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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

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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

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Abstract

As long as the future of federal immigration policy remains unsettled and the use of ICE detainers to capture and deport suspected noncitizens remains widespread, practitioners should focus their attention on waging a frontal assault against the legality of ICE detainers on state law grounds by arguing that they constitute warrantless arrests that are prohibited by state statute. The recent Massachusetts Supreme Judicial Court decision in *Lunn v. Commonwealth* provides a model for how to wage such an attack—not only in states with similar common law and statutory frameworks that are unlikely to resolve the issue legislatively, like Maine, but also in states with legislatures diametrically opposed to placing any limitations on local law enforcement agencies' abilities to effectuate federal immigration policy, like Texas. The fact that the reasoning in *Lunn* can be exported beyond Massachusetts' borders suggests that state courts are likely to serve as an important front in the fight against the legality of ICE detainers and to provide a rare opportunity for practitioners opposed to the Trump administration's draconian immigration policies to disrupt one of its primary mechanisms for arresting and deporting suspected noncitizens.

I. INTRODUCTION

President Trump's promise to severely curtail illegal immigration[1] and his administration's renewal of the controversial Secure Communities program[2] has

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[1] *See* Michael D. Shear & Ron Nixon, *New Trump Deportation Rules Allow Far More Expulsions*, N.Y. TIMES (Feb. 21, 2017), https://nyti.ms/2m4lcIO ("President Trump has directed his administration to enforce the nation's immigration laws more aggressively, unleashing the full force of the federal government to find, arrest and deport those in the country illegally, regardless of whether they have committed serious crimes.").

[2] The Obama administration launched the "Secure Communities" program in the summer of 2009 to facilitate the sharing of fingerprint information that local police already collected and provided to the FBI with the Department of Homeland Security, which, in turn, furnished a mechanism by which ICE could check arrestees' immigration status and issue a detainer to hold the arrestee until ICE could take custody. *See* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 94 (2013). Present Obama expanded the program during his first term but after facing increasing scrutiny, the administration ultimately replaced it with the Priority Enforcement Program, which refocused ICE's attention on the arrest and deportation of noncitizens convicted of criminal offenses but kept the same biometric data sharing system and the procedures for issuing detainers as its predecessor. *See*, *e.g.*, Barbara E. Armacost, *"Sanctuary" Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1209–10 (2016); Memorandum from Jeh Charles Johnson, Secretary, U.S. Dep't of Homeland

brought the legality of Immigration and Custom Enforcement (ICE) detainers[3] to the forefront of the national debate surrounding proper immigration enforcement. It has become a hotly contested issue in several states,[4] particularly in light of recent federal court decisions that suggest that an ICE detainer is an unconstitutional violation of the Fourth Amendment's protection against unreasonable seizures[5] and the Trump administration's increasing use of them as a means to execute its draconian approach to preventing illegal immigration.[6] The

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Sec., Secure Communities (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [https://perma.cc/WXQ2-ZHG2]. President Trump resurrected the Secure Communities program through an Executive Order four days into his presidency. Exec. Order No. 13768, 82 Fed. Reg. 8700 (Jan. 25, 2017) ("The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program . . . and to reinstitute the immigration program known as 'Secure Communities.'").

[3] ICE detainers serve as a "request" for a state or local law enforcement agency (LEA) to detain a noncitizen "when gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. § 287.7(a); *see* Arizona v. United States, 567 U.S. 387, 396, 410 (2012); City of Santa Clara v. Trump, 250 F. Supp. 3d 497, 510 (N.D. Cal. 2017). Only ICE officers can issue detainers. Memorandum from Acting ICE Director Thomas D. Homan, Issuance of Immigration Detainers by ICE Immigration Officers (Mar. 24, 2017). This detention cannot exceed 48 hours in duration, excluding weekends and holidays. § 287.7(d). Although § 287.7(d) includes the phrase "such agency *shall* maintain custody of the alien" (emphasis added), compliance with a detainer is always voluntary. Villars v. Kubiatowski, 45 F. Supp. 3d 791, 802 (N.D. Ill. 2014) ("[E]very federal court of appeals that has considered the nature of ICE detainers characterizes them as 'requests' that impose no mandatory obligation on the part of the detainer's recipient."); *see* Galarza v. Szalczyk, 745 F.3d 634, 640 (3d Cir. 2014) ("The words 'shall maintain custody,' in the context of the regulations as a whole, appear next to the use of the world 'request' throughout the regulation[,] [meaning] it is hard to read the use of the word 'shall' in the timing section to change the nature of the entry regulation."). ICE issued over 400,000 detainers annually in 2012 and 2013, which was double the number from a decade prior and twenty times as frequently as in the 1980s. Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL'Y REV. 87, 106 (2016).

[4] Caitlin Dickerson, *A Sheriff's Bind: Cross the White House, or the Courts*, N.Y. TIMES (Sept. 13, 2017), https://nyti.ms/2xZbCZs [https://perma.cc/6FLN-FTY8

] ("The political jockeying [between local LEAs and the federal government] is rooted in a vexing constitutional disconnect between criminal justice and immigration enforcement . . . ."). Kim Geiger, *Rauner signs immigration, automatic voter registration bills into law*, CHICAGO TRIBUNE (Aug. 28, 2017), http://www.chicagotribune.com/news/local/politics/ct-bruce-rauner-immigration-voting-met-0829-20170828-story.html [https://perma.cc/29EW-DJQC] (discussing Illinois's decision to adopt the Trust Act, which forbids LEAs from honoring ICE detainers).

[5] The Fourth Amendment of the United States Constitution protects citizens and noncitizens alike. *See generally* Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Bilokumsky v. Tod, 263 U.S. 149 (1923); Kate M. Manuel, Cong. Research Serv., Report No. R42690, Immigration Detainers: Legal Issues, at 18 (2015) ("[Noncitizens] have been found to be entitled to the protections of the Fourth and Fifth Amendments because they are encompassed by the usage of the word 'person' in those amendments."). In the past several years, courts across the country have held that ICE detainers violate noncitizens' Fourth Amendment protections against unreasonable searches and seizures because the federal power to regulate immigration is "subject to important constitutional limitations." Zadvydas v. Davis, 533 U.S. 678, 695 (2001); *see City of Santa Clara*, 250 F. Supp. 3d at 510 (noting that "[s]everal courts have held that it is a violation of the Fourth Amendment for local jurisdictions to hold suspected or actual removable aliens subject to civil detainer requests . . . ."); Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1258–59 (E.D. Wash. 2017) ("Courts around the country have held that local law enforcement officials violate the Fourth Amendment when they temporarily detain individuals for immigration violations without probable cause.").

[6] After the issuance of detainers gradually decreased during the Obama administration from its peak in 2011, the Trump administration immediately ramped up their use—leading to a 31.7 percent jump between January and March of 2017. *Use of ICE Detainers: Obama vs. Trump*, TRACIMMIGRATION, (Aug. 30, 2017), http://trac.syr.edu/immigration/reports/479/ [https://perma.cc/4D2C-4ZMN].

