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ICE-d out of Court: Courthouse Arrests and the Sixth Amendment Right to a Jury Trial for Noncitizen Defendants

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ICE-d out of Court: Courthouse Arrests and the Sixth Amendment Right to a Jury Trial for Noncitizen Defendants

Sumouni Basu*

Immigration enforcement has been especially brazen under the Trump administration. As part of a larger “mass deportation agenda,” and in retaliation against localities taking measures to protect immigrants, Immigration and Customs Enforcement (ICE) agents have significantly increased their presence at courthouses. As a result, ICE arrests at courthouses, or “courthouse arrests,” have instilled fear in immigrant communities and chilled participation in the legal system. While these arrests have had far-reaching impacts, preventing survivors and witnesses from accessing the court to seek relief, the focus of this Note is on the particular impact on noncitizen defendants involved in criminal proceedings. Increasingly, ICE will arrest noncitizens in the courthouse who are attempting to appear for arraignments, warrants, or important hearings in their cases. Following an ICE arrest, these noncitizens are often detained or deported, preventing them from continuing in their criminal cases and likely resulting in additional criminal sanctions for missing required court dates. This Note explores the Sixth Amendment right to a jury trial and presents a constitutional challenge to courthouse arrests based on the notion that these arrests prevent noncitizen defendants from accessing the courts, and therefore, meaningfully accessing their right to a jury trial.

* J.D. candidate, University of California, Irvine School of Law, 2021. First and foremost, I would like to thank Professor Annie Lai for her mentorship, guidance, and thoughtful feedback throughout my legal education and in the writing of this Note. My time in the UC Irvine Immigrant Rights Clinic under the supervision of Professor Lai, Professor Mónica Ramírez Almadani, and Caitlin Bellis affirmed my passion for immigrant rights work and underscored the importance of including people impacted by the criminal legal system in any immigrant rights advocacy. Thank you to my partner Jeremy Bennie for sharing insight on representing noncitizen defendants as a Public Defender in the Bronx and for editing several early drafts. Lastly, I am extremely grateful for the work of Jordan Lowery and the editorial team at the *UC Irvine Law Review*.

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INTRODUCTION

Early on a Friday morning, U.S. Immigration and Customs Enforcement (ICE) agents arrived at the Monterey County Superior Courthouse in Salinas, California.¹ Even before the courthouse officially opened its doors at 8 a.m., the agents took their places. Two agents sat and waited on a bench outside the courtroom of Judge Robert Burlison; three other agents stood by the front entrance.² Moments later, a young man entered the courthouse with his wife and young child. The man was immediately stopped at the security screening area.³ Just inside the front doors, before he could even make it inside the courthouse, this man was taken into custody by the three ICE agents.⁴ Though the courthouse had an internal protocol for reporting these types of arrests, the courthouse's contract security team failed to report anything to their administration.⁵ It only came to the court's attention later in the day after several county employees reported it to their supervisor.⁶ And, it only came to the attention of the media after the supervisor

1. Mary Duan, *When ICE Agents Make Arrests at the Courthouse, They Interfere with Justice.*, MONTEREY CNTY. WKLY. (Sept. 26, 2019), https://www.montereycountyweekly.com/opinion/local_spin/when-ice-agents-make-arrests-at-the-courthouse-they-interfere/article_773a53c0-e000-11e9-a0d4-1bbcf90242d.html [<https://perma.cc/U74C-8RJ9>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

shared the incident on his own Twitter feed.⁷ This courthouse arrest by federal agents occurred in California on September 20, 2019, even though in January 2018, California State Supreme Court Chief Justice Tani Gorre Cantil-Sakauye had asked ICE to stop making arrests at courthouses.⁸

Courthouse arrests like these became increasingly common under the Trump administration. Just five days after the presidential inauguration on January 20, 2017, the Trump administration issued an executive order titled “Enhancing Public Safety in the Interior of the United States,” which described the administration’s mass deportation agenda.⁹ This signaled an increase in community arrests and raids as well as other efforts by the Trump administration to “take the shackles off” immigration enforcement officers.¹⁰ In response to federal policy, many local jurisdictions have implemented “sanctuary” policies to limit jail transfers and coordination with ICE.¹¹ The tension between federal enforcement (ramping up immigration enforcement) and state or local governments (limiting coordination with federal immigration enforcement and increasing protections for noncitizens) has prompted federal agents to take more enforcement action, especially in areas that ICE previously did not generally pursue.¹² Paul Prince, a spokesman for ICE, pointed to California’s sanctuary law and claimed that “[s]anctuary policies leave ICE with no choice but to increase enforcement . . . to locate and arrest these persons while they are at-large—increasing the likelihood that other individuals previously not targeted for arrest will be taken into ICE custody.”¹³

As a result of both the executive order and the administration’s backlash against sanctuary cities,¹⁴ there has been increased enforcement activity specifically at courthouses. ICE now shows up to arrest and detain noncitizens and their families appearing in court. The Immigrant Defense Project recorded a 1200%

7. *Id.*

8. *Id.*

9. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf> [<https://perma.cc/DR8Z-H2MB>].

10. Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J.F. 410, 411 (2017) (quoting Sean Spicer, Press Sec’y, White House, Press Briefing by Press Secretary Sean Spicer (Feb. 21, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sean-spicer-022117/> [<https://web.archive.org/web/20210116173141/https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sean-spicer-022117/>]).

11. See LENA GRABER & KRSNA AVILA, IMMIGRANT LEGAL RES. CTR., GROWING THE RESISTANCE: HOW SANCTUARY LAWS AND POLICIES HAVE FLOURISHED DURING THE TRUMP ADMINISTRATION 3 (2019), https://www.ilrc.org/sites/default/files/resources/2019.12_sanctuary_report-final-12.17.pdf [<https://perma.cc/8SBB-W4DD>].

12. Joe Szydlowski, *ICE Courthouse Arrests, Like the One in Salinas, Could Become Illegal if Newsom Signs Bill*, CALIFORNIAN (Sept. 27, 2019, 3:44 PM), <https://www.thecalifornian.com/story/news/2019/09/27/ice-courthouse-arrests-illegal-salinas-california-immigration-newsom/2431538001/> [<https://perma.cc/M5QA-J2LC>].

13. *Id.*

14. See GRABER & AVILA, *supra* note 11, at 4.

increase in reports of ICE arrests and attempted arrests at New York courthouses from 2016 to 2017.¹⁵ In 2019, that number was up to a 1700% increase from 2016.¹⁶ The same report highlights that noncitizens are being arrested in a variety of courts, including family court, traffic court, and Youth Parts.¹⁷ Similar increases in ICE arrests have also been observed in many other states including in Arizona, California, Colorado, Maine, New Jersey, Oregon, and Texas.¹⁸ Despite these recorded increases and the opposition they have brought, it is unlikely that ICE is planning to stop these practices anytime soon. In early 2018, ICE issued a directive confirming that they will continue to make arrests in courthouses.¹⁹ In fact, the directive clarifies that ICE believes courthouses—far from being a sensitive location—are an essential location to make necessary arrests.²⁰

Possible Legal Challenges

Courthouse arrests represent the latest front in what Professor Christopher Lasch, drawing on the work of Professor Juliet Stumpf, calls “cimmigration’s ongoing federalism battle.”²¹ One potential argument against courthouse arrests rests on the ancient common law privilege from arrest. This goes back to 1817 when the Supreme Court in *Stewart v. Ramsay* found that “[c]ourts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect

15. IMMIGRANT DEF. PROJECT, ICE OUT OF COURTS CAMPAIGN TOOLKIT (2018) [hereinafter ICE OUT OF COURTS TOOLKIT], <https://www.immigrantdefenseproject.org/wp-content/uploads/IDPCourthouseToolkit.pdf> [<https://perma.cc/VZ6B-Z4ZE>]; see IMMIGRANT DEF. PROJECT, KEY FINDINGS: ICE IN NYS COURTS, LEGAL SERVICE AND ADVOCATES SURVEY, <https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-out-of-courts-survey-final-1.pdf> [<https://perma.cc/ZQR8-ACNA>] (last visited Jan. 24, 2021).

