

**ILLEGAL IMMIGRATION ARRESTS: A VERMONT  
PERSPECTIVE ON STATE LAW AND IMMIGRATION  
DETAINERS SUPPORTED BY INTERGOVERNMENTAL  
AGREEMENTS**

INTRODUCTION.....	646
I. HISTORICAL BACKGROUND: THE POLITICS OF IMMIGRATION AND RISING FEDERAL-STATE TENSIONS.....	649
A. A Brief History of Immigration Policy in the United States .....	649
B. Vermont and the Immigration Enforcement Debate.....	653
II. EVOLUTION OF LEGAL CHALLENGES TO DETAINERS .....	655
A. Statutory Interpretation of Immigration Enforcement .....	655
B. Federal Challenges to Detainers .....	657
C. State Law as a Means for Analyzing Detainer Legality .....	659
D. Unanswered Questions After Lunn.....	661
E. Intergovernmental Agreements and Local Law Enforcement .....	662
III. WHO IS IN CHARGE HERE?: A LEGAL ODYSSEY IN SEARCH OF LEGAL LIABILITY WHEN A STATE PRISON CONTRACTS TO HOLD FEDERAL PRISONERS.....	663
A. Limits on Spending Power.....	663
B. Pre-Emption: Federal Regulations in Conflict with Contractual Provisions for Holding Immigration Detainees in County Jails.....	664
C. Fee Disputes Between Sheriffs and County Governments .....	665
D. Liability for Federal Prisoners in Local Facilities .....	667
E. How to Contractually Circumvent Your Own Law, Part I: Colorado Life Insurance and the Interstate Compact .....	668
F. How to Contractually Circumvent Your Own Law, Part II: Wisconsin Gaming and the Tribal-State Compact .....	670
IV. APPLYING <i>LUNN</i> TO VERMONT.....	672
A. Detainers as Warrantless Arrests Under Vermont State Law .....	673
B. Show Me Your Papers: The Search for Authority with Which to Conduct Warrantless Immigration Arrests .....	674
V. ARTICLE XI OF THE VERMONT CONSTITUTION AND DETAINERS .....	676
A. The Oft-Overlooked State Constitution as an Alternative for Addressing Detainers.....	676
B. General Analysis Under the Vermont Constitution. ....	678
C. Probable Cause Under the Vermont Constitution.....	679
1. General Requirements .....	679
2. The Collective Knowledge Doctrine.....	681
D. Detainers and the Right to Automatic and Speedy Review by Neutral Magistrate. ....	683
VI. CONCLUSION: LEGAL RISKS, ALTERNATIVES, AND THE LESSONS OF	

HISTORY ..... 687  
 A. Alternatives Available to Vermont’s DOC..... 687  
 B. Federalism, Precedent, and Detainers: A Rare Judicial Opportunity to Learn from the Mistakes of the Past ..... 689

INTRODUCTION

Susai Francis has two children, one of whom is a U.S. citizen, and has spent over two decades living on Long Island.<sup>1</sup> On June 14, 2017, he was arrested for driving under the influence of alcohol and operating an uninsured vehicle.<sup>2</sup> Upon arrest, his fingerprints were taken and entered into federal databases.<sup>3</sup> These identified him as an Indian citizen who had overstayed his visa.<sup>4</sup> An officer with Immigration and Customs Enforcement (ICE) issued a “detainer” request and an administrative arrest warrant to the local police department.<sup>5</sup> On December 11, 2017, Francis plead guilty to an unrelated disorderly conduct charge and was sentenced to time served—terminating the state criminal action against him.<sup>6</sup>

However, rather than being released, Francis was returned to the county correctional facility, where his paperwork was “re-written” from “adult male misdemeanor” to “adult male warrant.”<sup>7</sup> Francis was placed in a jail cell rented by ICE, pursuant to an Intergovernmental Service Agreement (IGSA), where the sheriff considered him to be held in ICE custody.<sup>8</sup> The next day, New York’s Appellate Division heard argument on Francis’ *habeus corpus* proceeding to determine whether the detention was legal.<sup>9</sup> However, on December 13, 2017, two days after Francis was “re-written” into ICE custody, ICE agents arrived at the local jail and took Francis to a long-term ICE detention facility in New Jersey, where his removal from the U.S. was pending at the time of the *habeus corpus* decision.<sup>10</sup> The Francis case is part of a growing debate surrounding the legality of local participation in immigration enforcement through the use of detainers, often bolstered by bed-renting contracts with the federal government.

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1. People *ex rel.* Wells v. DeMarco, 168 A.D.3d 31, 34 (N.Y. App. Div. 2018).  
 2. *Id.*  
 3. *Id.*  
 4. *Id.*  
 5. *Id.* at 35.  
 6. *Id.*  
 7. *Id.* at 36.  
 8. *Id.*  
 9. *Id.*  
 10. *Id.* at 36.

A detainer is a notice from ICE to local officials, requesting that they maintain custody of an individual for up to 48 hours after local officials would have otherwise released the individual—such as on bail or upon the resolution of state charges.<sup>11</sup> The extra 48 hours gives ICE agents time to arrive and take custody of the individual for possible removal proceedings.<sup>12</sup> Those opposed to detainers warn of constitutional abuses associated with holding individuals with neither probable cause nor judicial review,<sup>13</sup> and caution against involving state resources in a federal issue that may be incompatible with local policy priorities.<sup>14</sup> Compliance with detainers has been a central issue in the debate over local cooperation with federal immigration enforcement.<sup>15</sup>

While a series of federal rulings have questioned the legality of detainers,<sup>16</sup> a recent Fifth Circuit Court of Appeals ruling<sup>17</sup> may signal the federal judiciary's reticence to tread too heavily on affairs of the immigration enforcement system.<sup>18</sup> If the door to federal challenges is indeed closing, opponents to detainers may wish to find another vehicle with which to articulate constitutional concerns surrounding detainers.

The Massachusetts Supreme Court pioneered one such alternative in the 2017 *Lunn v. Commonwealth* case, focusing on an absence of authorizing state law for state or local officials to conduct civil immigration arrests.<sup>19</sup> Another approach to detainer litigation could seek a state constitutional

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11. Francis Wilkinson, *Why Trump Deports Fewer Immigrants than Obama: Sanctuary States and Cities Are Slowing the Expulsions*, BLOOMBERG (May 15, 2018), <https://www.bloomberg.com/view/articles/2018-05-15/trump-is-deporting-fewer-immigrants-than-obama-did>.

12. *Id.*

13. See *Immigration Law—Local Enforcement—Massachusetts Supreme Judicial Court Holds That Local Law Enforcement Lacks Authority to Detain Pursuant to Ice Detainers*.—*Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017), 131 HARV. L. REV. 666, 670–71 (2017) [hereinafter *Immigration Law*] (footnotes omitted) (noting Fourth Amendment deficiencies with “the absence of individualized determinations of probable cause or prompt review by a neutral magistrate, and the very use of warrantless arrests for civil offenses”).

14. CHRISTOPHER LASCH, IMMIGRATION POL’Y CTR., THE FAULTY LEGAL ARGUMENTS BEHIND IMMIGRATION DETAINERS 7 (2013), [https://www.americanimmigrationcouncil.org/sites/default/files/research/lasch\\_on\\_detainers.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/lasch_on_detainers.pdf).

15. Audrey McGlinchy, *The “Sanctuary” Debate Revolves Around ICE Detainer Requests, but What Are They?*, KUT NEWS (Apr. 26, 2017), <https://www.kut.org/post/sanctuary-debate-revolves-around-ice-detainer-requests-what-are-they>.

16. See *infra* note 92 (listing federal district court decisions finding local compliance with detainers to violate the Fourth Amendment).

17. *City of El Cenizo v. Texas*, 890 F.3d 164, 189–90 (5th Cir. 2018) (holding a Texas law mandating state-wide compliance with immigration detainer requests not facially unconstitutional under the Fourth Amendment).

18. See *Immigration Law*, *supra* note 13, at 672 (striking down detainers under the Fourth Amendment may be “inconsistent with the historical deference shown to the government in immigration enforcement”).

19. *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1158 (Mass. 2017).

ruling based on the same underlying concerns that have thus far been invoked in the Fourth Amendment context.<sup>20</sup> A state constitutional ruling would not be susceptible to state legislation and, unlike a ruling under its federal counterpart, would not undermine the federal judiciary's deference to federal immigration enforcement generally.<sup>21</sup>

There is one preliminary hurdle to clear before employing either of these two state law challenges to detainees.<sup>22</sup> Many local and state officials working with ICE have begun relying on Intergovernmental Agreements (IGAs)—or IGSAs—with federal authorities, allegedly assuming the status of ICE contractors with federal immigration enforcement authority.<sup>23</sup> This arrangement supposedly allowed the local sheriff to “re-writ[e]” Francis from local to federal custody inside the same jail, nominally negating local involvement.<sup>24</sup> If this contention is true, then neither a *Lunn*-style challenge nor a state constitutional ruling would apply to local detainer compliance. Thus, whether arguing the absence of authorization at the statutory level, such as in *Lunn*,<sup>25</sup> or a prohibition at the state constitutional level,<sup>26</sup> litigators must first answer the threshold question of whether an IGA contract converts local facilities and officials into their federal immigration counterparts. This Note, using Vermont as a case study, addresses that threshold question before analyzing the potential for either a *Lunn* challenge or a state constitutional challenge to local detainer compliance.

Part I of this Note will briefly recount the history of U.S. immigration policy leading up to the current political debate, and Vermont's current self-contradictory stance in this dispute.<sup>27</sup> Part II considers the existing law regarding local law enforcement participation in immigration enforcement.<sup>28</sup> Part III addresses the argument that state officials acting pursuant to an IGA or IGSA are immune from state law challenges.<sup>29</sup> Part IV applies the approach developed by the Massachusetts Supreme Court in *Lunn* to Vermont, based on the absence of authorizing state law to comply with

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20. See *infra* Part V (analyzing Vermont state constitutional challenges).

21. See *infra* Part V (discussing state constitutional challenges in relation to federal immigration enforcement).

22. See generally *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31 (N.Y. App. Div. 2018).

23. Caitlin Dickerson, *Trump Administration Moves to Expand Deportation Dragnet to Jails*, N.Y. TIMES (Aug. 21, 2017), <https://nyti.ms/2vQTOBC>.

24. *People ex rel. Wells v. DeMarco*, 168 A.D.3d at 36.

25. *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1159 (Mass. 2017).

26. See *infra* Part V (discussing whether state constitutional rulings apply to detainer compliance).

27. *Infra* Part I.

28. *Infra* Part II.

29. *Infra* Part III.

detainers.<sup>30</sup> Part V considers a potential new challenge to detainers under Vermont's state constitution.<sup>31</sup> And finally, Part VI concludes by suggesting that Vermont's Department of Corrections (DOC) avoid potential constitutional abuses and subsequent legal liability by adopting Vermont's Fair and Impartial Policing (FIP) policy and ending detainer compliance.<sup>32</sup>

## I. HISTORICAL BACKGROUND: THE POLITICS OF IMMIGRATION AND RISING FEDERAL-STATE TENSIONS

### *A. A Brief History of Immigration Policy in the United States*

As “a nation of immigrants,” the U.S. has had a complex and often contradictory relationship with its own immigration policy along its southern border.<sup>33</sup> Demand for low-wage labor in the U.S., combined with uncertain economic and political circumstances south of the border, has driven a significant degree of northward migration for over a century.<sup>34</sup> Prior to the enactment of the Immigration and Naturalization Act (INA) of 1965, the U.S. attempted to control this valuable workforce by recruiting and deporting laborers in accordance with domestic labor shortages and surpluses<sup>35</sup> or by funneling laborers into restrictive work programs.<sup>36</sup> Subsequent enforcement of the INA, which limited immigration from Latin American countries for

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30. *Infra* Part IV.

31. *Infra* Part V.

32. *Infra* Part VI.

33. See JOHN F. KENNEDY, A NATION OF IMMIGRANTS 2–3, 32–34 (1964) (detailing both that the U.S. was literally founded by immigrants from other lands, and that it was immigrants that contributed to all aspects of American society, from science and technology to religion, language, politics, and more); see also Sofia Espinoza Álvarez & Martin Guevara Urbina, *U.S. Immigration Laws: The Changing Dynamics of Immigration*, in IMMIGRATION AND THE LAW: RACE, CITIZENSHIP, AND SOCIAL CONTROL 3, 3–9 (Sofia Espinoza Álvarez & Martin Guevara Urbina eds., 2018) (outlining the economic, political, racial, and cultural tensions at play in American immigration).

34. See Arnolde de León, *Beyond the Wall: Race Immigration Discourse*, in IMMIGRATION AND THE LAW: RACE, CITIZENSHIP, AND SOCIAL CONTROL 30, 31 (Sofia Espinoza Álvarez & Martin Guevara Urbina eds., 2018) (describing political unrest in Mexico and labor shortages in the U.S., resulting in increased immigration in the early 20th century).

35. Ruth Gomberg-Muñoz, *Building America: Immigrant Labor and the U.S. Economy*, in IMMIGRATION AND THE LAW: RACE, CITIZENSHIP, AND SOCIAL CONTROL 101, 104–05 (Sofia Espinoza Álvarez & Martin Guevara Urbina eds., 2018) (describing mass deportations during the Great Depression and how migrants from Latin American countries were neither restricted by quotas nor protected by visas, a useful arrangement for the needs of the agriculture industry); de León, *supra* note 34, at 33 (outlining the mass deportations of the Great Depression).

36. Gomberg-Muñoz, *supra* note 35, 105–06 (describing the Bracero guest-worker program, which denied workers the right to negotiate for better pay or conditions, or to change employers). In 1954, Operation Wetback deported those who had been working outside of the restrictions of the Bracero Program with the goal of returning them to the U.S. under the auspices of the program. *Id.* at 105.

the first time,<sup>37</sup> proved ineffective, consequently leading to immigration reform acts ramping up deportation efforts and making it more difficult for undocumented workers to change their legal status.<sup>38</sup> However, economic realities continued to prevail,<sup>39</sup> and enforcement at the border remained half-hearted, as American industries became increasingly reliant on a low-wage work force vulnerable to deportation and workplace exploitation.<sup>40</sup>

After hopes of comprehensive immigration reform died in 2014, the Obama Administration backed away from aggressive deportation measures, angering many border states.<sup>41</sup> However, the Supreme Court had already struck down state attempts to supplement federal immigration enforcement policies in 2012.<sup>42</sup> The Department of Homeland Security (DHS) admonished local governments that their “action must constitute genuine *cooperation* with DHS to avoid infringing on the Federal Government’s authority” and be “responsive to the policies and priorities set by DHS.”<sup>43</sup> The latter years of the Obama Administration were marked by attempts to restrain local law enforcement agents (LLEAs) to more moderate federal objectives.<sup>44</sup>

Promises of aggressive immigration enforcement, often bolstered by inflammatory rhetoric, frequently defined Donald Trump’s 2016 presidential campaign.<sup>45</sup> Once in office, President Trump sought to make good on these guarantees with controversial deportation efforts that some claimed did little to distinguish criminals from valued community members or to avoid “tearing apart families.”<sup>46</sup> Despite his high-profile deportation efforts, President Trump has been somewhat stymied by a reliance on LLEAs that

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37. Gomberg-Muñoz, *supra* note 35, at 108; de León, *supra* note 34, at 34.

38. Gomberg-Muñoz, *supra* note 35, at 108 (describing the Immigration Reform and Control Act of 1986 and the Immigration Reform and Immigrant Responsibility Act of 1996).

39. de León, *supra* note 34, at 34; Gomberg-Muñoz, *supra* note 35, at 108–09 (describing NAFTA’s effect on worker displacement in Mexico and demand for labor in the United States).

40. Gomberg-Muñoz, *supra* note 35, at 109.

41. David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/us/executive-action-on-immigration-prompts-texas-to-sue.html>.

42. Adam Liptak, *Blocking Parts of Arizona Law, Justices Allow Its Centerpiece*, N.Y. TIMES, (June 25, 2012), <https://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html>.

43. U.S. DEP’T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS’ ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 1–2 (2015) (emphasis in original).

44. See *supra* notes 41–43 and accompanying text (summarizing how the Obama Administration attempted to restrain LLEAs).

45. Alex Leary, *Trump Aims to Fire Up Republican Voters Over Immigration*, WALL ST. J. (Oct. 18, 2018), <https://www.wsj.com/articles/trump-aims-to-fire-up-republican-voters-over-immigration-1539906051>.

