



CALIFORNIA DIVIDED:
*The Restrictions and Vulnerabilities
in Implementing SB 54*

Nicholas Pavlovic (Santa Clara Law '19)

Jerome Ma (Santa Clara Law '18)

Draft last updated on: June 13, 2018

Immigration Law & Practicum Spring 2018
Professor P. Gulasekaram

**CALIFORNIA DIVIDED: THE RESTRICTIONS AND
VULNERABILITIES IN IMPLEMENTING SB 54**

Jerome Ma[†] & Nicholas Pavlovic[‡]

United States Immigration and Customs Enforcement (“ICE”) significantly relies on state and local personnel and resources to carry out enforcement of immigration law. California Senate Bill 54 (“SB 54”), the “California Values Act,” is California’s attempt to disentangle local law enforcement from federal civil immigration enforcement. This Article offers an in-depth evaluation of SB 54’s mechanics; identifies vulnerabilities that exist despite SB 54 and potential means for law enforcement agencies (“LEAs”) to combat these issues; and comments on 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/detainer requests from the federal government, as well as information and data-sharing requests, within 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 to restrict cooperation and communication with federal immigration enforcement. SB 54 provides a strong framework for accomplishing these goals, but nonetheless remains vulnerable to exploitation, such as LEAs making release dates publicly available, and falls short in addressing overarching issues such as ICE access to law enforcement databases.

[†] Jerome Ma is a J.D. candidate at Santa Clara University School of Law, class of 2018. He holds a B.S. in aerospace engineering and a minor in Asian American studies from the University of California, Los Angeles.

[‡] Nicholas Pavlovic is a J.D. candidate at Santa Clara University School of Law, class of 2019. He holds a B.A. in history from the University of California, Merced.

We thank Professor Pratheepan Gulasekaram for his support, guidance, and knowledge in helping us navigate this subject matter. We also thank Sara Foghani and David Muegge for their comments and suggestions. This is our final work product of our Immigration Law & Policy Practicum, an immigration course taught by Professor Gulasekaram at the Santa Clara University School of Law.

TABLE OF CONTENTS

INTRODUCTION	4
I. CALIFORNIA SENATE BILL 54	5
A. <i>The Background Behind SB 54</i>	7
1. 8 U.S.C. § 1373	7
2. Sanctuary City History.....	7
3. The TRUST Act.....	8
4. The TRUTH Act.....	9
B. <i>The Mechanics of SB 54</i>	10
1. Communication	10
2. Deputization	12
3. Restrictions on Joint Task Forces	14
4. Restrictions on Honoring Detainers.....	14
5. Other Restrictions on Participating in Immigration Enforcement.....	16
6. The California Department of Corrections and Rehabilitations	16
C. <i>The Federal Government’s Response to SB 54</i>	18
II. FALLING SHORT: THE VULNERABILITIES OF SB 54.....	19
A. <i>Inquiring About Place of Birth as a Proxy for Asking About Immigration Status</i>	20
B. <i>The “Primary Purpose” Requirement of Participation in a Joint Task Force</i>	21
C. <i>Databases</i>	23
D. <i>“Exclusive” Office Space</i>	25
E. <i>The Inherent Coerciveness of Custody</i>	26
F. <i>Detention Facilities</i>	26
G. <i>The Fine Line Between Misunderstanding and Purposeful Noncompliance</i>	28
H. <i>Making Release Dates and Other Information Publicly Available</i>	30

III. THE DISCRETIONARY IMPLEMENTATION OF SB 54..... 33

 A. *Setting a Baseline for Law Enforcement Agencies*..... 33

 B. *The Dichotomy of California Law Enforcement Agency Policies*..... 35

 1. Sticking to the Baseline – Orange, San Diego, and Riverside County Sheriffs 35

 2. Slight Modifications – San Mateo and Alameda County Sheriffs 37

 3. Going Above and Beyond – San Francisco City and County Sheriff, Santa Clara County Sheriff, and Los Angeles Police Department..... 38

 C. *The California Department of Corrections and Rehabilitation* 40

IV. RECOMMENDATIONS 40

 A. *Remove the Public Information Exception from Provisions of SB 54* 41

 B. *Implement More Departmental Policy Acknowledgement Procedures and Expand its Scope*..... 41

 C. *Prohibit ICE Access to Jails* 42

 D. *Rely Upon Judicial Warrants and Probable Cause Determinations Instead of Convictions* 42

 E. *Implement a Civilian Oversight Watchdog Organization*.... 43

CONCLUSION..... 44

INTRODUCTION

California Senate Bill 54 (“SB 54”) and its precursors are an immensely complex package of legislation aimed at combating multiple expansive and multi-faceted issues—the sharing of data, the bilateral communications, and the concerted custody of undocumented immigrants between federal and local law enforcement agencies.¹ The legislative history of SB 54 indicates that its purpose is to provide numerous safeguards for immigrants when interacting with law enforcement agencies (“LEAs”).² The primary objective of the law is to ensure that local LEAs do not facilitate federal immigration enforcement by unnecessarily communicating with federal immigration authorities or otherwise aiding in enforcement efforts.

Federal case law has clearly stated immigration enforcement falls squarely on the shoulders of the federal government.³ Despite the rationale that the federal government should fully undertake immigration enforcement matters, the federal government frequently and actively seeks local LEA participation in order to accomplish said responsibility. When local LEAs do not comply, the federal government attempt to “coerce localities to participate in immigration enforcement and punish those that pursue ‘sanctuary.’”⁴ Reacting to the federal government’s expropriating of state resources, the state of California enacted SB 54—a statewide minimum standard—which directs local LEAs to not facilitate nor participate via specified means to enforce the federal government’s immigration responsibility, unless certain exceptions apply. However, SB 54 leaves significant discretion to LEAs in its implementation and, like any legislation, is not infallible.

This policy memorandum examines three distinct facets of SB 54:

1. See S.B. 54, 2017 Leg., 2017-18 Sess., 2017 Cal. Legis. Serv. 1 (West) (to be codified at CAL. GOV’T. CODE §§ 7282, 7282.5, & 7284).

2. S.B. 54 § 3, 2017 Cal. Legis. Serv. 6 (“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, 2017-2018 Sess., at 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. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that power retained by 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) (“Deportation is not a punishment for crime.”); *Wong Wing v. United States*, 163 U.S. 228 (1896).

4. Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 58 B.C.L. REV. (forthcoming 2018) (manuscript at 3) (citation omitted).

- (1) Provide an overview of the protections offered by SB 54;
- (2) Identify vulnerabilities that exist despite SB 54 and potential means for individual LEAs to combat these issues; and
- (3) Determine how individual LEAs and the California Department of Corrections and Rehabilitation (“CDCR”) have chosen to exercise the discretion within the framework of SB 54.

Further, this Article aims to uncover competing motivations that influence whether SB 54 have the ultimate support of local LEAs.

