



THE MINORITY REPORTS

**How the Intersection of Criminal Justice,
Immigration and Surveillance Undermines
Freedoms in California**



A Report by the Rights Working Group

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and Surveillance Undermines Freedoms in California

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About the Rights Working Group

The Rights Working Group (RWG) is a coalition of more than 300 community-based grassroots groups and policy organizations committed to promoting the civil liberties and human rights of all people in the United States, particularly in the wake of 9/11.



RIGHTS
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Foreword

Law enforcement collaboration across agencies and jurisdictions is nothing new in the Golden State. Local sheriffs have collaborated with the U.S. Coast Guard and the federal Customs and Border Protection (CBP) in San Diego. Joint Terrorism Task Forces have been set up in Sacramento, San Francisco, Los Angeles, and San Diego to facilitate information-sharing and collaboration among the Federal Bureau of Investigations, CBP, the Secret Service, local police departments, and many other law enforcement agencies. Immigration and Customs Enforcement (ICE) has partnered with several local police departments to perform immigration law enforcement functions, including agencies in Orange County, Los Angeles, Riverside, San Bernardino and Escondido.

But it's also worth noting that communities in California have started to raise concerns about the growing collaboration among agencies. In San Francisco, both the police chief and the city council raised concerns about city collaboration with ICE because of deportations stemming from sometimes innocent interactions with police. The recent manhunt for Christopher Dorner, a former LA police officer suspected of killing three people, caused a national stir when a Los Angeles Police Department source indicated that airborne drones were being used in the search. Many postings on social media sites expressed fears that federal law enforcement agencies would seek to assassinate Dorner on U.S. soil.

It is clear that law enforcement agencies are working in new arenas, often using new technologies, and implementing new mandates and responsibilities not only in California but across the United States. While many have claimed that increasing collaboration and information-sharing among law enforcement agencies will better protect our communities, the reality is that the growing connections have also raised serious concerns about privacy rights, due process protections, and the rapidly expanding criminalization of communities of color.

In order to get a more comprehensive picture of how these intersections among various law enforcement agencies are playing out in one of the most racially and ethnically diverse states in the country, Rights Working Group asked Cynthia Buiza to research these questions and author this report. Cynthia interviewed seventeen organizations based in California that work in the arenas of criminal justice, immigration enforcement, civil liberties, and privacy. She also spoke with police departments in the state. Her findings are noteworthy, pulling from a wide and diverse range of sources, and her proposals for how to use this information moving forward deserve great attention from organizers and advocates across the state and beyond.

We hope that you will not only take the time to read this report but that you will also share it with colleagues and allies across California. None of this information is easily obtained, easily explained, easily translated, or easily disseminated. But we need to have this conversation with a much larger audience, including engaging our elected officials and law enforcement leaders. We all share a common goal: to promote community safety and engage our communities in decisions that affect their security. It is critical that we begin the discussion with an accurate understanding of what's happening, what's at stake, and how we are all affected by current law enforcement activities. We look forward to continuing the conversation with you in the months to come.



Margaret Huang
Executive Director
Rights Working Group

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Council on American Islamic Relations- Los Angeles
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Executive Summary

Increased cooperation and collaboration between federal institutions and local law enforcement agencies in California has created a major shift in the way public safety policies are developed and implemented in the state. The notion of *interoperability*, or the ability of systems and entities to work and operate with each other, became more pronounced after the attacks of September 11, 2001. It has also changed the way we view law enforcement in our communities.

In the name of “cooperation,” California has seen increased sharing of resources, data and personnel that negatively affects communities of color, immigrants, and people interacting with the criminal justice system. For example, the rapid expansion of immigration enforcement in the criminal justice system in the state has resulted in widespread bias against immigrants, and has created a two-tiered system of justice in which noncitizens are routinely denied bail, jailed for longer periods, and disqualified from alternative release programs.

The quest for interoperability began as early as the 1980s, when the country engaged in a “war on drugs” and continued on as the “war on terror” commenced. This report examines the impact of interoperability in California, as it became the fulcrum on which the intersection of criminal justice, immigration and surveillance in the state, balances. It highlights the concerns and increasing problems that diverse communities are experiencing as a consequence of the interaction of these systems and the absence of transparency and of clear mechanisms to hold elements in the system accountable. It examines the view of information sharing as a panacea, the real dangers it poses to community safety and cohesion, and the impact on the human rights and civil liberties of people who are affected by them. It also emphasizes the absence of coherent and strategic institutional response to the problem engendered by the intersection. Finally, the report offers recommendations that includes but is not limited to the following:

- The ultimate consumers of this report should not only think about the issue in terms of integration as the problem itself but also the smaller pieces in which the problem can be addressed.
- Identify a pool of expert practitioners who can develop further specialization on the intersection of criminal justice, immigration and national security.
- Explore inter-agency collaboration and examine more creatively and proactively the possibility of legislation which addresses the bigger problems generated by SCOMM, SAR, JTTFs, etc.
- Identify and work with a champion on the issue, including elected officials who will support reforms and accountability mechanisms.
- Develop an advocacy toolkit that focuses on the intersection issue.

As the post 9/11 security endgame enters our neighborhoods, our *immigrant* neighborhoods, our skies, our homes, our cars, our phones and our lives, it is crucial to figure out creative, realistic and well-resourced strategies to protect our fundamental freedoms. This report hopes to contribute to a better understanding of how we could begin to respond to the impact of the intersection on our communities, and a strong and powerful narrative in which to talk about it.

I. Introduction

In the 2002 film, *Minority Report*, based on a short story by Philip K. Dick, an elaborate system of pre-emptive law enforcement is in place, in which suspects are identified and arrested before they commit crimes. The film questioned the extent to which the future is predictable and turned upside down the premise of the American criminal justice system in which people are tried and punished only for wrongful acts they have committed, not for their potential to commit criminal acts. The allusion to that movie is mentioned in this report to challenge its main conceit: the idea that law enforcement could perfect itself, and that with the cunning of man and machine, lead us to a utopian destination of a crime-free society. Except the movie does not end that way. The technology employed to lead that society to this perfect place turned out be quite fallible, and ended up hurting the very people it sought to protect.

Increased entanglements between federal institutions and local law enforcement agencies have changed traditional notions of public safety and the role of policing in the United States. While it has its origins in the so-called “drug war” that began in the 1980s, the events following 9/11 saw an effort to establish interoperability¹ and increase sharing of resources, communications tools, and strategies to combat illegal immigration, crime and domestic terrorism. Interoperability became the guiding philosophy of the Department of Homeland Security. “For example, currently the FBI, DHS, and Department of Defense’s biometrics databases are interoperable, which means the systems can easily share and exchange data. This has allowed information sharing between FBI and DHS under the Immigration and Custom Enforcement’s (ICE) Secure Communities program.”²

As a result, many local law enforcement agencies began a shift in their culture and function, as immigration enforcement expanded into the criminal justice system, as the “criminalization of immigration law” came to the fore, and as local police began to undertake immigration related functions normally performed by Immigration and Customs Enforcement (ICE).

The pursuit of 287 (g) agreements, Arizona’s SB 1070 and copycat laws in other states, as well as the use of networked databases such as Secure Communities, have emboldened many local police departments to engage in activities outside their scope. This has had a dramatic impact on many communities’ trust in local police, and this includes communities in the state of California.

The integration of information systems and collaboration among law enforcement agencies has led to the gradual but steady shift in the practice of state and local law enforcement from a crimes-based to so-called intelligence-led policing. The post 9-11 push towards preemptive intelligence gathering, the narrative that preventing terrorism is a local issue, is a major development in law enforcement culture and practice. In addition, FBI surveillance and interrogation in Muslim communities and the various blacklist programs (the No Fly List, CARRP, TSDB) affect individual community members in various contexts from immigration benefits denials to re-entry programs. The expansion of federal military detention authority as well as LAPD’s (Los Angeles Police Department) suspicious activity reporting at the local level threaten to erode many of our constitutionally protected rights.

All of these arise from policies and programs at the intersection of different agencies. Furthermore, the increased reliance on purely data-driven outcomes, and the use of technology in the current political climate, has led to the increased criminalization of social issues, allowing the merger of these agencies where they used to be separate.

¹ The ability of systems, units, or forces to provide services to and accept services from other systems, units, or forces and to use the services so exchanged to enable them to operate effectively together. (Dictionary of Military and Associated Terms).

² See Jennifer Lynch: From Fingerprints to DNA: Biometric Data Collection in U.S. Immigrant Communities and Beyond. Electronic Frontier Foundation, p. 8.