Trump administration has vociferously opposed any reluctance by local law enforcement agencies (LEAs) or states to honor ICE detainers by threatening to withhold federal funding to communities that do not abide by detainer requests,[7] even though such a move risks infringing on Tenth Amendment protections against the commandeering of LEAs to do the federal government's bidding.[8] Responses by LEAs across the nation have been mixed. Some have decided to disregard ICE detainers given their apparent unconstitutionality.[9] Others have tried to cooperate with the Justice Department in order to blunt the impact of the adverse federal court decisions by claiming that ICE immediately takes custody of the noncitizens who are arrested because they are placed in a cell rented by federal immigration authorities.[10] State legislatures have also entered the fray, with some passing bills to compel local police officials to honor ICE detainers by penalizing departments that disregard them[11] and others enacting legislation that explicitly prevent LEAs from abiding by detainer requests.[12]

While most of the discussion at the national level about detainers has focused on the practice's constitutionality,[13] less attention has been paid to the intersection of ICE detainers with state law. The recent decision by the Massachusetts Supreme Judicial Court in *Lunn v. Commonwealth*[14] provides a model for how opponents of federal immigration policy can use state courts to undercut one of ICE's primary means of executing its crackdown and to provide

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[7] Julie H. Davis & Charlie Savage, *White House to States: Shield the Undocumented and Lose Police Funding*, N.Y. TIMES (Mar. 27, 2017), https://nyti.ms/2ob7TUw; Vivian Yee, *Judge Blocks Trump Effort to Withhold Money from Sanctuary Cities*, N.Y. TIMES (Apr. 25, 2017), https://nyti.ms/2piGzqA [https://perma.cc/3NWG-Y3MC]. The threat to withhold funding relates to non-detainer spending, as the federal government does not reimburse LEAs for honoring detainers. *City of Santa Clara*, 250 F. Supp. 3d at 511.

[8] If federal authorities were to mandate that state and local LEAs needed to act as agents of the federal government by requiring them to abide by ICE detainers, then that policy may violate the Tenth Amendment's protections against the "commandeering" of local officials to implement federal law. *Galarza*, 745 F.3d at 643 ("[T]he federal government cannot command the government agencies of the states to imprison persons of interest to federal officials."); *see generally* Printz v. United States, 521 U.S. 898, 922 ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 states.").

[9] Dickerson, *supra,* note 4 ("At least four state legislatures and many more cities and counties have considered enacting . . . laws [that restrict extended jail holds or ban them altogether] this year.").

[10] Caitlin Dickerson, *Trump Administration Moves to Expand Deportation Dragnet to Jails*, N.Y. TIMES (Aug. 21, 2017), https://nyti.ms/2vQTOBC [https://perma.cc/WZ8Z-V7FU] ("The Trump administration is working with like-minded sheriffs from around the country on a plan to channel undocumented immigrants from local jails into federal detention . . . [with] [t]he legal argument [being] that the arrangement effectively makes the immigrant a detainee of ICE, not the sheriff's department . . . .").

[11] James Barragán, *Appeals Court Rules Parts of Texas' Sanctuary Cities Ban Can Go Into Effect*, DALL. MORNING NEWS (Sept. 25, 2017), https://www.dallasnews.com/news/politics/2017/09/25/appeals-court-rules-parts-texas-sanctuary-cities-ban-can-go-effect [https://perma.cc/GKB8-L4VQ] (discussing a recent Fifth Circuit opinion ruling that Texas could implement part of a bill passed in 2017 that prohibited states from disobeying ICE detainers or failing to cooperate with federal immigration officials).

[12] Kim Geiger, *Rauner Signs Immigration, Automatic Voter Registration Bills Into Law,* CHICAGO TRIBUNE (Aug. 28, 2017), http://www.chicagotribune.com/news/local/politics/ct-bruce-rauner-immigration-voting-met-0829-20170828-story.html [https://perma.cc/DU9P-7XVQ] (discussing the passage of a bill forbidding Illinois police departments from honoring ICE detainers).

[13] Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 128 (2015) (noting that these cases have provided a new means to "attack immigration enforcement on the front end.").

[14] 78 N.E.3d 1143 (Mass. 2017).

legal support for the increasing number of local sheriffs and communities who have refused to honor detainers.

In *Lunn*, the Massachusetts Supreme Judicial Court ruled that Massachusetts's LEAs act without sufficient legal justification when they comply with ICE detainers by holding suspected noncitizens beyond the period of incarceration imposed for the original charge that landed them in custody.[15] According to the court, when LEAs comply with ICE detainers and maintain custody of noncitizens, they have, in effect, "arrested" those noncitizens for civil violations of immigration law (*i.e.*, unlawful presence) without a warrant, and by maintaining custody of them without sufficient cause for such an arrest, the police departments violate Massachusetts law.[16]

Lunn ultimately matters because it shows that state court rulings may bar LEAs from honoring ICE detainers, as doing so would clearly violate state laws that limit their authority to execute warrantless arrests for civil violations of federal law.[17] The fact that the logic behind this holding can be exported to other states transforms a case that may at first appear to be a limited regional victory into a national battle cry for practitioners to launch a frontal assault against the ICE detainer system through state courts.[18]

This Note will illustrate that *Lunn*'s summary and application of the relevant federal and state law provides a model strategy for attacking ICE detainers in other states with slightly different common law precedents and statutory language by applying it to Maine. Maine provides an interesting case study for a couple of reasons. For one, the divided nature of its government,[19] the divisiveness of Maine's political process,[20] and Governor Paul LePage's ardent opposition to illegal immigration[21] make it quite unlikely that the state will pass a law that

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[15] *Id.* at 1146.

[16] *Id.* Although the civil nature of unlawful presence is not disputed, *see* Arizona v. United States, 567 U.S. 387, 396 (2012), it is still possible—if not probable—that LEAs may not understand this fact. Because civil immigration detainer notices are reported in the National Crime Information Center (NCIC) system—which is primarily used to "notify law enforcement of strictly criminal warrants and/or criminal matters"—it is likely that LEAs are unaware that presence without legal status is a non-criminal matter. Major City Chiefs Immigration Committee, *M.C.C. Immigration Committee Recommendations* (June, 2006), available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf [https://perma.cc/4PLJ-T5UJ] (warning that the use of the NCIC system to distribute detainers "has created confusion . . . and in fact lays a trap for unwary officers who believe them to be valid criminal warrants or detainers.").

[17] *Lunn*, 78 N.E.3d at 1146.

[18] The concept of attacking the legality of ICE detainers at all—even as a violation of federal law—is a relatively novel approach because for years little precedent supported such a strategy. *See* Kagan, *supra* note 13, at 128 ("The new wave of federal cases are different because they find constitutional weakness with the way in which immigrants are taken into custody, not just with how long they are detained. They attack immigration enforcement on the front end."). Fighting against ICE detainers at the state level, then, offers a new method of attack in a conflict that has been primarily dominated by a debate about constitutional rights.

[19] Scott Thistle, *Republicans Hold Majority in Maine Senate, Draw Nearly Even with Democrats in House*, PORTLAND PRESS HERALD (Nov. 10, 2016), http://www.pressherald.com/2016/11/10/republicans-hold-majority-in-maine-senate-draw-nearly-even-with-democrats-in-house/ [https://perma.cc/4FTC-U8ZJ].

[20] *See, e.g.*, Scot Lehigh, *In Maine, It's LePage Against the Legislature*, BOS. GLOBE (July 9, 2015), https://www.bostonglobe.com/opinion/2015/07/09/maine-paul-lepage-against-legislature/Bv6xSVAMoHSIHHLbsFULPO/story.html https://perma.cc/ZL8M-BZVV].

