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# A Study on Immigrant Activism, Secure Communities, and Rawlsian Civil Disobedience

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**A STUDY ON IMMIGRANT ACTIVISM, SECURE  
COMMUNITIES, AND RAWLSIAN CIVIL  
DISOBEDIENCE**

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# A STUDY ON IMMIGRANT ACTIVISM, SECURE COMMUNITIES, AND RAWLSIAN CIVIL DISOBEDIENCE

KAREN J. PITA LOOR \*

## ABSTRACT

*This Article explores the immigrant acts of protest during the Obama presidency in opposition to the Secure Communities (SCOMM) immigration enforcement program through the lens of philosopher John Rawls' theory of civil disobedience and posits that this immigrant resistance contributed to that administration's dismantling the federal program by progressively moving localities, and eventually whole states, to cease cooperation with SCOMM. The controversial SCOMM program is one of the most powerful tools of immigration enforcement in the new millennium because it transforms any contact with state and local law enforcement into a potential immigration investigation. SCOMM has now been revived through executive order by the new Trump administration. Under SCOMM, an arrestee's identifying information is automatically forwarded to Immigration and Customs Enforcement (ICE), the largest investigative arm of the Department of Homeland Security (DHS). During Obama's tenure, when ICE chose to pursue an investigation into removability, agents issued an immigration detainer requiring that state/local authorities hold the individual beyond when she would have regularly been released, thereby providing ICE time to take her into custody and proceed with removal proceedings. John Rawls' theory of justice justifies engagement in civil disobedience by society members, which this Article argues includes immigrants, when basic liberties are at stake and ordinary avenues of political change are unavailable. Reviewing the critiques of SCOMM, including legal challenges to its constitutionality and claims that the program threatened public safety and unfairly criminalized all immigrants,*

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*this Article submits that SCOMM represents what Rawls would characterize as a violation of basic liberties. Further, given the stagnation and gridlock that typifies government approaches to immigration reform, regular political avenues to remedy SCOMM have been foreclosed. Using primarily two states as case studies, this Article describes immigrant acts of resistance and civil disobedience and explores how these acts mobilized local and state officials to cease cooperation with SCOMM and contributed to the Obama administration's dismantling the program. Immigrant activists and their allies must now integrate these strategies as they confront a heightened struggle.*

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## I. INTRODUCTION

In November of 2013, a crowd gathered outside an immigration detention center in Illinois chanting “Not one more: no more deportations.”<sup>1</sup> The group encouraged twelve activists who, while bound to each other with chains and PVC pipes, attempted to stop a deportation bus from leaving the facility with detainees.<sup>2</sup> Six of the activists attached themselves to the bus’s tires, only freeing themselves to avoid being run over as the bus drove away.<sup>3</sup> Immigration officers forcibly dispersed the activists.<sup>4</sup> Twelve people were arrested, five of whom were undocumented immigrants.<sup>5</sup> Prior protests at this detention center had also involved chains, pipes, and arrests. Undocumented immigrant activists targeted this facility and other locations throughout Illinois protesting the significant increase in deportations by the Obama administration—an increase that gained the President the ignoble title of “Deporter in Chief.”<sup>6</sup> Beyond Illinois and throughout the nation, immigrants (documented and undocumented) and their allies rallied against mass deportation through organized protests and other acts of civil disobedience.<sup>7</sup>

1. Ellyn Fortino, *Immigrant Rights Activists Arrested While Protesting Deportations At Broadview Detention Center*, PROGRESS ILLINOIS (Apr. 8, 2014), <http://progressillinois.com/quick-hits/content/2014/04/08/immigrant-rights-activists-arrested-while-protesting-deportations-broa> [<https://perma.cc/XQ2Z-N8CN>].

2. *BREAKING: 12 Chicagoans Form Human Chain Calling on President to Suspend Deportations*, IMMIGRANT YOUTH JUSTICE LEAGUE (May 29, 2013), <http://www.iyjl.org/nodeportations/> [<https://perma.cc/E2A7-XM29>].

3. *How a Middle-Aged Professor Came to Participate in a Civil Disobedience Action to Stop a Deportation Bus*, IMMIGRANT YOUTH JUSTICE LEAGUE (Dec. 5, 2013), <http://www.iyjl.org/professorengagesincivildisobedience/> [<https://perma.cc/5XW2-84GL>].

4. *Id.*

5. Fortino, *supra* note 1.

6. Alex Nowrasteh, *President Obama: Deporter-In-Chief*, FORBES, (July 30, 2012), <http://www.forbes.com/sites/alexnowrasteh/2012/07/30/president-obama-deporter-in-chief/#6ea7a4fa48cf>. See also ARMANDO NAVARRO, MEXICANO AND LATINO POLITICS AND THE QUEST FOR SELF-DETERMINATION: WHAT NEEDS TO BE DONE 238 (2015); *The Seven Sitting Down to Stop Deportations at Broadview Detention Center*, IMMIGRANT YOUTH JUSTICE LEAGUE (May 14, 2013), <http://www.iyjl.org/the-seven-sitting-down-to-stop-deportations-at-broadview-detention-center/> [<https://perma.cc/U628-W5KG>]. Although the Secure Communities program was initiated by the Bush administration in 2008, the program reached its peak during Obama’s tenure. See Alan Silverleib, *Obama’s Deportation Record: Inside the Numbers*, CNN (Oct. 19, 2011), <http://www.cnn.com/2011/10/19/politics/deportation-record/> [<https://perma.cc/S4A2-LW4T>].

7. See Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1261 n.8 (2015) (collecting cases); see also *infra* note 107 and accompanying text. In Part 4, this Article will review claims of Fourth, Fifth, and Fourteenth Amendment violations because these are relevant to its subject-matter. Nevertheless, it is worth

The administrative vehicle that led to this overwhelming number of deportations was the Secure Communities Program (SCOMM). SCOMM was one of the most powerful tools of immigration enforcement in the new millennium because it transformed any contact with state and local law enforcement into a potential immigration investigation that could lead to detention and eventual deportation. Under SCOMM, an arrestee's identifying information was automatically forwarded to Immigration and Customs Enforcement (ICE), the largest investigative arm of the Department of Homeland Security (DHS). When ICE chose to pursue an investigation into removability, agents issued an immigration detainer requiring that state/local authorities hold the individual beyond when she would have regularly been released, thereby providing ICE time to take her into custody and proceed with removal proceedings.

Critics opposed the program on many fronts. They argued that SCOMM violated the Constitution, threatened public safety, and painted all immigrants as criminals. Immigrants and their allies mobilized against the program across jurisdictions.<sup>8</sup> As immigrant activists raged against the program, certain states and localities began progressively opposing the program and attempting to cease their collaboration with federal immigration authorities.<sup>9</sup> Initially, the Department of Homeland Security (DHS) responded that state and local participation in SCOMM was mandatory.<sup>10</sup> Immigrants continued protesting. In turn, state and local officials were emboldened to defy DHS's dictates by refusing to comply with immigration detainers.<sup>11</sup>

After about four years of resistance and activism against SCOMM, the Obama administration dismantled the program. On November 20, 2014, President Obama appeared on primetime television to talk about immigration.<sup>12</sup> Lamenting that Congress had been unable to pass comprehensive immigration

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mentioning that litigators also alleged that the federal government mandating state participation in SCOMM would amount to a violation of the Tenth Amendment Anti-Commandeering Clause. See *infra* notes 115–17 and accompanying text. See Stumpf, *supra* note 7, at 1260.

8. *Id.* at 1261–62.

9. *Id.* at 1261.

10. HOMELAND SEC. ADVISORY COUNCIL, TASK FORCE ON SECURE COMTYTS. FINDINGS AND RECOMMENDATIONS 5 (2011), <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf> [<https://perma.cc/63NT-YTTV>].

11. See generally *States and Localities That Limit Compliance with ICE Detainer Requests*, CATH. LEGAL IMMIGR. NETWORK, INC., (Nov. 2014), [http://cliniclegal.org/sites/default/files/anti-detainer\\_policies\\_11\\_21\\_14.pdf](http://cliniclegal.org/sites/default/files/anti-detainer_policies_11_21_14.pdf) [<https://perma.cc/69QD-SRVV>].

12. President Barack Obama, Remarks Regarding Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/U7W2-NSCD>].

reform, the president exercised his executive powers to change immigrant life in America.<sup>13</sup> A DHS memorandum released that the same day stated that the DHS was dismantling SCOMM.<sup>14</sup> Despite the charged nature of the immigration issue, the memo garnered limited attention by those outside the immigrant community. Instead, the American public focused on the President's announcement of deportation relief for certain undocumented youth and parents.<sup>15</sup> Still, the termination of SCOMM affected an estimated six million undocumented people,<sup>16</sup> as well as others likely to be perceived as undocumented because of their ethnicity.<sup>17</sup>

13. *Id.*

14. Memorandum from the Dep't of Homeland Sec. Regarding Secure Cmty's. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) [<https://perma.cc/9XHQ-VGGN>] [hereinafter DHS SCOMM Memo]. In that same memorandum, DHS announced that SCOMM was being replaced with the Priority Enforcement Program (PEP). *Id.* Some advocates have argued that the PEP is essentially SCOMM in sheep's clothing. See Stumpf, *supra* note 7, at 1262; Patricia M. Corrales, *Will PEP Lead to Less Detention than Secure Communities?* *Not Likely*, CRIMMIGRATION (July 28, 2015), <http://crimmigration.com/2015/07/28/will-pep-lead-to-less-detention-than-secure-communities-not-likely> [<https://perma.cc/JA5E-V2QA>]; César Cuauhtémoc Garcia Hernández, *PEP vs. Secure Communities*, CRIMMIGRATION (July 7, 2015), <http://crimmigration.com/2015/07/07/pep-vs-secure-communities> [<https://perma.cc/UW39-A7TL>]; Letter from Advancing Justice—AAJC, et al., to Sec. Jeh Johnson, Dep't of Homeland Sec. (June 17, 2015), available at [www.ilrc.org/files/documents/pep\\_letter\\_to\\_dhs.pdf](http://www.ilrc.org/files/documents/pep_letter_to_dhs.pdf) [<https://perma.cc/BU7W-PVQB>]. This Article does not seek to evaluate whether PEP is an improvement over SCOMM.

15. See Memorandum from Sec'y of Homeland Sec. Jeh Johnson to U.S. Citizenship and Immigration Serv. Dir. Leon Rodriguez, U.S. Immigration and Customs Enf't Acting Dir. Thomas S. Winkowski, and U.S. Customs and Border Prot. Comm'r R. Gil Kerlikowske (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/V8XT-7HAK>] [hereinafter JOHNSON MEMORANDUM]. See also U.S. Immgr. and Customs Enf't, *Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)*, <https://www.ice.gov/daca> [<https://perma.cc/P4G5-5NNY>] (last visited Feb. 7, 2017). In *State of Texas, et al. v. United States*, 787 F.3d 733 (5th Cir. 2015), the Fifth Circuit enjoined DAPA and the second version of DACA from going into effect. The U.S. Supreme Court granted certiorari and the Court split evenly on the issue, thus upholding the Fifth Circuit injunction. *U.S. v. Texas*, 136 S. Ct. 2271 (2016), *reh'g denied*, 137 S. Ct. 285 (2016). While the original DACA was allowed to go into effect, Donald Trump promised that he would cancel President Obama's executive actions, memorandums, and orders that he deems unconstitutional. Amita Kelly, *Here Is What Donald Trump Wants to Do on His First Hundred Days*, NPR (Nov. 9, 2016) <http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days> [<https://perma.cc/65CL-FCYE>]. See Dara Lind & Matthew Iglesias, *Read leaked drafts of 4 White House executive orders on Muslim ban, end to DREAMer program, and more*, VOX (Jan. 25, 2017, 5:43 PM), <http://www.vox.com/policy-and-politics/2017/1/25/14390106/leaked-drafts-trump-immigrants-executive-order> [<https://perma.cc/CK7X-V9YS>].

16. Sarah Childress, *Obama's Immigration Plan Includes End to "Secure Communities"*, FRONTLINE (Nov. 21, 2014), <http://www.pbs.org/wgbh/frontline/article/obamas-immigration-plan-includes-end-to-secure-communities>.

17. See *Galarza v. Szalczyk*, No. 10-CV-06815, 2012 WL 1080020, at \*6–7 (E.D. Pa. Mar. 30,

Much has been written about the legality of SCOMM.<sup>18</sup> Yet, since its demise, there has been little exploration into the factors that led to the Obama administration's decision to abandon it. What we do know is that the DHS memorandum announcing the dismantling of SCOMM referenced attempts by state and local jurisdictions to cease cooperation with the program.<sup>19</sup> This Article posits that immigrant acts of civil disobedience in protest to SCOMM contributed to the dismantling of the federal program by progressively moving localities, and eventually whole states, to cease cooperation with the program. It further argues, relying on philosopher John Rawls' theory of civil disobedience,<sup>20</sup> that such immigrant protests were not only successful, but justified.

Now, more than ever, it is critical to understand the larger social forces that enable marginalized subsets of society, in this case undocumented immigrants, to affect positive change, despite entrenched federal policy and recalcitrant federal actors.<sup>21</sup> During the writing of article, Donald J. Trump was elected President of the United States. Although it is impossible to predict the extent of the aftermath of the 2016 presidential election after Trump's first week in office, noncitizens are in the cross hairs. On his fifth and seventh day as president, Trump signed three executive orders targeting immigrants and

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2012) *rev'd and remanded*, 745 F.3d 634 (3d Cir. 2014).

18. See Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629, 696–98 (2013); Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 154–56 (2013); Stumpf, *supra* note 7. See generally Amelia Fischer, *Secure Communities, Racial Profiling & Suppression Law in Removal Proceedings*, 19 TEX. HISP. J.L. & POL'Y 63 (2013); Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 647–48 (2015); Melissa Kearney, Julia Harumi Mass, & Angie Junck, WASHINGTON DEFENDER ASSOCIATION, ISSUE BRIEF: IMMIGRATION DETAINERS AND LOCAL DISCRETION 5–6 (Apr. 2011).

19. DHS SCOMM Memo, *supra* note 14.

20. JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

21. See LEO R. CHAVEZ, THE LATINO THREAT 113–76 (2008); MARIE FRIEDMANN MARQUARDT, TIMOTHY J. STEIGENGA, PHILIP J. WILLIAMS, & MANUEL A. VASQUEZ, LIVING "ILLEGAL": THE HUMAN FACE OF UNAUTHORIZED IMMIGRATION 155–258 (2011); WALTER J. NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE 75–165 (2013); ARMANDO NAVARRO, THE IMMIGRATION CRISIS: NATIVISM, ARMED VIGILANTISM, AND THE RISE OF A COUNTERVAILING MOVEMENT 231–388 (2009). See generally AMALIA PALLARES, FAMILY ACTIVISM: IMMIGRANT STRUGGLES AND THE POLITICS OF NONCITIZENSHIP (2014); Christopher Strunk & Helga Leitner, *Resisting Federal-Local Immigration Enforcement Partnership: Redefining 'Secure Communities' and Public Safety*, 1 TERRITORY, POLITICS, GOVERNANCE 62, 62 (2013). See generally Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does it Still Sleep Tonight?*, 7 NEV. L.J. 780 (2007); Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 2 (2013).



refugees.<sup>22</sup> The themes of the orders are the closure of entry to those from majority Muslim countries, an impenetrable militarized Southern border, increased immigration detention, and heightened immigration enforcement.<sup>23</sup> Trump promised to deport two million immigrants whom he labels “criminals,”<sup>24</sup> and his use of that label is exceedingly broad including anyone charged with any crime or deemed to “have committed acts that constitute” a crime.<sup>25</sup> Trump has now followed through on his promise to attempt to cut federal funding to cities that limit their cooperation with immigration enforcement.<sup>26</sup> Mayors of Boston, New York, Los Angeles, and Chicago have responded by reaffirming their intent to maintain sanctuary policies to protect immigrant communities.<sup>27</sup> Trump has also reinstated SCOMM.<sup>28</sup> Under the new administration and with DHS Secretary John Kelly—an immigration hardliner<sup>29</sup>—at the helm, SCOMM will be an even stricter and more punitive immigration enforcement tool. Protesters have already decried the beginning of the Trump presidency. The day after Trump’s inauguration, unprecedented numbers of protesters gathered throughout the nation at women’s marches.<sup>30</sup>

22. Exec. Order No. 13, 767, 82 Fed. Reg. 8,793 (Jan. 25, 2017) [hereinafter Border Security]; Exec. Order No. 13,678, 82 Fed. Reg. 8,799 (Jan. 25, 2017) [hereinafter Enhancing Public Safety]; Exec. Office of the President, EXECUTIVE ORDER: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES, <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [<https://perma.cc/9SLA-JLBZ>] (Jan. 27, 2017) [hereinafter Protecting the Nation].

23. *Id.* At the time of this writing and after reports of noncitizens who are legal permanent residents or possess valid visas being detained and refused entry into the country at various airports, United States District Court Judge Ann M. Donnelly has granted an emergency stay enjoining the removal of these individuals by the Trump administration. See *Darweesh v. Trump – Decision and Order*, AM. C.L UNION, <https://www.aclu.org/legal-document/darweesh-v-trump-decision-and-order> [<https://perma.cc/6M9V-3HAV>].

24. Amita Kelly, *Here Is What Donald Trump Wants To Do In His First 100 Days*, NPR (Nov. 9, 2016), <http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days> [<https://perma.cc/B4YN-NMHJ>].

25. Enhancing Public Safety, *supra* note 22, § 3(b)–(c).

26. *Id.* §§ 1, 9.

27. Maeve Reston, *Big city mayors confident they'll remain sanctuaries*, CNN (Jan. 27, 2017 6:31 PM), <http://www.cnn.com/2017/01/26/politics/donald-trump-sanctuary-cities/index.html> [<https://perma.cc/AD7Z-BSD3>]; Heather Cherone, *Rahm Says Chicago Will Remain Sanctuary Despite Trump's Order*, DNA Info (Jan. 25, 2017 12:14 PM), <https://www.dnainfo.com/chicago/20170125/humboldt-park/trump-sanctuary-cities-chicago-funding-immigration> [<https://perma.cc/4WJ3-NSMK>].

28. Enhancing Public Safety, *supra* note 22, § 10(a).

29. Elise Foley & Jessica Schulberg, *Donald Trump Taps Border Hawk and Retired Gen. John Kelly To Head DHS*, HUFFINGTON POST (Dec. 7, 2016), [http://www.huffingtonpost.com/entry/john-kelly-dhs-secretary-trump\\_us\\_584832e5e4b08c82e8891a47](http://www.huffingtonpost.com/entry/john-kelly-dhs-secretary-trump_us_584832e5e4b08c82e8891a47) [<https://perma.cc/Q9UD-97TQ>].

30. Heidi M. Przbyla & Fredreka Schouten, *At 2.6 million strong, Women's Marches Crush*

After the detention at airports of legal permanent residents and valid visa holders from majority Muslim countries, activists have gathered at Kennedy Airport, Boston Logan, Denver Airport, and others with signs declaring “We are all immigrants.”<sup>31</sup> As the threats to the immigrant populations increase so does the need to reinforce local and state resistance against harsh federal dictates. This Article explores how immigrants utilized Rawls’ civil disobedience to push localities and states to stand with them and resist immigration enforcement mandates.

Below, Part II of this Article describes John Rawls’ theory of civil disobedience. Rawls’ theory is instructive because it provides a guidepost by which to assess whether civil disobedience against SCOMM was morally justified. Before applying the principles of civil disobedience to immigrant protest, this Article confronts the question of whether the activists’ status as immigrants problematizes the application of Rawls’ theory since he presupposes a “closed” society, that is, one where individuals enter it and leave it through birth and death.<sup>32</sup> This Article concludes that immigrants can engage in civil disobedience to effectuate change since the alternative conclusion would contravene egalitarian principles that are integral to a Rawlsian society. Part III of this Article focuses on SCOMM, its spread across jurisdictions, and its demise. Part IV reviews select legal and other critiques of SCOMM and surveys failed attempts at immigration reform to demonstrate how these two circumstances fit into Rawls’ paradigm. Focusing primarily on two state case studies, it describes immigrant acts of resistance and civil disobedience and explores how these acts mobilized local and state officials to cease cooperation with SCOMM.

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*Expectations*, USA TODAY (Jan. 21, 2017 5:04 AM), <http://www.usatoday.com/story/news/politics/2017/01/21/womens-march-aims-start-movement-trump-inauguration/96864158/> [<https://perma.cc/3Y5K-E4DG>].

31. Ralph Ellis, *Protestors mass at airports to decry Trump’s immigration policies*, CNN (Jan. 28, 2017, 10:01 PM), <http://www.cnn.com/2017/01/28/politics/us-immigration-protests/> [<https://perma.cc/645C-ND3H>]; see also James Doubek, *PHOTOS: Thousands Protest At Airports Nationwide Against Trump’s Immigration Order*, NPR (Jan. 29, 2017 5:30 AM), <http://www.npr.org/sections/thetwo-way/2017/01/29/512250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order> [<https://perma.cc/F3HC-UA98>].

32. John Rawls, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2017), <https://plato.stanford.edu/entries/rawls/> [<https://perma.cc/JEZ9-HZEB>].