Certainly, collaboration, in itself, is not the problem. The indictment of many notorious human trafficking and white slavery cartels would not have been possible without robust cooperation between the FBI and local police. The problem is *the pursuit of these partnerships without transparency, accountability and strict guidelines to define the purpose for which the collaboration may be used.* If too many of these collaborations create negative outcomes in the communities where they take place, what does that do to our notion of public safety?

Virtually all of the issues mentioned in this report involve interaction between different agencies – including state criminal justice systems and the federal immigration detention and deportation system, or the DHS detention bureaucracy and the private prison system.

This report highlights the concerns and increasing problems that diverse communities are experiencing in relation to the interaction of these systems, the absence of transparency and clear mechanisms to hold the system accountable, and its impact on the human rights and civil liberties of people who are affected by it.

II. The Lay of the Land: Homeland Security vs. Hometown Security

The challenges we now face in relation to the intersection of criminal justice, immigration, and national security policies began before 9/11. Anyone who has followed the war on drugs in the 1980s can appreciate the structural foundations of a system that is now a powerful dragnet disproportionately impacting communities of color. Scholars and crime watchers credit the vast legislative framework that is the platform for the increased entanglement of police departments with military or federal enforcement functions.

The State Criminal Justice System as a Catchall Institution

Beginning with the Military Cooperation with Law Enforcement Act in 1981, which allowed and encouraged the military to give local, state, and federal police access to military bases, research, and equipment,³ and the National Defense Authorization Act which give the President broad powers to detain terrorism suspects, to initiatives such as the Law Enforcement Support Program which transfers excess DOD equipment to local law enforcement to assist in drug enforcement and counterterrorism efforts – all these policies have combined to create a powerful conflation of the “war on drugs” and the “war on terror” with an eye trained on the communities where we live.

California is a great laboratory for this intersection and it houses one of the nation’s highest numbers of incarcerated populations. At the end of 2010, California’s state prison population was at 165,062 inmates,⁴ while its penal institutions operated 200% above their design capacity. In a 2011 case, *Brown v. Plata*, the U.S. Supreme Court ruled that California’s prisons were so overcrowded that they violated the Eighth Amendment to the Constitution, which prohibits cruel and unusual punishment, and mandated that the state reduce its prison population to 137.5% of capacity.⁵ While significant to the corrections branch of criminal justice, this decision does not affect the law enforcement part of criminal justice in California. Suspected criminals continue to be investigated, arrested, and sentenced, often by federal/local law enforcement partnerships.

State agencies involved in criminal justice are the California Department of Corrections and the California Department of Justice. These bodies oversee the prosecution and incarceration of offenders. At the local level, the agencies involved in criminal justice are police, sheriffs’, and probation departments. The California Highway Patrol has patrol jurisdiction over all California highways and also functions as state police.

³ See: Radley Balko: http://www.huffingtonpost.com/2011/09/12/police-militarization-9-11-september-11_n_955508.html. Accessed on November 19, 2012.

⁴ See, Bureau of Justice Statistics, Prisoners in 2010 (December 2011), Appendix Table 1, p. 14, available at <http://bjs.gov/content/pub/pdf/p10.pdf>.

⁵ Rachel Myers, *Supreme Court Orders California to Reduce its Prison Population to Alleviate Overcrowding*, ACLU Lens (May 23, 2011), available at <http://www.aclu.org/blog/prisoners-rights/aclu-lens-supreme-court-orders-california-reduce-its-prison-population>.

Sharing Data

Data sharing is one of the most significant and critical ways in which federal and local law enforcement support each other. Federal and local agencies share data through a national information-sharing infrastructure called the Information Sharing Environment (ISE). Intelligence from local and federal agencies is gathered in Fusion Centers (overseen by DHS), and then exchanged in the ISE.⁶ The ISE is part of a trend towards intelligence-led policing, which encourages local law enforcement to contribute and access intelligence information.⁷ Launched in 2003, there are now 72 fusion centers in the U.S. and its territories.⁸ The Fusion Centers provide information to FBI (Federal Bureau of Investigation)-led Joint Terrorism Task Forces (JTTFs), inter-agency policing teams that include agents from ICE, Transportation Security Administration (TSA), Customs and Border Protection (CBP), the Secret Service, and local law enforcement.⁹ In total, over 600 state and local agencies, and more than 50 federal agencies, participate in JTTFs.¹⁰

In California, these task forces are currently operating in Sacramento, San Francisco, Los Angeles, and San Diego, and they exist in 106 cities nationwide (there is at least one JTTF at each field office).¹¹ The FBI also oversees the Combined DNA Indexing System (CODIS), which contains over 11 million offender and forensic DNA profiles.¹² Once entered into the system, DNA can be accessed by law enforcement at any level, at any time, without consent or a warrant.¹³ The Next Generation Identification (NGI) will include fingerprints, palm prints, iris scans, voice data, and face-recognition ready photos accessible to all levels of law enforcement¹⁴.

Sharing Personnel

The FBI JTTFs have been in existence since 1980, but rapidly increased in number after 9/11. As part of these JTTFs, local law enforcement lends personnel to the FBI to conduct investigations based on information gathered in Fusion Centers.¹⁵ The teams conduct surveillance, gather evidence, and make arrests.¹⁶ The FBI also leads numerous other inter-agency task forces. The Computer and Technology Crime High-Tech Response Team (CATCH) is a cooperative law enforcement effort formed to apprehend and prosecute those who use the Internet to commit crimes.¹⁷ In San Diego, CATCH includes investigators and prosecutors from 16 agencies.¹⁸ The Violent Gangs Safe Streets Task Forces (19 in California) investigate and attempt to dismantle violent gangs and emerging criminal enterprises that operate on a wide scale.¹⁹

ICE also spearheads a number of criminal justice collaborations. One of these is the program, Operation Community Shield (since 2005), which combats the growth of transnational criminal street gangs, prison gangs and outlaw motorcycle gangs throughout the United States.²⁰ The inter-agency teams gather intelligence on gangs, trace assets suspected to be derived from criminal enterprise, and seek prosecution and/or removal of gang members. State, local, tribal and foreign law enforcement partners help ICE agents locate, investigate, prosecute, and remove gang members through incarceration and/or deportation.²¹

6 See, Cincotta, *supra* note 1.

7 *Id.*

8 *Id.*

9 FBI Joint Terrorism Task Forces, http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jtffs.

10 *Id.*

11 *Id.*

12 CODIS-NDIS Statistics, <http://www.fbi.gov/about-us/lab/codis/ndis-statistics>.

13 Jennifer Lynch, *From Fingerprints to DNA*, Immigration Policy Center (May 2012), available at <https://www.eff.org/sites/default/files/filenode/BiometricsImmigration052112.pdf>.

14 *Id.*

15 *Id.*

16 See, Cincotta, *supra* note 1.

17 FBI San Diego Division Partnerships, <http://www.fbi.gov/sandiego/about-us/our-partnerships/partners>.

18 *Id.*

19 FBI Violent Gang Task Forces, http://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs/violent-gangs-task-forces.

20 ICE Operation Community Shield, <http://www.ice.gov/community-shield/>

21 *Id.*

Watching Me, Watching You, Watching Them: Surveillance in the Golden State

Because of the secretive nature of surveillance, it is difficult to compose an accurate picture of exactly how it takes place at the local level, but data sharing allows multiple agencies to collaborate and share surveillance data.

The main federal agencies involved in surveillance are the Department of Justice (FBI and Bureau of Justice Assistance), the Department of Homeland Security (Border Patrol), the National Security Agency, the Central Intelligence Agency, and the Department of Defense. Local partners in surveillance are police, private security employees including campus police, the private sector, community groups and individual citizens.

