

# California Divided: The Restrictions and Vulnerabilities in Implementing SB 54

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*The United States Immigration and Customs Enforcement (ICE) relies significantly on state and local personnel and resources to carry out enforcement of immigration law. California Senate Bill 54 (SB 54), the “California Values Act,” passed in 2017, is California’s attempt to disentangle local law enforcement from federal civil immigration enforcement. This Article first offers an in-depth evaluation of SB 54’s mechanics. Next, this Article identifies statutory, structural, and practical vulnerabilities that exist in California’s Asian American communities despite California’s adoption of SB 54, and suggests potential means for law enforcement agencies (LEAs) to combat these vulnerabilities. Finally, this Article analyzes how local individual LEAs and the California Department of Corrections and Rehabilitation have chosen to exercise the discretion to comply (or not comply) with immigration hold or detainer requests from the federal government, as well as information and data-sharing requests, under the framework of SB 54.*

*The constitutionality of SB 54 is not the focus of this Article; rather, the focus is on the myriad of issues implicated in California’s attempts through SB 54 to restrict cooperation and communication with federal immigration enforcement. SB 54 provides a strong framework for accomplishing these goals, but it nonetheless remains vulnerable to exploitation, such as LEAs making inmate release dates publicly available, and falls short in addressing overarching issues such as ICE access to law enforcement databases.*

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## INTRODUCTION

California Senate Bill 54 (SB 54) is an immensely complex package of legislation aimed at combating multiple expansive and multi-faceted issues arising between federal immigration enforcement and local law enforcement agencies, including the data sharing, the bilateral communications, and the concerted custody of undocumented immigrants.<sup>1</sup> The legislative history of SB 54 and its precursors indicates that its purpose is to provide numerous safeguards for immigrants when interacting with law enforcement agencies (LEAs).<sup>2</sup> The law's primary objective is to discourage local LEAs from facilitating federal immigration enforcement by unnecessarily communicating with federal immigration authorities or otherwise aiding federal enforcement efforts.<sup>3</sup>

However, SB 54 leaves significant discretion to LEAs in its implementation. But, like any legislation, it is not infallible. Federal case law clearly states that immigration enforcement falls squarely on the federal government's shoulders.<sup>4</sup> Contrary to the idea that the federal government should independently undertake immigration enforcement matters, the federal government frequently and actively seeks local LEA participation to accomplish its responsibilities.<sup>5</sup> When local LEAs do not comply, the federal government attempts to coerce localities to participate in immigration enforcement in order to crack down on sanctuary cities.<sup>6</sup> In response to the federal government's expropriation of state resources, the California legislature enacted SB 54, a statewide minimum standard, that directs local LEAs not to use departmental resources or personnel to support the federal

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1. See S.B. 54, 2017 Reg. Sess. (Cal. 2017) (as enacted on Oct. 5, 2017, codified at CAL. GOV'T CODE §§ 7282–7284.12).

2. CAL. GOV'T CODE § 7284.2(f) (2017) (“This chapter seeks to ensure effective policing, to protect the safety, well-being, and constitutional rights of the people of California, and to direct the state’s limited resources to matters of greatest concern to state and local governments.”); CALIFORNIA COMMITTEE REPORT, S.B. 54, 2017 Cal. Legis. Serv. 2 (Sept. 11, 2017) (“Exempt the California Department of Corrections and Rehabilitation from the provisions of the bill, but require the Department to provide increased protections and equal treatment to immigrant inmates.”).

3. GOV'T § 7284.2(c)–(d).

4. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that power retained by the states over criminal matters could not be used to control immigration by discrimination between citizens and noncitizens); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“[D]eportation is not a punishment for crime.”); see also *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (“No limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents.”).

5. As permitted under 8 U.S.C. § 1357(g).

6. Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C.L. REV. 1703 (2018).

government's immigration responsibility, unless certain exceptions apply.<sup>7</sup>

This legislation inevitably affects undocumented Asian immigrants, as well as other groups that constitute a sizeable proportion of California's undocumented immigrant community. According to 2015 data from the Center of Migration Studies, of the 1.7 million undocumented immigrants in the United States, 463,310 are Asian immigrants in California.<sup>8</sup> According to these metrics, one in eight (13%) of Asian immigrants in California are undocumented, and undocumented Asian immigrants represent one in five (18%) undocumented immigrants in California.<sup>9</sup> Over the last two decades, the Asian undocumented population has more than tripled.<sup>10</sup>

This Article seeks to achieve four distinct goals:

- (1) Provide an overview of the protections offered by SB 54;
- (2) Identify statutory, structural, and practical vulnerabilities that exist despite California's adoption of SB 54 and suggest potential means for individual LEAs to combat these issues;
- (3) Report how individual LEAs and the California Department of Corrections and Rehabilitation (CDCR) have chosen to exercise the discretion that SB 54 affords them; and
- (4) Uncover competing motivations (e.g., money, community trust, community safety, etc.) that likely influence whether local LEAs support SB 54.

Section I of this Article gives readers some historical context surrounding California's adoption of SB 54. Section II of this Article provides a brief overview of the protections SB 54 offers by first giving the historical context of sanctuary cities and the legal framework undergirding SB 54, then by providing an in-depth evaluation of SB 54's mechanics (e.g., the restrictions placed on LEAs prohibiting communications with ICE), and, finally, by illustrating the federal government's response to SB 54. Section III of this Article identifies vulnerabilities that exist despite California's adoption of SB 54 (e.g., LEAs' actively making the release dates of detainees and inmates publicly available) and suggests potential means for individual LEAs to combat these vulnerabilities. Section IV reports how individual LEAs and the California Department of Corrections and Rehabilitation have chosen to exercise the discretion SB 54 provides and relates those choices to "anti-immigrant" and "pro-immigrant" California LEA policies. Section V offers policy implementation recommendations.

## I. IN THE CONTEXT OF ASIAN AMERICAN IMMIGRATION

### Discrimination against Asian Americans and undocumented Asian

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7. See S.B. 54, 2017 Reg. Sess. (Cal. 2017).

8. Karthick Ramakrishnan & Sono Shah, *One Out of Every 7 Asian Immigrants is Undocumented*, AAPI DATA: DATA BITS (Sept. 8, 2017), <http://aapidata.com/blog/asian-undoc-1in7> [https://perma.cc/Y52W-5KWS].

9. *Id.*

10. *Id.*

immigrants in the United States is not a new phenomenon. Fueled by the desire to preserve and maintain “Anglo-Saxon purity,”

[a]ttempts to exclude Asians began in 1855 in California, when the state legislature levied a capitation tax of \$50 on “the immigration to this state of persons who cannot become citizens thereof.” An act passed three years later explicitly named “persons of Chinese or Mongolian races,” who would thenceforth be barred. In 1862 another act designed to “protect free white labor against competition with Chinese coolie labor” provided for a \$2.50 monthly “police tax” on every Chinese. Two acts passed in 1870 were directed against the importation of “Mongolian, Chinese, and Japanese females for criminal or demoralizing purposes” and of “coolie slavery.” None of these laws had an impact, for they were all declared unconstitutional [by the Supreme Court of the United States].<sup>11</sup>

The above-mentioned state laws stemmed from “Caucasian workers [targeting] Chinese immigrants as the source of economic depressions and unemployment problems.”<sup>12</sup>

In light of the failure of these state-led attempts to regulate immigration, anti-immigrant forces looked to Congress to enact a federal exclusion law. The 1868 Burlingame Treaty presented an obstacle to such efforts, recognizing the right of citizens from China and the US to “change their domiciles—that is, to emigrate.”<sup>13</sup> In 1875, Congress passed the Page Law to “forbid the entry of Chinese, Japanese, and Mongolian contract laborers, women for the purpose of prostitution, and felons.”<sup>14</sup> Then, the US and China negotiated a treaty that allowed the US to bottleneck Chinese immigration.<sup>15</sup> This allowed Congress to enact the 1882 Chinese Exclusion Act, which “suspended the entry of Chinese laborers for ten years but exempted merchants, students and teachers, diplomats, and travelers from its provisions.”<sup>16</sup> Congress extended the 1882 Chinese Exclusion Act several times thereafter, and by 1904, the Chinese were barred indefinitely.<sup>17</sup>

Although the Chinese Exclusion Act may seem far removed from the present-day political and economic climate, strikingly similar conditions have preceded both. Over the past four decades,

a massive restructuring of U.S. society has taken place. The changes . . . have included a regressive redistribution of income and a decline in real wages, a significant shift to the ideological right in terms of public discourse, and an increase in the use of coercion on the part of the

11. SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 54 (1991) (citations omitted).

12. George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875–1882*, 6 J. AM. ETHNIC HIST. 28, 28 (1986).

13. CHAN, *supra* note 11, at 54.

14. Some scholars have argued that the Page Law “reduced the influx of Chinese women but not men,” resulting in further treaty negotiations with China and the enactment of the 1882 Chinese Exclusion Act. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 55.

state.<sup>18</sup>

Undoubtedly, while anti-immigrant rhetoric still exists, immigrants today face subtle, yet significant, bureaucratic obstacles to their path to American citizenship. “At 12 percent of the total undocumented population, undocumented Asians number slightly more than 1.4 million.”<sup>19</sup> And in California, “undocumented Asian students make up a significant proportion of the undocumented population.”<sup>20</sup> According to Bjorklund, “many Asian undocumented students experience ‘undocumented status acquisition,’ meaning they come to the United States with their families via a visa, and when they overstay that visa they become undocumented.”<sup>21</sup>

Additionally, California state law governing local LEAs’ interactions with ICE may impact the 88.7 percent of University of California international students (based on Fall 2018 enrollment) who come from Asian countries to attain a world-class college education in California—and who may face the consequences of overstaying student visas, whether intentionally or unintentionally.<sup>22</sup> With the expectation that the undocumented today become staunch future advocates for the undocumented of tomorrow, sufficient motivation exists to educate and inform the Asian American community, and specifically the *undocumented* Asian community, about SB 54’s ramifications.

## II. CALIFORNIA SENATE BILL 54

United States Immigration and Customs Enforcement (ICE) relies significantly on state and local personnel and resources to carry out its enforcement of immigration law. Like all government agencies, ICE operates on a finite budget—nearly \$8 billion for Fiscal Year 2018.<sup>23</sup> While ICE alone is responsible for the deportation of an individual, the first step of deportation is to physically obtain custody of that individual.<sup>24</sup> Local law

18. Michael Omi & Howard Winant, *The Los Angeles “Race Riot” and Contemporary U.S. Politics*, in READING RODNEY KING/READING URBAN UPRISING 97, 108 (Robert Gooding-Williams ed., 1993).

19. Roberto G. Gonzales, *Young Lives on Hold: The College Dreams of Undocumented Students*, COLLEGEBOARD ADVOCACY, Apr. 2009, at 10, <https://secure-media.collegeboard.org/digitalServices/pdf/professionals/young-lives-on-hold-undocumented-students.pdf> [<https://perma.cc/3JZM-EG5F>].

20. *Id.*

21. Peter Bjorklund, Jr., *Undocumented Students in Higher Education: A Review of the Literature, 2001 to 2016*, 88 REV. EDUC. RES. 631, 655 (2018) (citing Tracy Lachica Buenavista, *Model (Undocumented) Minorities and “Illegal” Immigrants: Centering Asian Americans and U.S. Carcerality in Undocumented Student Discourse*, 21 RACE, ETHNICITY, & EDUC. 78, 83 (2018)).

22. *Fall Enrollment At A Glance*, UNIVERSITY OF CALIFORNIA SYSTEM INFOCENTER, <https://www.universityofcalifornia.edu/infocenter/fall-enrollment-glance> [<https://perma.cc/M6UV-EUUB>] (last visited Sept. 21, 2019).

23. U.S. DEP’T OF HOMELAND SEC., FY 2018 BUDGET-IN-BRIEF 11 & 33 <https://www.dhs.gov/publication/fy-2018-budget-brief> [<https://perma.cc/K323-ZLDW>] (showing a 2018 budget request of \$7,942,072,000. In FY 2016, ICE removed 240,255 individuals, 217,760 of whom ICE identified as a threat to “national security, border security, and public safety.”).

24. *Id.*; Morgan Smith & Terri Langford, *Federal Deportation Policy Depends on Sheriffs, Local*

enforcement often facilitates this first step—whether voluntarily or not.<sup>25</sup> Law enforcement databases, physical access to jails, deputization of local law enforcement officers (LEOs), joint task forces, informal communication tips from LEOs, and other methods provide ICE with information without sustained investment on ICE’s part.<sup>26</sup> Even without formal programs, many counties willingly cooperate with ICE and use local resources and personnel to assist in immigration enforcement.<sup>27</sup> California enacted SB 54 against this backdrop of extensive local LEA participation in federal immigration enforcement.

SB 54, the “California Values Act,” is California’s attempt to disentangle local law enforcement from federal civil immigration enforcement.<sup>28</sup> Senator Kevin de León authored the bill, and California Governor Jerry Brown signed it into law on October 5, 2017.<sup>29</sup> Prior to enacting SB 54, the California legislature had found that trust between California’s immigrant community and state and local law enforcement teetered in the balance when those agencies’ operations and duties became entangled with federal immigration enforcement.<sup>30</sup> This entanglement made it difficult for immigrant communities to approach the police, diverted state and local agency funding, and raised federal constitutional concerns.<sup>31</sup> With these concerns in mind, the legislature enacted SB 54 to further distinguish and clarify federal immigration enforcement from state and local law enforcement, and place limits on the resources local LEAs may use to assist in the enforcement of federal immigration law.

### A. *The Background Behind SB 54*

#### 1. *8 U.S.C. § 1373*

Section 1373 of Title 8 of the United States Code is central to the purpose of SB 54 and, in fact, all state laws related to immigration, in the

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*Jails to Detain Criminal Immigrants*, TEX. TRIBUNE (Feb. 16, 2016), <http://valleycentral.com/news/local/federal-deportation-policy-depends-on-sheriffs-local-jails-to-detain-criminal-immigrants> [https://perma.cc/9N74-JNUJ].