16. IMMIGRANT DEF. PROJECT, DENIED, DISAPPEARED, AND DEPORTED 6 (2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/Denied-Disappeared-Deported-FINAL.pdf> [<https://perma.cc/65JM-N469>].

17. ICE OUT OF COURTS TOOLKIT, *supra* note 15.

18. See generally Jake Bleiberg, *Somali Man ICE Arrested in Court Is a Permanent Resident Who’s Lived in U.S. for 20 Years*, BANGOR DAILY NEWS (Sept. 26, 2017), <https://bangordailynews.com/2017/04/11/news/somali-man-ice-arrested-in-court-is-a-permanent-resident-whos-lived-in-u-s-for-20-years/> [<https://web.archive.org/web/20201127212858/https://bangordailynews.com/2017/04/11/news/somali-man-ice-arrested-in-court-is-a-permanent-resident-whos-lived-in-u-s-for-20-years/>]; Erica Meltzer, *Report: The Man ICE Agents Wanted to Arrest in a Denver Courthouse Had a Felony Record*, DENVERITE (Mar. 2, 2017, 7:23 PM), <https://denverite.com/2017/03/02/report-man-ice-agents-wanted-arrest-denver-courthouse-felony-record/> [<https://perma.cc/K4ZA-GFHK>]; Curt Prendergast, *Arrest by ICE at Tucson Courthouse Concerns Judge*, TUCSON.COM (June 19, 2017), <https://tucson.com/news/local/border/arrest-by-ice-at-tucson-courthouse-concerns-judge/articleb7444b3a-700c-5265-9292-4d980c483726.html> [<https://perma.cc/KH9P-V8YV>]; S.P. Sullivan, *N.J.’s Chief Justice Asks ICE to Stop Arresting Immigrants at Courthouses*, NJ.COM (Jan. 16, 2019), https://www.nj.com/politics/2017/04/nj_top_judge_asks_ice_to_stop_arresting_immigrants.html [<https://perma.cc/C849-Z88B>].

19. See U.S. IMMIGR. & CUSTOMS ENF’T, DIRECTIVE NO. 11072.1: CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES (2018), <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf> [<https://perma.cc/284F-7QX4>].

20. See *id.*

21. Lasch, *supra* note 10, at 419.

protection around every man who necessarily approaches them.”²² In 1932, the Court added on in *Lamb v. Schmitt*:

[T]he due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation.²³

In June of 2019, a federal court in Massachusetts found that the Immigration and Nationality Act (INA) did not abrogate the common law privilege from arrest and enjoined ICE “from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse.”²⁴ Professor Lasch has evaluated in great detail how the common law privilege from arrests in courthouses applies to ICE activity in courthouses.²⁵ In his analysis, one of the key justifications for applying this common law privilege to immigration arrests is based on immigration proceedings being civil in nature, rather than criminal. Lasch accordingly highlights that

[r]eframing immigration arrests as somehow criminal in nature—based on, for example, the fact that immigration proceedings are initiated by the federal government rather than a private litigant—could conceivably support an argument against application of the privilege. But doing so would turn existing precedent on its head and undermine a premise currently used to justify denying criminal-style procedural protections to immigrants in removal proceedings, making this an argument unlikely to come from the federal government.²⁶

Another potential argument against courthouse arrests is based on the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. In 2004, the Supreme Court in *Tennessee v. Lane* found the Due Process Clause guarantees to a criminal defendant “the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.”²⁷ The Court held that the Due Process Clause also requires the states to “afford certain civil litigants a ‘meaningful opportunity to be heard’ by removing

22. *Stewart v. Ramsay*, 242 U.S. 128, 129 (1916) (quoting *Halsey v. Stewart*, 4 N.J.L. 426, 427 (1817)).

23. *Lamb v. Schmitt*, 285 U.S. 222, 225 (1932).

24. Kate Sullivan, *Massachusetts Federal Judge Blocks ICE from Making Civil Immigration Arrests Inside State’s Courthouses*, CNN (June 20, 2019, 5:27 PM), <https://www.cnn.com/2019/06/20/politics/federal-judge-blocks-ice-immigration-arrests-courthouses-massachusetts/index.html> [<https://perma.cc/2L3Q-HT6A>].

25. See Lasch, *supra* note 10.

26. *Id.* at 432.

27. *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)).

obstacles to their full participation in judicial proceedings.²⁸ Further, because the Due Process Clause does not limit its application to citizens, a noncitizen has the right to access courts in nonimmigration proceedings.²⁹ Applying these concepts to the proposition that courthouse arrests prevent access to courts, Bing Le argues that these arrests may violate noncitizens' due process rights.³⁰ In the same article, Le also explores challenging ICE courthouse arrests under the First Amendment right to free speech and right to petition, as well as under separation of powers principles.³¹

This Note explores the current state of courthouse arrests and proposes a new potential legal challenge—one rooted in the Sixth Amendment right to a jury trial. In Part I, I present the current state of courthouse arrests, first highlighting how these arrests are conducted and then speaking to the resulting impacts on both immigrant communities and the legal system. In Part II, I examine the Sixth Amendment right to a jury trial and propose that these courthouse arrests violate that right. Lastly, in Part III, I provide recommendations based on what is unlikely to change, what has already been done, and what more can be done, specifically at the state and local level.

I. CURRENT STATE OF COURTHOUSE ARRESTS: CHILLING IMPACTS ON IMMIGRANT COMMUNITIES AND THE RESISTANCE EFFORTS SPURRED IN RESPONSE

A. How ICE Arrests Noncitizens

The mechanics of how ICE courthouse arrests occur are alarming, often involving deception and confusion. On October 31, 2019, five ICE agents waited for hours outside a public defender's office in New Haven, Connecticut, to arrest a man from Jamaica who had overstayed his visa.³² The agents “were not wearing any obvious gear identifying themselves as federal agents, and they declined to identify

28. *See id.* (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

29. *See Zadvydas v. Davis*, 533 U.S. 678, 690–93 (2001); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: ‘Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”).

30. Bing Le, *Constitutional Challenges to Courthouse Civil Arrests of Noncitizens*, 43 N.Y.U. REV. L. & SOC. CHANGE 295, 341–54 (2019), https://socialchangenyu.com/wp-content/uploads/2019/07/Bing-Le_RLSC_43.2-1.pdf [<https://perma.cc/W5DQ-LWN3>].

31. *See id.* at 315–16, 324–25, 336, 354–57.

