

A Common-Law Privilege To Protect State and Local Courts During the Crimmigration Crisis

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ABSTRACT. Under the Trump presidency, Immigration and Customs Enforcement (ICE) officers have been making immigration arrests in state and local courthouses. This practice has sparked controversy. Officials around the country, including the highest judges of five states, have asked ICE to stop the arrests. ICE's refusal to do so raises the question: can anything more be done to stop these courthouse immigration arrests?

A common-law doctrine, the "privilege from arrest," provides an affirmative answer. After locating courthouse immigration arrests as the latest front in a decades-long federalism battle born of the entanglement of federal immigration enforcement with local criminal systems, this Essay examines treatises and judicial decisions addressing the privilege from arrest as it existed from the fifteenth to the early twentieth century. This examination reveals that the privilege had two distinct strands, one protecting persons coming to and from their business with the courts, and the other protecting the place of the court and its immediate vicinity.

Although the privilege is firmly entrenched in both English and American jurisprudence, the privilege receded from the body of modern law as the practice of commencing civil litigation with an arrest fell by the wayside. However, the recent courthouse arrests make this privilege newly relevant. Indeed, there are several compelling reasons to apply the common-law privilege from arrest to immigration courthouse arrests. First, immigration arrests are civil in nature, and civil arrests were the chief focus of the privilege. Second, the policy rationales underlying the common-law privilege—facilitating administration of justice and safeguarding the dignity and authority of the court—are equally applicable to immigration courthouse arrests. Third, the federal courts have a shared interest with state and local courts in enforcing the privilege to advance those policy rationales.

This deeply entrenched common-law privilege demonstrates that local courts have legal authority to regulate courthouse immigration arrests and would be standing on firmly recognized policy grounds if they did so.

INTRODUCTION

Since the Trump Administration promised to “take the shackles off” immigration enforcement officers,¹ arrests in state and local courthouses around the country have sparked controversy. In February 2017, the Meyer Law Office, an immigration law firm, released a video filmed in a Denver courthouse that depicted Immigration and Customs Enforcement (ICE) officers admitting they were in the courthouse to make an immigration arrest.² The video, viewed over 17,000 times on YouTube,³ increased awareness of the issue of courthouse arrests and reportedly surprised local officials who were unaware of ICE’s practice.⁴

In April 2017, top Denver officials including the Mayor, City Attorney, and all members of the City Council, sent a letter to the local ICE office.⁵ Citing the “recent media accounts” of courthouse arrests,⁶ the letter asked ICE to “consider courthouses sensitive locations” and “follow [its] directive . . . that par-

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1. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, PRESS BRIEFING BY PRESS SECRETARY SEAN SPICER (Feb. 21, 2017), <http://www.whitehouse.gov/the-press-office/2017/02/21/press-briefing-press-secretary-sean-spicer-2212017-13> [<http://perma.cc/G89C-GJFF>].
 2. Erica Meltzer, *A video Shows ICE Agents Waiting in a Denver Courthouse Hallway. Here’s Why That’s Controversial*, DENVERITE (Feb. 23, 2017), <http://www.denverite.com/ice-agent-s-denver-courthouse-hallway-video-30231> [<http://perma.cc/3SGW-UCH4>]; Chris Walker, *ICE Agents Are Infiltrating Denver’s Courts, and There’s a Video to Prove It*, WESTWORD (Feb. 24, 2017), <http://www.westword.com/news/ice-agents-are-infiltrating-denvers-courts-and-theres-a-video-to-prove-it-8826897> [<http://perma.cc/BVM3-86U6>].
 3. *ICE in Court*, YOUTUBE (February 23, 2017), <http://www.youtube.com/watch?v=35YUQbq5uBo> (reporting 17,521 views on October 9, 2017).
 4. Meltzer, *supra* note 2 (noting that the issue of courthouse arrests had come up at a February forum, where the City Attorney reported she “suspect[ed] there might be some instances” of courthouse arrests but that she was unable to confirm the practice, and reported that the presiding county judge was also unaware of the practice); Walker, *supra* note 2 (reporting earlier February forum at which a Deputy City Attorney responded affirmatively when asked if it was “safe to enter courthouses without risking a run-in with ICE”). The day after the video was publicized, the Denver City Attorney reported that four domestic violence cases would be “dropped as victims fear ICE officers will arrest and deport them.” Mark Belcher, *Denver Prosecutor: ICE Agents in Courthouses Compromising Integrity of Domestic Violence Cases*, DENVER CHANNEL (Feb. 24, 2017), <http://www.thedenverchannel.com/news/local-news/denver-prosecutor-ice-agents-in-courthouses-compromising-integrity-of-domestic-violence-cases> [<http://perma.cc/B2LL-WDTQ>].
 5. Letter from Michael Hancock, Mayor of Denver, to Jeffrey D. Lynch, Acting Field Office Director, U.S. Immigration and Customs Enf’t (Apr. 6, 2017), <http://www.denverpost.com/2017/04/06/denver-ice-agents-courthouse-school-raids> [<http://perma.cc/WB2C-FT2V>].
 6. *Id.* at 1. The letter also “acknowledged” that ICE previously used Denver courthouses “as staging areas for enforcement activities”—a fact that went unmentioned in either of the community forums at which courthouse arrests were publicly discussed. *Id.* at 2.

ticular care should be given to organizations assisting victims of crime.”⁷ For over six weeks, ICE did not respond while continuing courthouse arrests,⁸ two of which were captured on video.⁹

In late May 2017, ICE finally responded to the Denver officials’ letter, assuring the Mayor that ICE would “continue to be respectful of, and work closely with, the courts.”¹⁰ But following shortly on these assurances was the suggestion that ICE’s courthouse arrests might be retaliation for Denver’s policy of not detaining suspected immigration violators at ICE’s request¹¹ – ICE’s letter described “state and local policies that hinder [ICE’s] efforts” as among the “challenges to effective enforcement” causing ICE to “continually improve [its] operations.”¹² Taken in its entirety, the letter made clear there would be no actual change to ICE’s practice of courthouse arrests.¹³

Similar stories have unfolded around the country.¹⁴ By June 2017, the chief justices of the highest courts of California,¹⁵ Washington,¹⁶ Oregon,¹⁷ New Jer-

7. *Id.* at 2. The references to “sensitive locations” and the “directive” was to the Department of Homeland Security’s (DHS) “sensitive locations policy,” which generally precludes ICE enforcement at schools, hospitals, “institutions of worship,” “public religious ceremon[ies]” and public marches. Courthouses are not specifically mentioned in the policy, though the list is non-exhaustive. Memorandum from John Morton, Director, Dep’t of Homeland Sec., “Enforcement Actions at or Focused on Sensitive Locations” (Oct. 24, 2011), <http://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> [<http://perma.cc/G5KH-7R25>] [hereinafter DHS Sensitive Locations Policy].

8. See Chris Walker, *ICE Courthouse Busts Ten Times Higher Than City Knew*, WESTWORD (Sept. 19, 2017), <http://www.westword.com/news/immigration-agents-breaking-protocol-during-courthouse-arrests-in-denver-9499512> [<http://perma.cc/7LZL-LUK8>] (releasing records documenting six arrests at the Denver County Court from April 20 through May 8, 2017).

9. Erica Meltzer, *New Videos Show ICE Arresting Immigrants at Denver Courthouse, despite local leaders’ requests*, DENVERITE (May 9, 2017), <http://www.denverite.com/new-videos-show-ice-arresting-immigrants-denver-county-court-something-local-officials-asked-not-35314> [<http://perma.cc/3RNN-E5GL>].

10. Letter from Matthew T. Albence, Exec. Assoc. Dir., Immigration and Customs Enf’t, to Michael B. Hancock, Mayor, City of Denver (May 25, 2017) [hereinafter Albence Letter], available at <http://www.denverpost.com/2017/06/08/ice-denver-courthouse-arrests-will-continue> [<http://perma.cc/H43L-PRUJ>]; but see Meltzer, *supra* note 2 (reporting that the presiding judge was unaware of courthouse arrests by ICE officers).

11. See Memorandum from Gary Wilson, Sheriff, Denver City and County, “48-Hour ICE Holds” (Apr. 29, 2014), http://www.ilrc.org/sites/default/files/resources/denver_county.pdf. [<http://perma.cc/7G72-V5X2>]; see also *infra* notes 41-43 and accompanying text (describing immigration “detainers”).

12. Albence Letter, *supra* note 10, at 2.

13. *Id.*

14. See, e.g., Maria Cramer, *ICE Courthouse Arrests Worry Attorneys, Prosecutors*, BOS. GLOBE (June 16, 2017), <http://www.bostonglobe.com/metro/2017/06/15/ice-arrests-and-around>

sey,¹⁸ and Connecticut¹⁹ had asked the federal government to stop ICE’s court-
house arrests.²⁰ Meanwhile, Democrats in Congress introduced bills to include
courthouses as “sensitive locations”²¹ to prevent ICE enforcement actions.²²
Nevertheless, federal officials showed no sign of stopping the courthouse ar-