25. See NAT’L IMMIGRATION L. CTR., UNTANGLING THE IMMIGRATION ENFORCEMENT WEB: BASIC INFORMATION FOR ADVOCATES ABOUT DATABASES AND INFORMATION-SHARING AMONG FEDERAL, STATE, AND LOCAL AGENCIES (2017), <https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf> [https://perma.cc/L9XC-LQDD].

26. See *id.*

27. LENA GRABER & NIKKI MARQUEZ, SEARCHING FOR SANCTUARY AN ANALYSIS OF AMERICA’S COUNTIES & THEIR VOLUNTARY ASSISTANCE WITH DEPORTATIONS 11 (2016), [https://www.ilrc.org/sites/default/files/resources/sanctuary\\_report\\_final\\_1-min.pdf](https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf) [https://perma.cc/G58F-RWDB] (Out of 2,556 counties surveyed, 1,922 hold individuals on the basis of a detainer and 2,503 allow county employees to use local resources to assist ICE in federal immigration enforcement responsibilities).

28. See S.B. 54, 2017 Reg. Sess. (Cal. 2017) (as enacted on Oct. 5, 2017).

29. *Id.*

30. *Id.*

31. *Id.*

sense that it stakes out the metes and bounds of federal and state jurisdiction. Section 1373 provides 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<sup>32</sup> information regarding the citizenship or immigration status, lawful or unlawful, of any individual.<sup>33</sup>

As it stands, Section 1373 does not impose an affirmative obligation to communicate information; rather, it prohibits restrictions solely on the ability to communicate such information. Furthermore, at least one federal California jurisdiction has narrowly construed Section 1373 to apply only to direct prohibitions on communicating immigration status to federal officials.<sup>34</sup> Therefore, even if state legislation cannot *directly* prohibit state and local law enforcement from communicating information about immigration status to immigration authorities, states may, as SB 54 does, impose restrictions on an LEO's ability to learn such information or on an LEA's ability to release an individual into the custody of immigration authorities.

## 2. Sanctuary City History

Before any state law placed prohibitions on federal immigration enforcement assistance, individual cities and counties made grassroots efforts and initiatives to self-impose such restrictions. In 1971, Berkeley successfully passed a resolution that forbade city employees from assisting in the enforcement of federal immigration law.<sup>35</sup> While this initial resolution related to conscientious objectors of the Vietnam War, by 1985, Berkeley adopted a resolution declaring itself a sanctuary city for undocumented refugees.<sup>36</sup> In subsequent decades, a number of California cities followed suit. In 1989, San Francisco enacted its own sanctuary city ordinance.<sup>37</sup> San Francisco's sanctuary city ordinance is quite extensive and is codified as the "Due Process for All" ordinance.<sup>38</sup> While many other cities in California

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32. The Homeland Security Act of 2002, 6 U.S.C. § 101 (2012) separated the Immigration and Naturalization Service into U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Patrol and placed these new agencies within the Department of Homeland Security.

33. 8 U.S.C. § 1373(b) (2012).

34. See, e.g., *Steinle v. City & Cty. of S.F.*, 230 F. Supp. 3d 994, 1015 n.9 (N.D. Cal. Jan. 6, 2017) ("[Section] 1373(a) . . . do[es] not limit a sheriff's authority to set 'policies regarding the manner in which his employees speak on behalf of the Department in response to ICE's voluntary requests.'").

35. Sanctuary City, MAYOR JESSE ARREGUIN, <https://www.jessearreguin.com/sanctuary-city> [https://perma.cc/F2DH-9UWE] (last visited Feb. 5, 2019) ("Berkeley was the first U.S. city to become a sanctuary city, passing a resolution in 1971. . . . [T]hey drafted an initiative that forbade city employees from assisting in the enforcement of federal law.").

36. *Id.*

37. Lasch et al., *supra* note 6, at 1739 n.18 (citing S.F., Cal., Ordinance No. 375-89 (Oct. 24, 1989)).

38. See *Sanctuary City Ordinance*, OFF. OF CIVIC ENGAGEMENT & IMMIGRANT AFF., <http://sfgov.org/oceia/sanctuary-city-ordinance-0> [https://perma.cc/M6H6-L4SF] (last visited May 2,



have declared themselves sanctuary cities, most have not done so with codified ordinances. Regardless of their depth, sanctuary city ordinances demonstrate the importance many California cities place on protecting their immigrant populations even in the absence of state laws requiring them to do so.

### 3. *The TRUST Act*

Passed in 2014, the TRUST Act was California's first foray into statewide regulations restricting cooperation with federal immigration authorities. The California legislature had found that, under the Secure Communities program,<sup>39</sup> ICE began relying on local law enforcement to shoulder a part of the burden of enforcing federal civil immigration law. According to the California legislature, this resulted in an imprudent allocation of law enforcement resources to federal immigration matters, concerns over the erroneous issuance of detainers, and degradation of the relationship between local and state law enforcement and immigrant communities.<sup>40</sup> Specifically, the TRUST Act addresses the range of circumstances under which a California LEA may perform an immigration hold in compliance with an immigration detainer issued by federal immigration authorities. As defined by the TRUST Act, an "[i]mmigration hold means an immigration detainer issued by an authorized immigration officer, pursuant to Section 287.7 of Title 8 of the Code of Federal Regulations, that requests that the law enforcement official to maintain custody of the individual for a period not to exceed forty-eight hours, excluding Saturdays, Sundays, and holidays, and to advise the authorized immigration officer prior to the release of that individual."<sup>41</sup>

Under the TRUST Act, a California law enforcement agency is prohibited from complying with ICE detainers unless one of six exceptions apply.<sup>42</sup> Even if an exception applies, compliance is discretionary, and a law enforcement agency may choose not to comply with the detainer. Such an exception exists if (1) the individual has been convicted of (a) a serious or violent felony, (b) a felony punishable by imprisonment in state prison, (c) a specified wobbler offense within the past five years for a misdemeanor or at any time for a felony, or (d) an aggravated felony as defined under the Immigration and Nationality Act (INA); (2) the individual is a current registrant on the California Sex and Arson Registry; or (3) a magistrate judge has made a determination of probable cause for a serious or violent felony,

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2018).

39. See *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <https://www.ice.gov/secure-communities> [https://perma.cc/6F7N-U97J] (Mar. 20, 2018); see also Memorandum from Secretary Jeh Charles Johnson to Acting Dir. Thomas S. Winkowski et. al. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) [https://perma.cc/SNB2-7RJQ] (describing the goal of the Secure Communities program).

40. Memorandum from Secretary Jeh Charles Johnson, *supra* note 39.

41. 2013 Cal. Stat. 4650 (codified at GOV'T §§ 7282–7282.5).

42. *Id.*

felony punishable by imprisonment in state prison, or wobbler felony other than domestic violence.<sup>43</sup> If none of these conditions are met, then the individual may not be detained past their scheduled release date.<sup>44</sup> These conditions set forth by the TRUST Act retain significant importance in the operation of SB 54.

#### 4. *The TRUTH Act*

Two years following the TRUST Act, California enacted the TRUTH (Transparent Review of Unjust Transfers and Holds) Act, giving additional protections to immigrants in the custody of local law enforcement.<sup>45</sup> The California legislature took further issue with the federal Secure Communities program's "lack of transparency and accountability."<sup>46</sup> The TRUTH Act established mandatory written consent forms, available in six languages,<sup>47</sup> to be given to any individual in local law enforcement custody prior to any interview with ICE regarding civil immigration violations. The consent form must explain "the purpose of the interview, that the interview is voluntary, and that [the interviewee] may decline to be interviewed or may choose to be interviewed only with his or her attorney present."<sup>48</sup> Additionally,

[u]pon receiving any ICE hold, notification, or transfer request, the local law enforcement agency shall provide a copy of the request to the individual and inform him or her whether the law enforcement agency intends to comply with the request.<sup>49</sup>

Should the law enforcement agency, in accordance with the restrictions of the TRUST Act, choose to comply with a notification request, the same notification must be given to the individual and either their attorney or another designated person.<sup>50</sup> In furtherance of transparency, all records related to ICE access provided by a local law enforcement agency are public records.<sup>51</sup> Finally, should a law enforcement agency provide ICE access to an individual during a given year, that law enforcement's governing city or county must hold at least one public community forum the following year "to provide information to the public about ICE's access to individuals and to receive and consider public comment."<sup>52</sup>

#### B. *The Mechanics of SB 54*

SB 54 covers law enforcement agencies in California. As such, it is

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43. *Id.*

44. *Id.*

45. CAL. GOV'T CODE §§ 7283–7283.2 (2017) [hereinafter TRUTH Act].

46. *Id.*

47. *Id.* Specifically, the languages are "English, Spanish, Chinese Tagalog, Vietnamese, and Korean."

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

important to note the variety of agencies included within the law’s ambit. SB 54 sets forth numerous prohibitions and limitations, many an extension of prior legislation or a response to undesirable practices that existed despite prior legislation. To best explain the requirements and logic of SB 54, this Article will explain a specific provision of SB 54, the past practice, if any, that provision addresses, and where that provision fits within prior legislation.

### 1. Communication

We start our examination of SB 54 with its prohibitions on communication with immigration authorities. Because Section 1373 prohibits total restrictions on communication with immigration authorities, SB 54’s prohibitions on communication instead place restrictions on learning an individual’s immigration status in the first place and subsequently communicating information to immigration authorities that would allow them to take an individual into custody. SB 54’s first major communication restriction states that

California law enforcement agencies shall not:

(1) Use agency or department moneys or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes, including any of the following:

(A) Inquiring into an individual’s immigration status.<sup>53</sup>

This prohibition against inquiring about an individual’s immigration status does not have any analogs in prior legislation and allows immigrants to interact with police without worrying about forced disclosure of immigration status and any consequences associated with such disclosure.

This prohibition combats any potential instances of discrimination based on perceived immigration status—if an LEO believes a person to be undocumented, he is prohibited from confirming his suspicions. In contrast, Arizona’s SB 1070 required the opposite of SB 54: LEOs are required to determine an individual’s immigration status during a lawful stop, a practice that was upheld by the Supreme Court in *Arizona v. United States*.<sup>54</sup> Thus, in

53. GOV’T § 7284.6.

54. *Arizona v. United States*, 567 U.S. 387 (2012) (holding that all other provisions of Arizona SB 1070 are preempted). The Court found that:

[s]ection 2(B) of S.B. 1070 requires state officers to make a “reasonable attempt . . . to determine the immigration status” of any person they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” Ariz. Rev. Stat. Ann. § 11–1051(B) (West 2012). The law also provides that “[a]ny person who is arrested shall have the person’s immigration status determined before the person is released.” *Ibid.* The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records.

*Arizona*, 567 U.S. at 411. Finding that section 2(B) was not preempted, the Supreme Court went on to state that “Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations.” *Id.* at 412. Furthermore, because the law had not yet been implemented it would be “inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law.” *Id.* at 415.

some ways, this provision in SB 54 is an affirmative repudiation of the “stop and prove legal status” practice and precludes any LEA from enacting their own guidelines to emulate this.

Furthermore, SB 54 prohibits LEAs from communicating “information regarding a person’s release date . . . unless that information is available to the public, or is in response to a notification request from immigration authorities in accordance with Section 7282.5” and “personal information, as defined in Section 1798.3 of the Civil Code, about an individual.”<sup>55</sup> Even if LEAs must communicate certain information under Section 1373, immigration authorities must still obtain custody of an individual, which is difficult to do without cooperation from the LEA holding that individual or information relating to that individual’s work or home address.

Notably, SB 54 does not totally prohibit the communication of release dates in all circumstances. Information available to the public may be readily communicated. Section 7282.5 of the California Government Code, as amended by SB 54, provides a list of circumstances in which notification of release dates is permitted, but not required.<sup>56</sup> This list of exceptions was first contemplated by the TRUST Act: (1) the individual has been convicted of (a) a serious or violent felony, (b) a felony punishable by imprisonment in state prison, (c) a “wobbler” offense within the past five years if a misdemeanor or fifteen if a felony, or (d) an INA aggravated felony; (2) the individual is a current registrant on the California Sex and Arson Registry; or (3) a magistrate judge has made a determination of probable cause for a serious or violent felony or felony punishable by imprisonment in state prison.<sup>57</sup>

## 2. *Deputization*

SB 54 restricts local LEAs’ ability to comply with ICE’s attempts to deputize local LEAs in arrangements contemplated by Section 287(g) of the INA.<sup>58</sup> Section 287(g) of the Immigration and Nationality Act (INA) allows local law enforcement to enter into written agreements (Memoranda of Agreement (MOAs) or Memoranda of Understanding (MOUs)) with the Department of Homeland Security (DHS) in which a local LEO is deputized and undertakes the duties of a federal immigration officer.<sup>59</sup> Deputized officers undergo a training course, receive supervision from ICE, and must abide by relevant laws and procedures governing the conduct of federal immigration officers.<sup>60</sup> As a general matter, deputized officers interview

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55. GOV’T § 7284.6.

56. *Id.* § 7282.5.

57. *Id.*

58. *Id.*

59. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-546, 3009-563-64 (1996) (codified as amended at 8 U.S.C. § 1357(g) (2018)).

