that do not fully cooperate with federal immigration enforcement.2 Some states have threatened noncooperative LEAs with a similar loss of state funding.3

* Professor of Law, Texas A&M University School of Law; A.B. Harvard College; J.D. Harvard Law School. I would like to acknowledge the helpful comments I received when I presented a version of this article at the Conference of Asian Pacific American Law Faculty at the University of California, Davis. I am particularly grateful for the thoughtful feedback I received from Hiroshi Motomura. I would also like to thank Elizabeth Anderson, Michael Doyle, Kimberley Gorny, Christina Gutierrez, Jake Jensen, and Jessica Lesnau for their excellent research assistance.


Media outlets, in their coverage of this controversy, reported that hundreds of subfederal jurisdictions also have sanctuary policies. In doing so, these media accounts lumped together San Francisco’s very strict noncooperation policy with other jurisdictions that have much more moderate policies. This lumping together has important implications because it glosses over the differences in LEA practices and frames the debate as all or nothing—either LEAs cooperate wholesale with federal immigration enforcement, or they become “sanctuaries” like San Francisco, avoiding any type of immigration cooperation whatsoever. In fact, however, LEAs have taken a variety of paths, with some implementing fairly nuanced cooperation policies.

Drawing on our empirical database of subfederal immigration laws, this article seeks to move the debate forward by describing, in detail, the six different immigration enforcement models that LEAs have implemented. At the heart of all these models is the question of how much cooperation, if any, LEAs should offer to federal immigration authorities. Because the federal government ultimately controls the removal process, and because the Supreme Court has struck down subfederal attempts to enforce immigration law outside of the federal scheme, cooperation is the key concept for evaluating LEA responses.

The models, listed in order of most to least cooperation, are: (1) the unilateral model, where LEAs initiate immigration enforcement, feeding into federal programs; (2) the 287(g) model, where LEAs are delegated authority by ICE to act as immigration agents; (3) the jailhouse interview model, where LEAs voluntarily provide ICE with names of foreign-born detainees and allow ICE to interview those detainees in LEA facilities; (4) the detainer model, where LEAs cooperate with federal requests to detain immigrants and to notify when those immigrants are released from local custody; (5) the notification-only model, where LEAs will notify ICE when specific immigrants are released from local custody, but will not detain immigrants on ICE’s behalf; and (6) the no-cooperation model, where LEAs do not detain or notify.

As explained in Section II, these different models developed against a context of changing historical, legal, and technological forces. Some of the


6. Arizona v. United States, 132 S. Ct. 2492, 2509–10 (2012) (striking down three Arizona laws that made it a state crime to be unlawfully present or to work without authorization and that authorized Arizona LEAs to make warrantless arrests of people suspected to be removable).
models developed in response to these changes, particularly to changing federal policy. We also see instances where subfederal immigration initiatives have been engines of change themselves, influencing enforcement policies at the federal level. The federal government alternately discouraged and then encouraged LEA immigration cooperation at different points in time. After the 9/11 attacks, when the federal government encouraged LEA cooperation in earnest, the form of that cooperation was more labor-intensive. Some LEAs signed 287(g) agreements, where their officers are trained and authorized to act as immigration agents (Model 2); other LEAs agreed to participate in the Criminal Alien Program (CAP), through which they allowed ICE agents to interview foreign-born individuals being held in their jails (Model 3). A handful of jurisdictions have tried to act more unilaterally, imposing enforcement requirements on their LEAs independent of any federal programs (Model 1).

With advances in technology and the inclusion of immigration information in federal crime databases that all LEAs check when they make arrests, federal-LEA cooperation has become more focused on information sharing. Under this structure, LEAs inform ICE when they have custody of someone who allegedly violated immigration laws; until recently, ICE would also request LEAs to detain immigrants for ICE pickup. Now, after legal challenges, the Obama administration’s stated policy was to decrease the use of federal detainer requests, but questions remain about whether that policy will be widely and consistently implemented. Models 4, 5 and 6 represent different jurisdictions’ responses to this information-centered cooperation.

In discussing the varied LEA responses, the normative question naturally arises: Which model of immigration enforcement should an LEA embrace? If an LEA with no current immigration enforcement policy were to decide on a model, which model should it choose? Or, if an LEA wants to reconsider its current enforcement model, what factors should it consider in

7. See Anil Kalhan, Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy, 74 Ohio St. L.J. 1105, 1108-09 (2013) (arguing that a technology-based shift toward automated immigration policing disrupts the prevailing federalism equilibrium by mandating state and local participation in immigration policing).
8. See infra note 20 (opining that local police may enforce civil but not criminal provisions of the Immigration & Nationality Act).
making its decision? The answers to these questions depend on the interests of individual LEAs—interests that may vary from LEA to LEA. The second contribution of this article then is to raise important questions that LEAs should consider in deciding which model is best for them.

1. Who is your community that you are protecting?
2. How important is community communication/trust to your policing model?
3. Will immigration cooperation advance your mission of protecting public safety?

To help LEAs think through these questions, this article gathers and synthesizes the relevant empirical information and related research.

Section II of this article describes the six models of LEA cooperation in more detail, explaining the historical, legal, and technological context of each model’s development. Section II develops a framework to assist LEAs in choosing among the cooperation models. In asking the questions above, this section also analyzes the relevant empirical research and information. The article ends with some concluding thoughts for LEAs as they consider their options.

II. MODELS OF COOPERATION

What does it mean to say that an LEA cooperates with federal immigration enforcement? “Cooperation” is “an act or instance of working or acting together for a common purpose or benefit . . . [or] more or less active assistance from a person [or] organization.”12 To develop the different models of LEA cooperation, I focus on the assistance prong of the definition and consider what forms of assistance an LEA can offer to federal immigration authorities. Because LEAs may be motivated by goals that diverge from federal immigration goals, I do not consider whether LEAs and federal immigration authorities are acting “for a common purpose or benefit.”