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- local-courthouses-worry-lawyers-prosecutors/xxFH5vVJnMeggQaoNMi8gI/story.html
[<http://perma.cc/NK9P-9BSJ>]; Aaron Holmes, *House Democrats Seek Answers After ICE Agents Arrest Possible Victim of Human Trafficking*, N.Y. DAILY NEWS (July 14, 2017), <http://www.nydailynews.com/news/politics/dems-seek-answers-ice-arrests-human-trafficking-victim-article-1.3326930> [<http://perma.cc/L3DJ-XAHC>].
15. Letter from Tani G. Cantil-Sakauye, Chief Justice, Cal. Supreme Court, to Jeff Sessions, U.S. Attorney Gen. (Mar. 16, 2017) [hereinafter Cantil-Sakauye Letter], <http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses> [<http://perma.cc/6YXM-PLRT>].
 16. Letter from Mary E. Fairhurst, Chief Justice, Wash. Supreme Court, to John F. Kelly, Secretary, Dep’t of Homeland Sec. (Mar. 22, 2017) [hereinafter Fairhurst Letter], <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf> [<http://perma.cc/2Y7Q-BP9E>].
 17. Letter from Thomas A. Balmer, Chief Justice., Or. Supreme Court, to Jeff Sessions, Att’y Gen., & John F. Kelly, Sec’y, Dep’t of Homeland Sec. (Apr. 6, 2017) [hereinafter Balmer Letter], http://media.oregonlive.com/portland_impact/other/CJ%20ltr%20to%20AG%20Sessions-Secy%20Kelly%20re%20ICE.pdf [<http://perma.cc/7EE6-JTB2>].
 18. Letter from Stuart Rabner, Chief Justice, Supreme Court of N.J., to John F. Kelly, Sec’y, Dep’t of Homeland Sec., (Apr. 19, 2017), <http://assets.documentcloud.org/documents/3673664/Letter-from-Chief-Justice-Rabner-to-Homeland.pdf> [<http://perma.cc/ZLT5-DPDM>] [hereinafter Rabner Letter].
 19. Letter from Chase T. Rogers, Chief Justice., Conn. Supreme Court, to Jeff Sessions, Att’y Gen., & John F. Kelly, Sec’y, Dep’t of Homeland Sec. (May 15, 2017) (on file with author) [hereinafter Rogers Letter].
 20. Advocates in other states urged their courts to take action to stop ICE’s courthouse arrests. *E.g.*, Matthew Chayes, *Ban ICE Arrests of Immigrants at New York Courthouses*, *Advocates Say*, NEWSDAY (June 22, 2017, 8:46 PM), <http://www.newsday.com/news/new-york/advocates-ban-ice-arrests-of-immigrants-at-new-york-courthouses-1.13757452> [<http://perma.cc/Y8UX-9RAZ>]; Letter from Ivan Espinoza-Madrigal, Exec. Dir., Lawyers’ Comm. for Civil Rights and Econ. Justice, to Ralph D. Gants, Chief Justice, Mass. Supreme Judicial Court, et al. (June 16, 2017), <http://lawyerscom.org/wp-content/uploads/2017/06/Letter-Regarding-ICE-in-Courthouses.pdf> [<http://perma.cc/4Y5H-AY8P>].
 21. See DHS Sensitive Locations Policy, *supra* note 7.
 22. Protecting Sensitive Locations Act, S. 845 § 2, 115th Cong. (2017) (modifying 8 U.S.C. § 1357(i)(1)(E) by defining “sensitive location” to include the area within one thousand feet of “any Federal, State, or local courthouse, including the office of an individual’s legal counsel or representative, and a probation, parole, or supervised release office”); Protecting Sensitive Locations Act, H.R. 1815 (2017) (defining “sensitive location” to include the area within one thousand feet of any “Federal, State, or local courthouse, including the office of an individual’s legal counsel or representative, and a probation office”).

rests.²³ On October 17, 2017, Acting ICE Director Thomas Homan defended ICE’s courthouse arrests, stating, “I won’t apologize for arresting people in courthouses. We’re going to continue to do that.”²⁴

This Essay examines the current impasse over courthouse immigration arrests. Part I briefly describes the decades-long “cimmigration” crisis. Part II contextualizes courthouse arrests as the latest front in the federalism battle fueled by federal efforts to co-opt local criminal justice systems to serve the immigration enforcement mission. Part III examines a longstanding common-law doctrine establishing a privilege against courthouse arrests, and discerns two strands of this privilege. The first strand protects persons coming to and from the courts, while the second protects the place of a court and its environs. Part IV contends that this common-law privilege empowers states and localities to break the current impasse for three main reasons. First, courthouse immigration arrests fall within the privilege’s core concern with civil arrests. Second, they raise many of the same policy concerns—facilitating administration of justice and safeguarding the dignity and authority of the court—underlying the rationale for the privilege. And finally, case law indicates that federal courts will likely respect the privilege of state and local courts even in a federalism contest triggered by federal arrests.

I. THE CRIMMIGRATION CRISIS AND THE FEDERALISM BATTLE IT CREATED

In 2006, Juliet Stumpf described a “cimmigration crisis” in which the merger of criminal law and immigration law “brings to bear only the harshest elements of each area of law,” resulting in “an ever-expanding population of the

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23. See, e.g., Letter from Jefferson B. Sessions III, Att’y Gen., & John F. Kelly, Sec’y, Dep’t of Homeland Sec., to Tani G. Cantil-Sakauye, Chief Justice, Cal. Supreme Court (Mar. 29, 2017), <http://assets.documentcloud.org/documents/3533530/Attorney-General-and-Homeland-Security-Secretary.pdf> [http://perma.cc/JN7H-7NLE] [hereinafter Sessions Letter]; Matt Katz, *Defying N.J.’s Top Judge, ICE Continues Courthouse Arrests*, NJ.COM (May 5, 2017, 4:36 PM), http://www.nj.com/news/index.ssf/2017/05/defying_njs_top_judge_ice_continues_courthouse_arr.html [http://perma.cc/3PMY-EHQ6]. After the Attorney General and DHS Secretary wrote to the California Chief Justice indicating they would not change their practice, California prosecutors wrote in support of the Chief Justice, asking General Sessions and DHS Secretary Kelly to reconsider. Letter from Mike Feuer, L.A. City Att’y, et al., to Jeffrey Sessions, Att’y Gen., & John Kelly, Sec’y, Dep’t of Homeland Sec. (Apr. 4, 2017), <http://freepdfhosting.com/b3da7bbbf5.pdf> [http://perma.cc/J9FM-9TNM].
24. Thomas Homan, Acting Dir., Immigration & Customs Enf’t, Keynote Address at the Heritage Foundation: Enforcing U.S. Immigration Laws: A Top Priority for the Trump Administration, at 1:10:05 (Oct. 17, 2017), <http://www.c-span.org/video/?435827-1/acting-ice-director-discusses-immigration-enforcement> [http://perma.cc/94QE-SRZ7].

excluded and alienated.”²⁵ The crisis has intensified since the 1980s, making the record deportation numbers Stumpf cited²⁶ seem modest in comparison with the 2.7 million deportations under the Obama Administration²⁷ – more than all twentieth-century administrations combined.²⁸ And Donald Trump, in his presidential campaign, promised even more intense enforcement.²⁹

One dimension of the “cimmigration” regime has been an enduring federalism battle resulting from increasing downward pressure from the federal government on state and local criminal justice systems to cooperate with and participate in immigration enforcement. Courthouse immigration arrests are some of the more recent fault lines broken open by this downward pressure.

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25. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 378 (2006). Stumpf saw a convergence in the substance, enforcement mechanisms, and procedural regimes of criminal and immigration law. *See id.* at 379-92; *see also* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137 (2009) (describing the regulation of migration through criminal proceedings and the subsequent “importation of the relaxed procedural norms of civil immigration proceedings into the criminal realm”); César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 B.Y.U. L. REV. 1457, 1459 (arguing that “[c]rimmigration law . . . developed in the closing decades of the twentieth century due to a shift in the perception of criminal law’s proper place in society combined with a reinvigorated fear of noncitizens that occurred in the aftermath of the civil rights movement”); Yolanda Vázquez, *Constructing Cimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 599 (2015) (analyzing “the way in which cimmigration restructures the relationship between Latinos and dominant society to ensure their marginalized status”).
 26. Stumpf, *supra* note 25, at 372 (noting almost 200,000 deportations in 2004).
 27. César Cuauhtémoc García Hernández, *Removals & Returns, 1892-2015*, CRIMMIGRATION (Feb. 16, 2017, 4:00 AM), <http://cimmigration.com/2017/02/16/removals-returns-1892-2015> [<http://perma.cc/RXP5-FRJB>]. Every year the Obama Administration posted between 135% and 180% of the 2004 number of removals. *Id.*
 28. Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), <http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> [<http://perma.cc/U2PH-5D9S>]; *see also* Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 247 (2017) (“By every measure, immigration enforcement reached its historic peak in the Obama years.”).
 29. Trump promised on his campaign to deport all undocumented immigrants. Alexandra Jaffe, *Donald Trump: Undocumented Immigrants ‘Have to Go,’* MSNBC (Aug. 15, 2015, 10:23 PM), <http://www.msnbc.com/msnbc/donald-trump-undocumented-immigrants-have-go> [<http://perma.cc/SJ2M-X5HL>]. In his “immigration” speech in Phoenix in August 2016, Trump promised to deport “at least 2 million . . . criminal aliens” as well as “gang members, security threats, visa overstays, public charges—that is, those relying on public welfare or straining the safety net, along with millions of recent illegal arrivals and overstays who’ve come here under the current administration.” Donald Trump, *Speech on Immigration* (Aug. 31, 2016), in Domenico Montanaro et al., *Fact Check: Donald Trump’s Speech on Immigration*, NPR (Aug. 31, 2016, 9:44 PM ET), <http://www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration> [<http://perma.cc/68P6-YQEW>].