60. *See, e.g.*, Memorandum of Agreement between Orange County Sheriff’s Department and U.S. Immigration and Customs Enforcement 2-4 (Nov. 2, 2006), <https://www.ice.gov/doclib/287gMOA/countyoforange.pdf> [<https://perma.cc/QV6V-77PH>].

individuals to determine their immigration status and cross-check that information against DHS databases. If a deputized officer finds that an individual has immigration violations, the deputized officer informs their ICE supervisor who takes steps to prosecute and obtain custody of the individual.<sup>61</sup>

Section 287(g) agreements, however, have been fraught with issues in their administration. ICE has, in many instances, failed to provide clear guidance or supervision to deputized officers.<sup>62</sup> As a result, ICE and deputized officers targeted many individuals who posed no threat to public safety or had only committed misdemeanors or minor traffic offenses.<sup>63</sup> Furthermore, 287(g) agreements resulted in large economic and social costs. While ICE pays to train the officers, the federal government does not cover any of the other costs associated with the program.<sup>64</sup> For example, the local LEA still pays any officer involved and uses LEA facilities and resources.<sup>65</sup> Finally, 287(g) agreements have generated mistrust among or within immigrant communities and, in egregious cases, resulted in racial profiling.<sup>66</sup> This final point is particularly salient for Asian Americans due to their significant representation within the population of undocumented immigrants in California.<sup>67</sup>

As a result of these numerous issues with 287(g) agreements, SB 54 goes beyond prior legislation by wholly prohibiting any law enforcement agency from “[plac]ing peace officers under the supervision of federal agencies or employ[ing] peace officers deputized as special federal officers or special federal deputies for purposes of immigration enforcement.”<sup>68</sup> As

61. See *How ICE Uses Local Criminal Justice Systems to Funnel People Into the Detention and Deportation System*, NAT’L IMMIGR. L. CTR. 2 (Mar. 2014), <https://www.nilc.org/wp-content/uploads/2015/11/state-local-enforcement-and-ice-2014-03-25.pdf> [<https://perma.cc/TQ8A-9MJG>] [hereinafter NILC, LOCAL CRIMINAL JUSTICE SYSTEMS].

62. See OFF. OF INSPECTOR GENERAL, U.S. DEP’T OF HOMELAND SEC., OFF. OF INSPECTOR GENERAL, THE PERFORMANCE OF 287(G) AGREEMENTS 10 (Mar. 2010), [https://www.oig.dhs.gov/assets/Mgmt/OIG\\_10-63\\_Mar10.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf) [<https://perma.cc/25AW-F95T>] (“However, we observed inconsistencies in the level and type of supervision over 287(g) program officers and related activities in participating jurisdictions. This inconsistency could jeopardize the integrity of the 287(g) program and its ability to perform immigration enforcement activities appropriately.”).

63. See *id.* at 9 (“We obtained arrest information for a sample of 280 aliens identified through the 287(g) program at four program sites we visited. Based on the arresting offense, 263, or 94%, were within one of the three priority levels; however, only 26, or 9%, were within Level 1, and 122, or 44%, were within Level 2. These results do not show that 287(g) resources have been focused on aliens who pose the greatest risk to the public.”).

64. See *id.* (“ICE is responsible for providing supervision, training, computer equipment, and its installation and support costs. Participating LEAs are responsible for all other expenses, including 287(g) officer salaries and benefits.”).

65. See *id.*

66. Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, WARREN INST. (Sept. 2009), [https://www.law.berkeley.edu/files/policybrief\\_irving\\_0909\\_v9.pdf](https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf) [<https://perma.cc/8V7K-HA3Q>] (showing the effects of ICE policies on Hispanic communities in Irving, Texas).

67. Ramakrishnan & Shah, *supra* note 8.

68. GOV’T § 7284.6.

of late December 2017, the Orange County Sheriff's Department cancelled the last active 287(g) agreement held by a California LEA.<sup>69</sup> While prior federal court cases<sup>70</sup> challenged the constitutionality of 287(g) agreements, and some California law enforcement agencies, such as the San Bernardino County Sheriff's Department, cancelled their 287(g) agreements as a result of these decisions,<sup>71</sup> no California law affirmatively prohibited such agreements until SB 54.

### 3. *Restrictions on Joint Task Forces*

Akin to 287(g) agreements, joint task forces (JTFs) are another way for federal immigration authorities to conscript the manpower of local LEAs. JTFs essentially allow local and federal LEAs to pool their resources together to accomplish mutual goals.<sup>72</sup> Of course, not all JTFs are affiliated with federal immigration authorities, but those that are have the potential to result in arrests based on civil immigration violations.

In response to these concerns and understanding the significant benefits that JTFs can provide to local communities, SB 54 only prohibits JTFs whose "primary purpose [is] immigration enforcement."<sup>73</sup> As a further protection, SB 54 only permits JTFs when "[t]he enforcement or investigative duties are primarily related to a violation of state or federal law unrelated to immigration enforcement."<sup>74</sup> Of course, this does not preclude local law enforcement from entering into a JTF with ICE, nor does it outright prohibit any JTF that could result in arrests for immigration violations.

As a final protective measure, LEAs must submit a report to the California Department of Justice on the details of the JTF as well as the number of immigration and non-immigration arrests made. That data is made

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69. Alma Fausto & Roxana Kopetman, *Sheriff's Department No Longer Checking Immigration Status of Inmates, Cancels Agreement with ICE*, ORANGE COUNTY REG. (Dec. 28, 2017, 11:09 AM), <https://www.ocregister.com/2017/12/27/sheriffs-department-no-longer-checking-immigration-status-of-inmates-cancels-agreement-with-ice> [<https://perma.cc/T4BK-DPTC>].

70. See *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340 (D. Or. Apr. 11, 2014) (holding that Clackamas County's confinement of the plaintiff, based on an immigration detainer issued by ICE, violated the 4th and 14th Amendments; *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014) (denying ICE agents' motions to dismiss and motions for summary judgment on plaintiff's claim alleging that the use of an immigration detainer to prolong her detention by Rhode Island State police violated her 4th, 5th, and 14th Amendment rights), *aff'd*, 793 F.3d 208 (2015); *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014) (reversing trial court's dismissal of claim alleging that plaintiff's detention by Allentown, PA police, pursuant to an immigration detainer, violated the 4th Amendment and Equal Protection); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011) (granting preliminary injunction barring enforcement of statute allowing warrantless arrests of individuals for which ICE had issued a detainer, on the grounds that plaintiffs were likely to prevail on their constitutional challenge).

71. Press Release, San Bernardino Cty. Sheriff's Dep't., Immigration and Nationality Act, 287(g) Program (May 15, 2014), <http://cms.sbcounty.gov/sheriff/MediaCenter/SheriffPressReleases/PressReleasesfor2014/May/ImmigrationandNationalityAct287gProgram.aspx> [<https://perma.cc/AE5H-78RA>].

72. GOV'T § 7284.6.

73. *Id.*

74. *Id.*

publicly available and aggregated by the Attorney General of California.<sup>75</sup>

#### 4. *Restrictions on Honoring Detainers*

A detainer is essentially a request from ICE to an LEA to assist ICE to obtain custody of a specific individual. These requests are wholly voluntary, and an LEA is in no way compelled to comply.<sup>76</sup> ICE submits these requests to LEAs based on immigration violations they suspect an individual in LEA custody has committed.

SB 54's prohibitions against honoring detainers build upon the TRUST Act's formative foundation on that same subject. Effected in 2014, the TRUST Act similarly restricted the circumstances where LEAs could honor detainer requests. The TRUST Act's provisions are almost identical to SB 54's, notwithstanding two differences. First, SB 54 expanded the TRUST Act's language of "immigration hold" to "hold, notification, and transfer requests,"<sup>77</sup> each of which cover a different means by which ICE assumes custody of an individual in LEA custody. Additionally, SB 54 reduces the period for conviction of a wobbler felony from "at any point" to fifteen years and removes wobbler felonies from the probable cause determination exception.<sup>78</sup> Besides these changes, the requirements of the TRUST Act remain largely unchanged in their incorporation into SB 54.

SB 54 separates out detainers into three distinct requests: "hold, notification, and transfer requests."<sup>79</sup> Under a hold request, an LEA detains an individual for additional time past their scheduled release date, typically forty-eight hours. Under a notification request, the LEA communicates the individual's release date to ICE and ICE arranges to take that individual into custody. Under a transfer request, an LEA directly transfers an individual to ICE custody.<sup>80</sup>

SB 54 prohibits an LEA from "[d]etaining an individual on the basis of a hold request."<sup>81</sup> This means that an LEA may never hold an individual past their specified release date in response to a request from ICE to do so. This, however, does not preclude ICE from obtaining custody of the individual by utilizing the other two kinds of requests.

As discussed above, similar to the TRUST Act, SB 54 restricts LEAs in their ability to honor notification requests.<sup>82</sup> However, SB 54 also allows an LEA to respond to a notification request if the information requested is

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75. *Id.*

76. *Immigration Detainers: An Overview*, AM. IMMIGRATION COUNCIL 1 (Mar. 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration\\_detainers\\_an\\_overview\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detainers_an_overview_0.pdf) [https://perma.cc/PW2Y-XZTX].

77. GOV'T § 7284.4.

78. *Id.* § 7282.5.

79. *Id.* § 7284.4.

80. *Id.*

81. *Id.* § 7284.6.

82. *See supra* Section B.1.

publicly available.<sup>83</sup>

SB 54 additionally restricts an LEA's ability to honor transfer requests. Similar to its restrictions on notification of release dates, SB 54 limits honoring transfer requests to those situations where the individual in LEA custody has been convicted of one of the six categories of felonies listed in Section 7282.<sup>84</sup> In the absence of a conviction, SB 54 requires a judicial warrant or judicial probable cause determination before honoring a transfer request.<sup>85</sup> Much like notifications of release dates, transfer requests are a means by which ICE obtains custody over an individual it suspect of violating immigration law.<sup>86</sup> Even if ICE suspects an individual of violating immigration law, ICE cannot actually prosecute that individual if they are not yet in custody.<sup>87</sup>

##### 5. *Other Restrictions on Participating in Immigration Enforcement*

SB 54 flatly prohibits creating "office space exclusively dedicated for immigration authorities for use within a city or county law enforcement facility" and the use of "immigration authorities as interpreters for law enforcement matters relating to individuals in agency or department custody."<sup>88</sup> These two prohibitions relate to SB 54's goal of untangling federal immigration authorities from local LEAs, as local LEOs are required to affirmatively reduce involvement with federal immigration agents from their day-to-day operations and to let community members know that the officers they interact with at a police station will not report suspected immigration violations.

SB 54 also restricts LEAs from "[contracting] with the federal government for use of California law enforcement agency facilities to house individuals as federal detainees, except pursuant to Chapter 17.8."<sup>89</sup> Chapter 17.8 allows ongoing contracts to continue to operate, but prohibits renewal or expansion of such contracts.<sup>90</sup> ICE frequently contracts with local law enforcement to rent out jail beds for immigration detainees' use.<sup>91</sup> These arrangements are financially beneficial for the local LEA because the arrangements ensure the LEA receives funding for maintaining their jail at

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83. GOV'T § 7284.6.

84. *Id.* § 7282.

85. *Id.* § 7284.6.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. GOV'T CODE § 7310(b) ("A city, county, city and county, or local law enforcement agency that, as of June 15, 2017, has an existing contract with the federal government or any federal agency to detain adult noncitizens for purposes of civil immigration custody, shall not renew or modify that contract in such a way as to expand the maximum number of contract beds that may be utilized to house or detain in a locked detention facility noncitizens for purposes of civil immigration custody.").

91. Amanda Sakuma, *Donald Trump's Plan to Outsource Immigration Enforcement to Local Cops*, ATLANTIC (Feb. 18, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-immigration-enforcement/517071> [<https://perma.cc/SHY4-HZVX>].



capacity.<sup>92</sup> These arrangements facilitate further local LEA entanglement with federal immigration enforcement because of the financial benefits the LEA reaps, as they require the LEA's active participation in detaining individuals on the basis of immigration violations.

#### 6. *The California Department of Corrections and Rehabilitations*

The California Department of Corrections and Rehabilitations (CDCR) is explicitly excluded from SB 54's definition of a law enforcement agency and is given its own set of restrictions and requirements.<sup>93</sup> Unlike SB 54's governance of LEAs, SB 54 places no restrictions on the CDCR's discretion to honor hold, notification, or transfer requests.<sup>94</sup> However, the CDCR must inform any individual targeted by these requests whether it intends to comply with any of them.<sup>95</sup> Similarly, the CDCR is exempt from SB 54's prohibitions against inquiring into immigration status, providing use of office space and federal agents as interpreters, and housing federal detainees.<sup>96</sup>

Despite this, SB 54 expands certain provisions of the TRUST Act in an effort to prohibit discrimination based on immigration status within the CDCR. The TRUST Act required California law enforcement agencies to provide written consent forms to individuals held in custody before any interview with ICE regarding civil immigration violations. SB 54 also requires law enforcement agencies to give the same consent forms to individuals in the custody of the CDCR in those same circumstances. Furthermore, prior to SB 54, the CDCR would consider immigration status in determining an inmate's custodial classification.<sup>97</sup> Essentially, this meant that individuals with known civil immigration violations or pending notices to appear, deportation orders, etc., would be held in higher security facilities and denied access to certain prison programs.<sup>98</sup> SB 54 explicitly prohibits any restrictions on these programs based on immigration status as well as “[consideration] of immigration status . . . in determining a person's

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92. *Id.*

93. GOV'T § 7284.4.

94. *Id.* § 7282.5.

95. *Id.* § 7284.10.

96. *Id.* § 7284.4.

97. *Id.* § 7284.10.