Accordingly, section I of this Article provides a brief overview of the protections offered by SB 54 by first giving the historical context of sanctuary cities and the legal framework undergirding SB 54, then offering an in-depth evaluation of SB 54’s mechanics (e.g., the restriction placed on LEAs prohibiting communications with ICE unless certain exceptions apply), and finally illustrating the federal government’s response to SB 54. Section II of this Article identifies vulnerabilities that exist despite SB 54 (e.g., whether LEAs have the ability to inquire about place of birth as a proxy to asking about immigration status) and potential means for individual LEAs to combat these issues. Section III reports how individual LEAs and the California Department of Corrections and Rehabilitation have chosen to exercise the discretion within the framework of SB 54 (including select “anti-immigrant” and “pro-immigrant” California LEA policies). Section IV offers legislative and LEA policy implementation recommendations moving forward.

I. CALIFORNIA SENATE BILL 54

United States Immigration and Customs Enforcement (“ICE”) significantly relies 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 the 2018 Fiscal Year.⁵ While ICE⁶ alone is responsible for the deportation of an individual, the necessary first step is to physically obtain custody of

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

6. *Id.*

that individual.⁷ This is very often facilitated by the use of local law enforcement.⁸ Law enforcement databases, physical access to jails, deputization of local LEOs, joint task forces, informal communication and tips from LEOs, and other methods all provide ICE with information with minimal involvement from ICE.⁹ Even in the absence of formal programs, many counties willingly cooperate with ICE and use local resources and personnel to assist in immigration enforcement.¹⁰ It is under this background of extensive local LEA participation in federal immigration enforcement that SB 54 was enacted.

SB 54, the “California Values Act,” is California’s attempt to disentangle local law enforcement from federal civil immigration enforcement. SB 54 is a California Senate Bill authored by Senator Kevin de León and signed into law by California Governor Jerry Brown on October 5, 2017. In enacting SB 54, the California legislature found that the trust relationship between California’s immigrant community and state and local law enforcement became threatened when those agencies’ operations and duties became entangled with federal immigration enforcement. This entanglement made it difficult for immigrant communities to approach the police, diverted state and local agency funding, and raised constitutional concerns.¹¹ With these concerns in mind, the legislature enacted SB 54 to further distinguish federal immigration enforcement from state and local law enforcement and place limitations on the actions local law enforcement agencies may take to assist in the enforcement of federal immigration law.

7. Morgan Smith & Terri Langford, *Federal Deportation Policy Depends on Sheriffs, Local 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>.

8. 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> [hereinafter NILC, UNTANGLING].

9. *Id.*

10. 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 (Out of 2,556 counties surveyed, 1,922 will hold individuals on the basis of a detainer and 2,053 allow county employees to use local resources to assist ICE in federal immigration enforcement responsibilities.)

11. S.B. 54, 2017 Leg. § 3, 2017-18 Sess., 2017 Cal. Legis. Serv. 6 (West).

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 that relate to immigration, in the 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 information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”¹² At least in one California jurisdiction has narrowly construed section 1373 to apply to direct prohibitions on communicating immigration status.¹³ Further, federal law does not mandate state and local law enforcement to affirmatively communicate with the federal government.¹⁴ Therefore, state legislation cannot *directly* prohibit state and local law enforcement from communicating immigration status to 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 passed a resolution that forbid city employees from assisting in the enforcement of federal immigration law.¹⁵ While this initial resolution related to conscientious objectors of the Vietnam War, by 1985, Berkeley adopted a resolution declaring it a sanctuary city for

12. 8 U.S.C. § 1373 (2012).

13. *See, e.g.,* Steidle 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.’”).

14. Lena Graber & Annie Benson, *FAQ on 8 U.S.C. § 1373 and Federal Funding Threats to “Sanctuary Cities,”* IMMIGRANT LEGAL RESOURCE CTR. (Apr. 2017), https://www.ilrc.org/sites/default/files/resources/8_usc_1373_and_federal_funding_threats_to_sanctuary_cities.pdf.

15. *Sanctuary City*, MAYOR JESSE ARREGUIN, <https://www.jessearreguin.com/sanctuary-city/> (last visited May 2, 2018) (“As a sanctuary city, Berkeley has committed to not support, communicate with or submit to the demands of federal Immigration and Customs Enforcement (ICE) officers. Our community believes in protecting all of our residents and letting them know they are safe, regardless of their immigration status.”).

undocumented refugees.¹⁶ In the decades to follow, a number of California cities followed suit. In 1989, San Francisco enacted its sanctuary city ordinance.¹⁷ San Francisco's sanctuary city ordinance is significantly more extensive than others in California and reads more like a codified law than a city council resolution.¹⁸ 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

The TRUST Act was California's first foray into statewide regulations restricting cooperation with federal immigration authorities. Specifically, the TRUST Act addresses the range of circumstances a California law enforcement agency may comply with an immigration detainer (or "detainer") issued by federal immigration authorities. As defined by the TRUST Act, a detainer is a request by ICE to a local law enforcement agency to hold an individual for up to 48 hours after their initial release date and advise authorized immigration officers prior to the release of that individual.¹⁹ The California legislature found that, under the Secure Communities program, 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 allocation of law enforcement resources to federal immigration matters, concerns over the erroneous issuance of detainers, and degradation of the relationship between law enforcement and immigrant communities.²⁰

Under the TRUST Act, a California law enforcement agency is prohibited from complying with ICE detainers unless one of six exceptions applies. Even if the exceptions apply, the choice is discretionary and said law enforcement agency can still choose not to comply with the detainer. The exceptions are as follows: an exception exists if the individual has been convicted of: 1) a serious or violent

16. *Id.*

17. Lasch et al., *supra* note 4 (manuscript at 31 n.137) (citing San Francisco, Cal., Ordinance No. 375-89 (Oct. 24, 1989)).

18. *Sanctuary City Ordinance*, OFF. OF CIVIC ENGAGEMENT & IMMIGRANT AFF., <http://sfgov.org/oceia/sanctuary-city-ordinance-0> (last visited May 2, 2018).

19. Assemb. B. 4, 2013 Leg. § 2, 2013-14 Sess., 2013 Cal. Legis. Serv. 2 (West).

20. *Id.*

felony, 2) a felony punishable by imprisonment in state prison, 3) a specified wobbler offense within the past five years for a misdemeanor or at any time for a felony, 4) an INA aggravated felony, 5) the individual is a current registrant on the California Sex and Arson Registry, or 6) a probable cause determination by a magistrate of a serious or violent felony, felony punishable by imprisonment in state prison, or wobbler felony other than domestic violence.²¹ If none of these conditions are met then the individual may not be detained past their scheduled release date. 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 Act, giving additional protections to immigrants in the custody of local law enforcement. The California legislature took further issue with the federal government's Secure Communities program's lack of transparency and accountability.²² To begin with, the TRUTH Act established 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. 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."²³ 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."²⁴ 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 his or her attorney or another designated person. Third, in furtherance of the goal of transparency, all records related to ICE access provided by a local law enforcement agency are public records. Finally, should a law enforcement agency provide ICE access to an individual during

21. *Id.*

22. Assemb. B. 2792, 2016 Leg. § 2(b) [hereinafter TRUTH Act], 2015-16 Sess., 2016 Cal. Legis. Serv. 2 (West).

23. TRUTH Act § 3, 2016 Cal. Legis. Serv. at 4.

24. *Id.*

a given year, that law enforcement's governing city and/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.”²⁵

B. The Mechanics of SB 54

SB 54 covers law enforcement agencies in California. As such, it is important to note the variety of agencies included in 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 memorandum 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 deal with learning an individual’s immigration status in the first place and communicating information to immigration authorities that would allow them to take an individual in to 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.”²⁶ This prohibition on inquiring about immigration status does not have any analogs in prior legislation but is clearly intended to allow immigrants to interact with police without worrying about being forced to disclose their status and facing any consequences associated with such disclosure. Essentially, if an officer never learns of an individual’s immigration status then there is nothing that can be passed along to immigration authorities.