There have been no reports of immigration arrests in *federal* courthouses (and no outcry from federal judges), for the simple reason that federal immigration officials can count on the cooperation and support of federal criminal justice agencies like the U.S. Marshals Service and the Bureau of Prisons.³⁰ The absence of such cooperation on the state and local level was explicitly cited by ICE as a reason for sending officers to make arrests in state and local courthouses.³¹

Historically, the federal government increased pressure on local governments slowly at first. In 1996, Congress passed legislation that simply *invited* local criminal justice agencies to enter into “287(g) agreements” that would allow local officers to enforce immigration law.³² After 9/11, however, the federal government opined that local law enforcement had “inherent authority” to enforce immigration laws³³ and encouraged the activation of this dormant authority.³⁴ The ever-increasing identification of noncitizens with criminals observed by Stumpf and others³⁵ worked to transform immigration into a

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30. ICE can count on these agencies to provide notification of the upcoming release of suspected immigration violators, for example, and to detain suspected immigration violators for transfer to ICE when the law permits it. *See, e.g.*, Letter from Peter J. Kadzik, Asst. Att’y Gen. to Rep. John A. Culberson, Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations (Feb. 23, 2016), http://culberson.house.gov/uploadedfiles/doj_february_23_letter.pdf [<http://perma.cc/S9TA-2QX6>] (describing new procedures giving ICE the “right of first refusal” over inmates being released from Bureau of Prisons custody).
31. Albence Letter, *supra* note 10, at 2 (suggesting courthouse arrests were response to local policies that “hinder” immigration enforcement); Sessions Letter, *supra* note 18, at 2 (same).
32. 287(g) agreements are named after Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g) (2012), enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 133, 110 Stat. 3009, 563. Section 287(g) allows states or localities to enter into written agreements whereby local officers can perform immigration enforcement functions. *Id.*
33. Memorandum from Jay S. Bybee, Assistant Att’y Gen., to the Att’y Gen. (Apr. 3, 2002), http://perma-archives.org/warc/AXV3-V8FV/http://www.aclu.org/sites/default/files/field_document/ACF27DA.pdf [<http://perma.cc/4DF6-PVDH>].
34. *See* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1084-88 (2004) (describing the “federal effort to enlist, or even conscript, state and local police in routine immigration enforcement”).
35. *See* Stumpf, *supra* note 25, at 419 (2006) (noting that “aliens become synonymous with criminals”); *see also* Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 598 (2016) (observing that crimmigration “requires the constant production of populations who can be labeled ‘criminal aliens’” and that “this production of ‘criminal aliens’ occurs along lines of race, class, and other vectors of social vulnerability”); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1839-43 (2007) (describing the construction of immigrants as criminals and perpetuation of “images of migrant criminality”); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1458 (describing how the “emblems of

criminal problem, and therefore a problem appropriately solved by state and local police.³⁶ The “inherent authority” argument, though, was susceptible to challenge based on principles of federalism,³⁷ and was ultimately discredited in the Supreme Court’s 2012 decision striking down portions of Arizona’s Senate Bill 1070.³⁸

Meanwhile, by 2008, as enforcement numbers soared, the federal appetite for crime-based immigration enforcement could no longer await voluntary or even encouraged local participation. The “Secure Communities” program, initially depicted as a voluntary data-sharing program from which localities could “opt out” if they did not want to be part of the local-federal immigration enforcement team, was finally unmasked in 2011 (three years into the program) as a mandatory regime.³⁹ This brought the federalism battle to the fore, as unwilling participants at both the local and state level turned to the Tenth Amendment to disentangle local law enforcement from federal immigration enforcement.⁴⁰ After a federal court decision in early 2014⁴¹ made clear that the federal government could not use immigration “detainers” to command localities to prolong the detention of noncitizens otherwise entitled to release from local custody, a wave of policies limiting detainer compliance engulfed the

crimmigration law” work to “abandon framing noncitizens as contributing members of society” and instead “reimagine[] noncitizens as criminal deviants and security risks”).

36. See S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1475 (2012) (noting that the trope of immigrant criminality leads to the conclusion that “states and cities could and should be part of the solution, thereby justifying local police participation in immigration enforcement.”).
37. See, e.g., Wishnie, *supra* note 34, at 1088-95 (arguing that legislative history shows that Congress understands it “has preempted all state and local power to make immigration arrests except where specifically authorized”); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 967 (2004) (arguing that the Constitution demands that immigration enforcement power, “because of its effect on foreign policy, must be exercised exclusively and uniformly at the federal level.”).
38. *Arizona v. United States*, 132 S.Ct. 2492, 2506 (2012) (rejecting the inherent authority theory and finding that state-level immigration enforcement was largely preempted in light of the INA’s specification of “limited circumstances in which state officers may perform the functions of an immigration officer”). See also Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 34 (2013) (finding “no force” to the “inherent authority” argument after *Arizona*).
39. Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 154-59 (2013).
40. *Id.* at 160-63 (describing the resistance of Santa Clara County, California, and other jurisdictions characterized by “legal reliance on the Tenth Amendment, and the argument that the federal government – particularly in the absence of compensation – cannot compel enforcement of federal law by state and local officials”).
41. *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014).

country.⁴² Currently, over twenty-five percent of counties decline to hold prisoners based on immigration detainees.⁴³

The Trump Administration, apparently intent on exceeding the record deportation numbers of the Obama Administration,⁴⁴ has not retreated from the federalism battle. Instead, President Trump has attempted to pressure localities into immigration enforcement at every turn. A January 2017 Executive Order suggests that accomplishing the Administration's enforcement goals depends on the participation of state and local criminal justice actors.⁴⁵ The Order promised a return to the Secure Communities program⁴⁶ (which the Obama Administration had abandoned after losing the federalism fight it engendered⁴⁷), expressed a policy authorizing 287(g) agreements "to the maximum extent permitted by law,"⁴⁸ and directed the DHS Secretary to "on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainees

42. See Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1279–81 (2015) (describing policy changes following *Galarza* and the decision in *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014), granting summary judgment on the claim that a prisoner's detention based on an immigration detainee violated the Fourth Amendment).

43. *National Map of Local Entanglement With ICE*, IMMIGRANT LEGAL RESOURCE CTR., (Dec. 19, 2016), <http://www.ilrc.org/local-enforcement-map> [<http://perma.cc/8WW6-WWMG>].

44. Early in his campaign, candidate Trump said he would deport all of the estimated eleven million undocumented immigrants in the United States. See Jeremy Diamond, *Trump's Immigration Plan: Deport the Undocumented, 'Legal Status' for Some*, CNN (July 30, 2015, 8:48 AM ET), <http://www.cnn.com/2015/07/29/politics/donald-trump-immigration-plan-healthcare-flip-flop> [<http://perma.cc/38WD-VP6Z>]. After he was elected, he vowed to deport two to three million undocumented people with criminal records "immediately" on taking office. Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016), <http://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants> [<http://perma.cc/R27K-JNUG>].

45. Exec. Order 13,768 at § 5, 82 Fed. Reg. 8799 (Jan. 25, 2017); Walter Ewing, *Understanding the Dangerous Implications of President Trump's Immigration Executive Order*, IMMIGR. IMPACT (Jan. 26, 2017), <http://immigrationimpact.com/2017/01/26/understanding-dangerous-implications-president-trumps-immigration-executive-order> [<http://perma.cc/966S-LJBR>] (stating that the priorities in the Executive Order were "defined so expansively as to be meaningless").

46. Exec. Order 13,768, *supra* note 45, § 10.

47. Memorandum from DHS Secretary Jeh Charles Johnson to Acting ICE Director Thomas S. Winkowski, "Secure Communities" (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<http://perma.cc/R6A6-9EQY>].

48. Exec. Order 13,768, *supra* note 45, § 8.

with respect to such aliens.”⁴⁹ Finally, the Order appeared to make good on Trump’s campaign promise to “end . . . sanctuary cities”⁵⁰ by starving them of federal funding.⁵¹ This latter provision spawned immediate litigation and was enjoined by a federal judge in part because it “attempts to conscript states and local jurisdictions into carrying out federal immigration law,”⁵² and its coercion of local governments “runs contrary to our system of federalism.”⁵³

Three decades of crimmigration have thus set the stage for the current conflict, as the federal government moved from strategies of coaxing and cajoling states and localities to participate in immigration enforcement to strategies of co-opting, coercing, and commandeering them.

II. COURTHOUSE IMMIGRATION ARRESTS: THE LATEST FRONT IN THE FEDERALISM BATTLE

Courthouse arrests represent the latest front, with some new twists, in crimmigration’s ongoing federalism battle. One such twist has been the emergence of state-court judges at the front lines of this conflict: where the federalism battlefield was previously on the street (when entanglement of local police was at issue⁵⁴) or in the jails (when detainer policies were contested), it is now in state and local courthouses. In addition, the Tenth Amendment has not been invoked—yet. But a closer look at the complaints of state and local govern-

49. Exec. Order 13,768, *supra* note 45, § 9(b). This “name and shame” report was abandoned after three weeks, due to numerous inaccuracies. Darwin BondGraham, *ICE ‘Public Safety Advisory’ Criticizing Local Law Enforcement for Immigration Policies Appears to Contain Bad Data*, EAST BAY EXPRESS (Mar. 21, 2017), <http://www.eastbayexpress.com/SevenDays/archives/2017/03/21/ice-public-safety-advisory-criticizing-local-law-enforcement-for-immigration-policies-appears-to-contain-bad-data> [http://perma.cc/5R4P-CE4G]; David Nakamura & Maria Sacchetti, *Trump Administration Suspends Public Disclosures of ‘Sanctuary Cities’*, WASH. POST (Apr. 11, 2017), http://www.washingtonpost.com/politics/trump-administration-suspends-public-disclosures-of-sanctuary-cities/2017/04/11/7ea7fo78-1ec8-11e7-ad74-3a742a6e93a7_story.html [http://perma.cc/US9D-VCT4].

50. Montenegro et al., *supra* note 29 (“We will end the sanctuary cities that have resulted in so many needless deaths.”).

51. Exec. Order 13,768, *supra* note 45, § 9(a).

52. *County of Santa Clara v. Donald J. Trump*, No. 5:17-cv-00574, 2017 WL 1459081, at *23 (N.D. Cal. Apr. 25, 2017).

53. *Id.* (quoting *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519, 577-78 (2012)).

54. See *New Orleans: How the Crescent City Became a Sanctuary City Hearing Before the H. Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary*, 114th Cong. (2016), http://judiciary.house.gov/wp-content/uploads/2016/09/114-96_22124.pdf [http://perma.cc/V2F7-BYKW] (compiling testimony concerning the New Orleans Police Department policy against participating in immigration enforcement).

ments—and the response of the federal government—reveals that the controversy over courthouse arrests is merely a continuation of crimmigration’s federalism battle.