## II. RAWLS' THEORY OF CIVIL DISOBEDIENCE

### A. *The conditions of just civil disobedience.*

John Rawls' theory of civil disobedience in *A THEORY OF JUSTICE* sets forth a framework for assessing when acts of resistance, like the immigrant protests against SCOMM, are morally justified—that is, necessary to further a just society.<sup>33</sup> Understanding Rawls' theory of civil disobedience requires familiarity with the underpinnings of Rawlsian society. As a threshold, Rawls' civil disobedience theory is applicable to a nearly just society.<sup>34</sup> When Rawls describes a nearly just society, he refers to one which is constructed to advance the well-being of its members, where its members share the same principles of justice, and where societal institutions generally fulfill those principles.<sup>35</sup> Further, according to Rawls, a just society necessarily requires democratic governance.<sup>36</sup> Nevertheless, even in a nearly just society, unjust legislation and government action may still occur.<sup>37</sup>

In this Rawlsian society, individuals have a foundational fidelity to the law because they recognize that their general conception of justice is shared by all and that the laws were enacted in a fair manner.<sup>38</sup> This fidelity can only be overcome when the acceptable limits of injustice are exceeded.<sup>39</sup> In those circumstances, individuals may justifiably engage in civil disobedience within certain limitations. Such disobedience is morally sound and appropriate if its goal is to effectuate change in government laws and policies that will maintain the just constitutional regime.<sup>40</sup> However, civil disobedience may be used only

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33. RAWLS, *A THEORY OF JUSTICE*, *supra* note 20. While other theorists have treated the issue of civil disobedience, the choice to rely on Rawls' theory instead is that it has both clearly developed elements and specifically does not use personal morality or religious principles to justify the act of civil disobedience. *Id.* at 321 (“In justifying civil disobedience one does not appeal to principles of general morality or to religious doctrines . . . . Instead one invokes the commonly shared conception of justice that underlies the political order.”). See A. John Simmons, *Disobedience and Its Objects*, 90 B.U. L. REV. 1805, 1805 (2010) (“When John Rawls reinvigorated the contemporary philosophical debate about civil disobedience with his 1969 essay, *The Justification of Civil Disobedience*, he also largely set the terms for subsequent discussions of that subject.”) (footnote omitted).

34. RAWLS, *supra* note 20, at 319, 335.

35. *Id.* at 4, 319, 397–98. Rawls also calls this a well-ordered society. *Id.*

36. *Id.* at 313, 319, 335.

37. *Id.* at 313, 335.

38. *Id.* at 305–06.

39. *Id.* at 308.

40. *Id.* at 320.

as a last resort since it is a deviation from the democratically enacted law.<sup>41</sup> Thus, civil disobedience can fairly be viewed as a tool to bring the relevant law or government practice within the boundaries of the principles of justice that the society's members endorse.

To measure whether engagement in civil disobedience is morally sound, first there must exist either "serious infringements . . . of the principle of equal liberty [or] blatant violations of the . . . principle of fair . . . opportunity."<sup>42</sup> There is a serious infringement to the first principle of equal liberty when government action violates an individual's "basic liberty."<sup>43</sup> Therefore, it is relevant to explore how Rawls compiles his list of basic liberties. Rawls arrives at these basic liberties by theorizing about individuals' choices under a metaphorical "veil of ignorance"—unaware and thus unencumbered by their actual position or status within any particular society. According to Rawls, under such unbiased conditions individuals would conclude that basic liberties include the right to assemble; to be free from arbitrary arrest; to be free from psychological oppression, physical attack, or dismemberment; and to have integrity of the person.<sup>44</sup> Each individual would further have "an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."<sup>45</sup> Rawls views this principle of equal liberty as so essential to society that the basic liberties, available to everyone equally, cannot be negotiated away or limited for other goods; instead, liberty may only be limited for the sake of liberty.<sup>46</sup> Initially, basic liberties are broad; however, their scope is defined and limited once society erects a constitution that "enumerates and protects the basic liberties and rights and creates a democratic system of government."<sup>47</sup> Thus, Rawls' "basic liberties are those commonly

41. *Id.* at 326–28, 336–37. Rawls clarifies that the civilly disobedient act must deviate from the law, but need not do so in the same law that the individual finds unjust. *See id.* at 320 (Civil disobedience "does not require that the civilly disobedient act breach the same law that is being protested."). This is similar from Thoreau's act of civil disobedience where he refused to pay his tax bill as a civil disobedient act for the institution of slavery and the Mexican-American War. *See* HENRY DAVID THOREAU, CIVIL DISOBEDIENCE 9 (Infomotions, Inc., 2001) (1849), <http://www.infomotions.com/etexts/philosophy/1800-1899/thoreau-civil-182.txt> [<https://perma.cc/B924-EG8D>].

42. *Id.* at 326.

43. *Id.* at 326–27.

44. RAWLS, *supra* note 20, at 53, 118.

45. *Id.* at 53.

46. H.L.A. Hart recognizes but critiques this concept as too simplistic and argues that liberty may be limited to avoid other's harm and suffering and that for some it may be rational to exchange some liberty for economic gain. *See* H.L.A. Hart, Chapter 10, *Rawls on Liberty and Its Priority*, in READING RAWLS 230, 230–52 (Norman Daniels ed.) (1975).

47. *See* James W. Nickel, *Rethinking Rawls's Theory of Liberty and Rights*, 69 CHL-KENT L.

protected by constitutional regimes.”<sup>48</sup> As discussed in Part IV, SCOMM opponents argued that the program violated the basic liberties of freedom from arbitrary arrest and integrity of the person.<sup>49</sup>

After determining that a violation of basic liberties (and thus a violation of the principle of equal liberty) occurred, the second inquiry before engaging in civil disobedience is whether past attempts to change the unjust law or government practice through the regular political process have failed.<sup>50</sup> If those past attempts failed, individuals can view additional conventional political attempts as futile, since the majority has remained unmoved.<sup>51</sup> As is explored later in this Article, government gridlock and failure on immigration reform is well-known.<sup>52</sup> Rawls recognizes that civil disobedience may be particularly appropriate for those whose status handicaps their political power and engagement, like immigrants.<sup>53</sup> Nevertheless, multiple minority groups should avoid engaging in separate forms of civil disobedience simultaneously and should instead somehow strategize collaboratively to avoid cracking the foundations of the primarily just society.<sup>54</sup>

Finally, there is the strategic question of whether it is wise to engage in civil disobedience. Rawls suggests that although the minority may now, after satisfying the previously mentioned requirements, be “within [its] rights” to behave in a civilly disobedient manner, the time might not be ripe if the behavior “only serves to provoke the harsh retaliation of the majority.”<sup>55</sup> Since the theory of civil disobedience is, as Rawls frames it, one of persuasion—to persuade the majority to change its course and adopt a more just policy—“care must be taken to see that [the conduct] is understood.” Thus exercising the right to civil disobedience, like exercising any other right, should rationally advance one’s ends or the ends of those one wishes to assist.<sup>56</sup> In this sense, Rawls’ theory of civil disobedience is pragmatic and grounded.

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REV. 763, 764–65 (1994); Robert S. Taylor, *Rawls’s Defense of the Priority of Liberty: A Kantian Reconstruction*, 31 PHIL. & PUB. AFF. 246 (2003).

48. Taylor, *supra* note 47, at 246.

49. See *infra* Part IV.

50. RAWLS, *supra* note 20, at 327.

51. *Id.* at 328.

52. See *infra* Section IV.A.2.

53. RAWLS, *supra* note 20, at 327.

54. *Id.* at 328–29.

55. *Id.* at 330.

56. *Id.*

*B. The question of immigrants as members of a "closed society."*

Immigrants—documented and undocumented—should be considered “members” of a Rawlsian society and, as such, they may utilize civil disobedience. Rawlsian society has been described as self-contained and closed, in that individuals enter and exit through birth and death.<sup>57</sup> Thus, some may question whether Rawls’ theory of civil disobedience is inapplicable to immigrants who enter the society through alternative means. Further, Rawls states specifically that “citizens” are entitled to basic liberties.<sup>58</sup> However, Rawls’ basic liberties are expressed through central constitutional principles applicable to all “persons,” beyond the bounds of citizenship.<sup>59</sup> Therefore, the term “citizen” should denote active membership in society, rather than technical legal status. Professor Linda Bosniak has suggested as much in her exploration of the “citizen alien.”<sup>60</sup> Notably, the continued treatment of the immigrant as the Other or Stranger, relegated permanently to be content with unequal basic rights, would create a caste system which is inconsistent with egalitarian standards.<sup>61</sup> A different conclusion that would exclude immigrants from membership in a Rawlsian society would be inconsistent with a purported theory of justice.

Since Rawls’ basic liberties are those protected by constitutional principles, the initial inquiry is whether relevant American constitutional protections have been confined to citizens. A plain reading of the search and seizure limitations, due process and equal protection constitutional amendments implicated by SCOMM reveals that their protections are not limited to citizens, but extend to the “people.”<sup>62</sup> This word choice is instructive because different parts of the Constitution utilize “citizens” to denote other privileges.<sup>63</sup> James Madison, when discussing his Bill of Rights, explained that since noncitizens “owe, on one hand, a temporary obedience [to the Constitution], they are entitled, in

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57. See John Rawls, *supra* note 32. See also Daniel Correa, *Reciprocity Interest in Political Affiliation: Redefining the Political Community to Attain Just Principles in Immigration Reform*, 14 HARV. LATINO L. REV. 67 (2011); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POL. 251, 255 (1987).

58. RAWLS, *supra* note 20, at 178.

59. *Id.* at 177.

60. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (1998).

61. *Id.*

62. U.S. Const. amends. IV, V, XIV § 1.

63. Hon. Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 806–07 (2013).

return, to [its] protection and advantage.”<sup>64</sup> Supreme Court precedent suggests the same reciprocity regarding the constitutional rights implicated by SCOMM. In the 19th century, the Court dealt with two cases involving Chinese noncitizens.<sup>65</sup> In *Yick Wo v. Hopkins*, the Court stated that “[t]he fourteenth amendment to the constitution is not confined to the protection of citizens” and applied due process and equal protection to noncitizens, thus finding a San Francisco ordinance unconstitutional as applied because it was used to deny laundry permits only to Chinese individuals.<sup>66</sup> In *Wong Wing v. United States*, the Court again recognized that a noncitizen is entitled to due process of law and that the federal government could not constitutionally sentence a Chinese person to hard labor, as required by the Chinese Exclusion Act, without a jury trial.<sup>67</sup> Almost a century later, in *Almeida-Sanchez v. United States*, the Court applied Fourth Amendment protections to a noncitizen driver in the United States.<sup>68</sup> Thus the Supreme Court has applied to non-citizens the same basic liberties that the U.S. Constitution delineates and that SCOMM implicated.

Rawls himself does not seriously deal with immigration in any of his work.<sup>69</sup> Scholars have thus seldom utilized Rawls to assess questions of immigration or immigrant’s rights. An exception is Professor Robert Chang.<sup>70</sup>

64. *Id.* at 807; see sources cited *supra* note 21.

65. *Wong Wing v. United States*, 163 U.S. 228, 230 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

66. *Yick Wo*, 118 U.S. at 369.

67. *Wong Wing*, 163 U.S. at 237. The Chinese Exclusion Act of 1882 excluded laborers of Chinese origin from entering the United States for ten years and required Chinese immigrants already present to register with the federal government. The act is generally considered to be the first racially-based immigration law in American history. Sang Hea Kil, *Fearing yellow, imagining white: media analysis of the Chinese Exclusion Act of 1882*, 18 SOCIAL IDENTITIES 663, 663–64 (2012).

68. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). There is some language in the opinion that leaves open the question of whether these Fourth Amendment protections apply with the same force to undocumented immigrants since the Court references “those lawfully within the country.” *Id.* at 274–75. Since *Almeida-Sanchez*, the Supreme Court dealt again with the question when considering the search of a noncitizen’s home in Mexico. In the *Verdugo-Urquidez* plurality opinion, 494 U.S. 259 (1990), Chief Justice Rehnquist concluded that the Fourth Amendment was inapplicable to a search of the defendant’s Mexico home because the search was conducted outside the United States and also because the noncitizen had not developed a “substantial” connection to the United States. Moore, *supra* note 63, at 835–40. This substantial connection has not been further explored in the Supreme Court Fourth Amendment jurisprudence.

69. Rawls only touches upon immigration in a limited manner in his LAWS OF THE PEOPLES where he explains that migration would not be a problem in what he terms as his “realistic utopia” of liberal and decent Peoples. Karoline Reinhardt, Speech at the 49th Societas Ethica Annual Conference on Ethics and Migration: No Migration in a Realistic Utopia? Rawls’s The Law of the Peoples and the Topic of Migration (Aug. 23–26, 2012). This is because Rawls sees the migration problem as related to domestic injustices, which that would not exist in these societies. *Id.*

70. Another exception is Joseph H. Carens who expands Rawls’ original position to a global one

Professor Chang contends that in Rawls' original position, citizenship status would be one of the contingencies of which individuals would be ignorant and reasonable individuals would thus provide noncitizens equal access to basic liberties for fear that they would themselves be immigrants in the Rawlsian society.<sup>71</sup> Furthermore, Chang defines two types of citizenship. One is citizenship as a legal status and the second is citizenship as participation in socially desirable activity.<sup>72</sup> This latter definition is one that expands the citizen label to encompass immigrants. Evidence suggests that immigrants overall engage in desirable activities that likely benefit the nation.<sup>73</sup> This conduct includes increasing community connections that may lead to lower crime, contributing to growth in the labor market, paying taxes, revitalizing towns, and maintaining housing prices. After comparing data from states with a high immigrant work force with that of states with a low immigrant work force, economists suggest that the long term effect of immigrant workers is an increase in income for U.S. born workers.<sup>74</sup> This is because states are able to absorb immigrant labor, while U.S. workers move to different and higher paying positions.<sup>75</sup> Immigrants also contribute by paying taxes. A recent report by the Institute of Taxation and Economic Policy states that undocumented immigrants consistently contribute over \$10 billion annually in taxes.<sup>76</sup> That is about eight percent of their incomes.<sup>77</sup> In addition, a study by the Americas Society and Council of the Americas finds that immigrant presence in areas may be reinvigorating as it tends to boost moves of U.S. born individuals to

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and suggests that in this global original position individuals would be ignorant to their place of birth and thus would include a right to migration among basic liberties. Carens, *supra* note 57, at 255–62.

71. Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/national Imagination (Part III): Aoki, Rawls, and Immigration*, 90 ORE. L. REV. 1319, 1331–32 (1997); Carens, *supra* note 57, at 255–62.

72. Chang & Aoki, *supra* note 71, at 1330.

73. *Id.* at 1332.

74. Giovanni Peri, *The Effect of Immigrants on U.S. Employment and Productivity*, FEDERAL RESERVE BANK OF SAN FRANCISCO (Aug. 30, 2010), <http://www.frbsf.org/economic-research/publications/economic-letter/2010/august/effect-immigrants-us-employment-productivity/> [<https://perma.cc/KXH6-8XBM>].

75. *Id.*; see also Jacob L. Vigdor, *Immigration and the Revival of American Cities: From Preserving Manufacturing Jobs to Strengthening the Housing Market*, AMERICAS SOCIETY AND COUNCIL OF THE AMERICAS, 2–3, 5–10 (Sept. 2013), <http://www.as-coa.org/sites/default/files/ImmigrationUSRevivalReport.pdf> [<https://perma.cc/P3FD-Z4NE>].

76. Lisa Christensen Gee, Matthew Gardner, & Meg Wiehe, *Undocumented Immigrants' State and Local Tax Contributions*, THE INSTITUTE ON TAXATION AND ECONOMIC POLICY 1–2 (Feb. 2016), <http://www.itep.org/pdf/immigration2016.pdf> [<https://perma.cc/ZH88-NBS6>].

77. *Id.*



those locations likely due to interest in new services-oriented businesses.<sup>78</sup> This same study also concluded that immigrant presence tends to an increase in housing value.<sup>79</sup> Finally, data suggests that immigrant presence may reduce criminality.<sup>80</sup>

In *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP*, Linda Bosniak analyzes American law dealing with noncitizens and expands the traditional definition of citizen to the alien citizen.<sup>81</sup> Professor Bosniak does not treat Rawls in her work, but instead reviews how case law has treated alienage in various contexts and demonstrates that jurisprudence is mixed regarding the relevancy of immigrant status.<sup>82</sup> She proposes a type of participation in society where alienage is of little relevance in an individual's daily activities.<sup>83</sup> Thus, for the alien citizen, alienage is not an obstacle to membership in society. Bosniak constructs this concept of the alien citizen based on her interpretation of Political Theorist Michael Walzer's *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY*. While Walzer's work defends the sovereignty of nations and thus the nation's right to restrict immigration,<sup>84</sup> Bosniak highlights in her own work the alternate part of Walzer's theory where he argues that once immigrants reside and work inside the nation, they must be granted full membership in society.<sup>85</sup> Bosniak borrows from Walzer's criticism of the European guestworker system<sup>86</sup> and likewise suggests that maintaining a society where individuals are treated unequally because of their immigration status, particularly "where alienage status is . . . permanent," is inconsistent with the egalitarian principles of a democratic

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78. See Vigdor, *supra* note 75, at 2–3, 18–19.

79. *Id.* at 2–3, 11–17. See also KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 140 (2007).

80. See *infra* Section IV.A.1.b.ii

81. BOSNIAK, *supra* note 60.

82. *Id.* at 49–63.

83. *Id.*

84. *Id.* at 41.

85. *Id.* Like Walzer, Bosniak distinguishes the government's interest in regulating ingress and egress into the nation from its interest in regulating noncitizens already present in the nation. *Id.* at 38. Bosniak suggests that while the power to regulate immigration can be understood as related to sovereignty, once noncitizens reside within the nation's borders the government's ability to discriminate based on alienage is then limited since "[f]ormal commitments to norms of equal treatment and to the elimination of caste-like status have shaped American public law." *Id.* See also James Dwyer, *Illegal Immigrants, Health Care, and Social Responsibility*, HASTINGS CTR. REP. 34, 34–41 (2004).

86. *Id.* BOSNIAK, *supra* note 60.

society.<sup>87</sup> Bosniak's concerns stem from the incongruity of excluding from full national membership those who are nevertheless subject to that nation's laws is problematic.<sup>88</sup> This is consistent with Madison's pronouncements regarding the reciprocity of legal obedience and legal protections between the nation and its noncitizens.<sup>89</sup> Furthermore, it is particularly relevant considering how shifting American economic interests have caused immigration law's erratic attitudes towards especially Mexican migration—at times seeking to extricate from its society the same population that it previously invited and even recruited to fulfill its fiscal needs.<sup>90</sup>

Consistent with both Walzer and Bosniak, and for purposes of Rawls' theory, immigrants within the nation's territorial boundaries are entitled to membership in society and equal access to basic liberties—although their status might lead to certain political handicaps.<sup>91</sup> As such, this population may make use, when justified according to Rawls, of the tool of civil disobedience. This mechanism is of particular importance to the immigrant movement because their legal status impedes their ability to engage in the regular political process.

### III. SCOMM, ITS SPREAD, AND ITS DEMISE

SCOMM was set into motion by the Bush administration, spread at an exponential rate during the Obama administration, and was dismantled in November of 2014 by the latter administration. George W. Bush signed the Consolidated Appropriations Act of 2008, which provided Immigration and Customs Enforcement (ICE) \$200 million “to improve and modernize” its enforcement efforts.<sup>92</sup> Pursuant to this directive, in October of 2008, DHS initiated SCOMM with the stated goal of identification and removal of “dangerous criminal aliens who pose a threat to public safety.”<sup>93</sup> SCOMM

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87. *Id.* at 37–40.

88. *Id.* at 63.

89. *See* Moore, *supra* note 63, at 807.

90. *See* James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of Untied States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POLICY 227, 242–47 (1995).

91. Walzer accounts for these handicaps in his theory by referring to a transition period from potential to full citizenship when the immigrant's political rights may be curtailed, but not other rights. BOSNIAK, *supra* note 60, at 46. However, Bosniak takes issue with these limitations as being inconsistent with the remainder of Walzer's theory. *Id.* at 46–49.

92. OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-12-66, COMMUNICATION REGARDING PARTICIPATION IN SECURE COMMUNITIES 2 (2012) [hereinafter DHS, OFFICE OF INSPECTOR GEN.].

93. Press Release, Dep't of Homeland Security, Secretary Napolitano and ICE Assistant Secretary Morton Announce That the Secure Communities Initiative Identified More than 111,000

operated as an information sharing program between state and local law enforcement and ICE.<sup>94</sup> Before SCOMM, state and local law enforcement did not collaborate with immigration enforcement except through agreement either via the Criminal Alien Program (CAP), where ICE personnel are stationed at jails or prisons to identify noncitizens,<sup>95</sup> or a 287(g) Memorandum of Agreement, where ICE delegates immigration enforcement powers to local and state police.<sup>96</sup> SCOMM changed that. First, despite initial DHS suggestions to the contrary,<sup>97</sup> a jurisdiction's participation in SCOMM was not voluntary.<sup>98</sup> Instead, DHS progressively instituted SCOMM in counties throughout the country and by January 2013, achieved activation of the program throughout the nation.<sup>99</sup> Second, in activated jurisdictions, local and state law enforcement unwittingly became agents of immigration enforcement upon any interaction with civilians.<sup>100</sup> When local and state law enforcement book individuals at police stations or jails, they regularly share identifying and fingerprint information with the Federal Bureau of Investigations (FBI) to discover criminal background and any existing warrants.<sup>101</sup> Under SCOMM, the information shared with the FBI was automatically forwarded to ICE agents who would review it and decide whether to pursue an immigration investigation.<sup>102</sup> In the case where ICE wished to investigate immigration status, ICE would issue a Form I-247 immigration detainer pursuant to 8 U.S.C.

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Criminal Aliens in Its First Year (Nov. 12, 2009), <https://www.dhs.gov/news/2009/11/12/secure-communities-initiative-identified-more-111000-criminal-aliens-its-first-year> [<https://perma.cc/C6YV-JGK9>] [hereinafter Press Release, Dep't of Homeland Security].

94. KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 1–2 (2012). See also Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 938–39 (2014).

95. DHS, OFFICE OF INSPECTOR GEN., *supra* note 92, at 27, Appendix D. See also MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 13–15 (2012); *Criminal Alien Program*, U.S. Immigration and Customs Enforcement: What We Do, <https://www.ice.gov/criminal-alien-program> [<https://perma.cc/99M8-GENP>] (last visited Feb. 7, 2017).

96. DHS, OFFICE OF INSPECTOR GEN., *supra* note 92, at 27, Appendix D. See also *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. Immigration and Customs Enforcement Information Library, <https://www.ice.gov/factsheets/287g#signedMOA> [<https://perma.cc/PWQ5-LL32>] (last visited Feb. 7, 2017).

97. MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 11–12.

98. Miles & Cox, *supra* note 94, at 948.

99. *Id.* at 939, 947–52.

100. See DHS, OFFICE OF INSPECTOR GEN., *supra* note 92, at 3.

101. DHS, OFFICE OF INSPECTOR GEN., *supra* note 92, at 3; Miles & Cox, *supra* note 94, at 938–39.

102. MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 2 n.13 (2012). DHS, OFFICE OF INSPECTOR GEN., *supra* note 92, at 3.

§ 1101(a)(3).<sup>103</sup> Through the issuance of immigration detainers, ICE informed state and local law enforcements authorities that it was considering taking custody of individuals for immigration purposes,<sup>104</sup> and requested that the law enforcement agency hold the person for forty-eight hours beyond when they would have normally been released from government detention.<sup>105</sup> Local and state law enforcement were expected to comply with the ICE immigration detainers and hold the individual for the requested additional time so that ICE could potentially take custody.<sup>106</sup> Although the requested ICE holds were only for forty-eight hours beyond when the individual would have regularly been released, there were many stories and reports of individuals being held beyond these forty-eight hours.<sup>107</sup> Once ICE had custody, it often proceeded with removal efforts.<sup>108</sup>

Since ICE received information from initial police contact, SCOMM resulted in ICE issuing more immigration detainers at earlier stages in the criminal process.<sup>109</sup> Before SCOMM, assessing whether an arrestee might be a noncitizen was complicated and resource intensive. It often required interviews of detained individuals by federal authorities or others deputized by 287(g) agreement, and thus occurred in about 15% of jails and prisons by ICE agents and another 2% of counties by deputized police.<sup>110</sup> Because of automation, SCOMM rendered these interviews unnecessary. Before SCOMM, in 2007, ICE issued 68,558 detainers.<sup>111</sup> Post-SCOMM, in 2009, ICE comparatively

103. MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 1 nn.1–2.

104. *Id.* at 1.

105. *Id.* at 6.

106. *Id.* at 3.

107. National Immigration Forum Staff, *Community and Courtroom Responses to Immigration Detainers*, NAT'L IMMIGR. FORUM. (Dec. 16, 2013), <https://immigrationforum.org/blog/community-and-courtroom-responses-to-immigration-detainers-3> [<https://perma.cc/9HPL-ZGU5>] (collection of examples in Appendix A). *See, e.g.*, *Uroza v. Salt Lake Cty.*, No. 2:11CV713DAK, 2013 WL 653968, at \*7 (D. Utah Feb. 21, 2013) (“At the end of the 48–hour period of the detainer, ICE did not attempt to take custody of Uroza. Even after the state court judge ordered that Uroza be released and not turned over to ICE, the County Defendants refused to release Uroza until ICE took custody of him.”).

108. Strunk & Leitner, *supra* note 21, at 69 (referencing field notes from a September 2010 Washington DC Wilson Center Conference on 287(g) and SCOMM). At times, the individual would remain in immigration custody throughout the removal proceedings. MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 1.

109. MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 1, 8.

110. Miles & Cox, *supra* note 94, at 938, 946–47. This also coincides with this author’s own experience as a public defender in the District of Columbia during the 1990s and early 2000s.

111. *See* NAT'L IMMIGR. JUSTICE CTR., HOW HAVE ICE IMMIGRATION DETAINERS AFFECTED YOUR COMMUNITY?, <http://immigrantjustice.org/icedetainerdata#.VZGK30bQN8B> [<https://perma.cc/YB32-VNR5>] (last visited Feb. 7, 2017) (Number of detainers issued by ICE by year: 2007 = 68,558; 2008 = 204,132; 2009 = 270,988; 2010 = 196,778).

issued 270,988 detainees.<sup>112</sup> By 2011, the annual use of immigration detainees spiked to 316,170.<sup>113</sup>

As SCOMM spread across all jurisdictions, so did its critiques, as well as resistance by immigrant community activists.<sup>114</sup> In the latter section of Part VI, this Article uses two state case studies to demonstrate how immigrant activists opposed SCOMM through vigorous civil disobedience. Progressively, localities, as well as the states of Illinois, Massachusetts, and New York, began seeking to cease complying with immigration detention requests as early as 2010 and received conflicting information from DHS about their ability to stop cooperating with federal immigration authorities.<sup>115</sup> Multiple jurisdictions had signed Memorandums of Agreement (MOA) with ICE regarding participation in SCOMM that consistently included language stating that either party could unilaterally terminate the MOA at any time.<sup>116</sup> However, DHS maintained that cooperation was mandatory. These contradictory messages troubled officials and legislators who had believed SCOMM participation was voluntary and now felt misled by DHS.<sup>117</sup>

Legislative calls for investigations resulted in the creation of a task force to query into the program.<sup>118</sup> The task force held public hearings in several cities where community members vigorously opposed SCOMM and engaged in activism.<sup>119</sup> While the task force's investigations were ongoing, governors of all states with MOAs received letters from ICE rescinding the MOAs as unnecessary and non-binding, and instead stating that information sharing with

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112. *Id.*

113. See Dan Cadman & Mark Medcalf, *Disabling Detainers: How the Obama Administration has Trashed a Key Immigration Enforcement Tool*, CTR. FOR IMMIGR. STUDIES, <http://cis.org/disabling-detainers> [<https://perma.cc/4DYS-CQRY>] (Jan. 2015) (Number of detainees issued by ICE by year: 2011 = 316,170; 2012 = 282,541; 2013 = 212,455; 2014 = 157,447).

114. See *infra* Part IV.

115. See Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1129 (2013) (“[C]ommunity opposition mounted quickly as the program was implemented, prompting several states to exercise this opt-out option.”). See also DHS, OFFICE OF INSPECTOR GEN., *supra* note 92, at 6–7; Miles & Cox, *supra* note 94, at 948 n.10.

116. DHS, OFFICE OF INSPECTOR GEN., *supra* note 92, at 7–8.

117. Kalhan, *supra* note 115, at 1129–30 n.106.

118. HOMELAND SECURITY ADVISORY COUNCIL, *supra* note 10, at 4.

119. Julianne Hing, *Secure Communities Task Force Criticizes Program, Five Resign in Protest*, COLORLINES (Sept. 21, 2011), <http://www.colorlines.com/articles/secure-communities-task-force-criticizes-program-five-resign-protest> [<https://perma.cc/XXU8-ZDFM>] (“After being followed around the country during a protest-packed summer, a task force charged with evaluating the federal government’s immigration enforcement program Secure Communities released its report (pdf) last week that criticized the federal government’s implementation and design of the program.”).

immigration authorities was mandatory once fingerprint information was provided to FBI.<sup>120</sup> Ultimately, the task force investigation concluded by suggesting various reforms to SCOMM, but not before some of its members resigned in protest.<sup>121</sup>

DHS marketed that SCOMM would focus on the removal of “dangerous criminal aliens,”<sup>122</sup> but activists challenged this claim from the program’s inception.<sup>123</sup> Ultimately, the evidence negated this DHS claim.<sup>124</sup> A review of 2013 DHS deportation data demonstrated that only 12% of those deported had committed “Level 1” offenses, which are defined as those that “pose a serious threat to public safety or national security,” while 42% had no criminal conviction.<sup>125</sup> Of the rest of those deported, approximately 15% had a criminal immigration related conviction such as illegal entry and 13% had a traffic offense.<sup>126</sup> There is anecdotal evidence that ICE agents were issuing immigration detainers every time they suspected the individual was an alien and thus were not utilizing discretion in accordance with any stated enforcement priorities.<sup>127</sup> Further, in one circumstance, there was evidence that simply having a Spanish surname led to the issuance of a detainer.<sup>128</sup>

Since DHS unilaterally activated counties and began screening information obtained when police checked an individual’s criminal record, the only recourse for jurisdictions that wished to resist participation in SCOMM was to either refuse to enforce immigration detainers or adopt broader sanctuary policies.<sup>129</sup> While sanctuary policies differ by jurisdiction, they generally include resolutions, ordinances, or executive orders that prevent state and local law enforcement, representatives and/or workers from cooperating in some manner

120. DHS, OFFICE OF INSPECTOR GEN., *supra* note 92, at 8.

121. *See* Hing, *supra* note 119.

122. Press Release, Dep’t. of Homeland Security, *supra* note 93.

123. *See infra* Part IV.

124. *See* Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Datashows*, N.Y. TIMES (Apr. 7, 2014), <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html> [<https://perma.cc/3CQX-HTWE>].

125. *Secure Communities and ICE Deportation: A Failed Program?*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) (Apr. 8, 2014), <http://trac.syr.edu/immigration/reports/349/> [<https://perma.cc/JR7C-EWYG>]. *See also* Thompson & Cohen, *supra* note 124.

126. *Secure Communities and ICE Deportation*, *supra* note 125. For about 17% of deportations, the criminal conviction is listed as “other.” *Id.*

127. Strunk & Leitner, *supra* note 21, at 69 (referencing filed notes from a September 2010 Washington, D.C., Wilson Center Conference on 287(g) and Secure Communities).

128. *See* Galarza v. Szalczyk discussion *infra* Section IV.A.1.

129. Miles & Cox, *supra* note 94, at 963–64.

with federal authorities in the enforcement of immigration laws.<sup>130</sup> Through protests, activists urged jurisdictions to enact sanctuary policies at the local and state level.<sup>131</sup> By November of 2014, three states, as well as cities and counties in another twenty states, had enacted anti-detainer laws and policies.<sup>132</sup> The overwhelming majority of these sanctuary policies were enacted in response to SCOMM, as evidenced by the fact that, before SCOMM, only six jurisdictions had such policies.<sup>133</sup> Ultimately, the Obama administration dismantled SCOMM. In its memo detailing this action, DHS cited opposition at the state and local level, including refusal by governors, mayors, and police to cooperate with SCOMM.<sup>134</sup>

#### IV. SCOMM RESISTANCE AND RAWLS' CIVIL DISOBEDIENCE PARADIGM

This Part concludes that immigrant activists justly and effectively engaged in civil disobedience in opposition to SCOMM. The initial section proceeds with a review of SCOMM's critiques and a survey of the legislative failures in the area of immigration reform and suggests that civil disobedience was morally justified and essential. The subsequent section continues with two case studies which demonstrate that immigrant protesters did engage in civil disobedience and that resistance was effective in that it moved local and state officials to push back against the program, contributing to its dismantling.

##### *A. A review of the critiques of SCOMM and the legislative impasse on the issue of immigration reform suggest that civil disobedience was a justified response according to Rawls' paradigm.*

The first point of inquiry below is whether SCOMM caused a "serious infringement[] of the first principle of justice, the principle of equal liberty."<sup>135</sup> The concept of equal liberty refers to whether an individual's basic liberties have been violated. Other than Rawls' initial list of basic liberties, which he categorized as rough and non-exhaustive,<sup>136</sup> there has been limited exploration

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130. WILLIAM A. KANDEL & LISA SEGHETTI, CONG. RESEARCH SERV., R44118, SANCTUARY JURISDICTIONS AND CRIMINAL ALIENS: IN BRIEF, 1 (2015). *See also* "Sanctuary Cities," *Trust Acts, and Community Policing Explained*, AMERICAN IMMIGRATION COUNCIL (Oct. 10, 2015); *see also infra* Section IV.B.

131. *See infra* Section IV.B.

132. CATHOLIC LEGAL IMMIGRATION NETWORK, *supra* note 11.

133. AMERICAN IMMIGRATION COUNCIL, *supra* note 130.

134. *See* DHS SCOMM Memo, *supra* note 14.

135. RAWLS, *supra* note 20, at 326.

136. *Id.* at 53–54. Hart, *supra* note 46, at 230.

regarding the meaning of each of Rawls' liberties. Still, a plain reading of the items suggests that critiques of SCOMM implicate equal liberty violations.

The second point of inquiry below is whether individuals have previously attempted to change the unjust circumstance through the "normal appeals to the political majority" and whether these attempts have failed. An overview of the failures since 1986 reform to normalize the lives of the millions of undocumented immigrants living in the United States demonstrates that further legislative attempts were useless.<sup>137</sup>

These two points are threshold questions that must be satisfied before individuals might justifiably engage in civil disobedience in a nearly just society where one is regularly under a moral obligation to abide by all laws.<sup>138</sup> Before furthering the inquiry, it is important to recognize that some have argued that the United States is not a just society and thus there is no obligation, particularly for the consistently marginalized, to obey its laws<sup>139</sup>—a condition which discards with the need to overcome the moral presumption favoring obedience to law in seeking to justify acts of civil disobedience. Recognizing that immigrants may be classified as a consistently marginalized group, especially now under a Trump regime, this Article takes no position on whether the United States can be defined as a nearly just society. Instead it explores whether, assuming *arguendo* that the United States fits Rawls' perception of a nearly just society, the critiques of SCOMM justified deviation from the law through civil disobedience.

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137. RAWLS, *supra* note 20, at 327.

138. *Id.* at 326–31.

139. See David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, 27 PHIL. & PUB. AFF. 31 (1998). Prof. Lyons has also suggested that Rawls himself recognized that the United States was not a fairly just society and has pointed to Rawls' critiques of the sharp differences in wealth distribution which create political inequality and facilitate those who amass political power to gain "a favored position." DAVID LYONS, *CONFRONTING INJUSTICE: MORAL HISTORY AND POLITICAL THEORY* 120 (2013) (quoting RAWLS, *supra* note 20, at 226). Prof. Lyons has further pointed to Rawls' recognition that a duty to abide by the law is further problematized for "permanent minorities that have suffered from injustice for many years." *Id.* at 35 (quoting RAWLS, *supra* note 20). Prof. Lyons hypothesizes that when Rawls wrote about these unjustly treated "permanent minorities," he was referring to the treatment of African Americans under the system of Jim Crow. *Id.* However, some have argued that poor immigrants also fit the definition of permanent minorities. See Kevin R. Johnson, *Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham*, 21 WM. & MARY BILL RTS. J. 367 (2012); see also Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163 (2010).



## 1. Critics of SCOMM articulated violations of basic liberties

### a. *Basic liberty to be free from arbitrary arrest.*

Scholars,<sup>140</sup> immigrant advocacy groups,<sup>141</sup> and even government attorneys<sup>142</sup> criticized SCOMM as violating an individual's basic liberty from arbitrary arrest when they articulated concerns that the program's use of immigration detainees to hold an individual violated her right to due process, equal protection, and freedom from unreasonable seizure. Each of these constitutional rights are implicated by Rawls' theory in that each person shall have an equal right to be free from "arbitrary arrest and seizure as defined by the concept of the rule of law."<sup>143</sup> The aforementioned constitutional amendments delineate the governmental limitations to abridge a person's physical liberty. The Fourth Amendment plainly states that individuals shall be "secure in their persons . . . against unreasonable searches and seizures . . . and no Warrants shall issue [without] probable cause."<sup>144</sup> The contours of an individual's right to freedom from detention are further delineated by the Fifth Amendment and Fourteenth Amendment which guarantee that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law,"<sup>145</sup> and Supreme Court jurisprudence has firmly established that due process, at a minimum, requires notice and hearing before liberty may be curtailed.<sup>146</sup> Finally, the Fourteenth Amendment demands that no person be denied "equal protection of the laws"<sup>147</sup> and naturally this extends to laws that justify seizure and arrest.<sup>148</sup> When the government's treatment of individuals differs because

140. See Lasch, *Federal Immigration Detainers After Arizona v. United States*, *supra* note 18, at 696–98; Lasch, *Rendition Resistance*, *supra* note 18, at 154–56; Stumpf, *supra* note 7; Fischer, *supra* note 18. Vazquez, *supra* note 18, at 647–48.

141. WASHINGTON DEFENDER ASSOCIATION, ISSUE BRIEF: IMMIGRATION DETAINERS AND LOCAL DISCRETION 5–6 (Apr. 2011).

142. MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 17–25 (discussing potential Fourth Amendment and Fifth Amendment problems associated with the immigration detainee practice).

143. RAWLS, *supra* note 20, at 53. See Nickel, *supra* note 47, at 767. See also Jeffrey L. Vagle, *Furtive Encryption: Power, Trust, and the Constitutional Cost of Collective Surveillance*, 90 IND. L.J. 101, 145 (2015) ("[S]cholars such as the philosopher John Rawls have interpreted the Constitution as an agreement specifying certain liberties in terms of our capacity for a sense of justice and our capacity for a conception of the overall good.").

144. U.S. CONST. amend. IV.

145. U.S. CONST. amend V.

146. See *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 313 (1950).

147. U.S. Const. amend. XIV, § 1. See also *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

148. See *Whren v. United States*, 517 U.S. 806, 813 (1996); *United States v. Avery*, 137 F.3d 343, 353 (6th Cir. 1997).

of race—as critics claimed SCOMM did—it deserves the highest level of judicial scrutiny.<sup>149</sup> Note, however, that equal protection violation claims remain challenging when confronting a facially neutral law or governmental practice with disparate racial impact.<sup>150</sup>

Focusing initially on equal protection, critics leveled accusations SCOMM targeted Latinos for enforcement.<sup>151</sup> The data lent credence to these concerns by suggesting that Latinos were “disproportionately impacted by Secure Communities”<sup>152</sup> and thus at greater risk of detention than other immigrants as a result of the program.<sup>153</sup> From the early days of SCOMM, Latinos were “overrepresented in arrests.”<sup>154</sup> This was expected considering that precursors of SCOMM, which likewise relied on state and local law enforcement’s engagement in immigration policing, had previously led to marked increases in Latino arrests.<sup>155</sup> In addition, studies suggested strong correlations between a county’s high Latino population and prioritization for early activation under SCOMM.<sup>156</sup> The correlations remained significant even when controlling for other variables associated with the presence of undocumented immigrants, which suggests that the main factor that influenced priority in program activation was the presence of Latinos.<sup>157</sup> Thus, opponents argued that the

149. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967).

150. See *Washington v. Davis*, 426 U.S. 229 (1976). See also Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and the Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931 (2008); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

151. Strunk & Leitner, *supra* note 21, at 74.

152. Aarti Kohli, Peter L. Markowitz, & Liza Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, THE CHIEF JUSTICE EARL WARREN INST. ON L. AND SOC. POL’Y, U.C. BERKELEY L. SCH. 1, 5 (Oct. 2011). While Latinos certainly comprise most of the undocumented population at 77%, a 2011 study of 357 people who were identified for deportation and detained by SCOMM demonstrated that 93% of them were Latinos. *Id.* at 5–6. While 13% of undocumented individuals are from Asia and 6% are from Europe and Canada, only 2% deported were from Asia and 1% were from Europe and Canada. *Id.* It is worth mentioning that an ever greater discrepancy is present when looking at sex, considering that 93% of those detained were male, while 57% of undocumented people are male and 43% are female. *Id.* at 5.

153. *Id.* at 6.

154. Strunk & Leitner, *supra* note 21, at 74. See relevant cases cited *infra* note 176.

155. *Id.* (discussing sharp increase in the arrests of Latinos in jurisdictions with Criminal Alien Program (CAP) and 287(g) agreements).

156. Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013).

157. *Id.* See generally Fischer, *supra* note 18; see also Vazquez, *supra* note 18. Nevertheless, correlation between racial profiling and immigration enforcement is not a feature unique to SCOMM. Contextually, federal guidance in effect during the life of SCOMM permitted the use of race in immigration policing. See CIVIL RIGHTS DIVISION, U.S. DEP’T OF JUSTICE, *Guidance Regarding the*

program encouraged local police to engage in pretextual arrests of the Latino population with the ultimate goal of initiating an immigration investigation.<sup>158</sup> Litigators experienced success with this argument. For example, in *Galarza v. Szalczyk*, a United States citizen of Puerto Rican descent sued local police and an ICE agent as a result of his detention which was brought about by SCOMM.<sup>159</sup> A federal district judge in Pennsylvania refused to dismiss the equal protection counts against both the local police officer who contacted ICE after arresting Plaintiff Galarza and the ICE agent who then issued the detainer.<sup>160</sup> The Court found that the complaint supported a reasonable inference that both officials would have treated Mr. Galarza differently if he were not Latino and thus acted with discriminatory intent because of his ethnicity and Spanish surname.<sup>161</sup> After this ruling, the city and county settled the claims paying \$50,000 and \$95,000 respectively in damages and attorney's fees to Mr. Galarza.<sup>162</sup>

In addition to racial profiling concerns, critics also claimed that the program's use of immigration detainers to hold individuals for forty-eight hours—and beyond in many instances—violated the detainees' Fifth Amendment due process rights and Fourth Amendment rights to be free from unreasonable seizures.<sup>163</sup> Individuals complained of due process violations because they were routinely not provided with copies of the Form-247 immigration detainers or with any mechanism by which to challenge their

*Use of Race by Federal Enforcement Agencies (June 2003)* (allowed the use of race and ethnicity in immigration enforcement); CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* (Dec. 2014), <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf> [<https://perma.cc/WS9L-DJGB>] (no longer allows the use of race and ethnicity in internal immigration enforcement, but the Guidance does not apply to law enforcement in the Customs and Border Enforcement and the Transportation Security Administration). Further, pursuant to *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976), the Supreme Court permits "Mexican ancestry" to be considered a factor in the immigration stops by Border Patrol agents, whose jurisdiction extends 100 miles inward and thus encompasses two thirds of the U.S. population. *Know Your Rights: The Government's 100-Mile "Border" Zone-Map*, ACLU, <https://www.aclu.org/know-your-rights-governments-100-mile-border-zone-map> [<https://perma.cc/WS9L-DJGB>].

158. Kohli, Markowitz, & Cahvez, *supra* note 152, at 3.

159. *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014).

160. *Galarza v. Szalczyk*, No. 10-CV-06815, 2012 WL 1080020, at \*17 (E.D. Pa. Mar. 30, 2012) *reversed and remanded*, 745 F.3d 634 (3d Cir. 2014).

161. *Id.* at \*16–17.