Finally, this prohibition helps to combat any potential instances of discrimination based on perceived immigration status—if a LEO

25. TRUTH Act § 3, 2016 Cal. Legis. Serv. at 4-5.

26. S.B. 54, 2017 Leg. § 3, 2017-18 Sess., 2017 Cal. Legis. Serv. 7 (West).

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 in that LEOs were required to determine an individual's immigration status during a lawful stop, a practice that was upheld by the Supreme Court in *United States v. Arizona*.²⁷ Thus, in 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 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."²⁸ The logic of these novel provisions is that 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 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. Otherwise, section 7282.5 of the California Government Code, as amended by SB 54, provides a list of circumstances in which notification of release date is permitted, but not required. This list of exceptions was first created by the TRUST Act. These exceptions can be broken down into six categories: the individual in question has been convicted of (1) a serious or violent

27. *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." *Arizona*, 567 U.S. 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." *Arizona*, 567 U.S. at 415.

28. S.B. 54, 2017 Leg. § 3, 2017 Cal. Legis. Serv. 8 (West).

felony, (2) a felony punishable by imprisonment in state prison, (3) a “wobbler” offense within the past five years if a misdemeanor or fifteen if a felony, (4) an INA aggravated felony, (5) the individual is a current registrant on the California Sex and Arson Registry, and (6) a probable cause determination by a magistrate of a serious or violent felony or felony punishable by imprisonment in state prison.

2. Deputization

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. Deputized officers undergo a training course, are supervised by ICE, and must abide by relevant laws and procedures governing the conduct of federal immigration officers.²⁹ As a general matter, deputized officers interview individuals to determine their immigration status and cross-check that information against DHS databases. If an individual is found to have immigration violations, the deputized officer informs their ICE supervisor who would take steps to prosecute or obtain custody of the individual.³⁰

Section 287(g) agreements (“287(g) agreements”), however, have been fraught with issues in their administration. To begin with, ICE has, in many instances, failed to provide clear guidance or supervision to deputized officers.³¹ As a result, many individuals were targeted who posed no threat to public safety or had only committed misdemeanors or minor traffic offenses.³² Furthermore, while ICE pays to train the

29. *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>.

30. HOW ICE USES LOCAL CRIMINAL JUSTICE SYSTEMS TO FUNNEL PEOPLE INTO THE DETENTION AND DEPORTATION SYSTEM 2, NAT’L IMMIGR. L. CTR. (Mar. 2014), <https://www.nilc.org/wp-content/uploads/2015/11/state-local-enforcement-and-ice-2014-03-25.pdf> [hereinafter NILC, LOCAL CRIMINAL JUSTICE SYSTEMS].

31. *Id.*; U.S. DEP’T OF HOMELAND SEC., OFF. OF INSPECTOR GENERAL, OIG-10-63, THE PERFORMANCE OF 287(G) AGREEMENTS 10 (Mar. 2010), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf (“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.”).

32. *Id.* at 9 (“We obtained arrest information for a sample of 280 aliens identified through

officers, basically none of the other costs associated with the program are covered by the federal government.³³ The LEO is still paid by the local LEA, uses LEA facilities, and supplies, and any detainee is housed by the LEA.³⁴ Finally, 287(g) agreements can lead to distrust by immigrant communities and in egregious cases, racial profiling.³⁵

As a result of these numerous issues with 287(g) agreements, SB 54 goes beyond prior legislation and wholly prohibits any law enforcement agency from “[placing] peace officers under the supervision of federal agencies or [employing] peace officers deputized as special federal officers or special federal deputies for purposes of immigration enforcement.” As of late December of 2017, Orange County Sheriff’s Department cancelled the last active 287(g) agreement held by a California LEA.³⁶ While prior federal court cases³⁷ challenged the constitutionality of 287(g) agreements and some California law enforcement agencies, such as San Bernardino County Sheriff’s Department, cancelled their 287(g) agreements as a result of these decisions,³⁸ no California law affirmatively prohibited such agreements until SB 54.

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.”)

33. NILC, LOCAL CRIMINAL JUSTICE SYSTEMS, at 2.

34. *See id.*

35. 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.

36. 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/>.

37. *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340 (D. Or. Apr. 11, 2014); *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014); *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011).

38. 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>, [\[http://webcache.googleusercontent.com/search?q=cache:SCOqEheAawJ:cms.sbcounty.gov/sheriff/MediaCenter/SheriffPressReleases/PressReleasesfor2014/May/ImmigrationandNationalityAct287gProgram.aspx+&cd=7&hl=en&ct=clnk&gl=us&client=firefox-b-1\]](http://webcache.googleusercontent.com/search?q=cache:SCOqEheAawJ:cms.sbcounty.gov/sheriff/MediaCenter/SheriffPressReleases/PressReleasesfor2014/May/ImmigrationandNationalityAct287gProgram.aspx+&cd=7&hl=en&ct=clnk&gl=us&client=firefox-b-1).

3. Restrictions on Joint Task Forces

In a similar vein as 287(g) agreements, joint task forces (“JTFs”) are another way for federal immigration authorities to conscript the manpower of local law enforcement agencies. JTFs essentially allow local and federal law enforcement agencies to pool their resources together to accomplish mutual enforcement goals. Of course, not all JTFs are entered into with federal immigration authorities, but those that are carry the potential to result in arrests based on civil immigration violations.

In response to these concerns and with an understanding of the significant benefits that JTFs provide to local communities, SB 54 prohibits only those JTFs whose “primary purpose [is] immigration enforcement.”³⁹ As a further protection, JTFs are permitted only when “[t]he enforcement or investigative duties are primarily related to a violation of state or federal law unrelated to immigration enforcement.”⁴⁰ Of course, this does not preclude local law enforcement from entering into a JTF with ICE, nor does it prohibit any JTF that could result in arrests for immigration violations. However, as a final protective measure, LEAs must report on the details of the JTF as well as the number of immigration and non-immigration arrests made. That data is made publicly available and aggregated by the California Attorney General.

4. Restrictions on Honoring Detainers

A detainer, is essentially a request from ICE to a LEA that the LEA assist ICE in obtaining custody of a specific individual. These requests are wholly voluntary, and an LEA is in no way compelled to comply.⁴¹ ICE submits these requests to LEAs based on immigration violations they suspect an individual in LEA has committed. SB 54 parses out detainers into three distinct requests: “hold requests,” “notification requests,” and “transfer requests.” Under a hold request, an individual is detained for additional time past their scheduled release date, typically 48 hours. Under a notification request, the LEA communicates the individual’s release date to ICE and ICE arranges to

39. S.B. 54, 2017 Leg. § 3, 2017-18 Sess., 2017 Cal. Legis. Serv. 9 (West).

40. *Id.*

41. *Immigration Detainers: An Overview*, at 1, AM. IMMIGR. COUNCIL (Mar. 2017), <https://www.americanimmigrationcouncil.org/research/immigration-detainers-overview>.

take that individual into custody. Under a transfer request, the individual is directly transferred to ICE custody.