The voluntary nature of cooperation between any particular LEA and ICE should also be emphasized. Because of Tenth Amendment constraints, any assistance that ICE receives from LEAs regarding immigration enforcement has to be voluntary on the part of the LEAs.13 Any federal mandate to LEAs to assist in immigration enforcement would raise concerns that the federal government is commandeering state resources in violation of the Tenth Amendment.14

13. But see Kalhan, supra note 7.
14. See Printz v. United States, 521 U.S. 898, 935 (1997) (“The 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.”).
In developing the different models of cooperation, I drew upon the Immigration Climate Index (ICI), an empirical database that I codeveloped to track subfederal immigration laws.\textsuperscript{15} The ICI tracks laws enacted by states, cities, and counties from 2005 to 2015 that regulate immigrants within their jurisdictions. These subfederal laws regulate in many different substantive areas (e.g., LEA cooperation in enforcing federal immigration laws; immigrant access to employment, drivers’ licenses, and social welfare programs; English-only laws; and, laws related to voting and immigrant legal services).\textsuperscript{16} For present purposes, I focus on the LEA-related laws within the ICI to ascertain trends that are helpful in developing the models of cooperation.

For the ICI, we chose 2005 as the start date for our data collection because that is the year when subfederal governments enacted immigration regulations in noticeable volumes. The National Conference of State Legislatures, a clearinghouse for state level legislation, only started compiling reports on immigration-related laws in 2005. Before that year, state laws related to immigration were rare and largely limited to the distribution of state social service benefits.\textsuperscript{17} Our own tracking of city and county level laws confirms a similar timeline for the growth of local immigration laws.

What was the impetus for the growth of subfederal immigration regulations in 2005? Though subfederal governments have always played an important role in the integration of immigrants within their jurisdiction, the phenomenon of direct immigration regulation by cities, counties, and states can be traced to the 9/11 attacks. In June 2002, nine months after the attacks, Attorney General John Ashcroft invited states to enforce civil immigration laws as part of “our narrow anti-terrorism mission.”\textsuperscript{18} This invitation generated much controversy; previously, the federal government had forcibly maintained that state enforcement of federal immigration laws was limited to criminal laws (e.g., human trafficking laws).\textsuperscript{19} Using their “inherent authority” as sovereigns, Ashcroft argued that states could also enforce civil immigration laws (e.g., laws prohibiting visa overstays).

\textsuperscript{15} Pham \& Hoang Van, \textit{Measuring the Climate for Immigrants}, \textit{supra} note 5; Pham \& Hoang Van, \textit{State-Created Immigration Climates and Domestic Migrants}, \textit{supra} note 5.

\textsuperscript{16} Pham \& Hoang Van, \textit{Measuring the Climate for Immigrants}, \textit{supra} note 5, at 17.

\textsuperscript{17} Most of these pre-2005 state laws were reacting to federal welfare reform, the Illegal Immigration Reform and Immigrant Responsibility Act, which prohibited the distribution of welfare benefits to most immigrants. E-mail from Ann Morse, Program Dir., Immigrant Policy Project, Nat’l Conference of State Legislature, to author (Aug. 12, 2009, 11:47 AM) (on file with author).

\textsuperscript{18} Ashcroft, \textit{supra} note 9.

\textsuperscript{19} Memorandum from the Off. of Legal Counsel of the U.S. Dep’t of Justice, on Assistance by State and Local Police in Apprehending Illegal Aliens to the U.S. Attorney for the S. Dist. of Cal. (Feb. 5, 1996) (opining that local police may enforce civil but not criminal provisions of the Immigration \& Nationality Act).

\textsuperscript{20} Ashcroft, \textit{supra} note 9.
Encouraged by this federal invitation, subfederal governments have leapt into the world of immigration enforcement, taking substantially different paths. The following section describes the six main models that LEAs have taken. While it is possible for an LEA to embrace more than one model at a time (e.g., implementing Model 1’s Unilateral Enforcement while also allowing ICE to do jailhouse checks through Model 3), it’s easier to understand these LEA actions as separate models.

A. Model 1: Unilateral Enforcement

The unilateral model refers to LEAs in jurisdictions that impose affirmative enforcement responsibilities on the LEAs, independent from any federal enforcement program. The most well-known example of unilateral enforcement is Arizona. As part of its infamous SB 1070 legislation, Arizona requires its law enforcement officers to make a “reasonable attempt” to determine the immigration status of anyone they encounter during any “lawful stop, detention or arrest” where “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”21 This provision, known colloquially as the “show me your papers” law, survived a constitutional challenge in 2010 when the Supreme Court held that the provision was not preempted by federal law.22 Alabama, Georgia, South Carolina, and Utah have enacted similar laws.23

It may seem counterintuitive to characterize unilateral initiatives as involving immigration cooperation when these laws are enacted independently of any federal enforcement program. However, because the enforcement impact of these laws is to increase referrals into the removal system controlled by the federal government, the laws can be thought of as a form of immigration cooperation, a form of assistance from the LEA to the federal government. Moreover, because the enforcement under this model operates independently of federal control (i.e., the federal government does not create the guidelines or the rules governing enforcement), this model creates the potential for the most active form of cooperation among the six models.

Using Arizona’s law as an example, we see that LEA obligations under Model 1 are potentially broader. First, the LEA verification of a person’s immigration status (and any subsequent notification and detention) can occur at a much earlier stage—during a lawful stop or detention if the

21. The law provides in relevant part: “For any lawful stop, detention or arrest made by a law enforcement officer ..., in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation.” ARIZ. REV. STAT. ANN. § 11-1051 (2016).
officer has “reasonable suspicion” to believe that the person does not have legal immigration status. Second, in contrast with Models 3, 4, and 5, immigration verification by LEAs can happen even if the person is never arrested. For example, if an officer encounters someone who is panhandling and the officer reasonably suspects that the person is unlawfully present, then the officer must verify that person’s immigration status, even if the officer doesn’t arrest him or her.