46. Wilkinson, *supra* note 11.

are increasingly reticent to participate in federal deportation efforts.<sup>47</sup> According to the Research and Development (RAND) Corporation, “[m]any assert that it is utterly unrealistic to expect that the immigration problem can be solved by federal law enforcement alone.”<sup>48</sup>

In contrast to the Obama Administration’s attempts to restrain zealous LLEAs, President Trump—finding his controversial immigration policies thwarted by a lack of local assistance—has sought to compel cooperation by threatening to withhold federal funds from uncooperative local governments.<sup>49</sup> Controversial ICE detainers have become central to the local cooperation debate.<sup>50</sup> While detainers fell out of favor during the latter years of the Obama Administration, the early years of the Trump Presidency have witnessed a sharp increase in detainer requests.<sup>51</sup> Following a series of federal court rulings that have found ICE detainers to be non-obligatory and constitutionally dubious requests,<sup>52</sup> many local or state entities no longer honor them, often resulting in outspoken criticism by President Trump and his administration.<sup>53</sup>

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47. *Id.*

48. JESSICA SAUNDERS ET AL., RAND CENTER ON QUALITY POLICING, ENFORCING IMMIGRATION LAW AT THE STATE AND LOCAL LEVELS 1 (2010), [https://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2010/RAND\\_OP273.pdf](https://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP273.pdf). “[The] DHS has long viewed state and local governments as valuable partners that can serve a helpful role in assisting [the] DHS in fulfilling its responsibilities with respect to immigration enforcement.” U.S. DEP’T OF HOMELAND SEC., *supra* note 43, at 1.

49. Martin Kaste, *Trump Threatens “Sanctuary” Cities with Loss of Federal Funds*, NAT’L PUB. RADIO (Jan. 26, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/26/511899896/trumps-threatens-sanctuary-cities-with-loss-of-federal-funds>.

50. See Wilkinson, *supra* note 11 (describing how local authorities honor ICE detainers by holding an individual for up to 48 hours past their release date to enable ICE to more easily take custody of an individual suspected of removable status).

51. See generally *Use of ICE Detainers: Obama vs. Trump*, TRAC IMMIGRATION (Aug. 30, 2017), <http://trac.syr.edu/immigration/reports/479/> (illustrating a sharp uptick in detainers in the first two months after Trump’s inauguration). During President Trump’s first year in office, ICE issued approximately 11,000 detainers per month, a 78% increase over the previous year. Dickerson, *supra* note 23.

52. *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (“Lehigh County was free to disregard the ICE detainer, and it therefore cannot use as a defense that its own policy did not cause the deprivation of Galarza’s constitutional rights.”); *Orellana v. Nobles*, 230 F. Supp. 3d 934, 947 (D. Minn. 2017) (finding that honoring a detainer resulted in an “additional period of detention . . . made without probable cause, thereby exceeding the warrantless arrest power”); *Miranda-Olivares v. Clackamas*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at \*11 (D. Or. Apr. 11, 2014) (finding detention was “in violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention”); *Morales v. Chadbourne*, 235 F. Supp. 3d 388, 406–09 (D.R.I. 2017) (finding a constitutional violation by a state agent for holding an individual under an ICE detainer, but granting qualified immunity because, at the time of the incident, a reasonable state agent could have assumed that honoring an ICE detainer was legal).

53. Wilkinson, *supra* note 11; Jess Aloe, *Montpelier Makes ICE List, Mayor Questions Legality*, BURLINGTON FREE PRESS (Mar. 23, 2017), <https://www.burlingtonfreepress.com/story/news/2017/03/>

Seeking to allay concerns of local liability,<sup>54</sup> Sheriff Bob Gualtieri of Pinellas County, Florida, suggested in June of 2017 that LLEAs contract with ICE as a means to circumvent the constitutional liabilities of local immigration detention.<sup>55</sup> Under this view, a pre-existing bed-space contract with federal authorities allows “a seamless transition” of detainees from local to federal “custody” with the arrival of a detainer request—despite the detainees’ continued presence in the same local facility operated by the same local employees.<sup>56</sup> Thus, federal immigration law, rather than state law, applies to the detention, rendering it a valid exercise of federal immigration authority regardless of state law.<sup>57</sup> Using this arrangement, a Florida county jail held one individual, arrested for driving without a license, for five days after having posted bail, giving ICE agents time to take the detainee into federal custody.<sup>58</sup> So far, at least one federal court has mentioned the presence of an IGA in the context of detainer litigation, but the county stipulated that it was not relying on the IGA for its legal authority, and the issue was not litigated.<sup>59</sup> In New York, the state judiciary’s Appellate Division recently rejected a sheriff’s argument that an IGSA<sup>60</sup> granted him

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23/ice-lists-montpelier-uncooperative-city/99528090/.

54. See Dickerson, *supra* note 23 (describing a sheriff’s complaint that ICE is “giving me a detainer that’s not worth the paper it’s written on in my courts”).

55. *Id.*; JOSHUA BREISBLATT ET AL., ASSUMPTION OF THE RISK: LEGAL LIABILITIES FOR LOCAL GOVERNMENTS THAT CHOOSE TO ENFORCE FEDERAL IMMIGRATION LAWS 8 (2018).

56. Dickerson, *supra* note 23. See Tony Marrero, *Sheriff Gualtieri Taking Lead in Talks With ICE Over Immigrant Detainees*, TAMPA BAY TIMES (June 13, 2017), <https://www.tampabay.com/news/politics/sheriff-gualtieri-taking-lead-in-talks-with-ice-over-immigrant-detainees/2326957> (proposing a strategy to “eliminate[] the legal exposure for [localities] and put[] the onus on ICE” by having ICE send a detainer request, warrant, and booking form first, so when a person is released on local charges, they are booked back in on immigration charges until ICE arrives).

57. Marrero, *supra* note 56.

58. See *id.* (describing the story of Malkhaz Ambroladze who was arrested by police in Florida on a driving charge and held for ICE based on a detainer of probable cause for five days after he posted bail on the local charge).

59. See *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1254 (E.D. Wash. 2017) (discussing the structure and legality of intergovernmental agreements, while acknowledging there was no agreement in this case), *appeal dismissed as moot sub nom.*, 716 F. App’x 741 (9th Cir. 2018); see also *Cisneros v. Elder*, 2018CV30549, 2018 LEXIS 3388, at \*7–8 (Co. Dist. Ct., Dec. 6, 2018) (“It is stipulated that the named Plaintiffs . . . were not held pursuant to the IGSA . . .”).

60. *Cisneros*, 2018CV30549, 2018 LEXIS, at \*7 (“[T]he ISGA [is] a contract that authorizes the Sheriff to house ICE detainees in the Jail, in ICE’s custody and at ICE’s expense. The contract applies only to persons who are already in the physical custody of ICE officers when they arrive at the Jail.”). An IGSA is the functional equivalent of an IGA, but the IGSA is signed by the Department of Homeland Security rather than the U.S. Marshals Service. FISCAL YEAR 2017 REPORT TO CONGRESS: PROGRESS IN IMPLEMENTING 2011 PBNDS STANDARDS AND DHS PREA REQUIREMENTS AT DETENTION FACILITIES, DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 2 (2018), [https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBNDS%20Standards%20and%20DHS%20PREA%20Requirements\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBNDS%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf) (“Today, NDS [National Detention Standards] most frequently is applicable at county or city jails used by ICE pursuant



federal immigration arrest power, though the court did not elaborate on its reasoning.<sup>61</sup>

### B. Vermont and the Immigration Enforcement Debate

The second-least populated state in the nation, rural Vermont has long existed far from the border tensions of the southwest and the national political fray of Washington, D.C.<sup>62</sup> However, Vermont's struggling family dairy farms, central to the state's economy and culture, rely on an estimated 1,000 to 2,000 undocumented migrant laborers.<sup>63</sup> Shortly after President Trump took office, Vermont's Republican governor signed a bipartisan bill limiting the ability of state law enforcement to enter into formal cooperative agreements with federal immigration authorities.<sup>64</sup> Recently-adopted versions of Vermont's model Fair and Impartial Policing policy (FIP) limit local involvement with immigration enforcement.<sup>65</sup> Despite such official

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to an intergovernmental service agreement (IGSA) or U.S. Marshals Service (USMS) Intergovernmental Agreement (IGA).”).

61. *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 53–54 (N.Y. App. Div. 2018) (“While the Sheriff asserts that Francis was in the custody of ICE following his return to the correctional facility from the courthouse, we find that he was in the Sheriff’s custody . . .”).

62. *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico*, U.S. CENSUS BUREAU (last updated Dec. 30, 2019), [https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html#par\\_textimage](https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html#par_textimage).

63. Terry J. Allen, *Undocumented on the Farm: Inside the Life of a Vermont Migrant Dairy Worker*, VTDIGGER (Apr. 9, 2017), <https://vtdigger.org/2017/04/09/undocumented-on-the-farm-inside-the-life-of-a-vermont-migrant-dairy-worker/>; John Dillon, *For Undocumented Workers on Vermont Farms, 2017 Was a Year Filled with Anxiety*, VT. PUB. RADIO (Jan. 5, 2018), <https://www.vpr.org/post/undocumented-workers-vermont-farms-2017-was-year-filled-anxiety#stream/0>. One Vermont farmer noted that, because the work begins at 2:30 in the morning and continues 365 days per year, he is unable to attract American workers. *Id.* (“[I]f [immigration authorities] swoop in and they clean out my workforce, my wife and I can’t run this place by ourselves.”). Additionally, undocumented workers in Vermont report greater amounts of anxiety due to the Trump administration’s deportation measures. *Id.* The effects of the President’s policies are not limited to the dairy industry, and at least one medical student at the University of Vermont has spoken out about his deportable status after President Trump set the future of the popular Deferred Action for Childhood Arrivals program into uncertainty. See Henry Epp, “*It Is a Big Worry*”: *For One DACA Recipient at UVM, Uncertainty Continues*, VT. PUB. RADIO (Jan 22, 2018), <http://digital.vpr.net/post/it-big-worry-one-daca-recipient-uv-uncertainty-continues> (interviewing UVM medical student Juan Conde on the uncertainty of the DACA program and its effects on the student’s contingency plans when he becomes potentially deportable).

64. Alicia Freese, *Scott Signs Bill Limiting Trump’s Immigration Executive Orders*, SEVEN DAYS (Mar. 28, 2017), <https://www.sevendaysvt.com/OffMessage/archives/2017/03/28/scott-signs-bill-limiting-trumps-immigration-executive-orders>. The legislation also prohibited state participation in the creation of a potential “registry” based on religious, racial, national origin, or immigration status. *Id.*

65. See Taylor Dobbs, *Despite Activist Outcry, Panel Passes Updated Impartial Policing Policy*, SEVEN DAYS (Dec. 12, 2017), <https://www.sevendaysvt.com/OffMessage/archives/2017/12/12/despite-activist-outcry-panel-passes-updated-impartial-policing-policy> (showing local law enforcement’s duty to pass on information to federal immigration authorities under federal law, thus limiting their involvement with immigration enforcement); Liam Elder-Connors, *DOJ Demands Documents from Burlington Over “Sanctuary Policies,” Threatens Subpoena*, VT. PUB. RADIO (Jan. 24, 2018), <http://digital.vpr.net/post/>

resistance to recent federal deportation policies, some Vermont law enforcement agents have exhibited willingness to assist federal immigration authorities.<sup>66</sup>

Vermont DOC documents show that, pursuant to a long-standing IGA with the U.S. Marshalls Service (USMS), Vermont correctional facilities regularly hold—for \$130 per day—individuals believed to be deportable on a short-term basis for federal immigration authorities.<sup>67</sup> The DOC, pursuant to an ICE detainer request, will also hold individuals for an additional 48 hours after the resolution of their state proceedings, giving ICE agents time to take the individual into custody.<sup>68</sup>

Correspondence between state and federal officials at the time of FIP's implementation shows that state authorities accepted ICE's assurances that the IGA contract circumvented FIP's guidance against unnecessary cooperation with federal immigration authorities.<sup>69</sup> Echoing the Gualtieri logic,<sup>70</sup> Vermont state officials appear to believe that—despite responding to a document entitled a “detainer,” while holding an individual past their release date in the same cell of the same state facility run by the same state

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doj-demands-documents-burlington-over-sanctuary-policies-threatens-subpoena#stream/0. In response, President Trump's DOJ demanded documents and threatened to withhold federal funds from the state and the City of Burlington. *Id.* The state's capital of less than 8,000 residents, Montpelier, found itself listed next to Boston, Philadelphia, and New York City, thanks to an Executive Order requiring ICE to create a public report of uncooperative locales. *Aloe*, *supra* note 53. ICE has also been active in its enforcement efforts in the state, and is the subject of a recently filed complaint alleging ICE targeted outspoken members of advocacy group, Migrant Justice, for surveillance and arrest, using techniques, including planting an informant within the group and attempting to hack the group members' email accounts. Complaint for Plaintiff at 14–15, *Migrant Justice v. Nielson*, (D. Vt. 2018) (Case No. 5:18-CV-192). One Migrant Justice activist arrested by ICE was also a member of the Vermont Attorney General's Task Force on Immigration. Kathleen Masterson, *Advocates for Undocumented Farmworkers Arrested by ICE in Burlington*, VT. PUB. RADIO (Mar. 17, 2017), <https://www.vpr.org/post/advocates-undocumented-farmworkers-arrested-ice-burlington#stream/0>.

66. Taylor Dobbs, *Footage Shows Feds Using Ethnic Slur During Traffic Stop*, SEVEN DAYS (Dec. 8, 2017), <https://www.sevendaysvt.com/OffMessage/archives/2017/12/08/footage-shows-feds-using-ethnic-slur-during-traffic-stop>. For example, body camera footage showing a sheriff's deputy quickly calling Border Patrol to the scene of a traffic stop in which the driver and passengers did not speak English. *Id.*

67. Memorandum from Prisoner Operations Division to Chief Deputy United States Marshal (Jan. 2011) (on file with author) [hereinafter Memorandum from Prisoner Operations Division].

68. Telephone Interview with Cullen Bullard, Director of Classification and Facility Designation, Vermont Department of Corrections (Oct. 5, 2018); *see also* Marrero, *supra* note 56 (explaining the same process in Florida).

69. *See* E-mail from Jeffery Curtis, ICE to Greg Hale, Superintendent, Northwestern State Correctional Facility (Dec. 14, 2016) (showing through a string of e-mails with ICE and DOC that ICE reassured DOC that the detainee is “basically in ICE [c]ustody just in your facility,” and that the IGA contract gave them the authority to do so).

70. *See* Marrero, *supra* note 56 (detailing the Gualtieri logic as the process where ICE sends the detainer request to the locality first, so a person can be held on federal authority and probable cause instead of local).

employees—the detainee is in fact held in “federal” custody.<sup>71</sup> This legal slight-of-hand has not yet received a thorough examination in court.<sup>72</sup> Vermont’s long tradition of political independence, inclusiveness, and libertarianism is reflected in a vibrant state constitutional jurisprudence,<sup>73</sup> rendering the state a prime case study for potential state law challenges to contractually supported cooperation with federal immigration detainees.

## II. EVOLUTION OF LEGAL CHALLENGES TO DETAINERS

Opponents of detainers express concern that, by honoring these requests, LLEAs or state prisons violate constitutional rights of detainees and needlessly entangle state actors in a federal issue, diverting local resources towards federal policies that many regard as incongruent with local priorities and values.<sup>74</sup> In recent years, individuals held pursuant to detainers have successfully sought injunctions, temporary restraining orders, and damages claims against local officials for alleged violations of their rights under federal law.<sup>75</sup> These cases turn in part on the statutory interpretation of the underlying immigration statute.<sup>76</sup>

### *A. Statutory Interpretation of Immigration Enforcement*

Under the INA, federal immigration officers have broad power to arrest and detain individuals they suspect of having committed an immigration violation.<sup>77</sup> By contrast, the INA allows state and local officers to perform immigration functions in only three scenarios.<sup>78</sup> First, if an “imminent mass influx of aliens . . . presents urgent circumstances[,] . . . the Attorney General may authorize any State or local law enforcement officer” to act as

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71. Telephone Interview with Cullen Bullard, *supra* note 68.

72. See *supra* notes 59–61 and accompanying text (noting one court’s brief response to reliance on an IGSA and party stipulation removing the issue in a similar case).

73. Nathan Sabourin, *High Court Study, We’re from Vermont and We Do What We Want: A “Re”-Examination of the Criminal Jurisprudence of the Vermont Supreme Court*, 71 ALB. L. REV. 1163, 1163–64 (2008).