SB 54 prohibits an LEA from “[d]etaining an individual on the basis of a hold request.” That means that an LEA may never hold an individual past his 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.

Like the TRUST Act before it, SB 54 restricts LEAs in their ability to honor notification requests.⁴² SB 54 restricts a LEA’s ability to honor transfer requests in a similar fashion to its restrictions on notification of release dates. Much like notification of release date, detainers are the means by which ICE obtains custody over an individual they suspect of violating immigration law. Even if ICE suspects an individual of violating immigration law, they cannot actually prosecute that individual without custody. SB 54 requires that there be a judicial warrant or judicial probable cause determination before honoring a transfer request. Additionally, the same exceptions for requests for notification apply: (1) a serious or violent felony, (2) a felony punishable by imprisonment in state prison, (3) a “wobbler” offense within the past five years if a misdemeanor or fifteen if a felony, (4) an INA aggravated felony, (5) the individual is a current registrant on the California Sex and Arson Registry, and (6) a probable cause determination by a magistrate of a serious or violent felony or felony punishable by imprisonment in state prison.

SB 54’s prohibitions on honoring detainers build off the TRUST Act’s regulation of that same subject. Taking effect in 2014, the TRUST Act similarly restricted the circumstances in which LEAs could honor detainer requests. The TRUST Act’s provisions are almost identical to SB 54’s with only a few differences. First, SB 54 expanded the TRUST Act’s language of “immigration hold” to “hold request, notification request, and transfer request.” This change reflects SB 54’s decision to wholly prohibit LEAs from honoring “hold requests”. 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. Besides these changes, the requirements of the TRUST Act remain largely unchanged in their incorporation into SB 54.

42. We discussed notification requests in our earlier section on restrictions on communications. *See supra* subsection B.1.1.

5. Other Restrictions on Participating in Immigration Enforcement

SB 54 flatly prohibits “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.”⁴³ These two prohibitions relate to SB 54’s goal of disentangling federal immigration authorities from local law enforcement as they remove federal immigration agents from the day-to-day operations of local law enforcement.

SB 54 also restricts “[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.”⁴⁴ Chapter 17.8 allows ongoing contracts to continue to operate but prohibits renewal or expansion of such contracts.⁴⁵ ICE frequently contracts with local law enforcement to rent out jail beds to be used by immigration detainees.⁴⁶ These arrangements are financially beneficial for the local law enforcement agency as it ensures they receive funding for filling their jail to capacity.⁴⁷ Despite their financial benefits, these arrangements further local LEA entanglement with federal immigration enforcement as they require LEA participation in the detention of 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 law enforcement agency and is given its own set of restrictions and

43. S.B. 54, 2017 Leg. § 3, 2017 Cal. Legis. Serv. 9 (West).

44. S.B. 54 § 3, 2017 Cal. Legis. Serv. at 8.

45. CAL. GOV’T CODE § 7311(a) (“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.”).

46. 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/>.

47. Sakuma, *supra* note 46.

requirements.⁴⁸ Unlike law enforcement agencies, the CDCR has no restrictions placed on its discretion to honor hold, notification, or transfer requests.⁴⁹ As a small consolation, the CDCR must inform the individual in question whether it intends to comply with any of these requests.⁵⁰ Similarly, SB 54's prohibitions on inquiring into immigration status, office space, interpreters, and housing federal detainees do not apply to the CDCR.

Instead, SB 54 expands the provisions of the TRUST Act to cover the CDCR and prohibits discrimination on the basis of immigration status within the CDCR. Under the TRUST Act, California law enforcement agencies were required to provide written consent forms to individuals held in custody in advance of any interview with ICE regarding civil immigration violations. SB 54 requires those same consent forms be given in individuals in the custody of the CDCR in those same circumstances. Furthermore, prior to SB 54, the CDCR would take into account immigration status in determining an inmate's custodial classification. 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.⁵¹ 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 custodial classification level."⁵²

48. S.B. 54, 2017 Leg., 2017-18 Reg. Sess., 2017 Cal. Legis. Serv. 9.

49. S.B. 54, 2017 Cal. Legis. Serv. 6-7.

50. S.B. 54, 2017 Cal. Legis. Serv. 11.

51. INFORMATION FOR CALIFORNIA STATE PRISONERS WITH IMMIGRATION HOLDS, PRISON L. OFF. (Mar. 2012), <http://prisonlaw.com/wp-content/uploads/2015/09/ImmigrationManualFullMarch2012.pdf>.

As of March 2012,

[u]nder CDCR rules, 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.

Id. at 6-7.

52. S.B. 54, 2017 Cal. Legis. Serv. at 11.

C. *The Federal Government's Response to SB 54*

While the overall constitutionality of SB 54 is not the focus of this Article, it is important to highlight that the federal government has strongly disapproved of SB 54. On March 6, 2018, the U.S. Department of Justice filed suit against the state of California alleging that three California laws, including SB 54, violate the Supremacy Clause⁵³ 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.⁵⁴

In direct response to SB 54, ICE⁵⁵ 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 across Northern California⁵⁶ on this basis.⁵⁷

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

54. 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 A.B. 450, A.B. 103, and S.B. 54 should be held invalid).

55. 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> (“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.”).

56. 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> (“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.”).

57. 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> (“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

Given this federal hostility to SB 54, California law enforcement agencies who wish to circumvent the protections of SB 54 do so with implicit approval from the federal government. In fact, both Orange⁵⁸ and San Diego County⁵⁹ voted to join in the United States Justice Department's lawsuit against SB 54.⁶⁰ In both instances, the county Board of Supervisors cited concerns about SB 54's negative impact on public safety⁶¹ but did not elaborate on specific instances where SB 54 opposed public safety. Going even further, on March 19, 2018, the city council of Los Alamitos, the second-smallest city in Orange County, voted to exempt itself from SB 54.⁶² Even if these actions are no more than empty words they still demonstrate the open hostility to SB 54 that exists across California.

In the next section we will examine where these prohibitions in SB 54 fall short of meeting the overarching goal of restricting California LEA cooperation and communication with federal immigration enforcement.

II. FALLING SHORT: THE VULNERABILITIES OF SB 54

Of course, no legislation is ironclad, and SB 54 is no exception. SB 54 falls short in a number of areas and fails to address key features of federal immigration enforcement that still allow LEAs to cooperate

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.”).

58. 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>.

59. *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> [hereinafter *San Diego County to Join Lawsuit*].

60. 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).

61. Egelko, *supra* note 58 (“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 59 (“Both [Supervisor] Gaspar and [Supervisor] Jacob repeatedly said the decision was based on maintaining public safety and keeping criminals out of the region.”).

62. Roxana Kopetman, *Los Alamitos Votes to Opt Out of California Sanctuary Law*, ORANGE COUNTY REG. (Mar. 21, 2018), <https://www.ocregister.com/2018/03/19/los-alamitos-immigration-debate-sparks-singing-shouting/>.

with and share information with ICE. In some instances, the vulnerability is the narrow language used by SB 54—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. Although these vulnerabilities by no means nullify the protections enacted by SB 54, they allow California LEAs and ICE to undermine these protections and engage in precisely the behavior sought to be prevented by SB 54.