State-court judges primarily feared that civil immigration arrests would cause witnesses,⁵⁵ criminal defendants,⁵⁶ and civil litigants⁵⁷ to avoid the courthouse.⁵⁸ Deterring people from coming to court, they argued, in turn interferes with the state and local courts’ administration of justice,⁵⁹ deprives them of their ability to adjudicate cases effectively,⁶⁰ and threatens to cut off access to justice.⁶¹ In sum, state-court judges believed their “fundamental mis-

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55. *E.g.*, Cantil-Sakauye Letter, *supra* note 15, at 1 (mentioning crime victims and witnesses); Fairhurst Letter, *supra* note 16, at 1 (noting that “witnesses summoned to testify” may no longer find state courthouses to be a trustworthy public forum).
56. Fairhurst Letter, *supra* note 16, at 1 (describing how immigration officials in the courthouse may erode the trust of “criminal defendants being held accountable for their actions,” reducing their likelihood to “voluntarily appear to participate and cooperate in the process of justice”); Rabner Letter, *supra* note 18, at 1 (noting that “defendants in state criminal matters may simply not appear”).
57. *E.g.*, Cantil-Sakauye Letter, *supra* note 15, at 1 (mentioning “unrepresented litigants”); Balmer Letter, *supra* note 17, at 2 (mentioning “a driver paying a traffic fine; a landlord seeking an eviction or a tenant defending against one; or a small claims court plaintiff in a dispute with a neighbor” and “a victim seeking a restraining order against an abusive former spouse”). A number of the letters referenced domestic violence victims, who could be appearing either as witnesses or as litigants seeking a protective order. *E.g.*, Fairhurst Letter, *supra* note 16, at 1 (referencing “victims in need of protection from domestic violence”); *see also* P.R. Lockhart, *Immigrants Fear a Choice Between Domestic Violence and Deportation*, MOTHER JONES (Mar. 20, 2017, 10:00 AM), <http://www.motherjones.com/politics/2017/03/ice-dhs-immigration-domestic-violence-protections> [<http://perma.cc/A6M2-H73M>] (documenting concerns about the underreporting of domestic violence).
58. *See* Rogers Letter, *supra* note 19, at 1 (expressing concern that “having ICE officers detain individuals in public areas of our courthouses may cause litigants, witnesses and interested parties to view our courthouses as places to avoid, rather than as institutions of fair and impartial justice”).
59. *See* Balmer Letter, *supra* note 17, at 3 (describing courthouse arrests as a “current and prospective interference with the administration of justice in Oregon”); Fairhurst Letter, *supra* note 16, at 2 (suggesting courthouse arrests “impede” the “mission, obligations, and duties of our courts”).
60. *See* Balmer Letter, *supra* note 17, at 2 (“The safety of individuals and families, the protection of economic and other rights, and the integrity of the criminal justice system all depend on individuals being willing and able to attend court proceedings”); Cantil-Sakauye Letter, *supra* note 15, at 2 (noting that courthouse arrests “compromise our core value of fairness”).
61. Rabner Letter, *supra* note 18, at 1 (“Enforcement actions by ICE agents inside courthouses would . . . effectively deny access to the courts.”); Balmer Letter, *supra* note 17, at 2 (“Oregon courts must be accessible to all members of the public.”); Fairhurst Letter, *supra* note 16, at 1-2 (“When people are afraid to appear for court hearings . . . their ability to access justice is compromised.”); Cantil-Sakauye Letter, *supra* note 15, at 2 (stating that courthouse

sion”⁶² and “ability to function”⁶³ were undermined by courthouse arrests. Federal courts have not faced similar problems, as federal immigration officials can count on the cooperation and support of federal criminal justice agencies in lieu of making courthouse arrests.

The federal response made no effort to address the concerns of state-court judges that courthouse immigration arrests erode and undermine justice in state and local courts. Instead, administration officials suggested that the courthouse arrests might in some sense be retaliation for earlier federal defeats in the ongoing federalism battle fueled by the rise of crimmigration. “Some jurisdictions,” wrote Attorney General Sessions and then-DHS Secretary Kelly in response to California’s Chief Justice, “have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests.”⁶⁴ It was because of such policies, General Sessions and Secretary Kelly insisted, that “ICE officers and agents are required to locate and arrest these aliens in public places.”⁶⁵

arrests “undermine the judiciary’s ability to provide equal access to justice”). Notably absent from the chief justices’ letters was any discussion of the discriminatory intent or effect of the courthouse immigration arrests. The chief justices’ reticence contrasts with state officials’ allegations that other Trump Administration immigration programs are motivated by animus. See, e.g., *State of Hawai’i, et al. v. Donald J. Trump, et al.*, No. 1:17-cv-00050, Document 64 (“Second Amended Complaint for Declaratory and Injunctive Relief”) at 32 (D. Haw. Mar. 8, 2017) (arguing March 6 executive order imposing travel ban was “motivated by animus and a desire to discriminate on the basis of religion and/or national origin, nationality, or alienage”); *States of New York, Massachusetts, et al. v. Donald Trump et al.*, No. 1:17-cv-05228, Document 1 (“Complaint for Declaratory and Injunctive Relief”) at 2-3, 52 (E.D.N.Y. Sep. 6, 2017) (arguing President’s decision to end Deferred Action for Childhood Arrivals program “is a culmination of President’s Trump’s oft-stated commitments . . . to punish and disparage people with Mexican roots” and violates equal protection principles because it was grounded in anti-Mexican animus).

62. Fairhurst Letter, *supra* note 16, at 1; see also Balmer Letter, *supra* note 17, at 2 (arguing that courthouse immigration arrests “seriously impede[]” efforts to “ensure the rule of law for all Oregon residents”).
63. Fairhurst Letter, *supra* note 16, at 1; see also Rabner Letter, *supra* note 18, at 2 (suggesting that courthouse arrests “compromise our system of justice”).
64. Sessions Letter, *supra* note 23, at 2. As one commentator trenchantly observed, the Attorney General and DHS Secretary arrived at this explanation only after “needlessly mansplain[ing] the elements of the federal crime of ‘stalking’ (and basic Fourth Amendment doctrine on public arrests) to the Chief Justice” Jennifer Chacón, *California v. DOJ on Immigration Enforcement*, TAKE CARE (Apr. 11, 2017), <http://takecareblog.com/blog/california-v-doj-on-immigration-enforcement> [<http://perma.cc/YHT3-J8XB>].
65. *Id.* The federal response also indicated that courthouse arrests were a way to decrease risk to federal immigration officers, since arrests could take place behind the security screening provided by the state courts. *Id.*

ICE later suggested courthouse arrests would be directly correlated to a locality's cooperation with (or resistance to) federal immigration enforcement: "As ICE undertakes the necessary enforcement of our country's immigration laws, its officers and agents will continually improve their operations to meet the challenges to effective enforcement, *including state and local policies that hinder their efforts.*"⁶⁶ The suggestion in both letters that courthouse arrests were a response to local "sanctuary" policies reveals that the federal government viewed courthouse arrests as another weapon in the ongoing federalism battle, deployed simultaneously with the defunding threat.⁶⁷

The current federalism impasse raises several questions: Can state and local courts do anything more to protect those coming before them, beyond simply pleading with ICE to change its practice?⁶⁸ Or does the classification of a courthouse as a "public place" end the inquiry, as the Attorney General and DHS Secretary have argued?⁶⁹ And, even if the courthouse itself can be protected, will ICE lurk outside the courthouse and render such protection meaningless?⁷⁰

A legal doctrine from the past—the common-law privilege from arrest—suggests possible answers to these questions. Mainly concerned with the practice of arresting the defendant to commence a civil suit, which fell into disuse when civil arrests largely disappeared from the American legal landscape,⁷¹ the

66. Albence Letter, *supra* note 10, at 2 (emphasis added).

67. See *supra* notes 50–53 and accompanying text.

68. In Denver, for example, the City Council enacted legislation prohibiting city employees (specifically including "Denver County Court administrative and clerical employees") from using city resources to assist in immigration enforcement, declaring that "courts serve as a vital forum for ensuring access to justice and are the main points of contact for the most vulnerable in times of crises, . . . who seek justice and due process of law without fear of arrest from federal immigration enforcement agents." Council Bill No. 17-0940 (Denver, Colo. Aug. 31, 2017) (enacted). And Mayor Hancock issued an executive order committing the City and County to "strongly advocate" that areas including courthouses "should be respected as 'sensitive locations' to ensure the fair and effective administration of justice." Michael B. Hancock, Mayor of Denver, Colo., Exec. Order No. 142 (Aug. 31, 2017).

69. See Sessions Letter, *supra* note 23, at 1 (discussed *infra* at notes 153–159 and accompanying text).

70. See Balmer Letter, *supra* note 17, at 1 (requesting that ICE officials not "detain or arrest individuals *in or in the immediate vicinity of* the Oregon courthouses" (emphasis added)).

71. See Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 61–68 (1968) (describing the rise and fall of this civil procedure). *But see* Hale v. Wharton, 73 F. 739, 740–41 (W.D. Mo. 1896) (suggesting that "[t]he rule in the English courts at first was limited to exemption from arrest in a criminal proceeding"). This Essay does not address whether and to what extent the privilege from arrest might be applied to prevent criminal arrests, because immigration arrests are civil in nature. See *infra* Section IV.A. Likewise, this Essay is concerned with arrests, and therefore does not address many of

privilege from arrest has become newly relevant in light of the Trump Administration's increased use of courthouse arrests.⁷²

III. THE ANCIENT COMMON-LAW PRIVILEGE FROM ARREST

The common-law privilege from arrest dates back at least to the early fifteenth century.⁷³ Blackstone succinctly described it as follows:

Suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting.⁷⁴

Blackstone's first sentence describes a strand of the privilege pertaining to *persons* conducting business with the courts, while his second sentence describes a strand more generally pertaining to *places*—courthouses and their surroundings. Each is addressed here in turn.

the nuances attendant to the doctrine as it was extended beyond arrest to service of process and then to the question of how personal jurisdiction might or might not be obtained over non-residents. See *infra* notes 91-93 and accompanying text.

72. See Liz Robbins, *A Game of Cat and Mouse with High Stakes: Deportation*, N.Y. TIMES (Aug. 3, 2017), <http://www.nytimes.com/2017/08/03/nyregion/a-game-of-cat-and-mouse-with-high-stakes-deportation.html> [<http://perma.cc/XA2A-LLJG>] (reporting the Immigration Defense Project's assertion that compared to 14 courthouse arrests in 2015 and 11 in 2016, there had been 53 courthouse arrests in the state of New York in the first seven months of 2017).
73. *Sampson v. Graves*, 203 N.Y.S. 729, 730 (N.Y. App. Div. 1924) (noting that “[t]he doctrine of the immunity from arrest of a litigant attending the trial of an action to which he was a party found early recognition in the law of England, and in Viner's Abridgment (2d Ed.) vol. 17, p. 510 et seq., is to be found a very interesting collection of cases asserting the privilege dating back to the Year Book of 13 Henry IV, I. B.”), *overruled on other grounds* by *Chase Nat. Bank of City of New York v. Turner*, 199 N.E. 636 (N.Y. 1936); see also *Meekins v. Smith* (1971) 126 Eng. Rep. 363, 364; 1 H. Bl. 636, 637 (referencing a yearbook from the reign of King Edward IV as supporting the notion that “a mainpernor [surety] shall have the privilege of the Court”).
74. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 766 (1877) (footnote omitted).