74. Lasch, *supra* note 14, at 7; VERMONT CRIMINAL JUSTICE TRAINING COUNCIL, FAIR AND IMPARTIAL POLICING POLICY at Introduction (2017), <https://vcjtc.vermont.gov/content/model-fair-and-impartial-policing-policy> [hereinafter FIP] (“Vermont Residents are more likely to engage with law enforcement and other officials . . . if they can be assured they will not be singled out for scrutiny on the basis of the[ir] personal characteristics or immigration status.”).

75. See *infra* note 89 (listing federal court decisions finding compliance with detainers to violate the Fourth Amendment).

76. *Id.*

77. 8 U.S.C. § 1357(a)(2) (2006) (authorizing federal immigration officers “to arrest any alien in the United States”).

78. 8 U.S.C. § 1357(d).

a member of federal immigration enforcement.<sup>79</sup> Second, local law enforcement may enter into a “formal written agreement,” often referred to as a 287(g) agreement.<sup>80</sup> Pursuant to these agreements, LLEAs are subject to the direct supervision of the U.S. Attorney General and must have certification of “training regarding the enforcement of relevant Federal immigration laws.”<sup>81</sup> The statute specifies that LLEAs acting pursuant to a 287(g) agreement “shall be considered to be acting under color of Federal authority for the purposes of determining the liability, and immunity from suit” in a civil action against the officer.<sup>82</sup>

Finally, the statute contains a savings clause at the end, maintaining that the legislation does not prevent local authorities from “otherwise . . . cooperat[ing]” with federal immigration agents.<sup>83</sup> The U.S. Supreme Court interpreted this clause in the 2012 case *Arizona v. United States*.<sup>84</sup> The Court rejected Arizona’s claim that it could use the clause to supplement federal immigration enforcement, holding instead that a state could participate in immigration enforcement only in limited circumstances specified by federal law.<sup>85</sup> Thus, the Court adopted a narrow interpretation of “otherwise to cooperate.”<sup>86</sup> The Court further admonished LLEAs: “As a

79. 8 U.S.C. § 1103(a)(10).

80. 8 U.S.C. § 1357(g)(2). Congress originally added these agreements to the Immigration and Nationality Act as § 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT (2018) [hereinafter ICE, SECTION 287(G)], <https://www.ice.gov/287g>.

81. 8 U.S.C. § 1357(g)(2). ICE requires local officers to complete a four-week training program at the ICE Academy in Charleston, South Carolina, before participating in the 287(g) program. ICE, SECTION 287(G), *supra* note 80. Lunn v. Commonwealth, 78 N.E.3d 1143, 1158 (Mass. 2017).

Among other things, State and local officers performing Federal functions under such agreements must be trained in the enforcement of Federal immigration laws, must adhere to the Federal laws, may use Federal property and facilities to carry out their functions, and are subject to the supervision and direction of the United States Attorney General.”

*Id.*

82. 8 U.S.C. § 1357(g)(8).

83. 8 U.S.C. § 1357(g)(10)

Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—(A) to communicate with the Attorney General . . . or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”

8 U.S.C. § 1357(g)(10).

84. *Arizona v. United States*, 567 U.S. 387, 408 (2012).

85. *Id.* at 408–12 (citation omitted) (“[T]he removal process is entrusted to the discretion of the Federal Government.”).

86. *Id.* at 410.

general rule, it is not a crime for a removable alien to remain present in the United States. If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.<sup>87</sup> By emphasizing the statutorily imposed limits on local involvement in civil immigration matters, the *Arizona* decision allowed the Obama Administration to subsequently restrain states from implementing their own immigration enforcement policies.<sup>88</sup>

### *B. Federal Challenges to Detainers*

Emphasizing the language in *Arizona*, a number of federal district courts have found that LLEAs complying with detainer requests have violated detainees' Fourth Amendment rights.<sup>89</sup> These decisions rely on several predicate holdings.<sup>90</sup> First, courts have found that LLEAs who hold an individual beyond the time when that individual otherwise would have been released, or deny them the opportunity to post bail, have conducted a new

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There may be some ambiguity as to what constitutes cooperation under the federal law . . . [Examples] include situations where States participate in a joint task force with federal officers, provide operations support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities . . . State officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody.”

*Id.* (citations omitted).

87. *Id.* at 407 (citations omitted); *see also Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013) (emphasis in original) (“Although the Supreme Court has not resolved whether local police officers may detain or arrest an individual for suspected *criminal* immigration violations, the Court has said that local officers generally lack authority to arrest individuals suspected of *civil* immigration violations.”).

88. *See generally* OFFICE OF THE PRESS SEC'Y, STATEMENT BY THE PRESIDENT ON THE SUPREME COURT'S RULING ON *ARIZONA V. UNITED STATES* (2012) (discussing the Obama Administration's support to limit local involvement of civil immigration matters).

89. *See Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at \*11 (D. Or. Apr. 11, 2014) (finding that county behavior was “in violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention”); *see generally Morales v. Chadbourne*, 235 F. Supp. 3d 388 (D.R.I. 2017) (finding a constitutional violation by state agent for holding an individual under an ICE detainer, but granting qualified immunity, because at the time of the incident, reasonable a state agent could have assumed that honoring the ICE detainer was legal); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1253 (E.D. Wash. 2017) (ordering the county jail to release the detainee held pursuant to an immigration hold), *appeal dismissed as moot sub nom.*, 716 F. App'x 741 (9th Cir. 2018); *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 946 (D. Minn. 2017) (finding a Fourth Amendment violation for complying with a detainer that constituted a “warrantless arrest”); *Roy v. Cty. of Los Angeles*, No. CV1209012ABFFMX, 2018 WL 914773, at \*23 (C.D. Cal. Feb. 7, 2018) (finding that, because the LLEAs did not have authority to make civil immigration arrests, honoring a detainer was a Fourth Amendment violation), *reconsideration denied*, No. CV1209012ABFFMX, 2018 WL 3439168 (C.D. Cal. July 11, 2018).

90. *See infra* notes 91–94.

arrest subject to the Fourth Amendment's search and seizure provisions.<sup>91</sup> Second, because the decision to issue a detainer is not reviewed by a neutral magistrate, the new arrest is warrantless.<sup>92</sup> Third, enforcement of civil immigration law is a federal, rather than state, responsibility.<sup>93</sup> Fourth, detainer requests are not mandatory directives and therefore do not immunize those who comply with them.<sup>94</sup>

Additionally, ICE's recently adopted policy to issue detainer requests (form I-247) with an accompanying "civil arrest warrant"<sup>95</sup> (forms I-200 or I-205) is immaterial. A Washington District Court entered a Temporary Restraining Order against a county jail that had refused to allow an individual to post bail pursuant to such a warrant, noting that the warrant is a directive only to an "immigration officer," not a state agent.<sup>96</sup> Furthermore, the court rejected the argument that the county could rely on ICE's nominal "probable cause" determination, which consisted of only a checkbox on the warrant containing no specific facts or circumstances, and which was approved not by a judicial officer but by an ICE supervisor.<sup>97</sup>

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91. *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015); *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1008–09 (N.D. Ill. 2016); *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1153 (Mass. 2017); *Miranda-Olivares*, 2014 WL 1414305, at \*11; *Ochoa*, 266 F. Supp. 3d at 1252.

92. *Orellana*, 230 F. Supp. 3d at 946; *Cisneros v. Elder*, No. 2018CV30549, 2018 LEXIS 3388, at \*21 (Co. Dist. Ct., Dec. 6, 2018) (finding that the "continued detention of a local inmate at the request of federal immigration authorities, beyond when he or she would otherwise be released, constitutes a warrantless arrest"); see also *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016) (noting the government had "concede[d] that being detained pursuant to an . . . immigration detainer constitutes a warrantless arrest").

93. *Roy*, 2018 WL 914773, at \*23 (finding that, because LLEAs did not have authority to make civil immigration arrests, honoring a detainer was a Fourth Amendment violation).

94. *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) ("Lehigh County was free to disregard the ICE detainer, and it therefore cannot use as a defense that its own policy did not cause the deprivation of Galarza's constitutional rights.").

95. U.S. IMMIGRATION & CUSTOMS ENF'T, POL'Y NO. 10074.2, ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS 2 (2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf>. In response to a ruling that ICE detainees are warrantless arrests that must be justified by probable cause, the administrative warrant has a box labeled "probable cause" that is checked by an ICE supervisor before being sent to an LLEA. *Id.* (citing *Moreno*, 213 F. Supp. 3d at 1008–09).

96. See *Ochoa*, 266 F. Supp. 3d at 1255 ("Nothing in the administrative warrant indicates that it is directed at Yakima County officials or anyone other than authorized immigration officers."). The Supreme Court noted that such administrative warrants are to be executed by "federal officers who have received training in the enforcement of immigration law." *Arizona v. United States*, 567 U.S. 387, 408 (2012) (citing 8 C.F.R. §§ 241.2(b), 287.5(e)(3)); see also 8 C.F.R. §§ 236.1(b)(1), 241.2(b) (2016) (requiring warrants be issued and served by federal immigration officers).

97. *Ochoa*, 266 F. Supp. 3d at 1253, 1258; *El Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249, 276 (D. Conn. 2008) ("No neutral magistrate (or even a neutral executive official) ever examined the [administrative arrest] warrant's validity. Under Connecticut tort law (and federal constitutional law), the arrest must therefore be treated as warrantless."). Reports have surfaced of ICE agents forging their absent supervisors' signatures on administrative warrants accompanying detainees. Bob Ortega, *ICE*

Finally, courts have found that an IGA providing for payment for housing of federal prisoners in a local facility does not constitute a 287(g) formal written agreement under 8 U.S.C. § 1357(g)(2)–(3).<sup>98</sup> Thus, an IGA does not entitle LLEAs to the grant of federal sovereignty “for purposes of determining the liability, and immunity from suit” that would be accorded to those in a 287(g) agreement and should not forestall detainer litigation.<sup>99</sup>

Despite this string of successful challenges against detainers, a recent Fifth Circuit decision may signal a shift in the federal judiciary’s willingness to entertain Fourth Amendment challenges to detainers.<sup>100</sup> In *City of El Cenizo v. Texas*, the court found that a state anti-sanctuary law mandating that all Texas LLEAs comply with ICE detainers was not facially invalid under the Fourth Amendment.<sup>101</sup> The court disagreed that LLEAs necessarily violate the Fourth Amendment when they make a civil immigration arrest, noting that officers may sometimes make arrests for civil infractions in other contexts.<sup>102</sup> The court also asserted that, pursuant to the collective knowledge doctrine, LLEAs were entitled to rely on ICE’s probable cause determination on the “civil arrest warrant” for Fourth Amendment purposes.<sup>103</sup>

### C. State Law as a Means for Analyzing Detainer Legality

Though the *El Cenizo* case signifies only a single circuit’s response to a facial challenge, the reasoning used undermines two of the major underpinnings of the successful federal claims brought so far.<sup>104</sup> It may also represent a concern that expanding Fourth Amendment protections against detainers could unintentionally implicate the constitutionality of the entire federal immigration enforcement system, to which the courts have

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*Supervisors Sometimes Skip Required Review of Detention Warrants, Emails Show*, CNN (Mar. 13, 2019), <https://www.cnn.com/2019/03/13/us/ice-supervisors-dont-always-review-deportation-warrants-invs/index.html> (reporting additional incidents of supervisors providing pre-signed blank warrants to agents).

98. *Ochoa*, 266 F. Supp. 3d at 1253 (citing 8 U.S.C. § 1357(g) (2006)) (emphasizing that the IGA addresses only housing, and does not “suggest[] the existence of a formal written agreement between Defendants and federal immigration authorities regarding the performance of immigration-officer functions by Defendants.”).

99. 8 U.S.C. § 1357(g)(8).

100. *City of El Cenizo v. Texas*, 890 F.3d 164, 186–90 (5th Cir. 2018).

101. *Id.*

102. *Id.* at 188 (citing arrests of juveniles, the mentally ill, and the incapacitated).

103. *Id.* at 187 (citation omitted) (“Under the collective-knowledge doctrine, moreover, the ICE officer’s knowledge may be imputed to local officials even when those officials are unaware of the specific facts that establish probable cause of removability.”).

104. See *supra* notes 96–98 and accompanying text (describing cases which found civil immigration arrests to be beyond the authority of LLEAs and that LLEAs were not entitled to rely on detainers for probable cause purposes).

traditionally deferred.<sup>105</sup> Thus, those concerned with the potential for constitutional abuses resulting from detainers may need to look for alternative bases to challenge the practice.<sup>106</sup>

Recently, in *Lunn v. Commonwealth*,<sup>107</sup> Massachusetts's highest court explored one such alternative approach. There, Lunn was transported from the county jail to the courthouse, where the sole criminal charge against him was dismissed.<sup>108</sup> However, because the DHS had issued a detainer request against Lunn, the trial judge declined to release him.<sup>109</sup> Instead, court officers kept Lunn in a holding cell for several hours until federal immigration officers arrived to take him into custody.<sup>110</sup> Lunn's counsel, pursuant to state law, filed a petition to a single member of the Massachusetts's highest court the following day, asking that the trial court be ordered to release Lunn.<sup>111</sup> Because Lunn was already in federal custody at that point, the matter was moot.<sup>112</sup> But the single justice reserved and reported the matter to the full court, citing the important, recurrent, and time-sensitive nature of the issue.<sup>113</sup>

Rather than look to constitutional restraints on LLEAs, the *Lunn* court focused instead on the absence of affirmative authority with which LLEAs may make civil immigration arrests in the first place.<sup>114</sup> Because no Massachusetts statutory or common law granted LLEAs the authority to make a civil immigration arrest, such arrests could only be valid if supported by federal law.<sup>115</sup> Massachusetts LLEAs had not entered into a 287(g) agreement (and there was no "mass influx" at the border); therefore, the court found that federal law did not grant the requisite arrest authority to local authorities.<sup>116</sup> Relying on *Arizona*'s narrow interpretation, the *Lunn* court held that the "otherwise to cooperate" clause of federal statute was not an

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105. *Immigration Law*, *supra* note 13, at 670–71 (alteration in original) (citation omitted) (“[F]inding that ICE detainers violate the Fourth Amendment would cast doubt on the constitutionality of immigration detention generally, because many of the problems posed by detainers persist *after* ICE takes custody or when it initiates an arrest on its own.”).

106. *See Lunn v. Commonwealth*, 78 N.E. 3d 1143, 1154 (Mass. 2017) (focusing on the presence of affirmative authority, rather than constitutional challenges).

107. *Id.* at 1143.

108. *Id.* at 1147.

109. *Id.* at 1148.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1159.

115. *Id.* at 1155–56 (examining state common law and statutory law regarding arrest authority). “In the absence of a Federal statute granting State officers the power to arrest for a Federal offense, their authority to do so is a question of State law.” *Id.* at 1154.

116. *Id.* at 1159–60 (quoting 8 U.S.C. § 1103(a)(10) (2009)) (describing requirements of 287(g) agreements, or “emergency cases” of a “mass influx” “near a land border”).



affirmative grant of arrest authority.<sup>117</sup> According to the *Lunn* court, the language simply clarified that the federal statute as a whole did not detract from any pre-existing state authority exercised within the narrowly acceptable range of “cooperat[ion]” with federal objectives.<sup>118</sup> Finally, the *Lunn* court rejected the argument that LLEAs have “inherent authority” to make arrests for federal civil immigration violations absent legislation to the contrary.<sup>119</sup> Thus, Massachusetts LLEAs did not have the requisite authority to hold individuals pursuant to an ICE detainer.<sup>120</sup>

#### *D. Unanswered Questions After Lunn*

By focusing on state law and affirmative grants of authority, rather than restraints imposed by the federal Constitution, the *Lunn* holding presents a viable alternative to the federal Fourth Amendment challenges to detainers.<sup>121</sup> The holding seems readily exportable to other jurisdictions, as in *Cisneros*, where one Colorado state court adopted the *Lunn* approach to enjoin a sheriff from holding a plaintiff on a detainer who would otherwise have posted bail.<sup>122</sup> While the *Lunn* ruling opens up a viable path for challenging detainers without relying on the Fourth Amendment, the ruling leaves two important questions unanswered.<sup>123</sup> *Lunn* did not address detainers that are honored in concert with an IGA bed-renting contract between federal and local authorities, such as that used to hold Francis in a New York jail, or between the Vermont DOC and federal authorities.<sup>124</sup> Further, it is unclear what would happen if the state legislature side-stepped the ruling by enacting legislation granting LLEAs the authority to make civil

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117. *Id.* at 1158 (quoting 8 U.S.C. § 1357(g)(10)). “[I]t is not reasonable to interpret § 1357(g)(10) as affirmatively granting authority to all State and local officers to make arrests that are not otherwise authorized by State law.” *Id.* at 1159.