162. *Galarza v. Szalczyk*, ACLU (June 18, 2014), <https://www.aclu.org/cases/immigrants-rights/galarza-v-szalczyk> [<https://perma.cc/BBV4-9YCR>].

163. See Lasch, *supra* note 18, at 698. See cases cited *infra* note 170.

detention.<sup>164</sup> Further, Form I-247's language went through multiple versions, as did the agency's position on whether these detainers were mandatory or permissive on state and local law enforcement.<sup>165</sup> However, opponents suggested that in all of their incarnations, these immigration detainers were problematic because they could be issued in circumstances where DHS had simply initiated an investigation into the individual's immigration status, thus circumventing the Fourth Amendment probable cause requirements for detention.<sup>166</sup> Fourth Amendment jurisprudence dictates that an individual can only be arrested and held in government custody pursuant to an existing warrant supported by probable cause or if there is otherwise probable cause to believe that the person has committed or is committing a crime<sup>167</sup> or, in the immigration context, if there is probable cause to believe the individual is a noncitizen subject to detention and removal from the United States.<sup>168</sup> The additional forty-eight hours of detention that were not based on the criminal matter which caused initial police contact, but instead on the desire for immigration investigation, required a new probable cause determination.<sup>169</sup> An immigration detainer did not provide the requisite probable cause because it was issued simply from an ICE agent's desire to investigate possible deportability. In addition, there were egregious accounts of individuals being held significantly beyond the two days requested by the detainer. One person recounted being held by the local jail for 164 days.<sup>170</sup>

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164. See Lasch, *supra* note 18, at 698. It bears mentioning that government attorneys also articulated due process concerns with the program. See MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 23–25; see also Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363 (2014) (discussion of how immigration detention more generally violates due process).

165. Upon the inception of SCOMM, language in CFR Section 287.7(a) mandated that police departments hold individuals for forty-eight hours once they received notice that an immigration detainer had been issued. MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 11 n.75. In fact, the language of the immigration detainer Form I-247 until 2010 stated clearly that “Federal regulations (8 C.F.R. § 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays, and Federal holidays) to provide adequate time for INS to assume custody of the alien.” *Id.* As SCOMM was being rolled out across the country, this detainer language in the Form I-247 was changed in August of 2010 so that the language became more permissive. MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 11.

166. See Lasch, *supra* note 18, at 696; see also MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 20–23; Stumpf, *supra* note 7, at 1261. See also cases cited *infra* note 170.

167. *Galarza v. Szalczyk*, 745 F.3d 634, 639 (3d Cir. 2014).

168. *Reno v. Flores*, 507 U.S. 292, 306, 344 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” Also “Fourth Amendment requires judicial determination of probable cause as prerequisite to detention.”).

169. *Id.*

170. *Cacho v. Gusman*, No. CIV.A. 11-225-SS, at 1 (E.D. La. Sept. 29, 2014) (One individual

Beyond the previously discussed equal protection claims, the complaint in *Galarza* also recounted that the plaintiff was held in custody by police for a period of three days after posting bail and claimed that the police's refusal to release him amounted to violations of his Fourth Amendment and due process rights.<sup>171</sup> The District Judge refused to dismiss those counts, concluding that the immigration detainer did not coincide with probable cause that Mr. Galarza was deportable, and that he was held without proper notice or a manner in which to challenge his detention.<sup>172</sup> In another case from Oregon, Plaintiff Miranda-Olivares was held in a county jail for fourteen days, and her family was informed that she would not be released because of an immigration detainer.<sup>173</sup> Her family's attempts to pay her bail were refused after her arraignment and again during the fourteen days and nineteen hours after her criminal sentence served.<sup>174</sup> After spending those additional two weeks in jail due to the immigration detainer, she was taken into ICE custody and deported.<sup>175</sup> The Oregon District Judge found that the prolonged detention, beyond the time when the state judge ordered bail, violated Ms. Miranda-Olivares' Fourth Amendment rights because it was premised upon an immigration detainer which merely indicated that "DHS had initiated an investigation."<sup>176</sup>

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held 164 days and another held 91 days.). *See also* *Roy v. Cty. of Los Angeles*, 114 F. Supp. 3d 1030, 1033 (C.D. Cal. 2015) (Held 89 days.); *Quezada v. Mink*, No. 10-CV-00879-REB-KLM, 2010 WL 4537086, at \*1 (D. Colo. Nov. 3, 2010) (Held 47 days.); *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, slip op. (D. Or. Apr. 11, 2014) (Held 67 hours.); *Uroza v. Salt Lake Cty.*, No. 2:11CV713DAK, 2013 WL 653968, at \*1 (D. Utah Feb. 21, 2013) (Held 36 days.); *Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief* filed by *Brizuela, Brizuela v. Feliciano*, No. 3:12-CV-00226-JBA (D. Conn. Feb. 13, 2012) (Held 3 days at time habeas corpus petition filed.); *Cote v. Borders*, No. 5:11-CV-30-OC-10TBS, 2011 WL 6004081, at \*1 (M.D. Fla. Dec. 1, 2011) (Held 8 days.).

171. Complaint filed by Ernesto Galarza, *Galarza v. Szalczyk*, 510CV06815, 2010 WL 4822758, (E.D. Pa. filed Nov. 19, 2010).

172. *See Galarza v. Szalczyk*, No. 10-CV-06815, 2012 WL 1080020, at \*17 (E.D. Pa. Mar. 30, 2012) *reversed and remanded*, 745 F.3d 634 (3d Cir. 2014).

173. *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at \*11–13 (D. Or. Apr. 11, 2014).

174. *Id.*

175. *Id.*

176. *Id.* at \*1, 9–11. *See also* *Jimenez v. Napolitano*, No. 11-CV-05452, 2011 WL 3754359 (N.D. Ill. filed Aug. 11, 2011) (alleging Fourth, Fifth, and Tenth Amendments violations); *Brizuela v. Feliciano*, No. 3:12-CV-00226 (D. Conn. filed Feb. 19, 2013) (alleging Fourth and Tenth Amendment violations); *Bernabe v. Kronberg*, No. 1:10-CV-22829-JAL, (S.D. Fla. filed Aug. 5, 2010) (alleging violations of Fourth, Tenth, and Fourteenth Amendment rights); *Cote v. Lubins*, No. 5:09-CV-00091-WTH-GRJ (M.D. Fla. filed Feb. 23, 2009) (alleging Fourth and Tenth Amendment rights violations); *Ocampo v. Gusman*, No. 2:10-CV-04309-SSV-ALC (E.D. La. filed Nov. 12, 2010) (alleging Fourth, Tenth, and Fourteenth Amendment rights violations); *Villars v. Kubiatuski*, No. 12-CV-4586 (N.D. Ill. filed May 5, 2014) (alleging Fourth and Eighth Amendment rights violations); *Jimenez Moreno et*

Thereafter, Oregon County offered a pre-trial settlement and paid Ms. Miranda-Olivares \$30,000 in damages and \$97,000 in attorney's fees and costs.<sup>177</sup>

Thus, litigation and accompanying critiques against SCOMM focused on Fourth Amendment, due process, and equal protection claims that amounted to alleged violations of Rawls' basic liberty to be free from arbitrary arrest.

*b. Basic liberty to integrity of the person: violations of right to be free from psychological oppression and from physical attack or dismemberment.*

Rawls does little to define the basic liberty which he terms "integrity to the person."<sup>178</sup> He does include as components of this basic liberty the right to be free from psychological oppression and from physical attack or dismemberment.<sup>179</sup> Opponents of SCOMM claimed the program endangered the public safety of immigrant communities and those that lived among them and infused the oppressive threat of immigration enforcement throughout their daily lives, thus implicating an individual's personal integrity.<sup>180</sup>

*i. Right to be free from physical attack as a right to public safety.*

Some may read a right to be protected by law enforcement into the right to be free from physical attack.<sup>181</sup> In other words, an individual's right to have the government provide protection for her physical security. A criticism of SCOMM on this ground may seem counterintuitive since the Obama administration initially hailed the program as increasing public safety.<sup>182</sup> According to the administration, the rationale behind SCOMM was to focus enforcement efforts on the removal of dangerous criminal aliens who were a top immigration enforcement priority.<sup>183</sup> However, critics claimed that

*al. v. Napolitano et al.*, No. 11-CV-05452, 2014 BL 271979 (N.D. Ill. Sept. 30, 2014) (alleging Fourth, Fifth, and Tenth Amendment rights violations).

177. *Miranda-Olivares*, No. 3:12-CV-02317-ST at \*1.

178. Neither in *A THEORY OF JUSTICE* nor *POLITICAL LIBERALISM* does Rawls provide explanation of the principles contained within this basic liberty. Nickel, *supra* note 47, at 767.

179. *Id.* at 768–69.

180. Strunk & Leikner, *supra* note 21, at 64.

181. Professor of Philosophy James W. Nickel would disagree and instead asserts that Rawls wrongfully omitted what Nickel terms as "security rights" from his list of basic liberties. Nickel, *supra* note 47, at 767–70. Thus Nickel argues that Rawls' basic liberties do not "provide an adequate account of a government's responsibility to protect security." *Id.* at 768. Prof. Nickel finds this not only problematic but contra-intuitive since Rawls' does account for the individual's needs for physical security when stating that persons have a natural duty "not to injure, not to harm the innocent, and not to cause unnecessary suffering." *Id.* at 768 (internal quotation marks omitted).

182. See President Barack Obama, *supra* note 12.

183. See *infra* Part III.

SCOMM became an impediment to public safety because it caused immigrants to fear any police interaction, which they perceived as potentially leading to deportation.<sup>184</sup> Early in the rollout of SCOMM, a report by the Police Foundation foresaw that collaboration between local police and federal immigration authorities would damage law enforcement's relationship with the community.<sup>185</sup> The 2009 report warned that SCOMM would pose a risk to public safety by having "a chilling effect on immigrant cooperation [with the police]. . . . Without this cooperation, law enforcement will have difficulty apprehending and successfully prosecuting criminals."<sup>186</sup> That prediction proved accurate as immigrant communities became reticent to report crimes where either others or even they themselves were victims.<sup>187</sup>

On the issue of immigrant fear of police, sociologists Marjorie Zatz and Hillary Smith suggest that "areas of [immigrant] vulnerability . . . are intensified by aggressive anti-immigrant laws and enforcement practices."<sup>188</sup> Moreover, this chilling of the relationship between the police and its constituency may have extended beyond just immigrants since immigrants are not isolated within cities and towns but instead live within mixed-status families and relationships.<sup>189</sup> In a 2012 survey, Latinos, including citizens, responded that local police entanglement with immigration enforcement decreased their likelihood to initiate police contact and report crimes against themselves or

184. Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, 3 DEP'T OF URB. PLAN. & POL'Y U. OF ILL. AT CHI. 3, 3 (May 2013).

185. *Id.*

186. *Id.* It is important to note however that the problem of immigrant reluctance to initiate police contact has been a persistent one in the context of all crime and did not begin with SCOMM. Professor Jennifer Chacón has discussed this phenomenon in the context of human trafficking, explaining that immigrant workers are less likely to report wage theft and other crimes because "they know that [their] efforts to seek legal recourse can result in protracted immigration detention, criminal prosecution, and, of course, removal." Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1612 (2010). See also Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1886 (2007).

187. Chacón, *Unsecured Borders*, *supra* note 186, at 1886–87.

188. Marjorie S. Zatz & Hillary Smith, *Immigration, Crime, and Victimization: Rhetoric and Reality*, 8 ANNU. REV. OF L. & SOC. SCI. 141, 147 (2012). Zatz and Smith argue that immigrants need to be able to access police because immigrants are often vulnerable to crime at work, home, and in their communities. *Id.* at 147–50. Immigrant day laborers are often victimized by their employers who may engage in wage theft or even physical violence against their workers. *Id.* at 148–49. These laborers are also at increased risk for theft and violent assaults by other workers. *Id.* at 149.

189. Researcher Nik Theodore explains that since 85% of immigrant families are of mixed-status, "the family and community dynamics that are set in motion by state and local law enforcement's involvement in immigration policing affects immigrants and non-immigrants alike." Theodore, *supra* note 184, at 3, 5–6.

others because of concern that law enforcement would use this opportunity to investigate the immigration status of the reporter or her friends and family.<sup>190</sup> Responders also reported increased crime in their neighborhoods.<sup>191</sup> Critics further suggested that this fear to initiate police contact was most severe among women victimized by domestic violence.<sup>192</sup> Scholars have suggested that the cost-benefit analysis of initiating police contact led the rational member of the immigrant community who did not want to risk her detention and removal or that of her loved ones to avoid any police interaction.<sup>193</sup> As will be discussed in Section B of this Part, police and politicians pushed back against SCOMM as a result of such public safety concerns.

Critics eventually termed the program “insecure communities.”<sup>194</sup> Opponents of SCOMM substantiated this position by pointing to data indicating

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190. The 2012 survey was conducted by randomized telephone interviews with 2004 Latinos in Cook county, Illinois, Harris county, Texas, Los Angeles county, California, and Maricopa county, Arizona. Theodore, *supra* note 184, at 4–5. Surveyed Latinos included both authorized and unauthorized immigrants, as well as citizens. *Id.* at 5. The survey findings were that “[f]orty-four percent of Latinos surveyed reported they are less likely to contact police officers if they have been the victim of a crime because they fear that police officers will use this interaction as an opportunity to inquire into their immigration status or that of the people they know”; this percentage jumped to seventy percent when the responder was undocumented, while “28 percent of US-born Latinos expressed the same [fear].” *Id.* at 6.

191. Theodore, *supra* note 184, at 9 (“45 percent of respondents agreed that criminals and drug dealers have been moving into their neighborhoods because they know that residents are afraid to report them to law enforcement officers because police are more involved in immigration enforcement.”).

192. Undocumented domestic violence victims who initiate contact with police are in a precarious situation since they may wrongfully be arrested as the “primary aggressor” or in a jurisdiction where police have a policy to arrest all those involved in the domestic violence incident. Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in U.S. Immigration and Customs Enforcement’s “Secure Communities” Program*, 10 SEATTLE J. SOC. JUST. 327, 349–50 (2011); *see also* Zatz & Smith, *supra* note 188, at 149. This initial arrest thus could result in the lodging of an immigration detainer pursuant to SCOMM. Ray, *supra*, at 349–50. In addition, victims of domestic violence may likewise be threatened by their abusers with calls “to ICE or the police as a method of further victimization.” *Id.* at 350; *see also* Radha Vishnuvajjala, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J.L. & SOC. JUST. 185 (2012).

193. Professor Chapin declares that “[a] simple analysis of the pros and cons of calling the police will most certainly lead undocumented immigrant witnesses to conclude that reporting a crime to local police will place them in the crosshairs of immigration officials . . . . Such costs are unthinkable for most, and will indisputably outweigh any benefit received from involving the police in solving or stopping crimes.” Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 121 (2011). Further, Prof. Chapin argued that the immigrant witnesses of crimes should adopt “an organized commitment to silence . . . as a form of civil disobedience.” *Id.* at 122.

194. Advocates have turned the program’s name on its head by labeling it “insecure communities” and further challenging that removal of undocumented immigrants will make the community safer. *See* Strunk & Leitner, *supra* note 21, at 73.



that most of those detained and removed pursuant to SCOMM were individuals without criminal records or otherwise low-level minimal convictions.<sup>195</sup> There was evidence that, in practice, ICE was deporting any undocumented immigrant it came into contact with through SCOMM instead of focusing on its stated enforcement priorities.<sup>196</sup>

ii. Right to be free from psychological oppression

Again, within the basic liberty of integrity of the person, Rawls neglected to further define the right to be free from psychological oppression. Webster's Dictionary defines oppression as both an "unjust or cruel exercise of authority or power" and "a sense of being weighed down in body or mind."<sup>197</sup> The immigrant's position as the target of regular law enforcement heightens the perception of the immigrant as the threatening "Other" and amounts to psychological oppression of the immigrant individual or anyone who is perceived as belonging to that group. Specifically, the intent and consequence of SCOMM was to make citizenship status a relevant inquiry for state and local law enforcement such that it warranted the detention of individuals in local jails and therefore the expenditure of local and state resources.<sup>198</sup> This focus fostered an environment where immigrant status became analogous with criminality and thus amounted to psychological oppression.

Legal scholars have generally explored how the lines have been blurred between immigration and criminal enforcement and the magnified governmental power that results from this interaction as the two systems borrow from each other.<sup>199</sup> Observers noted specifically that the efforts that DHS

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195. Data collected in 2010 and 2011 demonstrated this. In particular, ICE's statistic in August of 2011 showed that "60% of immigrants processed through the program [SCOMM] were guilty of committing a misdemeanor offense or were never charged with a crime." *Id.* at 74-75. See also MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 2. DHS agency data reports that one quarter of those removed did not have any criminal conviction. A study in Miami-Dade County, a county with a high immigrant population, "found that only 18 percent of those targeted by the program were high-priority risks to public safety, and that 'the majority of removals [deportations] are individuals who pose little or no risk to public safety.'" Theodore, *supra* note 184, at 3 (alteration in original).

196. Strunk & Leitner, *supra* note 21, at 69 (referencing field notes from a September 2010 Washington, D.C., Wilson Center Conference on 287(g) and Secure Communities).

197. *Oppression*, MERRIAM-WEBSTER'S DICTIONARY (11th ed.), <http://www.merriam-webster.com/dictionary/oppression> [<https://perma.cc/G3J9-9KUM>].

198. See President Barack Obama, *supra* note 12.

199. Professor Ingrid V. Eagly discusses this merger of the immigration and criminal prosecution systems at length and explores how the criminal prosecutor prosecuting the noncitizen can utilize more lenient civil immigration enforcement tools available to ICE agents to obtain a criminal conviction and how the criminal justice system can act as the immigration screener when criminal prosecutors seek pleas that waive immigration relief or alternatively obtain convictions for crimes which result in

amassed in garnering local and state police energy in the enforcement of immigration law were impressive.<sup>200</sup> This move was predictable considering that immigration enforcement has increasingly been commingling federal power with that of the state and local government.<sup>201</sup> At times, the federal government has been either complicit or encouraged state participation in the management of the immigrant population, such as expressly permitting states to decide whether to deny welfare benefits based on immigration status.<sup>202</sup> Other times, states and localities have initiated their own efforts to regulate or exclude immigrants in the form of anti-immigrant housing ordinances<sup>203</sup> and state laws mandating detention of individuals until immigration status can be determined.<sup>204</sup> Moreover, the training and deputation of regular law enforcement as immigration officials through 287(g) agreements was certainly a precursor to SCOMM.<sup>205</sup> Nevertheless, DHS's power reached new heights in SCOMM as it deployed the tools of local and state law enforcements in its efforts to detain and remove immigrants—even without state and local

mandatory deportation. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010). Professor Motomura further exposed how the original decision of police to arrest is the “discretion that matters” because that arrest is the initial contact that can lead to civil immigration proceedings, even if there is no resulting criminal prosecution. Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1822 (2011). This results in state and local police making decisions regarding immigration enforcement. *Id.* Furthermore, Motomura warned that if the initial arrest decision continues to be the discretion that matters in setting the wheels of civil removal proceedings in motion, programs like SCOMM with broad arrest capabilities for any state or local infraction would result in these local and state actors making the ultimate removal decision based simply on that initial contact. *Id.* at 1851–52. We can now see that that Motomura’s concerns were well-founded as SCOMM did not specifically target violent and dangerous criminals, the administration’s purported removal priorities. See also Stumpf, *supra* note 7, at 1260; Department of Homeland Security, *supra* note 14.

200. See Press Release, Dep’t of Homeland Security, *supra* note 93.

201. See generally Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339 (2013) (arguing that states effectively shape immigration restriction, instead of the federal government).

202. See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (discussing the state’s ability to deny individuals public benefits based on the Personal Responsibility and Work Opportunity Act (PRWORA)); see also Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357 (2002).

203. See Tom I. Romerom II., *No Brown Towns: Anti-Immigrant Ordinances and Equality of Educational Opportunity for Latina/os*, 12 J. GENDER RACE & JUST. 13 (2008) (discussing state and local anti-immigrant housing, zoning, and employment ordinances); Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367 (2010) (discussing zoning ordinances and their use to target immigrants).

204. See Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL OF RTS. J. 577 (2012) (discusses how state and local authorities will shape immigration enforcement post *Arizona v. United States*).

205. See *supra* Part III.

agreement and across all jurisdictions. Professor Jennifer Chacón remarked that SCOMM “dwarf[ed] all other prior efforts to involve states and localities in immigration enforcement.”<sup>206</sup> After the program’s first year, then DHS Secretary Napolitano called its federal–state/local partnerships a “force multiplier.”<sup>207</sup>

Scholars observed that SCOMM was perhaps among the most powerful and effective tools in criminalizing immigrant life in the United States, equating alienage with criminality and often terrorism.<sup>208</sup> This criminalization of immigrant identity is incongruous with the data that generally demonstrates either no link between immigrants and crime or that under certain circumstances immigrants may reduce crime.<sup>209</sup> As a matter of fact, there is an inverse relationship between the influx of immigrants to a new region and particularly violent crime such that certain social scientists have suggested that “immigration may be the most important factor explaining the decrease in U.S. violent crime rates in recent years.”<sup>210</sup>

Despite this data and the fact that illegal presence is not a crime,<sup>211</sup> mechanisms such as SCOMM paint the immigrant as permanently criminal and an existing threat to American values, society and prosperity.<sup>212</sup> This labeling of immigrants as dangerous by media and politicians has fueled “campaigns for more restrictive immigration law enforcement” such as SCOMM.<sup>213</sup>

206. Chacón, *supra* note 186, at 603.

207. Press Release, Dep’t of Homeland Security, *supra* note 93.

208. See Hing, *supra* note 119. See also Strunk & Leitner, *supra* note 21, at 64.

209. See Zatz & Smith, *supra* note 188, at 142.

210. *Id.* Studies demonstrate that whether immigration has any effect on crime varies depending on the location. *Id.* at 143–45. In areas where immigrants have not historically migrated, immigration has no effect on crime. *Id.* Whereas in places that have been traditional destinations for immigrants, immigration has an adverse relationship with crime, including homicides, violent crime, and adolescent crime. *Id.* The only area of crime that studies suggest may increase with more immigrants is gang-related crime. *Id.* at 145. However, it is possible that the latter may be a result of police labeling of crime as gang-related simply due to immigrant presence. *Id.* Some explain that this inverse relationship may be due to new immigrants bringing new life to communities by establishing ties with to other immigrants in the locale, as well as “to non-kin persons like clergy, social service providers, and school officials. Such ties and the trust they generate likely lead to an infusion of social control and reductions of crime.” *Id.* at 144 (internal quotation marks omitted). While others suggest that it may be a result of strong family ties among immigrants. *Id.* at 145.