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, however, there are certainly ways to infer immigration status without ever directly asking an individual’s immigration status. An officer might ask an individual their place of birth,⁶³ for example, as an individual not born in the United States might not be a citizen and could be in the country

63. 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>:

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.

unlawfully. Thus, it is possible that an officer or an LEA might use questions regarding birth place as a proxy for immigration status.

These proxy questions may have a legitimate purpose, such as consular notification,⁶⁴ 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. As a practical matter these aspects of criminal procedure—proper booking questions, legitimacy of police stops, etc.—are beyond the reach of SB 54 and our memorandum and will not be explored in depth. Regardless, unless such proxy questions are commonly asked to individuals not in custody and with no reasonable suspicion, it is unlikely that such proxy questions pose a significant issue. In fact, there is nothing to indicate that such questions have been used as a proxy for determining immigration status, and at this time, it remains a hypothetical exercise. Even if an LEA communicates an individual’s place of birth directly to ICE, that does not circumvent SB 54’s protections on ICE’s ability to take custody. Furthermore, an individual’s place of birth, on its own does not give LEOs cause to arrest an individual.

B. The “Primary Purpose” Requirement of Participation in a Joint Task Force

SB 54 prohibits law enforcement agencies from entering into a joint task force (“JTF”) only if that JTF’s primary purpose is civil immigration enforcement. By its language, SB 54 does not preclude JTFs with DHS or even ICE.⁶⁵ 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 is not due until March 2019 and does not place further restrictions on JTFs.⁶⁶

The potential vulnerabilities lie in the operation of the phrase “primary purpose” as SB 54 does not clearly explain what the threshold is.⁶⁷ On the one hand, immigration authorities can represent, or even misrepresent, the purpose of a JTF as not primarily for immigration enforcement when there is a high probability that arrests for civil

64. *Id.*

65. S.B. 54, 2017 Cal. Legis. Serv. at 9.

66. S.B. 54, 2017 Cal. Legis. Serv. at 10.

67. S.B. 54, 2017 Cal. Legis. Serv. at 9.

immigration violations will be made. On the other hand, a non-compliant law enforcement agency can seek out JTFs with immigration authorities when they know, or believe, that their non-immigration related police work could result in arrests for civil immigration violations that the LEA would not be able to make on their own under SB 54. These two scenarios, do not really run afoul of SB 54 as their primary purpose, on its face, does not implicate civil immigration enforcement even though that is the ultimate outcome.

In fact, the first scenario is not speculation, it already happened twice before SB 54. The Santa Cruz Police Department entered into a JTF with DHS to aid in gang-related arrests in a dozen residences. During the February 13, 2017, raid, a number of individuals were arrested based on criminal offenses. DHS also arrested more than 10 other individuals on solely immigration-related offenses.⁶⁸ The Santa Cruz Police Department alleges that they were misled about the probability and number of immigration-related arrest while DHS counters that the Santa Cruz Police Department was well informed that the operation had a high probability of resulting in such arrests.⁶⁹ On August 16, 2017, the Oakland Police Department participated in a JTF with ICE's Homeland Security Investigations branch. The alleged purpose of the investigation was to investigate human trafficking. However, during the course of serving the search warrant, no one was arrested for human trafficking violations. The only arrest made was for a civil immigration violation and the arrested individual was placed in deportation proceedings.⁷⁰ The Oakland Police Department's role

68. David Marks, *Santa Cruz Police: ICE Lied to Us About Immigration Arrests*, KQED NEWS: CAL. REP. (Feb. 24, 2017), <https://www.kqed.org/news/2017/02/24/santa-cruz-police-ice-lied-to-us-about-immigration-arrests/>. Santa Cruz Assistant Police Chief Dan Flippo said:

the 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.

69. *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.”)

70. Ali Tadayon, *Commissioner: Raid Violated Oakland Sanctuary City Policy*, EAST BAY TIMES: COMMUNITY NEWS (Nov. 10, 2017, 12:09 PM),

during the search was allegedly relegated to traffic control outside of the residence. Oakland Police Chief, Anne Kirkpatrick, was scheduled to give a report about the raid in a public hearing on November 14, 2017. However, that hearing has been indefinitely postponed.⁷¹

Examining these two incidents under SB 54, it is unclear that either LEA violated the restrictions on JTFs. SB 54's only prohibition concerns the nebulous concept of the "primary purpose" of the JTF. If, for example, each JTF had the "primary purpose" of enforcing state criminal law then SB 54 would allow that JTF. Of course, it is not compulsory for an LEA to engage in a JTF and repeated incidents where the LEA feels that they have been misled could result in that LEA's refusal to enter into JTFs with certain federal agencies.⁷² As it stands, SB 54 clearly does contemplate that immigration arrests will result in the course of JTFs as it explicitly requires the number of such arrests to be disclosed to the California Attorney General and the public. Thus, SB 54 places the onus on individual LEAs to regulate their entry into JTFs.

C. Databases

SB 54 delegates the task of publishing guidelines and recommendations to limit the availability of information in databases that can be used in immigration enforcement to the Attorney General,⁷³ but as more information about ICE access to databases comes to light the vulnerabilities appear much more significant. While it remains to be seen what specifically will be done to address these concerns, it is unclear exactly how far LEAs are willing to go in an effort to stymie that amount of information in databases accessible to ICE.⁷⁴

<https://www.eastbaytimes.com/2017/10/05/commissioner-raid-violated-oakland-sanctuary-city-policy/>.

71. *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.")

72. Marks, *supra* note 68 ("[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.")

73. S.B. 54, 2017 Leg. § 3, 2017-18 Sess., 2017 Cal. Legis. Serv. 10-11 (West).

74. 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-660e2dfddb3> [hereinafter Joseph, *New Documents*] ("While some local officials are calling for greater

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.”⁷⁵ These databases allow ICE to pull together an in-depth profile of an individual incredibly quickly.⁷⁶ With access to “information on employers, associates, and hangout spots,”⁷⁷ ICE is easily able to independently take custody of identified individuals.

However, even incidentally giving ICE access to such a wealth of personal information LEAs endanger immigrants. Where SB 54 seeks to impose limitations on communication of information to ICE, ICE access to law enforcement databases is essentially unfettered. With no limitations, information from these databases could lead ICE to arrest many low-level offenders or individuals with no arrests other than just having ties to others under investigation.⁷⁸

In fact, ICE’s reliance on these databases has contributed to the detention and even deportation of United States citizens.⁷⁹

[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

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, 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.”).

75. Joseph, *New Documents*, *supra* note 74.

76. Joseph, *New Documents*, *supra* note 74 (“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.”).

77. Joseph, *New Documents*, *supra* note 74.

78. 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> [hereinafter Joseph, *Where ICE*]

79. 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>.

searches.⁸⁰

Although extensive, the databases ICE uses are not always fully accurate; inaccurate digital fingerprints, incomplete documentary records, or even misspellings in an individual's name can lead to an individual being incorrectly identified as deportable despite being a U.S. citizen.⁸¹

This problem has no easy solution, in large part due to the significant law enforcement benefit of databases. “Law enforcement officials and former ICE agents say 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.”⁸² While databases can certainly be misused in the pursuit of immigration enforcement, they are also a powerful tool for legitimate law enforcement purposes.