32. Eugene Driscoll, *Under Pressure in Public and Private, ICE Folds in Immigration Standoff*, VALLEY INDEP. SENTINEL (Oct. 31, 2019, 11:29 PM), https://valley.newhavenindependent.org/archives/entry/under_pressure_in_public_and_private_ice_folds_in_immigration_standoff/ [<https://perma.cc/V4QR-X8C3>].

themselves as such to a reporter.”³³ This is not an isolated incident: ICE officers across the country often appear in plainclothes, without their uniform as identification.³⁴ Even when in uniform, ICE agents regularly use ruses and only wear “police” on their uniforms, intentionally hiding their role as immigration enforcement.³⁵ As noted in an investigative report by *The Intercept* on ICE ruses, “ICE’s methods are designed not simply to arrest and deport, but to confuse and terrorize the communities it enters.”³⁶

These issues are exacerbated when looking at ICE arrests at courthouses. While detaining noncitizens involved in the criminal justice system is not new—and in fact, has generally been a priority for all administrations—the timing and broad reach of arrests that started under the Trump administration is especially concerning.³⁷ ICE targets immigrants in the courts “at a much earlier point in criminal proceedings, arresting immigrants as early as arraignments.”³⁸ Further, the agency also routinely refuses to bring these immigrants back to state courts so they can be present for and attempt to resolve their ongoing criminal cases.³⁹ Oftentimes, while ICE interviews noncitizen criminal defendants, their public defender is not allowed to speak with them.⁴⁰ These problematic arrests also extend to probation.⁴¹ Probation has been accepted as being part of the “courthouse,” given that probation and pretrial services are housed under the United States Court system.⁴² In Orange County, California, a young woman with Deferred Action for Childhood Arrivals (DACA) was arrested at her house by ICE agents who claimed to be probation officers, a day after her routine probation check-in.⁴³

These arrests are enabled in part by court staff and local officers who assist ICE by sharing docket information and assisting in detaining noncitizens.⁴⁴ To be sure, ICE regularly arrests noncitizens at courthouses without the help of, or against

33. *Id.*

34. See Leon Neyfakh, *Secret Police*, SLATE (Sept. 15, 2017, 4:05 PM), <https://slate.com/news-and-politics/2017/09/plainclothes-ice-agents-in-brooklyn-refused-to-identify-themselves.html> [<https://perma.cc/FP5H-2L7Z>].

35. Nausicaa Renner, *As Immigrants Become More Aware of Their Rights, Ice Steps Up Ruses and Surveillance*, INTERCEPT (July 25, 2019, 9:09 AM), <https://theintercept.com/2019/07/25/ice-surveillance-ruse-arrests-raids/> [<https://perma.cc/4Y4S-M8HP>].

36. *Id.*

37. See Lasch, *supra* note 10, at 415.

38. ICE OUT OF COURTS TOOLKIT, *supra* note 15.

39. *Id.*

40. *Id.*

41. *Id.*

42. See *Probation and Pretrial Services – Mission*, U.S. CTS., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission> [<https://perma.cc/CSY4-8BFE>] (last visited Jan. 14, 2021).

43. See ACLU, FREEZING OUT JUSTICE: HOW IMMIGRATION ARRESTS AT COURTHOUSES ARE UNDERMINING THE JUSTICE SYSTEM 4 (2018) [hereinafter FREEZING OUT JUSTICE], https://www.aclu.org/sites/default/files/field_document/rep18-icecourthouse-combined-rel01.pdf [<https://perma.cc/YP2U-3UH5>].

44. *Id.*

the wishes of, court staff.⁴⁵ ICE has never indicated that they only perform arrests with the consent and help of court staff or local law enforcement. However, it is important to acknowledge that, in some cases, ICE is supported by these local forces. Some law enforcement groups have shown support for ICE actions at courthouses.⁴⁶ For example, the New York State Court Officers' union issued a directive in 2017 instructing its court officers to "provide 100 percent cooperation" to ICE agents and "report any attempts by anyone to obstruct ICE to the union immediately."⁴⁷ In the case of the Orange County woman, although she had not violated the terms of her probation, it appears that the probation office provided her information to ICE, leading to her arrest and detention.⁴⁸

Prosecutors may also be sharing information with ICE to facilitate courthouse arrests. A report from the University of Washington highlights the specific partnership between the Grant County, Washington, Prosecutor's Office, and Customs and Border Patrol (CBP).⁴⁹ Following a meeting in January 2018 between the Prosecutor and a Supervisory CBP Agent, employees of the Grant County Prosecutor's Office began to forward court schedules for two courthouses to CBP agents.⁵⁰ The Grant County Sheriff's Office and the Grant County Prosecuting Attorney's Office also sent emails to an ICE Deportation Officer highlighting specific individuals' court dates and details about their criminal cases.⁵¹ The report shows ongoing emails between the two parties that celebrated the success of the partnership in arresting noncitizens.⁵² In sharing that the CBP agents had arrested three people one morning, the Supervisory CBP Agent wrote "it's been fun. :)"⁵³

B. *The Chilling Impacts of ICE Arrests*

These courthouse arrests impact noncitizen communities broadly, instilling fear and distrust of law enforcement generally. Witnesses, victims, and criminal defendants and their accompanying families are all subject to and harmed by immigration enforcement activity. Noncitizen survivors of violence are often key

45. *Id.* at 3.

46. *See id.* at 1.

47. Colby Hamilton, Gloria Pazmino & Azi Paybarah, *Court Officers Union Tells Members to Cooperate '100 Percent' with ICE*, POLITICO (Mar. 24, 2017, 8:04 PM), <https://www.politico.com/states/new-york/city-hall/story/2017/03/court-officers-union-tells-members-to-cooperate-100-percent-with-ice-110699> [<https://perma.cc/L58Q-BW68>].

48. FREEZING OUT JUSTICE, *supra* note 43, at 4.

49. Lilly Fowler, *County Prosecutors Are Sharing Information with ICE and Border Patrol to Facilitate Courthouse Arrests*, CROSSCUT (Oct. 16, 2019), <https://crosscut.com/2019/10/county-prosecutors-are-sharing-information-ice-and-border-patrol-facilitate-courthouse> [<https://perma.cc/BA4A-PK5D>]; *Justice Compromised: Immigration Arrests at Washington State Courthouses*, CTR. FOR HUM. RTS. UNIV. WASH. (Oct. 16, 2019), <https://jsis.washington.edu/humanrights/2019/10/16/ice-cbp-courthouse-arrests/> [<https://perma.cc/9WWT-SGH7>].

50. Fowler, *supra* note 49.

51. *Id.*

52. *Id.*

53. *Id.*

witnesses against their abusers.⁵⁴ ICE has said, through Directive 11072.1, that “family members or friends accompanying the target alien to court appearances or serving as a witness in a proceeding, will not be subject to civil immigration enforcement action, absent special circumstances.”⁵⁵ However, there is no explanation of what “special circumstances” means and how far it goes. It is questionable how limited this directive actually is considering that a DHS spokesman said the following:

Just because they’re a victim in a certain case does not mean there’s not something in their background that could cause them to be a removable alien Just because they’re a witness doesn’t mean they might not pose a security threat for other reasons.⁵⁶

Further, following an arrest in Brooklyn, New York, by ICE officers in plainclothes, ICE Spokeswoman Rachel Yong Yow justified courthouse arrests by claiming that “courthouse visitors are typically screened upon entry, making arrests inside such facilities far safer for everyone involved.”⁵⁷ The arrests of immigrants at courthouses have had a far-reaching chilling effect. In interviews conducted by the American Civil Liberties Union (ACLU), prosecutors and judges around the United States indicated that “courthouse arrests that occurred far away, in other states, were well-known to their local immigrant communities”⁵⁸ As a result, immigrant communities are increasingly wary of coming in contact with law enforcement. This means that, in situations of violence where one might otherwise call the police or pursue a criminal charge, noncitizens are not coming to court or calling the police in the first place.⁵⁹ Immigration enforcement at courthouses “greatly undermines the security of vulnerable communities and the fundamental right to equal protection under the law, shared by noncitizens and citizens.”⁶⁰ Not only does this create fear and confusion, but it also limits the “efficacy of the judiciary, law enforcement, survivors’ services, public defenders, and other core services available at courthouses.”⁶¹

In response to these chilling impacts and the resulting implications on judiciary efficacy, everyone from grassroots community groups to judges and congressional representatives have spoken out in opposition to courthouse arrests. Community

54. See Devlin Barrett, *DHS: Immigration Agents May Arrest Crime Victims, Witnesses at Courthouses*, WASH. POST (Apr. 4, 2017), https://www.washingtonpost.com/world/national-security/dhs-immigration-agents-may-arrest-crime-victims-witnesses-at-courthouses/2017/04/04/3956e6d8-196d-11e7-9887-1a5314b56a08_story.html [<https://perma.cc/6WTS-KWTW>].