[21] LePage has a history of expressing his vehement opposition to illegal immigration by claiming—without evidence—that "illegals" hurt Maine by spreading disease and draining funds from the state's welfare program. *See, e.g.*, Joe Lawlor, *State Won't Name Restaurant Where Worker Had Hepatitis A,*

clarifies the legality of LEAs honoring detainers under state law.

Secondly, the common criminal law foundation in Maine is relatively similar but not identical to that of Massachusetts, making the comparison and application of *Lunn* apt. The issue is especially pertinent in Maine after the debate over honoring detainers recently flared up when the Cumberland County Sheriff, Kevin Joyce, decided to follow in the footsteps of several of his fellow sheriffs across the country[22] by refusing to honor ICE detainers without an accompanying judicial warrant because fulfilling them "could violate the individual's Fourth Amendment right and we could ultimately be sued for false imprisonment."[23] Although Sheriff Joyce's fear is well-founded,[24] Governor LePage quickly denounced Joyce's decision and promised to remove from office any sheriff who do not work with ICE because he believes that their refusal to cooperate violates Maine law.[25] LePage's insistence makes the holding and logic of *Lunn* particularly

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PORTLAND PRESS HERALD (Nov. 1, 2014), http://www.pressherald.com/2014/10/31/maine-cdc-restaurant-worker-may-have-exposed-patrons-to-hepatitis-a [https://perma.cc/TEY6-WV5W] (reporting on LePage's statement that he had "been trying to get [President Obama] to pay attention to the illegals in our country because there's been a spike in hepatitis C, tuberculosis and HIV, but it's going on deaf ears"); *see also* Amanda Hoover, *Maine Governor Says He Is Suing "Illegal Immigrant," Not the President*, BOSTON.COM (Aug. 12, 2015), https://www.boston.com/news/politics/2015/08/12/maine-governor-says-he-is-suing-illegal-immigrants-not-the-president [https://perma.cc/4SJT-K86K] (noting that LePage denied that his personal lawsuit in opposition to Obama's 2014 executive order shielding some noncitizens from deportation was filed against the President, but instead against "illegal immigrants taking state money against state and federal laws").

[22] *See, e.g.*, Noelle Phillips, *Colorado Sheriffs Say They Will Not Be Shamed by New ICE Naughty List*, DENVER POST (Mar. 22, 2017), http://www.denverpost.com/2017/03/22/colorado-sheriffs-wont-be-shamed-ice-naughty-list [https://perma.cc/8E9R-4M5M] (discussing resistance amongst Colorado sheriffs to honoring ICE detainers); Joel Rubin & Paloma Esquivel, *For Some California Sheriffs, It's Not Politics Stopping Them from Fully Helping ICE: It's The Legal Risk*, L.A. TIMES (Mar. 31, 2017), http://www.latimes.com/local/lanow/la-me-ice-detainers-sheriffs-20170330-story.html [https://perma.cc/N3DN-9E8H] (noting that none of California's Fifty-eight county sheriffs honor ICE detainers).

[23] Jake Bleiberg, *Maine Sheriff Won't Detain Inmates Any Longer for Immigration Agents*, BANGOR DAILY NEWS (Sept. 26, 2017), https://bangordailynews.com/2017/09/20/politics/maine-sheriff-says-he-wont-detain-inmates-longer-for-immigration-agents [https://perma.cc/2SFA-MQMB]; *see also* Matt Byrne, *Cumberland County Jail Stops Holding Some Inmates for Immigration Agents*, PORTLAND PRESS HERALD (Sept. 20, 2017), http://www.pressherald.com/2017/09/20/sheriff-joyce-stops-holding-some-inmates-at-request-of-immigration-agents [https://perma.cc/9K9P-EHZL].

[24] *Recent ICE Detainer Cases*, ACLU IMMIGRANTS' RIGHTS PROJECT (July 25, 2015), https://www.aclu.org/other/recent-ice-detainer-cases (listing eight cases resulting in significant monetary settlements or damages against local police for honoring ICE detainers); Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014) ("[The LEA] was free to disregard the ICE detainer, and it therefore cannot use a defense that its own policy did not cause the deprivation of [the noncitizen's] constitutional rights.").

[25] Edward D. Murray, *LePage Says He'll Remove Sheriffs Who Refuse To Hold Certain Inmates for Immigration Agents,* PORTLAND PRESS HERALD (Sept. 25, 2017), http://www.pressherald.com/2017/09/25/lepage-says-he-will-remove-maine-sheriff-for-refusing-to-hold-prisoners-for-immigration-agents [https://perma.cc/QH44-33DJ] ("We have a couple sheriffs who say they're not going to be working with ICE . . . [and] unbeknownst to them, the Maine Constitution says if they don't follow state law, that I can remove them."). Maine's constitution states that "[w]henever the Governor . . . shall find that a sheriff is not faithfully or efficiently performing any duty imposed upon the sheriff by law, the Governor may remove such sheriff from office and appoint another sheriff to serve for the remainder of the term for which such removed sheriff was elected." ME. CONST. art. IX, § 10. LePage has since publicly deferred to Maine state courts regarding the matter but has not yet changed his stance that he will fire the sheriffs for not honoring ICE detainers. Fred Bever, *Governor Says He'll "Let Courts Decide" If Holding Released Inmates for ICE Violates Civil Rights*, ME. PUBLIC (Sept. 28, 2017), http://mainepublic.org/post/governor-says-hell-let-courts-decide-if-holding-released-inmates-ice-violates-civil-rights [https://perma.cc/Z9U6-8WQU].

important to how this conflict will be resolved in Maine. If, contrary to LePage's assertion, ICE detainers violate state law, then LePage will not be able to fire the sheriffs; but if state courts find that ICE detainers accord with common law, LePage will be able to use the threat of firing sheriffs to chill any resistance. Because this stand-off between county sheriffs and the governor in Maine is emblematic of conflicts within states across the country regarding the proper response to changing federal immigration priorities in general and the increasing number of cases challenging the constitutionality of ICE detainers in particular, analyzing the legality of these detainers through the state law lens provides a critical insight into how the battle over the legality of ICE detainers can be waged at the local level, regardless of how federal courts eventually decide the issue.[26]

The purpose of this Note, then, is to illustrate how *Lunn* provides a new front on which opponents of current federal immigration policies can attack the legality of ICE detainers in order to either significantly curtail or outright end the practice. It may be easy to imagine after just a cursory review of the *Lunn* case that the court's holding is simply a result of the peculiarities of Massachusetts common law or a byproduct of the state's liberal bent.[27] But that is not an accurate reading. Instead, this Note will demonstrate that the revolutionary logic in *Lunn* is easily exportable to other states because it is founded in generally accepted common law principles, thereby extending its ramifications far beyond the Commonwealth of Massachusetts. Put simply, the holding in *Lunn* suggests that now is the appropriate time for opponents of ICE detainers to use state courts to fight against the ICE detainer system.