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” dedicated to federal immigration authorities. 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 in instances where the law enforcement agency is engaged in a JTF with DHS or ICE, limitations on JTFs already prohibit those whose primary purpose is immigration enforcement. It is unclear what, if any, purpose this prohibition on exclusive office space serves when immigration authorities can, very easily, still gain access to office space within law enforcement facilities.

The obvious recommendation for such a narrow prohibition is to broaden it depending on its ultimate goal. If the goal is to allow office space for when law enforcement is engaged in a JTF with immigration authorities, 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

80. *Id.*

81. *Id.*

82. Joseph, *New Documents*, *supra* note 74.

except for interviews or transfers then, once again, the prohibition should be broadened.

E. The Inherent Coerciveness of Custody

Although beyond the purview of SB 54, it is well understood that law enforcement custody has an inherent coercive effect on an individual⁸³ and SB 54's attempt to address this through mandatory consent forms may fall short in some situations. The 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. This requirement is extended to the CDCR by SB 54. As Ms. Merton from Freedom for Immigrants explains, many people in custody either do not understand the languages of the consent forms or are simply illiterate.⁸⁴ In either case, law enforcement does not always have the ability or the desire to provide a translator or interpreter.⁸⁵ This leads to instances where individuals sign the form without at all comprehending its significance.⁸⁶ SB 54 attempts to address this by requiring that the consent forms are provided in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean. 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 a consent form to be presented in the individual's language or, in the case of illiteracy, 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. SB 54 itself does not address closing existing immigration detention facilities or mandating minimum conditions. While many immigrant rights groups have serious concerns over the conditions in federal facilities, including those contracted out to local LEAs, the

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

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

85. *Id.*

86. *Id.*

wholesale closing of such facilities in California without some workable alternative in place comes with serious consequences.⁸⁷

Immigration detention is massive feature of the federal government's immigration enforcement process;⁸⁸ thus, any action taken by California against federal detention facilities would not fully address the issue and could worsen the circumstances of Californians in detention. The federal government mandates that ICE fill 34,000 beds with immigration detainees each day.⁸⁹ Additionally, ICE operates numerous detention facilities across the United States and many in California that have no connection to any California LEA.⁹⁰ While prohibiting contracting with the federal government to operate a federal detention facility ultimately places federal immigration enforcement outside the hands of California LEAs, it significantly worsens the situation of any Californian taken into immigration detention, as it would potentially take them away from their family, away from any California attorney, and away from the reach of any California law protecting them.⁹¹

Additionally, unlike 287(g) programs,⁹² ICE provides significant compensation for the use of LEA facilities⁹³ for immigration detention.⁹⁴ In Contra Costa County, the county received about half of the six million dollars from the United States Department of Justice for operating the West County Immigration Detention Facility goes to

87. *Id.*

88. *United States Immigration Detention*, GLOBAL DETENTION PROJECT (May 2016), <https://www.globaldetentionproject.org/countries/americas/united-states/>.

89. *Detention Bed Quota*, NAT'L IMMIGRANT JUST. CTR. <https://www.immigrantjustice.org/eliminate-detention-bed-quota> (last visited May 16, 2018).

90. *Immigration Detention Map & Statistics*, ENDISOLATION.ORG, <http://www.endisolation.org/resources/immigration-detention/> (last visited May 16, 2018).

91. *Id.*

92. *See supra* subsection I.B.1.2 and accompanying notes.

93. 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>. *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.

94. 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> ("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.").

paying employee salaries; and not just those employees involved in the operation of the detention facility.⁹⁵ 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 the contract with ICE pays for.⁹⁶ Thus, even though the ultimate purpose of these contracts is essentially to assist in federal immigration enforcement, there are significant benefits to LEAs, unrelated to immigration enforcement.

Similar to many other vulnerabilities, the issues surrounding immigration detention cannot seriously be addressed by SB 54 alone. Because of this, a better approach might be to address the extreme human suffering caused by immigration detention⁹⁷ to the extent constitutionally permissible—for example, mandating standards for the facilities of LEAs that enter into such contracts with ICE. In fact, California has attempted to do just that with AB 103 which requires the California Attorney General to review the conditions of immigration detention centers, including those operated by California law enforcement.⁹⁸

G. The Fine Line Between 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.⁹⁹ This interview violated the TRUTH

95. Telephone Interview with Rebecca Merton, *supra* note 84.

96. *Id.*

97. 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-o-meter/article/2017/sep/06/immigration-detention-expansion/> (“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.”).

98. Assemb. B. 103, 2017 Leg., 2017-18 Sess., 2017 Cal. Legis. Serv. 23 (West).

99. 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> [hereinafter Aleaziz, *San Francisco Jail*]

Act's requirement¹⁰⁰ of a signed consent form and San Francisco's Sanctuary ordinance's prohibition on assisting in immigration enforcement by allowing ICE interviews of jail inmates.¹⁰¹ The Sheriff's Department maintains that this was not intentional and mandated additional training on Department's obligations under California law and city ordinance.¹⁰² In an almost identical situation, ICE agents were also allowed into Santa Clara County jails on March 7 and 8, in violation of Santa Clara County's prohibition on ICE access to jails.¹⁰³ While the majority of California sheriffs strongly opposed SB 54¹⁰⁴ and it comes as no surprise that many of these sheriffs still desire to cooperate with ICE similarly to before SB 54,¹⁰⁵ these incidents are particularly troubling as San Francisco and Santa Clara County have long-standing policies that extend beyond the baseline restrictions of SB 54.¹⁰⁶

These distinctions and repudiations are made more 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 the recourse is for the State of California 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 violating LEAs might be required to pay out compensation.¹⁰⁷

100. Assemb. B. 2792, 2016 Leg. § 3 [hereinafter TRUTH Act], 2015-16 Sess., 2016 Cal. Legis. Serv. 4 (West).

101. *Sanctuary City Ordinance*, *supra* note 18.

102. Aleaziz, *San Francisco Jail*, *supra* note 99.

103. 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>.

104. Ulloa, *supra* note 94.

105. *Id.* (“[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.”).

106. *See infra* subsection III.B.3 on selected policies covering San Francisco and Santa Clara County.

107. 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/> (“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.”)

H. Making Release Dates and Other Information Publicly Available

The practice of publicly posting inmate release dates poses a serious threat 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's baseline restrictions on when ICE can take custody of an individual. Furthermore, because the release date is publicly available this practice essentially gives full discretion on whether to take custody of an individual to ICE.

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 applies to compliance with a notification request, thus if ICE only sends a transfer request to an LEA with publicly-available release dates, the LEA may not comply unless the conditions of the TRUST Act¹⁰⁸ are met or there is a judicial warrant or probable cause determination.¹⁰⁹ However, ICE can instead send a notification request which the LEA can comply with if it makes release dates publicly available. 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.¹¹⁰ 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 drawn based on exactly how ICE assumes custody.

108. *See supra* subsection I.B.4.

109. *See supra* subsection I.B.4.