118. *Id.* at 1158.

119. *Id.* at 1159. “There is no history of ‘implicit’ or ‘inherent’ arrest authority having been recognized in Massachusetts that is greater than what is recognized by our common law and the enactments of our Legislature.” *Id.* at 1157.

120. *Id.* at 1160.

121. *See, e.g., Immigration Law, supra* note 13, at 673 (“*Lunn* thus provides a way to address the rights infringed by ICE’s detainer process without deciding a sensitive constitutional question that implicates federal power and sovereignty as much as standard Fourth Amendment principles.”); *see infra* Part IV (analyzing the *Lunn* case).

122. Sean Turley, *Death by Fifty Cuts: Exporting Lunn v. Commonwealth to Maine and the Prospects for Waging a Frontal Assault on the Ice Detainer System in State Courts*, 70 ME. L. REV. 235, 239 (2018); *Cisneros v. Elder*, 2018 Colo. Dist. LEXIS 2, \*3 n. 1, \*23 (Colo. Dist. Ct. Mar. 19, 2018) (noting a reluctance to imply sheriff powers not expressly granted and that the power to make warrantless arrests is strictly proscribed by statute).

123. *Lunn*, 78 N.E.3d at 1160.

124. *Supra* notes 23–26 and accompanying text.

immigration arrests.<sup>125</sup> The *Lunn* court did not examine detainees through the lens of the *state* constitution.<sup>126</sup> A state constitutional ruling would invoke fundamental rights beyond the reach of state legislation, while remaining below the level of sensitive federal constitutional issues.<sup>127</sup>

### *E. Intergovernmental Agreements and Local Law Enforcement*

Two viable state law challenges to the Vermont DOC's practice of honoring detainees may be available: (1) the *Lunn*-style affirmative authority approach and (2) an as-yet untested state constitutional challenge.<sup>128</sup> The IGA underlying the Vermont DOC immigration holds may complicate both approaches, however. An IGA was not present in *Lunn* and was not ultimately relied upon by LLEAs in *Cisneros*.<sup>129</sup> If—as ICE represented to the Vermont DOC,<sup>130</sup> and as maintained by Sheriff Gaultieri,<sup>131</sup>—an IGA deputizes local authorities into federal agents, then neither challenge is likely to succeed. The INA affirmatively grants arrest power to federal immigration officers,<sup>132</sup> so a *Lunn* challenge would be inapplicable to the contractually deputized local actors. The Supremacy Clause of the federal Constitution immunizes federal agents acting pursuant to federal law from state law, thereby neutralizing any state constitutional challenge.<sup>133</sup> Thus, both available state law challenges are dependent on whether an IGA bed-renting

125. See Memorandum from the ACLU of Mass. & Mass. Immigrant and Refugee Advocacy Coal. (MIRA) to The Honorable Members of the Great and Gen. Court 2 (Aug. 10, 2017) (asserting that any legislation authorizing local police to make arrests based on ICE detainees would violate the Massachusetts and federal constitutions). For example, Massachusetts's Governor Baker responded to the *Lunn* decision by filing legislation that would authorize LLEAs to honor detainees in many situations. Shannon Dooling, *Baker Bill Would Allow Officers to Honor Certain ICE Detainers*, WBUR NEWS (Aug. 1, 2017), <http://www.wbur.org/news/2017/08/01/baker-legislation-ice-detainers>.

126. T. Heuer & D. McFadden, *Massachusetts High Court Rules State Law Does Not Authorize Detention Based on Ice Detainers Alone*, 61 B.B.J. 14, 16 (2017).

127. See *Immigration Law*, *supra* note 13, at 666, 667 (“*Lunn* found a state law mechanism for addressing the constitutional concerns raised by ICE detainees while avoiding thorny questions of how Fourth Amendment protections and federal sovereignty principles play out in the immigration context. Massachusetts prosecutors arraigned Sreynuon Lunn on one count . . .”).

128. *Lunn*, 78 N.E.3d at 1159 n.27.

129. Turley, *supra* note 122, at 251; *Cisneros*, 2018 Colo. Dist. LEXIS 2, \*11–12 (Colo. Dist. Ct. Mar. 19, 2018).

130. See E-mail from Jeffery Curtis, *supra* note 69 (reassuring the DOC that the detainee is “basically in ICE [c]ustody just in your facility” and that “[t]he [IGA] is giving the jail the authority to hold an alien in [c]ustody”).

131. JOSHUA BREISBLATT ET AL., *supra* note 55; see Marrero, *supra* note 56 (maintaining that first having an ICE detainer request, arrest warrant, and probable cause, gives localities a shield from liability because they are acting as quasi-deputized federal officers).

132. 8 U.S.C. § 1357(a)(2) (2006).

133. *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890) (finding that if a federal official acted as “he was authorized to do by the law of the United States . . . and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state”).

contract between local and federal authorities legally transforms the former into the latter.

### III. WHO IS IN CHARGE HERE?: A LEGAL ODYSSEY IN SEARCH OF LEGAL LIABILITY WHEN A STATE PRISON CONTRACTS TO HOLD FEDERAL PRISONERS

If an IGA contract with federal authorities converts state officials into federal immigration officers, then they enjoy federally granted immigration arrest power and may be immune to state constitutional requirements.<sup>134</sup> Thus, there is no state law challenge to their practice of honoring detainees. An IGA's ability to deflect legal challenges has not yet received full judicial treatment in the detainer context, and the overlay of contractual and federalism principles can lead to unexpected outcomes.<sup>135</sup> Law developed in a handful of comparable circumstances sheds some light on the potential effect of an IGA.<sup>136</sup> To better understand how a federal-state IGA might affect immigration detainees, this Part examines analogous holdings regarding the validity of intergovernmental contracts that contravene state law, and those that determine whether federal or local entities incur the benefits and liabilities of holding prisoners pursuant to similar agreements.<sup>137</sup> The holdings in these contexts, while not entirely consistent, generally show that courts are unwilling to accept that contractual terms alone can circumvent duly enacted law, often looking to the language of enabling statutes and other related statutory provisions.<sup>138</sup> Further, courts generally view local jailors, rather than federal officials, as liable for what happens to prisoners held for the federal government in state or local facilities.<sup>139</sup>

#### *A. Limits on Spending Power*

The U.S. Supreme Court held in *Dole* that, under the constitutionally granted spending power, Congress may attach conditions to federal funds, so

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134. See 8 U.S.C. § 1357(a)(2) (authorizing federal immigration officers to arrest any undocumented immigrant in the United States).

135. See Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1074 (2015) (comparing the uncertainty of state implementation of federal programs to that of sending a teenager to the grocery store).

136. See *infra* Parts III.A (discussing the law of spending power), III.B (discussing the law of federal immigration detainees in county jails), III.C (discussing the law of fee disputes between sheriffs and county governments), III.D (discussing the law of federal prisoners in local facilities), III.E (discussing the law of interstate compacts), III.F (discussing the law of tribal-state compacts).

137. *Id.*

138. *Id.*

139. *Id.*

long as it does not cross the line from inducement to coercion.<sup>140</sup> Furthermore, the Court noted that Congress may not use this power to “induce the States to engage in activities that would themselves be unconstitutional.”<sup>141</sup> Presumably, the Court was referring to activities that would violate the *federal* Constitution. While the \$130 per detainee per day the USMS offers to the Vermont DOC<sup>142</sup> likely does not amount to coercion, the funds could arguably be inducing the DOC to violate its *state* constitution.<sup>143</sup> A court could analogize *Dole* to find that a contract may not condition the receipt of federal funds on violations of the state’s constitution.

*B. Pre-Emption: Federal Regulations in Conflict with Contractual Provisions for Holding Immigration Detainees in County Jails*

A closer analogy can be found in the immigration context.<sup>144</sup> In the two months following the September 11th terrorist attacks, federal authorities used immigration laws to detain over 1,200 individuals, by and large men from Arab or South Asian countries.<sup>145</sup> Most were held indefinitely without charges before eventually being deported.<sup>146</sup> The Justice Department, citing national security concerns, refused to release the names of the detainees.<sup>147</sup> Because the detainees were held in New Jersey county jails pursuant to an IGSA, the ACLU of New Jersey sought to compel the release of information pursuant to New Jersey state law.<sup>148</sup> In response, the Immigration and Naturalization Services (INS) promulgated an emergency interim regulation, which prevented any detention facility that contracted to hold federal detainees from releasing prisoners’ identifying information, regardless of contractual provisions or state law to the contrary.<sup>149</sup>

On appeal, a New Jersey state court agreed with the INS and held that the federal regulation pre-empted state law, barring the release of prisoners’

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140. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

141. *Id.* at 210–11 (“Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress’[s] broad spending power.”).

142. Memorandum from Prisoner Operations Division, *supra* note 67.

143. *See infra* Part V (analyzing detainers under Vermont’s state constitution).

144. *Infra* notes 145–54.

145. Ronald K. Chen, *State Incarceration of Federal Prisoners After September 11 Whose Jail Is It Anyway?*, 69 BROOK. L. REV. 1335, 1335 (2004).

146. *Id.* at 1335–36.

147. *Id.*

148. *Id.* at 1337.

149. 8 C.F.R. § 236.6 (2003).

identities.<sup>150</sup> The court rejected the ACLU's claim that the terms of the contract, which specified that state law would apply to prisoners, should control.<sup>151</sup> Instead, the court held that "the pre-emption doctrine is not subject to limitation by any agreement of the parties."<sup>152</sup> While the case ultimately upheld secret immigration arrests, the ruling relied on finding that duly enacted federal law could abrogate the terms of the contractual IGSA, rather than the inverse.<sup>153</sup> Analogously, Vermont's DOC should not expect that *state* statutory or constitutional restraints on immigration arrests are "subject to limitation by an[] agreement" made with federal authorities.<sup>154</sup>

### *C. Fee Disputes Between Sheriffs and County Governments*

A third body of relevant law developed in the early 20th-century recognizes disputes regarding the allocation of payments the federal government made to local sheriffs in exchange for holding federal prisoners.<sup>155</sup> In these cases, the sheriffs generally claimed that, by housing federal prisoners, they had become agents of the federal government and were personally entitled to retain excess federal funds not spent providing for the prisoners.<sup>156</sup> Conversely, the county governments claimed that the sheriffs were acting as local employees, and the unused federally disbursed funds belonged to the county.<sup>157</sup> Thus, the local sheriffs would be entitled to the unused funds if they could show that their agreement to house federal prisoners had deputized them into federal agents.<sup>158</sup>

With some exceptions, the courts generally ruled for the county, finding that the sheriff and jail were not federal entities, despite holding prisoners for the federal government.<sup>159</sup> These courts relied heavily on the language of

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150. *ACLU of New Jersey, Inc. v. Cty. of Hudson*, 799 A.2d 629, 650 (N.J. Super Ct. App. Div. 2002).

151. *Id.* at 649–50.

152. *Id.* at 650.

153. *Id.* at 653.

154. *Id.* at 650.

155. *See infra* note 156 and accompanying text (collecting cases of disputes between the federal government and localities regarding excess funds as payment for holding for ICE).

156. *Majors v. Lewis & Clark Cty.*, 201 P. 268–69 (Mont. 1921); *Holland v. Fayette Cty.*, 41 S.W.2d 651, 653–54 (Ky. 1931); *Los Angeles Cty. v. Cline*, 197 P. 67, 68 (Cal. 1921); *Bd. of Chosen Freeholders of Hudson Cty. v. Kaiser*, 69 A. 25, 27–28 (N.J. 1908), *aff'd*, 71 A. 1133 (N.J. 1908); *Avery v. Pima Cty.*, 60 P. 702, 704–06 (Ariz. 1900).

157. *Majors*, 201 P. at 269; *Holland*, 41 S.W.2d at 654; *Cline*, 197 P. at 68; *Kaiser*, 69 A. at 28; *Avery*, 60 P. at 704.

158. *Majors*, 201 P. at 269 (showing no argument by the sheriffs that they were deputized by the federal agency, only whether excess compensation for prisoners can be kept personally).

159. *Compare Holland*, 41 S.W.2d at 653–54 (federal funds "belong[] not to the jailer but to the county in whose jail the prisoner is kept"), and *Cline*, 197 P. at 68 (finding it "sufficiently clear" that the

state and federal law in determining whether the agreement to hold prisoners for the federal government provided sheriffs with status as federal agents.<sup>160</sup>

The relevant state and federal law underpinning the DOC's relationship with ICE supports the conclusion that state prisons remain state entities when acting pursuant to an IGA.<sup>161</sup> The Vermont statute authorizing the IGA mentions only receiving federal prisoners, not arresting them.<sup>162</sup> In fact, the state statutory requirement that such prisoners be "subject to the same rules and discipline to which other inmates are subjected" suggests that nominal federal involvement does not detract from the detainees' rights under state law.<sup>163</sup> Likewise, the federal statute authorizing the IGA discusses only payment for detention of federal prisoners.<sup>164</sup> It does not purport to confer an arrest power, which is expressly granted by the INA only pursuant to 287(g) agreements and during a "mass influx" of undocumented immigrants.<sup>165</sup> Similarly, the contractual language of the IGA between the DOC and federal authorities discusses payment for housing and feeding prisoners, while making no mention of arresting them.<sup>166</sup> The underlying enabling statutes, critical to the fee dispute cases, further support the conclusion that the IGA is simply a means of payment in exchange for housing individuals already

sheriff was not "acting for and as the agent of the United States"), and *Kaiser*, 69 A. at 28 (rejecting the "conten[tion] that in caring for and feeding federal prisoners and witnesses the sheriff is the agent of the United States marshal"), with *Majors*, 201 P. at 270 ("The funds received from the United States were not in any sense public funds and had no place in the county treasury," but instead belonged to the sheriff). Apparently, neither party argued that the remaining funds were intended to be spent providing for the well-being of the prisoners. *Id.* at 268–70.

160. *Avery*, 60 P. at 704–06; *Holland*, 41 S.W.2d at 653–54 (describing how state constitution capped sheriff's income); *Cline*, 197 P. at 68 (finding that the state and federal statutes "make[] it sufficiently clear that [the] contention [that the sheriff is acting as the agent of the United States] cannot be upheld"); *Kaiser*, 69 A. at 28 (citation omitted) ("[T]he act concerning sheriffs makes it the duty of the sheriff of every county to receive all persons committed to his custody by the authority of the United States. He takes them into his custody as sheriff.").

161. VT. STAT. ANN. tit. 28, § 707(b) (2019). Additionally, the state statute makes clear that local officials are not entitled to the proceeds of such arrangements with the federal government. *Id.* ("All payments received from the United States for the confinement of such persons [federal prisoners] referred to in subsection (a) of this section shall be made to the State Treasurer.").

162. *Id.* § 707(a).

The Department shall have the authority, on such terms and conditions as it may prescribe, to receive into custody any person ordered detained or convicted by any court of the United States. Any person against whom such sentence is rendered, while he or she is confined at any such facility, shall be subject to the same rules and discipline to which other inmates are subjected.

*Id.*

163. *Id.*

164. District of Columbia Appropriations Act—FY 2001, Pub. L. No. 106-553, 114 Stat 2762 (2000) (authorizing funding "[f]or necessary expenses . . . relating to the detention of Federal prisoners in non-Federal institutions or otherwise in the custody of the United States Marshals Service; and the detention of aliens in the custody of the Immigration and Naturalization Service").

165. *Arizona v. United States*, 567 U.S. 387, 408–10 (2012).

166. Memorandum from Prisoner Operations Division, *supra* note 67.

duly arrested or convicted by federal authorities.<sup>167</sup> Thus, under the logic of these fee dispute cases, an IGA does not allow state DOC officials to become federal immigration agents authorized to make a “new arrest” by honoring a detainer at the behest of federal authorities.<sup>168</sup>

#### *D. Liability for Federal Prisoners in Local Facilities*

Courts have addressed the legal status of LLEAs in the context of liability for the treatment of prisoners held for the federal government in local facilities.<sup>169</sup> While LLEAs may be liable to the federal government for failing to uphold federal obligations,<sup>170</sup> the federal government is generally not liable to federal prisoners for conditions at local facilities.<sup>171</sup> This tension is highlighted in the language of the 1815 *Randolph* case, which initially noted that “[f]or certain purposes, and to certain intents, the state jail lawfully used by the United States, may be deemed to be the jail of the United States, and that keeper to be keeper of the United States.”<sup>172</sup> However, the *Randolph* Court then went on to negate federal liability by finding that “[t]he keeper of a state jail is neither in fact nor in law the deputy of the marshal . . . [and] [t]he keeper becomes responsible for his own acts, and may expose himself by misconduct to the ‘pains and penalties’ of the law.”<sup>173</sup> Thus, local jailors who hold prisoners at the federal government’s request are responsible to both prisoners *and* the federal government for their actions, while distant federal officials are not.<sup>174</sup>

Under the Federal Tort Claims Act (FTCA), modern courts have also found that federal authorities are generally not liable for conditions in a local facility over which federal officials do not have direct control.<sup>175</sup> While one D.C. Circuit court declared that “legal custody is not co-extensive with physical control,” it went on to “conclude that [Plaintiff] sued the wrong

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167. See *Arizona*, 567 U.S. at 410 (concluding that federal statutes provide the legal authority for lawful federal arrests of undocumented immigrants); Memorandum from Prisoner Operations Division, *supra* note 67 (enumerating IGA requirements as only reimbursement for services with no mention of arrests).