Because these unilateral laws operate independently from federal enforcement programs, the federal government can’t place restrictions on Arizona’s LEAs (e.g., to limit immigration verification to investigations where the person is suspected of committing serious or violent crimes). Unlike with Model 2 (the 287(g) model), the federal government can’t choose which LEAs participate, so the potential number of participants (and the resulting increased enforcement) could be quite large. The bottom line, then, is that cooperation under Model 1 requires active, earlier LEA participation. This model of cooperation could also potentially result in more notifications, detentions, and, eventually, removals, as more immigrants are funneled into the immigration enforcement system.

The long-term horizon for the unilateral model is uncertain. The legality of the model was upheld by the Supreme Court, and the states that rushed to enact some version of it currently still have those laws on their books. However, enacting this unilateral model has also extracted costs. Arizona received a torrential amount of negative publicity for its “show me your papers” law. Critics charged that the law would result in racial profiling of Latinos, either because LEAs would be inadequately trained in the complexities of immigration law and would resort to enforcement against those who look like immigrants, or because they would abuse their new powers to carry out anti-Latino agendas. Indeed, the Supreme Court, in upholding the law, left the door open for a subsequent challenge if there


25. However, the enforcement experience of Tucson, Arizona post–SB 1070 suggests that this provision hasn’t increased dramatically the number of LEA notifications to ICE. See Perla Trevizo, SB 1070 Leads to Immigration Checks, Few Deportations, Ariz. Daily Star (Dec. 12, 2015), http://tucson.com/news/sb-leads-to-immigration-checks-few-deportations/article_a2610e46-3efd-570a-9f5a-ca3b95c849c.html (finding that from June 2014 to October 2015, Tucson police ran over 26,000 immigration checks, but only fifty-one checks were done to comply with the “show me your papers” provision; the other checks were done to comply with another state requirement that all arrestees be checked for legal immigration status). However, the number of show-me checks could increase, depending on each LEA’s policies regarding the parameters of reasonable suspicion.


was evidence that the law was being applied in an unconstitutional way.\textsuperscript{28} In protest, national organizations and even some states vowed to boycott Arizona; some reports estimate that the state lost $140 million in tourism spending in the immediate aftermath of enacting the law.\textsuperscript{29} Critics also charge that LEA involvement with immigration enforcement under this model diverts important enforcement resources away from the investigation of local crimes.\textsuperscript{30}

Perhaps most detrimental to the long-term prospects of this model is the federal government’s aggressive expansion of Secure Communities and similar programs. As described in more detail below, these programs rely on information sharing between ICE and LEAs, information sharing that has been devastatingly successful in placing large numbers of immigrants into removal proceedings.\textsuperscript{31} A subfederal government that wants to increase immigration enforcement in its jurisdiction may find that participation in a federal enforcement program is a lower-cost and lower-profile way to obtain the additional enforcement it seeks.

\textbf{B. Model 2: Deputization}

Model 2 deputizes LEAs to carry out immigration enforcement tasks pursuant to a signed agreement between the LEA and ICE. Those agreements—called 287(g) agreements—are authorized by a provision of the Immigration and Nationality Act, which provides in relevant part:

\begin{quote}
[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.\textsuperscript{32}
\end{quote}

Model 2 represents a very active form of LEA cooperation, albeit one that is more firmly under the federal government’s control. Under this model, local law enforcement officers are trained by ICE in the basics of immigration law; upon successful completion of the four-week training, officers are deputized to carry out immigration law enforcement functions, as

\begin{flushleft}
\textsuperscript{28} Arizona v. United States, 132 S. Ct. 2492, 2509 (2012).
\textsuperscript{30} ACLU, supra note 27.
\textsuperscript{31} See discussion infra Section II.D.
\textsuperscript{32} Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2012).
\end{flushleft}
described in the Memorandum of Agreement (MOA) signed by the LEA and ICE. Examples of these functions include interviewing noncitizens to ascertain their status, entering information into ICE’s case management system, issuing detainers, making immigration charges, making recommendations for voluntary departure, making recommendations for bond and detention, and transferring noncitizens into ICE custody. While training and carrying out their immigration duties, law enforcement officials continue to be paid by their LEA departments.

There are three types of 287(g) agreements: (1) the task force model, which grants broader authority to LEAs to conduct immigration enforcement tasks during their regular law enforcement activities in the field; (2) a jail model, which assigns ICE-trained LEA officers to prisons and jails; and (3) a hybrid model, which combines features of both the task force and jail models. The 287(g) agreements are posted on ICE’s website. While the agreements expire on a certain date, they can also be revoked by either side. The agreements specify the scope of immigration powers that each LEA is allowed to exercise.

In 2009, at its height, the 287(g) program had seventy-seven LEA participants. Currently, there are only thirty-two LEAs participating in the program. The list of current LEA participants includes the Las Vegas Metropolitan Police Department, the Jacksonville Sheriff’s Office (Florida), and the Massachusetts Department of Corrections. Explanations for its declining popularity echo the concerns raised about the unilateral enforcement model. First, signing a 287(g) agreement is an active and very visible symbol of immigration enforcement cooperation—one that risks alienating immigrant communities within LEA jurisdictions, which could undermine an LEA’s ability to protect public safety. Participating in the 287(g) program also carries financial costs, as LEAs have to pay for their officers’

34. Id. at 14–15.
38. Id.
time both during training and during the actual implementation of their immigration duties; these costs have led to criticism that the program diverts crucial LEA resources from the investigation of local crimes.\textsuperscript{39}

From ICE’s perspective, complaints about racial profiling and other bad behavior by LEA participants has led ICE to revoke some agreements and make more specific and stringent criteria for the remaining agreements.\textsuperscript{40} Another reason for the declining popularity of the 287(g) program is technology that makes it possible for LEAs to cooperate in less-costly, less-visible ways. That technology is discussed in more detail in Section II.D.