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

Orange County Sheriff,¹¹¹ Contra Costa County Sheriff,¹¹² and Alameda County Sheriff¹¹³ are now posting release date information for all inmates online; essentially making the release date of any inmate public information. Each county, however, has advanced a different rationale for engaging in this practice. According to Orange County 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).”¹¹⁴ In contrast, in Contra Costa County, the same practice was implemented because

[publicly-available release dates] can be helpful to other governmental organizations, crime victims, inmates’ family members and others. Additionally, organizations¹¹⁵ who provide services to persons released from custody have specifically asked for this information so they can start reentry transition assistance right away.¹¹⁶

Finally, Alameda County Sheriff maintains that publicly available release dates are a way to further transparency.¹¹⁷ 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

111. 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>.

112. 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/>.

113. 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>.

114. 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.oregister.com/2018/03/26/in-response-to-california-sanctuary-law-orange-county-sheriff-makes-public-inmates-release-dates/>.

115. 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 84.

116. Davis & Gartrell, *supra* note 112.

117. Bond-Graham, *supra* note 113.

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.¹¹⁸

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

Unlike the other conditions SB 54 places on compliance with ICE custody requests, publicly available release dates allow an LEA, acting on its own, to satisfy the necessary condition to permit compliance with an ICE custody request. SB 54 explicitly regulates LEA conduct, so it follows that the conditions for LEA compliance with an ICE request should be outside LEA control. However, this idea does not hold true for all conditions of compliance. 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. Almost paradoxically, however, an LEA has control over whether an individual's release date is public information. It makes very little sense to give the regulated entity, LEAs, control over the conditions which subject them to regulation. By making inmate release dates publicly available, an LEA essentially discards SB 54's restrictions on notification and transfer requests and substitutes its own discretion.

Publicly available release dates also allow ICE to independently take custody of an individual without even relying on an LEA to honor a notification request. Following the rationale of Contra Costa County, even if release dates are made publicly available for reasons other than cooperation with ICE,¹¹⁹ the fact that release dates are publicly available potentially removes the need for ICE to rely on LEA cooperation at all. 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.¹²⁰ If ICE already knows that information by virtue of it being publicly available, the notification

118. *Id.*

119. Davis & Gartrell, *supra* note 112.

120. *See supra* subsection I.B.4.

request is 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, even in instances where public release dates are well-intentioned they could have significant consequences.

III. THE DISCRETIONARY IMPLEMENTATION OF SB 54

A. *Setting a Baseline for Law Enforcement Agencies*

SB 54 merely sets the minimum standard of conduct a law enforcement agency must abide by—a law enforcement agency’s policies on how it exercises discretion can significantly change how much protection is afforded to immigrants. Here, we examine the heads of three typical, highly-visible LEAs: the county sheriff, the police chief, and the California Highway Patrol (“CHP”) Commissioner. In California, the county sheriff is an official directly elected by the constituents of said county.¹²¹ Unlike the county sheriff, the police chief is generally appointed by the mayor of a city or municipality.¹²² In contrast to the county sheriff and police chief, the CHP Commissioner is appointed by the Governor of California.¹²³ Police jurisdiction covers incorporated municipalities; the duties comprise preventing, suppressing, and investigating crimes; and police officers provide emergency and non-emergency services.¹²⁴ The CHP has jurisdiction over all California state routes (including freeways), U.S. highways, interstate highways, and all public roads, because its main mission is related to transportation.¹²⁵ That being said, some

121. 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.

122. *Id.*

123. See, e.g., Press Release, Cal. Highway Patrol, Statement by CHP Commissioner Warren Stanley (Feb. 9, 2018), <https://www.chp.ca.gov/PressReleases/Pages/Statement-by-CHP-Commissioner-Warren-Stanley.aspx>.

124. See, e.g., *Bureau of Field Operations*, SAN JOSÉ POLICE DEP’T., <https://www.sjpd.org/BFO/> (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> (last visited May 3, 2018).

125. See *About Us*, CAL. HIGHWAY PATROL, <https://www.chp.ca.gov/home/about-us> (last visited May 3, 2018); see also *Merger of the Highway Patrol and the State Police*, CAL. HIGHWAY PATROL, <https://www.chp.ca.gov/home/about-us/the-history-of-the-california-highway-patrol/milestones-in-time/merger-of-the-highway-patrol-and-the-state-police> (last visited May 3, 2018) (discussing CHP’s continued performance of preexisting service contracts originally

municipalities, unincorporated areas, and towns contract with county sheriffs to act as “contract law enforcement” for police services.¹²⁶

In contrast to the CHP Commissioner and police chief, who have distinct jurisdictions and responsibilities, county sheriffs may provide supplemental law enforcement services by contract to neighboring unincorporated areas (e.g., townships, smaller municipalities, etc.) 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].”¹²⁷ In other words, all peace officers in California are able to exercise their police powers anywhere in the state, on or off duty, regardless of county or municipal boundaries. Given the nature that the county sheriff directly reports to his or her constituents—and since he or she is directly elected by his or her constituents as opposed to political appointment—the interests of the county sheriff’s department may inherently be pulled in disparate directions.

For example, in the 2017–2018 fiscal year, the Contra Costa County Sheriff’s Office faces an estimated general fund net cost of 43 million dollars.¹²⁸ The Contra Costa County Sheriff attempts to make up the difference through ancillary revenue, including providing contract services to nearby cities, including Danville, Lafayette, and Orinda.¹²⁹ And, as discussed earlier, the Contra Costa County Sheriff also receives millions of dollars in rent from the United States government for the use of its jail facilities.¹³⁰ Thus, resources such as money and personnel prove to be important components to any county

provided by the California State Police).

126. 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; 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 [https://web.archive.org/web/20130304185244/http://www.lasdhq.org/lasdhq_services/contract_law/index.html].

127. CAL. PENAL CODE § 830.1(a) (West 2008).

128. 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> (last visited May 12, 2018).

129. *Id.* at 135; Special Operations Division, CONTRA COSTA CTY. OFF. OF SHERIFF, http://www.cocosherriff.org/bureaus/field_operations/special_operations/default.htm (last visited May 14, 2018).

130. See *supra* notes 93-94 and accompanying text.

sheriff department's budget and likely influences a California county sheriff's implementation of SB 54.

While there are a number of ways in which an LEA can exercise discretion—e.g., participation in JTFs, permitting ICE interviews in jails, etc.—one of the most important and most prominent is honoring notification and transfer requests. Some LEAs believe cooperation with ICE is necessary for safety,¹³¹ and while they will comply with SB 54, they will do so in ways that allow them to cooperate with ICE as much as possible (e.g., county sheriffs, in order to prolong their financial relationships with ICE).¹³² Other LEAs believe that such cooperation is not beneficial and go above and beyond SB 54 in enacting protections for immigrants.¹³³ In our examination of these differing approaches, we will first examine the policies of selected counties, cities, or law enforcement agencies and where they fit along this spectrum. We will then focus on policies that we believe are against the spirit of SB 54, even if they comply with the letter of the law, and policies that we believe go beyond the minimum protections to address vulnerabilities within SB 54.

B. The Dichotomy of California Law Enforcement Agency Policies

1. Sticking to the Baseline – Orange, San Diego, and Riverside County Sheriffs

Differences in implementation exist even in cases where an LEA opts only for baseline compliance with SB 54. Despite the vulnerabilities in SB 54, baseline compliance is not necessarily a negative as it still ensures significant restrictions are put in place on an LEA's ability to cooperate and communicate with federal immigration enforcement. Implementation of baseline compliance of SB 54 occurs on a scale—on the one end are the LEAs that strongly dislike SB 54

131. Ulloa, *supra* note 94 (“[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.”).

132. 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>.