Sharing Data

As in the criminal justice system, agencies involved in surveillance use the Information Sharing Environment. Suspicious Activity Reporting (SAR) is a collaborative effort led by the DOJ's Bureau of Justice Assistance in partnership with the DHS and the FBI. Local and federal agents are encouraged to watch for "suspicious activity" and file a report in the local Fusion Center, which then sends the report to the ISE.³¹ Ordinary civilians are also encouraged to submit these reports, adding to the already dense amount of data that flood the system. The SAR Initiative "established national standards to assess suspicious activity, introduced a uniform and synchronized system for sharing and searching SAR-based data (ISE), and instituted new measures to increase the production and sharing of SAR Reports by more policing agencies" (state, local, and tribal law enforcement and the FBI, NSA, DOD, CIA, and Border Patrol).³²

In California, nearly every police department has a gang enforcement unit. The California Department of Justice maintains a database called CalGang, which tracks 200 data points of personal and gang-related information. In 2003 alone, 47 percent of African American men in Los Angeles County between the age of 21 and 24 had been logged into the Los Angeles County gang database and law enforcement personnel had entered more than a quarter million Californians into CalGang across the state.²²

Although the FBI and ICE are the main federal participants in criminal justice work, several other federal agencies lead joint task forces. Since 2000, the U.S. Marshals Service has led the Fugitive Task Force (FTF). The primary mission of the FTF is to locate and apprehend wanted felony fugitives with active warrants (issued by county Superior Courts).²³ The California FTF operates statewide, with the state broken down into four districts.²⁴ Another example of criminal justice collaboration is DEA task forces (15 in California), in which state and local officers are deputized as federal drug enforcement agents.^{25, 26}

Sharing Resources

Aside from sharing data and people, federal and local agencies share other resources, including physical space and funding. As a response to the new population of post-release offenders to be supervised locally under realignment (AB 109), many California cities are stationing specially designated probation officers within police departments.²⁷ Another example of sharing space in the criminal justice context is the Federal Law Enforcement Training Center, used by 90 federal agencies, international, state, tribal, and local law enforcement agencies.²⁸ Examples of sharing funding are law enforcement grants from the DOJ²⁹ and the DEA task forces in which the DEA funds local enforcement of federal drug law.³⁰

22 See Gang Wars, Justice Policy Institute, July 2007 and Siegel, Loren. 2003. Gangs and the Law. In *Gangs and Society: Alternative perspectives*, ed. Louis Kontos, David Brotherton, and Luis Barrios. New York: Columbia University Press.

23 San Diego Sheriff's Department- Special Investigations-Fugitive Task Force, http://www.sdsheriff.net/lesb_sid.html#ftf.

24 Local Fugitive Task Forces, <http://www.usmarshals.gov/investigations/taskfrcs/taskforces.htm>.

25 DEA Task Forces, <http://www.justice.gov/dea/programs/taskforces.htm>.

26 DEA Task Force Map, http://www.justice.gov/dea/programs/taskforces_map.html.

27 See, County Plans at www.calrealignment.org.

28 Federal Law Enforcement Training Center, <http://www.fletc.gov/>.

29 <http://www.justice.gov/business/>.

30 Task Forces Today, <http://www.justice.gov/dea/programs/taskforces.htm>.

31 See, Cincotta, *supra* note 1.

32 See, Cincotta, *supra* note 1, at 32.

Concerns

Surveillance is one of the major contributors to the preponderance of information contained in the databases shared by federal agencies and local enforcement. Police and businesses are encouraged to watch for “suspicious activity” and enter the information into the ISE and InfraGard. Information regarding the activities of millions of innocent Americans makes these databases unwieldy and creates too much “white noise” to be effective. Even more troubling is the continuing erosion people’s privacy in the name of security.

Dragnet surveillance, like obtaining records for an entire cell tower, broad National Security Letters, and license plate tracking mean that a vast amount of information is being compiled on U.S. citizens. Furthermore, the lack of oversight allows the government to overstep its legal bounds and conduct illegal surveillance without much risk of anyone finding out. The incidences of illegal surveillance that we know about – such as the NSA’s monitoring of emails in San Francisco with the help of AT&T – are likely just the tip of the iceberg.³³

Perhaps the most terrifying effect of surveillance is the racial, religious, and political profiling inherent in suspicious activity reporting, intelligence-led policing, and an all-encompassing counterterrorism framework. Since 9/11, the FBI and other federal agencies have conducted intense and intrusive surveillance of Muslim communities, Arab Americans, South Asians, and Middle Eastern people, and FBI agents are permitted to enter mosques and churches without identifying themselves.³⁴ Although Suspicious Activity Reports are supposed to be based on behavior and not skin color, the guidelines are extremely vague and invite subjective usage easily influenced by individual bias.

Standards issued to state and local police include the following as suspicious activities: taking pictures or videos of facilities or infrastructure; taking notes or drawing maps or structures of a facility; and monitoring the activities of people, facilities, processes or systems.³⁵ These behaviors are completely legal and clearly widespread: many people and tourists are likely to take pictures, videos, and other renderings of government buildings and other elements of infrastructure for aesthetic or other innocent reasons. Because police could not possibly question or report every individual taking part in these activities, they are likely to fall back on racial bias in choosing whom to target. The vague standards regarding suspicious behavior also permit police and federal agents to target political dissidents and people engaging in free speech and assembly.³⁶

Giving With One Hand, Taking with the Other: Misguided Immigration Enforcement Policies and California’s Immigrant Communities

Overview

California is home to approximately 2.8 million unauthorized residents.³⁷ They are a vital part of the state’s formal and informal economies, and they are integral to the vitality of California. In the general public, stereotypes about immigrants, especially Hispanic immigrants, are rampant. Two significant myths are that immigrants have a negative impact on the American economy and that immigrants bring crime to American neighborhoods, but research shows that both of these myths are factually untrue.³⁸ It appears that, with the great deal of effort and resources being spent on catching and deporting undocumented immigrants, federal law enforcement agencies either agree with those stereotypes or do not care to combat them publicly.

³⁵ See, Cincotta, *supra* note 1, at 48.

³⁶ See, Cincotta, *supra* note 1.

³⁷ Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011 (March 2012)*, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

³⁸ ACLU, *Immigration Myths and Facts* (April 11, 2008), available at <http://www.aclu.org/immigrants-rights/immigration-myths-and-facts>.

³³ NSA Spying, <https://www.eff.org/issues/nsa-spying>.

³⁴ See, Cincotta, *supra* note 1, at 45.

Agencies Involved

The Federal agencies that participate in immigration regulation are the Department of Homeland Security (ICE, CBP, and Border Patrol) and the Department of Justice (FBI and the U.S. Attorney's Office). State agencies include the California Department of Justice and the California Department of Corrections (dealing with criminal aliens). Local participants are police and sheriffs' departments.

Sharing Data

Secure Communities is a program in which fingerprints of arrestees are sent from local law enforcement to the FBI (IAFIS database) and then to ICE (IDENT database).³⁹ If the fingerprint matches against IDENT as someone who is removable, ICE may take action to detain and then deport the individual.⁴⁰ In addition, ICE's Law Enforcement Support Center provides customs information and immigration status and identity information and real-time assistance to local, state and federal law enforcement agencies on aliens suspected, arrested or convicted of criminal activity.⁴¹ Law enforcement officers also have immediate access to alien records entered with the National Crime Information Center and immigration information from every alien file maintained by DHS.⁴²

Sharing Personnel

ICE has an umbrella program called ICE ACCESS (Agreements in Cooperation in Communities to Enhance Safety and Security). Under the ACCESS umbrella are several key collaborations relevant to immigration. The first is the 287(g) Immigration Cross-Designation. Since 1996, 287(g) has permitted designated local law enforcement officers (trained by ICE) to perform immigration law enforcement functions.⁴³

In California, the Cross-Designation program currently operates in Orange County, Los Angeles, Riverside, and San Bernardino.⁴⁴ Another significant ACCESS operation is the Criminal Alien Program (CAP). In CAP, Enforcement and Removal Operations (ERO) officers and agents assigned to all federal, state and local prisons and over 300 jails throughout the country screen inmates and place *detainers* on criminal "aliens" to process them for removal before they are released to the general public.⁴⁵ CAP also involves the aggressive prosecution of criminal offenders identified by ERO officers, in conjunction with the U.S. Attorney's Office⁴⁶.

One component of CAP is the Joint Criminal Alien Removal Task Force (JCART), which identifies, investigates and arrests at-large criminal "aliens."⁴⁷ JCART partners with probation and parole offices, the U.S. Marshals Service, U.S. Customs and Border Protection, the Bureau of Prisons, and local law enforcement agencies.⁴⁸ Another component of CAP is the Rapid Removal of Eligible Parolees Accepted for Transfer (REPAT) program, a joint partnership with state correctional/parole agencies to deport removable parolees.⁴⁹

One other ICE collaboration with local law enforcement is Operation Joint Effort. Currently only in the pilot city of Escondido, California (since 2010), but expected to expand, Operation Joint Effort places ICE agents inside local police departments.⁵⁰ At DUI checkpoints targeting undocumented drivers, ICE agents are called and come immediately to take such undocumented drivers into custody and initiate deportation proceedings.⁵¹

39 Secure Communities, http://www.ice.gov/secure_communities/.

40 *Id.*

41 Law Enforcement Support Center, <http://www.ice.gov/lesc/>.

42 National Crime Information Center, <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm>.

43 ICE Immigration Cross-Designation, <http://www.ice.gov/news/library/factsheets/287g.htm>.

44 *Id.*

45 *See*, Jails and Prisons, <http://www.ice.gov/criminal-alien-program/>.

46 *See*, Violent Criminal Alien Section, *supra* note 104.