168. See *supra* notes 156–60 and accompanying text.

169. See *infra* notes 170–80 and accompanying text (showing a consensus that, in general, the federal government is not liable for the conditions and treatment at local facilities by LLEAs, however, LLEAs and the state can be held liable).

170. *Bay Cty. v. Marvin*, 226 N.W. 247, 248 (Mich. 1929) (citations omitted) (“If the sheriff, while acting as jailer of the United States, violates the order of commitment respecting escape, cruel and unusual punishment; or otherwise, he is answerable as such jailer to the federal court.”).

171. *Randolph v. Donaldson*, 13 U.S. 76, 85–86 (1815).

172. *Id.* at 86.

173. *Id.* at 85–86.

174. *Id.* at 86.

175. See *infra* notes 176–80 and accompanying text.

government here; it is the District of Columbia, his immediate jailer, from whom he should have sought redress for his injuries.”<sup>176</sup> Characterizing the relationship between the U.S. Bureau of Prisons and the D.C. Department of Corrections as “the functional equivalent of the ‘contractor’ relationship” formed with state-run facilities holding federal prisoners, the court understood that the local jailkeeper, not a distant federal official, is responsible to those it houses.<sup>177</sup> The U.S. Supreme Court, relying on statutory and contractual language, found that a “sheriff’s employees were employees of a ‘contractor with the United States,’ and not, therefore, employees of a ‘Federal agency,’” thereby immunizing federal officials for local agents’ acts under the FTCA.<sup>178</sup>

Because the federal government is generally not responsible for the treatment of prisoners held at its behest in local facilities, a court would likely conclude that it is a plaintiff’s “immediate jailer, from whom he should [seek] redress for his injuries.”<sup>179</sup> Thus, the state DOC likely bears the same constitutional responsibilities to those it holds pursuant to detainers for the benefit of the federal government as to those held on state charges.<sup>180</sup>

*E. How to Contractually Circumvent Your Own Law, Part I: Colorado Life Insurance and the Interstate Compact*

Outside of the prison context, courts have occasionally attempted to untangle overlapping statutory and contractual legal principles in the form of an interstate compact.<sup>181</sup> In *Amica Life Ins. Co. v. Wertz*, the district court recounted how the Colorado legislature enacted the Interstate Insurance Product Regulation Compact, by which it entered into a contractual arrangement with other member states, forming an Interstate Commission.<sup>182</sup> The compact authorized the Commission to promulgate uniform insurance regulations, “which shall have the force and effect of law and shall be binding

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176. *Cannon v. United States*, 645 F.2d 1128, 1137, 1141 n.53, 1142 (D.C. Cir. 1981). Agencies of the District of Columbia are not federal agencies under the FTCA. *Id.* at 1137.

177. *Id.* at 1140–41.

178. *Logue v. United States*, 412 U.S. 521, 530 (1973) (“[T]hat the deputy marshal had no authority to control the activities of the sheriff’s employees is supported by both the enabling statute and the contract actually executed between the parties.”).

179. *Cannon*, 645 F.2d at 1142.

180. *See id.* (holding a detainee jailed for a federal charge in a state jail can legally sue the state jailer for its negligence).

181. *Amica Life Ins. Co. v. Wertz*, 350 F. Supp. 3d 978 (D. Colo. 2018). Interstate compacts are contracts between states. COUNCIL OF STATE GOV’TS—NAT’L CTR. FOR INTERSTATE COMPACTS, UNDERSTANDING INTERSTATE COMPACTS 1, [http://www.gsgp.org/media/1313/understanding\\_interstate\\_compacts-csgncic.pdf](http://www.gsgp.org/media/1313/understanding_interstate_compacts-csgncic.pdf) (last visited Apr. 19, 2020).

182. *Wertz*, 350 F. Supp. 3d at 982–83.



in the Compacting States.”<sup>183</sup> Pursuant to a regulation promulgated by the Commission, Amica Life Insurance Company issued policies that excluded from coverage death by suicide within the first two years of the policy.<sup>184</sup> However, an independent Colorado statute mandated that suicide exclusions not extend beyond one year.<sup>185</sup> A policy-holder committed suicide 14 months after purchasing the policy, thus excluded from coverage by the interstate compact regulation, but protected by the conflicting Colorado law.<sup>186</sup>

Amica sought a declaratory judgment against the policy’s beneficiary, claiming that the Commission regulation, rather than state statute, controlled.<sup>187</sup> The district court “conclude[d]—to its surprise—that the Colorado Legislature may validly delegate to an administrative agency the power to promulgate a regulation that modifies a statute.”<sup>188</sup> The court further held that, because there was no legal barrier to such delegation directed towards an “interstate administrative agency,” rather than a typical intrastate executive agency, the exclusion was valid.<sup>189</sup>

However, while the court agreed with Amica that the Colorado legislature could delegate an equivalent amount of rulemaking power to an interstate agency as it could to its own state administrative bodies, it disagreed with the contention that the contractual nature of an interstate compact could allow the legislature to delegate *more* rulemaking power to an interstate agency than it could otherwise.<sup>190</sup> After a lengthy analysis of caselaw, the court rejected Amica’s “argument that an interstate compact is impervious to state constitutional challenge once enacted.”<sup>191</sup> The court disagreed with the assertion that the terms “in an interstate compact are not . . . limited by any specific state constitutional restrictions; rather as with any ‘contract,’ the subject matter is largely left to the discretion of the parties.”<sup>192</sup> Regarding the rights of private parties affected by the compact, the court was equally unconvinced by the claim that “the terms of the compact and any rules and regulations authorized by the compact . . . supersede any substantive state laws that may be in conflict.”<sup>193</sup>

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183. COLO. REV. STAT. § 24-60-3001 (2005), Art IV, § 1.

184. *Wertz*, 350 F. Supp. 3d at 984.

185. COLO. REV. STAT. § 10-7-109.

186. *Wertz*, 350 F. Supp. 3d at 984.

187. *Id.* at 981.

188. *Id.* at 982.

189. *Id.*

190. *Id.* at 1000–01.

191. *Id.* at 990–97 (finding such compacts “do[] not prevent a citizen aggrieved by a particular compact from challenging the state’s authority under the state constitution to enter into the compact”).

192. *Id.* at 978, 997 (omissions in original) (quoting MICHAEL L. BUENGER ET AL., *THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS* § 1.2.1 at 16 (2d ed. 2016)).

193. *Id.* at 998 (quoting BUENGER ET AL., *supra* note 192, § 3.4, at 103).

The court concluded that the interstate compact did not foreclose private constitutional rights by considering a hypothetical “interstate legislation compact.”<sup>194</sup> The court imagined this compact could result in regulations allowing for the enactment of legislation without a majority vote in both houses of the legislature or without the governor’s signature.<sup>195</sup> The court expressed skepticism that such a “sea-change amendment to the state’s constitution” could be achieved by contract.<sup>196</sup>

Though the *Amica* case involves a delegation question compact between states, the court’s reasoning rebuts the notion that states may contract around their own duly enacted law.<sup>197</sup> While the Vermont DOC has contracted with a federal entity, the *Amica* case undermines the argument that an IGA contract has allowed state officials to supersede substantive law that may prohibit state officials from honoring detainer requests.

*F. How to Contractually Circumvent Your Own Law, Part II: Wisconsin Gaming and the Tribal-State Compact*

Similar questions have arisen in the context of “tribal-state compact” negotiations of casino gaming terms between tribal and state governments pursuant to the federal Indian Gaming Regulatory Act of 1988 (IGRA).<sup>198</sup> Following a failed attempt by Wisconsin’s Republican legislature to take control of compact renegotiations from its Democratic governor, whom they accused of giving tribes a “sweetheart deal” during a 2003 renegotiation, the Joint Committee on Legislative Action brought a suit against the governor.<sup>199</sup>

The Wisconsin Supreme Court, in *Panzer v. Doyle*, agreed with the legislature that the governor had exceeded his authority in negotiating the compact amendments.<sup>200</sup> The Court expressed concern that the indefinite duration of the compact amendments allowed the Governor to circumvent

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194. *Id.*

195. *Id.*

196. *Id.* Appeal was pending as of this writing. *Amica Life Insurance Co. v. Wertz*, No. 18-1455, appeal docketed (10th Cir. Nov. 23, 2018).

197. See *Wertz*, 350 F. Supp. 3d at 997 (alterations omitted) (reasoning that forcing Colorado to accept an interstate compact “even if the legislature exceeded its constitutional authority to delegate when it enacted the Compact” would allow states to contract around their own constitutions by entering into a compact).

198. 25 U.S.C. §§ 2701–21 (2000).

199. See Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. L. REV. 971, 993–95 (2007) (recounting Wisconsin state political conflicts between a republican statehouse and democratic governor over negotiations with local tribes, ending in a suit against the sitting governor).

200. *Panzer v. Doyle*, 680 N.W.2d 666, 691 (Wis. 2004), *abrogated by Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408 (Wis. 2006).

key constitutional constraints on his authority.<sup>201</sup> Additionally, the Court found that a 1993 amendment to the Wisconsin constitution was “absolutely clear” that, with several inapplicable exceptions, “the legislature may not authorize *gambling* in any form.”<sup>202</sup> Thus, the Court was “unable to conclude that the legislature . . . could delegate such power [to authorize gaming activity] in light of the 1993 constitutional amendment.”<sup>203</sup> The holding suggested that contracts between governments cannot supersede duly enacted state law to the contrary.<sup>204</sup>

After two years, the Wisconsin Supreme Court appeared to reverse course in *Dairyland Greyhound Park, Inc. v. Doyle*.<sup>205</sup> Focusing on the state’s “contractual obligations,” the Court held that “[b]ecause the Original Compacts [predating the 1993 constitutional amendment] contemplated extending and amending the scope of Indian gaming, the parties’ right of renewal is constitutionally protected” and was unaffected by the subsequent state constitutional amendments.<sup>206</sup> The divided opinion highlighted a rift in the Court and an acrimonious political backdrop.<sup>207</sup>

Assuming these opinions are not mere political artifacts, together they seem to stand for the proposition that a state may not enter into a contract with another government that violates its own state law. However, once a state has entered into a valid contract, the state may not void that contract through subsequent constitutional or statutory amendment. Under this logic, the Vermont DOC’s 2011 IGA with federal authorities is at least subject to pre-existing state laws.<sup>208</sup> Wisconsin’s tribal gaming cases further undermine the argument that the DOC’s IGA with federal authorities can subvert Vermont state law.<sup>209</sup>

Taken together, these various areas of law suggest that state and local entities, such as the DOC, cannot rely on an IGA contract to avoid state law challenges to the practice of honoring detainees. Courts frown on the use of

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201. *Id.* (“The electorate might be able to voice its displeasure, and the Governor might in theory pay a heavy political price, but the voters would be powerless to elect a governor who could impact the terms that had already been agreed to.”).

202. *Id.* at 693 (emphasis in original).

203. *Id.* at 697.

204. *Id.* at 697–98.

205. See *Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 417, 444 (Wis. 2006) (concluding that rules of contracts and the contract clauses of the federal and Wisconsin constitutions protect the parties’ right to renew and expand Indian gaming); Rand, *supra* note 199, at 991 (describing the chronology of the compact negotiations and the constitutional amendment).

206. *Dairyland*, 719 N.W.2d at 417, 444.

207. *E.g., id.* at 443–44 (footnote omitted) (“This decision has nothing to do with making one Governor look bad and another Governor look good.”).

208. Because the term is at-will, it may be subject to state law created subsequently as well.

209. See *supra* notes 198–207 and accompanying text.

spending power to induce constitutional violations.<sup>210</sup> When a duly promulgated immigration detention regulation conflicts with contractual terms of a jail IGA, the regulation controls.<sup>211</sup> When sheriffs hold prisoners at the behest of federal authorities, they are generally viewed as county employees rather than federal agents for payment purposes.<sup>212</sup> Local jailors, rather than federal officials, are legally responsible for conditions in their facilities, even when holding the prisoners for the federal government.<sup>213</sup> Finally, courts are highly suspicious of state-level governments attempting to supersede their own laws by contracting with other governments.<sup>214</sup> In most of these cases, the strength of the contractual agreement is considered in light of the enabling and surrounding statutes, as well as the language of the agreement itself.<sup>215</sup> Thus, a court is unlikely to accept that an IGA for payment and housing converts state employees and facilities into their federal counterparts, thereby steamrolling the INA's highly restrictive statutory framework for local participation in immigration enforcement. The presence of such an IGA should not affect potential state law challenges to detainer practices.

#### IV. APPLYING *LUNN* TO VERMONT

Finding that the INA did not affirmatively authorize state or local officials to make civil immigration arrests without a formal 287(g) agreement, the *Lunn* court concluded that detainers constitute warrantless arrests requiring explicit state law authorization.<sup>216</sup> Courts in Colorado, New York, California, and Washington state have since followed suit, highlighting an absence of state law authorizing civil immigration arrests.<sup>217</sup> Assuming that an IGA does not convert local or state agents and holding cells into their federal counterparts for purposes of arrest,<sup>218</sup> the *Lunn* ruling should apply to

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210. *Supra* Part III.A.

211. *Supra* Part III.B.

212. *Supra* Part III.C.

213. *Supra* Part III.D.

214. *Supra* Parts III.E–F.

215. *Supra* Parts III.A–F.

216. *Supra* notes 114–20 and accompanying text.

217. *Cisneros v. Elder*, 18CV30549, 2018 LEXIS 3388, at \*26 (Co. Dist. Ct. Dec. 6, 2018); *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 43 (N.Y. App. Div. 2018); see *Gonzalez v. Immigration & Customs Enf't*, 416 F. Supp. 3d 995, 1016 (C.D. Cal. 2019); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1254 (E.D. Wash. 2017) (concluding that, in the absence of clear state law or a written agreement with state and local governments and the Attorney General, state and local law enforcement officers are not qualified to make civil immigration arrests), *appeal dismissed as moot sub nom.*, 716 F. App'x 741 (9th Cir. 2018).

218. *Supra* Part III. Neither does an IGA operate as an independent federally granted arrest authority. See *supra* Parts III.C–D and accompanying text (outlining how the IGA's enabling statute

all states with legal codes similarly devoid of civil immigration arrest powers.<sup>219</sup> Those opposed to detainers may use this approach to articulate their concerns without invoking sensitive Fourth Amendment principles. The DOC's practice of honoring detainers in Vermont is at least as vulnerable to legal challenge as was the practice the *Lunn* court struck down in Massachusetts.<sup>220</sup>

#### *A. Detainers as Warrantless Arrests Under Vermont State Law*

The first step in detainer litigation is establishing that the officer honoring the detainer has conducted a new arrest.<sup>221</sup> Because the individual was legally free at the moment their state charges were resolved, courts have found that the subsequent failure to release them (or provide an opportunity to post bail) pursuant to a detainer is the legal equivalent of arresting the individual a second time, requiring an independent legal justification.<sup>222</sup> Such an arrest is distinguished from a brief detention of "an individual for investigatory purposes."<sup>223</sup> Vermont recognizes these so-called "*Terry* stops."<sup>224</sup> However, as the *Lunn* court made clear, detainers serve no "investigatory purpose" and are "not necessarily brief" enough to be categorized as such.<sup>225</sup>

Not only do local or state officials conduct an arrest by honoring a detainer, but the arrest is of the "warrantless" variety.<sup>226</sup> An immigration detainer form states that "DHS has determined that probable cause exists that the subject is a removable alien," and is signed by an ICE officer selecting

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authorizes payment, but not an arrest power that would eclipse and render superfluous the INA's carefully constructed arrest and training provisions).

219. Turley, *supra* note 122, at 251.

220. *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1148 (Mass. 2017).