Part II of this Note will introduce this argument by walking through an exegesis of *Lunn* to show how the case is revolutionary for being the first of its kind to synthesize the relevant federal case law and apply it within a state law context, and for how it establishes a model for practitioners to follow in order to attack ICE detainers in other states' courts. Part III will demonstrate the general exportability of *Lunn* to states with similar common law frameworks by demonstrating that ICE detainers most likely violate Maine state law because (a) holding noncitizens in accordance with an ICE detainer qualifies as an "arrest"; (b) no Maine statute or common law precedent justify an arrest for civil violations of

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[26] It is conceivable that Republicans in Congress and the White House will attempt to undercut "sanctuary city" policies through legislation, especially after a federal judge blocked the Justice Department's attempt to unilaterally deny funding to these communities. *See generally* Eli Rosenberg, *Federal Judge Blocks Trump's Executive Order on Denying Funding to Sanctuary Cities,* WASH. POST (Nov. 21, 2017), http://wapo.st/2zXBxmt?tid=ss_tw-bottom&utm_term=.e3489bfae20c [https://perma.cc/74M5-JMGS] (reviewing U.S. District Judge William H. Orrick's final decision to permanently block Executive Order 13768, which revoked financial support to so-called "sanctuary cities"). The House has already passed Kate's Law, which attempts to criminalize reentry by a noncitizen who has been deported or denied admission, or who has departed the United States, and the No Sanctuary for Criminals Act, which punishes states and localities that do not comply with the carrying out of federal immigration policy—including ICE detainer requests—by denying them a variety of grants and other monetary assistance. Kate's Law, H.R. 3004, 115th Cong. (2017); No Sanctuary for Criminals Act, H.R. 3003, 115 Cong. (2017). The fact that state common law precedent is likely to change much more slowly means that it provides a relatively more stable foundation on which to launch an attack against ICE detainers.

[27] *See* Jim O'Sullivan, *Massachusetts: Even More Liberal Than You Thought*, BOS. GLOBE (July 31, 2014), https://www.bostonglobe.com/news/politics/2014/07/31/massachusetts-even-more-liberal-than-you-thought/HCk5j2MZ7b64zmi3SZiKzH/story.html [https://perma.cc/SY9T-TC3X] (noting that Massachusetts stereotypes include "Taxachusetts," "[t]he bluest state," and "[a] vegetarian convention," and are all "well-earned" given poll results in the state).

federal immigration law without a warrant; and (c) no current federal law gives Maine's LEAs the authority to conduct such arrests. Lastly, this Note will conclude by advocating for opponents of current immigration policy to launch a challenge against ICE detainers in state courts by couching their arguments in terms of how the practice violate state law prohibitions against warrantless arrests for civil offenses and by discussing the possible barricades that proponents of ICE detainers may erect to protect them from attack.

II. THE REVOLUTIONARY NATURE OF *LUNN V. COMMONWEALTH*

The facts in the *Lunn* case are relatively simple. Sreynuon Lunn, a noncitizen without legal status and subject to a final order of removal, was originally arrested for a single count of unarmed robbery in October 2016.[28] Before his arraignment in Boston Municipal Court, the Department of Homeland Security (DHS) issued a detainer to Boston's police department and any subsequent LEAs that might hold him to keep him in their custody for an additional two days beyond when he would otherwise be released so ICE could arrest him.[29] After failing to post bail, the Suffolk County Sheriff's Office held Lunn while he awaited trial.[30] When a judge dismissed the case against him for lack of prosecution, Lunn's attorney requested that he be released, but the judge declined.[31] Lunn remained in court custody in a holding cell until several hours later, at which point ICE took him into federal custody.[32] Lunn's attorney promptly filed a petition to the Massachusetts Supreme Judicial Court, alleging that the trial court officers had violated Lunn's federal constitutional rights by detaining him.[33]

The court in *Lunn* classified the detention of a person in response to an ICE detainer as a warrantless arrest[34] for a civil violation of federal immigration

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[28] Lunn v. Commonwealth, 78 N.E.3d. 1143, 1147 (Mass. 2017).

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1148.

[32] *Id.*

[33] *Id.*

[34] *Id.*at 1153. Federal law authorizes ICE officers to issue detainers without a warrant, and even if a warrant is issued, there is no review by a neutral and detached magistrate to determine if sufficient probable cause exists. Memorandum from Acting ICE Director Thomas D. Homan, *Issuance of Immigration Detainers by ICE Immigration Officers*(Mar. 24, 2017) (noting that issuing a warrant with a detainer "is not legally required"); Kagan, *supra* note 13, at 157 ("Immigration arrest warrants [that may accompany detainers] do not include review and authorization by a judicial officer, nor by any other neutral adjudicator such as an immigration judge. In immigration enforcement, the 'warrant' issues with the officer's signature alone."). Instead an ICE officer fills out form I-247A "IMMIGRATION DETAINER – NOTICE OF ACTION," which states that "DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN" and lists four possible justifications: (1) the existence of a "final order of removal against the alien"; (2) "[t]he pendency of ongoing removal proceedings against the alien"; (3) "[b]iometric confirmation of the alien's identity and a records check of federal databases"; or (4) the presence of "other reliable evidence that affirmatively indicate[s] [that] the alien either lacks immigration status or . . . is removable under U.S. immigration law." U.S. Dep't of Homeland Security, DHS Form I-247A, Notice of Action (Mar. 2017). The problem is that removability is not sufficient to justify a noncitizen's arrest by local LEAs. Santos v. Frederick City Bd. of Comm'rs, 725 F.3d 451, 464-65 (4th Cir. 2013) ("Lower federal courts have universally and we think correctly interpreted *Arizona v. United States* as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations."). In an attempt to address this deficiency, DHS recently changed its detainer policy so that future detainer requests will be accompanied by I-200 "Warrant for Arrest of Alien" or I-205 "Warrant of Removal/Deportation" forms. Memorandum from Acting ICE

law.[35] Failing to find a legal justification for a warrantless arrest for a civil violation of federal immigration law either explicitly[36] or implicitly[37] in federal law[38] or specifically in state law,[39] the *Lunn* court held that because no state or federal statute authorized LEAs in Massachusetts to arrest suspected noncitizens for civil violations of federal immigration law, holding noncitizens beyond the time for which there is a preexisting legal justification is unlawful in the state.[40]

The reason why this seemingly state-specific holding is so revolutionary for the national debate about ICE detainers is in the way the justices analyzed their

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Director Thomas D. Homan, *Issuance of Immigration Detainers by ICE Immigration Officers*(Mar. 24, 2017). This new form does not cure the constitutional defect as this "warrant" can also be issued by an ICE officer without a probable cause determination by a neutral magistrate. Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1252 (N.D. Cal. 2017) ("[T]he probable cause determination here was made by an ICE officer, not a neutral magistrate."); Miranda-Olivares v. Clackamas City, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) ("But the ICE detainer alone did not demonstrate probable cause to hold [the noncitizen] . . . . It stated only that an investigation 'has been initiated' to determine whether she was subject to removal from the United States.").

As a result, courts have consistently classified arrests stemming from an ICE detainer as warrantless, which the federal government has conceded in previous litigation. Cervantez v. Whitfield, 776 F.2d 556, 559-60 (1985) (recording a stipulation by the federal government that "an immigration hold is an arrest without [a] warrant."); Moreno v. Napolitano,213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016) (stating that the federal defendants in the case "concede[d] that being detained pursuant to an . . . immigration detainer constitutes a warrantless arrest."); *see generally* Kagan, *supra* note 13, at 161 ("In immigration, 'warrants' are signed only by the law enforcement agency, so that in criminal law terms immigration enforcement makes warrantless arrests the norm."). These warrantless arrests are assumed to be unreasonable under federal law. Mincey v. Arizona, 437 U.S. 385, 390 (1978) ("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 . . . .'" (quoting Katz v. United States, 389 U.S. 347, 357 (1967))).