211. Illegal entry into the United States is a federal crime pursuant to 8 U.S.C. § 1325. However, illegal presence is only a civil immigration violation but not a crime. *Gonzales 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).

212. See generally Strunk & Leitner, *supra* note 21.

213. *Id.* When discussing the construction of the undocumented immigrant as the threatening Other, Strunk and Leitner explain how biopolitics requires the creation of a dangerous Other to foster

Sociologists Christopher Strunk and Helga Leitner called SCOMM “the latest instance of federal-local partnership programs that are supposed to protect American citizens from the dangerous Other by pushing enforcement inward from the borders.”<sup>214</sup> Nevertheless, this relationship is likely not linear, but instead circular. Public opinion and government action feed each other such that the perception of immigrants as criminal facilitates the creation of programs like SCOMM that in turn facilitate the view that immigrants are the proper target for law enforcement and thus criminal.

Adding to this framing of immigrants is the potentially racialized nature of these perspectives and resulting racialized practice.<sup>215</sup> The perceived dangerous immigrant is nonwhite, namely Latino or Muslim, and the “implicit object[ ] of suspicion and threat.”<sup>216</sup> As state and local law enforcement are mandated to capture and hold immigrants, this alarmist perception of immigrants of color is legitimized into broader social norms.<sup>217</sup>

Since SCOMM does not exist in a vacuum, its framing effect likely aggregates with the existing state and local anti-immigrant legislation that some suggest “seeks to make life so prohibitive for [the] undocumented immigrant[] that [she] will presumably self-deport.”<sup>218</sup> SCOMM provided wide discretion to local police to act as immigration enforcers, thus creating an environment the immigrant is unable to escape the risk and thus fear of deportation during her regular daily activities.<sup>219</sup> In other words, SCOMM did not situate the risk of

the feeling of insecurity and resulting fear which in turns “mobilize[s] support for regulatory interventions.” *Id.* at 65. When discussing anti-immigrant legislation and enforcement at federal and state and local level, Zatz and Smith state that in response to immigration “politicians and the media continue to fuel moral panic, inciting fears about dangerous racialized others. This moral panic, in turn, has contributed to a substantial increase in restrictive immigration policies.” Zatz & Smith, *supra* note 188, at 145.

214. Strunk & Leitner, *supra* note 21, at 64.

215. See *infra* Part IV.A.2.

216. Strunk & Leitner, *supra* note 21, at 64.

217. In connection to Hispanics, this rhetoric has previously been characterized as the Latino threat narrative which “is part of a grand tradition of alarmist discourse about immigrants and their perceived negative impacts on society.” Zatz & Smith, *supra* note 188, at 142 (internal quotation marks omitted). See also McKanders, *supra* note 139. Professor McKanders argues that state and local anti-immigrant legislation is comparable to Jim Crow regimes in that both demonstrate the “amplification and legitimization effect that the law can have on social norms.” *Id.* at 166.

218. Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 673 (2014). Professor Maddali remarks that the combination of federal immigration enforcement, public anti-immigrant sentiment and these state and local anti-immigrant initiatives transform “the identity of the undocumented immigrant . . . into not only a violator of immigration laws, but also a criminal and culturally deviant person.” *Id.* at 673–74.

219. Mathew Coleman, *The “Local” Migration State: The Site-Specific Devolution of Immigration Enforcement in the U.S. South*, 34 L. & POL’Y 159, 168 (2012).

immigration enforcement in a specific location or during interactions with specific federal authorities with which the individual likely has limited contact, but this risk was instead ever and continually present as the immigrant moved through her life. Geopolitics Professor Mathew Coleman states that SCOMM “shift[ed] immigration policing into the immigrant populations’ everyday spaces” thus resulting in no respite or safe harbor from deportation fear.<sup>220</sup>

## 2. Previous attempts to correct injustice through political process

The harm that anti-SCOMM activists sought to remedy through civil disobedience was the widespread targeting, oppression, and removal of the undocumented population. Prior attempts to remedy this harm through legalization had proved consistently unsuccessful.<sup>221</sup> The last time that Congress provided the undocumented population a pathway to citizenship was three decades ago.<sup>222</sup> Since then, other attempts at this relief have failed.<sup>223</sup> Thirty years ago, the Immigration Reform and Control Act (IRCA) was passed by Congress and signed by President Ronald Reagan.<sup>224</sup> That legislation provided a pathway for undocumented people who were longtime residents of the United States and certain agricultural workers to legalize their status.<sup>225</sup> In

220. *Id.* at 184. Coleman further supports this point by arguing that when any routine contact with local police becomes a risk for serious immigration consequences, “the spaces of immigrant social reproduction [become] ground zero for interior immigration enforcement. . . . The point then is that programs like . . . Secure Communities work . . . to generate insecurity—namely, the ever present threat of detention and deportation—for undocumented populations who are, as a result, increasingly structurally cut off in social reproduction terms from the society in which they nonetheless labor.” *Id.* Furthermore, in terms of numbers of removals, SCOMM was an effective removal tool and, for example, resulted in a much greater number of deportations than the now disfavored worksite raids. *Id.* During the time of SCOMM, a possible safe harbor would be if the immigrant resided in a jurisdiction that refused to cooperate or sought to opt out of SCOMM. See *infra* Part IV.B.

221. Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST, (Jan. 30, 2013), <http://www.washingtonpost.com/news/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/> [https://perma.cc/G3J9-9KUM].

222. *Id.*

223. See generally *id.*

224. *Id.*

225. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 8 U.S.C. § 1255a (2015); Emily Badger, *What Happened to the Millions of Immigrants Granted Legal Status Under Ronald Reagan?*, WASH. POST, (Nov. 26, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/11/26/what-happened-to-the-millions-of-immigrants-granted-legal-status-under-ronald-reagan/> [https://perma.cc/V3H2-MKSN]. IRCA did not apply to immigrants who entered the country after 1982. *Id.* IRCA had other important provisions which troubled some immigrant supporters. These included employer sanctions for hiring undocumented workers and increases in border security. Muzaffar Chishti, Doris Meissner & Claire Bergeron, *At Its 25<sup>th</sup> Anniversary, IRCA’s Legacy Lives On*, MIGRATION POL’Y INSTITUTE, (Nov. 16, 2011), <http://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives>

the immigration context, legalization means the process of changing the immigration status of an undocumented immigrant to a lawful status such as a legal permanent resident (LPR). A LPR is able to lawfully remain and work in the United States and eventually apply to become a citizen.<sup>226</sup> IRCA allowed undocumented immigrants who had lived for four years in the United States continuously and some individuals who had already worked in agriculture for ninety days or who were willing to do agricultural work for several seasons to apply for LPR status.<sup>227</sup> While opening an avenue to legalization in the 1980s was still controversial, there were no serious calls for widespread deportations of undocumented immigrants like today.<sup>228</sup> While Donald Trump won his presidential campaign partly on his promise to deport eleven million “illegals,”<sup>229</sup> Presidents Carter and ultimately Reagan supported legalization to avoid “fostering a large ‘shadow’ [immigrant] population.”<sup>230</sup> Under IRCA, 2.7 million people successfully legalized their status.<sup>231</sup>

Since 1986, immigrant advocates, whether politicians or interest groups, have experienced no successes in enacting legislation providing a road to LPR status for the undocumented population.<sup>232</sup> This is despite estimates that over twelve million<sup>233</sup> undocumented immigrants reside in the United States and the growing Latino electorate now constitutes 10.8% of the country’s eligible voters.<sup>234</sup> On the contrary, federal legislation has made life increasingly hostile for the immigrant over the past three decades. Just two years after IRCA, Congress passed the Anti-Drug Abuse Act (ADAA) which created the category of aggravated felony and mandated that noncitizens convicted of those crimes were deportable.<sup>235</sup> While the aggravated felony category initially affected few noncitizens since these crimes were first limited to murder, firearms, and drug

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[<https://perma.cc/RZD7-ZFWH>]. See also CAROLYN WONG, LOBBYING FOR INCLUSION 96, 100 (2006).

226. 8 U.S.C.A. § 1101 (West, Westlaw through Pub. L No 114-165).

227. *Key Immigration Laws and Policies Developments Since 1986*, MIGRATION POLICY INSTITUTE (Mar. 2013), <http://www.migrationpolicy.org/research/timeline-1986> [<https://perma.cc/G5QF-DU8K>].

228. See WONG, *supra* note 225, at 100 (2006). See also NAVARRO, *supra* note 21, at 104–06.

229. Tom LoBianco, *Donald Trump promises ‘deportation force’ to remove 11 million*, CNN (Nov. 12, 2015), <http://www.cnn.com/2015/11/11/politics/donald-trump-deportation-force-debate-immigration/> [<https://perma.cc/GW9X-SP8W>].

230. WONG, *supra* note 225, at 97.

231. Badger, *supra* note 225.

232. See generally *infra* Part IV.A.

233. NAVARRO, *supra* note 6, at 235.

234. *Id.* at 225.

235. Anti-Drug Abuse Act of 1988, 8 U.S.C. § 1228 (2012); see also *Key Immigration Laws and Policies Developments Since 1986*, *supra* note 227.

trafficking, and related attempts or conspiracies,<sup>236</sup> Congress has expanded the aggravated felony definition several times and it now encompasses thirty different types of crimes.<sup>237</sup> Thus “non-violent, fairly trivial misdemeanors are [now] considered aggravated felonies”<sup>238</sup> that lead to mandatory deportation.

In 1996, under the Clinton administration, legislative change swept through Congress to the detriment of immigrants via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>239</sup> and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).<sup>240</sup> Among other things, IIRIRA increased obstacles for immigrants seeking asylum, instituted significant time bars for re-entry into the United States for deported immigrants, blocked judicial review of many immigration agency decisions, increased border security, and created the 287(g) program, the precursor of SCOMM.<sup>241</sup> PRWORA, otherwise known as the welfare act, contained its own immigrant related provision permitting states to bar individuals from welfare benefits in their first five years as legal permanent residents.<sup>242</sup> The antecedent to the federal anti-immigrant legislation might have been California’s Proposition 187, a voter passed initiative which sought to block children of undocumented immigrants from accessing California’s public school system and deny most social services to undocumented immigrants.<sup>243</sup> Although most provisions of Proposition 187 were eventually held unconstitutional as preempted by federal law,<sup>244</sup> its passage in California

236. Anti-Drug Abuse Act of 1988, 8 U.S.C. § 1228 (2012).

237. IMMIGRATION POLICY CENTER, *Aggravated Felonies: An Overview* (Mar. 2012), <http://www.immigrationpolicy.org/sites/default/files/docs/aggravated-felony-fact-sheet-march-2012.pdf> [<https://perma.cc/M3RN-QHW5>].

238. *Id.* (quoting Hon. Dana Leigh Marks & Hon. Denise Noonan Slavin, *A View Through the Looking Glass: How Crimes Appear from the Immigration Court Perspective*, 39 *FORDHAM URB. L.J.* 91, 92 (2012)).

239. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546 (codified as amended in scattered sections of 8 U.S.C.).

240. Personal Responsibility and Work Opportunity Reconciliation Act, 8 U.S.C. §§ 1611–1646 (2015). See also Lauren E. Moynihan, *Welfare Reform and the Meaning of Membership: Constitutional Challenges and State Reactions*, 12 *GEO. IMMIGR. L.J.* 657, 657 (1998).

241. Philip E. Wolgin, *5 Major Immigration Laws that the House Passed in an Election Year*, CENTER FOR AM. PROGRESS (Jan. 9, 2014), <https://www.americanprogress.org/issues/immigration/news/2014/01/09/81849/5-major-immigration-laws-that-the-house-passed-in-an-election-year/> [<https://perma.cc/JR6Z-QDMV>]. See also WONG, *supra* note 225, at 135–36; Weiner, *supra* note 221.

242. Moynihan, *supra* note 240, at 659–60.

243. NAVARRO, *supra* note 21, at 134–39.

244. *Id.*; see also League of United Latin American Citizens, et al. v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).

served as proof of anti-immigrant public sentiment.<sup>245</sup> Coinciding with an atmosphere of economic insecurity, proponents of the California legislation utilized rhetoric portraying immigrants as a threat to national identity and lawbreakers and ultimately pitted immigrants as “freeloaders” against the law abiding taxpayer thus making the political atmosphere ripe for the passage of IIRIRA and PRWORA.<sup>246</sup>

Post-1986 attempts to legalize undocumented immigrants have either failed to reach Congress or died on its floor. In 2001, President George W. Bush appeared ready for immigration change after multiple meetings with Mexican President Vicente Fox.<sup>247</sup> Both administrations stated that they prioritized immigration concerns and “anticipated that a historic accord on immigration reform would be reached.”<sup>248</sup> However, the 9/11 attacks destroyed hopes for an immigration change that would benefit immigrants, particularly as the Bush administration created DHS whose duty was to protect the country from terrorism and simultaneously took over immigration enforcement, thus inextricably linking terrorist with immigrant.<sup>249</sup> “[S]ince . . . the hijackers were foreigners who somehow managed to get into the United States, the movement of people in and out of the country has become indissociable from this threat.”<sup>250</sup>

In 2005 and 2006, immigration was again on the agenda of legislators and President Bush. A slew of immigration bills were proposed by lawmakers.<sup>251</sup> After the storm of immigration proposals settled, Congress was left with two bills: HR4437, a harsh bill passed by the House which criminalized undocumented status and focused on internal and border immigration enforcement, and S2454, a compromise bill passed by the Senate which included increased enforcement but also legalization and a guest worker program.<sup>252</sup> President Bush was supportive of the Senate bill.<sup>253</sup> Pro-immigrant

245. *Id.* See also LINA NEWTON, *ILLEGAL, ALIEN, OR IMMIGRANT: THE POLITICS OF IMMIGRATION REFORM* 104–05 (2008).

246. *Id.* at 104–37.

247. NAVARRO, *supra* note 21, at 280.

248. *Id.*

249. WONG, *supra* note 225, at 280–81.

250. *Id.* at 280 (quoting JONATHAN XAVIER INDA, *TARGETING IMMIGRANTS: GOVERNMENT, TECHNOLOGY AND ETHICS* 117 (2006)).

251. NAVARRO, *supra* note 21, at 297–305. See also *McCain-Kennedy Bill Opens Citizenship Path*, WASH. TIMES, (May 12, 2005), <http://www.washingtontimes.com/news/2005/may/12/20050512-111803-6952r/?page=all> [<https://perma.cc/CMV6-8QS7>].

252. NAVARRO, *supra* note 21, at 300–05.

253. *Id.*



groups engaged in unprecedented levels of mobilization against HR4437 and in support of legalization in early 2006.<sup>254</sup> During that time, protests crossed the nation and even extended internationally as immigrant activists met with Latin American government officials who in turn pressured the Bush administration to oppose the House bill and support a legalization plan.<sup>255</sup> On May 1, the International Day of the Worker, between one and two million participated in marches and united in boycotts of work and school with the objective of demonstrating the U.S.'s economic dependence on migrant labor.<sup>256</sup> Marches extended to Mexico City, where there were also boycotts of certain U.S. products.<sup>257</sup> National and international media covered the mobilization.<sup>258</sup> Although this movement may have played a role in the defeat of the House bill, ultimately no legalization plan was enacted either. Both HR4437 and S2454 died after House and Senate public hearings.<sup>259</sup>

During the subsequent Congress, in 2007, immigration bills were again proposed in the Senate and the House and their legislative path were likewise unsuccessful. A Republican and a Democratic Congressman proposed HR1645.<sup>260</sup> The House bill contained a legalization provision, but it would not be triggered until two years after tough border and employer enforcement provisions were enacted.<sup>261</sup> Further, the legalization process required the applicant to leave and re-enter the U.S., pay a substantial fine and back taxes and wait six years to obtain LPR status.<sup>262</sup> In the Senate, S1348 was proposed and received the support of Bush administration and DHS.<sup>263</sup> S1348 also included a legalization provision that would not go into effect until border enforcement measures were in place.<sup>264</sup> The provision would permit legalization of undocumented immigrants who had resided in the U.S. for some

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254. *Id.* at 313–42. Political Scientist Armando Navarro posits that this immigrant mobilization ended in mid-2006 as a “climate of fear” permeated the immigrant population because of the failure to achieve a legislative legalization program, ICE’s increased enforcement efforts in the form of work and other raids, public anti-immigrant sentiment, and police’s violent response at a Los Angeles march. *Id.* at 343–50.

255. *Id.* at 316–18.

256. *Id.* at 340–42.

257. *Id.* at 342.

258. *Id.* at 340–42.

259. *Id.* at 305.

260. *Id.* at 307.

261. *Id.* at 307–09.

262. *Id.* at 308–09.

263. *Id.* at 309.

264. *Id.* at 309–10.

time, as well as post-secondary students.<sup>265</sup> It would further make in-state college tuition available to those students.<sup>266</sup> Legislators were largely torn about whether to support S1348.<sup>267</sup> The bill “had something each senator could support, but concomitantly things they could also oppose.”<sup>268</sup> After multiple debates on the Senate floor, senators voted to cease the debate and the bill failed.<sup>269</sup> Ultimately, the Senate bill was opposed by most immigrant advocates because of what were considered harsh anti-immigrant provisions.<sup>270</sup> Notably, anti-immigrant groups also opposed the bill because of its legalization provision.<sup>271</sup> After the failure in the Senate, HR1645 also failed.<sup>272</sup>

During Obama’s presidency there was an early attempt at immigration reform in 2010 that failed quickly.<sup>273</sup> More recently, in 2013, the popularly named bipartisan Gang of Eight were successful at passing at the Senate the S744 bill that would have provided a long, difficult, but possible journey to legalization for undocumented immigrants.<sup>274</sup> Many immigrants and their supporters disagreed with S744 believing the road to legalization was too harsh, long, and contingent on the execution of extreme border enforcement provisions.<sup>275</sup> However, others enthusiastically supported the bill.<sup>276</sup> Besides immigrant groups, supporters included business and labor organizations and law enforcement.<sup>277</sup> However, the Republican Chairman of the House Judiciary Committee guaranteed that he would “do everything he can to ensure the House

265. *Id.*

266. *Id.* at 310. A notable characteristic of S1348 was that it introduced a merit point system into family-based immigration. Only those family members who obtained the threshold points would be provided with a greencard to migrate to the U.S. *Id.* at 310–11.

267. *Id.* at 311–12.

268. *Id.* at 311.

269. *Id.*

270. *Id.*

271. *See id.* at 312.

272. *Id.*

273. Weiner, *supra* note 221.

274. Elise Foley, *Senate Immigration Reform Bill Passes with Strong Majority*, HUFFINGTON POST, (June 27, 2013), [http://www.huffingtonpost.com/2013/06/27/senate-immigration-reform-bill\\_n\\_3511664.html](http://www.huffingtonpost.com/2013/06/27/senate-immigration-reform-bill_n_3511664.html) [<https://perma.cc/L2SA-L79J>]. The Gang of Eight included John McCain (R-Ariz.), Marco Rubio (R-Fla.), Lindsey Graham (R-S.C.), Jeff Flake (R-Ariz.), Chuck Schumer (D-N.Y.), Dick Durbin (D-Ill.), Bob Menendez (D-N.J.), and Michael Bennet (D-Colo.). *Id.*

275. *See* NAVARRO, *supra* note 6, at 248–52. *See also* Foley, *supra* note 274 (describing bill provisions including 20,000 more border agents, a 700-mile fence and mandated E-verify).

276. Foley, *supra* note 274; NAVARRO, *supra* note 6, at 248–52.

277. Dan Nowicki, *A year after Senate acted on immigration, hope is dead*, AZCENTRAL.COM (June 24, 2014), <http://www.azcentral.com/story/news/politics/immigration/2014/06/25/year-senate-acted-immigration-hope-dead/11344151/> [<https://perma.cc/68WJ-HL83>].

never takes up the Senate's comprehensive immigration bill, which includes a path to citizenship for the 11 million immigrants in the country illegally."<sup>278</sup> Although there were splits among House Republicans about whether S744 should be considered, Speaker John Boehner refused to permit discussion of the Senate bill<sup>279</sup> and the House passed its own enforcement only bills.<sup>280</sup> The legislative road to legalization was again foreclosed, leaving President Obama to utilize his executive power in an attempt to provide deportation relief to some of the undocumented population.<sup>281</sup> The Fifth Circuit later blocked some of these executive actions and that Circuit's ruling was upheld by an even split at the Supreme Court.<sup>282</sup> As to the remainder of Obama's deportation relief, Trump promised to rescind his predecessor's standing immigration executive orders in his first 100 days in office and may have already done so upon this Article's publishing.<sup>283</sup>

Some have remarked that constructing a legislative pathway to legalization of a substantial portion of the undocumented population has proven impossible for the last thirty years because, since 1986, while immigration reform has included some form of legalization for the Democratic party, for the Republican party generally reform has meant increased border enforcement, employment sanctions, and a purely guest worker program.<sup>284</sup> With diametrically opposed views, there has been no room for legislative compromise.

Thus, SCOMM, rampant with critiques and litigation surrounding basic liberty claims and entrenched within the politically charged purview of immigration legislation, was ripe for civil disobedience, and activists utilized this tool effectively and influenced the dismantling of the program.