55. U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 19.

56. Barrett, *supra* note 54.

57. Maya Rhodan, *Plainclothes Officers Arrested Immigrants at a Courthouse. Can They Do That?*, TIME (Sept. 18, 2017, 5:12 PM), <https://time.com/4946747/immigration-plainclothes-brooklyn-courthouse/> [<https://perma.cc/2X2S-CTXB>].

58. FREEZING OUT JUSTICE, *supra* note 43, at 2.

59. *Id.* at 3.

60. *Id.* at 1.

61. *Id.*

groups have held “Know Your Rights” trainings to inform immigrant communities of their rights in this current climate.⁶² Addressing the incident in New Haven, Connecticut, described above, United States Senator Richard Blumenthal stated that, “[c]ourthouses should be regarded as places to go where people can seek justice or be held accountable for violations of law.”⁶³ Senator Blumenthal contacted ICE directly to strongly urge them to leave, as initially requested of them by the Chief Court Administrator Patrick Carroll.⁶⁴ Across the country in Oregon, a similar incident involving plainclothes agents prompted United States Representatives Suzanne Bonamici and Earl Blumenauer to demand a federal investigation into the two agents.⁶⁵ The two representatives also sent a letter to the regional supervisor for ICE, calling for the agency to apologize to the noncitizen who was harassed and questioning the tactic of ICE agents not identifying themselves.⁶⁶

These congressional representatives are not alone. In December 2018, sixty-eight former state and federal judges signed on to a letter to urge ICE to halt arrests at courthouses.⁶⁷ By June 2017, the chief justices of the highest courts of California, Washington, Oregon, New Jersey, and Connecticut had asked the federal government to stop ICE’s courthouse arrests.⁶⁸ Prosecutors and public defenders alike have publicly condemned immigration enforcement actions in courthouses. In

62. See ICE OUT OF COURTS TOOLKIT, *supra* note 15.

63. Driscoll, *supra* note 32.

64. *Id.*

65. Everton Bailey Jr., *Oregon Lawmakers Demand Investigation, Apology over Mistaken ICE Stop*, OREGONIAN (Jan. 9, 2019), https://www.oregonlive.com/hillsboro/2017/09/oregon_lawmakers_demand_invest.html#incart_river_home_pop [https://perma.cc/B7SX-ZACE]; Ericka Cruz Guevarra, *Officials to Review Oregon ICE Arrest After Alleged Trespassing by Agents*, OPB (Oct. 20, 2017, 11:15 AM), <https://www.opb.org/news/article/oregon-ice-arrest-alleged-trespassing-agent/> [https://perma.cc/6AMS-HA7Z]; Mat dos Santos, *Federal Immigration Agents Caught on Video Racially Profiling Hillsboro Man*, ACLU OR. (Sept. 25, 2017, 4:45 PM), <https://aclu-or.org/en/news/federal-immigration-agents-caught-video-racially-profiling-hillsboro-man> [https://perma.cc/7TE8-GYV8].

66. See Bailey, *supra* note 65.

67. See Letter from Former U.S. State & Fed. JJ., to Ronald D. Vitiello, Acting Dir., U.S. Immigr. & Customs Enf’t (Dec. 12, 2018), <https://www.scribd.com/document/395488473/Letter-From-Former-Judges-Courthouse-Immigration-Arrests#fullscreen&fromembed> [https://perma.cc/D5T2-RKZ5].

68. See Letter from Tani G. Cantil-Sakauye, C.J., Cal. Sup. Ct., to Jeff Sessions, Att’y Gen., U.S. Dep’t of Just., and John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec. (Mar. 16, 2017), <http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses> [https://perma.cc/XSC3-TM6B]; Letter from Mary E. Fairhurst, C.J., Wash. Sup. Ct., to John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec. (Mar. 22, 2017), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf> [https://perma.cc/TTB6-DPGH]; Letter from Thomas A. Balmer, C.J., Or. Sup. Ct., to Jeff Sessions, Att’y Gen., U.S. Dep’t of Just., and John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec. (Apr. 6, 2017), http://media.oregonlive.com/portland_impact/other/CJ%20ltr%20to%20AG%20Sessions-Secy%20Kelly%20re%20ICE.pdf [https://perma.cc/7ZM9-6AXF]; Letter from Stuart Rabner, C.J., N.J. Sup. Ct., to John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec. (Apr. 19, 2017), <http://assets.documentcloud.org/documents/3673664/Letter-from-Chief-Justice-Rabner-to-Homeland.pdf> [https://perma.cc/PBC7-89WW]; Letter from Chase T. Rogers, C.J., Conn. Sup. Ct., to Jeff Sessions, Att’y Gen., U.S. Dep’t of Just., and John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec. (May 15, 2017).

April 2019, “[s]everal Massachusetts district attorneys filed a federal lawsuit . . . demanding a judge order ICE to stop enforcing the law at state courthouses, saying too many people are refusing to be witnesses or show up for cases because they fear being deported.”⁶⁹ And in late September of 2019, the New York State Attorney General, the Brooklyn District Attorney, and the Legal Aid Society came together in an unusual alliance to file two separate lawsuits aimed at blocking ICE from carrying out courthouse arrests.⁷⁰

Most of these resistance efforts are concerned with access to justice with respect to the prosecution of crimes, but the harsh impacts on criminal defendants are not discussed as often. Public defenders, however, have protested ICE courthouse arrests with a focus on the rights of criminal defendants. In November 2017, about 100 defense attorneys staged an impromptu protest outside a Brooklyn courthouse after federal authorities arrested a lawyer’s client.⁷¹ On February 8, 2018, more than 100 public defenders walked out of the Bronx Criminal Court in protest.⁷² And on February 28, 2018, a group of about 100 people, including public defenders as well as religious leaders and community members, gathered at the New Haven County Courthouse “to demonstrate against recent courthouse arrests and deportations in Connecticut.”⁷³ These advocates have reported seeing an increase in the number of defendants not appearing for their court dates. For example, one public defender from New York County reported that even after he negotiated the dismissal of all charges for an undocumented client (who had no other criminal record), his client declined to show up in fear of being arrested by ICE.⁷⁴ As Monterey County Deputy Public Defender Jeremy Dzubay describes, noncitizen defendants face an impossible dilemma: if they show up to court, they might get arrested, but if they decide not to show up because they might get arrested, a judge may issue a warrant for failing to appear.⁷⁵

This Note will focus on challenging ICE courthouse arrests through the lens of how these arrests impact criminal defendants’ rights.

69. Stephen Dinan, *Prosecutors Sue in Bid to Create Sanctuary Courthouses by Kicking out ICE Agents*, WASH. TIMES (Apr. 29, 2019), <https://www.washingtontimes.com/news/2019/apr/29/prosecutors-sue-kick-ice-out-courthouses/> [https://web.archive.org/web/20201216121710/https://www.washingtontimes.com/news/2019/apr/29/prosecutors-sue-kick-ice-out-courthouses/].

70. Mazin Sidahmed, *Prosecutors and Public Defenders File Lawsuits to Halt ICE Courthouse Arrests*, DOCUMENTED (Sept. 25, 2019, 4:47 PM), <https://documentedny.com/2019/09/25/new-york-state-brooklyn-da-and-legal-aid-society-file-lawsuits-to-halt-ices-courthouse-arrests/> [https://perma.cc/R7YX-HCDM].

71. See *Le*, *supra* note 30, at 304.

72. *Id.* at 296.

73. *Id.* at 304.

74. ICE OUT OF COURTS TOOLKIT, *supra* note 15.

75. Duan, *supra* note 1.

II. LEGAL CHALLENGE TO ICE COURTHOUSE ARRESTS UNDER THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL

In this Part, I first speak to the background of the Sixth Amendment right to a jury trial and when it applies. I then turn to look at whether deportation is a severe enough “penalty” to trigger the right to a jury trial. Finding that there could be a right to a jury trial, I next analyze the relationship between access to the courts and the right to a jury trial. I look to cases where fees prevented access to courts in a way that could infringe on the right to a jury trial. Lastly, I present that courthouse arrests, like fees, prevent meaningful access to the courts and therefore infringe on noncitizens’ right to a jury trial.