47 *See*, Joint Criminal Alien Removal Taskforces, *supra* note 104.

48 *Id.*

49 *See*, Rapid Removal of Eligible Parolees Accepted for Transfer, *supra* note 104.

50 Sarah Gates, *California DUI Checkpoint Program Targets Undocumented Immigrants*, Huffington Post (March 12, 2012), available at http://www.huffingtonpost.com/2012/03/12/california-dui-immigration-checkpoint_n_1339772.html.

51 *Id.*

Operation Joint Effort and CAP are two examples of agencies sharing physical space, with a police department or in a correctional facility. The State Criminal Alien Assistance Program (SCAAP), run by the Bureau of Justice Assistance in conjunction with ICE and DHS, provides federal payments to states and localities that incurred correctional officer salary costs for incarcerating undocumented criminal aliens with at least one felony or two misdemeanor convictions for violations of state or local law, and incarcerated for at least four consecutive days.⁵²

Concerns

Law enforcement's myriad programs aimed at catching and deporting undocumented immigrants have a number of significant unfortunate consequences.

A 2009 report by the Government Accountability Office (GAO) concluded that ICE's failure to clearly document its objectives and to oversee local implementation of 287(g) agreements, has resulted in local police using their authority to detain and deport immigrants for traffic violations and minor crimes.⁵³ Similarly, the CAP program identifies a broad range of immigrants. The information about victims of and witnesses to crimes who are noncitizens or who are suspected of being noncitizens is shared with ICE along with the information about the arrestees.

In 2009, DHS reported that 57% of immigrants identified through CAP had no criminal convictions, and 58% of the CAP detainees placed on offenders were for misdemeanor charges.⁵⁴ In addition, legal permanent residents and visa holders may be deportable if they commit even minor crimes, and non-citizens can be deported retroactively for past convictions.⁵⁵ Operation Joint Effort is another dragnet that clearly targets Latino immigrants for potential deportation.

III. The Criminal Justice, Immigration, National Security and Surveillance Matrix in California: The Impact on Fundamental Freedoms

This section outlines the underlying and emerging issues that various advocates in California and some members of the law enforcement community are experiencing in their work, in their respective regions, in relation to the intersection of criminal justice, immigration and national security issues mentioned in the previous section. It talks about the various ways in which different law enforcement agencies are "collaborating, cooperating with and co-opting each other," and the impact on civil rights and fundamental freedoms.

The Crimmigration- Surveillance Web in California: A Crisis Waiting to Explode?

In traditional policing, local problems were solved with local police. Because of the robust integration of these systems, the system of accountability is so vague, and figuring out who is accountable, so confusing. You get passed on from one entity to another.

-Council on American Islamic Relations, Los Angeles

Today, the lines between criminal law and immigration law have become so blurred as to be indistinguishable. Many scholars, criminal justice and immigrant rights advocates, and even the media have begun sounding the alarm bells on this merger but little has been done about it either in a theoretical and practical sense. A civil rights organization in San Francisco notes that there are 8,000 indigent Californians per one civil legal attorney and the number of lawyers trained to look at the complexities of the criminal justice, immigration and privacy system is very limited.⁵⁶

⁵² State Criminal Assistance Program, https://www.bja.gov/ProgramDetails.aspx?Program_ID=86.

⁵³ Government Accountability Office, *Immigration Enforcement, Better Controls Needed Over Program Authorizing State and Local Enforcement of Federal Immigration Laws* (January 2009), available at <http://www.gao.gov/new.items/d09109.pdf>.

⁵⁴ See, Immigration Policy center, *supra* note 108.

⁵⁵ *Id.*

⁵⁶ Interview with Asian Law Caucus, September 2012.

In the name of “cooperation,” California is seeing an increased – and often informal – sharing of resources that affects communities of color, immigrants and criminal defendants negatively. For example, the San Diego County Sheriff’s Department recently revealed that Immigration and Customs Enforcement (ICE) agents had been physically located in his substations without his knowledge. In Santa Cruz County, there is ongoing conversation with the Sheriff and new detainer policies. There is also a pronounced increase in communication between ICE and local Sheriff’s as well as probation offices and juvenile detention centers.

In the city of Escondido in San Diego County, cooperation between ICE and the Escondido Police Department is formalized and being promoted by ICE as a national model, yet the arrangement and its impacts are largely protected from public scrutiny. In Santa Clara County, ICE is present in courtrooms. It is now increasingly common for people who enter the criminal justice system to wind up handed over to immigration and vice-versa, – regardless of whether they were convicted, victims, or defendants found not guilty.

In her comprehensive study on the subject of “crimmigration,” Juliet Stumpf notes, “the 1980s saw the beginning of a dramatic increase in criminal consequences of immigration law violations and deportations of even legal immigrants convicted of crimes. As Congress swept more immigration-related conduct into the criminal realm, the executive branch stepped up criminal enforcement of immigration violations.⁵⁷ By 2005, immigration-related matters represented the single largest group of federal prosecutions, outstripping drug and weapon prosecutions.⁵⁸” At the same time, the grounds for deportation based on state and federal convictions vastly expanded.

The rapid expansion of immigration enforcement in the criminal justice system in California, coupled with rampant confusion and misunderstanding amongst criminal justice stakeholders about their legal obligations regarding immigration enforcement has resulted in widespread bias against immigrants in the state’s criminal justice system. In particular, it has resulted in a two-tiered system of justice, in which noncitizens are routinely denied bail, jailed for longer periods, and disqualified from alternative release programs.⁵⁹

Even scholars of criminal and immigration law have tended to stay within the confines of their professions, instead of examining the growing intersections of immigration and criminal law and their long-term consequences.⁶⁰ If there is increased attention to this issue now, it has not translated into a coherent and strategic institutional response. At the same time there are not enough resources to support public defenders to effectively represent their noncitizen clients and advocate against immigration enforcement. Immigration enforcement targeting immigrant households, so-called electronic raids, and the detention of immigrants have increased exponentially, due largely to an increase in collaboration between local law enforcement and ICE officials.

While the number of immigrants ordered deported through California’s immigration courts have gone down compared to the national average (nearly half of all cases), the determination of ICE to arrest undocumented individuals have not abated.⁶¹

57 In Juliet Stumpf’s “The Crimmigration Crisis: Teresa Miller, Citizenship & Severity: Recent Immigration Reforms and the New Penology,” 17 *GEO. IMMIGR. L.J.* 611, 613 (2003) [hereinafter *Citizenship & Severity*]; see, e.g., Immigration Reform and Control Act of 1986 (“IRCA”), Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360 (1986) (codified as amended in scattered sections of 8 U.S.C.) (declaring the act of employing unauthorized aliens illegal).

58 See TRAC REPORTS, TRAC/DHS, IMMIGRATION ENFORCEMENT, NEW FINDINGS (2005), <http://trac.syr.edu/tracins/latest/current> (establishing that immigration matters represent about one third (thirty-two percent) of the total number of federal prosecutions and comparing the total to drug and weapons prosecutions).

59 Angie Junck, Supervising Attorney, Immigrant Legal Resource Center, SORT-Survey, 2012.

60 The Crimmigration Crisis, Immigrants, Crime and Sovereign Power. Juliet Stumpf. *American University Law Review*, Volume 56:2, p. 377.

61 California Watch, California Deportations Down Despite More ICE Arrests, Electronic access, October 15, 2012. http://www.huffingtonpost.com/2011/10/26/california-deportations-_n_1032840.html

Case Sample 1 from San Jose, Northern California:

“Santa Clara County is home to more than 655,000 immigrants, comprising more than a third of the county’s population. The issues affecting the community most profoundly are around community trust in law enforcement and an increase in immigration enforcement activities. The increased entanglement between the criminal law system and the immigration enforcement system undermines trust and confidence in law enforcement. This was very clear when earlier this year the San Jose police chief decided to bring in two ICE officers to help with investigations on gang-related crimes. Immediately after this announcement the community denounced the collaboration and called the police chief to end the partnership. Soon after the police chief announced that the two ICE officers were no longer part of his team but the community continues to be reluctant to contact the police to report crimes. The increasing intersection between local law enforcement and ICE is creating confusion on the ground and the community cannot help but see local police as an arm of ICE. The roles are so intertwined that the community does not feel comfortable contacting law enforcement.

“The other issue that is affecting us is the increased presence of ICE in our county, especially in the courtrooms. We heard from community members and county officials that ICE is now going inside courtrooms to detain people whom they have immigration holds. This new development is in part because last year, the Board of Supervisors passed the most liberal anti-immigration enforcement policy in existence today. The policy says that the county will not honor any ICE detainer request until they are fully reimbursed for the costs associated with the detainer. Even if they receive reimbursement, they will still exercise their discretion to comply with detainers that meet the proposed and original mandate of Secure Communities. It also an exemption for all juveniles and bars ICE from coming into County facilities and from having local officials use local resources to communicate with ICE.”