98. INFORMATION FOR CALIFORNIA STATE PRISONERS WITH IMMIGRATION HOLDS, PRISON LAW OFFICE (Mar. 2012), <http://prisonlaw.com/wp-content/uploads/2015/09/ImmigrationManualFullMarch2012.pdf> [https://perma.cc/88B4-YUBY] (“Under CDCR rules [as of March 2012], an immigration hold does not increase your classification score, but it is a case factor that will be noted in your classification documents and might affect where you will be housed. For example, if you have an immigration hold you cannot be housed at a Level One minimum security facility that does not have gun towers. You are also more likely to be transferred to one of the CDCR's out-of-state facilities if you have an immigration hold. An immigration hold may prevent you from participating in some programs, such as Prison Industries Authority (PIA) jobs, the Family Foundations Program, the Alternative Custody Program, substance abuse programs, or work furlough.”).

custodial classification level.”<sup>99</sup>

### C. *The Federal Government’s Response to SB 54*

While the overall constitutionality of SB 54 is not a focus of this Article, it is important to highlight that the federal government has strongly disapproved of the provisions of SB 54. On March 6, 2018, the US Department of Justice filed suit against the State of California alleging that three California laws, including SB 54, violate the Supremacy Clause<sup>100</sup> and Section 1373 of Title 8 of the United States Code, a federal law prohibiting restrictions on communication of an individual’s immigration status to immigration authorities.<sup>101</sup>

In direct response to SB 54, ICE<sup>102</sup> has stated that it intends to increase its activities in California to counteract the lack of assistance from state and local law enforcement and has initiated numerous raids in Northern California<sup>103</sup> on this basis.<sup>104</sup>

Given this federal hostility to SB 54, California LEAs that wish to circumvent the protections of SB 54 can do so with implicit approval from

99. GOV’T § 7284.10.

100. U.S. CONST. art. VI, cl. 2.

101. Complaint at 17–18, 55, *United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018) (No. 2:18-at-00264) (asking that the court invalidate provisions of A.B. 450, A.B. 103, and S.B. 54).

102. Christopher Cadelago, *ICE Director Plans More Neighborhood Arrests After California’s ‘Sanctuary State’ Bill*, SACRAMENTO BEE (Oct. 7, 2017, 7:58 AM), <http://www.sacbee.com/news/politics-government/capitol-alert/article177503311.html> [<https://perma.cc/M5FT-3EV7>] (“The Trump administration’s immigration chief warned Friday that his agents will be making more arrests in California neighborhoods and workplaces because Gov. Jerry Brown signed a ‘sanctuary state’ law. Tom Homan, acting director of Immigration and Customs Enforcement, said Brown’s decision to sign Senate Bill 54, which offers more protections for unauthorized immigrants, undermines public safety and hinders his department from performing its federally mandated mission, adding that ‘the governor is simply wrong when he claims otherwise. SB 54 ‘will inevitably result in additional collateral arrests, instead of focusing on arrests at jails and prisons where transfers are safer for ICE officers and the community,’ Homan warned.”).

103. Hamed Aleaziz, *Immigration Agents Raid 77 Northern California Workplaces; No Arrests Reported*, SFGATE (Feb. 2, 2018, 9:42 AM) <https://www.sfgate.com/bayarea/article/ICE-workplace-sweep-hits-Northern-California-12544863.php> [<https://perma.cc/9JJS-URP2>] (“Federal immigration agents raided 77 businesses in Northern California [the week of Friday February 2, 2018], demanding proof that their employees are legally allowed to work in the United States, officials said Thursday. It was believed to be the largest such localized sweep of workplaces by the Immigration and Customs Enforcement agency since President Trump took office. ICE agents swept into nearly 100 7-Eleven stores nationwide last month and arrested 21 suspected undocumented immigrants. Thomas Homan, the agency’s acting director, has called for a ‘400 percent increase’ in such workplace operations.”).

104. Alene Tchekmedyan, *150 Arrested in Northern California Immigration Sweep; ICE Official Says Others Eluded Authorities After Oakland Mayor’s ‘Reckless’ Alert*, L.A. TIMES (Feb. 27, 2018, 11:05 PM), <http://www.latimes.com/local/lanow/la-me-ln-norcal-immigration-arrests-20180227-story.html> [<https://perma.cc/TA7C-25VQ>] (“Federal agents arrested more than 150 people suspected of violating immigration laws during a three-day sweep across Northern California, authorities said [Tuesday, February 27]. About half of those arrested have criminal convictions. A top Immigration and Customs Enforcement official said he thought others were able to elude arrest after the Oakland mayor alerted the public about the upcoming raids. ICE Deputy Director Thomas D. Homan blasted so-called sanctuary laws in San Francisco and Oakland, saying they endanger immigration officers who aren’t allowed in jails and therefore must make more arrests in the community.”).

and backing of the federal government. In fact, both Orange County<sup>105</sup> and San Diego County<sup>106</sup> voted to join in the United States Justice Department's lawsuit against SB 54.<sup>107</sup> In both instances, the county Board of Supervisors cited concerns about SB 54's negative affect on public safety<sup>108</sup> but did not elaborate on specific instances where SB 54 reduces public safety. Going even further, on March 19, 2018, the city council of Los Alamitos, the second-smallest city in Orange County with a population of just over 11,000,<sup>109</sup> voted to exempt itself from SB 54.<sup>110</sup> Even if these actions are little more than political speech, they still demonstrate the open hostility to SB 54.

These repudiations of SB 54 are particularly troubling for some Asian American communities such as the Vietnamese refugee community of "Little Saigon" in Orange County.<sup>111</sup> In 2008 the governments of the United States and Vietnam signed an agreement that provided that Vietnamese citizens who arrived in the United States before July 12, 1995 were not subject to removal to Vietnam.<sup>112</sup> However, as of December 2018, the Trump administration argued that this agreement does not explicitly preclude the removal of all Vietnamese immigrants who arrived before 1995 and that the administration will prioritize the removal of 5,000 aliens from Vietnam with final orders of removal based on criminal convictions.<sup>113</sup> Orange County's

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105. Bob Egelko, *Orange County Joins Lawsuit Against California Over Sanctuary Law*, S.F. CHRONICLE (Mar. 28, 2018, 8:47 PM), <https://www.sfchronicle.com/news/article/Orange-County-joins-lawsuit-against-California-12789323.php> [https://perma.cc/Y2G2-VWM8].

106. *San Diego County to Join Lawsuit Against SB 54, California's Sanctuary State Law*, NBC 7: SAN DIEGO (Apr. 18, 2018, 5:41 PM), <https://www.nbcsandiego.com/news/local/San-Diego-County-Joins-Lawsuit-Against-SB54-480039933.html> [https://perma.cc/VF9Z-BW9Y] [hereinafter *San Diego County to Join Lawsuit*].

107. Complaint at 17-18, *United States v. California*, No. 2:18-at-00264, (E.D. Cal. Mar. 6, 2018), ECF No. 1 (The U.S. Department of Justice filing suit in E.D. Cal. and seeking relief that provisions of AB 450, AB 103, and SB 54 should be held invalid).

108. Egelko, *supra* note 105 ("Bartlett, the county supervisor, said, 'This is not a racial issue, and no amount of race-baiting by Mr. de León will make it one. This is about complying with laws and protecting public safety.'"); *San Diego County to Join Lawsuit*, *supra* note 106 ("Both [Supervisor] Gaspar and [Supervisor] Jacob repeatedly said the decision was based on maintaining public safety and keeping criminals out of the region.").

109. U.S. CENSUS BUREAU, QUICKFACTS LOS ALAMITOS CITY, CALIFORNIA (2018) *available at* <https://www.census.gov/quickfacts/losalamitoscitycalifornia> [https://perma.cc/VVSF2-EP4Q]. 64.8% of the population of Los Alamitos is characterized as White while 27.8% and 12.0% are characterized as Hispanic or Latino and Asian respectively.

110. Roxana Kopetman, *Los Alamitos Votes to Opt Out of California Sanctuary Law*, ORANGE COUNTY REG. (Mar. 21, 2018, 8:12 AM), <https://www.ocregister.com/2018/03/19/los-alamitos-immigration-debate-sparks-singing-shouting> [https://perma.cc/L59J-5PB4].

111. See Hien Duc Do, ONLINE ARCHIVE OF CALIFORNIA, *The Formation of a New Refugee Community: The Vietnamese Community in Orange County, California (1961)*, [https://oac.cdlib.org/view?docId=hb8g500803&brand=oac4&doc.view=entire\\_text](https://oac.cdlib.org/view?docId=hb8g500803&brand=oac4&doc.view=entire_text) [https://perma.cc/E8S8-GSZQ].

112. *Agreement Between the Government of the United States and the Government of the Socialist Republic of Vietnam on the Acceptance of the Return of Vietnamese Citizens*, Jan. 22, 2008, <https://www.state.gov/documents/organization/108921.pdf> [https://perma.cc/QN3V-8D4C] (last visited Feb. 5, 2019).

113. Charles Dunst and Krishnadev Calamur, *Trump Moves to Deport Vietnam War Refugees*, THE ATLANTIC (Dec. 12, 2018), <https://www.theatlantic.com/international/archive/2018/12/donald-trump->

repudiation of SB 54 could render greater numbers of these refugees subject to deportation based solely on minor criminal convictions. For example, INA 237(B)(i) classifies any alien with a conviction relating to a controlled substance (other than a single offense involving possession for one's own use of 30 grams or less of marijuana) as deportable regardless of the severity of the offense.<sup>114</sup> SB 54 restricts the ability of an LEA to honor a notification or transfer request unless the individual was convicted of a more serious controlled substance violation; specifically: “[a]n offense involving the felony possession, sale, distribution, manufacture, or trafficking of controlled substances.”<sup>115</sup>

In the next section, we will examine where SB 54 falls short of meeting the overarching goal of restricting California LEAs' cooperation and communication with federal immigration enforcement.

### III. FALLING SHORT: THE VULNERABILITIES OF SB 54

No legislation can ever be ironclad, and SB 54 is no exception. As discussed earlier, extensive cooperation between LEAs and federal immigration authorities has made it difficult for immigrant communities to approach the police, diverted state and local agency funding, and raised constitutional concerns.<sup>116</sup> In order to limit the negative effects of such cooperation, SB 54 needs to effectively impose some degree of separation between LEAs and federal immigration authorities.

SB 54 falls short in a number of areas and fails to address key features of federal immigration enforcement that still facilitate LEA cooperation and information sharing with federal immigration authorities. Although these vulnerabilities by no means nullify the protections enacted by SB 54, they afford California LEAs and ICE opportunities to undermine these protections and engage in precisely the behavior SB 54 sought to prevent.

In some instances, the vulnerability comes from SB 54's use of narrow language—words such as “primary purpose” and “exclusive.” In other instances, the vulnerability is SB 54's and, to a large extent, the State of California's inability to rectify ongoing issues with federal immigration enforcement, including practices such as database mining and immigration detention.

#### A. *Inquiring About Place of Birth as a Proxy for Asking About Immigration Status*

SB 54 explicitly prohibits any law enforcement agency from inquiring about an individual's immigration status.<sup>117</sup> However, there are ways to infer

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deport-vietnam-war-refugees/577993 [https://perma.cc/W4VW-ZXMH] (last visited Feb. 18, 2019).

114. 8 U.S.C. § 1227 (2018).

115. GOV'T § 7284.5.

116. *Id.* § 7284.2.

117. *Id.* § 7284.6.

immigration status without ever directly asking about it. For example, an officer might ask an individual about their place of birth,<sup>118</sup> since an individual not born in the United States might be in the country unlawfully. Thus, it is possible that an officer or an LEA might use questions regarding birthplace as a proxy for such an inquiry.

These proxy questions may have a legitimate purpose, such as consular notification,<sup>119</sup> and thus likely cannot be prohibited altogether. An officer asking an individual on the street his place of birth without even reasonable suspicion of any wrongdoing is certainly more problematic than an officer asking a properly-arrested and booked individual his place of birth. The validity of booking procedure and police stops are aspects of criminal procedure, which are beyond the reach of SB 54 and of our Article. Regardless, unless LEAs start asking individuals who are not reasonably suspected of wrongdoing for their birthplaces, it is unlikely that such proxy questions pose a significant issue. In fact, there is no evidence that such questions have been used as a proxy for determining immigration status, and at this time, this practice remains a hypothetical. Even if an LEA communicates an individual's place of birth directly to ICE, that does not circumvent SB 54's protections against ICE's ability to take custody of that person. Furthermore, an individual's place of birth on its own does not give LEOs cause to arrest an individual.

*B. The "Primary Purpose" Restriction on Participation in a Joint Task Force*

SB 54 prohibits LEAs from entering into a JTF if that JTF's primary purpose is civil immigration enforcement.<sup>120</sup> By its language, SB 54 does not

118. See Memorandum from the L.A. Police Department on Immigration Enforcement Procedures (Dec. 29, 2017), available at <https://assets.documentcloud.org/documents/4365811/2017-12-29-COP-Notice-Immigration.pdf> [<https://perma.cc/77Z2-SCJ5>]:

Place of Birth Inquiries

Some members of the public may misperceive the purpose of inquiring about a person's birthplace when questioned during a law enforcement contact, especially when contacting the police as a victim or witness. To minimize the potential misperception and possible degradation of public trust, the following procedures shall take effect:

- Victims, Witnesses and Temporarily-Detained Suspects. Officers shall not ask a victim, witness, or temporarily-detained individual for his or her place of birth unless necessary under the particular circumstances to investigate a criminal offense.
- Arrestees. Department personnel may ask and record an arrestee's place of birth when it is:
  - Necessary to book or process the arrestee for a criminal offense;
  - Necessary to comply with consular notification obligations,
  - Necessary to investigate a criminal offense; or,
  - Otherwise required by law.
- Field Interview Cards. Department personnel shall no longer record a victim, witness or temporarily detained individual's place of birth on Field Interview Cards, Form 15.43.00, unless an exception set forth above applies. *Id.*

119. *Id.*

120. GOV'T § 7284.6.

preclude JTFs with DHS or even ICE.<sup>121</sup> While SB 54 requires the Attorney General to compile and release data on the number of immigration arrests that result from participation in JTFs with specific federal agencies, that report was published on February 26, 2019, and does not place further restrictions on JTFs.<sup>122</sup> The potential vulnerabilities lie in the operation of the phrase “primary purpose,” as SB 54 does not clearly define that threshold.<sup>123</sup>

One possible exploitation of the primary purpose requirement is that a federal agency can misrepresent, either intentionally or innocently, the purpose of a proposed JTF as not primarily for immigration purposes when, in reality, there is a high probability that arrests for civil immigration violations will be made in the course of the execution of the JTF. This arguably occurred when the Santa Cruz Police Department entered into a JTF with DHS to aid in gang-related arrests in a dozen residences.<sup>124</sup> During a February 13, 2017 raid by the Santa Cruz Police Department and DHS, a number of individuals were arrested based on criminal offenses.<sup>125</sup> DHS also arrested more than ten other individuals on solely immigration-related offenses.<sup>126</sup> The Santa Cruz Police Department alleged that they were misled about the probability and number of immigration-related arrests, while DHS countered that the Santa Cruz Police Department was well informed that the operation had a high probability of resulting in such arrests.<sup>127</sup> On August 16, 2017, the Oakland Police Department participated in a JTF with ICE’s Homeland Security Investigations branch, allegedly to investigate human trafficking.<sup>128</sup> However, during the course of serving the search warrant, law enforcement made only one arrest for a civil immigration violation, made

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121. *Id.*

122. *Id.*; Press Release, Dep’t of Just., Off. of the Att’y Gen., *Attorney General Becerra Releases First Report on Immigration Detention Facilities in California* (Feb. 26, 2019), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-releases-first-report-immigration-detention-facilities> [<https://perma.cc/C4MP-EEJB>].