133. 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>.

and endeavor to actively find ways around it. In the middle are LEAs do not fully support SB 54 but remain steadfast in their obligation to implement it. On the opposite end are LEAs whose goals align with SB 54 but have not implemented additional policies. These three approaches are illustrated by Orange County Sheriff, San Diego County Sheriff, and Riverside County Sheriff respectively.

Orange County Sheriff's Department has opposed SB 54,¹³⁴ so it comes as no surprise that their official policies mandated only baseline compliance with the requirements of SB 54. Orange County Sheriff's official policy is to "comply with Immigration Detainers by notifying ICE and releasing the inmate to ICE custody when the referenced inmate qualifies in accordance with the Trust Act."¹³⁵ Essentially, there is no room for discretion. Once the TRUST Act conditions are met, any detainer will be honored. Furthermore, as discussed above,¹³⁶ Orange County Sheriff also made inmate release dates public to further facilitate cooperation with ICE.¹³⁷

Similar to Orange County Sheriff, San Diego County Sheriff Department's policy is to only comply with the minimum standards of SB 54.¹³⁸ Unlike Orange County, San Diego has not implemented publicly available release dates. Furthermore, even though San Diego County has voted to join the Justice Department lawsuit against SB 54, the Sheriff's Office has made clear that this does not release San Diego from its obligations under SB 54.¹³⁹

134. 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_Sheriff_Hutchens_SB54OpposeLetter.pdf.

135. 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.

136. Park, *supra* note 132.

137. Press Release, Orange Cty. Sheriff's Dep't., *supra* note 134.

138. 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.

139. *San Diego County to Join Lawsuit*, *supra* note 59 ("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 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.").

Riverside County Sheriff is another LEA that opts for baseline compliance with SB 54.¹⁴⁰ However, unlike Orange and San Diego counties, Riverside County and its sheriff have not been outspoken critics of SB 54. In fact, according to their policy memorandum addressing the additional requirements imposed by SB 54 explains that: “[t]he Department position remains the same and [Riverside County Sheriff does] not enforce immigration laws or use Department resources for immigration enforcement. As such, the new mandates do not significantly impact daily operations.”¹⁴¹ Thus, even though Riverside County Sheriff honors all detainees for individuals who meet the TRUST Act conditions,¹⁴² it is clear that such a policy is not necessarily borne out of animosity towards the operation of SB 54.

Although none of these LEAs provide for greater protection than is required by SB 54, it is clear from their rhetoric and interpretation of SB 54 that there are differences in their willingness to abide by the spirit of SB 54. Orange County Sheriff has made 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 San Diego County Sheriff 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. Finally, the Riverside County Sheriff states 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.

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

140. 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.

141. *Id.*

142. *Id.*

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 magistrate¹⁴³—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.¹⁴⁴ Alameda County Sheriff’s Department similarly narrows the criteria of the TRUST Act. In their policy statement, the Sheriff’s Office notes that certain crimes listed under the “wobbler offenses” category of SB 54’s amendments to the TRUST Act are straight misdemeanors.¹⁴⁵ “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.”¹⁴⁶

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

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. For violent felonies, the conviction must be within seven years; for serious felonies, the conviction must be within five. And felonies punishable by imprisonment in state prison or wobbler felonies must be within five

143. 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.

144. *Id.*

145. 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.

146. *Id.*

years and there must be three convictions arising out of separate incidents.¹⁴⁷

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.¹⁴⁸ This distinction helps to explain why ICE agents are prohibited from interviewing inmates in San Francisco jails.¹⁴⁹ San Francisco sanctuary policy also requires that, for every six months, a report be given to the Board of Supervisors detailing all communications received from and made to federal immigration enforcement agencies.¹⁵⁰

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 government.¹⁵¹ However, the federal government since 2011 has not agreed to reimburse the costs of honoring detainees thus no requests have been honored.¹⁵² 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.¹⁵³

The Los Angeles Police Department 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.¹⁵⁴ Additionally, any JTF involving ICE or CBP must include "a provision indicating that LAPD participants must comply with LAPD policies

147. *Sanctuary City Ordinance*, *supra* note 18.

148. *Id.*

149. Aleaziz, *San Francisco Jail*, *supra* note 99.

150. *Sanctuary City Ordinance*, *supra* note 18.

151. 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

152. 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.

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

154. Memorandum from the L.A. Police Department on Immigration Enforcement Procedures (Dec. 29, 2017), *supra* note 59.

and procedures regarding immigration enforcement during their participation in any task force activity.”¹⁵⁵ As a further protection, all LAPD officers who participate in a JTF must sign an acknowledgement indicating his or her understanding of LAPD policies and procedures and LAPD’s stance on immigration enforcement.¹⁵⁶ 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.¹⁵⁷

C. *The California Department of Corrections and Rehabilitation*

Similar to law enforcement agencies, SB 54 grants the CDCR discretion to honor hold, notification, and transfer requests from ICE. 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 with respect to honoring ICE requests but, at the time of this writing, have not received a 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.

IV. 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 LEA policy implementation.

155. *Id.*

156. *Id.*

157. *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 (“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.”).

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. A number of County Sheriffs¹⁵⁸ 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 as it more or less circumvents all limitations entirely.¹⁵⁹ 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, he or she can be taken into ICE custody immediately preceding his or her release from LEA custody.

Thus, we recommend either removing the public information exception by legislative amendment or encourage LEAs to adopt an internal policy prohibiting the release of public information of its detainees.

B. Implement More Departmental Policy Acknowledgement Procedures and Expand its 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 Los Angeles Police Department requires officers who participate in any JTF to sign an acknowledgement stating that they understand the department's policies in regard to SB 54.¹⁶⁰ We believe that 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

158. *Id.*

159. *See supra* subsection II.H.

160. Memorandum from the L.A. Police Department on Immigration Enforcement Procedures (Dec. 29, 2017), *supra* note 63.

their department's policies and their obligations. Second, it increases accountability in the sense that if an error is made then the LEA can hold its officers responsible as 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.¹⁶¹ This policy helps to protect inmates from the inherently coercive nature of a custodial interrogation.¹⁶² We believe 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 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.

161. *Sanctuary City Ordinance*, *supra* note 18.

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

E. Implement a Civilian Oversight Watchdog Organization

One potential means to ensure that SB 54 is followed is to create an oversight committee to review an LEA's compliance with SB 54 and 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.¹⁶³ With SB 54 and its expansion of LEA responsibilities, it follows that 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.¹⁶⁴ Regardless of the exact implementation, an oversight committee can help to ensure an LEA's compliance with SB 54 and other department policies.

163. See, e.g., L.A. CTY. SHERIFF CIVILIAN OVERSIGHT COMM'N, <https://coc.lacounty.gov/> (last visited May 16, 2018).

164. *Sanctuary City Ordinance*, *supra* note 18.

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 to 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. Despite all this, SB 54's effectiveness hinges on actual compliance with its restrictions rather than mere statements of policy. While we were not able to determine the extent to which law enforcement agencies complied with SB 54 or their own policies, other organizations within California are working on just that.