“Although this was a great victory for the community, ICE has changed its tactics in that they are now going after people inside the courtrooms. This development has sowed fear in the community and now many people do not show up for their court hearings for fear of being detained by ICE officials who do not always identify themselves as such.”

Case Sample 2, Orange County, Southern California

“In Orange County, the presence of ICE officers in city jails has resulted in an increase in custodial arrests of otherwise cite-and-release offenses (i.e. jaywalking, riding a bicycle against traffic or with no bicycle license). There are 287 (g) programs in Los Angeles, Orange, Riverside, and San Bernardino County jails. Orange, Riverside, and San Bernardino counties conduct immigration interviews at booking. The Orange County Jail (Theo Lacy) is a detention facility for immigration detainees and there are concerns about how civil detainees are being treated/housed in that location. There are incidents of juvenile referral to ICE without parental notification – especially in the Inland Empire. Local police contact individuals for minor crimes/infractions and directly refer them to ICE.”

In South Orange County a woman was going through trash bins for recycling and a local police officer made contact with her for an alleged violation of a city ordinance that prohibited such activity. The woman did not speak English, and the officer did not speak Spanish. After contacting a pedestrian to assist in translation, the police officer asked her, “Where are your papers?” The woman admitted that she was undocumented, and the police officer called ICE to pick her up, which they did. The woman was not arrested or processed for a violation of any state or local law. She was taken to the San Clemente station where we learned that she was held overnight (it is not an overnight facility – no beds, etc.) and deported shortly thereafter.

Case Sample 3, City of Escondido, North County, San Diego, California

In May, 2010, Immigration and Customs Enforcement (ICE) and the Escondido Police Department (EPD) introduced a new program aimed at detaining and deporting undocumented immigrants. Operation Joint Effort, as the two agencies calls the program, allows for ICE agents to hold residence at the Escondido Police Department. There are currently 11 ICE agents, according to Escondido police chief Jim Maher, based at the EPD, tasked with searching out undocumented persons with criminal convictions and those with previous removal orders. The program, which began in May of 2010, was apparently made permanent in 2011 and was responsible for the arrest of 731 individuals since the program’s inception.

An ICE spokesperson said, “If it’s deemed a success, ICE may approach other local police departments.” ICE it seems, intends this misguided program to be a national pilot program.

The ACLU of San Diego and Imperial Counties conducted a series of meetings with at least four police chiefs in San Diego County and the Sheriff of Imperial County. All these law enforcement executives stated that these partnerships are not a good use of their resources and that because of the diversity of their immigrant populations, it is in their interest to encourage community trust by not allowing their offices to be used for immigration enforcement purposes.

National Security/Surveillance

In Los Angeles County, the use of law enforcement surveillance on constitutionally protected activities, harassment of community members by law enforcement, and the false premise that interaction with the American Muslim community with law enforcement can only be through a counter-terrorism narrative has created widespread fear, anxiety and suspicion. This is manifest in the way that law enforcement agencies use a community members’ immigration status against them when asking them to become an informant, say for example, the FBI.

Case Sample, San Jose, California

A 25-year-old resident of San Jose, California, claimed that he found a GPS tracking device on his Volvo SUV while visiting his mother in Modesto, about 80 miles northeast of San Jose. After contacting *Wired Magazine* and allowing a photographer to snap pictures of the device, it was swapped out and replaced with a second tracking device. Little is known about how or how often law enforcement agents use these devices. Without a clear ruling requiring agents to obtain a “probable cause” warrant to use the tracking devices, it leaves citizens with only a distant connection to a crime or no connection at all, vulnerable to the whimsy of agents who are fishing for a case.⁶²

Case Sample, Anaheim, Southern California

In a case of mistaken identity, a Southern California resident was visited by FBI agents in 2005 and was held at gunpoint. He was released after questioning and after they verified his identity. From this moment on, he faced constant surveillance and stops and frisks at airports, especially after he tried to visit Pakistan in 2008. A year later, DHS agents visited his home in various unmarked vehicles looking for a person they thought was him. He was detained one more time only to be released upon verifying that his name was spelled differently from the man they were looking for. He received another “home visit” in June 2011, where an agent pointed a gun at his wife and demanded she open the door. His wife did not comply, but when he arrived home, 10-15 agents surrounded his house and 5-6 unmarked vehicles were parked in his driveway.⁶³

Specific Problem Areas of the Intersection

The examples and cases noted above points to the steady pace in which this intersection is creating short and long term implications for our fundamental freedoms and expose the limitations of the law to keep up with the problems the overlaps have created. The 17 statewide and national organizations that responded to the Rights Working Group survey and request for one-on-one interviews unanimously expressed heightened concern over the following specific problem areas that the intersection has created:

The racial and ethnic implications of the intersection: Impact on communities of color

A report by the W. Haywood Burns Institute and the ACLU of Northern California called the state’s criminal justice system a “catchall institution.” California’s criminal justice system continues to grow and expand, and this growth correlates with the mass incarceration of racial and ethnic minorities for the past 30 years.⁶⁴ James Bell of the Burns Institute decried the increased criminalization of otherwise age-appropriate behavior when normal type of defiance by young people has become illegal, especially for youth in neighborhoods of concentrated poverty.

62 “Busted! Two New Fed GPS Trackers Found on SUV,” *Wired Magazine*, Electronic access. <http://www.wired.com/threatlevel/2011/11/gps-tracker-times-two/>. Accessed on October 15, 2012,

63 Shared case file from Southern California civil rights organization.
64 See: *Balancing the Scales of Justice*, J. Hayward Burns Institute and ACLU of Northern California.

According to Bell, the primary form of social control in these neighborhoods is incarceration instead of strengthening the support systems in their families and communities. His organization is seeing an increase in many Latino and Asian immigrant youth entering the criminal justice system and staying longer, or ending up in deportation proceedings.⁶⁵ The Children’s Defense Fund-California states that there were over 700,000 suspensions given to children attending public schools in California in the 2010-2011 school year. Additionally, the U.S. Department of Education, Office of Civil Rights reports that African-American children in California receive out of school suspensions at a rate of 171 per 1000 students—over two times the average rate for the state (75 per 1000 students).⁶⁶

In places like Alameda, Fresno and Los Angeles county, racial and ethnic disparities in access to education, employment and housing affect the interaction people will have with the criminal justice system.⁶⁷

In the study mentioned above, some of the findings exposed the impact of policing in schools. “Of the people interviewed, those who attended school where police officers regularly patrolled campus had a greater likelihood of being arrested at a young age, expelled, and suspended. In Alameda County, people on probation were less likely to have graduated high school, compared to the county average.”⁶⁸

LEA-Federal agencies collaboration on immigration enforcement issues has created a huge trust deficit in diverse communities in California.

Advocates decry the fact that these collaborations are a problem because the infrastructure itself is a mess and that policy-makers making decisions on behalf of these collaborations do not even have all the information they need. From immigrants afraid to report to their court hearings for fear of encountering ICE in Santa Clara County, to crime victims or witnesses refusing to report perpetrators of domestic violence to the police, to anti-immigrant

policies in San Diego – the list is long in terms of the grave consequences that the enforcement of immigration laws at the local level has wrought. It is not only advocates that have expressed concern over this problem. Members of the law enforcement community in the state have raised the issue of scarce police resources being used for other purposes than going after serious criminals that victimize these same communities.⁶⁹

Entanglement of local agencies in counter-terrorism efforts and “pre-emptive law enforcement”

The strategy of pre-emptive action permeates counter-terrorism efforts on the ground. Advocates see a lot of targeting of “potential” criminals and express widespread concern that we are inching dangerously towards a police state. For example, a total of over 600 state and local agencies, and more than 50 federal agencies, participate in JTTFs. In California, these task forces are currently operating in Sacramento, San Francisco, Los Angeles, and San Diego, and they exist in 106 cities nationwide.⁷⁰ The focus of advocates concern over JTTFs is their role in political surveillance.

The American Civil Liberties Union of Northern California through Freedom of Information Act (FOIA) requests filed with other ACLU affiliates found that JTTFs have also been collecting information on activity having nothing to do with terrorism, instead these activities often result in racial profiling. San Francisco has taken measures to make this partnership accountable by introducing legislation to ensure that police officers in San Francisco working on the FBI Joint Terrorism Task Force comply with local standards governing police intelligence and investigative activities, which are considered more protective of privacy and civil rights than the FBI’s Guidelines.⁷¹

65 James Bell, J. Hayward Burns Institute of Justice, Interview transcript, September 19, 2012.

66 See: Children’s Defense Fund-California, <http://www.cdfca.org/policy-priorities/dismantling-the-school-to-prison-pipeline/>. Accessed on November 20, 2012.