C. Model 3: Jailhouse Checks

Under this model, LEAs give ICE agents access to their jails to interview detainees that ICE may be interested in removing. This federal program, the Criminal Alien Program (CAP), is one of the least understood and least studied of the federal immigration programs that have been very successful in removing immigrants. Described as, “the primary mechanism through which ICE removes people from the U.S. interior,” CAP was responsible for removing 508,000 people during 2010–2013 alone.\textsuperscript{41}

The focus of CAP is to screen detainees held in prisons and jails to ascertain immigration status and begin removal proceedings for those without lawful immigration status. Participating LEAs cooperate by providing ICE with lists of detainees held in their jails and allowing ICE access (either physical access or video access) to interview detainees of interest.\textsuperscript{42} Often, ICE will ask LEAs to detain the immigrants beyond their release date, so ICE can pick them up for removal proceedings.\textsuperscript{43}

The jailhouse check model requires less cooperation from LEAs than the 287(g) model, where LEAs are deputized to carry out immigration enforcement functions themselves. Yet, participation in CAP necessarily entangles LEAs with federal immigration enforcement; under the usual CAP procedures, ICE agents are physically present and active within LEA jails. This entanglement raises the very real possibility of creating distrust be-

\textsuperscript{39} CAPPS ET AL., supra note 33, at 28–29.
\textsuperscript{40} Id. at 4.
\textsuperscript{43} Id.
between LEAs and immigrant communities within their jurisdictions, which could negatively interfere with their ability to protect public safety.  

CAP is also resource intensive for ICE because it requires them to have agents available to interview detainees of interest (either through video or phone interviews, or face-to-face interviews that require agent travel). CAP operates in all federal and state prisons, where its job is to determine which prisoners should be placed in removal proceedings, either at the conclusion of their sentences or before their sentences are fully served. However, perhaps because of the resource-intensive nature of this cooperation, the program only operates in approximately 300 local jails.

D. Model 4: Immigration Detainers

Model 4 (where LEAs honor ICE detention requests and notification requests) and Model 5 (where LEAs only honor ICE notification requests) are best understood against the context of technological advances that made the models relevant. Described in more detail below, those technological advances have made immigration information more readily available to LEAs, thus making LEA cooperation in immigration enforcement less costly and less visible.

The first technological advance was the addition of immigration records into the National Crime Information Center (NCIC) database, the federal database that law enforcement officers around the country check to identify individuals with criminal histories and outstanding warrants. Starting in 1996, criminal immigration records (e.g., the offense of re-entering the U.S. after a previous removal) were added. In 2002, the federal government added civil immigration records as well (e.g., the offense of not leaving after a final removal order is issued). Shortly after Attorney General Ashcroft issued his enforcement invitation to LEAs, the addition of civil immigration records significantly expanded the scope of potential LEA cooperation. So, now when an LEA checks the NCIC (as they typically do during a traffic stop or when they book someone after an arrest), they are also given information about the person’s immigration records. If there is an immigration “hit,” the LEA is instructed by the system database to contact ICE to allow ICE the opportunity to file a detainer.

The second technological advance is inextricably linked with the advent of the Secure Communities program in 2008. The goal of Secure Communities was to “identify and remove aliens who pose a threat to public


45. GUTTIN, supra note 42, at 4–6.

safety.” To do this, the federal government emphasized automated biometric identification and the sharing of information among the FBI, DHS, and LEAs. One crucial component to this strategy was to automatically compare the fingerprint information that LEAs input when they book someone with the information in DHS’s Automated Biometric Identification System (IDENT).

IDENT is used by DHS for a wide range of immigration control functions and contains records of those who have interacted with DHS, other agencies, and even other governments. These records include information from encounters directly related to immigration enforcement (unauthorized immigrants apprehended at sea or at the border and immigrants suspected of violating immigration laws), but also from encounters related to more benign immigration events (applicants for U.S. visas, noncitizens traveling to and from the United States, and even U.S. citizens applying to participate in Global Entry and other similar programs).

If there is a fingerprint match with IDENT records, ICE does further research with multiple federal databases to determine whether the flagged individual is removable from the United States. A response with the individual’s immigration status and criminal history (if any) is shared with the regional ICE office, the FBI, and the arresting LEA. Until recently, if ICE wanted to place the arrested immigrant in removal proceedings, it would often ask the arresting LEA to detain the immigrant beyond his or her ordinary release date, to give ICE additional time to pick up the immigrant.

These technological advances, with their emphasis on information sharing, make LEA cooperation much less costly and less visible. Instead of enacting its own enforcement legislation and formulating its own enforcement procedures (Model 1), spending extensive resources to train its officers to enforce immigration laws directly (Model 2), or inviting ICE into its jails (with the resulting entanglement) (Model 3), an LEA now can cooperate with ICE in ways that are relatively cost-efficient and not highly visible to the public. These advantages make Model 4 (and Model 5) more attractive for both LEAs and ICE.

However, as explained in more detail with Model 5, the LEA practice of honoring ICE detainers has been the subject of legal challenge. As a result, one of the major changes the Obama administration instituted when

it replaced Secure Communities with the Priority Enforcement Program (PEP) was to limit the issuance of detainer requests to, "special circumstances."  

Nonetheless, there are several reasons why Model 4 remains relevant. First, PEP, with its relevant guidelines and restrictions, is a program created and administered by the Obama administration. Based on his stated positions on the campaign trail, President-elect Trump seems unlikely to continue this limitation on ICE detainer requests. Furthermore, even during President Obama’s administration, civil rights and immigrant advocates were skeptical that the detainer limitation would be implemented in a consistent and timely manner. Finally, even if PEP’s changes are enacted in good faith, the exception allowing for detainer requests to be issued under “special circumstances” (which is not defined by ICE) still presents an opportunity for LEAs to accept or deny these requests.

Given the uncertainty about the legality of detainer holds and ongoing policy concerns about LEA immigration cooperation, the various LEAs that follow Model 4 have been selective about what kinds of detainer holds and notification requests they will honor. For example, some LEAs only detain or notify when the individual has been booked for a violent or other serious crime.

E. Model 5: Notifications Only

LEAs operating under Model 5 cooperate by notifying ICE when noncitizens of interest to ICE will be released or transferred from LEA custody. Importantly, under this model, LEAs do not honor ICE requests to detain nonimmigrants beyond the date that they would otherwise be released under LEA procedures.