123. GOV’T § 7284.6.

124. David Marks, *Santa Cruz Police: ICE Lied to Us About Immigration Arrests*, KQED NEWS: CAL. REP. (Feb. 24, 2017), <https://ww2.kqed.org/news/2017/02/24/santa-cruz-police-ice-lied-to-us-about-immigration-arrests> [<https://perma.cc/BEB9-CYFV>]. Santa Cruz Assistant Police Chief Dan Flippo said: “[T]he gang-related arrests at about a dozen residences were the culmination of a five-year investigation launched when a Santa Cruz resident called police to complain about gang members extorting local businesses. He said his department enlisted the help of DHS because of the gang’s notoriety and global reach, and that the raids were made because it appeared gang members were planning another killing. But Flippo also said 10 or more additional people who agents encountered at the residences were detained solely on immigration charges.” *Id.*

125. *Id.*

126. *Id.*

127. *Id.* (“We worked closely with the Santa Cruz Police Department over the last five years on this case . . . Allegations that the agency secretly planned an immigration enforcement action in hopes there would be new political leadership that would allow for an alleged ‘secret’ operation to take place are completely false, reckless and disturbing.”).

128. Ali Tadayon, *Commissioner: Raid Violated Oakland Sanctuary City Policy*, EAST BAY TIMES: COMMUNITY NEWS (Nov. 10, 2017, 12:09 PM), <https://www.eastbaytimes.com/2017/10/05/commissioner-raid-violated-oakland-sanctuary-city-policy> [<https://perma.cc/L892-WP3Q>].

none for human trafficking, and placed the arrested individual in deportation proceedings.<sup>129</sup> The Oakland Police Department's role during the search was allegedly relegated to traffic control outside of the residence.<sup>130</sup> The Oakland Police Chief, Anne Kirkpatrick, was scheduled to give a report about the raid in a public hearing on November 14, 2017.<sup>131</sup> However, that hearing was indefinitely postponed.<sup>132</sup>

Even if SB 54 had been in place at the time of these two incidents, it is unclear that either LEA would have violated the bill's restrictions on JTFs. SB 54's only restriction on JTFs rests on the nebulous concept of the "primary purpose" of a JTF. Of course, an LEA is not compelled to continue engaging in a JTF, and repeated incidents where an LEA feels that it has been misled could result in that LEA's refusal to enter into JTFs with certain federal agencies.<sup>133</sup> However, SB 54 places the onus on individual LEAs to self-regulate and determine which JTFs' primary purposes are not immigration enforcement. Due to imperfect information or intentional misrepresentation, LEAs' participation in seemingly permissible JTFs can lead and has led to arrests for civil immigration violations. As it stands, SB 54 clearly contemplates that immigration arrests will result in the course of JTFs, as it explicitly requires the disclosure of the number of such arrests to the California Attorney General and the public.<sup>134</sup>

### C. Databases

SB 54 delegates to the Attorney General the task of publishing guidelines and recommendations to limit the availability of information in databases that can be used in immigration enforcement.<sup>135</sup> As of September 2019, information about ICE access to databases is still coming to light, and while the full extent of ICE's use of LEA databases is not fully understood, the information currently available reveals vulnerabilities in SB 54. It is uncertain whether LEAs are willing or even able to meaningfully limit the amount of information in databases accessible by ICE.<sup>136</sup>

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* ("The commission voted to recommend the City Council demand Kirkpatrick present a report on the raid during a public hearing. Oakland police officials were scheduled to address the allegations at a Nov. 14 Public Safety Committee meeting, but the hearing has been indefinitely postponed.").

133. Marks, *supra* note 124 ("[Police Chief Kevin] Vogel said the department no longer trusts the Department of Homeland Security, which includes Immigration and Customs Enforcement (ICE), and will no longer work with the agency.").

134. GOV'T § 7284.6.

135. *Id.* § 7284.8.

136. George Joseph, *New Documents Reveal How ICE Mines Local Police Databases Across the Country*, MEDIUM: IN JUST. TODAY (Apr. 26, 2018), <https://injusticetoday.com/new-documents-reveal-how-ice-mines-local-police-databases-across-the-country-660e2dfddbe3> [<https://perma.cc/3QXB-SWFK>] [hereinafter Joseph, *New Documents*] ("While some local officials are calling for greater transparency regarding their data-sharing with ICE, none have definitively called for their police departments to stop using COPLINK or limit ICE's access to their residents' data through, for example,

Currently, “[ICE] software ingests local police databases, allowing users to map out people’s social networks and browse data that could include their countries of origin, license plate numbers, home addresses, alleged gang membership records, and more.”<sup>137</sup> These databases allow ICE to pull together an in-depth profile of an individual incredibly quickly.<sup>138</sup> With access to “information on employers, associates, and hangout spots,”<sup>139</sup> ICE is able to independently take custody of identified individuals with ease.

Giving ICE access to such a wealth of personal information endangers immigrants. Despite the limitations put into place by SB 54, it only calls for the Attorney General to make recommendations.<sup>140</sup> If these recommendations are not followed by LEAs, ICE access to law enforcement databases will remain essentially unfettered.<sup>141</sup> With no mandatory limitations, information from these databases could allow ICE to arrest low-level offenders or individuals with no arrests other than just for having ties to others under investigation.<sup>142</sup>

In fact, ICE’s reliance on these databases has contributed to the detention and even deportation of United States citizens.<sup>143</sup> In some egregious instances, ICE seemingly ignored evidence of citizenship provided by the detained:

[I]n three dozen false arrest lawsuits, Americans caught in the ICE dragnet alleged that officers took them into custody on the basis of cursory computer searches. The agents, according to the lawsuits, often overlooked evidence of citizenship such as passports, and failed to examine paper files or conduct interviews to confirm the accuracy of their database searches.<sup>144</sup>

Although extensive, the databases that ICE uses are not always fully accurate; inaccurate digital fingerprints, incomplete documentary records, or even incorrect spelling of names can lead to an individual’s false

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amendments to the agencies’ data-sharing agreements. While legal experts differ on whether or not cities could prevent ICE from accessing local police data altogether, Crockford says amending such agreements would weaken ICE’s ability to mine millions of records at once and instantly piece together people’s connections.”).

137. *Id.*

138. *Id.* (“Work that would have taken months in the past, and required piecing together disparate data points from agencies across the state, can now be done with a few clicks, says Lieutenant Michael Kmiec of the Lynn Police Department in Massachusetts.”).

139. *Id.*

140. George Joseph, *Where ICE Already Has Direct Lines to Law-Enforcement Databases With Immigrant Data*, NPR: CODE SWITCH (May 12, 2017, 1:44 PM), <https://www.npr.org/sections/codeswitch/2017/05/12/479070535/where-ice-already-has-direct-lines-to-law-enforcement-databases-with-immigrant-d> [<https://perma.cc/G5Q2-4EPJ>] [hereinafter Joseph, *Where ICE*].

141. *Id.*

142. *Id.*

143. Paige St. John & Joel Rubin, *ICE Held an American Man in Custody for 1,273 Days. He’s Not the Only One Who Had to Prove His Citizenship*, L.A. TIMES (Apr. 27, 2018, 5:00 AM), <http://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htm1story.html> [<https://perma.cc/YCM3-53NK>].

144. *Id.*



identification as deportable despite being a US citizen.<sup>145</sup>

This problem has no easy solution largely due to the significant law enforcement benefit of databases. LEAs and immigration authorities agree that “the sharing of these databases and analytic tools helps ICE Homeland Security Investigations — the agency’s investigative arm — tackle serious crimes, like child pornography and money laundering.”<sup>146</sup> While databases can certainly be misused for immigration enforcement, they are also a powerful tool for legitimate law enforcement purposes. As such, it is preferable to have the Attorney General regulate what information from databases is available to ICE, rather than merely having the Attorney General publish guidelines and recommendations.

#### D. “Exclusive” Office Space

Another instance of vague and potentially abusable language lies in SB 54’s prohibition on office space in law enforcement facilities “exclusively” used by federal immigration authorities.<sup>147</sup> A literal reading of that prohibition seems to allow the creation of “shared” office space that is used “primarily” but not “exclusively” by federal immigration authorities. While such temporary office space might be necessary if an LEA is engaged in a JTF with DHS or ICE, there are already limitations on JTFs whose primary purpose is immigration enforcement. Such shared office space frustrates SB 54’s purpose of creating a bright line between federal immigration enforcement and local law enforcement.<sup>148</sup> It is unclear what, if any, purpose this prohibition on exclusive office space serves when immigration authorities can still, very easily, gain access to office space within law enforcement facilities, even if that office space is not exclusive.

The obvious recommendation for amending such a narrow prohibition is to broaden it depending on its ultimate goal. If the goal is to allow office space for permissible JTF operations, then that can be explicitly allowed while still broadening the prohibition. If the goal is to require immigration authorities to use their own equipment within law enforcement facilities or to push immigration authorities out of law enforcement facilities altogether except when conducting interviews or transfers, then the prohibition should be broadened.

#### E. The Inherent Coerciveness of Custody

It is well understood that law enforcement custody has an inherent coercive effect on an individual,<sup>149</sup> and SB 54’s attempt to address this through mandatory consent forms may fall short in some situations. The

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145. *Id.*

146. Joseph, *New Documents*, *supra* note 140.

147. GOV’T § 7284.6(a)(5).

148. See S.B. 54, 2017 Reg. Sess. (Cal. 2017) (as enacted on Oct. 5, 2017, codified at GOV’T §§ 7282–7284.12).

149. *Miranda v. Arizona*, 396 U.S. 868 (1969).

TRUTH Act requires mandatory written consent forms, available in six languages, to be given to any individual in local law enforcement custody prior to any interview with ICE regarding civil immigration violations.<sup>150</sup> SB 54 extends this requirement to the CDCR.<sup>151</sup> As Rebecca Merton from Freedom for Immigrants explained, many people in custody either do not understand the languages of the consent forms or are simply illiterate.<sup>152</sup> In either case, law enforcement does not always have the ability or the desire to provide a translator or interpreter.<sup>153</sup> This leads to instances where individuals sign consent forms without comprehending their legal significance.<sup>154</sup> SB 54 attempts to address this by mandating law enforcement to provide the consent forms in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean.<sup>155</sup> SB 54 itself does not address language availability beyond these six languages. Thus, a potential solution is to expand the language availability requirements of SB 54 to require law enforcement to present a consent form in the individual's language or, if the individual is illiterate, require an interpreter to explain the consent form's protections.

#### F. Detention Facilities

As noted earlier, SB 54 restricts LEAs from expanding or entering into new contracts with the federal government for housing federal detainees.<sup>156</sup> SB 54 itself does not call for closing existing immigration detention facilities or mandating minimum conditions in these facilities. While many immigrant rights groups have serious concerns over the conditions in federal facilities, including those contracted out to local LEAs, the wholesale closing of such facilities in California without some workable alternative in place comes with serious consequences.<sup>157</sup>

Immigration detention is a massive feature of the federal government's immigration enforcement process<sup>158</sup>; thus, any action taken by California against federal detention facilities would not fully address the national issue of immigration detention and could even worsen the circumstances of Californians in detention. The federal government mandates that ICE fill 34,000 beds with immigration detainees each day.<sup>159</sup> As a result, ICE

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150. GOV'T § 7283.1.

151. *Id.* § 7284.10.

152. Telephone Interview with Rebecca Merton, Independent Monitor & National Visitation Network Coordinator, Freedom for Immigrants (Apr. 18, 2018) (transcript of interview on file with authors).

153. *Id.*

154. *Id.*

155. GOV'T § 7284.10.

156. *See supra* Section II.B.5.

157. *Id.*

158. *See United States Immigration Detention*, GLOBAL DETENTION PROJECT (May 2016), <https://www.globaldetentionproject.org/countries/americas/united-states> [<https://perma.cc/T6WA-E973>] (last visited Feb. 5, 2019).

159. *Detention Bed Quota*, NAT'L IMMIGRANT JUST. CTR.

operates numerous detention facilities across the United States, including many in California that have no connection to any California LEA.<sup>160</sup> While prohibiting LEAs from contracting with the federal government to operate a federal detention facility places that aspect of federal immigration enforcement outside the hands of California LEAs, it significantly worsens the situation of any Californian taken into immigration detention, as the detention would be undetectable by any California attorney and outside the reach of any California law protecting the detained individual.<sup>161</sup>

Additionally, unlike in 287(g) programs,<sup>162</sup> ICE provides significant compensation for the use of LEA facilities<sup>163</sup> for immigration detention.<sup>164</sup> Contra Costa County received about six million dollars from the United States Department of Justice for operating the West County Immigration Detention Facility, half of which was used to pay the salaries of employees, even those not involved in operating the detention facility.<sup>165</sup> Contra Costa County Sheriff David Livingston has commented that he would be willing to end his department's contract with ICE if the County is willing to foot the bill for the employees who are paid through the contract with ICE.<sup>166</sup> In fact, on July 10, 2018, Sheriff Livingston ended the Department's contractual relationship with ICE, explaining that

the Board of Supervisors promised to make up for the \$2.4 million that will be lost when the contract ends; the number of detainees and the total reimbursement from ICE has fluctuated; county employee costs have increased while reimbursement rates have stayed flat; and the work of sheriff's deputies has been overshadowed by protests and community tensions.<sup>167</sup>

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[https://www.immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2017-01/Immigration%20Detention%20Bed%20Quota%20Timeline%202017\\_01\\_05.pdf](https://www.immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2017-01/Immigration%20Detention%20Bed%20Quota%20Timeline%202017_01_05.pdf) [<https://perma.cc/WV33-26ZH>] (last visited May 16, 2018).