67 See: Balancing the Scales of Justice, J. Hayward Burns Institute and ACLU of Northern California.

68 Ibid.

69 See: “*The LAPD Fights Crime, Not Illegal Immigration.*” William Bratton, Los Angeles Times. October 27, 2009. Electronic access: <http://articles.latimes.com/2009/oct/27/opinion/oe-bratton27>

70 FBI Joint Terrorism Task Forces, http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jtffs.

71 <http://www.aclu.org/spy-files/sf-supes-consider-local-oversight-fbi-terrorism-investigations-blogskqedorg>. Accessed electronically on October 17, 2012.

The view of information sharing as a panacea

One of the country's largest federally funded fusion centers covers most of Southern California. The Joint Regional Intelligence Center in Norwalk has more than 80 full-time staff members and stitches together information from 166 law enforcement departments.⁷² Databases containing information about people's locations and movements, gathered using technologies that track phones and license plates is by now a fixture of the information-sharing environment. DHS makes sure that billions of dollars are spent on interoperability equipment.

According to the Institute for Intergovernmental Research, "Nothing is more critical to today's law enforcement agencies than the ability to share information. Yet history shows that to collect and share information without purpose, needs, and controls is counterproductive to law enforcement's mission and diminishes the public's trust."⁷³ Some of the problems that information sharing for its sake has created include the fact that there is little oversight on how information is shared across law enforcement agencies. Once an individual is placed within the database and the placement turns out to be unsubstantiated, there is little assurance that the name will be purged from these databases.

When eager, inadequately trained, and poorly supervised police interact with technology containing information from multiple agencies, mistakes are bound to happen. The potential for human error increases along with the number of people, agencies, and bits of information interacting with massive databases. Information may be out of date, or an individual may interpret it incorrectly, or arrest the wrong person. The willingness to permit false positives in the name of increasing the chances of catching those who actually fit the criteria is a questionable practice, especially because criminal justice and immigration proceedings are difficult to appeal and overturn. Even if contact with the system is deemed to be wrongful in a specific instance, it is likely that the person's information will remain in the virtual information storehouse for years to come.

A recent Senate sub committee investigation concluded that DHS's numerous information sharing and fusion centers threaten civil liberties but do little to protect our security and combat terrorism. The 146 page report which took two years to complete noted that these fusion centers "could identify nothing that uncovered a terrorist threat, nor could it identify a contribution any fusion center made to disrupt an active terrorist plot."⁷⁴

In the criminal justice context, it is easy to see why sharing can be useful. For example, when an individual is committing serious crimes in multiple states, knowing the perpetrator's behavior patterns can help law enforcement bring him to justice, an outcome in which communities have an interest. Data sharing about specific crimes and individuals can certainly help law enforcement make arrests. The problem is that the gathering and sharing of data has become so broad as to overwhelm law enforcement with an unfathomably large amount of information.

Additionally, intelligence-led policing encourages police to constantly be on the lookout for suspicious behavior, which distracts from their main job of ensuring public safety, and it engenders a two-way mistrust between the police and community members. Distrust of the police is exacerbated when they are tasked with serving as federal agents.

The absence of clear oversight, accountability and transparency mechanisms

Many advocates interviewed for this report decried the lack of clear and transparent accountability mechanisms in these collaborations. They pointed out that communities only learn of these partnerships after the fact, and often through the news media. The role of overseers in local government sometimes seem nonexistent, especially when there is no insight from local governing bodies like city councils. The gamut of these relationships seem to create a huge confusion in the communities where they take place because of the absence of transparency or even the most basic act of communicating relationships that these communities may interpret as having an impact on their own safety.

72 See LA Times: Anti-Terror Centers Criticized. <http://articles.latimes.com/2012/oct/03/nation/la-na-fusion-centers-20121003>

73 Institute for Governmental Research, "Overview," available at <http://www.iir.com/28cfr/Overview.htm>. See, Cincotta, *supra* note 1, at 54.

74 See LA Times: Anti-Terror Centers Criticized. <http://articles.latimes.com/2012/oct/03/nation/la-na-fusion-centers-20121003>

IV. No Such Thing As Unintended Consequences

This section outlines the specific ways in which the intersection of the three systems has manifested itself in affected communities in California and the perceived civil rights and ethical implications that such mergers have engendered. It discusses various advocates, organizers' and community members' perspectives on the dangerous effects of intersectionality on public safety and individual freedoms.

The Civil Rights and Ethical Implications of Intersectionality: Sharing the Matrix, Spreading the Harm?

"Mixing different agencies priorities leads to lack of focus on priorities. The feds are not the only ones finding and apprehending immigrants. The police already do this. Now, individuals end up in one system that has merged. So who is therefore responsible? Who is accountable? It is becoming all the same thing!"

-An advocate and community member from the Inland Empire

"These collaborations all depend on the implementation. Information sharing is important to law enforcement because we have so many levels of function. In an increasingly complex criminal justice system, information sharing is key. The critical issue here is how you prevent various agencies from prioritizing their own agenda as you form these alliances."

-Notes from interview with Police Chief from California

How Collaboration Takes Place

To many advocates, these collaborations are a great mystery. But in the course of speaking with a few members of the law enforcement community (LEA), there was a desire to demystify how these partnerships take place, though not always to great satisfaction and effect.

Because of the robust integration of these systems, there is a confusion of what priorities now mean to law enforcement, as there appears to be no single accountable actor. People who are interested in finding out who is responsible tend to get passed on from one entity to another. It is also important to note that communities do not always distinguish or are able to distinguish one law enforcement agency from another, so that if one partner agency is committing overreach or abusive acts, other members of that entity are painted with the same brush which gives rise to the whole issue of mistrust.

It is not known whether the problem of transparency is a function of public relations, or a failure of law enforcement agencies to communicate the intent of these partnerships even at a surface level. For example, advocates in the Inland Empire only learned that the Customs and Border Protection (CBP) had offered to provide translation services to the local police after the CBP had talked to many police departments about it. Another concern shared by the respondents is the dramatic trend in information sharing between agencies and the accountability issues they raise. For example, the Chula Vista Police Department in San Diego uses an off-site agency to store data. Questions were raised about the rules on which said data could be used, who has legal access to it and what is the chain of custody.⁷⁵

Some advocates suggested that in order to address this cat and mouse game, coming up with generic guidelines that limit what can be done informally between agencies maybe a place to start. Providing more nuanced disclosure to communities where these partnerships exist, is another. In a more proactive sense, cities like San Francisco and Berkeley have taken it upon themselves to counteract this type of behavior from law enforcement by coming up with their own policies such as the Safe San Francisco Ordinance or Berkeley's policy of refusing to honor detainer requests by ICE. While it is unclear how issues of accountability can be truly addressed and engaged, everyone interviewed for this report agrees that something needs to be done about it, and soon.

⁷⁵ Interview with San Diego criminal justice advocate, September 13, 2012.

The LEAs premised their defense and stance on collaboration by saying that information sharing is very important to their work given how complex the system they are working with has become after 9/11. Because technology has come at the forefront of law enforcement, LEAs have to use it lest the criminal enterprises they are after outmaneuver them. On the other hand, they expressed surprise at the lack of judgment among some of their peers on the efficacy of these technologies and whether they are always critical to their work on a daily basis.

Often, the partnership starts by way of invitation to share information or resources. At any given time, collaboration could be either information driven or practice driven. A practice driven collaboration could be through the need to clear up homicide cases or extra funding for DNA evidence processing. Often, the FBI enters the picture, but there are no contracts or memoranda of agreement signed. The gang enforcement work for example begins at the local level, but takes on a broader dimension once crime is no longer confined to a specific neighborhood or location. The most common form of partnership is the Narcotics Task Force because partnership with local police is fundamental to obtaining working knowledge of the street. A DHS-LEA collaboration often begins with a project identified by the former and local police are given a grant, which sometimes require them to deal with contractors.