There seem to be several reasons that LEAs are rejecting detainer requests. Spurred by protests from immigrant and civil rights advocates, some LEAs refuse to honor detainer requests because of concerns that the requests were being issued indiscriminately, reaching noncitizens without criminal records. Indeed, audits of data from Secure Communities showed

50. See Johnson, supra note 10.
51. President-elect Trump has stated that “ICE officers should be required to place detainers on every illegal alien they encounter in jails and prisons, since these aliens not only violated immigration laws, but then went on to engage in activities that led to their arrest by police.” Donald Trump on Immigration, REPUBLICANVIEWS.ORG (Sept. 1, 2015), http://www.republicanviews.org/donald-trump-on-immigration/.
52. Tanfani & Linthicum, supra note 11.
53. See, e.g., Letter from Martin O’Malley, Governor, State of Md., to Hon. Gregg Hershberger, Sec’y, Dept. of Pub. Safety and Corr. Serv. (April 18, 2014), https://immigrantjustice.org/sites/immigrantjustice.org/files/MD_Baltimore_2014_04_18.pdf (directing the department to only honor ICE detainer requests involving individuals convicted or charged with a felony offense; convicted of three or more misdemeanor convictions; convicted of or charged with an offense involving a significant threat to public safety; or with an outstanding order of removal).
that, contrary to the stated goals of the program, it has resulted in mass
removals of immigrants with no criminal record. This particular concern
has been raised from the inception of the Secure Communities program.

A more recent concern for LEAs is the potential legal and financial
liability that comes with honoring detention requests. A number of federal
court decisions have held that LEAs can be held legally liable for the result-
ing Fourth Amendment violations when they hold individuals pursuant to
an ICE detainer request. Because civil immigration detentions are seizures
subject to Fourth Amendment constraints, immigration detainer holds must
be based on probable cause regarding removability. Thus, when LEAs de-
tain someone pursuant to an ICE request that lacks probable cause regard-
ing the individual’s removability, that detention is unconstitutional and
subjects the LEA to legal and financial liability.

Cognizant of these court decisions, a wave of LEAs declared that they
would no longer honor ICE detainer requests. Different advocacy groups
estimate that over 200 jurisdictions currently have policies expressing oppo-
sition to, or limited cooperation with, ICE detainer requests.

The adverse court decisions and the decisions by many LEAs to refuse
to honor ICE detainer requests, incentivized the Obama administration to
restrict its use of these requests. In announcing the creation of PEP to re-
place Secure Communities, DHS Secretary Jeh Johnson made several im-
portant changes to the administration’s use of detainer requests. First,
instead of routinely issuing detainer requests, ICE would ask for notifica-
tion instead. Second, if “special circumstances” do justify the issuance of a
detainer request, then ICE must also “specify that the person is subject to a
final order of removal, or there is other sufficient probable cause to find that
the person is a removable alien.” The federal government’s stated purpose
in adding this information is to try to address the Fourth Amendment issues
litigated in the detainer cases discussed above.

54. See Secure Communities, NAT’L IMMIGR. F. (July 11, 2011), https://immigrationforum.org/blog/secure-communities-2/ (Secure Communities data shows that “ICE has arrested more individuals with no criminal history than any other category; a total of 61,234 arrests since the program began.”).

55. See, e.g., Morales v. Chadbourne, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (holding detention of an immigrant based on an immigration detainer “for purposes of mere investigation is not permitted”); Miranda-Olivares v. Clackamas Cty., 2014 WL 1414305, at *11 (D. Ore. Apr. 11, 2014) (holding that the County violated the plaintiff’s Fourth Amendment rights by detaining her on an immigration detainer request beyond the time she would have otherwise been released).


57. See Johnson, supra note 10.

58. Id.
F. Model 6: No Cooperation

This model is perhaps the easiest to understand: LEAs under this model do not cooperate with federal immigration enforcement in any form, including the forms discussed in previous models (unilateral enforcement, deputization, jailhouse checks, detainers, or notification). Their reasons for noncooperation echo LEA concerns that have been raised about immigration cooperation, generally. First and foremost, LEAs express unease that entanglement with immigration enforcement will destroy the trust developed with immigrant communities and undermine their ability to protect public safety. Second, noncooperative LEAs worry that immigration enforcement will violate the civil rights of immigrants and groups associated with immigrants (through racial profiling or unconstitutional detentions). Finally, LEAs are concerned about the diversion of scarce local resources to pay for immigration enforcement (e.g., unreimbursed detention expenses, time LEA officers spend in immigration enforcement duties, and possible legal liability associated with certain forms of enforcement).

San Francisco is, perhaps, the most famous jurisdiction popularly associated with a noncooperation policy. The policy changed several times before reaching its current version. In 1989, the city and county of San Francisco declared itself, through an ordinance, to be a “City and County of Refuge.” That ordinance prohibits city and county employees from assisting in the enforcement of federal immigration laws and from gathering or disseminating the immigration status of anyone living in the city or county, unless required by federal or state law. The city amended its code again in 2013 to prohibit its LEAs from honoring detainer requests. The San Francisco Sheriff’s Department, whose primary function is to operate the county jails, enacted policies that correspondingly limited its deputies’ authority to cooperate with federal immigration agencies.