A. *The Privilege as Applied to Persons Attending Court*

A leading English case from 1791 set forth the general rule reported by Blackstone, “that all persons who had relation to a suit which called for their attendance, whether they were compelled to attend by process or not, . . . were intitled to privilege from arrest eundo et redeundo,⁷⁵ provided they came bonâ fide.”⁷⁶ A decade later, *Spence v. Stuart* demonstrated the breadth of this privilege.⁷⁷ The court found the defendant “clearly privileged” from his arrest, even though the proceeding he had attended was an arbitrator’s examination at a coffee house.⁷⁸ Application of the privilege to the arrest occurring the morning after the proceeding⁷⁹ showed the liberality with which “eun-

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75. “Eundo et redeundo” means “going and returning.” BLACK’S LAW DICTIONARY (2d ed. 1910). Another common formulation of the privilege was to say it applies “eundo, morando, et redeundo” (with “morando” meaning “remaining,” *id.*). See *Person v. Grier*, 66 N.Y. 124, 125 (1876) (“It is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending the court and while returning home. Upon principle as well as upon authority their immunity from the service of process for the commencement of civil actions against them is absolute *eundo, morando et redeundo.*”); *Spence v. Stuart*, 102 Eng. Rep. 530, 531; 3 East at 89, 91 (“[T]he privilege extends to one redeundo as well as eundo et morando.”); SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 316, at 474 (Lawbook Exchange, Ltd. 2001) (16th ed. 1899) (emphasis added) (footnote omitted) (“Witnesses as well as parties are protected from arrest while going to the place of trial, while attending there for the purpose of testifying in the cause, and while returning home, *eundo, morando, et redeundo.*”) (footnote omitted). As will be shown below, see *infra* Section III.B, a privilege preventing arrests at the courthouse and its environs addressed much of what might be encompassed by “morando.”
76. *Meekins*, 126 Eng. Rep. at 363; 1 H. Bl. at 637. The privilege was not extended to the habeas petitioner in *Meekins*, on the ground that he was “an uncertificated Bankrupt, and in desperate circumstances,” and showed “a manifest intention . . . to impose upon the Court” *Id.* at 363-364.
77. (1802) 102 Eng. Rep. 530; 3 East 89.
78. *Id.* at 90.
79. *Id.* at 89-90 (reporting that the arbitrator’s examination concluded at 11 o’clock in the evening, whereupon the defendant, “having intimat[ed] that bailiffs were lying in wait to arrest him . . . slept at the coffee-house that night, and was arrested there early the next morning”).

do et redeundo” was interpreted.⁸⁰ This served the rule’s policy “to encourage witnesses to come forward voluntarily.”⁸¹

The breadth of this component of the privilege was sustained upon its arrival in America. Greenleaf’s influential treatise on evidence, citing the leading English and American cases, noted that the rule was interpreted broadly to encompass “all cases” and “any matter pending before a lawful tribunal” (including proceedings before arbitrators, bankruptcy proceedings, and the like).⁸² Additionally, the courts were “disposed to be liberal” with respect to “going . . . and returning.”⁸³ And neither a writ of protection nor a subpoena compelling one’s attendance was a prerequisite for enjoyment of the privilege.⁸⁴

At common law a court might issue a “writ of . . . protection” to a litigant or witness who feared arrest while coming to court.⁸⁵ But obtaining the writ was not a precondition for exercise of the privilege; rather, it served simply to provide “convenient and authentic notice to those about to do what would be a violation of the privilege. It neither establishes nor enlarges the privilege, but merely sets it forth, and commands due respect to it.”⁸⁶

The Supreme Court has addressed the common-law privilege from arrest in a series of decisions in two closely related contexts—in construing the privilege afforded legislators under the Constitution, and in assessing the extent to which out-of-state residents are immune from service of process while in a state for the purpose of attending court. The Court’s discussions demonstrate that the English common-law privilege from arrest has been firmly entrenched in American law from the outset.

80. The court noted that “it does not appear that [the defendant] has been guilty of any negligence in not availing himself of his privilege redeundo within a reasonable time; for he was arrested early the next morning, before it could be known whether he were about to return home or not.” *Spence*, 102 Eng. Rep. at 531; 3 East at 91; *see also* *Lightfoot v. Cameron*, 96 Eng. Rep. 658, 658 (1776); 2 Black W. 1113, 1113 (collecting similar cases and holding that a party who was dining with his counsel and witnesses after court recessed for the day was privileged from arrest).

81. *Walpole v. Alexander* (1782) 99 Eng. Rep. 530, 531; 3 Dougl. 45, 46.

82. GREENLEAF, *supra* note 75 § 317, at 475 (footnotes omitted).

83. *Id.* at § 316, at 459.

84. *Id.* at § 316, at 474 (noting that a writ of protection served only to prevent an arrest and perhaps lay the groundwork for subjecting the arresting officer to punishment for contempt for disobeying the writ).

85. *See Parker v. Marco*, 32 N.E. 989, 989 (N.Y. 1893) (“At common law a writ of privilege or protection would be granted to the party or witness by the court in which the action was pending, which would be respected by all other courts.”).

86. *Bridges v. Sheldon*, 7 F. 17, 44 (D. Vt. 1880) (citations omitted).

In *Williamson v. United States*, the Court addressed whether the privilege for legislators extended to arrests for criminal offenses, and quoted Joseph Story, who likened the legislator's privilege to the common-law privilege from arrest described by Blackstone: "*This privilege is conceded by law to the humblest suitor and witness in a court of justice; and it would be strange indeed if it were denied to the highest functionaries of the State in the discharge of their public duties.*"⁸⁷ And in *Long v. Ansell*, addressing the same question, the Court said that the legislator's privilege "must not be confused with the common law rule that witnesses, suitors and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service in another."⁸⁸ The Court noted that "arrests in civil suits were still common in America" when the Constitution was adopted, and cited several treatises as authority for this proposition,⁸⁹ each of which explicitly recognized the privilege from arrest for those attending court.⁹⁰

Similarly, in the context of immunity for out-of-state residents traveling to a state to attend court, the Court in *Lamb v. Schmitt* noted the "general rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another."⁹¹ Here, and in two other cases addressing jurisdiction over nonresidents, the Court adverted to the seminal American decisions concerning the common-law privilege

87. 207 U.S. 425, 443 (1908) (emphasis added) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 859, at 608 (4th ed. 1873)).

88. 293 U.S. 76, 83 (1934).

89. *Id.* at 83 & n.4 (citing WILLIAM WYCHE, PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK 50 et seq. (2d ed. 1794); CONWAY ROBINSON, PRACTICE IN COURTS OF LAW AND EQUITY IN VIRGINIA 126-30 (1832); SAMUEL HOWE, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW IN MASSACHUSETTS 55-56, 141-48, 181-87 (1834); FRANCIS J. TROUBAT & WILLIAM W. HALY, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN SUPREME COURT OF PENNSYLVANIA 170-89 (1837)); *see also supra* note 71.

90. HOWE, *supra* note 89, at 143-44 ("[A]ll persons connected with a cause, which calls for their attendance in court, and who attend *bonâ fide*, — are protected from arrest, *eundo, morando, et redeundo*"; ROBINSON, *supra* note 89, at 133 (providing that witnesses should be exempt from arrest) (citing, *inter alia*, Ex Parte McNeil, 6 Mass. Rep. 245 (1810)); TROUBAT & HALY, *supra* note 89, at 178 ("The parties to a suit, their attorneys, counsel and witnesses, are, for the sake of public justice, privileged from arrest in coming to, attending upon, and returning from the court; or as it is usually termed, *eundo, morando, et redeundo*."); WYCHE, *supra* note 89, at 36 ("The parties to a suit, and their witnesses, are, for the sake of public justice, protected from arrest, in coming to, attending upon, and returning from the court. Nor have the courts been nice in scanning this privilege, but have given it a large and liberal construction.") (citations omitted).

91. 285 U.S. 222, 225 (1932).

from arrest.⁹² Those decisions recognized the firm entrenchment of the privilege as it pertained to all persons (whether resident or nonresident) attending court.⁹³

The Court's decisions, and the lower court rulings upon which they relied, articulated the policy rationale behind the privilege. Quoting a "leading" New Jersey decision, the Court in *Stewart v. Ramsay* said that "[c]ourts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them."⁹⁴ And in *Lamb*, the Court described the privilege as

proceed[ing] upon the ground that the 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.⁹⁵

The Court also characterized the privilege as "founded in the necessities of the judicial administration"⁹⁶ and the notion that the courts should be "available to

92. See e.g., *id.* (citing *Hale v. Wharton*, 73 F. 739 (C.C.W.D. Mo. 1896); *Bridges v. Sheldon*, 7 F. 17 (C.C.D. Vt. 1880)); *Stewart v. Ramsay*, 242 U.S. 128, 131 (1916) (citing *Hale*, 73 F. 739 and *Peet v. Fowler*, 170 F. 618 (C.C.E.D. Pa. 1909)); *Page Co. v. MacDonald*, 261 U.S. 446, 447 (1923) (citing *Larned v. Griffin*, 12 F. 590, 590 (C.C.D. Mass. 1882)).