The police chiefs interviewed in this report expressed a level of skepticism over these partnerships but noted that they are often under pressure to collaborate because budget issues and limited resources often keep them from saying no to overtures by federal agencies, and that it is not always clear to them what the big picture implications are. Some law enforcement executives for example, were not prepared for the fallout that the implementation of Secure Communities created in California because it was marketed to local enforcement agencies as a benign crime-fighting tool that targeted only serious criminals. The dangers, they believe, is how competing agendas are brought to bear on these alliances and the fact that various regulations are being promoted largely to promote uniformity in the system rather than anticipating accountability issues and overreach that might occur.⁷⁶

Impact on Public Safety

Domingo is a 70 year-old immigrant who lives with his relatives in a mixed-status household composed of legal permanent resident cousins, his undocumented daughter and son-in-law, and citizen grandchildren. He lives in South Los Angeles. Because of his age and various infirmities, he is not able to work any longer and acts as the caretaker of his grandchildren while his daughter and son-in-law work two jobs. In his neighborhood, domestic violence often takes place. He knows that his neighbor beats up his wife and children. He hears the noises, screams and cries they make at any given time. He has however, refused to call social services or even the police, for fear that they might find out his own household situation and arrest and deport his family members.⁷⁷

Can communities like Domingo's return to a time when the choices to report crimes were starkly clear: you just called the police? One of the biggest casualties of the intersections of these issues is the trust that local communities have in their local police. It has created an Us vs. Them dynamic between the police and community members, and this dynamic is like a wave that is changing how states and localities think about policing.

Because of the way that these collaborations are marketed and sold on the ground, it has also become harder for many members of the law enforcement community in California who are skeptical about the practice to criticize it. As states like California suffer their worst budget crises in years and local jurisdictions cut back on public safety programs, grants from DHS are viewed as additional and much-needed resources, even if the long-term consequences for public safety are not always appreciated.

76 Interviews with Police Chiefs in California. Names withheld. September 2012.

77 Rights Working Group, Night of 1,000 Conversations, CARECEN, Los Angeles 2009.

Aggressive enforcement of immigration laws and punitive criminal justice policies have devastating effects, especially on families and communities of color. These communities inevitably become the target and the object of these systems, causing a significant portion of members to be either deported or incarcerated. This destroys important social bonds and puts enormous financial strain on families who suddenly have one less wage earner. Stereotypes become self-fulfilling prophecies when communities under social and economic strain become the subject of crime enforcement efforts, therefore justifying and inviting even more attention from law enforcement.

These two systems that claim to prevent crime and protect Americans actually contribute to the conditions and cycles that engender criminality. Turning police into federal agents and spies is not only ineffective; it actually produces negative outcomes. The community members they serve no longer trust them, which greatly hinder their ability to do their jobs. Police are unable to protect people if those people are afraid to report being victimized, or if they are equally afraid to provide information about someone who poses a threat to the community for fear of deportation.

Impact on 4th Amendment Rights and other Constitutional Rights

*ICE agents raided a mixed status family in their home without any warrant. ICE entered by breaking down the door. The agents held the family in detention in their home for two hours until they got the warrant.*⁷⁸

The increased conflation of the three systems creates dangerous implications for civil rights and civil liberties. Advocates ask: “what are we giving up as a society when we continue to pursue these collaborations at the expense of civil rights? When domestic violence survivors get arrested when they ask for help, what message does that send to the public? What is it that we agreed to in the Constitution as protections and why are we not taking it seriously?”

The system in place is not catching up fast enough with the problems it is creating and our ambivalence towards this dilemma is costing us. There is for example great concern over equal protection issues created by the intersection. However, proving how this happens is problematic because the law makes it very difficult to prove discrimination. While there are efforts nationally to appoint a public defender for people in civil immigration proceedings, there is generally no Constitutional right to an attorney in these proceedings.

Civil rights advocates interviewed for this report pointed out the problems with policies like Suspicious Activity Reporting (SAR). SAR is heavily marketed by DHS in the state, evidenced by advertisement in train stations, bus stations and airports across California. Oftentimes, people’s immigration status is used to coerce community members to be informants or they are harassed constantly by regular visits or “stops” by local law enforcement in their homes.⁷⁹

Advocates believe that SAR creates a tension with the reasonable suspicion standard. As noted by the American Civil Liberties Union: “The Supreme Court established “reasonable suspicion” as the standard for police stops in *Terry v. Ohio* in 1968. This standard required suspicion supported by facts that can be articulated, suggesting criminal activity was afoot before a policeman could stop a person for investigative purposes.” The ACLU further emphasized that SAR programs threaten this reasonable, time-tested law enforcement standard by encouraging the police and the public to report behaviors that are not reasonably indicative of criminal or terrorist behavior.⁸⁰

If people are less likely to participate in religious or political activities for fear of being targeted, Ameena Qazi of CAIR Los Angeles argues, “This sort of isolation has the potential to breed antisocial or anti-establishment behavior, not to mention depressing the same constitutional values law enforcement is sworn to protect.”⁸¹

79 Interview with community advocate, September 25, 2012.

80 See, <http://www.aclu.org/spy-files/more-about-suspicious-activity-reporting>. Accessed on November 9, 2012.

81 See, Cincotta, supra note 1, at 39. Ameena Mirza Qazi, correspondence with the author (January 14, 2010).

78 Interview with Orange County Advocate, October 20, 2012. Name withheld.

Suspicious Activity Reporting and intelligence-led policing encourage police to be constantly suspicious, meaning they approach every situation with a question of guilt instead of a presumption of innocence. This two-way mistrust between law enforcement and the public is simply dangerous.

V. A Framework for Action

There is no doubt that the national security endgame has created a new social order. It is an order in which criminal justice, immigration and national security policies and programs have become so intertwined as to be inseparable from each other. Shadowing this merger is the twin dilemmas of the ongoing “war on drugs,” and “war on terror.” This new order has posed serious limits to political activities and our democracy as we know it.

In the course of speaking with many voices that formed the basis for this report; voices from civil rights advocates, academics, community organizers and law enforcement officials, a common strain emerged: it maybe too late to stop this mega-merger. They feel that it has become too big and too necessary for the safety and security institutions that now operate in an increasingly powerful dragnet, to ever walk away from it. Since it is all couched under the powerful argument of national security prerogatives, little debate has taken place on the distinction between popular security, which is the protection of people, and state security, and normally protected rights are now being violated.

Furthermore, because our forms of resistance are so dispersed, not for lack of effort but for very limited resources and capacity, we have been caught up in a protracted mode of reactive response and playing catch-up. The sentiment that we are now living in the matrix of this huge security apparatus is rife, but hope exists. While the respondents lamented the fact that it will be very hard to reverse the course that was set by a post 9/11 world, we can keep things from becoming worse.

Here are some of those ideas:

The ultimate consumers of this project should not only think about the issue in terms of integration as the problem itself but also the smaller pieces in which the problem can be addressed.

Proponents of this approach believe that the system is simply too big to ever imagine creating a response equal to its size. This is where small but significant fixes could make a difference. The idea is to slowly but sustainably carve holes into the merger by specific approaches such as what California is doing with the TRUST Act, the Safe San Francisco Ordinance or Berkeley’s limited detainer policies, or by coming up with generic guidelines that limit what can be done informally between agencies. This approach requires a careful weaving together of successful attempts, including combined FOIA litigation efforts, to chip away at the merger by looking at the impact of these specific campaigns and creating a ripple effect in other parts of the country.

Identify a pool of expert practitioners who can develop further specialization in these three areas.

There is general consensus that there is so much that the advocacy community in California does not know about the intersection. We also need to work harder in reaching out, working with and educating the criminal justice community in the state, on the dangers of not paying attention to the problems created by the intersection. Since the universe in which it operates is vast, further investigation is needed. As new surveillance and law enforcement technology develops, the challenge is how to keep up. Pooling together a group of experts interested in this particular area or creating an RWG fellowship which looks at the problem in a more comprehensive manner, including the ones this report did not cover, or a program where the focus is on the actual intersection issue, might be a place to start.

Explore an inter-agency collaboration and examine more creatively and proactively the possibility of broader legislation which addresses the bigger problems generated by SCOMM, SAR, JTTFs, etc.

Advocates charge that because we have been working separately from each other, the impact of our work is so diffused. It is entirely possible to look at the common problems and challenges that these systems have created and find a longer-term legislative fix which not only limits the over-reach of this intersection but also institutes a built-in mechanism of accountability into LEA-federal agencies collaboration. Examples of how to pursue this include studying how advocates have turned the tide in other big government programs like COINTELPRO or other successful forms of resistance such as the Church Committee. However, inter-agency collaboration will only succeed if a good structure is in place at the outset, and there is clear understanding among the participating agencies about their common goals and interests. As a short-term response, the organizations that participated in this report are interested in an initial meeting and brainstorm to review the research findings and share ideas for future action and collaboration.

Identify and work with a “champion” on the issue

Identifying and working with a powerful ally/allies or elected officials who could help provide a broader platform for public messaging and political consensus on the issue will help remove the mystique around the intersection and help advocates reach more people and communities who are new to the issue and are not necessarily convinced that there is a problem.