A. *The Right to a Jury Trial and When It Applies*

The Sixth Amendment enumerates a right to a jury trial: In all criminal prosecutions, the defendant is entitled to trial “by an impartial jury of the State and district wherein the crime shall have been committed.”⁷⁶ The text reflects the rationale that “[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”⁷⁷ The right to a jury trial was so significant to the founding of the United States that it was “the only right protected in both the original Constitution and the Bill of Rights.”⁷⁸ Recognizing that the right to a jury trial is “fundamental to the American scheme of justice,” the Supreme Court in 1968 incorporated the right to the states in *Duncan v. Louisiana*.⁷⁹ From the historical roots of the Constitution to more recent developments in jurisprudence, the right to a jury trial has been of great importance; this right has been described as the “spinal column of American democracy.”⁸⁰ Juries act “as a bulwark of liberty” and are especially important in the “prosecution and adjudication of criminal actions.”⁸¹ As recently as 2004, the Supreme Court emphasized the need “to give intelligible content” to the right, which exists as a “fundamental reservation of power in our constitutional structure.”⁸²

Although the “institution of criminal juries” was included in both Article III and the Sixth Amendment of the Constitution, this right has never been attached

76. U.S. CONST. amend. VI.

77. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

78. Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 857 (2014); *see also id.* at 850–51 (“In fact, the Framers of our Constitution found the institution of the jury so important that they made certain to preserve the jury through no less than four protections in the foundational document, making the jury the most frequently named safeguard of our freedom in the Constitution and its Amendments.”).

79. *Duncan*, 391 U.S. at 149.

80. *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting in part and concurring in part).

81. Ryan, *supra* note 78, at 856 (citing Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 378, 386 (1999)).

82. *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004).

to all criminal proceedings.⁸³ Going back to eighteenth-century England, certain “petty offenses” were regularly tried without a jury.⁸⁴ While petty offenses usually meant offenses with only minor punishments, sometimes offenses with more severe fines, and even corporal punishment, were tried in the absence of a jury as well.⁸⁵ In 1888, the Supreme Court in *Callan v. Wilson* held that the Framers implicitly preserved this distinction between petty and serious offenses and that the constitutional jury trial guarantee only applied to “offenses of a serious or atrocious character.”⁸⁶ In 1904, the Court reaffirmed this distinction and stated that the intent of the Framers was to exclude petty offenses from the constitutional requirement of a jury.⁸⁷ Therefore, the extension of the right to states in *Duncan* only covers the federal guarantees of a jury trial for “nonpetty” criminal offenses.

What qualifies as serious enough to be nonpetty differs across jurisdictions. The standard has often been determined based on the possible penalty in terms of the length of imprisonment.⁸⁸ At the federal level, recent cases have set six-months imprisonment as the “effective bright line” separating petty from serious offenses.⁸⁹ States vary widely, with some following the six-month standard and others interpreting petty more broadly. In California, for example, anyone charged with a misdemeanor or felony is entitled to a jury trial, regardless of possible punishment.⁹⁰

B. Deportation as a Penalty? Implications on the Right to a Jury Trial for Noncitizens

In assessing whether an offense is petty or not, lower courts have agreed that only authorized statutory penalties are to be taken into account and collateral consequences are not considered.⁹¹ However, most of the leading cases on this issue were decided before 1996 when the modern immigration enforcement regime was

83. T. Ward Frampton, Comment, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 198 (2012); see also *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937).

84. Frampton, *supra* note 83.

85. *Id.*

86. *Callan v. Wilson*, 127 U.S. 540, 549 (1888).

87. Frampton, *supra* note 83, at 199 n.78 (first citing *Schick v. United States*, 195 U.S. 65, 69–70 (1904); and then citing *Duncan v. Louisiana*, 391 U.S. 145, 160 (1967) (“There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.”)).

88. See *Baldwin v. New York*, 399 U.S. 66, 72–73 (1970) (“This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn -- on the basis of the possible penalty alone -- between offenses [which] are and [which] are not regarded as ‘serious’ for purposes of trial by jury.”).

89. Frampton, *supra* note 83, at 200; see also *id.* at 199 (quoting *Baldwin*, 399 U.S. at 69) (“[N]o offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”).

90. CAL. CONST. art. I, § 16.

91. See *United States v. Musser*, 873 F.2d 1513, 1516 (D.C. Cir. 1989); *United States v. LaValley*, 957 F.2d 1309 (6th Cir. 1992).

established.⁹² The 1996 laws defined and expanded the scope of deportable offenses and entangled the immigration system with the criminal system.⁹³ Prior to these laws, noncitizens did not face the same threat of deportation as a collateral consequence of criminal involvement. Now, however, even though the 1996 laws mean that noncitizens face a consequence as severe as deportation for some “petty offenses,” they still do not have the right to a jury trial when facing these charges. In recent years, this has changed as some states have begun to recognize deportation as a severe enough penalty to warrant the protections of a jury trial right. In December 2018, New York’s highest court found that noncitizens are entitled to a jury trial even when they are accused of misdemeanor crimes that carry sentences of six months or less.⁹⁴ Washington, D.C. had a similar ruling in 2018, holding “the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury.”⁹⁵ Therefore, in some jurisdictions—and hopefully soon in most jurisdictions—noncitizens have the right to a jury trial in any criminal proceeding where they may face deportation (in addition to any sentence-based standards).

C. Access to the Courts and The Right to a Jury Trial

Acknowledging that there exists a right to a jury trial for noncitizens in most cases, I turn to look at when that right is infringed. Many challenges that implicate the jury trial right rest on access to justice in terms of the fees and costs associated with choosing to go to trial. In defense of the criminal jury trial in 1999, Justice Scalia wrote that the right to a jury trial “has never been efficient; but it has always been *free*.”⁹⁶ The highest court of New Hampshire abolished criminal jury fees in 1979, holding that “a criminal defendant cannot be required to purchase a jury trial—even for so nominal a sum as eight dollars.”⁹⁷ In another more recent case

92. See generally Yalidy Matos, *How America’s 1996 Immigration Act Set the Stage for Increasingly Localized and Tough Enforcement*, SCHOLARS STRATEGY NETWORK (Jan. 9, 2018), <https://scholars.org/brief/how-americas-1996-immigration-act-set-stage-increasingly-localized-and-tough-enforcement> [<https://perma.cc/GSF2-HUB2>] (noting that the 1996 Illegal Immigration Reform and Immigrant Responsibility Act formed the legal basis of rigorous immigration enforcement); Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. ON MIGRATION & HUM. SEC. 192 (2018), <https://journals.sagepub.com/doi/pdf/10.1177/2331502418786718> [<https://perma.cc/FC6K-KAKG>] (tracing how the Trump administration’s harsh policies and immigration policy today is built on, and legally allowed by, the 1996 laws).

93. The “1996 laws” refer to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009, <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf> [<https://perma.cc/GU7J-ZN6R>], and the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, <https://www.congress.gov/104/plaws/publ132/PLAW-104publ132.pdf> [<https://perma.cc/XV9Z-2T36>].

94. *People v. Suazo*, 118 N.E.3d 168, 171 (N.Y. 2018).

95. *Bado v. United States*, 186 A.3d 1243, 1246–47 (D.C. 2018) (en banc).

96. *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (emphasis added).