221. *Id.* at 1157.

222. *See supra* note 74 and accompanying text; *Lunn*, 78 N.E.3d at 1153–54.

223. *Lunn*, 78 N.E.3d at 1153.

224. *State v. Adams*, 131 Vt. 413, 415–18, 306 A.2d 92, 94–95 (Vt. 1973), *overruled on other grounds* by *State v. Dacey*, 138 Vt. 491, 495–97, 418 A.2d 856, 859 (Vt. 1980) (citing *Terry v. Ohio*, 392 U.S. 1, 12–13 (1968)) (finding that "an officer [may] engag[e] in non-restraining encounters with citizens").

225. *Lunn*, 78 N.E.3d at 1153; *see also* *Cisneros v. Elder*, 2018CV30549, 2018 LEXIS 3388, at \*18 (Co. Dist. Ct. Dec. 6, 2018) (citation omitted) ("The duration of reasonable *Terry* stops is typically measured in minutes, not hours or days."); *United States v. Tucker*, 610 F.2d 1007, 1011–13 (2d Cir. 1979) (explaining that detention of several hours is an arrest, rather than a *Terry* stop).

226. *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 946 (D. Minn. 2017) (finding a Fourth Amendment violation for complying with detainer that constituted a "warrantless arrest"); *Cisneros*, 2018 LEXIS 3388, at \*21 (finding that the "continued detention of a local inmate at the request of federal immigration authorities, beyond when he or she would otherwise be released, constitutes a warrantless arrest"); *see also* *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016) (noting the government had "concede[d] that being detained pursuant to an . . . immigration detainer constitutes a warrantless arrest.").

one of four possible justifications.<sup>227</sup> Even when accompanied by an “administrative warrant,” containing the same generic probable cause determination approved by an ICE supervisor, the detainer’s lack of an individualized fact-specific determination of probable cause by an independent judicial officer has caused courts to view detainers as warrantless arrests.<sup>228</sup> Vermont statute requires that the judiciary only grant an arrest warrant where an officer presents, under oath, an affidavit or sworn statement to a “judicial officer,” showing “substantial evidence” sufficient to support a finding of probable cause.<sup>229</sup> Because ICE detainers are unsupported by such a sworn statement presenting evidence of probable cause to a judicial officer,<sup>230</sup> Vermont DOC officials who hold individuals pursuant to such detainers are conducting a new warrantless arrest.

*B. Show Me Your Papers: The Search for Authority with Which to Conduct Warrantless Immigration Arrests*

The *Lunn* court next turned its attention to sources of authority for state agents to make such arrests.<sup>231</sup> Absent specific federal statutory instruction, state law controls the authority of state officers to make arrests for federal crimes.<sup>232</sup> Rule 3 of the Vermont Rules of Criminal Procedure governs warrantless arrests, granting law enforcement officers the authority to arrest without a warrant those whom the officer has probable cause to believe have committed a felony or, if the crime was committed in the presence of the officer or is one of a set of listed exceptions, a misdemeanor.<sup>233</sup> The rule also allows warrantless arrests when an officer believes the individual has violated a condition of probation, supervised community sentence, parole, or furlough.<sup>234</sup>

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227. U.S. DEP’T OF HOMELAND SEC., DHS FORM I-247A, NOTICE OF ACTION 1 (2017). These include (1) the presence of a “final order of removal against the alien,” (2) pending “ongoing removal proceedings,” (3) “[b]iometric confirmation of the alien’s identity and a records check of federal databases . . . indicat[ing] . . . removab[ility],” or (4) “[s]tatements made by the alien to an immigration officer and/or other reliable evidence” of removability.” *Id.*

228. *Supra* Part II.B; *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1252–53 (E.D. Wash. 2017) (“[T]he probable cause determination here was made by an ICE officer, not a neutral magistrate.”), *appeal dismissed as moot sub nom.*, 716 F.App’x 741 (9th Cir. 2018); *see also* Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 161 (2015) (footnote omitted) (“In immigration, ‘warrants’ are signed only by the law enforcement agency, so that in criminal law terms immigration enforcement makes warrantless arrests the norm.”).

229. Vt. R. Crim. P. 4(a)–(b).

230. *Supra* text accompanying note 228.

231. *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1154 (Mass. 2017).

232. *Id.* (citing *United States v. Di Re*, 332 U.S. 581, 589–90 (1948)).

233. Vt. R. Crim. P. 3(a)–(c).

234. *Id.* at 3(d).

The rule requires that those arrested without a warrant be “brought before the nearest available judicial officer without unnecessary delay”<sup>235</sup> to review the determination that “there is probable cause to believe that an offense has been committed” by the arrestee.<sup>236</sup> The Vermont Supreme Court has held that “[p]robable cause for issuance of an arrest warrant or a warrantless arrest exists when facts and circumstances known to an officer are sufficient to lead a reasonable person to believe that a crime was committed and that the suspect committed it.”<sup>237</sup>

Presence in the country without legal status is a civil, rather than criminal, violation that may render the non-citizen removable.<sup>238</sup> Thus, detainees (form I-247), even when accompanied by an administrative warrant (form I-200 or I-205), lack both the judicial review and criminal element required to fall under Vermont’s warrantless arrest statutes.<sup>239</sup> In fact, the Vermont Rules of Civil Procedure prohibit all forms of civil arrest before final judgment other than for contempt of court or failure to obey a subpoena.<sup>240</sup> Thus, Vermont state law forbids, rather than authorizes, state and local officials from making civil immigration arrests, further negating the argument *Lunn* rejected: that LLEAs enjoy an “inherent” or “implicit” arrest power in absence of laws to the contrary.<sup>241</sup>

The Vermont Rules of Criminal Procedure grant warrantless arrest power to law enforcement officers.<sup>242</sup> The rules define law enforcement officers as state police, sheriff’s department personnel, municipal police, and

235. *Id.* at 3(g).

236. *Id.* at 5(c).

237. *State v. Arrington*, 2010 VT 87, ¶ 11, 188 Vt. 460, 465, 8 A.3d 483, 487 (internal quotes omitted). The Vermont Rules of Criminal Procedure do not define the term “offense,” however the New York Penal Code defines the term in a similar provision as “conduct for which a sentence to a term of imprisonment or to a fine is provided” by law. N.Y. Penal Law 40 § 10.00(1) (McKinney 2019). “Removable aliens are subject to deportation, not a term of imprisonment or fine,” and therefore are not subject to the code’s warrantless arrest provisions. *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 44 (N.Y. App. Div. 2018).

238. *See supra* Part II.B. and accompanying text (outlining the possible legal consequences for non-citizens); 8 U.S.C. § 1227 (a)(1)(B); *Hinds v. Lynch*, 790 F.3d 259, 264 (1st Cir. 2015) (citation omitted) (internal quotation marks omitted) (“[T]he Court has consistently classified removal as a civil rather than a criminal procedure.”); *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1155 n.22 (Mass. 2017) (distinguishing detention based solely on a “civil immigration detainee” from one based on “probable cause that a Federal criminal offense had been committed”); *Wells*, 2018 WL 5931308, at \*7 (citation omitted) (“Immigration violations, as considered in the matter sub judice, are not crimes but rather are civil matters.”).

239. *See supra* text accompanying notes 231–37.

240. Vt. R. Civ. P. 4.3.

241. *Lunn*, 78 N.E.3d at 1157 (footnote omitted) (“Where neither our common law nor any of our statutes recognizes the power to arrest for Federal civil immigration offenses, we should be chary about reading our law’s silence as a basis for affirmatively recognizing a new power to arrest . . . under the amorphous rubric of ‘implicit’ or ‘inherent’ authority.”).

242. *See* Vt. R. Crim. P. 3 (discussing how law enforcement officers are granted warrantless arrest power).

“any other person authorized to make an arrest by the state . . . provided the offense is one for which the person is otherwise authorized by law to make an arrest.”<sup>243</sup> Vermont state statute authorizes correction officers to make arrests for infractions, such as violations of conditions of parole, supervised community sentence, or probation.<sup>244</sup> Civil immigration violations are absent from the list.<sup>245</sup> Thus, Vermont DOC officials, like other Vermont LLEAs, have no authority under state law with which to conduct civil immigration arrests.<sup>246</sup> In the absence of any state or federal law authorizing Vermont state officials to make civil immigration arrests, the DOC’s practice of honoring ICE detainers in Vermont is on even shakier legal footing than that of its Massachusetts counterparts in *Lunn*.<sup>247</sup>

## V. ARTICLE XI OF THE VERMONT CONSTITUTION AND DETAINERS

### *A. The Oft-Overlooked State Constitution as an Alternative for Addressing Detainers*

Opposition to detainers has typically focused on the practice’s constitutional infirmities.<sup>248</sup> In particular, LLEAs that honor detainers may deprive individuals of their Fourth Amendment right to be free from arrests unsupported by a warrant or probable cause, and to automatic and speedy review by a neutral magistrate.<sup>249</sup> Arguments based on these fundamental rights may resonate far more with courts, policy makers, and the public than *Lunn*’s absence-of-authority argument.

However, Fourth Amendment challenges under the federal Constitution must perform a difficult dance in order to contest detainers without exposing the same infirmities underlying federal immigration enforcement

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243. Vt. R. Crim. P. 54(c)(7).

244. VT. STAT. ANN. tit. 28, § 551(c) (2019); *id.* § 363; *id.* § 301.

245. *See id.* (showing no power for DOC officials to make unwarranted civil immigration arrests due to an absence of an enumerated power to do so in the Vermont rules of criminal procedure).

246. *Id.* Additionally, internal DOC directives require that individuals to be held for outside agencies be accompanied by an affidavit of probable cause and proof that the individual is lawfully detained. VT. AGENCY OF HUMAN SERVS., DEP’T OF CORRECTIONS, DIRECTIVE 315.01, INTAKE AND BAIL, 4.I.E (“A person may . . . be lodged by a request filed by an outside agency . . . . The request must also include sufficient information to show the person is lawfully detained. No person will be accepted for Lodging without [a warrant or] . . . an affidavit of probable cause.”). The validity of probable cause determinations found in administrative warrants and detainers are suspect. *See supra* Part II.B (noting judicial skepticism of the conclusory nature of the generic probable cause indication on ICE detainers).

247. *See supra* Part II.C–D (discussing the *Lunn* case).

248. *See supra* Part II.B (listing federal court decisions regarding constitutional challenges to detainers).

249. *See supra* Part II.B (listing federal court decisions analyzing Fourth Amendment application to detainers).



generally.<sup>250</sup> For example, in the hands of an LLEA, courts generally agree that detainers and accompanying administrative warrants do not constitute a legitimate arrest warrant under the Fourth Amendment.<sup>251</sup> Yet, courts claim that the same administrative warrant carried by a federal immigration officer *does* pass constitutional muster.<sup>252</sup> This is a dubious distinction, as there are no obvious justifications for why one's constitutional right to be free from unreasonable seizure is less protected when at the hands of a federal immigration agent than a local prison guard.<sup>253</sup> Federal courts may well choose to back away from Fourth Amendment rulings on detainers, rather than risk causing administrative upheaval by suddenly revealing the same constitutional defects in federal immigration enforcement policy generally, which has hitherto enjoyed over a century of development largely shielded from judicial scrutiny.<sup>254</sup>

A frontal assault of the entire federal immigration enforcement system is not necessary to examine the potential constitutional shortcomings of detainers. State courts, free to interpret their own state constitutions, need not wait for the development of a more constitutionally sound national immigration enforcement policy generally before addressing the constitutional shortcomings of local compliance with detainers. Since a ruling under state law would only implicate the actions of state and local officials, finding detainers and administrative warrants inadequate under a state constitution would not affect how ICE agents conduct arrests or damage the federal judiciary's current deferential stance.<sup>255</sup> Such a ruling would merely afford all state residents, regardless of their U.S. citizenship status, equal protections from unreasonable seizure by their state or local officials.

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250. See Kagan, *supra* note 228, at 130 (arguing that “[i]t is quite plausible that the statutory framework by which ICE currently takes people into custody is unconstitutional,” but that the “specter of immigration chaos” may dissuade judges from addressing these concerns).

251. See *supra* note 226 (listing cases describing the use of detainers as a warrantless arrest).

252. See, e.g., *City of El Cenizo v. Texas*, 890 F.3d 164, 187 (5th Cir. 2018) (emphasis in original) (citing *Abel v. United States*, 362 U.S. 217, 234, 236 (1960)) (“It is undisputed that *federal* immigration officers may seize aliens based on an administrative warrant attesting to probable cause of removability.”); *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 31–32 (N.Y. App. Div. 2018) (citing *Abel*, 362 U.S. at 234, 236) (“Although administrative arrest warrants are constitutionally valid in the federal immigration law enforcement context, such warrants are civil and administrative, and not judicial, in nature.”); *Douglas v. United States*, 796 F. Supp. 2d 1354, 1368 (M.D. Fla. 2011) (citations omitted) (“ICE agents who detained suspects without a warrant issued by a neutral magistrate did so under legal authority, thereby barring the detainee’s false imprisonment claim.”).

253. Kagan, *supra* note 228, at 146–50 (describing why the civil nature of deportation arrests does not justify the distinction).

254. Kagan, *supra* note 228, at 135, 167 (outlining how the Chinese Exclusion Case of 1889 insulated immigration arrests from constitutional scrutiny, allowing “the American immigration enforcement infrastructure to develop in a parallel universe for more than a century”); see also, *infra* Part VI.B; *supra*, notes 100–03 (discussing a recent Fifth Circuit case upholding the constitutionality of state law requiring LLEAs to comply with detainer requests).

255. See *supra* notes 16–18, 133 and accompanying text.

*B. General Analysis Under the Vermont Constitution.*

The Vermont Supreme Court has frequently interpreted its state constitution independently of its federal counterpart:

The Vermont Constitution is the fundamental charter of our state, and it is this Court's duty to enforce the constitution. Although the Vermont and federal constitutions have a common origin and a similar purpose, our constitution is not a mere reflection of the federal charter. Historically and textually, it differs from the United States Constitution. It predates the federal counterpart, as it extends back to Vermont's days as an independent republic. It is an independent authority, and Vermont's fundamental law.

Although we have frequently treated parallel state and federal provisions in a similar manner, particularly in the area of criminal procedure, we have never intimated that the meaning of the Vermont Constitution is identical to the federal document. Indeed, we have at times interpreted our constitution as protecting rights which were explicitly excluded from federal protection. We are free, of course, to provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter.<sup>256</sup>

Analogous to the Fourth Amendment, Article 11 of the Vermont Constitution states “[t]hat the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them . . . are contrary to that right, and ought not to be granted.”<sup>257</sup> The state's highest court has found that “Article 11 provides broader protection to individual rights than does the Fourth Amendment.”<sup>258</sup> In the search and seizure context, the Vermont Supreme Court has frequently offered greater constitutional protections to the individual than those offered

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256. *State v. Badger*, 141 Vt. 430, 449, 450 A.2d 336, 347 (Vt. 1982) (citations omitted) (internal quotation marks omitted).

257. VT. CONST. ch. I, art. XI.

258. *State v. Bryant*, 2008 VT 39 n.2, 183 Vt. 355, 950 A.2d 467; *see also State v. Roberts*, 160 Vt. 385, 392, 631 A.2d 835, 840 (Vt. 1993) (finding that Article 11 “may offer protections beyond those provided by the Fourth Amendment”); Jason J. Legg, *High Court Study: The Green Mountain Boys Still Love Their Freedom: Criminal Jurisprudence of the Vermont Supreme Court*, 60 ALB. L. REV. 1799, 1799–1800 (1997) (concluding via empirical study that “the Vermont Supreme Court closely scrutinizes cases involving the state against the presumably innocent citizen, i.e., situations involving confessions, interrogations, and searches and seizures”).

by its federal counterpart.<sup>259</sup> For example, the Court has refused to adopt federal Fourth Amendment interpretations that would have allowed: warrantless searches of “open fields”<sup>260</sup> and secured trash bags,<sup>261</sup> the use of police recordings of a conversation with an individual in their home,<sup>262</sup> a “good faith” exception to the exclusionary rule,<sup>263</sup> a broad search-incident-to-arrest doctrine,<sup>264</sup> or an officer to order a driver to exit their vehicle during a traffic stop without additional justification.<sup>265</sup> Thus, any constitutional deficiencies that detainees suffer under the Fourth Amendment are likely even more pronounced under Article 11.