Develop an advocacy toolkit that focuses on the intersection issue

A separate initiative that brings together the targeted fixes (mentioned previously) in one document, would be an important first step. That document would be the basis for an advocacy toolkit advocates can use in their work.

VI. Conclusion

This report attempted to map a clear picture of the troubling and dangerous developments and consequences that characterize the intersection of criminal justice, immigration and surveillance systems, and modern American law enforcement.

California’s criminal justice system is not free of wrongful convictions and is a system that does not turn anybody away. The incarceration of innocent people, the increasing presence of young people in our jails and the massive number of immigrants crowding the state’s prisons and detention centers, paint a stark picture of the future. As sharing of information, personnel and resources between agencies continue, as interoperability defines the norm and culture of our public safety institutions and pre-emptive policing redefines the culture of policing as we know it, this report asks us to pause and consider: *what is it we are doing and where are we headed with it?*

The report struggled with these questions but it also believes that there are hopeful prospects for reversing some of the dangerous trends the intersection has created. If we believe that there are real limits to incarceration as a strategy for controlling non-violent behavior, then we cannot keep imprisoning people because fiscally, ethically, it is just unrealistic. There is also a limit to data processing on people because evidence has shown that such a system is not perfect.

The time and resources that federal, state, and local agencies devote to these counterproductive efforts would be much better spent on exploring alternatives and evidence-based methods. Instead of thinking that the historical inefficacy of punitive policies is a problem of degree and that, therefore, doing the same things more aggressively will solve the problem, law enforcement needs to admit that the problem is one of a kind. Increased surveillance is a similar waste of time and resources, as it has resulted in a great deal of information about everyday people and very little in the way of counterterrorism benefits. Sharing of data, specifically of information gathered through surveillance, pose significant implications for civil liberties as this report has asserted.

In conclusion, the report challenges us to reexamine the assumptions that have been made about our safety and security, and forces us to ask the following questions: What rights are we willing to give up in the name of security, and do we even have a say? Do we want to have a say? Are we willing to accept the denial of our right to be presumed innocent until proven guilty? Are we comfortable with information about our movements, communications, and bodies (biometrics) being stored indefinitely in databases to be accessed by law enforcement at any level at any time? Is it permissible for the government to target specific groups of people because they look a certain way, dress a certain way, or worship a certain way? How big and bloated do we want our prisons to be?

What this report just tackled are dangerous trends, policies and practices in California that go against the letter and spirit of our Constitution, of our values of fairness and dignity for all peoples. If we allow these most fundamental protections to be compromised, where will it end? ♦

Appendices

Federal Agencies, or The Mother of all Matrices

Central Intelligence Agency (CIA): Collects, evaluates, and disseminates foreign intelligence; engages in covert action⁸²

Department of Defense (DOD): Oversees all military branches and forces⁸³

Department of Homeland Security (DHS): Counterterrorism, immigration, and emergency management⁸⁴

Customs and Border Protection (CBP): Enforces border security (inspects and searches travelers entering the U.S.); regulates trade and travel⁸⁵
The Automated Targeting System creates a “risk assessment” for all travelers crossing the U.S. border, which CBP uses to make decisions regarding entry and searches⁸⁶

Border Patrol
Federal Emergency Management Agency (FEMA)

Immigration and Customs Enforcement (ICE): Detains and deports undocumented immigrants; investigates fraud, trafficking and smuggling⁸⁷
Office of the Inspector General

Transportation Security Administration (TSA): Screens travelers, travel employees, and vehicles (counterterrorism)⁸⁸

U.S. Citizenship and Immigration Services
U.S. Coast Guard

U.S. Secret Service: Protects national leaders, visiting heads of government, designated sites and events; investigates counterfeiting, fraud, identity crimes⁸⁹

Department of Justice (DOJ): Oversees federal criminal investigations, drug enforcement, and management of prisoners and prisons⁹⁰

Antitrust Division
Asset Forfeiture Program
Office of the Attorney General
Bureau of Alcohol, Tobacco, Firearms, and Explosives

Bureau of Justice Assistance: supports law enforcement, courts, corrections, treatment, victim services, technology, and prevention initiatives⁹¹
Bureau of Justice Statistics
Civil Division
Civil Rights Division
Community Oriented Policing Services
Community Relations Service
Criminal Division
Diversion Control Program

Drug Enforcement Administration (DEA): Investigates international and interstate drug crimes; manages drug intelligence; seizes assets involved in drug trafficking; crop eradication⁹²

Environment and Natural Resources Division
Executive Office for Immigration Review
Executive Office for Organized Crime Drug Enforcement Task Forces
Executive Office for U.S. Attorneys
Executive Office for U.S. Trustees

82 Central Intelligence Agency, <https://www.cia.gov/about-cia/faqs/index.html#whatdo>.

83 Department of Defense, <http://www.defense.gov/about/>.

84 Department of Homeland Security, <http://www.dhs.gov/index.shtm>.

85 Customs and Border Protection, <http://cbp.gov/xp/cgov/about/>.

86 Jay Stanley, *ACLU Backgrounder on ATS*, ACLU (January 10, 2007), <http://www.aclu.org/technology-and-liberty/aclu-backgrounder-ats>.

87 Immigration and Customs Enforcement, <http://www.ice.gov/about/overview/>.

88 Transportation Security Administration, http://www.tsa.gov/who_we_are/index.shtm.

89 United States Secret Service, <http://www.secretservice.gov/mission.shtml>.

90 Department of Justice, <http://www.justice.gov/agencies/index-list.html>.

91 Bureau of Justice Assistance, <http://www.justice.gov/agencies/index-list.html#BJA>.

92 Drug Enforcement Administration, <http://www.justice.gov/agencies/index-list.html#DEA>.

Federal Bureau of Investigation (FBI): Investigates terrorism, organized crime, cyber crime, crimes against children, serial murders, hate crimes, major thefts, corruption, gangs, and fraud⁹³

Collects data on Americans' private communications and Internet activity through National Security Letters served on communication service providers⁹⁴

Collects information through Section 215 of the PATRIOT Act ("any tangible thing")⁹⁵

Conducts secret searches using "sneak and peek warrants" from Section 213 of the PATRIOT Act⁹⁶

Federal Bureau of Prisons: Oversees the 117 Federal prisons and 217,000 Federal offenders⁹⁷

Foreign Claims Settlement Commission
INTERPOL Washington
Justice Management Division
National Criminal Justice Reference Service
National Institute of Corrections
National Institute of Justice
National Security Division
Office of the Associate Attorney General
Office of Attorney Recruitment and

Management

Office of the deputy Attorney General
Office of the Federal Detention Trustee
Office of Information Policy
Office of the Inspector General
Office of Justice Programs
Office of Juvenile Justice and delinquency

Prevention
Office of Legal Counsel
Office of Legal Policy
Office of Legislative Affairs
Office of the Pardon Attorney
Office of Privacy and Civil Liberties
Office of Professional Responsibility
Office of Public Affairs
Office of Sex Offender Sentencing, Monitoring, Apprehending, registering, and Tracking
Office of the Solicitor General
Office of Special Counsel
Office of Tribal Justice
Office for Victims of Crime
Office on Violence Against Women
Professional Responsibility Advisory Office
Tax Division
U.S. Attorney's Office: Prosecutes Federal criminal cases; defends and prosecutes civil cases on behalf of the U.S. government⁹⁸
U.S. Marshals Service: Custody of federal prisoners; seizes and manages illegal assets; witness protection; protection of courts, judges, and court personnel⁹⁹
U.S. Parole Commission
U.S. Trustee Program

National Security Agency (NSA): protects national security information; collects, processes and disseminates intelligence information from foreign signals; delivers strategic and tactical information to war planners and war fighters¹⁰⁰

93 Federal Bureau of Investigation, <http://www.fbi.gov/about-us>.

94 National Security Letters, Electronic Frontier Foundation, <https://www.eff.org/issues/foia/07656JDB>.

95 Trevor Timm, *Ten Years After the Patriot Act, A Look at Three of the Most Dangerous Provisions Affecting Ordinary Americans*, Electronic Frontier Foundation (October 26, 2011), <https://www.eff.org/deeplinks/2011/10/ten-years-later-look-three-scariest-provisions-usa-patriot-act>.

96 *Id.*

97 Federal Bureau of Prisons, <http://www.bop.gov/about/index.jsp>.

98 U.S. Attorneys, <http://www.justice.gov/agencies/index-list.html#USAtt>.

99 U.S. Marshals Service, <http://www.justice.gov/agencies/index-list.html#USMarshal>.

100 National Security Agency, <http://www.nsa.gov/about/index.shtml>.



RIGHTS

working group