### B. Case Studies of Resistance to SCOMM

As SCOMM continued its spread across jurisdictions, immigrants and their allies engaged in increasing levels of civil disobedience to convince government officials at the federal, state and local level to abandon the program. Immigrant activists utilized the tools of social media and organized acts of resistance ranging from rallies, sit-ins which blocked traffic on public

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278. NAVARRO, *supra* note 6, at 262.

279. *Id.* at 264. See also Nowicki, *supra* note 277.

280. See NAVARRO, *supra* note 6, at 261.

281. See JOHNSON MEMORANDUM, *supra* note 15, at 3.

282. See sources cited *supra* note 15.

283. Linda Qui, *Donald Trump campaign promises for the first 100 days*, POLITIFACT (Nov. 10, 2016), <http://www.politifact.com/truth-o-meter/article/2016/nov/10/donald-trumps-campaign-promises-first-100-days/> [<https://perma.cc/XZ3N-Q4BV>]. See Lind & Hazard, *supra* note 15.

284. NAVARRO, *supra* note 6, at 262.

streets and highways, blocking the path of deportation buses, to undocumented youth driving a bus across the country demanding an end to deportations.<sup>285</sup> At times, this behavior would lead to arrests.<sup>286</sup> Due to the information sharing involved in SCOMM, these arrests were potentially particularly harmful to undocumented immigrants because they could theoretically result in their detention and subsequent deportation.<sup>287</sup> Eventually certain jurisdictions began enacting roadblocks to state and local police participation in the program,<sup>288</sup> culminating in the dismantling of SCOMM.<sup>289</sup>

The rationales that limited compliance with SCOMM immigration detainers were mixed for each state, municipality, and law enforcement agency.<sup>290</sup> Further, the relationship between acts of civil disobedience and the jurisdiction's opposition to SCOMM was not and needs not be linear to be significant. Instead, these acts of civil disobedience served as a catalyst that brought the communities' objections to SCOMM into focus and contributed to an environment that fueled the jurisdiction's opposition to the program. This community opposition may have likewise ignited anti-detainer litigation which also led to the program's dismantling.<sup>291</sup> Immigrant resistance influenced or supported jurisdictions' desires to opt-out of SCOMM:<sup>292</sup> litigation efforts on behalf of those targeted by SCOMM contributed to the enactment of policies, ordinances, or laws restricting or abolishing compliance with SCOMM ICE detainers.<sup>293</sup> Those acts of civil disobedience and opposition spread across the nation,<sup>294</sup> and this aggregate resistance was thus a component of the Obama

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285. See *infra* pp. 221–38.

286. *Id.*

287. Eventually, it became evident that those undocumented immigrants arrested while protesting and engaging in civil disobedience were not being placed in removal proceedings. See PALLARES, *supra* note 21, at 113–14 (2014).

288. See CATHOLIC LEGAL IMMIGRANT NETWORK, INC., *supra* note 11 (The following list of twenty-three states complied with ICE detainer requests as of November 23, 2014: Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Washington, and Wisconsin. Washington, D.C., also complied with ICE detainers.).

289. Kate Linthicum, *Obama Ends Secure Communities Program as Part of Immigration Action*, L.A. TIMES, (Nov. 21, 2014), <http://www.latimes.com/local/california/la-me-1121-immigration-justice-20141121-story.html> [<https://perma.cc/7G25-E7PY>].

290. CATHOLIC LEGAL IMMIGRANT NETWORK, INC., *supra* note 11.

291. *Id.*

292. See *infra* pp. 221–38.

293. *Id.*

294. PALLARES, *supra* note 21, at 113–14; IMMIGRANT YOUTH JUSTICE LEAGUE, Category Archives: Civil Disobedience, <http://www.iyjl.org/category/cd/> [<https://perma.cc/G2Q6-9RYY>] (last visited Feb. 7, 2017).

administration's decision to abandon SCOMM.<sup>295</sup>

Perhaps the best metaphor for the spread across the nation of resistance to SCOMM is the Undocu-Bus. In 2012, undocumented immigrants rode this 1970s tour bus across the country with stops in Arizona, New Mexico, Colorado, Texas, Louisiana, Alabama, Georgia, and Tennessee.<sup>296</sup> The Undocu-Bus' destination was the Democratic National Convention in North Carolina.<sup>297</sup> The side of the bus read Sin Papeles, Sin Miedo (No Papers, No Fear).<sup>298</sup> At each stop, riders engaged in protest, including civil disobedience, against SCOMM and other programs that utilized local and state police for immigration enforcement.<sup>299</sup> The culmination was the arrests of ten riders after they placed a banner with their No Papers/No Fear slogan at the Democratic Convention's checkpoint.<sup>300</sup> Riders maintained that the very act of publicly exposing their undocumented status amounted to civil disobedience.<sup>301</sup>

While there were acts of immigrant civil disobedience and resistance beyond the Undocu-Bus in vital pockets of the nation,<sup>302</sup> this Section documents the resistance against SCOMM in Illinois and California.<sup>303</sup> These two states

295. Linthicum, *supra* note 289.

296. See *No Papers No Fear: Ride for Justice*, UNDOCUBUS.ORG, <http://undocubus.org/> [<https://perma.cc/S3GN-NZKY>] (last visited Feb. 7, 2017); see also Eyder Peralta, *The Undocumented Bus: In Charlotte, A Different Kind Of Coming Out*, NAT'L PUB. RADIO (Sept. 3, 2012), <http://www.npr.org/sections/itsallpolitics/2012/09/03/160508224/the-undocumented-bus-in-charlotte-a-different-kind-of-coming-out> [<https://perma.cc/YR5S-YC4W>].

297. Peralta, *supra* note 296.

298. *Id.*

299. See UNDOCUBUS.ORG, *supra* note 296; see also NO PAPERS NO FEAR, *All Four Immigrant Rights Advocates Arrested on Gay Street Released, No Papers No Fear Bus Tour Heads Towards Democratic National Convention, Local Groups Continue Fight* (Aug. 29, 2012), <http://nopapersnofear.org/blog/post.php?s=2012-08-29-all-four-immigrant-rights-advocates-arrested-on-gay-street-released-no-papers-no-fear-bus-tour-heads-towards-democratic-national-convention-local-groups-continue-fight> [<https://perma.cc/L5AL-HW6W>].

300. NO PAPERS NO FEAR, *10 Undocumented No Papers No Fear Riders Arrested for Defending Civil Rights, Supporters Call on President and ICE to Be on the Right Side of History, Use Discretion and Do Not Pursue Deportation of Community Leaders* (Sept. 4, 2012), <http://nopapersnofear.org/blog/post.php?s=2012-09-04-10-undocumented-no-papers-no-fear-riders-arrested-for-defending-civil-rights-supporters-call-on-president-and-ice-to-be-on-the-right-side-of-history-use-discretion-and-do-not-pursue-deportation-of-community-leaders> [<https://perma.cc/PTR4-T68D>].

301. See UNDOCUBUS.ORG, *supra* note 296; PALLARES, *supra* note 21, at 113.

302. Through her research, the author has found this type of resistance in Alabama, California, Connecticut, Georgia, Michigan, Minnesota, New Jersey, New York, North Carolina, Oregon, Tennessee, Vermont, Washington, Washington, D.C., and Wisconsin. CATHOLIC LEGAL IMMIGRANT NETWORK, INC., *supra* note 11.

303. Protests against deportations generally have been included as resistance against SCOMM because during the program's existence it was a powerful deportation mechanism. See *supra* Part III.

are featured because they play an important role in the immigrant movement. Illinois is significant because it was the first state to attempt to cease collaboration with SCOMM.<sup>304</sup> California is significant as the state with the highest number of unauthorized immigrants<sup>305</sup> and because it eventually enacted state-wide legislation limiting cooperation with SCOMM.<sup>306</sup> However, while the remainder of this section focuses on only two—albeit significant—states, it bears consideration that protesters were not necessarily bounded by state lines and therefore resistance spilled across these boundaries and thus aggregated at the national level.<sup>307</sup>

## 1. Illinois

In May 2011, Illinois Governor Pat Quinn declared his desire to terminate his state's participation in SCOMM.<sup>308</sup> Governor Quinn informed DHS of his intent via a letter from his office, with similar correspondence from the director of the Illinois State Police.<sup>309</sup> However, this was not the governor's or law enforcement's original position on SCOMM. Two years before, during Quinn's tenure, the Illinois state police signed a Memorandum of Agreement (MOA) with DHS to initiate SCOMM in the state.<sup>310</sup>

With the backdrop of this MOA, immigrants in Chicago engaged in the first

304. Julia Preston, *Immigration Program is Rejected by Third State*, N.Y. TIMES (June 6, 2011), [http://www.nytimes.com/2011/06/07/us/politics/07immig.html?\\_r=0](http://www.nytimes.com/2011/06/07/us/politics/07immig.html?_r=0) [<https://perma.cc/HU5V-LBV9>]. New York and Massachusetts attempted to opt out soon after Illinois.

305. The Pew Research Center reported that in 2012, 2,450,000 unauthorized immigrants lived in California, accounting for 6.3% of the state's total population. See PEW RESEARCH CENTER HISPANIC TRENDS, *Chapter 1: State Unauthorized Immigrant Population* (Nov. 18, 2014).

306. See *infra* Part IV.B.2.

307. Strunk & Leitner, *supra* note 21, at 76. Strunk and Leitner explain that activists work and organize resistance across state lines and thus their advocacy is regionally fluid. *Id.* They further recount how activists in the Washington, D.C., area were connected to those in the California area and were thus successful in simultaneously obtaining official local opposition to SCOMM in Arlington, VA, and the Bay area on the same day. *Id.* This move then mobilized opposition in different localities of the East Coast. *Id.*

308. See Letter from Gov. Pat Quinn, Governor of Ill., to Marc Rapp, Acting Assistant Dir., Secure Communities., Immigration and Customs Enf't, Dep't of Homeland Sec. (May 4, 2011), [http://epic.org/privacy/secure\\_communities/sc\\_ill.pdf](http://epic.org/privacy/secure_communities/sc_ill.pdf) [<https://perma.cc/W5U7-BY8L>] [hereinafter Letter from Gov. Pat Quinn].

309. *Id.*

310. Memorandum of Agreement Between U.S. Department of Homeland Security Immigration and Customs Enforcement and Illinois State Police (signed Nov. 2, 2009), [https://www.ice.gov/doclib/foia/secure\\_communities-moa/r\\_illinois\\_11-2-09.pdf](https://www.ice.gov/doclib/foia/secure_communities-moa/r_illinois_11-2-09.pdf) [<https://perma.cc/4AYB-PFBP>] (Memo signed by Marc A. Rapp, Acting Director, Secure Communities, Immigration and Customs Enforcement, and Jonathan E. Monken, Director, Illinois State Police).

Coming out of the Shadows day.<sup>311</sup> At this event, immigrants publicly revealed their status as undocumented as they gathered in front of the immigration and federal office building.<sup>312</sup> At a microphone, seven immigrants declared that they were each undocumented and unafraid.<sup>313</sup> The undocumented who revealed their status perceived this act as “political escalation” and connected to civil disobedience.<sup>314</sup> The Chicago-based undocumented group who organized the Coming Out event later decided that their main tool of resistance would be civil disobedience.<sup>315</sup> This immigrant group not only engaged in civil disobedience in Illinois but their members further participated in acts of civil disobedience outside the state,<sup>316</sup> thus modeling resistance for others and aggregating efforts on a national level.

When exploring this movement, Political Scientist Amanda Pallares has explained that undocumented youth “considered overcoming the fear of showing oneself as a necessary first step to assuming political agency in their

311. Before this Chicago 2010 Coming Out of the Shadows day, there were other smaller scale events where undocumented individuals revealed their status to each other. However, the Chicago event was the first in a national “Coming Out of the Shadows” week where immigrants came out as undocumented in several cities across the United States. PALLARES, *supra* note 21, at 113–15.

312. IMMIGRANT YOUTH JUSTICE LEAGUE, *Category Archives: Civil Disobedience*, <http://www.iyjl.org/category/cd/> [<https://perma.cc/GLH3-NN76>] (last visited Feb. 7, 2017); PETER HOLDERNESS PHOTOGRAPHY, *Video: Immigrant Youth Justice League, (March 2010)*, <http://www.peterholderness.com/iyjl/> [<https://perma.cc/7MSW-B56J>] (last retrieved June 18, 2015).

313. IMMIGRANT YOUTH JUSTICE LEAGUE, *supra* note 312.

314. The website of the Immigrant Youth Justice League (IYJL), the group mainly responsible for the Chicago “Coming Out of the Shadows” event, describes this coming out “as a form of self-determination and political escalation.” IMMIGRANT YOUTH JUSTICE LEAGUE, *Who We Are*, <http://www.iyjl.org/whoweare/> [<https://perma.cc/5HFY-J272>] (last visited Feb. 7, 2017).

315. The Immigrant Youth Justice League (IYJL) “is a Chicago based organization led by undocumented organizers.” *Id.* IYJL not only organized the initial “Coming Out of the Shadows” event, but continued to do so every year. *Id.*; see also PALLARES, *supra* note 21, at 115.

316. IYJL and its members worked with organizers outside Illinois in acts of civil disobedience, including the planning of the first and second acts of civil disobedience by undocumented individuals first in Arizona and then in Washington, D.C., IMMIGRANT YOUTH JUSTICE LEAGUE, *Who We Are*, *supra* note 314; see also Strunk & Leitner, *supra* note 21, at 76. Furthermore, IYJL’s acts of civil disobedience spanned beyond protesting SCOMM to other issues affecting the immigrant population. In 2013, an IYJL member was one of the nine undocumented individuals who publicly crossed from the United States and requested to be allowed to re-enter the United States. PALLARES, *supra* note 21, at 137–39. The group called themselves the DREAM 9 and were protesting the failure of the legislature to pass the Dream Act. *Id.*; ‘Dream 9’ Immigrant Says Don’t Think of Issue Politically, NPR (Aug. 16, 2013), <http://www.npr.org/templates/story/story.php?storyId=212603798> [<https://perma.cc/WXP5-JYAQ>]. The nine were allowed to re-enter and subsequently filed asylum petitions, but were initially held for two weeks in detention. *Id.*; Auro Bogado, *The Dream 9, One Year Later*, COLORLINES (July 22, 2014), <http://www.colorlines.com/articles/dream-9-one-year-later> [<https://perma.cc/P9SV-KQDV>].

struggle.”<sup>317</sup> The hope for the activists was that their human stories, when attached to their identities, would transform the public face of the undocumented struggle and move politicians.<sup>318</sup> Since illegal presence itself is not a crime in the U.S., the act of declaring that status is not a deviation from the law and thus strictly not civil disobedience. Nevertheless, the public nature of the act is certainly consistent with civil disobedience, which is a public attempt to persuade others to effectuate legal reform.<sup>319</sup> Further, those who “came out” conceived it as civil disobedience since the act was political in nature, public, and could lead to deportation.<sup>320</sup> As even the United States Supreme Court has recognized, for an immigrant deportation might be even worse than, or at least a fate comparable to, a criminal penalty.<sup>321</sup> When discussing the possibility of deportation and comparing the criminal process to the immigration removal, the Court has stated “[t]he impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution, or even death.”<sup>322</sup>

The youths who came out at the 2010 event stated that their actions resulted from a commitment to American democratic values.<sup>323</sup> They further articulated violations of basic liberties, including feeling that they were not free and were dehumanized by their portrayal as criminals,<sup>324</sup> thus articulating claims of psychological oppression. Furthermore, these activists were cognizant that by coming out they were risking the possibility of deportation.<sup>325</sup> When deciding whether to proceed with the 2010 Coming Out of the Shadows event, the seven people who came out and the event organizers considered whether this

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317. PALLARES, *supra* note 21, at 113.

318. *See id.*

319. In this manner, civil disobedience is distinguishable from conscientious refusal where the deviation from the law is non-public. RAWLS, *supra* note 20, at 234–325. For example, Thoreau’s 1840s refusal to pay his taxes in protest was a form of conscientious refusal until he publicized his resistance and thus converted to civil disobedience. *Id.*

320. IMMIGRANT YOUTH JUSTICE LEAGUE, *Who We Are*, *supra* note 314.

321. When concluding that advice regarding the immigration consequences of a guilty plea was a vital part of criminal representation, the Supreme Court stated that “deportation is an integral part—indeed sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to certain crimes.” *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

322. *Bridges v. Wixon*, 326 U.S. 135, 164 (1945).

323. This is a statement made by an undocumented immigrant at the 2010 “Coming Out of the Shadows” event. PETER HOLDERNESS PHOTOGRAPHY, *supra* note 312.

324. *Id.*

325. *See* PALLARES, *supra* note 21, at 113–14.



revelation was too dangerous since it could result in the youths' deportation.<sup>326</sup> The event in Chicago was the first of multiple similar public revelations in various cities that same month in 2010.<sup>327</sup> Thereafter, March became National Coming Out of the Shadows month with an increasing number of undocumented individuals revealing their status each year and increasing the national impact of this event.<sup>328</sup>

Resisters acted in May 2010, after SCOMM actively began to spread across many Chicago suburbs and then ICE Director John Morton visited Illinois to announce the agency's intent to increase enforcement efforts in the state.<sup>329</sup> Forty activists organized into a three-day, fifty-mile protest walk from Chicago to McHenry County jail, an immigration detention center which held about 400 people on immigration matters.<sup>330</sup> The protestors ranged in age and objected to increased police focus on undocumented workers.<sup>331</sup>

This strategic and political revelation of undocumented status and other acts of immigrant resistance influenced the response of other states' officials to enhanced immigration enforcement. In May of 2011, Governor Pat Quinn and the Illinois state law enforcement changed their course regarding SCOMM, attempted to rescind the existing MOA with DHS, and to recant the state's cooperation in the SCOMM.<sup>332</sup> While other localities had attempted unsuccessfully to rescind SCOMM, including San Francisco and Santa Clara in California and Cook County in Illinois,<sup>333</sup> Quinn was the first governor that

326. *Id.* A youth described coming out as "putting [his] whole life on the line." PETER HOLDERNESS PHOTOGRAPHY, *supra* note 312. Nevertheless, although the participants were clearly unaware of this in 2010, participation in these events has not led to deportation. PALLARES, *supra* note 21, at 123. The organizers of the event included a Chicago based group of undocumented immigrants who called themselves the Immigrant Youth Justice League (IYJL) and the umbrella national immigrants' right group—United We Dream—of which IYJL were members. *Id.* at 113–14.

327. *Id.* at 114–15.

328. Walbert Castillo, *Undocumented students come out of the shadows*, USA TODAY COLLEGE (Mar. 24, 2016), <http://college.usatoday.com/2016/03/24/undocumented-students-come-out-of-the-shadows/> [<https://perma.cc/SXD8-UZBS>].

329. Dan Simmons, *Marchers protest suburbs' immigration initiative*, CHICAGO TRIBUNE (May 22, 2010), [http://articles.chicagotribune.com/2010-05-22/news/ct-met-mchenry-immigration-march-052220100522\\_1\\_homeland-security-database-marchers-federal-immigration-laws](http://articles.chicagotribune.com/2010-05-22/news/ct-met-mchenry-immigration-march-052220100522_1_homeland-security-database-marchers-federal-immigration-laws) [<https://perma.cc/K8MQ-MF4H>].

330. *Id.*

331. *Id.* Apparently, the organizer of the May 2010 protest walk was the Illinois Coalition for Immigrant and Refugee Rights (ICIRR), not the IYJL (which was primarily responsible for the Chicago "Coming Out of the Shadows" event). However, ICIRR did provide support to IYJL as they organized for that event. PALLARES, *supra* note 21, at 113–14.

332. See Letter from Gov. Pat Quinn, *supra* note 308.

333. See *infra* Part IV.B.2; see also Suzanne Gamboa, "Voluntary" Immigration Program Not So Voluntary, ASSOCIATED PRESS (Feb. 16, 2011),

sought to have his entire state rescind the program, and thus encouraged other governors to follow suit as both the Massachusetts and New York expressed their desire to opt out within one month.<sup>334</sup> However, these requests were met with DHS opposition as the agency maintained that participation in SCOMM was mandated.<sup>335</sup> This DHS response was reflective of its position with prior localities' opt-out requests.<sup>336</sup> The governor's requests coincided and aggregated with California U.S. House of Representatives Congresswoman Zoe Lofgren's demands for an investigation into Secure Communities after some of California's localities were unable to opt-out.<sup>337</sup> In June of 2011, a national task force was created and charged with SCOMM's investigation.<sup>338</sup> The purpose of the Task Force was to advise DHS Secretary Napolitano about "how . . . (ICE) may improve the Secure Communities Program, including how to address some of the concerns about the program that 'relate to [its] impact on community policing and the possibility of racial profiling.'"<sup>339</sup> The Task Force members met in Washington, D.C., and held information-gathering sessions in certain cities where residents were knowledgeable about SCOMM.<sup>340</sup> The cities included Chicago, Dallas, Los Angeles, and Arlington, Virginia.<sup>341</sup>

After it was clear that Illinois could not opt out of SCOMM, civil disobedience in the state intensified.<sup>342</sup> The resisters targeted federal events, symbols, and politicians, as a result supporting Governor Quinn's opposition to the program and attacking its proponents and enforcement tools.<sup>343</sup> When the SCOMM task force held its Chicago public hearing, hundreds walked out in protest.<sup>344</sup> Before the walk-out, an immigrant activist addressed task force

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[http://www.nbcnews.com/id/41625585/ns/us\\_news-security/t/voluntary-immigration-program-not-so-voluntary/](http://www.nbcnews.com/id/41625585/ns/us_news-security/t/voluntary-immigration-program-not-so-voluntary/) [<https://perma.cc/W5EZ-J38S>].

334. Gamboa, *supra* note 333; *see also* Strunk & Leitner, *supra* note 21, at 77 (discussing how the governor's actions in Illinois influenced the Massachusetts' and New York's governors' decisions).

335. Daniel C. Vock, *Deportation Record Has States Reconsidering Secure Communities*, The Pew Charitable Trusts (June 20, 2011). *See also* Letter from Gov. Pat Quinn, *supra* note 308.