[35] *Lunn*, 78 N.E.3d at 1155. Although entry into the country is a misdemeanor criminal offense, INA § 275(a), presence without legal status is a civil violation that may render the noncitizen deportable. INA § 237(a)(1)(B); Arizona v. United States, 567 U.S. 387, 396, 407 (2012) ("Removal [of noncitizens] is a civil, not criminal, matter" because "[a]s a general rule, it is not a crime for a removable alien to remain in the United States."); Hinds v. Lynch, 790 F.3d 259, 264 (1st Cir. 2015) ("th[is] Court has 'consistently classified' removal 'as a civil rather than a criminal procedure'" (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952))); Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1247 (N.D. Cal. 2017) ("A warrant issued under this discretionary authority [by ICE] is necessarily a warrant for civil—as opposed to criminal—immigration enforcement.").

[36] *Lunn*, 78 N.E.3d. at 1159 ("In those limited instances where [INA § 287(g)] affirmatively grants authority to State and local officers to arrest, it does so in . . . explicit terms . . . .").

[37] The court dismissed the notion that states possess "inherent authority" to "cooperate" with federal officials in implementing federal immigration law in light of *Arizona v. United States*. *Id.* at 1157 ("Where neither our common law nor any of our statutes recognizes the power to arrest for Federal civil immigration offenses, we should be wary 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"). The court also rejected the idea that "287(g) agreements"—which allow police to serve as immigration officers but only after receiving specialized training and when supervised by the Attorney General—provided a mechanism through which the federal government can grant the authority necessary to arrest noncitizens for civil violations of immigration laws, particularly when there is no controlling state law on the books. *Id.* at 1159.

[38] *Lunn*, 78 N.E.3d. at 1159.

[39] *Id.* at 1155 ("Conspicuously absent from [Massachusetts] common law is any authority (in absence of a statute) for police officers to arrest generally for civil matters, let alone authority to arrest specifically for federal civil immigration matters."); *see generally* Santos v. Frederick City Bd. of Comm'rs, 725 F.3d 451, 465 (4th Cir. 2013) ("[A]bsent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.").

[40] *Lunn*, 78 N.E.3d. at 1146.

illegality not just in terms of federal constitutional law—by aggregating and clarifying the logic behind several recent federal court decisions—but also by viewing the issue through the lens of state common and statutory law. The court's approach demonstrates the vulnerability of ICE detainers to an important new angle of attack. Although the Massachusetts Supreme Judicial Court did not discuss the broader implications of its holding, the outcome in *Lunn* is provocative and inspiring for practitioners in any state that shares a common state law foundation with Massachusetts and that is either unlikely to resolve this dispute through the legislative process (like Maine) or ruled by a conservative majority who may try to compel LEAs to honor ICE detainers without considering the state law implications (like Texas).

III. THE MAINE CASE STUDY: APPLYING *LUNN* WITHIN ANOTHER STATE'S STATUTORY AND COMMON LAW FRAMEWORK

The degree to which *Lunn* can be exported to another state—such as Maine—will ultimately hinge on three key legal issues: (1) whether maintaining custody of a noncitizen after the expiration of any preexisting state law justification qualifies as an "arrest" under state law; (2) whether any state statute or common law precedent provides the legal authorization that is necessary for LEAs to conduct warrantless arrests for civil violations of federal immigration law; and (3) whether any current federal law might provide the necessary legal justification. As this Note will demonstrate in this section, the fact that the detention of a noncitizen in accordance with an ICE detainer qualifies as an arrest under Maine law[41] and neither Maine state common or statutory law, or federal law adequately authorize LEAs to conduct such warrantless arrests for civil violations of federal immigration law.[42] This means not only that ICE detainers appear to violate Maine state law but also that *Lunn* can be used as a weapon against ICE detainers in a state with a slightly different statutory system and common law precedent.

A. Holding a Noncitizen in Custody in Accordance with an ICE Detainer is an "Arrest" under Maine State Law

The use of the word "detainer" by ICE officers to describe their requests for local police departments to hold suspected noncitizens is deceptive because "detention" and "arrest" are related yet distinct concepts under the Fourth Amendment of the Constitution.[43] Although a "detainer" conceptually involves "detention," it resembles an "arrest" in practice because a "detention" involves a momentary or limited seizure of a person based on reasonable suspicion while an arrest involves a longer period of custody justified by probable cause.[44] Any new

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[41] *See* discussion *infra* Section III.A.

[42] *See* discussion *infra* Sections III.B-C.

[43] *See* Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015) ("[W]hile a detainer is distinct from an arrest, it nevertheless results in the detention of an individual."); Gonzalez v. City of Peoria, 722 F.2d 468, 477 (9th Cir. 1983) *overruled on other grounds by* Hodgers–Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc) (noting that "'Detention' defines a special category of fourth amendment seizures that are substantially less intrusive than arrests . . . [but when] the defendant is transported to the police station and placed in a cell or interrogation room he has been arrested, even if the purpose of the seizure is investigatory rather than accusatory").

[44] "The Fourth Amendment prohibits government agents from detaining a person in the absence of probable cause," Manuel v. City of Joliet, Ill., 137 S.Ct. 911, 918 (2017), and "requires a judicial

arrest, such as by holding someone in accordance with an ICE detainer, requires a new probable cause finding separate from the justification for the initial arrest.[45]

Courts in Maine define a lawful arrest as including four components:

> (1) an intention on the part of an arresting officer then and there to make the arrest under a real or pretended authority; (2) a communication of that intention by the arresting officer to the one whose arrest is sought; (3) an understanding of that intention by the person who is to be arrested; and (4) the actual or constructive seizure or detention of the person to be arrested by one having the present power to control that person.[46]

This definition for arrest in Maine closely resembles the definition of "arrest" in Massachusetts.[47] These definitions both incorporate (1) the officer's intent; (2) the objective understanding of the person being arrested; and (3) the actual or constructive detention or seizure of a person. They differ only slightly: Maine law includes an additional element by requiring that the arresting officer communicate his intention to arrest the arrestee while Massachusetts law does not.

Given the clear parallels between these definitions for an "arrest," it is likely that a court in Maine would classify the detention of a noncitizen by police in accordance with an ICE detainer as an arrest under state law. Although the police departments "detain" noncitizens for ICE, the nature of this detention resembles an arrest under the common law because the police department is seizing a person for a period beyond a simple investigatory stop.[48] Additionally, the same common law language that led the court in *Lunn* to classify holding a noncitizen in compliance with an ICE detainer as an arrest exists in Maine's common law, suggesting that a court in Maine would come to a similar conclusion. The slight difference between the two definitions only involves communication between the arresting officer and the person being arrested. This does not fundamentally change the essential elements of an arrest because the outcome and the relevant mental states of the people involved remains unchanged even if this element was excluded from the

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determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Gerstein v. Pugh, 420 U.S. 103, 114 (1975). State v. Donatelli, 2010 ME 43, ¶ 11, 995, 995 A.2d 238 ("[A] detention may amount to an arrest and is lawful only if it is supported by probable cause.") (quoting State v. Langlois, 2005 ME 3, 863 A.2d 913, 916).