93. *Peet*, 170 F. at 618 ("It is a well-established principle of law that parties to a suit, for the sake of public justice, are privileged from the service of process upon them in coming to, attending upon, and returning from the court, or as it is usually termed, eundo, morando, et redeundo."); *Hale*, 73 F. at 740 ("[N]o rule of practice is more firmly rooted in the jurisprudence of United States courts than that of the exemption of persons from the writ of arrest and of summons while attending upon courts of justice, either as witnesses or suitors." (citations omitted)); *Larned*, 12 F. at 590 ("It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning." (citations omitted)); *Bridges*, 7 F. at 43 ("The privilege to parties to judicial proceedings, as well as others required to attend upon them, of going to the place where they are held, and remaining so long as is necessary and returning wholly free from the restraint of process in other civil proceedings, has always been well settled and favorably enforced.").

94. *Stewart*, 242 U.S. at 129 (quoting *Halsey v. Stewart*, 4 N.J.L. 366, 367 (1817)).

95. *Lamb*, 285 U.S. at 225 (emphasis added) (citations omitted).

96. *Id.* Similarly, when addressing the legislative privilege, the Court found the privilege necessary for the functioning of the legislative branch. See *Williamson v. United States*, 207 U.S. 425, 443 (1908) ("It seems absolutely indispensable for the just exercise of the legislative power in every nation purporting to possess a free constitution of government, and it cannot be surrendered without endangering the public liberties as well as the private independence of the members.").

suitors, fully available, neither they nor their witnesses subject to be embarrassed or vexed while attending, the one ‘for the protection of his rights,’ the others ‘while attending to testify.’”⁹⁷

An early New York decision went further and expressed the privilege as an *obligation* of the courts: “We have power to compel the attendance of witnesses, and when they do attend, we are bound to protect them *redeundo*.”⁹⁸

B. *The Privilege as Applied to the Courthouse and Its Environs*

Blackstone’s second sentence—“And no arrest can be made in the king’s presence, nor within the verge of his royal palace, nor in any place where the king’s justices are actually sitting”⁹⁹—addresses the sanctity of the court as a *place*, rather than formulating the privilege as attaching to certain people.¹⁰⁰

An English case from 1674, in which a person was arrested while “entering his coach at the door of Westminster hall,” was cited in a leading treatise in support of an expansive view of the privilege: “[I]t was agreed, that . . . *all persons whatsoever*, are freed from arrests, so long as they are in view of any of the courts at Westminster, or if near the courts, though out of view, lest any disturbance may be occasioned to the courts or any violence used”¹⁰¹

The salient points of this aspect of the privilege—that it applies to “all persons whatsoever” and that it precludes arrest not only in the courts but also “near the courts, though out of view”—are confirmed in other English cases. In *Orchard’s Case*,¹⁰² a person was arrested on civil process¹⁰³ either inside the court or “in the space between the outer and the inner doors” of the court.¹⁰⁴ Although Orchard was an attorney, he had no business before the court at the time of his arrest.¹⁰⁵ Thus, there was no claim (and could have been no claim) that Orchard enjoyed the privilege of someone “necessarily attending any

97. *Page Co.*, 261 U.S. at 448 (quoting *Stewart*, 242 U.S. at 130).

98. *Norris v. Beach*, 2 Johns. 294, 294 (1807).

99. BLACKSTONE, *supra* note 74, at *290.

100. See also JAMES FRANCIS OSWALD, CONTEMPT OF COURT, COMMITMENT, AND ATTACHMENT, AND ARREST UPON CIVIL PROCESS, IN THE SUPREME COURT OF JUDICATURE: WITH THE PRACTICE AND FORMS 193 (London, William Clowes & Sons, Ltd., 2d ed. 1895) (discussing “[p]laces in which persons are privileged from arrest”).

101. 6 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 530 (London, A. Strahan, 7th ed. 1832) (emphasis added and omitted).

102. (1828) 38 Eng. Rep. 987, 987; 5 Russ. 159.

103. The arrest was pursuant to a writ of *capias ad satisfaciendum*. *Id.*

104. *Id.*

105. *Id.* (“It was admitted that *Orchard* was not in court for the purpose of professional attendance, or of discharging any professional duty.”).

courts of record upon business.”¹⁰⁶ Instead, the case was argued and decided on the basis of a privilege of *place*, with Orchard’s representative submitting:

that every place, in which the Judges of the King’s superior courts were sitting, was privileged, and that no arrest could be made in their presence or within the local limits of the place where they were administering justice. To permit arrest to be made in the Court would give occasion to perpetual tumults, and was altogether inconsistent with the decorum which ought to prevail in a high tribunal.¹⁰⁷

In addition to quoting the sentence from Blackstone referencing a privilege “where the King’s justices are actually sitting,”¹⁰⁸ Orchard’s counsel cited *Long’s Case*,¹⁰⁹ wherein arrest had been made “in the palace-yard, not far distant from the hall gate, the Court being then sitting.”¹¹⁰ The arresting officer in this case was “committed to the *Fleet*, that he might learn to know his distance.”¹¹¹ In *Orchard’s Case*, the court (after discharging Orchard from custody) “admonished the officer to beware of again acting in a similar manner.”¹¹²

The common-law privilege surrounding the court was deemed sufficiently important that it extended beyond arrest, to mere service of process. In *Cole v. Hawkins*, for example, the court held that an attorney attending court was privileged from service made on the courthouse steps, because “service of a process in the sight of the Court is a great contempt.”¹¹³

American jurists likewise recognized this component of the privilege protecting the *place* of the court. In *Blight v. Fisher*, a federal judge explained that

106. BLACKSTONE, *supra* note 74, at 288.

107. 38 Eng. Rep. at 987.

108. *Id.* (quoting BLACKSTONE, *supra* note 74, at 289).

109. (1676-77) 86 Eng. Rep. 1012; 2 Mod. 181.

110. 38 Eng. Rep. at 987 (quoting *Long’s Case*, 86 Eng. Rep. at 1012).

111. *Id.* The reference was to the Fleet Prison, the “most venerable of all English prisons.” Margery Bassett, *The Fleet Prison in the Middle Ages*, 5 U. TORONTO L.J. 383, 383 (1944).

112. 38 Eng. Rep. at 988.

113. (1738) 95 Eng. Rep. 396, 396; Andrews 275, 275. The court rejected the argument that service of process on the courthouse steps “did not hinder, or tend to hinder” the court’s business. *Id.* In the New Jersey case of *Halsey v. Stewart*, 4 N.J.L. 366, 368 (1817), a “leading authority” cited by the Supreme Court, *Stewart v. Ramsay*, 242 U.S. 128, 129 (1916), the court took a similarly expansive view of the privilege, discrediting “the idea, that the interruption of the court, must arise from noise, disturbance, or confusion created by the service, in its presence.” The court afforded the privilege to a person who was initially read the summons by the sheriff “while descending the steps” from the courthouse, but upon whom the summons was not served until later when he was meeting with counsel in his office. *Id.* at 367.

“[t]he service of process . . . in the actual or constructive presence of the court, is a contempt, for which the officer may be punished.”¹¹⁴ The decision relied on *Cole v. Hawkins* and on the Pennsylvania Supreme Court’s decision in *Miles v. M’Cullough* setting aside process served on a person attending oral argument.¹¹⁵

These seminal cases—*Blight*, *Cole*, and *Miles*—were cited in Greenleaf’s 1864 treatise on evidence, which likewise understood the privilege as heightened at the courthouse and its surroundings, encompassing protection not only from arrest but also from service of process. “[I]t is deemed as a contempt to serve process upon a witness, even by summons, if it be done in the immediate or constructive presence of the court upon which he is attending; though any service elsewhere without personal restraint, it seems, is good.”¹¹⁶

* * *

The tendency of American courts was to expand the privilege,¹¹⁷ and the privilege as it pertained to persons expanded in some instances to encompass protection from service of process even if it occurred beyond the “actual or constructive presence of the court.”¹¹⁸ This expansion of the privilege as applied to some *persons* attending court,¹¹⁹ did not diminish or otherwise alter the privilege as to *place* described in *Blight* and established in other English and American decisions. The broad contours of the privilege as to *place* were that it ap-

114. 3 F. Cas. 704, 704-05 (C.C.D.N.J. 1809) (No. 1,542). The court noted that the strand of the privilege pertaining to *persons* “extends only to an exemption from arrest.” *Id.* at 704.

115. *Id.* at 705 (citing *Cole*, 95 Eng. Rep. 396; *Miles v. M’Cullough*, 1 Binn. 77 (Pa. 1803)).

116. GREENLEAF, *supra* note 75, at § 316, at 475 (footnote omitted); *see also In re Healey*, 53 Vt. 694, 696 (1881) (noting a similar understanding of the privilege); *Cole*, 95 Eng. Rep. at 396 (same); *Blight*, 3 F. Cas at 704 (same); *Miles*, 1 Binn. at 77 (same).

117. *Larned v. Griffin*, 12 F. 590, 592 (C.C.D. Mass. 1882) (describing “the tendency in this country . . . to enlarge the right of privilege so as to afford full protection to suitors and witnesses from all forms of process of a civil character during their attendance before any judicial tribunal, and for a reasonable time in going and returning”).

118. *Blight*, 3 F. Cas at 704-05. In *Parker v. Hotchkiss*, the court understood *Miles v. M’Cullough* as applying the privilege pertaining to persons, and “plac[ing] the case of a summons on precisely the same ground as that of an arrest on the score of privilege.” 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849) (No. 10,739) (discussing *Miles*, 1 Binn. 77). The Supreme Court later noted that *Parker* had expanded the protection from service beyond that recognized in *Blight* and had given rise to a line of federal decisions that “consistently sustained the privilege” to protect *persons* from service of process regardless of their proximity to the *place* of the court. *Stewart*, 242 U.S. at 130-31 (citing *Parker*, 18 F. Cas. at 1138, as “overrul[ing]” *Blight*, 3 F. Cas. 704; other citations omitted).

119. As noted above, the Supreme Court’s decisions were addressing the immunity of non-residents from service of process. *See supra* notes 91-93 and accompanying text.

plied to prevent arrest and service of process, both at the courthouse or near it, and to all persons regardless of whether or not they were pursuing business before the court.