### *C. Probable Cause Under the Vermont Constitution*

#### 1. General Requirements

As a preliminary matter, Article 11 guarantees an individual the right to “be free from the unlawful stop and seizure of one’s person.”<sup>266</sup> Thus, civil immigration arrests made without legal authority<sup>267</sup> are unlawful and result in a complementary Article 11 constitutional violation, as well as a *Lunn* violation.<sup>268</sup>

A more interesting question is whether, even if granted the statutory authority to make immigration arrests, LLEAs that hold individuals pursuant to a detainer have met Article 11’s probable cause requirement. LLEAs who hold individuals pursuant to an ICE detainer conduct a warrantless arrest.<sup>269</sup>

259. Legg, *supra* note 258, at 1814 (“[T]he court has repeatedly noted that an individual’s right to privacy and freedom from government interference has its foundation in strong state traditions.”).

260. *State v. Kirchoff*, 156 Vt. 1, 9–10, 12–14, 587 A.2d 988, 994, 996–97 (Vt. 1991) (rejecting a federal exception to the warrant requirement where police walked across the defendant’s land that had been posted with “no trespassing” signs).

261. *State v. Morris*, 165 Vt 111, 127, 680 A.2d 90, 101 (Vt. 1996).

262. *State v. Blow*, 157 Vt. 513, 519, 602 A.2d 552, 556 (Vt. 1991).

263. *State v. Oakes*, 157 Vt. 171, 203, 598 A.2d 119, 138 (Vt. 1991).

264. *State v. Bauder*, 2007 VT 16, ¶¶ 20, 22, 181 Vt. 392, 401–02, 924 A.2d 38, 46–47 (“[T]he principles and values underlying Article 11 . . . forbid[] a warrantless search [absent an officer’s] need to secure their own safety or preserve evidence.”).

265. *State v. Sprague*, 2003 VT 20, ¶ 8, 175 Vt. 123, 126, 824 A.2d 539, 543 (agreeing with the defendant’s assertion that “the ‘request’ [to] exit [his vehicle] constituted a further seizure requiring reasonable suspicion of criminal activity under Chapter I, Article 11 of the Vermont Constitution”).

266. *State v. Hart*, 149 Vt. 104, 106 n.1, 539 A.2d 551, 553 n.1 (Vt. 1987) (holding that a municipal constable lacked authority to conduct a warrantless arrest outside of the constable’s jurisdiction, absent an authorizing statute).

267. *Supra* Part IV.

268. *See Cisneros v. Elder*, 2018CV30549, 2018 LEXIS 3388, at \*38 (Co. Dist. Ct. Dec. 6, 2018) (emphasis omitted) (finding that “by depriving the Plaintiffs of liberty without legal authority [pursuant to a detainer], Sheriff Elder carries out unlawful warrantless arrests that constitute unreasonable seizures, in violation of Article II, Section 7 [of the Colorado Constitution]”).

269. *See supra* notes 226–30 and accompanying text; *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1252–53 (E.D. Wash. 2017) (“Accordingly, the probable cause determination here was made by an ICE

Article 11 requires that “any warrantless arrest be supported by probable cause,”<sup>270</sup> existing at the time of the arrest “based on the knowledge available to the officer at the time.”<sup>271</sup> The Vermont Supreme Court defines probable cause as “the facts and circumstances known to the arresting officer . . . sufficient to lead a reasonable person to believe that a crime was committed and that the suspect committed it”<sup>272</sup> and requires that the finding “be based on ‘substantial evidence.’”<sup>273</sup>

If the Court expanded the definition of probable cause to include a hypothetical statutorily-authorized civil—rather than only criminal—immigration arrest,<sup>274</sup> the question remains whether an LLEA acting pursuant to a detainer has “substantial evidence”<sup>275</sup> to establish probable cause under the Vermont constitution. Caselaw indicates that Vermont courts take the “substantial evidence” standard seriously, requiring a significant degree of findings and an articulation of how those findings connect the individual to the alleged offense.<sup>276</sup> In contrast, courts have been unconvinced that the detainer form’s generic “probable cause” checkbox, unaccompanied by any specific facts, carries the legal significance of its namesake.<sup>277</sup>

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officer, not a neutral magistrate.”), *appeal dismissed as moot sub nom.*, 716 F. App’x 741 (9th Cir. 2018). In the search context, government intrusion without a warrant is presumed unreasonable under federal law. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (emphasis in original) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)) (“The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . .”).

270. *State v. Richard*, 2016 VT 75, ¶ 14, 202 Vt. 519, 526, 150 A.3d 1093, 1099.

271. *State v. Betts*, 2013 VT 53, ¶ 19, 194 Vt. 212, 222–23, 75 A.3d 629, 637.

272. *Richard*, 2016 VT 75, ¶ 17.

273. *Betts*, 2013 VT 53, ¶ 19.

274. *See, e.g., City of El Cenizo v. Texas*, 890 F.3d 164, 188 (5th Cir. 2018) (noting that “[c]ourts have upheld many statutes that allow seizures absent probable cause that a crime has been committed,” including the arrests of juvenile runaways, the incapacitated, the mentally ill, or those seriously ill and a danger to themselves).

275. *Betts*, 2013 VT 75, ¶ 19.

276. *State v. Blais*, 163 Vt. 642, 645, 665 A.2d 569, 572 (Vt. 1995) (finding no probable cause to arrest the defendant despite the knowledge that marijuana was being cultivated and the sound of ground sensors activating every five minutes for about one-half hour before the defendant exited the path toward officers); *State v. Chicoine*, 2007 VT 43, ¶¶ 2–11, 181 Vt. 632, 632–35, 928 A.2d 484, 486–88 (finding no probable cause to arrest, even though the officer saw the defendant’s vehicle exit the driveway of a suspected drug house and saw the defendant’s passenger appear to quickly place something into the defendant’s mouth before traffic stop, and the defendant tried to shield the left side of his body just before the pat-down search); Sabourin, *supra* note 73, at 1190 (citing *State v. Davis*, 2007 VT 71, ¶¶ 7–9, 182 Vt. 573, 574–75, 933 A.2d 224, 226–27) (proposing that the Court decision whether to suppress the DUI evidence “appeared to turn on the fact that the officer . . . failed to articulate how his ‘observations led him to a reasonable and articulable suspicion that a crime was being committed’”).

277. *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1252–53 (E.D. Wash. 2017) (“It is also important to note that nowhere on the administrative warrant does [the ICE agent] provide any factual details about what led him to make his determination.”), *appeal dismissed as moot sub nom.*, 716 F. App’x 741 (9th Cir. 2018); *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 946 (D. Minn. 2017) (citation omitted) (“[T]he Fourth Amendment demands a particularized assessment of [arrestee’s] likelihood of escaping.”);

## 2. The Collective Knowledge Doctrine

In *El Cenizo*, the Fifth Circuit recently denied a facial challenge to a Texas law requiring detainer compliance by its LLEAs, in part based on the court's understanding that "[u]nder the collective-knowledge doctrine, moreover, the ICE officer's knowledge may be imputed to local officials even when those officials are unaware of the specific facts that establish probable cause of removability."<sup>278</sup> Thus, the court held that the Fourth Amendment did not bar LLEAs from relying on the probable cause determination of the federal immigration agent who filled out the detainer form.<sup>279</sup>

Though Vermont state jurisprudence accepts the collective knowledge doctrine generally,<sup>280</sup> courts have split over the doctrine's suitability to the detainer context.<sup>281</sup> In particular, courts disagree over whether an ICE detainer satisfies the "minimal communications between officers"<sup>282</sup> required to invoke the collective knowledge doctrine. The Fifth Circuit found that "the detainer request itself provides the required communication between" officers.<sup>283</sup> In contrast, the Eastern District of Washington found "the 'collective knowledge' doctrine does not provide a basis for Defendants to rely on ICE's probable cause determination" without more specific communications between officers.<sup>284</sup> Vermont cases typically apply the doctrine to officers working closely together.<sup>285</sup> The legal and physical

Miranda-Olivares v. Clackamas Cty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at \*11 (D. Or. Apr. 11, 2014) ("Therefore, it was not reasonable for the Jail to believe it had probable cause to detain Miranda-Olivares based on the box checked on the ICE detainer.").

278. *City of El Cenizo v. Texas*, 890 F.3d 164, 187 (5th Cir. 2018).

279. *Id.* at 187–88.

280. *State v. Phillips*, 140 Vt. 210, 216, 436 A.2d 746, 749–50 (Vt. 1981) (citations omitted) ("Assuming some minimal communications between the officers, it is the collective knowledge of the police at the time of the arrest and not the knowledge of the individual arresting officer which is measured.").

281. *Cisneros v. Elder*, 2018CV30549, 2018 LEXIS 3388, at \*8, 12–19 (Co. Dist. Ct. Dec. 6, 2018) ("[C]ourts in other jurisdictions have differed on whether [the collective knowledge] doctrine is applicable under these circumstances . . ."); *see also Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1258 (E.D. Wash. 2017) ("Accordingly, the 'collective knowledge' doctrine does not provide a basis for Defendants to rely on ICE's probable cause determination."), *appeal dismissed as moot sub nom.*, 716 F. App'x 741 (9th Cir. 2018).

282. *State v. Quigley*, 2005 VT 128, ¶ 13, 179 Vt. 567, 570, 892 A.2d 211, 217 (citation omitted) ("Where the facts show 'some minimal communications between the officers,' we may consider their collective knowledge of the salient facts prior to applying for the warrant.").

283. *City of El Cenizo v. Texas*, 890 F.3d 164, 187 (5th Cir. 2018) (internal quotation marks omitted).

284. *Ochoa*, 266 F. Supp. 3d at 1258 (noting no "indicat[ion] that [ICE agent] Gladish interacted with [LLEA] Yakima County officials at all").

285. *E.g., Quigley*, 2005 VT 128, ¶ 13 ("[The detective] conversed with other officers in the apartment . . . [and] was in telephone contact with Officer Goslin, who was [subsequently] securing the scene.").

distance between ICE and DOC officers may weaken the inference of “minimal communications” between them.<sup>286</sup> The Vermont Supreme Court refused to apply the collective knowledge doctrine to information that city police had received from the state’s Department of Motor Vehicles (DMV), noting that, despite its law enforcement authority, the DMV is “independent of law enforcement agencies,” such as the municipal police department.<sup>287</sup> ICE, like the DMV, is a regulatory body independent of the state’s DOC or local police.<sup>288</sup>

The Eastern District of Washington also believed it “important to note that nowhere on the administrative warrant does [the ICE agent] provide any factual details about what led him to make his determination.”<sup>289</sup> Vermont’s highest court has noted that “conclusory affidavits present the spectre—offensive to constitutional guarantees—that the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate . . . but instead by a police officer engaged in the often competitive enterprise of ferreting out crime.”<sup>290</sup> If a Vermont court would not accept such a “conclusory affidavit” to justify an arrest during judicial review or issuance of a warrant,<sup>291</sup> it is unclear why it would allow state officers to make *unreviewed* and *warrantless* arrests based on equally conclusory detainers.

The predicate assumptions which justify the collective knowledge doctrine’s existence appear to be inapplicable to the detainer setting.<sup>292</sup> The U.S. Supreme Court accepted the doctrine because “officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.”<sup>293</sup> The Court went on to caution that “[w]here, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge” by an officer’s reliance on collective knowledge.<sup>294</sup>

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286. See *State v. Lanoue*, 156 Vt. 35, 38, 587 A.2d 405, 407 (Vt. 1991) (finding the local DMV independent of the local police department).

287. *Id.* at 407.

288. *Id.*

289. *Ochoa*, 266 F. Supp. 3d at 1252–53 (internal quotation marks omitted). In fact, one federal district court recently found the automated ICE database searches underlying many ICE detainers to be so error-prone that it enjoined ICE offices in the Central District of California from issuing detainers on the basis of these searches. *Gonzalez v. Immigration & Customs Enf’t*, 416 F. Supp. 3d 995, 1017–20 (C.D. Cal. 2019).

290. *State v. Robinson*, 2009 VT 1, ¶ 12, 185 Vt. 232, 238, 969 A.2d 127, 131 (alteration in original) (internal quotation marks omitted).

291. *Id.*

292. *United States v. Williams*, 627 F.3d 247, 252 (7th Cir. 2010).

293. *Whiteley v. Warden*, 401 U.S. 560, 568 (1971).

294. *Id.*

ICE detainers or administrative warrants are filled out by members of ICE, not by a neutral magistrate.<sup>295</sup> Neither are they subject to swift review after the arrest.<sup>296</sup> Thus, Vermont DOC officers have no reason to assume that the requesting ICE agent “offered the magistrate” the facts supporting probable cause, and should not therefore expect to be “insulated from challenge.”<sup>297</sup> One can make a reasonable argument that the absence of neutral review in the immigration system, the conclusory nature of the detainers’ probable cause determination, and the lack of meaningful communication between ICE and LLEAs renders the application of the collective knowledge doctrine to immigration detainers incompatible with Vermont constitutional principles.<sup>298</sup>

*D. Detainers and the Right to Automatic and Speedy Review by Neutral Magistrate.*

Even if LLEAs are entitled to rely on the probable cause determination contained in the detainer documents, the lack of subsequent swift judicial review renders the entire process constitutionally dubious.<sup>299</sup> Noting the serious consequences of an arrest, the U.S. Supreme Court insisted on neutral review of warrantless arrests because “[w]hen the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.”<sup>300</sup> The requirement of neutral review likely stems from the longstanding belief that “[z]eal in tracking down crime is not in itself an assurance of soberness of judgment . . . . The awful instruments of the criminal law cannot be entrusted to a single functionary.”<sup>301</sup> The Court later specified that the review of a warrantless arrest must take place within 48 hours.<sup>302</sup>

The Court initially supported its historical reluctance to furnish constitutional protections for removable individuals by emphasizing the civil, rather than criminal, nature of removal proceedings.<sup>303</sup> However, the modern U.S. Supreme Court has found the Fourth Amendment applicable to

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295. *See supra* notes 92 and accompanying text.

296. *Infra* Part V.D.

297. *Whiteley*, 401 U.S. at 568.

298. *See supra* notes 266–97.

299. *See generally* *Cty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (describing the 48-hour rule).

300. *Gerstein v. Pugh*, 420 U.S. 103, 114, 116–17 (1975) (rejecting the argument that prosecutorial judgment was a sufficient Fourth Amendment safeguard).

301. *McNabb v. United States*, 318 U.S. 332, 343 (1943).

302. *Cty. of Riverside*, 500 U.S. at 56.

303. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

civil as well as criminal infractions, rejecting as “anomalous” the contention that “the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”<sup>304</sup> The Court has acknowledged that the consequences of deportation often rival those of incarceration,<sup>305</sup> and the use of the civil-criminal distinction has fallen out of favor as a justification for the deprivation of constitutional rights in removal proceedings.<sup>306</sup> The substantial number of successful modern Fourth Amendment claims made against detainers demonstrates that, despite historical deference to federal immigration enforcement generally, Fourth Amendment protections are very much in play in the detainer context.<sup>307</sup> Though Vermont’s highest court has adopted a federal exception to the search warrant requirement during an administrative inspection of a “closely regulated” business,<sup>308</sup> it has given no indication that it views arrests made under civil law as any less deserving of constitutional protection than those made under criminal law. Those suspected of a civil immigration violation are likely entitled to the same Article 11 protections as those arrested on any other grounds.

ICE agents issue detainers and administrative warrants that are unreviewed by a neutral magistrate, rendering the arrests “warrantless” for constitutional purposes.<sup>309</sup> Thus, the arrests must be supported by probable cause and be judicially reviewed within 48 hours.<sup>310</sup> Critically, those apprehended on a suspected immigration violation do not receive a timely and neutral review of probable cause.<sup>311</sup> The closest analogue in the immigration context is a *Joseph* hearing, where an immigration judge reviews the determination that an individual is subject to mandatory detention while awaiting deportation proceedings.<sup>312</sup> The hearing does not review probable cause for the arrest itself.<sup>313</sup> Further, the detainee must know

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304. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 530, 534 (1967).

305. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001) (citing the defense’s claim that remaining in the United States may be of greater importance to a client than a potential jail sentence); *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (citation omitted) (“We have long recognized that deportation is a particularly severe ‘penalty’ . . .”).

306. *Kagan*, *supra* note 228 (describing why the civil nature of deportation arrests does not justify any Fourth Amendment distinction).

307. *See Sabourin*, *supra* note 73 (listing federal court decisions regarding Fourth Amendment challenges to detainers). Even where a Fourth Amendment claim was rejected, such as in *El Cenizo*, the court made no argument that Fourth Amendment protections are less powerful in the immigration context than elsewhere. *City of El Cenizo v. Texas*, 890 F.3d 164, 188–89 (5th Cir. 2018).