336. Gamboa, *supra* note 333.

337. *Id.* *See also infra* Part IV.B.2.

338. In June 2011, a Task Force on Secure Communities was created as a Subcommittee of the Homeland Security Advisory Council. HOMELAND SEC. ADVISORY COUNCIL, *supra* note 10, at 4. *See infra* Part IV.B.2.

339. HOMELAND SEC. ADVISORY COUNCIL, *supra* note 10, at 4 (alteration in original).

340. *Id.* at 6.

341. *Id.*

342. *See* IMMIGRANT YOUTH JUSTICE LEAGUE, *supra* note 312.

343. *Id.*

344. A Task Force on Secure Communities was created in June 2011 to advise DHS Secretary Janet Napolitano "to consider how . . . (ICE) may improve the Secure Communities Program.

members. After outing herself as undocumented, she expressed her frustration with the public hearing:

Sometimes words are not enough, hearings are not enough, press conferences and speeches are not enough. I am here today with my undocumented friends, because there comes a time when we need to take greater action. We are tired of fear, and today, today we will break that fear from Secure Communities. I and five others are going to walk outside the building right now. We are going to intentionally block traffic and put ourselves under arrest, knowing full well that under Secure Communities, this act of protest, this minor offence, will mean that we could get placed in deportation. This is the risk that immigrants all across the country take everyday.<sup>345</sup>

After declaring that she was “undocumented[,] unafraid [and] unapologetic” she and 300 others walked-out of the hearing.<sup>346</sup> Several of these protesters were arrested as a result of blocking a highway on-ramp.<sup>347</sup> Protesters argued that any attempts to reform SCOMM would be insufficient and urged task force members to resign from the hearing process instead and join their acts of civil disobedience.<sup>348</sup> They lodged critiques that the program criminalized the immigrant community and further threatened the relationship between that community and law enforcement.<sup>349</sup> There was likewise substantial opposition to SCOMM at other cities’ task force hearings.<sup>350</sup> The task force report ultimately criticized SCOMM both for creating confusion regarding whether jurisdictions’ participation was mandatory and for eroding trust between communities and local police leading to public safety issues.<sup>351</sup>

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Including how to address some of the concerns about the program that ‘relate to [its] impact on community policing and the possibility of racial profiling.’” HOMELAND SEC. ADVISORY COUNCIL, *supra* note 10, at 4 (alteration in original). The Task Force members met in Washington, D.C., and held information-gathering sessions in certain cities where residents were knowledgeable of SCOMM. The cities included Dallas, Los Angeles, Arlington, Virginia, and Chicago. *Id.* at 6. The Task Force on Secure Communities was created as a Subcommittee of the Homeland Security Advisory Council by DHS Secretary Janet Napolitano. *Id.* at 4.

345. *How to Walk Out of a DHS Insecure Communities Hearing*, IMMIGRANT YOUTH JUSTICE LEAGUE (Aug. 18, 2011), <http://www.iyjl.org/how-to-walk-out-of-a-dhs-insecure-communities-hearing/> [<https://perma.cc/P729-WD5G>].

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Another Missed Opportunity: How the Long-Awaited S-Comm “Reforms” are Designed to Fail*, NAT’L IMMIGRATION LAW CTR. (May 2012), <https://www.nilc.org/issues/immigration-enforcement/scommresponse/> [<https://perma.cc/QK7Y-CZQX>].

351. Julia Preston, *Deportation Program Sows Mistrust, U.S. Is Told*, N.Y. TIMES (Sept. 16,

While the task force report suggested what it considered improvements to SCOMM,<sup>352</sup> it is notable that five out of the nineteen task force members did resign in protest because they found themselves unable to sign on to a report that suggested SCOMM could somehow be improved.<sup>353</sup>

Immigrant activists and their allies continued to use the tool of civil disobedience in Illinois to express their disagreement with SCOMM and the system of deportation until the program's dismantling.<sup>354</sup> Simultaneous with these coming out events and more traditional acts of civil disobedience, litigation efforts intensified. The National Immigrant Justice Center (NIJC), a Chicago based legal services nonprofit, filed both class action and individual lawsuits against DHS. These lawsuits alleged violations of basic liberties in the form of Fifth Amendment due process and Fourth Amendment search and seizure violations.<sup>355</sup> The current status of the lawsuits vary. In the *Jimenez*

2011), at A12; *see also* HOMELAND SEC. ADVISORY COUNCIL, *supra* note 10, at 28–29.

352. HOMELAND SEC. ADVISORY COUNCIL, *supra* note 10, at 25–27.

353. Preston, *supra* note 351; *see also* Hing, *supra* note 119; Resignation Letter from Arturo Venegas, Jr., Committee Member, Task Force on Secure Communities, to Chuck Wexler, Chairman, Task Force on Secure Communities, U.S. DEP'T OF HOMELAND SEC. (Sept. 14, 2011), <http://big.assets.huffingtonpost.com/VenegasLetter.pdf> [<https://perma.cc/2TLA-QMNZ>]; Resignation Letter from Andrea Zuniga DiBitetto, Christopher Crane, & Monica Beamer, Committee Members, Task Force on Secure Communities, to Chuck Wexler, Chairman, Task Force on Secure Communities, U.S. DEP'T OF HOMELAND SEC. (Sept. 14, 2011), <http://big.assets.huffingtonpost.com/LaborLetter.pdf> [<https://perma.cc/LA6B-L5P4>].

354. In May of 2013, seven undocumented immigrants were arrested as they blocked the door of the immigration detention facility in Broadview, Illinois, “linking arms together, using pipes, chains and locks.” *The Seven Sitting Down to Stop Deportations at Broadview Detention Center*, IMMIGRANT YOUTH JUSTICE LEAGUE, *supra* note 6. Later in May, twelve were arrested as they sat similarly on the street in front of the location of an Obama fundraiser and shouted “No more deportations. Not one more.” *BREAKING: 12 Chicagoans Form Human Chain Calling on President to Suspend Deportations*, IMMIGRANT YOUTH JUSTICE LEAGUE, *supra* note 2. In November 2013, six immigrants blocked a bus carrying immigrants from the Broadview detention center towards deportation by, among other things, attaching themselves to the buses' tires again shouting the “Not one more” mantra. *How a Middle-Aged Professor Came to Participate in a Civil Disobedience Action to Stop a Deportation Bus*, IMMIGRANT YOUTH JUSTICE LEAGUE, *supra* note 3. Twelve activists were arrested at that event as many others lent support shouting the same mantra. *BREAKING: 12 Chicagoans Form Human Chain Calling on President to Suspend Deportations*, IMMIGRANT YOUTH JUSTICE LEAGUE, *supra* note 2. The following year, in April 2014, eleven were arrested outside the same detention facility after blocking the flow of traffic to protest the Obama administration's deportations. This sit-in was the culmination of two days of protests that began with a march from ICE's Chicago office and continued with a rally of a few hundred outside the immigrant jail. Fortino, *supra* note 1.

355. In August 2011, NIJC lawyers filed *Jimenez Moreno v. Napolitano* alleging violations of Fifth Amendment due process and Fourth Amendment search and seizure violations. *See* Complaint for Injunctive and Declaratory Relief and Petition for Writ of Habeas Corpus, *Moreno v. Napolitano*, No. 11-CV-05452 (filed Aug. 11, 2011). In 2012 and 2013, NIJC filed complaints alleging wrongful imprisonment. Complaint filed by James Aziz Makowski, *Makowski v. Napolitano*, No. 12-CV-05265 (filed July 3, 2012); Complaint filed by Sergey Mayorov, *Mayorov v. United States*, 13-CV-05249

*Moreno* class action, plaintiffs' motion for summary judgment is pending as of the date of this writing on both the search and seizure and due process claims.<sup>356</sup> Another two lawsuits were settled in 2015 and 2016.<sup>357</sup>

Immigrant activists' opposition in Illinois to harsh immigration enforcement contributed to a domino effect whose impact extended beyond state lines. Likely influenced by this opposition and inquiries from external localities and politicians which included California Representative Lofgren's investigatory demands, Governor Quinn sought to rescind Illinois' collaboration with SCOMM.<sup>358</sup> Thereafter, other state governors swiftly attempted to opt-out. DHS's position that program participation was mandatory prompted litigation and a national investigation.<sup>359</sup> During this time, California immigrant activists engaged in their own battles against SCOMM.

## 2. California:

DHS targeted multiple California counties for early SCOMM activation.<sup>360</sup> Back in 2008, with Jerry Brown as Attorney General, California officials signed an MOA with ICE.<sup>361</sup> According to an ICE report, by July 7, 2010, SCOMM had been activated in 36% of California jurisdictions.<sup>362</sup> In two 2010 events,

(filed July 22, 2013). In *Makowski*, a U.S. citizen plaintiff sued the U.S. government pursuant to the Federal Tort Claims Act (FTCA) stating that he was held in prison for seventy days, instead of being released to boot camp, because of an immigration detainer issued without probable cause. *Makowski v. United States*, 27 F. Supp. 3d 901, 907 (N.D. Ill. 2014). The District Judge denied the government's motion to dismiss that FTCA count of the complaint concluding that plaintiff alleged "a plausible claim for false imprisonment against the United States." *Id.* at 918. *Cf. Mayorov v. United States*, 84 F. Supp. 3d 678, 696–705 (N.D. Ill. 2015) (where the District Judge granted summary judgment on the false imprisonment claim because although the U.S. citizen plaintiff was placed back in jail from the boot camp program as a result of an immigration detainer he remained at all times in Illinois Department of Corrections custody but denied summary judgment on the claim that DHS negligently issued the detainer).

356. *Jimenez Moreno et al. v. Napolitano et al.*, No. 11-CV-05452, 2014 BL 271979 (N.D. Ill. Sept. 30, 2014).

357. *Makowski v. United States*, No. 12-CV-05265, 2014 BL 379362 (N.D. Ill. Mar. 18, 2014) *dismissed* (Feb. 19, 2015); *Mayorov v. United States*, No. 13-CV-5249, 2015 BL 80716 (N.D. Ill. Mar. 23, 2015) *settled* (Jan. 19, 2016).

358. See Letter from Gov. Pat Quinn, *supra* note 308.

359. See generally MANUEL, CONG. RESEARCH SERV., *supra* note 94, at 2 n.13.

360. See *supra* Part III for a description of how SCOMM was activated by county.

361. See Memorandum of Agreement Between Dep't of Homeland Sec., Immigration and Customs Enf't, and Cal. Dep't of Justice, Bureau of Criminal Identification and Info., [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiescaliforniamoa10april2009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiescaliforniamoa10april2009.pdf) [<https://perma.cc/FKN4-JDP3>].

362. See SECURE COMMUNITIES, ACTIVATED JURISDICTIONS, IMMIGRATION AND CUSTOMS ENF'T (July 7, 2010) [hereinafter ACTIVATED JURISDICTIONS]. In addition, a Deportation Nation blog reports that by August 2, 2010, 100% of California counties were activated. See *Counties Enrolled in*

activists had engaged in resistance first by chaining themselves together and blocking deportation buses from entering an immigration detention center<sup>363</sup> and then by standing outside the county courthouse steps protesting that jurisdiction's SCOMM activation.<sup>364</sup> As justification for their protests, activists articulated the dehumanization and criminalization of the immigrant community,<sup>365</sup> as well as racial profiling,<sup>366</sup> and pledged resistance through civil disobedience.<sup>367</sup> Simultaneous with these protests, certain California localities began attempting to opt-out or limit SCOMM. That year, the San Francisco Board of Supervisors voted to stop compliance with SCOMM immigration detainers, expressing concerns about discriminatory enforcement, pretextual arrests, and public safety.<sup>368</sup> That move was consistent with San Francisco's general position regarding immigrants, since it was one of the few cities that had adopted a sanctuary policy before SCOMM.<sup>369</sup> San Francisco Sheriff Hennessey sent a letter to ICE requesting that San Francisco County be allowed to opt out of SCOMM.<sup>370</sup> The Santa Clara County Board of Supervisors also

*Secure Communities, DEPORTATION NATION* (Aug. 2, 2010), <http://www.businessofdetention.com/deportationnation/library/sc-map/> [<https://perma.cc/UQ42-3FNL>].

363. At this event, activists protested the Arizona's SB1070 state law that permitted Arizona police to check the immigration status of any individual with whom they came into contact. *LA Civil Disobedience Against AZ SB1070*, GRASSROOTS GLOB. JUSTICE ALL. (May 10, 2010), <http://ggjalliance.org/node/392> [<https://perma.cc/RG3F-BHSY>]. SB1070 has been called the "show your papers" law and at this protest activists refused to show their identification when requested by police in solidarity with immigrants in Arizona. *Supreme Court Reinstates Arizona "Show Me Your Papers" Law, but Strikes Down Three Other Provisions of Anti-Immigration Measure*, ACLU (June 25, 2012), <https://www.aclu.org/news/supreme-court-reinstates-arizona-show-me-your-papers-law-strikes-down-three-other-provisions> [<https://perma.cc/N5Y9-GG2M>].

364. Laura Dudnick Bay, *Groups Protest Implementation of Secure Communities Program*, THE DAILY JOURNAL (May 26, 2010), <http://www.smdailyjournal.com/articles/news/2010-05-26/groups-protest-implementation-of-secure-communities-program/132241.html> [<https://perma.cc/EM33-64MF>].

365. GRASSROOTS GLOB. JUSTICE ALL., *supra* note 363.

366. Bay, *supra* note 364; *see also* GRASSROOTS GLOBAL JUSTICE ALLIANCE, *supra* note 363.

367. GRASSROOTS GLOBAL JUSTICE ALLIANCE, *supra* note 363.

368. S.F. Bd. of Supervisors, Res. No. 269-10 (May 21, 2010), <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions10/r0269-10.pdf> [<https://perma.cc/H92D-T7X9>].

369. *Sanctuary Ordinance*, SAN FRANCISCO GSA (last visited Feb. 7, 2017), <http://sfgov.org/ccsfgsa/sanctuary-ordinance>.

370. Letter to Hon. Edmund G. Brown, Attorney General, California Department of Justice, et al., from Sheriff Michael Hennessey, City & County of San Francisco (Aug. 31, 2010), <http://uncoverthetruth.org/wp-content/uploads/2010/09/Secure-Communities-Setting-the-Record-Straight.pdf> [<https://perma.cc/8V5Z-4BC6>].

unanimously voted to opt-out.<sup>371</sup> These California jurisdictions were early in their requests to rescind SCOMM, doing so in 2010<sup>372</sup>—one year in advance of Illinois Governor Quinn’s request.<sup>373</sup> However, after San Francisco and Santa Clara’s requests to cease participation in SCOMM were referred to then Attorney General Jerry Brown, he denied the requests.<sup>374</sup> Undeterred, the San Francisco Sheriff later penned an op-ed criticizing SCOMM and calling for the enactment of a state-wide law limiting California’s compliance.<sup>375</sup> In his editorial, the chief recalled the executive director of the ICE Office of State and Local Coordination announcing to law enforcement at the 2008 Police Foundation’s national conference “[i]f you don’t have enough evidence to charge someone criminally but you think he’s illegal, we can make him

371. *News Release*, CTY. OF SANTA CLARA, CAL. (Sept. 28, 2010) <https://www.sccgov.org/sites/opa/nr/Pages/County-of-Santa-Clara-to-Request-to-Opt-Out-of-Secure-Communities-Program.aspx> [<https://perma.cc/37UP-5X79>]; see also Michele Waslin, *Counties Say No to ICE’s Secure Communities Program, But Is Opting Out Possible?*, IMMIGRATION IMPACT (Oct. 1, 2010), <http://immigrationimpact.com/2010/10/01/counties-say-no-to-ices-secure-communities-program-but-is-opting-out-possible/> [<https://perma.cc/3FR3-NPPD>]. After creating a task force to consider the issue, Santa Clara instituted a policy in 2011 that essentially terminated any of the county’s collaboration with ICE. Raj Jayadev & Fernando Perez, *Santa Clara County Ends Collaboration with ICE*, NEW AMERICA MEDIA (Oct. 18, 2011), <http://newamericamedia.org/2011/10/santa-clara-county-ends-collaboration-with-ice.php> [<https://perma.cc/SPC6-G9XA>].

372. *Id.*

373. See Letter from Gov. Pat Quinn, *supra* note 308.

374. Brown cited in his denial the need for state-wide uniformity. *SF Request to Opt Out of Secure Communities Denied*, KGO-TV (May 25, 2010), <http://abclocal.go.com/story?section=news/state&id=7461945>; Letter from Edmund G. Brown, Jr., Attorney General, Cal. Dep’t of Justice to Sheriff Michael Hennessey, City & County of San Francisco, (May 25, 2010), <https://oag.ca.gov/news/press-releases/brown-denies-san-francisco-sheriffs-request-opt-out-secure-communities-program> [<https://perma.cc/D9D6-WLA2>]. In 2013, the San Francisco Board of Supervisors, referencing equal protection concerns and the disproportionate targeting and impact on the Latino population, passed an ordinance that only permitted compliance with immigration detainers for those convicted within seven years of a violent felony and with a probable cause determination of a pending violent felony. Administrative Code Ordinance No. 204-13, Chapter 121.1-121.1.7; see also Laila Kearney, *San Francisco Passes Law to Prohibit Immigrant Holds*, REUTERS (Oct. 1, 2013), <http://www.reuters.com/article/us-usa-immigration-sanfrancisco-idUSBRE99102Y20131002> [<https://perma.cc/X3TE-PE2F>]. It bears mentioning that this ordinance was revisited in 2015 after the shooting of Kathryn Steinle. It is alleged that the decedent was killed by Juan Francisco Lopez-Sanchez, who was released by San Francisco authorities who refused to honor an ICE detainer consistent with the ordinance. Mr. Lopez-Sanchez was released after his twenty-year-old warrant for possession of marijuana was dismissed. Jonah Owen Lamb, *Due Process for All Ordinance Revisited in Wake of Steinle Homicide*, S.F. EXAMINER (July 21, 2015) <http://www.sfexaminer.com/due-process-for-all-ordinance-revisited-in-wake-of-steinle-homicide/> [<https://perma.cc/4G6M-5DEG>].

375. Michael Hennessey, *Secure Communities Destroys Public Trust*, S.F. GATE (May 1, 2011), <http://www.sfgate.com/opinion/article/Secure-Communities-destroys-public-trust-2373213.php#photo-1809895> [<https://perma.cc/X3TE-PE2F>].

disappear.”<sup>376</sup> Then California Attorney General Brown’s response to San Francisco and Santa Clara that participation was mandated throughout the state, as well as disclosure of ICE and FBI internal documents suggesting DHS misled jurisdictions about whether SCOMM was mandatory, fueled California Congresswoman Zoe Lofgren’s demand for an investigation into the program.<sup>377</sup> As previously mentioned, Lofgren’s demands were instrumental in leading to the creation of the national task force that investigated the program.<sup>378</sup> “[P]ublic outcry” at multiple task force meetings nationwide highlighted broad opposition to SCOMM.<sup>379</sup>

While a couple of California localities had attempted to take steps to limit SCOMM in 2010, most were participating in the program.<sup>380</sup> Notably, Los Angeles County and the City of Los Angeles, the most populated jurisdictions in California,<sup>381</sup> were complying with detainers.<sup>382</sup> In 2011, 2012, and 2013, activists engaged in multiple protests of increasing numbers throughout California.<sup>383</sup> Opponents continued justifying their acts of resistance and civil

376. *Id.*

377. See Letter from Rep. Zoe Lofgren, Ranking Member, Subcommittee on Immigration Policy and Enforcement to Charles K. Edwards, Acting Inspector General, U.S. Department of Homeland Security, and Timothy Moynihan, Assistant Director, Office of Professionals Responsibility, Immigration and Customs Enforcement (Apr. 28, 2011), available at [uncoverthetruth.org/wp-content/uploads/2011/05/Letter-to-DHS-OIG-re-SCOMM-Investigation-Follow-Up-5-17-11.pdf](http://uncoverthetruth.org/wp-content/uploads/2011/05/Letter-to-DHS-OIG-re-SCOMM-Investigation-Follow-Up-5-17-11.pdf). See also Gamboa, *supra* note 333.

378. *Supra* note 338 and accompanying text.