If we stopped the story in 2013, San Francisco would be the classic example of a noncooperation jurisdiction. Its policies, both citywide and LEA-focused, were specific in their refusal to cooperate with federal immigration enforcement. After Kate Steinle was shot in July 2015 by Francisco

---

59. See Iverac, supra note 44.
60. See, e.g., ACLU, supra note 27.
61. Id.
63. Id.
65. Memorandum from Ross Mirkarimi, Sheriff, S.F. Sheriff’s Dep’t, to All Sworn Pers., S.F. Sheriff’s Dep’t (Jan. 28, 2015), http://www.castroact.org/uploads/2/5/4/6/25464410/sf_sheriffs_dept_ice_policy_3_2015.pdf (informing personnel that the department will no longer honor ICE detainers submitted on I-247 forms); Memorandum from Ross Mirkarimi, Sheriff, S.F. Sheriff’s Dep’t, to All Pers., S.F. Sheriff’s Dep’t (Mar. 13, 2015), http://www.castroact.org/uploads/2/5/4/6/25464410/ice_contact_signed.pdf (informing personnel that the department will have only limited contact and exchange of information with ICE).
Sanchez, an unauthorized immigrant who had been released by the San Francisco Sheriff’s Department, the city faced immense pressure to change its noncooperation policy. Sanchez, who had been deported five times previously and had seven felony convictions (five of which were immigration-related), had been turned over to the sheriff’s department by ICE for an outstanding drug warrant. According to media reports, ICE had requested notification if the sheriff’s department released Sanchez. When the San Francisco district attorney declined to prosecute Sanchez for the decade-old marijuana possession charge, the sheriff’s office released him without notifying ICE, in compliance with its noncooperation policy. After his release, Sanchez shot Steinle in an incident that he described as an accident.

Shortly after the shooting, the San Francisco Board of Supervisors (its city council) passed a nonbinding resolution to reaffirm its status as a sanctuary city and rejected cooperation with the federal government’s Priority Enforcement Program. However, when newly elected Sheriff Vicki Hennessy pushed for more discretion to cooperate with ICE and threatened to unilaterally enact policies enabling the department to do so, the Board of Supervisors approved compromise amendments.

Now, San Francisco’s laws allow the sheriff’s department to honor detainer requests if the individual has been convicted of a violent felony within the past seven years, and a magistrate judge has determined that there is probable cause to believe that the individual is guilty of a violent felony, based on current charges. Similarly, the sheriff’s department may honor an ICE notification request if the individual has been convicted of a violent felony within the past seven years (or has been convicted of a serious felony in the past five years, or has been convicted of three separate enumerated felonies—other than domestic violence—within the past five years), and a magistrate judge has determined that there is probable cause to believe that the individual is guilty of an enumerated felony, based on current charges. Immigrant advocates strongly pushed for the added involvement of a magistrate judge in both processes, believing that the magistrate’s

68. Sernoffsky & Van Derbeken, supra note 1.
72. Id.
independent determination would help protect the due process rights of immigrants who are the potential targets of immigration cooperation.\textsuperscript{73}

That San Francisco, with its history of liberal politics and immigrant advocacy, allows for limited immigration cooperation raises questions about whether Model 6 actually exists. As we move into a policy discussion about the type of cooperation model that LEAs should have, it’s important to consider a strict no-cooperation model among the available options for several reasons. First, different stakeholders in the debate about immigration cooperation believe that a strict no-cooperation model is being implemented in the United States. Based on their rhetoric, some politicians seem to believe this model exists, and based on news articles, some media outlets seem to believe this, too.\textsuperscript{74} Second, even if they do not believe that a non-cooperation policy currently exists, some stakeholders (including immigrant advocacy groups) believe that such a policy should exist.\textsuperscript{75} Considering this model among our available options enables us to weigh the costs and benefits of adopting a noncooperation policy.

III. FRAMEWORK FOR DECISION-MAKING

Given the variety in the models of cooperation, which model should an LEA choose? This analysis starts with the baseline assumption that LEAs should make their own decisions, based on their particular demographics, political constraints, and values. This Section seeks to provide a framework for that decision-making by suggesting questions that LEAs should ask when choosing among models. The three basic questions are:

1. Who is your community that you are protecting?
2. How important is community communication and trust to your policing model?
3. Will immigration cooperation advance your mission of protecting public safety?

A. Defining the Protected Community

The threshold task for an LEA that is choosing among cooperation models is to define the community that it seeks to protect. LEAs commonly define the communities under their jurisdiction by geographical boundaries

\textsuperscript{73} Id.
\textsuperscript{74} Cal Thomas, Kate Steinle’s Death and Sanctuary Cities: What Good are our laws without Enforcement?, Fox News Opinion (July 13, 2015), http://www.foxnews.com/opinion/2015/07/13/there-should-be-no-sanctuary-from-law.html.
(individuals living within set county, city, or state lines). Yet, to make a wise decision about immigration cooperation, an LEA needs to know detailed demographic information about the residents within its jurisdiction. How many foreign-born residents live in the jurisdiction? How many unauthorized immigrants live there? In the LEA’s jurisdiction, how large are the populations of Asians, Latinos, and other groups commonly associated with immigrants?76

When an LEA is considering the impact of its cooperation policy, it’s important to recognize that the impact will go well beyond the unauthorized immigrants within its jurisdiction. Demographic data shows that many immigrant families are mixed status—meaning some family members have authorized immigration status (often children born in the United States who are natural-born citizens) while other members have unauthorized status.77 When an immigrant is deported as a result of LEA immigration cooperation, the deportation not only hurts the affected immigrant, but also his or her family members, some of whom are likely to have lawful status.

Additionally, the federal databases used in immigration cooperation schemes often have erroneous information, raising the stakes for affected groups within the LEA’s jurisdiction. Studies by outside groups and by the federal government itself have pointed out the patterns of errors in this information.78 The implications of these errors are that people who have not committed immigration offenses are being wrongfully questioned and detained.79 Finally, the pernicious effects of racial profiling, a concern with all immigration cooperation models, are not limited to immigrants, of course. Latinos, Asians, and other individuals associated with immigrants can be victims of racial profiling, even if they are U.S. citizens.

The larger the size of these affected communities, the more ripple effects immigration cooperation will have within a jurisdiction. Accordingly, an LEA that has large populations of immigrants and other immigrant-asso-


77. The PEW Research Center estimates that, in 2010, an estimated nine million people were living in “mixed status” families. A Nation of Immigrants: A Portrait of the 40 Million, Including 11 Million Unauthorized, PEW RES. CTR. (Jan. 29, 2013), http://www.pewhispanic.org/2013/01/29/a-nation-of-immigrants/.