308. *State v. Welch*, 160 Vt. 70, 79, 624 A.2d 1105, 1110 (Vt. 1992) (citing *New York v. Burger*, 482 U.S. 691, 699–701 (1987)).

309. *Supra* notes 226–30.

310. *Supra* notes 306–08.

311. *Cf. In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999) (disregarding probable cause analysis).

312. *Id.* at 800.

313. *Id.*



to affirmatively request a *Joseph* hearing, and also bears the burden of proof.<sup>314</sup> Most importantly, the *Joseph* hearing has no immediate timeline, and may not even occur before the immigration court resolves the removal proceedings.<sup>315</sup> Thus, those held pursuant to detainers do not receive the automatic, speedy, and neutral review of the probable cause determination underlying their arrest that the Fourth Amendment guarantees.<sup>316</sup>

While the Vermont courts have so far been without reason to inspect the constitutionality of federal immigration proceedings, the role that state corrections officers play in the system's dealings with Vermont residents may provide such a necessity. Unreviewed warrantless immigration arrests seem to have survived the test of time, not because they are constitutionally sound, but rather because of the U.S. Supreme Court's historical decision to withhold scrutiny from federal immigration enforcement.<sup>317</sup> In light of what appear to be unconstitutional warrantless arrests, the Vermont Supreme Court should be able to find that Vermont state employees' participation in the practice falls short of Article 11's heightened protections.

The DOC transfers or releases individuals held on the basis of a detainer within 48 hours.<sup>318</sup> If the DOC transfers the individual to ICE after 47 hours, the violation of the constitutional right to neutral review may not technically occur until the individual has left state custody, thereby negating a state claim.<sup>319</sup> However, the state DOC is the critical (arresting) link in a chain of conduct that likely violates the constitutional rights of Vermonters. The DOC's willing participation, with knowledge of the resulting violation, may itself constitute a violation of the state constitution.<sup>320</sup>

Detainers are issued on the unreviewed belief of an ICE agent that an individual may be deportable.<sup>321</sup> This is not a certain proposition, and errors do occur.<sup>322</sup> As such, the practice of honoring unreviewed detainers

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314. Kagan, *supra* note 228, at 163.

315. *Id.*

316. *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

317. See *infra* Part VI.B (describing racial tensions underlying the Chinese Exclusion Act leading to judicial deference to federal immigration enforcement).

318. Telephone Interview with Cullen Bullard, *supra* note 68.

319. *Id.*

320. Imagine how a state court would view an arrangement by which two police departments in adjacent states continually transfer custody of a prisoner arrested without probable cause across the state border every 47 hours, avoiding judicial review by perpetually resetting the clock just before a constitutional violation occurs.

321. Telephone Interview with Cullen Bullard, *supra* note 68.

322. See *Gonzalez v. Immigration & Customs Enf't*, 416 F. Supp. 3d 995, 1008–12 (C.D. Cal. 2019) (detailing factual findings of extremely high error rates in ICE databases leading to the arrest of U.S. Citizens and lawfully present non-citizens); Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 932 (2014) (pointing out that U.S. citizens with mental disabilities are commonly detained and deported based on mistakes in their own statements); see also William Finnegan, *The Deportation Machine: A Citizen Trapped in the*

undermines not only the constitutional rights of deportable individuals, but also those of any lawful resident who might fall prey to what Justice Frankfurter termed “the dangers of the overzealous as well as the despotic”<sup>323</sup>—not to mention the simply mistaken—enforcement agent, in this case faxing a detainer request to arrest an individual they may have never met.

The Fourth Amendment infirmities associated with detainers appear to be significant.<sup>324</sup> LLEAs honoring detainers make an arrest based on nothing more than a generic probable cause checkbox marked by a federal enforcement agent, with no timely subsequent neutral review.<sup>325</sup> Vermont courts have interpreted Article 11 to provide an even greater degree of protection than its federal counterpart.<sup>326</sup> It is an open question whether the application of the collective knowledge doctrine to immigration detainers or the “hot potato” approach to evading judicial review by transferring individuals to federal custody within 48 hours would stand up to Article 11 scrutiny.<sup>327</sup> By answering either question in the negative, a Vermont court could find detainers unconstitutional under state law.<sup>328</sup> Vermont constitutional jurisprudence proudly touts its historical emphasis on both individual freedom and equality under the law.<sup>329</sup> Vermont has the first constitution to prohibit slavery and to guarantee universal male suffrage, public education, and marriage equality.<sup>330</sup> Unhindered by the threat of inadvertently striking down a large swath of the federal immigration system,

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*System*, NEW YORKER (Apr. 29, 2013), <http://www.newyorker.com/magazine/2013/04/29/the-deportation-machine> (telling the story of Mark Lyttle, who was flagged for ICE’s Criminal Alien Program based on two incorrect entries in his intake form at a minimum-security state facility); Mark Reaman, *Immigration Officers Detain Citizen for Days Without Formal Charges*, CRESTED BUTTE NEWS (Mar. 4, 2015), <http://crestedbuttenews.com/2015/03/immigration-officers-detain-citizen-for-days-without-formal-charges/>.

323. *McNabb v. United States*, 318 U.S. 332, 343 (1943).

324. See Kagan, *supra* note 228, at 130–34 (describing the decision made by multiple courts that, under the Fourth Amendment, an ICE detainer does not provide probable cause to seize a person).

325. See *id.* at 133 (lamenting the unbridled discretion of immigration officials to detain on probable cause with “no automatic or timely review” by a neutral magistrate).

326. *State v. Cunningham*, 2008 VT 43, ¶ 16, 183 Vt. 401, 410, 954 A.2d 1290, 1295.

327. *Detainers*, DEP’T OF HOMELAND SEC. (Nov. 13, 2019), <https://www.ice.gov/detainers>.

328. VT. CONST. art. 11.

329. See, e.g., *State v. Kirchoff*, 156 Vt. 1, 16–17, 587 A.2d 988, 998 (Vt. 1991) (Springer, J., concurring) (applying an extensive historical and textual analysis of the Vermont constitution’s “expansive approach to political rights” to find greater Article 11 protections than those found in the federal reasonable expectation of privacy framework); *Brigham v. State*, 166 Vt. 246, 264–65, 692 A.2d 384, 395 (Vt. 1997) (finding the state’s locally-funded educational system unconstitutional due to excessive differences in per-pupil spending between districts of varying financial means); *Baker v. State*, 170 Vt. 194, 211, 744 A.2d 864, 876 (Vt. 1999) (citation omitted) (using historical analysis and the conclusion “that Vermont’s first charter was the ‘most democratic constitution produced by any of the American states’” to find a constitutional right to marriage equality).

330. *Old Constitution House*, VT. AGENCY OF COMMERCE & CMTY. DEV., <https://historicsites.vermont.gov/constitution-house> (last visited Apr. 16, 2020); *Baker*, 744 A.2d at 876.

a Vermont state court could readily find that the participation of its own state officials in the current detainer system is incompatible with Vermont constitutional principles and guarantees.

## VI. CONCLUSION: LEGAL RISKS, ALTERNATIVES, AND THE LESSONS OF HISTORY

### *A. Alternatives Available to Vermont's DOC.*

Vermont DOC agents who honor ICE detainer requests are making warrantless arrests that are likely unauthorized by law and in violation of Article 11 protections against unreasonable seizures. The DOC's Intergovernmental Agreement to rent bed space to federal authorities is unlikely to remedy these shortcomings. In the midst of national partisan gridlock and polarization, Vermont's Republican governor signed a bipartisan bill to prevent formal cooperation with ICE or state involvement in creating any of President Trump's threatened "registries."<sup>331</sup> Given such apparent disapproval of current immigration enforcement methods, it is unclear why the state's DOC has continued to participate in the federal enforcement system by honoring detainees of dubious legality.

The Vermont DOC has a ready-made alternative. The DOC "operat[es] with guidance from" Vermont's Fair and Impartial Policing policy.<sup>332</sup> FIP begins by noting the importance of maintaining the public's trust, and that a person's "immigration status . . . should have no adverse bearing on an individual's treatment" while in custody.<sup>333</sup> In its "Administrative Warrants/Detainers" section, FIP states that those acting pursuant to its mandates lack authority to enforce federal civil immigration law and that "[t]he Constitution's Fourth Amendment and the Vermont Constitution's Article 11 . . . apply equally to all individuals residing in Vermont."<sup>334</sup> The section goes on to clarify that agency members "shall not facilitate the detention of undocumented individuals or individuals suspected of being undocumented by federal immigration authorities," and "shall not arrest or detain any individual based on an immigration 'administrative warrant' or 'immigration detainer'" due to probable cause insufficiencies.<sup>335</sup> FIP drives home the point by clarifying that those acting pursuant to the policy "shall

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331. Freese, *supra* note 64.

332. E-mail from David Turner, Director of Offender Due Process and Grievances, Vermont DOC, to Author (Oct. 9, 2018).

333. FIP, *supra* note 74, at Introduction.

334. *Id.* § VIII(a).

335. *Id.* § VIII(b), (d).

not hold for, or transfer people to, federal immigration agents,” noting that detainees are not judicially reviewed and do not constitute a warrant.<sup>336</sup>

The Vermont DOC should, in addition to “operating with guidance from the” FIP,<sup>337</sup> actually adhere to the FIP’s clear prohibition against compliance with constitutionally deficient immigration detainees. Such a move would be consistent with LLEAs state-wide,<sup>338</sup> the state’s current views and policy priorities,<sup>339</sup> and longstanding constitutional principles.<sup>340</sup> Internal DOC directives already require that those booked for an outside agency be accompanied by “sufficient information to show the person is lawfully detained,” including a warrant or an affidavit of probable cause.<sup>341</sup> By engrafting FIP’s acknowledgment that an “immigration detainer is not a warrant” and that the ICE detainer “documents do not meet the probable cause requirements,” on to the current internal DOC directive, detainer compliance should be forbidden under the DOC directive as written.<sup>342</sup> By following FIP and declining to honor detainees, the DOC would avoid the legal liability stemming from the constitutional abuses associated with detainees.

The DOC could follow the lead of other facilities by ending its contractual agreement to hold immigration detainees for ICE.<sup>343</sup> As a more modest step focused purely on detainees, the DOC could add language to its IGA, clarifying that the contract does not attempt to create a legal loophole through which to honor detainees. The term of the agreement is at-will, subject to six-months’ notice, so the DOC need not be unduly delayed.<sup>344</sup> The new provision could read: “This agreement does not grant federal civil immigration arrest authority to the state DOC. It does not authorize state employees to enforce civil immigration law by holding an individual beyond the resolution of their state charges.”

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336. *Id.* § VIII(e).

337. E-mail from David Turner, *supra* note 332.

338. FIP, *supra* note 74, at Purpose (requiring law enforcement agencies to adopt the policy verbatim).

339. Freese, *supra* note 64.

340. *See supra* note 258 and accompanying text; *supra* Part V (analyzing the Vermont constitution’s application to detainees).

341. VT. AGENCY OF HUMAN SERVS., DEP’T OF CORRECTIONS, *supra* note 246.

342. FIP, *supra* note 74, § VIII(d).

343. *See, e.g.*, Nick Miller, *Sacramento County Cancels Multimillion Dollar Immigrant Detention Contract with ICE*, CAPITAL PUB. RADIO (June 6, 2018), <http://www.capradio.org/articles/2018/06/06/sacramento-county-cancels-multimillion-dollar-immigrant-detention-contract-with-ice/> (describing Sacramento County’s canceled detention contract with ICE).

344. Memorandum from Prisoner Operations Division, *supra* note 67.

*B. Federalism, Precedent, and Detainers: A Rare Judicial Opportunity to Learn from the Mistakes of the Past*

The suspect constitutionality of some aspects of current federal immigration enforcement derive from a troubled time in American history, which cautions against expanding the consequentially lenient judicial review from the federal to the state arena. In the midst of violent nation-wide anti-Chinese sentiment, the 1893 *Fong Yue Ting v. United States* case established the U.S. Supreme Court's role in monitoring the federal deportation process.<sup>345</sup> The Court upheld a provision in the Chinese Exclusion Act that allowed for warrantless arrests of all Chinese laborers unable to produce a certificate of residence, and subsequent deportation unless the laborer could provide "at least one credible white witness" excusing the failure.<sup>346</sup>

Despite the absence of an expressly enumerated constitutional power of immigration enforcement,<sup>347</sup> the Court found an implied "inherent" enforcement authority of the federal government, and foreclosed meaningful review by noting that the judiciary "does not undertake to pass upon political questions."<sup>348</sup> The majority then gave its blessing to the white witness requirement, accepting the assertion that "the testimony of Chinese persons [had a] . . . suspicious nature . . . arising from the loose notions entertained by the witnesses of the obligation of an oath."<sup>349</sup>

In his dissenting opinion, Justice Brewer expressed concern that the newly-implied "inherent" power of deportation "is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced?"<sup>350</sup>

Beyond questions regarding the source of the government's enforcement authority, Justice Fields found the lack of constitutional rights afforded to the Chinese laborers particularly disconcerting, noting that the act's warrantless arrest provision "[g]rossly . . . violat[ed] the [F]ourth [A]mendment."<sup>351</sup>

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345. *See generally* THE CHINESE EXCLUSION ACT (PBS 2018) (recounting racially based attempts to exclude, segregate, and disenfranchise Chinese immigrants, culminating in the Chinese Exclusion Act, which, among other things, denied naturalization opportunities to Chinese immigrants).

346. *Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893).

347. One scholar concluded that:

The attempt to build all the foreign affairs powers of the federal government with the few bricks provided by the Constitution has not been accepted as successful. It requires considerable stretching of language, much reading between the lines, and bold extrapolation from "the Constitution as a whole," and that still does not plausibly add up to all the power which the federal government in fact exercises.

LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 17–18 (1972) (footnote omitted).

348. *Fong Yue Ting*, 149 U.S. at 711–12.

349. *Id.* at 730 (internal quotation marks omitted).

350. *Id.* at 737 (Brewer, J., dissenting).

351. *Id.* at 760 (Fields, J., dissenting).

Calling the legislation's ramifications "brutal and oppressive," consistent only with a government of "despotic power," Justice Fields lamented the "cruelty" of "forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted."<sup>352</sup> Finally, he reminded the Court that a failure to vindicate the constitutional rights of some undermines the rights of all.<sup>353</sup>

These arguments were insufficient to carry the day amidst the racial tensions of 1893, leaving a legacy of undefined and unreviewed powers of federal immigration enforcement. Over a century later, the dissenting justices' concerns may receive a second day in court, albeit state court. The federal immigration enforcement system's "indefinite and dangerous" inherent powers are not unlike those sought by LLEAs who wish to honor detainers, despite the absence of any affirmatively-granted authority to do so.<sup>354</sup> The warrantless arrests the Chinese Exclusion Act employed in disregard of the Fourth Amendment are strikingly similar to those that detainers encourage today.<sup>355</sup> Significantly, the human consequences of "forcible deportation from a country of one's residence, . . . friend[s, and] family" for individuals like Francis—whose moving violation resulted in sudden separation from his family and home of over two decades—is no less grievous in the 21st century.<sup>356</sup>

Modern state courts setting parameters for state officers' participation in the deportation process need not follow the course set by the *Fong Yue Ting* decision. State courts should, as in *Lunn*, insist that LLEAs rely on an explicit and definite source of authority when conducting a civil immigration detainer arrest.<sup>357</sup> Rather than renounce the judiciary's power of constitutional review, state courts should closely scrutinize warrantless immigration detainer arrests made by LLEAs. A state court should heed Justice Field's warning that if the government may ignore the constitutional rights of some, it may later come to disregard those guarantees with respect to society at large.<sup>358</sup> Finally, state officials, lawmakers, and the public should be mindful of the human consequences to individuals such as Francis attendant to the chosen methods

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352. *Id.* at 754–56, 759 (Fields, J., dissenting).

353. *Id.* at 761 ("The unnaturalized resident feels it to-day, but if [C]ongress can disregard the [constitutional] guaranties with respect to any one domiciled in the country with its consent, it may disregard the guaranties with respect to naturalized citizens.").

354. *Id.* at 737.

355. *See supra* note 226 (listing decisions finding detainer compliance to constitute a warrantless arrest).

356. *Fong Yue Ting*, 149 U.S. at 759.

357. *See supra* Part III.D; *see* Parts III.E–F (analyzing the unmet requirement of affirmatively and explicitly granted civil immigration arrest authority in *Lunn*).

358. *Fong Yue Ting*, 149 U.S. at 761 (Fields, J., dissenting).

of immigration enforcement when contemplating the role that they wish to play in the immigration system.

—Anders Newbury\*

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