160. See *Immigration Detention Map & Statistics*, ENDISOLATION.ORG, <http://www.endisolation.org/resources/immigration-detention> [<https://perma.cc/RSL5-AYEP>] (last visited Feb. 5, 2019).

161. *Id.*

162. See *supra* Section II.B.2 and accompanying notes.

163. See Monica Lam, *How the Contra Costa County Sheriff Works With ICE*, KQED NEWS: CAL. REP. (May 19, 2017), <https://www.kqed.org/news/11466901/how-the-contra-costa-county-sheriff-works-with-ice> [<https://perma.cc/UUG4-43QU>]; see Detention Services Intergovernmental Agreement between the United States Marshals Service & Contra Costa West County Detention Facility (Sept. 21, 2009), *available at* [https://www.usmarshals.gov/foia/IGAs\\_Cap\\_Agreements/california/contra\\_costa\\_county.pdf](https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/california/contra_costa_county.pdf) [<https://perma.cc/L25R-SR9Y>].

164. See Jazmine Ulloa, *Most California Sheriffs Fiercely Opposed the 'Sanctuary State' Law. Soon They'll Have to Implement It*, L.A. TIMES (Nov. 12, 2017, 12:05 AM), <http://www.latimes.com/politics/la-pol-ca-sanctuary-state-california-sheriffs-20171112-htmlstory.html> [<https://perma.cc/VZE8-C4LU>] ("But in Orange County, Hutchens has a \$7.27 million contract to incarcerate immigrant detainees convicted of crimes, as well as a \$22 million annual lease to provide ICE with jail beds.")

165. Telephone Interview with Rebecca Merton, *supra* note 152.

166. *Id.*

167. Aaron Davis, *Contra Costa Sheriff Ends ICE Contract, Citing Budget, 'Growing Chorus' of Opposition*, EAST BAY TIMES (July 13, 2018, 10:13 PM),

Thus, even though the ultimate purpose of these contracts is essentially to assist in federal immigration enforcement, there are monetary benefits to LEAs unrelated to immigration enforcement that may incentivize continuation of contracts.<sup>168</sup>

Similar to many other vulnerabilities in state law, the issues surrounding immigration detention cannot seriously be addressed by SB 54 alone. A better approach might be to address the extreme human suffering caused by immigration detention<sup>169</sup> to the extent constitutionally permissible—for example, mandating standards for the facilities of LEAs that enter into immigration detention contracts with ICE. In fact, the California legislature has attempted to do just that by passing AB 103, which requires the California Attorney General to review the conditions of immigration detention centers, including those operated by California law enforcement.<sup>170</sup>

### *G. The Fine Line Separating Misunderstanding and Purposeful Noncompliance*

When SB 54 and other related guidelines are not followed by an LEA, it might not always be clear whether that failure stemmed from a genuine misunderstanding of obligations or a purposeful scheme to circumvent the law. In some instances, that distinction becomes almost impossible to make. On March 8, 2018, the San Francisco Sheriff's Department allowed ICE officers to interview an inmate held in Sheriff's Department custody.<sup>171</sup> This interview violated the TRUTH Act<sup>172</sup> because law enforcement failed to obtain a signed consent form. Additionally, the officers also violated San Francisco's Sanctuary ordinance's prohibition on assisting in immigration enforcement by allowing ICE to interview the inmate.<sup>173</sup> The Sheriff's Department argued that the violations were not intentional and mandated additional training for officers regarding Department obligations under

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<https://www.eastbaytimes.com/2018/07/10/contra-costa-sheriff-says-hes-cancelling-contract-with-ice> [<https://perma.cc/D54A-VK8V>].

168. See *id.* (“[Sheriff] Livingston cited five reasons for the decision: the Board of Supervisors promised to make up for the \$2.4 million that will be lost when the contract ends; the number of detainees and the total reimbursement from ICE has fluctuated; county employee costs have increased while reimbursement rates have stayed flat; and the work of sheriff's deputies has been overshadowed by protests and community tension.”).

169. Miriam Valverde, *How Do Standards Measure Up At Immigration Detention Centers? A Special Report*, POLITIFACT (Sept. 6, 2017, 3:30 PM), <http://www.politifact.com/truth-ometer/article/2017/sep/06/immigration-detention-expansion> [<https://perma.cc/TQ93-SCBW>] (“Throughout the years, watchdog groups and advocates have reported neglect and inadequate conditions at several immigration detention facilities operated by U.S. Customs and Immigration Enforcement and contracted facilities.”).

170. Assemb. B. 103, 2017 Reg. Sess. (Cal. 2017) (as enacted June 27, 2017).

171. Hamed Aleaziz, *San Francisco Jail Let ICE Interview Inmate in Breach of Sanctuary Policy*, STATE LAW, SFGATE (Mar. 12, 2018), <https://www.sfgate.com/bayarea/article/San-Francisco-jail-let-ICE-interview-inmate-12748127.php> [<https://perma.cc/6FLR-6TPP>] [hereinafter Aleaziz, *San Francisco Jail*].

172. See TRUTH Act, *supra* note 45.

173. *Sanctuary City Ordinance*, *supra* note 38.

California law and city ordinance.<sup>174</sup> In an almost identical situation, ICE agents were also allowed into Santa Clara County jails on March 7 and 8, in violation of the County's prohibition on ICE access to jails.<sup>175</sup> Unlike the majority of California sheriffs who strongly oppose SB 54,<sup>176</sup> San Francisco and Santa Clara counties have Sanctuary Ordinances and policies that go beyond the scope of SB 54 and have the support of their respective sheriffs.<sup>177</sup> Thus, it is unlikely these violations were a result of a concentrated policy to circumvent SB 54, but it is nonetheless concerning that individual actors, either through willfulness or ignorance, were able to circumvent SB 54's protections.<sup>178</sup>

These distinctions and repudiations are made even more worrisome due to SB 54's complete lack of any enforcement or punishment mechanism. While individual departments might discipline their officers for failing to follow SB 54, it is unclear what form of recourse the State of California may take when LEAs consistently allow negligent violations of SB 54. Unlike, for example, San Francisco's sanctuary ordinance, SB 54 does not establish a formalized complaint procedure and there is no indication that LEAs that violate SB 54 might be required to pay compensation.<sup>179</sup>

#### *H. Making Release Dates and Other Information Publicly Available*

The practice of publicly posting inmate release dates poses a serious threat to the effectiveness of SB 54's prohibitions on when an LEA can allow ICE to take custody of an individual. Because this practice triggers SB 54's "publicly available information" exception to compliance with notification requests, an LEA, for all practical purposes, has control over whether it is bound by SB 54 restrictions on when ICE can take custody of an individual. Furthermore, because the release date is publicly available, ICE essentially exercises full discretion on whether to take custody of an individual.

Although SB 54 differentiates between notification and transfer requests, the practical consequence of LEA compliance with either is the same—ICE custody. The publicly-available information exception only

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174. Aleaziz, *San Francisco Jail*, *supra* note 171.

175. Hamed Aleaziz, *ICE Gained Access to Santa Clara County Inmates, Breaching Sanctuary Policies*, S.F. CHRONICLE (Mar. 27, 2018, 6:00AM), <https://www.sfchronicle.com/bayarea/article/ICE-gained-access-to-Santa-Clara-County-inmates-12783122.php> [<https://perma.cc/V5VD-DZFF>].

176. Ulloa, *supra* note 164.

177. *See infra* Section IV.B.3 on selected policies covering San Francisco and Santa Clara County.

178. *See infra* Section IV.B.3 on selected policies covering San Francisco and Santa Clara County.

179. Jonah Owen Lamb, *Man to Receive \$190,000 from SF for Sanctuary City Violation*, S.F. EXAMINER (June 28, 2017, 2:44 PM), <http://www.sfexaminer.com/man-receive-190000-sf-sanctuary-city-violation> [<https://perma.cc/24CU-3NSC>] ("A man who San Francisco police turned over to immigration authorities in violation of The City's sanctuary ordinance is set to be awarded \$190,000 in a settlement agreement reached with the City Attorney's Office, which his lawyer hopes will push police to obey such laws."); *see* HUMAN RIGHTS COMM'N, CITY & CTY. OF S.F., HOW TO FILE A SANCTUARY CITY ORDINANCE COMPLAINT, <https://sf-hrc.org/how-file-sanctuary-city-ordinance-complaint> [<https://perma.cc/2W49-WRJL>] (last visited Feb. 18, 2019).

applies to compliance with a notification request.<sup>180</sup> Thus, if ICE only sends a transfer request to an LEA with publicly-available release dates, the LEA may not comply unless either (1) conditions of the TRUST Act<sup>181</sup> are met or (2) there is a judicial warrant or probable cause determination.<sup>182</sup> However, ICE can instead send a notification request that the LEA can comply with, if it makes release dates publicly available by operation of the public information exception in SB 54.<sup>183</sup> Taken together, notification and transfer requests are ICE's means of assuming custody of an individual in LEA custody, but there is no requirement that the conditions for both must be met.<sup>184</sup> By setting restrictions on both methods, it is clear that SB 54 intended to create a baseline set of conditions necessary for an LEA to comply with an ICE request for custody. However, the difference between the two is a legal distinction based on exactly how ICE assumes custody. Under a notification request, ICE takes custody of an individual following their release from custody, whereas under a transfer request, the individual is directly transferred from LEA custody to ICE custody.<sup>185</sup>

Sheriff offices in Orange County,<sup>186</sup> Contra Costa County,<sup>187</sup> and Alameda County<sup>188</sup> are now publicizing online release date information for all inmates. Each county, however, has advanced a different rationale for engaging in this practice. According to Orange County's Undersheriff Don Barnes, "[this practice] is in response to SB-54 limiting our ability to communicate with federal authorities and our concern that criminals are being released to the street when there's another avenue to safeguard the community by handing them over (to ICE for potential deportation)."<sup>189</sup> In

180. See *supra* Section II.B.4.

181. See *supra* Section II.B.4.

182. See *supra* Section II.B.4.

183. S.B. 54, 2017 Leg., 2017–18 Sess., 2017 Cal. Legis. Serv. 8 (West). "California law enforcement agencies shall not: (1) Use agency or department moneys or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes, including any of the following: . . . Providing information regarding a person's release date or responding to requests for notification by providing release dates or other information **unless that information is available to the public**" (emphasis added).

184. S.B. 54, 2017 Leg., 2017–18 Sess., 2017 Cal. Legis. Serv. 3 (West).

185. See *supra* Section II.B.4.

186. Press Release, Orange Cty. Sheriff's Dep't., SB 54 Prompts Sheriff's Department to Publicly Post Inmate Release Dates (Mar. 26, 2018), *available at* <http://www.ocsd.org/civicax/inc/blobfetch.aspx?BlobID=73747> [<https://perma.cc/5DBL-N8F6>].

187. Aaron Davis & Nate Gartrell, *Experts Concerned Contra Costa Sheriff Tipping Off ICE by Posting Release Dates of Detained Immigrants*, EAST BAY TIMES (Mar. 30, 2018, 3:45 PM), <https://www.eastbaytimes.com/2018/03/29/experts-concerned-contra-costa-sheriff-tipping-off-ice-by-posting-release-dates-of-detained-immigrants> [<https://perma.cc/LJ4Z-MVQB>].

188. Darwin Bond-Graham, *Alameda County Sheriff's Decision to Make Inmate Release Dates Public Stirs Concern Among Immigrant Rights Advocates*, EAST BAY EXPRESS (Apr. 3, 2018), <https://www.eastbayexpress.com/SevenDays/archives/2018/04/03/alameda-county-sheriffs-office-decision-to-make-inmate-release-dates-public-stirs-concern-among-immigrant-rights-advocates> [<https://perma.cc/MHN6-XHVQ>].

189. Roxana Kopetman, *In Response to California Sanctuary Law, Orange County Sheriff Makes Public Inmates' Release Dates*, ORANGE COUNTY REG. (Mar. 28, 2018, 1:44 PM), <https://www.ocregister.com/2018/03/26/in-response-to-california-sanctuary-law-orange-county-sheriff->

contrast, Contra Costa County implemented the same practice because [publicly-available release dates] can be helpful to other governmental organizations, crime victims, inmates' family members and others. Additionally, organizations<sup>190</sup> who provide services to persons released from custody have specifically asked for this information so they can start reentry transition assistance right away.<sup>191</sup>

Finally, the Alameda County Sheriff's office maintains that publicly available release dates are a way to further transparency.<sup>192</sup> However,

[u]nlike Orange County and the Contra Costa Sheriff's Office . . . the Alameda County Sheriff's website doesn't list all of the currently incarcerated people along with their release dates in one document. Instead, users of the system still need to know the name of a person who is detained in the jail before obtaining their information.<sup>193</sup>

While the Orange County Sheriff intends to comply with transfer requests on the basis of the public information exception, it is unclear that the Contra Costa and Alameda County Sheriffs intend to do the same. We reached out to both for clarification but received no responses.