97. *State v. Cushing*, 399 A.2d 297, 298 (N.H. 1979).

out of Iowa, thirteen anti-war protesters engaged in nonviolent civil disobedience were arrested and ultimately convicted by a jury for misdemeanor trespassing.⁹⁸ At sentencing, the district court charged each of the defendant protesters \$100 as a “jury fee,” which amounted to a total of \$1,300 for the “privilege of a single misdemeanor jury trial.”⁹⁹ While the defendants only challenged the fees under the cost recovery provisions of the Iowa Code and not based on the constitutionality, their attorney, Sally Frank, was vocal about the effect of fees on the trial choices of criminal defendants.¹⁰⁰ Frank noted that these jury taxes, along with other fees like public defender recoupment costs, prevent a lot of defendants from going to a jury trial, which is often critical.¹⁰¹ Frank emphasized that “if you want to talk about broader issues [beyond narrow factual innocence], it only makes sense to do it with a jury.”¹⁰² Still, while the importance of a jury trial is generally recognized and the coercive impact of fees is routinely challenged, constitutional arguments are more difficult to make and often rejected.¹⁰³

D. ICE Courthouse Arrests May Violate the Sixth Amendment Right to a Jury Trial

Like high jury fees, ICE courthouse arrests pose a similar coercive effect on noncitizens, pushing many noncitizens to waive their right to a jury trial. Here, instead of steep fees, it is the presence of ICE in and around courthouses that discourages noncitizens from choosing to go to trial. Advocates and lawyers have reported that noncitizens are increasingly avoiding going to court, compromising their ability to participate in their own defense against criminal charges in order to avoid the possibility of detention and deportation.¹⁰⁴ Leland Baxter-Neal, a staff lawyer with the ACLU of Oregon, shares that “there is a perception in communities across the state that if they go to court for any reason, they may be arrested by

98. *State v. Basinger*, 721 N.W.2d 783, 786–87 (Iowa 2006).

99. *Frampton*, *supra* note 83, at 213.

100. *Id.* at 214.

101. *Id.*

102. *Id.*

103. *See id.* at 212 n.165 (first citing *State v. Wright*, 13 Mo. 243, 244 (1850) (rejecting defendant’s argument that jury tax violated state constitutional guarantee “that right and justice ought to be administered without sale, denial or delay”); then citing *State v. Fertterer*, 841 P.2d 467, 473 (Mont. 1992) (“[T]he constitutionality of the foregoing statute [allowing courts to assign costs of jury service as part of sentence] has been upheld against claims of a violation of due process rights under the Constitution.”), *overruled on other grounds by* *State v. Gatts*, 928 P.2d 114 (Mont. 1996); then citing *Kincaid v. Commonwealth*, 105 S.E.2d 846, 848 (Va. 1958) (rejecting defendants argument “that the taxing of the costs of the jury is an invasion of the constitutional right of the accused to a trial by jury”); and then citing *State ex rel. Ring v. Boober*, 488 S.E.2d 66, 71 (W. Va. 1997) (rejecting the argument that potential jury fee “imposed an unreasonable burden upon the exercise of an indigent defendant’s constitutional right to a jury trial”).

104. *Justice Compromised: Immigration Arrests at Washington State Courthouses*, *supra* note 49.

ICE.”¹⁰⁵ Further, the fact, or perception, that court staff and prosecutors may be working with ICE adds to the fear noncitizen defendants feel. Not only does this increase the risk of encountering ICE when going to court, but this also creates uncertainty for noncitizen defendants who must interact with court staff and prosecutors during their criminal proceedings.

When these fears compound, the thought of choosing to go to trial and having to come back to court repeatedly seems unbearably daunting. As a result, noncitizen defendants are more likely to waive their jury trial right in order to resolve their case in the manner that limits future court appearances. Returning to the arrest described at the start of this Note, multiple ICE agents waited for a defendant and arrested him within minutes of him entering the courthouse.¹⁰⁶ As mentioned, this arrest did not come to the attention of the court administration until later in the day when there was media attention. For this defendant (even assuming he was released and physically able to return to court) and other noncitizen defendants who witnessed or heard of this incident, the idea of coming back to court several times to pursue a jury trial would be a high risk. Considering the court administration may be unaware of—or worse, helping facilitate—these ICE arrests, noncitizen defendants at this courthouse likely prioritized not having to return. In reality, this would mean noncitizen defendants are waiving their jury trial right and taking any available plea option. As mentioned above, in some cases noncitizen defendants are not even showing up for negotiated dismissals out of fear of ICE.

Beyond choosing to waive a jury trial, a noncitizen defendant’s right to a jury trial is also violated when ICE conducts an arrest before the completion of a criminal proceeding, making it nearly impossible for the noncitizen defendant to meaningfully continue with a trial. This is illustrated by an incident that occurred outside of Queens Criminal Court, where several ICE officers were caught on tape tackling and arresting a man who had an open criminal case.¹⁰⁷ After briefly being detained in New Jersey, the man was sent to a detention facility in Oklahoma.¹⁰⁸ The man was without an immigration attorney and was soon deported, but his criminal case remained open. Even though he was no longer in the country, a Queens judge issued a bench warrant for his arrest for his failure to appear.¹⁰⁹ Even for those who are not yet deported, many are still stuck in detention centers where ICE refuses to release them for their criminal hearings. In these cases, noncitizen

105. Jake Thomas, *Seeking to Curb ICE Courthouse Arrests in Oregon, Immigrant Advocates Push for New Court Rule*, E. OREGONIAN (Oct. 22, 2019), https://www.eastoregonian.com/news/state/seeking-to-curb-ice-courthouse-arrests-in-oregon-immigrant-advocates-push-for-new-court-rule/article_0319ce32-f4da-11e9-a39c-97d672ed0bc7.html [<https://perma.cc/9ZKL-E7LE>].

106. Duan, *supra* note 1.

107. IMMIGRANT DEF. PROJECT, *THE COURTHOUSE TRAP: HOW ICE OPERATIONS IMPACTED NEW YORK’S COURTS IN 2018* (2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf> [<https://perma.cc/23VR-LJQ2>].

108. *See id.*

109. *See id.*

defendants are unable to participate in their criminal case at all, let alone in front of a jury.

III. RECOMMENDATIONS

The constitutional challenge I have proposed suggests that ICE should be constitutionally barred from being present and conducting enforcement actions in courthouses. However, given that it may take decades for case law to reflect this, we must look to state and local policy to effect more immediate change.

A. Federal Policy

The Trump administration could have ended courthouse immigration arrests by designating courthouses as sensitive locations and instructing ICE officers to avoid enforcement in courthouses, as they do in hospitals, schools, and religious institutions. However, since the Trump administration had doubled down on justifying and encouraging these courthouse arrests, it was unlikely to expect this positive change at the federal level. On the contrary, ICE responded to these resistance efforts by skirting or outright violating the rules and making unlawful arrests anyway. Through Freedom of Information Act (FOIA) requests, the Immigrant Defense Project obtained some of ICE's internal communications in 2019.¹¹⁰ One email chain amongst ICE leaders in New York stated the following: "We can enter the courthouses to observe . . . [W]e are good to make the arrest outside the courthouse with or without a judicial warrant."¹¹¹ Not only is ICE refusing to follow rules, but they are also doing so with an increased show of force; ICE agents are "slamming people on the ground and against courthouse walls and fences, snatching people's phones, and arresting them without explanation."¹¹² And while the Trump administration refused to classify courthouses as sensitive locations, the same administration in June 2020 classified ICE as a "Security Agency," which blocks more information from public access and now limits what can be obtained through FOIA requests.¹¹³

On his first day in office, President Biden issued an executive order revising the "Civil Immigration Enforcement Policies and Priorities."¹¹⁴ As part of this

110. *Id.*

111. IMMIGRANT DEF. PROJECT, *supra* note 16, at 2 (quoting an email Re: Courthouse Arrests (Apr. 18, 2019, 14:43:22) that was obtained under FOIA in *Immigrant Def. Project v. U.S. Immigr. & Customs Enft.*, 1:19-CV-02520-PKC (S.D.N.Y. Mar. 21, 2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/311.pdf> [<https://perma.cc/C99Z-KU56>]).