[45] *Morales*, 793 F.3d at 217 ("Because [the noncitizen] was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification."); Miranda-Olivares v. Clackamas County, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9 (D. Or. April 11, 2014) ("The seizures that allegedly violated [petitioner's] Fourth Amendment rights were not a continuation of her initial arrest, but new seizures independent of the initial finding of probable cause for violating state law.").

[46] State v. Dorweiler, 2016 ME 73, ¶ 7, 143 A.3d 114 (quoting State v. Donahue, 420 A.2d 936, 937 (Me. 1980)).

[47] *See* Lunn v. Commonwealth, 78 N.E.3d. 1143, 1153 (Mass. 2017) (defining an "arrest" as occurring when "there is (1) an actual or constructive detention or seizure, (2) performed with the intention to effect an arrest, and (3) so understood by the person detained . . . [for which] [t]he subjective understanding of the officer or defendant does not control").

[48] *See Donatelli*, 2010 ME 43, ¶ 11, 995, 995 A.2d 238 (distinguishing between a brief investigatory stop and a "de facto arrest"); Terry v. Ohio, 392 U.S. 1, 24 (1968) (holding that LEAs to conduct brief investigatory stops without probable cause while reiterating the need for LEAs to establish probable cause before executing an arrest).

definition. Critically, the federal government has conceded that holding a person for the purpose of abiding by an ICE detainer qualifies as a "warrantless arrest,"[49] thereby weakening any argument they might make to the contrary. Therefore, it is fair to assume that when police departments hold a noncitizen in compliance with an ICE detainer, they have "arrested" that person under Maine state law.

B. Maine Statutes and Common Law do not Grant Local Law Enforcement Officials the Power to Conduct Warrantless Arrests for Civil Violations of Immigration Law

The Fourth Amendment of the United States Constitution[50] and Article I, § 5 of the Maine Constitution protect individuals from unlawful arrest in Maine.[51] Maine's Constitution specifically states that "the people shall be secure in their persons . . . from all unreasonable . . . seizures . . . and no warrant to . . . seize any person . . . shall be issue[d] without a specific designation . . . [of] the person . . . to be seized, nor without probable cause."[52] These protections arise only if the encounter between the police and the individual constitutes a seizure of the citizen to the point that the individual "is not free to walk away."[53] If the police do in fact conduct an arrest without adequate justification, they may be held liable under state law.[54]

The probable cause that is necessary for an arrest with or without a warrant exists "whenever facts and circumstances within the knowledge of the police and of which there was reasonably trustworthy information would warrant a prudent and cautious person to believe that the arrestee had committed [a] crime."[55] Although the standard for probable cause has "a very low threshold,"[56] the justification for arrest still must be objectively reasonable.[57] This probable cause

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[49] Moreno v. Napolitano, 213 F.Supp.3d 999, 1005 (N.D. Ill. 2016); *see also* Cervantez v. Whitfield, 776 F.2d 556, 559-60 (5th Cir. 1985).

[50] U.S. CONST. amend. IV.

[51] Gonzalez v. City of Peoria, 722 F.2d 468, 476 (9th Cir. 1983) *overruled on other grounds by* Hodgers–Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc) ("[A]rrests for federal offenses can be justified by state law authorization only if the arrest procedures do not violate the federal Constitution."); State v. Blier, 2017 ME 103, ¶ 8, 162 A.3d 829; Clifford v. Maine-General Med. Ctr., 2014 ME 60, ¶ 67 n. 21, 91 A.3d 567.

[52] ME. CONST. art. I, § 5.

[53] State v. Gulick, 2000 ME 170, ¶ 10, 759 A.2d 1085 ("[W]hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . we conclude that a 'seizure' has occurred.").

[54] ME. REV. STAT. ANN. tit. 15, § 704 (2015) (holding liable LEAs that execute an arrest warrant "wantonly or oppressively, or detain[] a person without a warrant longer than is necessary to procure it . . . .").

[55] State v. Johnson, 2014 ME 83, ¶ 11, 95 A.3d 621 (quoting State v. Foy, 662 A.2d 238, 240 (Me. 1995); Devenpeck v. Alford, 543 U.S. 146, 152 (2004) ("[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed."). A probable cause determination needs to be "particularized with respect to the person to be searched or seized." Maryland v. Pringle, 540 U.S. 366, 371 (2003). This standard applies for arrests with or without a warrant. Wong Sun v. United States, 371 U.S. 471, 479 (1963) ("Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent then where an arrest warrant is obtained.").

[56] State v. Lagasee, 2016 ME 158, ¶ 14, 149 A.3d 1153 (quoting State v. Webster, 2000 ME 115, ¶ 7, 754 A.2d 976).

[57] State v. Flint, 2011 ME 20, ¶ 12, 12 A.3d 54 ("[I]t is the objective view of the circumstances that matters; the arresting officer's subjective belief regarding whether probable cause exists is not

determination requires a fact-specific analysis by a neutral magistrate,[58] and includes the collective information known to the police.[59] Importantly, in Maine, the police's ability to execute a valid arrest of anyone, including a noncitizen, when they possess probable cause but neither a warrant nor reason to believe a crime has been committed, is restricted to a specific list of offenses defined by statute.[60]

Similarly, LEAs can arrest someone for a civil offense only in limited circumstances: Maine statute permits arrest or detention for noncriminal matters such as contempt of court,[61] involuntary commitment of the mentally ill,[62] material witness orders,[63] failure to provide child support,[64] and refusal to comply with monetary judgments.[65] As compared to Massachusetts' statutes, Maine's noncriminal detention laws are more limited in scope.[66] Massachusetts and Maine statutes and common law are similar, though, in that neither state provides to police the authority—using the language in *Lunn*—"to arrest generally for civil matters, let alone authority to arrest specifically for Federal civil immigration matters."[67] Ultimately, then, the permissibility of arresting a noncitizen in Maine for unlawful presence by holding them in compliance with an ICE detainer beyond any period of time authorized by a preexisting charge or conviction will depend on (1) whether a neutral magistrate has issued an arrest warrant after conducting a fact-specific analysis of probable cause and (2) if such an arrest falls within one of the categories under which police officers can execute an arrest for a civil offense.

When a noncitizen violates federal law by being unlawfully present, the noncitizen has committed a civil, non-criminal offense. Therefore, the re-arrest of such a noncitizen solely for unlawful presence (as opposed to for the initial criminal offense that led to his detention) must be predicated on one of the justifications for arresting a person in Maine for a civil offense, which are clearly delineated in state statutes. Just as in Massachusetts, Maine does not grant the police the power to arrest people for all civil violations, and none of the civil violations that justify an arrest in the relevant statutes—such as contempt of court or the involuntary commitment of the mentally ill—cover the arrest of a noncitizen for unlawful presence, either directly or tangentially. Importantly, the specificity with which the Maine legislature has authorized noncriminal detention suggests a

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determinative."). *See generally* Fox v. Hayes, 600 F.3d 819, 834 (7th Cir. 2010) ("Probable cause may be a loose concept, but it leaves no room for the absurd.").

[58] State v. Martin, 2015 ME 91, ¶ 15, 120 A.3d 113; State v. Hawkins, 261 A.2d 255, 259 (1970) ("The policy of the law is that the existence or absence of probable cause shall be determined by a 'neutral and detached magistrate' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.'" (quoting Johnson v. United States, 333 U.S. 10, 68 (1948))).