In some sense, SB 54 gives LEAs the keys to their own cell by allowing them to independently satisfy one of the conditions for permissible disclosure of information to facilitate ICE in assuming custody of an inmate. SB 54 explicitly regulates LEA conduct, so it follows that the conditions for LEA compliance with an ICE request should be outside LEA control. An LEA may comply with a notification or transfer request if the requirements set forth in the TRUST Act are met, but those conditions are wholly removed from an LEA's control. The TRUST Act requirements center around the criminal convictions of the individual in question. Thus, if an individual does not meet those requirements there is nothing an LEA can do to change that. Similarly, an LEA cannot issue a judicial warrant or probable cause determination. However, almost paradoxically, an LEA has control over whether an individual's release date is public information and may thus be permissibly disclosed to ICE. By making inmate release dates publicly available, an LEA essentially discards SB 54's restrictions on notification and transfer requests and wholly substitutes its own discretion.

When release dates are made publicly available, ICE can take custody of an individual without even relying on an LEA to honor a notification request. As SB 54 describes it, a notification request is simply a request from ICE to an LEA for notification of when an individual will be released from LEA custody.<sup>194</sup> Even if release dates are made publicly available for reasons

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makes-public-inmates-release-dates [https://perma.cc/YS9P-5EU6].

190. According to Merton, reentry organizations identified public release dates as a potential benefit for their organizations and included it in a rough draft of a memorandum but ultimately scrapped the idea. Telephone Interview with Rebecca Merton, *supra* note 152.

191. Davis & Gartrell, *supra* note 187.

192. Bond-Graham, *supra* note 188.

193. *Id.*

194. See *supra* Section II.B.4.

other than cooperation with ICE, as in the case of Contra Costa County,<sup>195</sup> their availability potentially removes the need for ICE to rely on LEA cooperation at all and makes the notification request all but a formality. ICE can simply check release date information against DHS databases and ensure that ICE officers are present when individuals with immigration violations are released. Thus, public release dates could carry significant consequences, even in instances where they are well intentioned.

#### IV. THE DISCRETIONARY IMPLEMENTATION OF SB 54

##### A. *Setting a Baseline for Law Enforcement Agencies*

SB 54 merely sets the minimum standard of conduct by which an LEA must abide. An LEA's policy on how it exercises discretion can significantly change how much protection is afforded to immigrants residing in communities within the law enforcement agency's jurisdiction. Here, this Section will examine the heads of two typical, highly-visible LEAs: the county sheriff and the police chief. In California, the county sheriff is an official directly elected by the county's constituents.<sup>196</sup> Unlike the county sheriff, the police chief is generally appointed by the mayor of a city or municipality.<sup>197</sup> A police department's jurisdiction covers incorporated municipalities, and its duties include preventing, suppressing, and investigating crimes.<sup>198</sup> That being said, some municipalities, unincorporated areas, and towns contract with county sheriffs to act as "contract law enforcement" for police services, which also gives the county sheriff an additional revenue source.<sup>199</sup> For example, in the 2017–2018 fiscal year, the Contra Costa County Sheriff's Office faced an estimated general fund net cost of forty-three million dollars.<sup>200</sup> The Contra Costa County Sheriff attempted to make up the difference through ancillary revenue, which included providing contract services to nearby cities, including Danville,

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195. Davis & Gartrell, *supra* note 187.

196. See Tim Dees, *Police Officers, Sheriffs, Rangers, and Marshals: What's the Difference?*, HUFFINGTON POST: BLOG (Dec. 6, 2017), [https://www.huffingtonpost.com/entry/police-officers-sheriffs\\_b\\_7835320.html](https://www.huffingtonpost.com/entry/police-officers-sheriffs_b_7835320.html) [<https://perma.cc/5W82-UTZD>].

197. *Id.*

198. See, e.g., *Bureau of Field Operations*, SAN JOSÉ POLICE DEP'T., <https://www.sjpd.org/BFO> [<https://perma.cc/K4PE-PSU3>] (last visited May 3, 2018) (showing the jurisdiction of San José Police Department); see also POLICE OFFICER DUTIES, SAN JOSÉ POLICE DEP'T., <https://www.sjpd.org/JoinSJPDBlue/PoliceOfficerDuties.html> [<https://perma.cc/3DK5-ENK3>] (last visited May 3, 2018).

199. See, e.g., STRAPPED CITIES THAT HIRED THE SHERIFF. . . IS IT WORKING? 1, SUPER. CT. OF SAN MATEO (July 25, 2013), [https://www.sanmateocourt.org/documents/grand\\_jury/2012/policing\\_services.pdf](https://www.sanmateocourt.org/documents/grand_jury/2012/policing_services.pdf) [<https://perma.cc/L78Y-UV6R>]; Leroy D. Baca, *Welcome to Contract Law Enforcement*, L.A. CTY. SHERIFF'S DEP'T (Mar. 4, 2013), [http://www.lasdhq.org/lasdhq\\_services/contract\\_law/index.html](http://www.lasdhq.org/lasdhq_services/contract_law/index.html) [<https://perma.cc/EG9H-7DM8>].

200. OFF. OF THE AUDITOR-CONTROLLER, FISCAL YEAR 2017 – 2018 FINAL COUNTY BUDGET 133, CTY. OF CONTRA COSTA, <http://www.cccounty.us/DocumentCenter/View/47424/2017-18-Final-County-Budget> [<https://perma.cc/E7UN-5D88>] (last visited May 12, 2018).



Lafayette, and Orinda.<sup>201</sup> The Contra Costa County Sheriff also received millions of dollars in rent from the federal government for the use of its jail facilities.<sup>202</sup>

In contrast to the police chiefs, who have distinct jurisdictions and responsibilities, county sheriffs may provide supplemental law enforcement services by contract to neighboring unincorporated areas, such as townships or smaller municipalities, and are legally allowed to do so because the authority of California LEAs, as peace officers, “extends to any place in the state [of California].”<sup>203</sup> In other words, all peace officers in California can exercise their police powers anywhere in the state, on or off duty, regardless of county or municipal boundaries.

SB 54 offers LEAs a number of ways to exercise discretion in implementation—e.g., participation in JTFs, permitting ICE interviews in jails, honoring notification and transfer requests, etc. In fact, some LEAs believe cooperation with ICE is necessary for safety.<sup>204</sup> While these LEAs will comply with SB 54, they will do so in ways that allow them to cooperate with ICE as much as possible. For example, some county sheriffs comply with SB 54 to maximize the benefits of their financial relationships with ICE.<sup>205</sup> Other LEAs believe that such cooperation is not beneficial and go above and beyond what SB 54 requires in enacting protections for immigrants.<sup>206</sup> In this examination of these differing approaches, the following Section will first examine the policies of selected counties, cities, or law enforcement agencies and where they fit along this spectrum. This Section will then focus on policies that may be against the spirit of SB 54, even if they comply with the letter of the law, and policies that may go beyond the minimum protections to address vulnerabilities within SB 54.

### *B. The Dichotomy of California LEA Policies*

#### *1. Sticking to the Baseline: Orange, San Diego, and Riverside Counties’ Sheriff’s Departments*

Differences in implementation exist even in cases where an LEA opts only for baseline compliance with SB 54. Although none of these LEAs provide greater protection than is required by SB 54, it is clear from their

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201. *Id.* at 135; Special Operations Division, CONTRA COSTA CTY. OFF. OF SHERIFF, [http://www.cocosherriff.org/bureaus/field\\_operations/special\\_operations/default.htm](http://www.cocosherriff.org/bureaus/field_operations/special_operations/default.htm) [https://perma.cc/Z955-M2QB] (last visited May 14, 2018).

202. *See supra* notes 163–164 and accompanying text.

203. CAL. PENAL CODE § 830.1(a).

204. Ulloa, *supra* note 164 (“[Fresno County Sheriff] Mims said her department is once more looking for ways to increase its collaboration with ICE in the wake of new communication restrictions.”).

205. Madison Park, *Orange County Votes to Join Feds to Oppose California’s ‘Sanctuary’ Law*, CNN (Mar. 28, 2018, 7:16 AM), <https://www.cnn.com/2018/03/28/us/orange-county-sanctuary-state-law/index.html> [https://perma.cc/9UWE-PWNW].

206. Gale Holland, *California ‘Sanctuary’ Bill Gets Support from Law Enforcement, Rebuke from Trump Administration*, L.A. TIMES (Sept. 16, 2017, 4:15 PM), <http://www.latimes.com/local/lanow/la-me-ln-mcdonnell-immigration-20170916-story.html> [https://perma.cc/R4E2-CLSV].

rhetoric and interpretation of SB 54 that there are differences in their willingness to abide by the spirit of SB 54.

On one end of the spectrum are the LEAs that strongly dislike SB 54 and actively endeavor to find ways around it. The Orange County Sheriff's Department has been explicitly clear that it disfavors SB 54 and has chosen to resolve ambiguities and vulnerabilities in SB 54—namely, the publicly available information exception—in favor of cooperation with federal immigration enforcement. The Orange County Sheriff's Department has publicly opposed SB 54,<sup>207</sup> so it comes as no surprise that its official policies mandate only baseline compliance with the requirements of SB 54. The Orange County Sheriff's official policy is to “comply with Immigration Detainers by notifying ICE and releas[e] the inmate to ICE custody when the referenced inmate qualifies in accordance with the Trust Act.”<sup>208</sup> Essentially, there is no room for discretion. Once the TRUST Act conditions are met, any detainer will be honored. Furthermore,<sup>209</sup> the Orange County Sheriff also made inmate release dates public to further cooperate with immigration authorities.<sup>210</sup>

In the middle of the spectrum are LEAs who do not fully support SB 54 but remain steadfast in their obligation to implement it. The San Diego County Sheriff's Department takes no real position one way or the other, despite the negative position taken by the County Board of Supervisors, but remains faithful to its obligations under state law.<sup>211</sup> Similar to the Orange County Sheriff's Department, the San Diego County Sheriff's Department's policy is to comply only with the minimum standards of SB 54.<sup>212</sup> Unlike Orange County though, San Diego has not made release dates publicly available.<sup>213</sup> Furthermore, even though San Diego County has voted to join the Justice Department's lawsuit against SB 54, the Sheriff's Office has clearly expressed that this does not release San Diego from its obligations under SB 54.<sup>214</sup>

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207. Press Release, Orange Cty. Sheriff's Dep't., OC Sheriff Sandra Hutchens' Response to SB 54 Amendments (Sept. 12, 2017), *available at* [http://cssrc.us/sites/default/files/170926\\_OC\\_SheriffHutchens\\_SB54OpposeLetter.pdf](http://cssrc.us/sites/default/files/170926_OC_SheriffHutchens_SB54OpposeLetter.pdf) [<https://perma.cc/QK7M-ZZFN>].

208. Memorandum from the Orange County Sheriff's Department on Immigration Enforcement Procedures (Dec. 2017), [http://www.iceoutofca.org/uploads/2/5/4/6/25464410/orange\\_county\\_sheriff\\_policy\\_1206.pdf](http://www.iceoutofca.org/uploads/2/5/4/6/25464410/orange_county_sheriff_policy_1206.pdf) [<https://perma.cc/GSL4-N62P>].

209. Park, *supra* note 205.

210. Press Release, Orange Cty. Sheriff's Dep't., *supra* note 186.

211. See Memorandum from the San Diego County Sheriff's Department on Verification of Legal Status Conformance to Immigration Laws (Dec. 28, 2017), [http://www.iceoutofca.org/uploads/2/5/4/6/25464410/san\\_diego\\_sheriffs\\_department\\_q4\\_verification\\_of\\_legal\\_status\\_conformance\\_to\\_immigration\\_laws.pdf](http://www.iceoutofca.org/uploads/2/5/4/6/25464410/san_diego_sheriffs_department_q4_verification_of_legal_status_conformance_to_immigration_laws.pdf) [<https://perma.cc/M9VJ-SR6J>].

212. *Id.*

213. *Id.*

214. *San Diego County to Join Lawsuit*, *supra* note 106 (“The Sheriff's Department has and will continue to comply with the Trust, Truth and California Values Acts. My deputies work hard to make our communities safe and we want to ensure all of our residents feel comfortable reporting crimes or coming

On the opposite end of the spectrum are LEAs whose goals align with SB 54 but have not implemented additional policies. The Riverside County Sheriff's Department is another LEA that opts for baseline compliance with SB 54.<sup>215</sup> The Riverside County Sheriff stated that its policies in compliance with SB 54 existed some time before such policies were made mandatory by state law — indicating some level of support for the goals of SB 54.<sup>216</sup> Unlike Orange and San Diego counties, Riverside County and its sheriff have not been outspoken critics of SB 54. In fact, its policy memorandum addresses the additional requirements imposed by SB 54: “[T]he Department position remains the same and [the Riverside County Sheriff does] not enforce immigration laws or use Department resources for immigration enforcement. Therefore, the new mandates do not significantly impact daily operations.”<sup>217</sup> Thus, even though Riverside County Sheriff honors all detainers for individuals who meet the TRUST Act conditions,<sup>218</sup> that policy is not necessarily borne out of animosity towards the operation of SB 54.

## 2. *Slight Modifications: San Mateo and Alameda County Sheriffs*

Other counties have chosen to slightly increase the protections afforded by SB 54, typically by narrowing conditions in which the TRUST Act exceptions apply. San Mateo County Sheriff's Department policies keep stride with SB 54 with a few additional protections relating to notification and transfer requests. To honor a notification or transfer request, the individual in question must have been convicted of a serious or violent felony or be the subject of a warrant or court order signed by a judge or a magistrate,<sup>219</sup> a slightly narrower category than the TRUST Act. Additionally, release information will only be provided in response to an official inquiry and will not be provided for inmates released on bail or their own recognizance.<sup>220</sup>

Alameda County Sheriff's Department similarly narrows the criteria of the TRUST Act. In its policy statement, the Sheriff's Office notes that certain crimes listed under the “wobbler offenses” category of SB 54's amendments

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forward as witnesses to criminal acts. Law enforcement at all levels in the San Diego region has a strong culture of cooperation. The Sheriff's Department will continue to comply with state law and will closely follow the federal lawsuit against the State of California where this level of cooperation will ultimately be determined.”).