112. *Id.* at 4.

113. Ken Klippenstein, *ICE Just Became Even Less Transparent*, NATION (July 2, 2020), <https://www.thenation.com/article/politics/ice-security-agency/> [<https://web.archive.org/web/20201220025556/https://www.thenation.com/article/politics/ice-security-agency/>].

114. Exec. Order No. 13,993, 86 Fed. Reg. 7,051 (Jan. 25, 2021), <https://www.govinfo.gov/content/pkg/DCPD-202100062/pdf/DCPD-202100062.pdf> [<https://perma.cc/JV7W-V9JY>]. Given

order, President Biden revoked Trump's Executive Order 13768,¹¹⁵ one of the first steps the Trump administration took to expand civil immigration enforcement.¹¹⁶ While this is a welcome change, and the Biden administration has generally indicated an intention to roll back harsh immigration enforcement policies, they have also stated this process will take time—and their early priorities do not seem to include courthouse arrests.¹¹⁷ Further, under the previous Obama and Biden administration, federal authorities continued to deputize state and local law enforcement officers to enforce federal immigration law through 287(g) agreements, and there was always a focus on “criminal aliens” or noncitizens with criminal involvement.¹¹⁸ Therefore, it is still questionable whether the Biden administration will take federal action anytime soon to end courthouse arrests, especially for criminal defendants. Given the state of federal policies, it is critical that the fight continues at the state and local level to ensure that courthouse doors remain open to all.

B. State and Local Actions To-Date

Some states and localities have started to take action to prevent ICE presence and enforcement activity at courthouses. New York's judiciary became the first to prohibit courthouse arrests without a judicial warrant when the State Unified Court

how recently the executive order was issued, it still remains unclear what its actual enforcement implications will be.

115. *Id.*

116. See *infra* note 9 and accompanying text; see also Hamed Aleaziz, *Biden Has Rescinded A Trump Order That Made Nearly Every Undocumented Immigrant A Priority For Arrest*, BUZZFEED NEWS (Jan. 20, 2021), <https://www.buzzfeednews.com/article/hamedaleaziz/biden-rescinds-trump-order-ice-undocumented-arrests> [<https://perma.cc/TML4-BLWF>].

117. See generally Camilo Montoya-Galvez, *Biden Committed to Limiting Deportations and Overturning Trump Border Policies, Advisers Say*, CBS NEWS (Dec. 22, 2020, 12:24 PM), <https://www.cbsnews.com/news/biden-limit-ice-deportations-trump-border-policies/> [<https://perma.cc/9ZM4-PW56>] (noting that the Biden administration's priorities for immigration policy include asylum adjudications, the “Remain in Mexico” program, DACA, the travel ban, civil detention, and restrictions on green cards and legal pathways to immigration). But see Franco Ordoñez, *On Immigration, Activists' Demands May Exceed Biden Realities*, NPR (Dec. 15, 2020, 8:45 PM), <https://www.npr.org/2020/12/13/944791054/on-immigration-activists-demands-may-exceed-biden-realities> [<https://perma.cc/67C4-HZR4>] (“Although Biden promised to reverse Trump's most restrictive immigration policies, he didn't include immigration among his top four priorities: the coronavirus pandemic, economic recovery, racial equity and climate change.”).

118. See Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1265–70 (2018), <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=2286&context=facscholar> [<https://perma.cc/S8EL-4X76>]; Press Release, Migration Pol'y Inst., ICE's 287(g) Immigration Enforcement Program Is Not Targeted Primarily at Serious Offenders, New MPI Study Finds (Jan. 31, 2011), <https://www.migrationpolicy.org/news/ices-287g-immigration-enforcement-program-not-targeted-primarily-serious-offenders-new-mpi> [<https://perma.cc/8MXS-6GD5>]; see also Serena Marshall, *Obama Has Deported More People than Any Other President*, ABC NEWS (Aug. 29, 2016, 11:05 AM), <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> [<https://perma.cc/4K4Z-9U8N>].

System (UCS) issued a directive in April 2019.¹¹⁹ The directive also required court security officers to file reports if they saw ICE officers observing court proceedings.¹²⁰ Then in May, New Jersey followed by issuing several procedural requirements to make judges and administrators aware of ICE's plans to arrest someone.¹²¹ While the New York directive was limited only to inside courthouses and the New Jersey directive did not go far enough to require judicial warrants at all, Oregon recently adopted a much broader rule. On November 14, 2019, Oregon's Chief Justice Martha Walters issued Uniform Trial Court Rule 3.190, a rule to prohibit civil immigration arrests inside *or near* courthouses without a judicial warrant.¹²² Municipal courts in Seattle, Washington, and Bernalillo County, New Mexico, have also updated their courthouse access policies to prohibit warrantless courthouse arrests in response to increased ICE activity. Bernalillo County's policy also goes further to prohibit noncourt law enforcement from "randomly interrogat[ing] individuals about their identity," based on the understanding that "the prospect of being questioned by ICE may be as much of a deterrent [for coming to court] as being arrested."¹²³ And in June 2019, in the first judicial decision of its kind, Judge Indira Talwani of the U.S. District Court for the District of Massachusetts issued a preliminary injunction prohibiting ICE from making courthouse arrests.¹²⁴ This injunction came after a group of advocates (including district attorneys) sued ICE and argued that "its courthouse activity both oversteps the agency's statutory authority and violates constitutional protections of individual access to courts and states' authority over their justice systems."¹²⁵

Unfortunately, in September 2020, the First Circuit lifted this injunction. In doing so, the First Circuit panel noted that "there was very little evidence that the common-law rule applied to arrests by the government as opposed to private

119. Douglas Keith, *States Push Back Against ICE Courthouse Arrests*, BRENNAN CTR. FOR JUST. (Nov. 22, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/states-push-back-against-ice-courthouse-arrests> [<https://perma.cc/7Q3T-4DVT>]; see also OFF. OF THE CHIEF ADMIN. JUDGE, N.Y. STATE UNIFIED CT. SYS., POLICY AND PROTOCOL GOVERNING ACTIVITIES IN COURTHOUSES BY LAW ENFORCEMENT AGENCIES (2017), https://www.ncsc.org/__data/assets/pdf_file/0023/14189/nys-courthouse-activity-by-leas.pdf [<https://perma.cc/TRX5-UN5D>] ("Absent leave of the court under extraordinary circumstances (e.g., extradition orders), no law enforcement action may be taken by a law enforcement agency in a courtroom.").

120. Keith, *supra* note 119.

121. *Id.*

122. Order Approving Out-of-Cycle Adoption of New Uniform Trial Court Rule 3.190, Order No. 19-095 (Nov. 14, 2019), https://www.courts.oregon.gov/rules/UTCR/CJO_2019-095.pdf [<https://perma.cc/4G3S-S67E>]; see also Conrad Wilson, *Oregon Supreme Court Justice Bars Warrantless ICE Courthouse Arrests*, OPB (Nov. 14, 2019, 5:35 PM), <https://www.opb.org/news/article/ice-courthouse-arrest-ban-oregon/> [<https://web.archive.org/web/2020112021055/https://www.opb.org/news/article/ice-courthouse-arrest-ban-oregon/>].

123. Keith, *supra* note 119 (quoting ROBERT L. PADILLA, STATE OF N.M. BERNALILLO CNTY. METRO. CT., COURTHOUSE ACCESS POLICY (2018), <https://www.kob.com/kobtvimages/repository/cs/files/Courthouse%20Access%20Policy.pdf> [<https://perma.cc/TM2R-RNRL>]).