[59] *Lagasse*, 2016 ME 158, ¶ 14, 149 A.3d 1153.

[60] ME. REV. STAT. ANN. tit. 17-A § 15(1) (2015).; *See Lagasee*, 2016 ME 158, ¶ 13, 149 A.3d 1153 ("law enforcement officers are authorized to make warrantless arrests under certain circumstances, including when an officer has probable cause to believe that a person has committed any Class A, Class B, or Class C crime.").

[61] ME. REV. STAT. ANN. tit. 14 § 3136(2) (2015).

[62] ME. REV. STAT. ANN. tit. 34-B §§ 3862(1), 3864 (2017).

[63] ME. REV. STAT. ANN. tit. 15 § 1104 (2017).

[64] ME. REV. STAT. ANN. tit. 19-A § 2361(8) (2017).

[65] ME. REV. STAT. ANN. tit. 14 § 3135 (2017).

[66] *See* Lunn v. Commonwealth, 78 N.E.3d 1143, 1156 (Mass. 2017) (listing Massachusetts statutes that authorize detention of individuals in the following circumstances: "protective custody for intoxicated persons"; "emergency hospitalizations for mental illness"; "involuntary commitment of persons with alcohol and substance abuse orders"; "sexually dangerous persons"; "civil contempt for noncompliance with spousal or child support order"; and "material witnesses in criminal proceedings").

[67] *Id.* at 1155.

conscious exclusion of other justifications or circumstances. Therefore, it appears that arresting a noncitizen for unlawful presence in compliance with an ICE detainer is impermissible under Maine law because LEAs lack adequate probable cause to do so. This type of arrest for a civil violation is simply not authorized by statute.

C. Neither Federal Statutes nor Section 287(g) Agreements Appear to Empower Maine Law Enforcement Officials to Conduct Arrests for Civil Violations of Immigration Law

The Supreme Court recently rejected the idea that states possess any "inherent authority" as sovereign entities to enforce immigration laws.[68] Instead, the authority to arrest is a matter of state law, unless it is defined in federal statute.[69] Federal law sets clear limits on the ability of state or local police officers to enforce federal immigration law.[70] Federal law does not grant LEAs the authority to arrest an individual based solely on the possibility that the noncitizen is removable because this justification fails to provide the requisite probable cause for arrest.[71] State and local police can only arrest noncitizens who are "illegally present in the United States" *and* have "previously been conflicted of a felony . . . and deported or left after such conviction" *but only* after obtaining "appropriate confirmation from [ICE] of the status of such individual[,] for such a period of time as may be required . . . to take the individual into Federal custody[,]" *and* "to the extent permitted by relevant State and local law."[72]

The power possessed by LEAs to enforce federal immigration law may be expanded through "cooperative" INA § 287(g) agreements[73]— a program through

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[68] Arizona v. United States, 567 U.S. 387, 396, 410 (2012) ("By . . . authorizing state and local officers to engage in these enforcement activities as a general matter, [a state law permitting warrantless arrests for certain civil immigration violations] creates an obstacle to the full purposes and objectives of Congress."); *see also* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 425 (15th ed. 2016) ("The notion of 'inherent authority' to arrest and detain undocumented persons . . . has been seriously undermined in *Arizona.*").

[69] United States v. Di Re, 332 U.S. 581, 589 (1948) ("In [the] absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity.").

[70] *See Arizona,* 567 U.S. at 408 ("Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer.").

[71] *See id.* at 407 ("If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.").

[72] 8 U.S.C. § 1252c(a) (2012).

[73] Former DHS Secretary John Kelly revived the "Secure Communities" program and expanded the use of 287(g) agreements to enforce federal immigration law soon after the Trump administration came to power. Memorandum from DHS Secretary John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017), available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/M2FC-P5BT]. There has already been a significant uptick in LEAs entering into 287(g) agreements since Trump took office with twenty nine departments joining this year and "scores" of other LEAs contacting the Justice Department to express their interest. Mica Rosenberg & Reade Levinson, *Police in Trump-Supporting Towns Aid Immigration Officials in Crackdown*, Reuters (Nov. 27, 2017), https://www.reuters.com/article/us-trump-effect-immigration-police/police-in-trump-supporting-towns-aid-immigration-officials-in-crackdown-idUSKBN1DR169 [https://perma.cc/YKG6-PUY9]. There are currently no Maine police departments abiding by a 287(g) agreement. U.S. Immigration and Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/factsheets/287g [https://perma.cc/8N4E-MR7U].

which DHS deputizes police officers as "immigration officers."[74] These agreements are entered into voluntarily.[75] Any additional authority granted by the agreement applies only to incidences during which local police and federal officers are working cooperatively while under the supervision of the Attorney General.[76] Even if federal law, state law, or a 287(g) agreement permits local police to enforce federal immigration laws, this authority only extends to criminal matters.[77] Any power granted to state officials to arrest noncitizens pursuant to federal law is also circumscribed by procedural limits on arrests contained within the federal Constitution.[78]

Federal statutes do not seem to grant state or local law enforcement the power to arrest individuals for civil violations of federal immigration law without a warrant. Therefore, it is likely that a court in Maine would find that police departments lack the necessary legal authority to hold noncitizens in accordance with ICE detainers absent a clear state law justification for such an arrest. Federal law specifically limits the situations in which local police can execute federal immigration law, and case law suggests that even if the local police have this authority—whether it be through a 287(g) agreement or a federal statute—it may be limited to criminal matters for which they already possess the authority to arrest individuals under state law. Therefore, it appears that police forces in Maine lack the requisite authority to enforce civil federal immigration law that might justify the holding of a suspected noncitizen in response to an ICE detainer request.

IV. CONCLUSION

The decision in *Lunn* opens up a new front in the resistance against the use of ICE detainers to enforce federal immigration policy across the country in states with similar common law and statutory frameworks to Massachusetts. With the constitutional footing of the practice significantly weakened by recent federal cases,[79] state courts are positioned to be major players in the inevitable future debates about the appropriate means by which to police immigration and the degree

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[74] *See* INA §§ 287(g)(1), (3) ("[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, . . . who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to its investigation, apprehension, or detention of aliens . . . subject to the direction and supervision of the Attorney General."); Kelly, *supra* note 73 ("The INA § 287(g) Program has been a highly successful force multiplier that allows a qualified state or local law enforcement officer . . . to perform all law enforcement functions specified in section 287(a) of the INA, including the authority to . . . arrest [noncitizens] . . . under the direction and supervision of the [DHS].").

[75] INA § 287(g)(9) ("Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.").

[76] *See* Arizona v. United States, 567 U.S. 387, 410 (2012) ("There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government.").

[77] *See* Melendres v. Arpaio, 695 F.3d 990, 1001 (9th Cir. 2012) ("[I]f the [local police] are to enforce immigration-related laws, they must enforce only immigration-related laws that are criminal in nature, which they are permitted to do even without section 287(g) authority."); Gonzalez v. City of Peoria, 722 F.2d 468, 476 (9th Cir. 1983), *overruled on other grounds by* Hodgers–Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc) ("We . . . conclude that state law authorizes [local] police to enforce the criminal provisions of the [INA] . . . [and] [w]e firmly emphasize . . . that this authorization is limited to criminal violations.").

[78] *Gonzalez*, 722 F.2d at 477.