215. Memorandum from the Riverside County Sheriff's Department on Cooperation – Federal Immigration Enforcement Authorities (Jan. 2, 2018), [http://www.iceoutofca.org/uploads/2/5/4/6/25464410/riverside\\_sheriff\\_sb\\_54\\_policy.pdf](http://www.iceoutofca.org/uploads/2/5/4/6/25464410/riverside_sheriff_sb_54_policy.pdf) [https://perma.cc/2F23-42DG].

216. *Id.*

217. *Id.*

218. *Id.*

219. Memorandum from the San Mateo County Sheriff's Office on ICE Holds, Requests for Notifications, and ICE Interviews (Jan. 2, 2018), [http://www.iceoutofca.org/uploads/2/5/4/6/25464410/san\\_mateo\\_4\\_09\\_ice\\_policy\\_1-2-18.pdf](http://www.iceoutofca.org/uploads/2/5/4/6/25464410/san_mateo_4_09_ice_policy_1-2-18.pdf) [https://perma.cc/692P-RQPZ].

220. *Id.*

to the TRUST Act are straight misdemeanors.<sup>221</sup> “In no case shall cooperation occur pursuant to section 7282.5 [the TRUST Act] for individuals arrested, detained, or convicted of misdemeanors that were previously felonies or previously crimes punishable as either misdemeanors or felonies prior to the passage of the Safe Neighborhoods and Schools Act of 2014.”<sup>222</sup>

3. *Going Above and Beyond: San Francisco City and County Sheriff, Santa Clara County Sheriff, and Los Angeles Police Department*

Finally, some counties have demonstrated their commitment to the goals of SB 54 by enacting policies that provide for significantly increased restrictions on cooperation and communication with federal immigration enforcement.

San Francisco’s sanctuary city ordinance provides a number of increased protections over SB 54. To begin with, San Francisco significantly narrows the circumstances in which an LEA may respond to a notification request. There is no public information exception and the conviction exceptions require a recent conviction.<sup>223</sup> For violent felonies, the conviction must be within seven years; for serious felonies, the conviction must be within five.<sup>224</sup> Felonies punishable by imprisonment in state prison or wobbler felonies must be within five years and there must be three convictions arising out of separate incidents.<sup>225</sup>

Additionally, San Francisco’s prohibition on using funds and resources extends to any assistance in the enforcement of federal immigration law, whereas SB 54 only prohibits the use of such funds and resources in affirmative enforcement acts.<sup>226</sup> This distinction helps to explain why ICE agents are prohibited from interviewing inmates in San Francisco jails.<sup>227</sup> San Francisco sanctuary policy also requires that every six months a report be given to the Board of Supervisors detailing all communications with federal immigration enforcement agencies.<sup>228</sup>

Santa Clara County’s detainer policy sets a number of additional limitations on cooperation with ICE. Santa Clara County will only honor ICE requests when the individual has been convicted of a serious or violent felony and the costs incurred by the county would be reimbursed by the federal

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221. Memorandum from the Alameda County Sheriff’s Office on Communication with Immigration Authorities, at 5 (Feb. 9, 2018), [http://www.iceoutofca.org/uploads/2/5/4/6/25464410/alameda\\_sherriffs\\_policy\\_2\\_2018.pdf](http://www.iceoutofca.org/uploads/2/5/4/6/25464410/alameda_sherriffs_policy_2_2018.pdf) [<https://perma.cc/SBR3-CLVT>].

222. *Id.*

223. *Sanctuary City Ordinance*, *supra* note 38.

224. *Id.*

225. *Id.*

226. *Id.*

227. Aleaziz, *San Francisco Jail*, *supra* note 171.

228. *Sanctuary City Ordinance*, *supra* note 38.

government.<sup>229</sup> However, since 2011, the federal government has not agreed to reimburse the costs of honoring detainers, and thus no requests have been honored.<sup>230</sup> Furthermore, much like San Francisco, Santa Clara County prohibits ICE agents from accessing individuals in county facilities without a criminal warrant or a legitimate law enforcement purpose unrelated to immigration enforcement.<sup>231</sup>

Lastly, the Los Angeles Police Department (LAPD) policies also provide a number of protections beyond SB 54. LAPD's policies prohibit all custodial transfers to ICE except when there is a judicial warrant for or prior conviction of a federal criminal immigration offense.<sup>232</sup> Additionally, any JTF involving ICE or Customs and Border Patrol must include "a provision indicating that LAPD participants must comply with LAPD policies and procedures regarding immigration enforcement during their participation in any task force activity."<sup>233</sup> As a further protection, all LAPD officers who participate in a JTF must sign an acknowledgement indicating their understandings of LAPD policies and procedures and LAPD's stance on immigration enforcement.<sup>234</sup> Finally, the LAPD indicates that they will engage in place of birth inquiries only when necessary to investigate a criminal offense, book or process an arrestee, or comply with consular notification obligations.<sup>235</sup>

### C. *The California Department of Corrections and Rehabilitation*

SB 54 also grants the CDCR discretion to honor hold, notification, and transfer requests from ICE.<sup>236</sup> Unlike law enforcement agencies, the CDCR has unrestricted discretion and must account for different factors when deciding whether to exercise discretion.

We contacted the CDCR to determine what guidelines have been set

229. Santa Clara County, Cal., Policy Res. No. 2011-504, Resolution of the Board of Supervisors of the County of Santa Clara Adding Board Policy 3.54 Relating to Civil Immigration Detainer Requests (Oct. 18, 2011), [https://www.ilrc.org/sites/default/files/resources/santa\\_clara\\_ordinance.pdf](https://www.ilrc.org/sites/default/files/resources/santa_clara_ordinance.pdf) [<https://perma.cc/Y7W5-K2AF>].

230. Complaint for Declaratory and Injunctive Relief at 13, *Santa Clara County v. Trump*, No. 5:17-cv-00574 (N.D. Cal. Feb. 3, 2017), ECF No. 1.

231. Santa Clara County, Cal., Policy Res. No. 2011-504.

232. Memorandum from the L.A. Police Department on Immigration Enforcement Procedures (Dec. 29, 2017), *supra* note 118, at 4.

233. *Id.* at 6.

234. *Id.*

235. *The Los Angeles Police Department and Federal Immigration Enforcement: Frequently Asked Questions* 7-8, L.A. POLICE DEP'T (Jan. 22, 2018), [http://assets.lapdonline.org/assets/pdf/immigration\\_enforce.pdf](http://assets.lapdonline.org/assets/pdf/immigration_enforce.pdf) [<https://perma.cc/7BZY-VUZA>] ("An officer, however, may ask for and record an individual's place of birth if the person is arrested for a criminal offense. This is required to process the arrestee for a criminal offense, comply with consular notification requirements, investigate a crime, or otherwise comply with the law."). LAPD made modifications to internal policies "to minimize the potential misperception and possible degradation of public trust." *Id.* at 7. ("The Department's Field Interview Report (FI card) has been redesigned and the 'Birthplace' field removed so officers do not ask or record the birthplace of victims, witnesses, or temporarily-detained individuals unless an exception applies.").

236. GOV'T § 7284.6.

with respect to honoring ICE requests but, at the time of this writing, have not received any response. Thus, unfortunately, we can offer no insight as to how the CDCR's policies stack up against SB 54's guidelines for law enforcement agencies.

## V. RECOMMENDATIONS

In light of the identified vulnerabilities of SB 54, we recommend several changes either in the form of a legislative amendment to SB 54 or in LEA policy implementation. The recommendations we discuss here include: removing the public information exception from provisions of SB 54; implementing more departmental policy acknowledgement procedures and expanding their scope; prohibiting ICE access to jails; relying upon judicial warrants and probable cause determinations instead of past convictions; and implementing a civilian oversight watchdog organization on LEA policy compliance.

### A. *Remove the Public Information Exception from Provisions of SB 54*

SB 54 allows an LEA to honor a notification request if the information is public, regardless of whether the individual in question falls under the conviction exceptions first enumerated by the TRUST Act.<sup>237</sup> A number of County Sheriffs<sup>238</sup> have begun to exploit this function of SB 54 by publicly posting the release date information for all inmates, thus making it public information that can be communicated to ICE. Of course, ICE can also look it up online.

Because SB 54 relies on restricting the ability of federal immigration authorities to obtain custody of individuals held by local LEAs, this practice is particularly troubling because it more or less circumvents all limitations entirely.<sup>239</sup> If an individual's release date falls within the public information exception, it does not matter whether the individual was in LEA custody on the basis of a misdemeanor or a felony. If that individual is deemed by ICE to have committed immigration violations, they can be taken into ICE custody immediately before their release from LEA custody.

Thus, two recommendations include removing the public information exception by legislative amendment and encouraging LEAs to adopt an internal policy prohibiting the release of public information regarding its detainees.

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237. *Id.* § 7284.6(a)(1)(C) ("California law enforcement agencies shall not use agency or department moneys or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes, including . . . [p]roviding information regarding a person's release date or responding to requests for notification by providing release dates or other information *unless that information is available to the public*, or is in response to a notification response from immigration authorities in accordance with Section 7282.5. Responses are never required, but are permitted under this subdivision, provided that they do not violate any local law or policy.") (emphasis added).

238. See *supra* notes 186–188 and accompanying text.

239. See *supra* Section III.H.

*B. Implement More Departmental Policy Acknowledgement Procedures and Expand their Scope*

Despite the protections offered by SB 54, one obstacle to its implementations—even for LEAs that want to further its goals—is its complexity. Even well-intentioned officers may slip up and act in a way prohibited by SB 54 or LEA policies. Currently, the LAPD requires officers who participate in any JTF to sign an acknowledgement stating that they understand the department’s policies with regard to SB 54.<sup>240</sup> Such an acknowledgement is something that could be useful for all officers to sign for a number of reasons. First, requiring such an acknowledgement encourages individual LEOs to ensure that they actually understand their department’s policies and their obligations. Second, it increases accountability because if an error is made, then the LEA can hold its officers responsible because they formally acknowledged their understanding of their obligations. Third, it presents an opportunity for the LEA to proactively educate officers and encourages the development of transparent and clear policies.

*C. Prohibit ICE Access to Jails*

Although SB 54 is silent on the issue, San Francisco and Santa Clara’s policies both prohibit ICE from accessing any inmate in a San Francisco jail.<sup>241</sup> This policy helps to protect inmates from the inherently coercive nature of a custodial interrogation.<sup>242</sup> This is a sound policy because conducting such interviews is wholly unrelated to any of the criteria SB 54 sets forth as relevant for determining that an LEA should honor a transfer or notification request. Any ICE interview of an individual only serves the purpose of advancing ICE’s case against that person relating to federal immigration violations and, under SB 54, it is imperative to separate such investigations from the typical duties of a local LEO.

*D. Rely Upon Judicial Warrants and Probable Cause Determinations Instead of Convictions*

In setting forth conditions in which transfer and notification requests will be honored, some LEAs limit the circumstances to judicial warrants or judicial probable cause determinations. There are a number of advantages to this approach. First, it is much easier for an LEA to receive a judicial warrant or probable cause determination compared to searching the individual’s criminal history and ensuring any convictions match with the criteria of the TRUST Act. Furthermore, it requires ICE to operate with judicial oversight and imposes a greater degree of accountability. Finally, it ensures that the

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240. Memorandum from the L.A. Police Department on Immigration Enforcement Procedures (Dec. 29, 2017), *supra* note 118, at 6.

241. *Sanctuary City Ordinance*, *supra* note 38.

242. See *Miranda v. Ariz.*, 384 U.S. 436, 533 (1966).

individual poses a current public safety threat, rather than honoring the request on the basis of a crime committed any number of years in the past or for a crime that was a straight misdemeanor.

*E. Implement a Civilian Oversight Watchdog Organization*

One potential way to ensure that LEAs follow SB 54 is to create an oversight committee to review an LEA's compliance with SB 54 and its department policies. An oversight committee will help ensure violations of SB 54 are independently investigated and reviewed and determine consequences for failing to follow SB 54. Although not in response to SB 54, Los Angeles County created its Sheriff Civilian Oversight Commission in January 2016 to improve transparency and accountability within the Sheriff's Department.<sup>243</sup> With SB 54 and its expansion of LEA responsibilities, such a committee could also review an LEA's adherence to SB 54. San Francisco provides another model on how to implement such oversight. San Francisco's sanctuary ordinance gives its Human Rights Commission power to review compliance by the various departments and agencies of the City and County.<sup>244</sup> Regardless of the exact implementation, an oversight committee can help ensure an LEA's compliance with SB 54 and other department policies.

CONCLUSION

SB 54 endeavors to significantly change the dynamic between local law enforcement agencies and the enforcement of federal immigration laws. Its protections, however, come hand-in-hand with opposition and loopholes. While it is not perfect, SB 54 takes important steps in disentangling local law enforcement from federal immigration enforcement and ensures greater protections for California's immigrant population.

In many respects, the issues that SB 54 cannot solve—such as ICE access to databases and detention facilities—are issues that exceed California's control and implicate overarching problems with federal immigration enforcement in general. SB 54 also brings to light the remarkable desire of California's individual counties, cities, and law enforcement agencies to enact their own stricter protections for their immigrant populations in contrast to pockets of reluctant anti-immigrant strongholds.

As California LEAs continue to operate under SB 54, further information will come to light about their actual compliance with the requirements of SB 54 and will, ideally, allow lawmakers to reflect and make informed and competent revisions or additions to SB 54. And with the expectation that the undocumented today will become staunch future

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243. See, e.g., L.A. CTY. SHERIFF CIVILIAN OVERSIGHT COMM'N, <https://coc.lacounty.gov/https://perma.cc/9GX3-56A8> (last visited May 16, 2018).

244. *Sanctuary City Ordinance*, *supra* note 38.



advocates for the undocumented of tomorrow, this Article aims to motivate, educate, and inform the Asian American community about the history of discrimination against outsiders and what is at stake in reforming today's state- and national-level immigration policies.