124. *Id.*

125. *Id.*

parties.”¹²⁶ Judge Bruce Selya, writing for the panel, said that this was not within the province of the court: “[T]hat question lies within the domain of the politically accountable branches of the federal and state governments.”¹²⁷ Suffolk County District Attorney Rachael Rollins expressed her intent to continue fighting against courthouse arrests.¹²⁸ On November 16, 2020, U.S. District Judge Dana Sabraw granted a temporary restraining order barring immigration agents from arresting noncitizens in federal courthouses in the Southern District of California.¹²⁹ Judge Sabraw addressed the common law privilege and found “the essence of the privilege [against courthouse arrests] is the sanctity of the court.”¹³⁰

Outside of courts, legislation has been another avenue through which ICE courthouse enforcement has been curbed. In October 2019, California enacted a law requiring judicial warrants for civil immigration arrests.¹³¹ The law also gives judicial officers the power to “prohibit activities that threaten access to state courthouses and court proceedings, and to prohibit interruption of judicial administration, including protecting the privilege from civil arrest at courthouses and court proceedings.”¹³² In Washington, advocates successfully petitioned Washington courts to adopt a new rule that would prohibit arrests at courthouses without a warrant¹³³ and amend the Rules of Professional Conduct to prohibit prosecutors from collaborating with ICE and CBP.¹³⁴ Lastly, the New York State Legislature in July 2020 passed the “Protect Our Courts Act,” which bars civil

126. Thomas F. Harrison, *First Circuit Lifts Block of ICE Arrests at Massachusetts Courthouses*, COURTHOUSE NEWS SERV. (Sept. 1, 2020), <https://www.courthousenews.com/first-circuit-lifts-block-of-ice-arrests-at-massachusetts-courthouses/> [<https://perma.cc/X8BG-G4Q9>].

127. Nate Raymond, *U.S. Appeals Court Overturns Bar on Immigration Arrests at Massachusetts Courts*, REUTERS (Sept. 1, 2020, 1:32 PM), <https://www.reuters.com/article/us-usa-immigration-massachusetts/u-s-appeals-court-overturns-bar-on-immigration-arrests-at-massachusetts-courts-idUSKBN25S66B> [<https://perma.cc/TE2U-WFJB>].

128. *Id.*

129. Order Granting Motion for Temporary Restraining Order, *Velazquez-Hernandez v. U.S. Immigr. & Customs Enft*, No. 3:20-cv-2060-DMS-KSC (S.D. Cal. Nov. 16, 2020), <https://www.courthousenews.com/wp-content/uploads/2020/11/ICECourthouseArrests-TRO.pdf> [<https://perma.cc/Q2R7-GGJX>].

130. *Id.* at 14.

131. CAL. CIV. CODE § 43.54 (West 2020).

132. CAL. CIV. PROC. CODE § 177 (West 2020).

133. WASH. CTS., GENERAL RULE 38, OPEN ACCESS TO COURTS (2020), https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_38_00_00.pdf [<https://perma.cc/Q6CJ-B7LF>]; *see also GR 38 – New General Rule*, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=2718 [<https://perma.cc/LX6E-C8YK>] (last visited Jan. 24, 2021).

134. In the Matter of the Proposed Amendment to RPC 4.4 Comment [4], Order No. 25700-A-1289 (Apr. 1, 2020), https://wsba.org/docs/default-source/legal-community/committees/court-rules/25700-a-1289.pdf?sfvrsn=137f0ef1_1 [<https://perma.cc/J4E4-6C9G>]; *see also RPC 4.4 - Respect for Rights of Third Person*, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=2721 [<https://perma.cc/TS5L-8D9N>] (last visited Jan. 24, 2020); Fowler, *supra* note 49.

arrests by ICE at or near courthouses unless they have a judicial warrant.¹³⁵ New York Governor Andrew Cuomo signed the Act on December 15, 2020.¹³⁶

C. Additional Recommendations for State and Local Action

While the states mentioned above have started taking action and the more recent efforts are increasingly more restrictive on ICE, I propose three additional recommendations to advocate for change. First, as only a handful of states have adopted rules or directives requiring judicial warrants, more states should adopt similar rules. Further, these rules should not be limited only to within courthouses, but instead should encompass the areas around courthouses, including parking lots and public transportation stations. As described above, ICE has often waited right outside of courthouses or in parking lots to arrest noncitizens. Therefore, to be most effective in providing noncitizens and immigrant communities with a sense of security when attending court, the rules must extend to the areas outside of the courthouse. As for probation, probation offices are often located inside courthouses, so any rules covering courthouses must include those probation offices. To be safe, I suggest that these rules should be explicit in extending to probation. This ensures probation offices outside of physical courthouses are also protected. More broadly, even outside of the realm of the courthouse, these rules should seek to prohibit ICE arrests as part of (or under the ruse of) probation home visits.

Second, court administrators and district attorneys should issue guidance directing court personnel and prosecutors, respectively, not to facilitate federal immigration enforcement activities in the course of their employment. The guidance should specifically include a prohibition on stopping, questioning, or interrogating an individual based on actual or suspected immigration or citizenship status or an immigration detainee.

Lastly, in recognition of the unique fear of coming to court that noncitizen defendants face, judges should expand the circumstances under which defendants can be excused from court. This would allow noncitizen defendants to feel more comfortable with choosing, or continuing, to go forward with a trial. This would

135. See Press Release, Rachel Cohen, Immigrant Def. Project, and Elianne Ramos, LatinoJustice, Immigrant Defense Project Celebrates the Passage of the Protect Our Courts Act (July 22, 2020), <https://www.latinjustice.org/en/news/immigrant-defense-project-celebrates-passage-protect-our-courts-act> [<https://perma.cc/84BD-Q4WG>]; Douglas Keith, *New York Passes Ban on Immigration Arrests at Courthouses*, BRENNAN CTR. FOR JUST. (Dec. 15, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-york-passes-ban-immigration-arrests-courthouses> [<https://perma.cc/W93H-7L6X>]. For more information on the bill, see IMMIGRANT DEF. PROJECT, PROTECT OUR COURTS ACT FAQ, <https://www.immigrantdefenseproject.org/wp-content/uploads/Protect-Our-Courts-FAQ-061118.pdf> [<https://perma.cc/S6J3-6M9Y>] (last visited Jan. 15, 2021).

136. Press Release, Andrew M. Cuomo, Governor, New York State, Governor Cuomo Signs the ‘Protect Our Courts’ Act (Dec. 15, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-protect-our-courts-act> [<https://perma.cc/T72R-YBYR>].

not be unprecedented; in response to the COVID-19 pandemic, many courts across the country have already shifted to holding remote or virtual proceedings.¹³⁷ However, this recommendation is more of a band-aid than a meaningful solution—because it assumes ICE will continue to make courthouse arrests and noncitizens must remain cautious when going to court—and may conflict with the other rights defendants have to be present at trial and confront their accusers. Still, it may be a valuable short-term solution, especially in localities that are less likely to pass broader restrictions against ICE.

CONCLUSION

In the current era of immigration enforcement, ICE's courthouse arrests are pervasive and dangerous. One particularly chilling effect of these courthouse arrests is on noncitizen defendants, who are increasingly not appearing in court out of fear of ICE or because they have been detained by ICE. As a result, noncitizen defendants are losing their constitutional right to a jury trial. Therefore, it is crucial that states and localities, including court administrators and judges, take further action against ICE arrests to ensure noncitizen defendants have some semblance of their right to a jury trial.

137. See generally Douglas Keith & Alicia Bannon, *Promise and Peril as Courts Go Virtual Amid Covid-19*, BRENNAN CTR. FOR JUST. (May 29, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/promise-and-peril-courts-go-virtual-amid-covid-19> [<https://perma.cc/JP3C-FZ8C>]; *Courts and Classes Are Closed, but Judges Make Virtual House Calls During COVID-19 Crisis*, U.S. CTS. (May 14, 2020), <https://www.uscourts.gov/news/2020/05/14/courts-and-classes-are-closed-judges-make-virtual-house-calls-during-covid-19-crisis> [<https://perma.cc/95WE-3X97>].