IV. APPLYING THE COMMON-LAW PRIVILEGE TO CONTEMPORARY COURTHOUSE IMMIGRATION ARRESTS

As arrest gave way to summons as the principal means for initiating a civil suit, the privilege from arrest fell into disuse, and courts increasingly concerned themselves with questions of immunity from service of process.¹²⁰ ICE's courthouse arrests justify awakening the doctrine for three compelling reasons. First, the common-law privilege was typically used to address arrests commencing civil litigation. As immigration proceedings are civil, the privilege maps well onto courthouse arrests for immigration violations. Second, the policy objectives underlying the privilege align significantly with the concerns expressed regarding courthouse immigration arrests. And third, the American incorporation of the privilege demonstrates that federal and state courts alike have an interest in enforcing the privilege, making the doctrine particularly apt for resolving the federalism conflict created by courthouse arrests.

Thus, state and local courts not only have the legal authority to protect their courthouses and people coming and going on court business, but also their authority is likely to be respected.

A. *Immigration Enforcement Is Largely Civil Enforcement*

The Supreme Court has explained that immigration arrests that initiate deportation proceedings are civil in nature.¹²¹ In *Arizona v. United States*, the Court noted that “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States,” and that where a person is seized “based on nothing more than possible removability, the usual predicate for an arrest is

120. See *supra* note 71.

121. There are, of course, immigration crimes that may be enforced through criminal arrests and criminal prosecutions. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U.L. REV. 1281 (2010) (describing rise of criminal immigration enforcement); see also Chacón, *supra* note 25, at 137 (“In recent years . . . the U.S. government has increasingly handled migration control through the criminal justice system.”); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1470 (2015) (documenting the rise of criminal immigration prosecutions). This Essay does not address the applicability of the common-law privilege from arrest to arrests for crimes.

absent.”¹²² Such an arrest must find justification in federal immigration statutes and regulations, which generally require that trained federal immigration officers perform the arrest.¹²³ And the proceedings that such an arrest initiates are also characterized as civil: “Removal is a civil, not criminal, matter.”¹²⁴

The legal categorization of immigration arrests and proceedings as civil supports application of the common-law privilege, which was largely used to address civil arrests.¹²⁵ Furthermore, important similarities exist between civil immigration arrests and civil arrests commencing private litigation. They are both arrests—physical seizures of a person—made by public “officers.”¹²⁶ For the privilege to apply, the arrests occur either in or near the courthouse,¹²⁷ or the arrests are of people who are attending the courts on business.¹²⁸ The arrests are followed by jail. And they are accomplished in order to commence a second, unrelated legal proceeding in a different court.¹²⁹ These similarities, particularly when considered in light of the policy rationales supporting the privilege,¹³⁰ and the shared federal and state interest therein,¹³¹ support application of the privilege.

Reframing 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.¹³²

122. 132 S.Ct. 2492, 2505 (2012) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)).

123. *Id.* at 2505-06. This Essay does not examine whether the statutory basis for a lawful civil immigration arrest is being met in the courthouse immigration arrests that are occurring. The privilege against arrest would apply even in the face of an otherwise lawful arrest.

124. *Id.* at 2499; *see also Lopez-Mendoza*, 468 U.S. at 1038 (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country.”).

125. *See supra* note 71.

126. *See Orchard’s Case*, (1828) 38 Eng. Rep. 987, 987; 5 Rus. 158 (referring to the “officer” who made the arrest); *Long’s Case*, (1676-77) 86 Eng. Rep. 1012, 1012; 2 Mod. 181, 181 (referring to the same).

127. *See supra* Section III.B.

128. *See supra* Section III.A.

129. *See supra* note 91 and accompanying text.

130. *See infra* Section IV.B.

131. *See infra* Section IV.C.

132. *Lopez-Mendoza*, 468 U.S. at 1038 (explaining that “[c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a

B. Significant Policy Alignment

The policy reasons underlying the common-law privilege from arrest dovetail nicely with the objections raised to courthouse immigration arrests. The privilege was principally concerned with protecting the business of the court.¹³³ The privilege pertaining to the place of the court—preventing all arrests in the “face”¹³⁴ or “view”¹³⁵ of the court, or “near the courts, though out of view”¹³⁶ (in the “constructive presence”¹³⁷)—prevented “violence” and “disturbance” in or near the courts.¹³⁸ This preservation of decorum¹³⁹ upheld the dignity and authority of the court generally.¹⁴⁰ But the privilege of place attaching to the courthouse was also deemed essential to the administration of justice itself:¹⁴¹

deportation hearing”). Some have argued that the rise of a “cimmigration” enforcement system justifies importation of criminal procedural protections into immigration proceedings. See, e.g., Yafang Deng, *When Procedure Equals Justice: Facing the Pressing Constitutional Needs of a Criminalized Immigration System*, 42 COLUM. J.L. & SOC. PROBS. 261, 291 (2008) (describing immigration enforcement as “a system of criminal investigation and punishment held only to civil law standards” and arguing for application of criminal protections); Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIAMI L. REV. 556, 558-59 (2016) (describing the push to “extend[] to immigrants enhanced judicially enforced procedural protections” but arguing that “[j]ust as the Warren Court revolution in constitutional criminal procedure failed to ameliorate the harshness of substantive criminal law, more robust immigration procedural protections would likely fail to reorient immigration enforcement in a more humane and sustainable direction”).

133. *Long*, 293 U.S. at 83 (describing the privilege as “founded upon the needs of the court”).
134. *Whited v. Phillips*, 126 S.E. 916, 917 (W. Va. 1925).
135. BACON, *supra* note 101, at 530.
136. *Id.*
137. *Blight*, 3 F. Cas. at 704.
138. BACON, *supra* note 101, at 530 (“[L]est any disturbance may be occasioned to the courts or any violence used.”).
139. See *Orchard’s Case*, 38 Eng. Rep. at 987; 5 Russ. at 159 (arguing that “[t]o permit arrest to be made in the Court would give occasion to perpetual tumults, and was altogether inconsistent with the decorum which ought to prevail in a high tribunal.”).
140. See *Bramwell v. Owen*, 276 F. 36, 41 (D. Or. 1921) (citation omitted) (stating that the “rule is even buttressed upon a broader principle, namely, that it is a privilege of the court as affecting its dignity and authority, and is founded upon sound public policy.”); *Bridges v. Sheldon*, 7 F. 17, 44 (C.C.D. Vt. 1880) (“The privilege arises out of the authority and dignity of the court where the cause is pending”); *Parker v. Marco*, 32 N.E. 989, 989 (N.Y. 1893) (“It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity . . .”).
141. See, e.g., *Parker*, 32 N.E. at 989 (stating the privilege “is deemed necessary . . . in order to promote the due and efficient administration of justice . . .”).

This rule is buttressed with the high conception that as courts are established for the ascertainment of the whole truth, and the doing of exact justice, as far as human judgment can attain, in disputes between litigants, every extraneous influence which tends to interfere with or obstruct the trial for the attainment of this sublime end should be resisted by the ministers of justice to the last legitimate extremity in the exercise of judicial power.¹⁴²

Justice was thought to be hindered in two ways by courthouse arrests. First, the threat of arrest and additional litigation might “disturb and divert the witness so that on the witness stand his mind might not possess that repose and equipoise essential to a full and true deliverance of his testimony.”¹⁴³ Proceedings might even be interfered with, interrupted, or delayed by the arrest of a witness or party.¹⁴⁴ Second, the fear of arrest might deter parties and witnesses from coming to court at all.¹⁴⁵ To borrow the words of Chief Justice Lee in *Cole v. Hawkins*, “it would produce much terror.”¹⁴⁶

This last reason, of course, was why the privilege pertaining to *people* attending court was extended “eundo et redeundo.”¹⁴⁷ Protection at or near the courthouse was deemed insufficient, so the threat of arrest was removed as a possibility (and a deterrent) during the journey to and from the courthouse. Only in this way could the courts be made “available to suitors, *fully available*, neither they nor their witnesses subject to be embarrassed or vexed while at-

142. *Hale v. Wharton*, 73 F. 739, 741 (C.C.W.D. Mo. 1896)

143. *Id.*

144. *Stewart v. Ramsey*, 242 U.S. 128, 129 (1916) (quoting *Parker v. Hotchkiss*, 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849)) (stating that the privilege “is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify”).

145. *Id.* at 130-31 (“Witnesses would be chary of coming within our jurisdiction . . . and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense” (quoting *Parker*, 18 F. Cas. 1137, 1138)); *Person v. Grier*, 66 N.Y. 124, 126 (N.Y. Ct. App. 1876) (“Witnesses might be deterred, and parties prevented from attending, and delays might ensue or injustice be done.”); *Diamond v. Earle*, 105 N.E. 363, 363 (Mass. 1914) (stating that “justice requires the attendance of witnesses cognizant of material facts, and hence that no unreasonable obstacles ought to be thrown in the way of their freely coming into court to give oral testimony.”); *Bramwell v. Owen*, 276 F. 36, 40 (D. Or. 1921) (noting that deterring witnesses “would result many times in a failure of justice”).

146. (1738) 95 Eng. Rep. 396, 396; *Andrews* 275, 275.

147. *Meekins v. Smith* (1791) 126 Eng. Rep. 363, 363; 1 H. Bl. 636, 636.

tending, the one ‘for the protection of his rights,’ the others ‘while attending to testify.’”¹⁴⁸

All of these policy reasons support application of the privilege to courthouse immigration arrests, given the shared features of immigration arrests and arrests to which the privilege was applied at common law.¹⁴⁹ The prospect of arrest and jail—whether at the hands of an eighteenth-century English or American lawman or a twenty-first-century ICE officer—provides a powerful deterrent to the attendance of parties and witnesses in court. Indeed, echoing the concern of “terror” raised by Chief Justice Lee in *Cole v. Hawkins*¹⁵⁰ (who was merely discussing service of process), those chief justices objecting to ICE’s courthouse arrests have principally complained about the “chilling effect” of ICE arrests.¹⁵¹ Furthermore, the prospect of violent courthouse arrests, like those captured on video in Denver, for example, offers no less a threat today to the decorum, dignity, and authority of the courts than it has in the past.¹⁵²

The ancient foundations of the common-law privilege also neatly address the argument put forth by the Attorney General and DHS Secretary: that courthouse arrests are lawful because they take place in a “public place based on probable cause.”¹⁵³ Attorney General Sessions and Secretary Kelly relied on a Supreme Court case, *United States v. Watson*, in which postal officers conducted a warrantless arrest of the defendant in a restaurant.¹⁵⁴ In *Watson*, the Court relied heavily on an examination of common-law sources (including Black-

148. Page *Co. v. MacDonald*, 261 U.S. 446, 448 (1923) (emphasis added).

149. See *supra* Section IV.A.

150. *Cole v. Hawkins* (1738) 95 Eng. Rep. 396; Andrews 275.