78. Based on data from 2002 to 2004, the Migration Policy Institute reported that NCIC’s rate of false positives was forty-two percent overall and as high as ninety percent for some individual law enforcement agencies. “‘The incredibly high number of false positives in the database means that police resources, which are always stretched thin, are being wasted on detaining immigrants and non-immigrants alike who haven’t done anything wrong,’ said MPI President Demetrio Papademetriou.” Press Release, Migration Policy Inst., MPI Report Shows Database Errors Plague Federal Efforts to Induce Immigration Enforcement by Local Police; Report Offers First Look at Police Activity Since September 11 (Dec. 8, 2005), http://www.migrationpolicy.org/news/database-errors-plague-federal-effort-immigration-enforcement.

79. Id.
ciated communities should carefully consider the negative impact of choosing an active model of immigration cooperation.

B. The Role of Community Trust

The second question an LEA needs to consider is the relative importance of community trust and communication to its policing model. If the affected populations are sizeable (see Question 1 above), then an LEA needs to carefully consider whether communication and trust with those populations is important to its policing model. As discussed in more detail below, immigration cooperation may undermine the ability of LEAs to protect their communities.

A 2012 study by researchers at the University of Illinois at Chicago shows that immigrants who associate their LEAs with immigration enforcement are less willing to report crimes or cooperate as witnesses, for fear of exposing themselves or their family members. The survey interviewed over 2000 Latinos living in different counties across the United States with different immigration statuses (U.S. born, naturalized, and unauthorized). The increased reluctance to cooperate with law enforcement was widely shared by Latinos, regardless of immigration status, and was particularly heightened in counties like Maricopa County, Arizona, where LEAs have been actively involved in immigration enforcement.

More specific findings from the survey include:

- Forty-four percent of respondents stated that they are less likely to contact an LEA if they have been victims of a crime because they are afraid that the LEA will use the contact to inquire about their immigration status or the immigration status of people they know.
- Forty-five percent reported that they are less likely to volunteer information about crimes; similarly, forty-five percent said that they are less likely to report a crime because they are afraid the LEA will inquire about their immigration status or the immigration status of people they know.
- Seventy percent of unauthorized immigrants said that they are less likely to contact LEAs if they are victims of a crime because of increased LEA cooperation with immigration law enforcement.
- Twenty-eight percent of U.S. born Latinos said that they are less likely to report a crime because they are afraid the LEA will inquire about their immigration status or the immigration status of people they know.

81. Id. at 4–5.
Based on these results, the authors of the study concluded that LEA involvement with immigration law enforcement has increased Latino fear of, and isolation from, their local LEAs. This sense of isolation has many Latinos feeling less secure in their homes and neighborhoods, as they are reluctant to contact LEAs if they are victimized by criminals.\(^\text{82}\)

If an LEA employs a community policing model, it may be reluctant to become entangled with immigration enforcement. Community policing is a model of law enforcement that depends on developing community partnerships.\(^\text{83}\) Though LEAs differ in how they develop these partnerships, the essential components consist of “develop[ing] positive relations with the community, . . . involv[ing] the community in the quest for better crime control and prevention, and . . . pool[ing] their resources with those of the community to address the most urgent concerns of community members.”\(^\text{84}\)

To do these things, it is essential that an LEA maintains trust and candid communication with the residents living in its jurisdiction. As the University of Illinois at Chicago survey demonstrates, that trust and communication will not be forthcoming from many Latinos if an LEA becomes involved with immigration enforcement.

At a minimum, the principles of community policing, together with the conclusions of the University of Illinois at Chicago survey, should raise red flags for LEAs contemplating the adoption of a more visible and active cooperation model (Models 1–3).

C. Does Cooperation Advance Public Safety?

This question is at the heart of an LEA’s decision-making and essentially requires an LEA to balance the potential costs and benefits of immigration cooperation. The question assumes that an LEA’s primary mission is to protect public safety and presents a framework for deciding whether immigration cooperation advances public safety in its jurisdiction (and if so, which model of cooperation).

The benefits of cooperation are increased immigration enforcement and increased removals of immigrants. Our national experience with the Secure Communities program clearly demonstrated that information sharing between LEAs and ICE leads to increased deportations.\(^\text{85}\) If those who are deported have committed dangerous or serious crimes, then public safety is arguably enhanced when these persons are removed from the United States.

\(^{82}\) Id. at 17.

\(^{83}\) The second commonly identified requirement of community policing is problem solving: “the process through which the specific concerns of communities are identified and through which the most appropriate remedies to abate these problems are found.” Bureau of Justice Assistance, Understanding Community Policing: A Framework for Action 13 (Aug. 1994), https://www.ncjrs.gov/pdffiles/commp.pdf.

\(^{84}\) Id.

\(^{85}\) U.S. Immigration and Customs Enforcement, supra note 47.
The costs of cooperation include the reduced trust and communication with immigrant communities (discussed earlier), fiscal costs to pay for enforcement, and possible legal liability. Depending on the political currents within an LEA’s jurisdiction, immigration cooperation may also bring political costs or benefits.

To accurately weigh the costs and benefits of immigration cooperation, LEAs should consider these questions:

- What kinds of crime are your enforcement priorities?
- Will immigration cooperation decrease those types of crimes?
- Looking at the different LEA models, will certain types of cooperation be more effective in decreasing crime than others?
- In the LEA’s community, does cooperation bring political benefits or costs?
- What are the fiscal and legal costs of cooperation?

With finite resources, LEAs have to prioritize the types of offenses they will enforce. The specific crimes that LEAs are responsible for enforcing depends, of course, on their jurisdictions’ laws, but for police departments, sheriff’s offices, and state troopers, the list of crimes is likely to include crimes against persons, crimes against property, traffic offenses, and controlled substance violations.

Where do immigration offenses, and specifically, civil immigration offenses, fit in on that list? Examples of civil immigration offenses that may be enforced through immigration cooperation include overstaying a temporary visa, or staying in the United States after a removal order has been issued.86 With the possible exception of Model 2, where LEAs are deputized to enforce immigration laws, LEAs are not directly enforcing civil immigration laws through immigration. However, their assistance (through granting ICE access to their jails, providing notifications of release, or honoring detainer requests) in Models 1, 3, 4, and 5 result in additional enforcement of civil immigration laws.