379. See NAT’L IMMIGRATION LAW CTR., *supra* note 350.

380. See ACTIVATED JURISDICTIONS, *supra* note 362.

381. *Id.*

382. *Id.*

383. See Carlos Montes, *All Out for May 1, 2011 in LA: Demand Legalization, End to Police, ICE Repression*, FIGHTBACK!NEWS (Apr. 27, 2011), <http://www.fightbacknews.org/2011/4/27/all-out-may-1-2011-la> [<https://perma.cc/54ZJ-8SR5>] (Protestors marched against SCOMM. in L.A. at the city’s May Day Celebration); Matt O’Brien, *UC Berkeley Student Senator Released After Arrest at Immigration Rally*, SAN JOSE MERCURY NEWS (July 12, 2011), <http://www.mercurynews.com/2011/07/12/uc-berkeley-student-senator-released-after-arrest-at-immigration-rally/> [<https://perma.cc/3DSP-37QL>] (After a “coming out” as undocumented rally in San Bernardino on July 2011, activists interrupted traffic and were arrested and charged with misdemeanor crimes.); Paloma Esquivel, *Controversial Immigration Enforcement Program is Target of Lively Protest*, L.A. TIMES (Aug. 15, 2011), <http://latimesblogs.latimes.com/lanow/2011/08/immigration-enforcement-program-is-the-target-of-protest.html> [<https://perma.cc/NB5X-DQUR>]; *Hundreds Protest Fingerprinting Program that Leads to Deportations*, CBS L.A. (broadcast Aug. 15, 2011), <http://losangeles.cbslocal.com/2011/08/15/hundreds-protest-fingerprint-sharing-program-by-immigration-authorities/> [<https://perma.cc/2T94-ZD2R>]; *L.A. Activists Confront Obama*, FIGHTBACK!NEWS (Sept. 27, 2011), <http://www.fightbacknews.org/2011/9/27/la-activists-confront-obama> [<https://perma.cc/4UEK-FB6F>] (After speaking out against the program at a L.A. SCOMM task force hearing, about 200 people walked out of the hearing shouting “terminate the program” and joined crowds picketing outside. Over 200 protested during Obama’s September 2011 L.A. visit demanding



disobedience by charging that SCOMM led to racial profiling, arrests without probable cause, arbitrary deportations,<sup>384</sup> encouraged police harassment of immigrants engaging in mundane tasks such as street car vending or working as a day laborer,<sup>385</sup> and chilled that community's access to police.<sup>386</sup>

Shifting law enforcement's position in the City of Los Angeles was important to the fight against SCOMM since that jurisdiction complied with thousands of detainers each year.<sup>387</sup> In 2011, the Los Angeles City Council

an end to SCOMM.); Jorge Rivas, *Ten Undocumented Youth Arrested in San Bernardino for Civil Disobedience at DHS Office*, COLORLINES (Jan. 26, 2012), <http://www.colorlines.com/articles/ten-undocumented-youth-arrested-san-bernardino-civil-disobedience-dhs-office> [https://perma.cc/R3GW-DBPP] (Ten young undocumented immigrants, including college students, were arrested during a January 2012 "sit-in" outside the San Bernardino DHS building. One activist coalition member confirmed that "many immigrant youth activists, are employing their civil disobedience tactics to call an end to enforcement programs like Secure Communities and 287(g) that are sweeping the community up into the country's deportation machine."); Press Release, *Ammiano Reveals TRUST Act Details as Hundreds Rally Against Sheriff Baca's Immigration Policies In LA*, NAT'L DAY LABORER ORG. NETWORK (Feb. 23, 2012), <http://www.ndlon.org/en/pressroom/press-releases/item/445-pr-trust-la> [https://perma.cc/PQB2-LRRR] (Hundreds, including day laborers, marched in L.A. on February 2012, in protest of SCOMM.); *Breaking: Undocumented People, Allies Block Intersection During President's Los Angeles Fundraiser Calling for Stop to Deportations, #NOT1MORE* (June 7, 2013), <http://www.notonemoredeportation.com/2013/06/07/iyc-demo/> [https://perma.cc/DB9B-PH2G] (While others also rallied against SCOMM, eleven undocumented activists blocked Santa Monica traffic in June of 2013 as they encircled a banner reading "Undocumented, Unafraid: Not1More Deportation."); *Domestic Abuse Victims and Immigrant Rights Activists Protest "Secure Communities" Program at SF City Hall*, The Pacifica Evening News, KPFA 94.1-FM BERKELEY (broadcast on July 23, 2013), <http://pacificaeveningnews.blogspot.com/2013/07/domestic-abuse-victims-and-immigrant.html> [https://perma.cc/42DD-7HXT] (Activists protested SCOMM outside the San Francisco City Hall as they highlighted how the program causes domestic victims to avoid contacting police because of fear of being detained themselves and placed in deportation proceedings and called for San Francisco's adoption of an ordinance which would end the county's participation in SCOMM.).

384. The Director of the National Day Laborer Organization Network, a group who participated and organized much of the grass root opposition to SCOMM in California, lodged these accusations against the program. Pablo Alvarado, "Secure Communities": *End It, Don't Mend It*, HUFFINGTON POST LATINO VOICES (Mar. 24, 2012), [http://www.huffingtonpost.com/pablo-alvarado/secure-communities-end-it\\_b\\_1375814.html](http://www.huffingtonpost.com/pablo-alvarado/secure-communities-end-it_b_1375814.html) [https://perma.cc/URE6-HZ6Q].

385. A protest participant recounted street vendor harassment by police and deportations resulting from traffic arrests. Carlos Montes, *Immigrant Rights Activists Protest Sheriff Baca at Awards Event in West L.A.*, FIGHTBACK!NEWS (Dec. 19, 2011); see also *Protesters Demand of Obama and L.A. Sheriff Baca: Stop Police/ICE Repression!*, FIGHTBACK!NEWS (Dec. 11, 2011), <http://www.fightbacknews.org/2011/12/11/protesters-demand-obama-and-la-sheriff-baca-stop-policerice-repression> [https://perma.cc/R3H7-P6MM]; see also Ingrid V. Eagly, *Criminal Clinics in the Pursuit of Immigrant Rights: Lessons from the Loncheros*, 2 U.C. IRVINE L. REV. 91, 97 (2012).

386. Press Release, NAT'L DAY LABORER ORG. NETWORK, *supra* note 383.

387. Joel Rubin & Andrew Blankstein, *Chief Beck Eases Policy on Illegal Immigrant Deportation*, L.A. TIMES (Oct. 4, 2012), <http://articles.latimes.com/2012/oct/04/local/la-me-lapd-immigration-20121004> [https://perma.cc/A5L2-DRXD].

adopted a resolution urging that the city cease cooperation with the program.<sup>388</sup> The following year, Los Angeles Police Chief Charlie Beck stated that he would not comply with these detainers in arrests for low level criminal offenses.<sup>389</sup> In his statement, Chief Beck highlighted harms to public safety.<sup>390</sup>

Densely populated L.A. County was another vital battleground. In that county, SCOMM had a vocal advocate in its Sheriff Lee Baca.<sup>391</sup> In 2011, Sheriff Baca alienated immigrant advocates when he declared during a radio interview that undocumented immigrants were not entitled to the same civil rights as citizens<sup>392</sup> and wrote an op-ed for the Los Angeles Times stating that racial profiling and other SCOMM related concerns were misplaced.<sup>393</sup> Instead, the sheriff labeled the program successful stating that it detained criminal immigrants.<sup>394</sup> The L.A. Sheriff further refused immigrant rights groups' 2011 public records requests about his department's cooperation with federal immigration authorities.<sup>395</sup> This refusal resulted in a lawsuit by these same groups.<sup>396</sup> The sheriff was not only the target of this lawsuit but also the target of protests. In December of 2011, Sheriff Baca's actions resulted in a march of

388. *Los Angeles Resolution Calls for SCOMM Opt Out*, NAT'L DAY LABORER ORG. NETWORK (June 6, 2011), <http://www.ndlon.org/en/pressroom/press-releases/item/200-los-angeles-resolution-calls-for-scomm-opt-out> [<https://perma.cc/HQ7L-EN7M>].

389. Rubin & Blankstein, *supra* note 387.

390. *Id.* That same year, Chief Beck had also made other pro-immigrant moves such as expressing support for issuing driver's licenses to immigrants and limiting the impoundment of vehicles of those charged with driving without a license—an offense with which immigrants are often charged. *Id.* The environment of immigrant resistance in California may have affected not only officials' views about SCOMM but also about the other problems faced by immigrants.

391. The Los Angeles Sheriff Department provides policing in areas of Los Angeles County that are not incorporated into cities. *Inquiries, Contact Information, Commendations/Complaints, Suggestion and Most Frequently Asked Questions* [FAQs], L.A. SHERIFF DEPT., <http://shq.lasdnews.net/Contact.Info-ALL.html> [<https://perma.cc/C38J-KHRW>] (last visited Feb. 7, 2017).

392. Paloma Esquivel, *Rights Advocates Sue L.A. County Sheriff Lee Baca Over Immigrant Data*, L.A. TIMES (July 1, 2011), <http://articles.latimes.com/print/2011/jul/01/local/la-me-baca-suit-20110701> [<https://perma.cc/H9A9-LJ82>]; *Sheriff Baca Questions Civil Rights of Illegal Immigrants*, ASSOCIATED PRESS (May 13, 2011), <http://losangeles.cbslocal.com/2011/05/13/sheriff-baca-questions-civil-rights-of-illegal-immigrants/> [<https://perma.cc/27AM-QMKS>].

393. Lee Baca, Op-Ed, *Lee Baca: Let Us Deport the Bad Guys*, L.A. TIMES (May 16, 2011), <http://articles.latimes.com/2011/may/16/opinion/la-oe-baca-immigration-20110517> [<https://perma.cc/5LK8-56MB>].

394. *Id.*

395. *Lawsuit Seeks to Uncover Truth Behind Sheriff's Immigration Operations in Los Angeles County*, NAT'L IMMIGRATION LAW CTR. (June 30, 2011), <https://www.nilc.org/2011/06/30/community-groups-sue-l-a-county-sheriff-baca/> [<https://perma.cc/XA8Q-U2TS>]; Esquivel, *supra* note 383.

396. Esquivel, *supra* note 383.

hundreds from an immigration detention center to the local jail where activists demanded that L.A. County stop enforcing ICE detainers.<sup>397</sup> Less than two weeks after this march, Sheriff Baca was met with loud opposition at a speaking engagement in West L.A.<sup>398</sup> The following year, Sheriff Baca was singled out by name at multiple of the L.A. community's protests.<sup>399</sup> Groups called for the sheriff's resignation<sup>400</sup> declaring that due to his cooperation with SCOMM detainers, Sheriff Baca had "deport[ed] more people per year than Arizona's Sheriff Joe Arpaio."<sup>401</sup> In late 2012, Sheriff Baca ceased honoring federal immigration detainers for immigrants arrested for low level crimes.<sup>402</sup> The sheriff's spokesperson stated that this change was a result of a bulletin from California Attorney General Kamala Harris that the federal hold requests were not compulsory and each law enforcement agency should institute policies about when to comply.<sup>403</sup> Nevertheless, Sheriff Baca was also embroiled in a

397. FIGHTBACK!NEWS, *supra* note 385.

398. Montes, *supra* note 385.

399. *Id.*

400. *Spirited Protest Against LA's Sheriff Baca*, FIGHTBACK!NEWS (Jan. 15, 2012), <http://www.fightbacknews.org/2012/1/15/spirited-protest-against-la-s-sheriff-baca> [<https://perma.cc/NC7M-36YQ>]. In 2014, Sheriff Baca did resign his post amid allegations of brutality against minority youth, including an FBI investigation about inmate abuse at the jail that resulted in criminal charges against eighteen deputies. His resignation was celebrated by immigrant rights activists. See Mick Kelly, *Carlos Montes Speaks on Resignation of LA Sheriff Baca*, FIGHTBACK!NEWS (Jan. 13, 2014); see also Gene Maddaus, *Plagued by Scandal, Sheriff Lee Baca Resigns To Avoid Bruising Re-election Battle*, L.A. WEEKLY (Jan. 7, 2014), <http://www.laweekly.com/news/plagued-by-scandal-sheriff-lee-baca-resigns-to-avoid-bruising-re-election-battle-4288262>.

401. *Sheriff Baca Told to Break Ties with 'Secure Communities'*, FIGHTBACK!NEWS (July 19, 2012), <http://www.fightbacknews.org/2012/7/19/sheriff-baca-told-break-ties-secure-communities> [<https://perma.cc/ZN8U-7NRJ>]. Sheriff Arpaio considered himself to be "America's toughest sheriff" and toed a hard line on illegal immigration. See Joe Hagan, *The Long, Lawless Ride of Sheriff Joe Arpaio*, ROLLING STONE MAGAZINE (Aug. 2, 2012) ("Joe Arpaio, the 80-year-old lawman who brands himself 'America's toughest sheriff'"); Anderson Cooper, *Kerry Attacks; Steroids & Baseball; Skating on Thin Ice*, ANDERSON COOPER 360 DEGREES, CNN (aired Mar. 10, 2004 at 19:00 ET), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/040310/acd.00.html> [<https://perma.cc/288T-WNQT>] (Sheriff Arpaio reinstates prison chain-gang labor); Stephen Lemons, *Joe Arpaio Obliterated in New TV Ads by Citizens for Professional Law Enforcement*, PHOENIX NEW TIMES (Oct. 18, 2012 at 7:54 p.m.), <http://www.phoenixnewtimes.com/blogs/joe-arpaio-obliterated-in-new-tv-ads-by-citizens-for-professional-law-enforcement-6502025> (Sheriff Arpaio attacked for stance on pink underwear for inmates).

402. Cindy Chang, *Baca Will No Longer Turn Over Low-level Offenders to Immigration*, L.A. TIMES (Dec. 5, 2012), <http://latimesblogs.latimes.com/lanow/2012/12/baca-immigration-secure-communities.html> [<https://perma.cc/JR9V-PD3J>].

403. *Id.*; see also Information Bulletin dated 12-4-12 from Kamala Harris, Attorney General, Cal. Dep't of Justice regarding Responsibilities of Local Enforcement Agencies under Secure Communities.

class action lawsuit at that time which alleged due process and Fourth Amendment violations as a result of his practice of refusing bail and release from the L.A. County Jail of individuals with ICE detainees.<sup>404</sup> That lawsuit led to L.A. County ceasing the procedure of denying bail based on an ICE detainee.<sup>405</sup>

While different California jurisdictions and officials took steps at varying speeds to limit cooperation with SCOMM,<sup>406</sup> at the state level activists advocated for passage of a law that would mandate limited compliance across California with ICE detainees.<sup>407</sup> Such a law would provide base protections for immigrants across counties, cities, and police departments. Before the state wide law was passed and later became effective on January 1, 2014, only eight of California's fifty-three counties and cities had rules curtailing full compliance with immigration detainees—although these eight included some of the most populous jurisdictions in California, namely the City of Los Angeles, Los Angeles County, Santa Clara County, and San Francisco County.<sup>408</sup> After the passage of the state wide TRUST Act, no California

404. *Complaint for Injunctive and Declaratory Relief and Damages*, Roy v. Cty. of Los Angeles, 114 F. Supp. 3d 1030 (C.D. Cal. 2015).

405. *Case Updates*, Roy, et. al. v. Los Angeles County, ACLU (Mar. 12, 2013), <https://www.aclu.org/cases/roy-et-al-v-los-angeles-county> [<https://perma.cc/EV4G-7FVH>].

406. See *supra* notes 321–24 and accompanying text. In 2012, the East Palo Alto City Council passed a resolution urging its neighboring San Mateo County to limit cooperation with ICE detainees, *East Palo Alto City Council Passes Resolution Against Juvenile Detainer Requests*, ALBERT COBARRUBIAS JUSTICE PROJECT (Oct. 11, 2012), <http://acjusticeproject.org/2012/10/11/east-palo-alto-city-council-passes-resolution-against-juvenile-detainer-requests/> [<https://perma.cc/9SB6-KMWA>], and the Berkeley City Council unanimously voted to seriously limit the circumstances under which Berkeley would honor an ICE detainee request, Emilie Raguso, *Berkeley Says 'No' to Federal Immigration Detainers*, BERKELEYSIDE (Oct. 31, 2012), <http://www.berkeleyside.com/2012/10/31/berkeley-officials-say-no-to-federal-immigration-detainers/> [<https://perma.cc/JHL7-UYPM>]; see also Recommendation to Members of the City Council from City Manager Christine Daniel (Oct. 30, 2012). In 2013, the Richmond California Police Department adopted Policy No. 428 declaring that it would not comply with ICE detainee requests and that ICE would be denied “access to the Richmond Police Department Detention Unit . . . unless they are there to pick up a prisoner on a federal warrant or order signed by a judge.” Richmond Cal. Police Dep't Policy No. 428.

407. Geopolitics Professor Mathew Coleman studied this question of unequal immigration enforcement across a state when he compared the application of 287(g) and SCOMM in Wake County and City of Durham in North Carolina and concluded that immigration enforcement by local authorities differed greatly in the two jurisdictions. Due to variables at the local level, Coleman found immigration enforcement to be uneven in these localities, despite being situated in the same state and both enrolled in the federal immigration enforcement programs. See Coleman, *supra* note 219. The preceding discussion of California jurisdictions suggests that the same uneven enforcement existed in that state. These differences may be even more likely in such a geographically vast state like California.

408. See CATHOLIC LEGAL IMMIGRATION NETWORK, *supra* note 11.

jurisdiction was permitted to comply with an immigration detainer request unless the individual had been convicted of certain enumerated crimes,<sup>409</sup> thus forbidding California police and jail or prison personnel from enforcing a detainer where there was no requisite criminal conviction. Thereafter, if the act's threshold conviction requirements were met, the jurisdiction's officials would decide whether to cooperate with the ICE detention requests.<sup>410</sup> Failure by California law enforcement to adhere by the limitations of the TRUST Act could amount to a misdemeanor of arrest without lawful authority.<sup>411</sup> The Act thus stopped the practice of holding an individual who was simply undocumented or arrested. The TRUST Act was a meaningful success for immigrant advocates in California.

The legislative history of the TRUST Act demonstrates that the law was targeted to combat immigration detainers issued through SCOMM, and lists the legislature's concerns that the detainers circumvent the Fourth Amendment and harm law enforcement's relationship with the community.<sup>412</sup> Nevertheless, the road to the passage of the TRUST Act was rocky with then California Governor Jerry Brown initially vetoing the bill in late September of 2012,<sup>413</sup> but committing himself to work with legislators to craft another version of the bill.<sup>414</sup> Advocates mobilized as the second version of the bill was submitted to Governor Brown.<sup>415</sup> Mirroring the Undocu-Bus, twenty-three undocumented immigrants boarded what they termed the "Undocumented Caravan to Restore Trust for California's Families" on a one week journey which crossed the state

409. CAL. GOV. CODE § 7282.5(a) (West 2014). See Attorney General Kamala Harris Information Bulletin, *supra* note 403. See also *Recent Legislation*, 127 HARV. L. REV. 2593, 2595 (2014).

410. CAL. GOV. CODE § 7282.5(a) (West 2014). See also *Recent Legislation*, *supra* note 409, at 2598.

411. *Recent Legislation*, *supra* note 409, at 2598.

412. CAL STATE ASSEMB., LEG. COUNSEL'S DIGEST, AB-4, 1st Sess. (Oct. 5, 2013), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201320140AB4](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140AB4) [<https://perma.cc/GZZ5-W29R>].

413. See Letter from Gov. Brown to Members of the California Assembly regarding Assembly Bill 1081 (Sept. 30, 2012). See also Elise Foley, *TRUST Act Vetoed: California Gov. Jerry Brown Calls Limits On Immigration Enforcement 'Flawed'*, HUFFINGTON POST (Oct. 1, 2012), [http://www.huffingtonpost.com/2012/10/01/trust-act-veto-jerry-brown\\_n\\_1928444.html](http://www.huffingtonpost.com/2012/10/01/trust-act-veto-jerry-brown_n_1928444.html) [<https://perma.cc/Y89K-QQ4J>].

414. See *Undocumented Caravan to Restore Trust for California's Families*, #NOT1MORE, <http://www.notonemoredeportation.com/take-action/calicaravan/> [<https://perma.cc/5S6G-UZ35>] (last visited Feb. 7, 2017); see also Jonathan Perez, *Why Undocumented Californians Sat-in Governor Brown's Office*, HUFFPOST LATINO VOICES BLOG (July 9, 2013), [http://www.huffingtonpost.com/jonathan-perez/why-undocumented-californ\\_b\\_3568241.html](http://www.huffingtonpost.com/jonathan-perez/why-undocumented-californ_b_3568241.html) [<https://perma.cc/A8M7-XJXW>].

415. #NOT1MORE, *supra* note 414.

beginning at Escondido—with stops in Los Angeles, Orange County, San Fernando Valley, Pasadena, Fresno, and the Bay Area.<sup>416</sup> The caravan's trip ended at Sacramento, where its occupants testified at the California Senate hearing on the TRUST Act, rallied outside the Governor's office, and ultimately conducted a sit-in at Brown's office, refusing to leave until they succeeded in meeting with Brown and reminding him of his expressed commitment to sign the Act into law.<sup>417</sup> Governor Brown subsequently approved the TRUST Act.<sup>418</sup>

## VI. CONCLUSION

This Article has recounted the mobilization of immigrant activists through civil disobedience against the deportation machine of SCOMM and demonstrated that this activism was effective in moving officials in the immigrants' home jurisdictions to defy compliance with the program, leading eventually to the dismantling of the program at the national level. Further, using John Rawls' theory as a compass, an analysis of the circumstances and the alleged injustices surrounding SCOMM establishes that this form of resistance was morally justified. Rawls instructs that civil disobedience is a tool of last resort because it is a deviation from the law. Considering the intractable political climate surrounding legislative immigration reform, alternatives to the political process have become not only wise, but necessary. This might be particularly so for immigrants who are handicapped in their access to regular political channels. Immigrant activists that engaged in these actions expressed “[s]ometimes words are not enough, hearings are not enough, press conferences and speeches are not enough . . . there comes a time when we need to take greater action.”<sup>419</sup> In the case of SCOMM, this greater action, aggregated with litigation efforts and jurisdictions' reluctance to comply, eventually shifted the Obama administration's position.

As Trump's new administration reignites the xenophobia of a segment of the American public, reinstitutes SCOMM, and further ramps up anti-immigrant federal policies,<sup>420</sup> civil disobedience in the immigrant rights' movement becomes increasingly relevant. In these daunting times, the state

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416. *Id.*

417. *Id.*

418. Elise Foley & Roque Planas, *Trust Act Signed In California To Limit Deportation Program*, HUFFINGTON POST (Oct. 5, 2013), [http://www.huffingtonpost.com/2013/10/05/trust-act-signed\\_n\\_4050168.html](http://www.huffingtonpost.com/2013/10/05/trust-act-signed_n_4050168.html) [<https://perma.cc/6Y97-CRMW>].

419. IMMIGRANT YOUTH JUSTICE LEAGUE, *supra* note 345.

420. *See* Border Security, *supra* note 22; Enhancing Public Safety, *supra* note 22; Protecting the Nation, *supra* note 22.

case studies provide solace that local and state authorities can and will recognize and resist unjust federal exercise of power when urged by the forceful protest of even the most marginalized groups. Activists have already taken to the streets and across the nation's airports in support of noncitizens.<sup>421</sup> Mayors have vowed continued protection to their immigrant constituencies.<sup>422</sup> Immigrant activists must integrate effective strategies they used to oppose SCOMM and apply them to solidify support at their home jurisdictions in defense of intrusive nativist federal directives.

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421. See Ellis, *supra* note 31; Doubek, *supra* note 31.

422. See Reston, *supra* note 27; Cherone, *supra* note 27.