[79] *See supra* text accompanying note 24.

to which LEAs will be part of these policies. State courts, such as those in Maine, are likely to be called upon soon to enter into the fray and look at the intersection of state statute, common law, and federal immigration law as it pertains to ICE detainers. Their decisions may serve as a bulwark against any changes to federal policy or law that are likely to result as the Trump administration squares off against "sanctuary cities" and other actors resistant to his crackdown on illegal immigration.

Fundamentally, *Lunn* changes the dynamics of the struggle because it provides an avenue for practitioners to go on the offensive—particularly in states resistant to any challenges to ICE detainers or unlikely to resolve the issue legislatively. If an ICE detainer qualifies as an arrest under state law and there is no state statutory grant of power to conduct warrantless arrests for civil violations of immigration law, then it is likely that a state court will rule that detainers are unlawful.[80] The federal precedents are clear: unlawful presence is a civil offense, ICE detainers are warrantless because there is no oversight when they are issued by a neutral magistrate, and LEAs cannot unilaterally enforce civil federal immigration law, even if they enter into a 287(g) agreement with the Justice Department.[81] Unless federal courts take a radical turn and override these precedents, practitioners should feel empowered to rely on current federal law to support a strike against the ICE detainer system.

Even with this current advantage, practitioners in conservative states need to be mindful of how their state's government may respond to fill the breach and eliminate the vulnerability of ICE detainers from attack on state law grounds. Immediately after the *Lunn* decision came down, Charlie Baker, the Republican governor of Massachusetts, proposed that the legislature pass a law specifically providing for LEAs to conduct arrests for civil violations of federal immigration law.[82] Although it never passed, Baker did correctly identify the reliance of the *Lunn* court on the "statutory gap" under current Massachusetts law that—if filled—

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[80] Conducting a fifty state analysis is beyond the scope of this Note, but it is still worth highlighting the fact that ICE detainers may be vulnerable to attack on state law grounds even in conservative jurisdictions like Texas. Texas defines an arrest slightly differently than Maine and Massachusetts by asking its courts to analyze five variables: "(1) the amount of force displayed; (2) the duration of a detention; (3) the efficiency of the investigative process and whether it is conducted at the original location . . . ; (4) the officer's expressed intent . . . ; and (5) any other relevant factors." Melendez v. State, 467 S.W.3d. 586, 592-93 (Tex. Crim. App. 2015). Although these variables may be weighed differently by different courts, the ultimate test is "whether a reasonable person would perceive the detention to be a restraint on his movement comparable to a formal arrest . . . ." *Id.* at 592 (quoting State v. Ortiz, 382 S.W.3d 367, 372 (Tex. Crim. App.2012). Texas statute defines a "warrant of arrest," *inter alia*, as "a written order from a magistrate," meaning that ICE detainers are not "warrant[s] of arrest" under state law. TEX. CODE CRIM. PROC. ANN. art. 15.01 (West 2015). To conduct a warrantless arrest, Texas LEAs must possess either probable cause or specific statutory authority to do so. Dansby v. State, 530 S.W.3d 213, 220 (Tex. App. 2017). Just as in Maine and Massachusetts, Texas statutes fail to provide such authority in regards to arrests for civil violations of federal immigration law. *See* art. 14.01-.04. Therefore, it is possible that ICE detainers may violate Texas state common law—even though the state has recently passed legislation to force LEAs to honor them. *See* Barragan, *supra* note 11 (describing the state's efforts to proscribe compliance with ICE detainers).

[81] *See supra* text accompanying note 74. Although these agreements may provide additional authority for LEAs to enforce criminal immigration law, courts have unanimously declined to extend this power to civil enforcement. *See supra* text accompanying note 77.

[82] Claire Parker, *Baker Proposes Bill to Tighten Immigration Enforcement*, BOS. GLOBE (Aug. 1, 2017), https://www.bostonglobe.com/metro/2017/08/01/baker-files-bill-allow-local-law-enforcement-detain-certain-unauthorized-immigrants/58RpjL2RqjGDkAxvtomcfM/story.html [https://perma.cc/549J-6U6J].

might provide sufficient legal justification for honoring ICE detainers in the state.[83]

It is worth noting, though, that even if such steps might address the state law problem with ICE detainers or decrease LEA's liability, they would not cure the underlying constitutional weaknesses exposed by several federal courts[84] and acknowledged by numerous LEAs across the country.[85] The awareness by LEAs of these issues has already had a chilling effect in some states because they fear the increased exposure to liability that accompanies being complicit in honoring detainers.[86] But the resistance has not been universal, as evidenced by Texas's attempt to compel LEAs to honor ICE detainers[87] and the threat by Maine Governor LePage to fire sheriffs who do not comply.[88] Although the constitutional challenge remains, it is certainly possible—even likely—that states with unified governments that support the use of ICE detainers will be able to quickly counterattack by fixing whatever state statutory "gaps" make the practice unlawful. This eventuality means that the power of *Lunn* will be limited primarily to states with divided governments, like Maine, that are unlikely to resolve the issue legislatively.

Another novel response by LEAs interested in protecting the ICE detainer system, not from attack on state law grounds, but from federal constitutional challenges is for the LEA to coordinate with ICE directly so that ICE, not the LEA, take custody of the noncitizen immediately.[89] This custodial sleight of hand involves the LEA leasing a prison cell to ICE so that as soon as the term of the original detention on state law grounds expires, the noncitizen is placed in an "ICE" cell.[90] Although this may appear at first blush to fix the constitutional defect with ICE detainers, it actually demonstrates how proponents fundamentally misunderstand the problem.[91] Even if ICE immediately takes custody, the Fourth Amendment requires that any LEA—including ICE—get a warrant from a detached and neutral magistrate[92], meaning that the warrantless arrest[93] that takes

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[83] *Id.*

[84] ACLU, *supra* note 24 (listing federal court decisions).

[85] Dickerson, *supra* note 4.

[86] *Id.*

[87] Barragan, *supra* note 11.

[88] Murray, s*upra* note 25. It is ultimately quite ironic that Maine sheriffs may, in fact, be following state law by *not* honoring ICE detainers—even if they and Governor LePage are currently unaware.

[89] Dickerson, *supra* note 10.

[90] *Id.*

[91] *See* Kagan, *supra* note 13, at 128-29, 132 ("The principal constitutional problem with immigration enforcement is that a person may be deprived of liberty without any prompt review by a neutral magistrate to determine if probable cause exists to justify the arrest and continued custody . . . [and], in most removal cases there is no neutral determination about deportability [for unlawful presence] until the conclusion of removal proceedings in immigration court.").

[92] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21 (1968) ([The] Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of [law enforcement officers] can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."); Johnson v. United States, 333 U.S. 10, 13-14 (1948) ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."). Critically, the Fourth Amendment does not differentiate between citizens and noncitizens. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Bilokumsky v. Tod, 263 U.S. 149 (1923); Manuel, *supra* note 5.

[93] *See supra* note 34 for an extensive discussion.

place when a noncitizen is held in ICE's cell is still likely unconstitutional.

Although there is likely to be a substantial response by either the Trump administration or state governments that are in favor of the current crackdown on illegal immigration to any attack, *Lunn* provided an opening salvo in a conflict that may well topple the ICE detainer system as it currently exists. *Lunn* exclaims a worthy battle cry for practitioners in states in which the legality of ICE detainers remains unsettled, and it is time for them to hear its message loud and clear.