Some LEAs may place a high priority on assisting with civil immigration law enforcement. In explaining their support for immigration cooperation, some LEA leaders argue that all violations of law need to be punished in order to preserve the rule of law.87 Other LEA officials have suggested that enforcing the nation’s immigration laws, and thus, securing the country’s borders, furthers public safety.88 If an LEA places a high priority on

---

86. Immigration and Nationality Act § 222(g), 8 U.S.C. § 1202(g) (2016).
88. See, e.g., Craig E. Ferrell Jr., Immigration Enforcement: Is It a Local Issue?, THE POLICE CHIEF, Feb. 2004, at 36 (“Many local law enforcement executives can support this position because persons who are in the country illegally have violated the law and should be treated in the same fashion as other criminals.”).
89. See id.
immigration law enforcement relative to the enforcement of other types of laws, then it would favor Models 1–3 (and, perhaps, Model 4 as well) for its active forms of cooperation.

Other LEAs may place a lower priority on immigration enforcement, especially as compared with other law enforcement responsibilities that the LEAs may already have. If an LEA regards immigration cooperation as having little or no priority, then it could simply choose not to cooperate with any immigration enforcement (Model 6). However, for reasons explained below, a pure no-cooperation policy is difficult to maintain because of intense political opposition to such a policy.

An LEA that doesn’t prioritize immigration law enforcement may find it easier to embrace Model 5. Not only is Model 5 more politically palatable, but it can also provide synergy between criminal law enforcement and immigration cooperation. For example, if an LEA prioritizes laws prohibiting violent or dangerous crimes, it can set up internal criteria so it only honors ICE detainer or notification requests targeted at violent or dangerous crimes. There are many different possible criteria: an LEA could choose to honor ICE requests only for persons who have been charged with violent or dangerous crimes, only for persons with previous convictions for violent or dangerous crimes, only for persons with recent convictions, regardless of the nature of the underlying crimes, or only when a neutral party (like a magistrate judge) has determined that probable cause supports a criminal conviction.90

By setting its own criteria, an LEA can ensure that its immigration cooperation efforts also enhance its primary goal of enforcing laws targeting more traditional crimes (like homicide or robbery).

Another important consideration for LEAs is to weigh the political impact of adopting any specific model of cooperation. LEAs do not work in a political vacuum. In most jurisdictions, sheriffs are elected and police chiefs are appointed by mayors, who are themselves elected.91 Immigration cooperation is a very politically volatile topic, and while LEAs should not be guided solely by political concerns in choosing a model of cooperation, LEAs should be sensitive to the political impact of their decisions. In some jurisdictions, adopting an active and visible model of cooperation may bring political benefits; in other jurisdictions, the same policy might bring condemnation from civil rights and immigrant advocacy groups.

Similarly, given the rise of anti-immigrant sentiment, a strong non-cooperation policy can provoke threats to defund LEAs at the state or federal level. Even San Francisco—a very pro-immigrant city, in a pro-

90. San Francisco’s current policy requires involvement of a magistrate judge before its LEAs can cooperate with immigration law enforcement. See S.F., CAL., ADMIN CODE ch. 12H §§ 12H.2, 121 (2016).
immigrant state—faced political pressure to allow exceptions in its no-cooperation policy. Vicki Hennessey, who was elected sheriff of San Francisco shortly after the Kate Steinle shooting, had made a campaign promise to modify the sheriff department’s no-cooperation policy. Once in office, Hennessey claimed an electoral mandate and pushed the city’s Board of Supervisors to change the city’s laws to allow her department to have more discretion to contact ICE. The experience of San Francisco suggests that a strict Model 6 no-cooperation policy is politically difficult to sustain. Regardless of the model chosen, an LEA should expect strong political reactions and be prepared to clearly communicate its reasoning for choosing that model.

The last factor for LEAs to consider is the financial costs of immigration cooperation. One cost—the threat of state or federal governments cutting funding for noncooperation policies—has already been mentioned. Other costs are directly related to cooperation, as LEAs that cooperate with immigration enforcement do so largely on their own dime. When LEA officers assist in immigration cooperation, their salaries are paid for by the LEA, not by the federal government. Moreover, when an LEA honors an ICE detainer request, the expenses it incurs to detain the individual are not reimbursed by ICE. Finally, in light of recent litigation, an LEA that honors a detainer request may also be financially liable for violating detainees’ constitutional rights.

IV. Conclusion

The decision by an LEA to define its role in immigration enforcement is an important and complicated task. The complexity arises, in part, from competing (and often contradictory) demands made by different constituencies, changes in federal policies, and changes in technology that can reshape enforcement tools. As it considers this decision, an LEA should recognize that there is substantial variety in the cooperation models available to it. This article defines these models based on current federal programs and technology.

92. Romney, supra note 67.
93. Green, supra note 70.
94. See Abbott, supra note 3.
95. For example, local officers training and implementing 287(g) agreements are paid by their LEAs. AM. IMMIGRATION COUNCIL, THE 287(G) PROGRAM: A FLAWED AND OBSOLETE METHOD OF IMMIGRATION ENFORCEMENT (Nov. 29, 2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/287g_fact_sheet_11-2012_0.pdf.
96. MATTHEW SEAMON, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., THE COST OF STATE & LOCAL INVOLVEMENT IN IMMIGRATION ENFORCEMENT 3 (June 2014), https://cliniclegal.org/sites/default/files/cost_of_involvement_in_immigration_enforcement_version_5_mm.pdf. Representative costs include utilities and pay for guards, administrators, cooks, and other personnel needed to operate the detention center.
If new technologies in immigration enforcement are developed, or if the federal government changes its cooperation programs, then the specific details of these models will, of course, change. However, the policy questions raised in this article should remain relevant. In this complicated area of policy and politics, LEAs are well-served by knowing their own communities and their own law enforcement goals. With this knowledge and awareness, LEAs can be more proactive in defining their own cooperation model, resulting in policies that reflect their enforcement priorities and are more beneficial and consistent for the communities within their jurisdictions.

* * *