151. E.g., Balmer Letter, *supra* note 17, at 2 (noting the “chilling effect” of courthouse arrests); Rabner Letter, *supra* note 18, at 1 (same); Rogers Letter, *supra* note 19, at 1 (worrying that courthouses will be seen “as places to avoid”). The common-law privilege, in its application “eundo et redeundo,” *Meekins*, 126 Eng. Rep. at 363, addresses the concern that even if ICE ceases arrests in courthouses it will simply wait outside the courthouse to make its arrests. Cf. S. 845, 115th Cong. § 2 (2017) (proposing a 1,000-foot penumbra around “sensitive locations” including courthouses).

152. See Meltzer, *supra* note 9.

153. Sessions Letter, *supra* note 23, at 1.

154. 423 U.S. 411, 412-13 (1976). Note that the case is cited incorrectly as 432 U.S. 411 in Sessions Letter, *supra* note 23, at 1. A critique of *Watson* is beyond the scope of this Essay, as is the question of *Watson*’s suitability as authority to justify ICE courthouse arrests. The assertion by the Attorney General and Secretary Kelly that *Watson* supports ICE courthouse arrests because ICE is “authorized by federal statute” to arrest based upon probable cause of removability, Sessions Letter *supra* note 23, at 1 (citing 8 U.S.C. § 1357), is at best incomplete. The statute, as the Supreme Court has pointed out, indicates such warrantless arrests are permissible “only where the alien ‘is likely to escape before a warrant can be obtained.’” *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012) (quoting 8 U.S.C. § 1357(a)(2)).

stone) and ultimately held that its Fourth Amendment jurisprudence “reflect[s] the ancient common-law rule” regarding warrantless arrest, and that “[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact.”¹⁵⁵

But to say that an arrest in a restaurant is consonant with “the ancient common-law rule” is to prefer the more general rule (concerning arrest on probable cause in a public place) to the more specific—but equally ancient and well-established in the common law—rule examined here, the common-law privilege from arrest. Indeed, these two rules can coexist comfortably, as the former is a rule for determining when an arrest is lawful and the latter a rule for determining when there is a privilege from even lawful arrests.

This is not to say the common law rejected the notion of the courthouse as a public place. Rather, to ensure that the courts remained truly accessible to the public, it was deemed necessary to proscribe arrests at or near courthouses,¹⁵⁶ and of those coming and going from the court.¹⁵⁷ The Supreme Court acknowledged the wisdom of this “balance struck by the common law”¹⁵⁸ when it quoted a leading early American case grounding the privilege in the notion that “[c]ourts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them.”¹⁵⁹

C. *Shared Interests of Federal and State Courts*

Because ICE can work closely with other agencies in the federal criminal justice system, it has not found it necessary to make arrests in federal courthouses, and the federal courts will likely have little need to assert the privilege from arrest in order to protect their own administration of justice. But American judicial decisions demonstrate the aligned interests of federal and state tribunals in advancing the public policy goals of the common-law privilege from arrest. First, federal, state, and local governments historically demonstrated a shared interest in applying the privilege from arrest to protect their own courts and those attending them, and therefore a shared interest in the idea that those courts are sufficiently empowered to do so. Second, all courts—federal, state,

155. *Watson*, 423 U.S. at 418, 421.

156. *See supra* Section III.B.

157. *See supra* Section III.A.

158. *Watson*, 423 U.S. at 421.

159. *Stewart v. Ramsey*, 242 U.S. 128, 129 (1916) (quoting *Halsey v. Stewart*, 4 N.J.L. 366, 367 (N.J. 1817)).

and local—demonstrated a shared interest in enforcing the privilege as to other courts, that it might likewise be enforced by other courts as to their own.

The privilege from arrest has been deemed necessary to preserve courts' ability to administer justice.¹⁶⁰ The jurisprudence surrounding the privilege unsurprisingly establishes that protecting the courthouse and its environs from disruption and violence (as accomplished by the privilege as to place) and protecting the administration of justice by privileging those with business before the court (as accomplished by the privilege as to people) is deemed a necessary power belonging to all courts.¹⁶¹

The most obvious demonstration of this power, at common law, was each court's power to issue a writ of protection. That the power to issue such writs was held by American courts at common law is demonstrated by numerous authorities.¹⁶² A Rhode Island case recounted that a writ of protection had issued

in the ordinary form, commanding the sheriffs of the several counties, and their deputies, that they “let the said William T. Merritt of and from all civil process, whether original or judicial, so long as he shall attend said court, and until he shall be discharged from the protection aforesaid by this court at the present term.”¹⁶³

But the writ of protection was not deemed necessary¹⁶⁴—the power to grant privilege from arrest was deemed “*a power inherent in courts.*”¹⁶⁵ This inherent power flowed necessarily from the understanding that courts could not do justice without “preventing delay, hindrance, or interference with the orderly ad-

160. See *supra* Section IV.B.

161. Beyond the scope of this Essay is the question of whether a sovereign government can exercise power over the privilege through nonjudicial action, or whether the power over the privilege is limited to the courts themselves. Cf. *Diamond v. Earle*, 105 N.E. 363, 363 (Mass. 1914) (describing the privilege as “a prerogative exerted by the sovereign power through the courts for the furtherance of the ends of justice”).

162. See, e.g., *Bridges v. Sheldon*, 7 F. 17, 44 (D. Vt. 1880) (“A writ of protection issued out of that court is proper”); *Parker v. Marco*, 32 N.E. 989, 989 (N.Y. 1893) (“We cannot find that the power to issue such a writ has been abrogated by legislation, and it doubtless exists, and the writ may still be granted by courts possessing a common-law jurisdiction”); HOWE, *supra* note 89, at 144-46 (describing Massachusetts procedure with respect to writs of protection).

163. *Waterman v. Merritt*, 7 R.I. 345, 345-46 (1862); see also *Ex parte Hall*, 1 Tyl. 274 (Vt. 1802) (issuing a writ and upholding liberal reading of the writ).

164. See *Thompson's Case*, 122 Mass. 428, 429 (1877) (recognizing the privilege “whether they have or have not obtained a writ of protection” (citations omitted)).

165. *Wemme v. Hurlburt*, 289 P. 372, 373 (Or. 1930) (citations omitted) (emphasis added).

ministration of justice”¹⁶⁶—and that courts could not expect the attendance of parties and witnesses, even pursuant to court order, without the power (or obligation)¹⁶⁷ to also offer protection.¹⁶⁸

Courts needed this power to operate, but they also needed other courts to recognize it. Indeed, the privilege can be understood as a rule governing the relationship of courts, whereby courts follow the rule out of a categorical imperative, respecting other courts’ dignity¹⁶⁹ to ensure their own:

Out of the enforcement of this policy has sprung the doctrine of comity. No court will direct its process to be served upon litigants before another court where it would protect its own litigants from a like service. Every court will aid every other court by permitting attendance upon one free from the danger of service of process by another. All courts recognize this principle of immunity involved.¹⁷⁰

A leading case from New York put it similarly: “[T]his court ought not to suffer its process to be executed in violation of the privileges of other courts”¹⁷¹ Moreover, the Supreme Court was emphatic in its endorsement of comity as applied to the privilege in a case where service of process in a federal case was served on a nonresident present in Massachusetts to attend state-court proceedings. The Court was asked to uphold the service of process on the ground that the federal lawsuit and the state-court proceedings were taking place in different jurisdictions, but the Court rejected this, holding that “[a] federal court in a State is not foreign and antagonistic to a court of the State within the principle”¹⁷² The privilege against service of process

^{166.} *Id.*

^{167.} An important early decision from New York described the privilege as an obligation of the court, owing to the court’s power to compel the attendance of persons before the court. *Norris v. Beach*, 2 Johns. 294 (N.Y. 1807).

^{168.} *Bridges v. Sheldon*, 7 F. 17, 46 (D. Vt. 1880) (holding a writ of protection unnecessary, because “[t]he order to take testimony issued under the authority of the court carried with it the protection of the court”); *United States v. Edme*, 9 Serg. & Rawle 147, 151 (Pa. 1822) (“[T]he court must necessarily possess the power to protect from arrest all who are necessarily attending the execution of their own order.”).

^{169.} See *Kaufman v. Garner*, 173 F. 550, 554 (W.D. Ky. 1909) (stating that the rule is based on “the dignity and independence of the court first acquiring jurisdiction”).

^{170.} *Feister v. Hulick*, 228 F. 821, 823 (E.D. Pa. 1916).

^{171.} *Bours v. Tuckerman*, 7 Johns. 538, 539 (N.Y. Sup. Ct. 1811); see also *Vincent v. Watson*, 30 S.C.L. (1 Rich.) 194, 198 (S.C. Ct. App. 1845) (describing *Bours* as expressing “[t]he rule most consistent with the courtesy due from the courts to each other, and with a proper care for the liability of the citizen”).

^{172.} *Page Co. v. Macdonald*, 261 U.S. 446, 447-48 (1923).

rests on “the necessities of the judicial administration,” the Court wrote.¹⁷³ “[T]he courts, federal and state, have equal interest in those necessities.”¹⁷⁴

These decisions have two important implications for the current impasse over courthouse immigration arrests. First, state and local courts have the power “inherent in courts” to privilege from arrest those who attend their courts on business (in their coming, remaining, and returning) as well as those people present in and around the courts.¹⁷⁵ The letters asking ICE to stop making courthouse arrests need not be the last step taken—ICE’s refusal to stop these arrests cannot deprive courts of a power they derive simply from being courts. Second, if ICE refuses to respect the power of state and local courts concerning the privilege, once asserted, state and local courts can reasonably expect to be supported by the federal courts, if not the immigration courts, because of the federal courts’ shared interest in upholding rules that address the administration of justice and therefore must be universally enforced. This is so even though the federal courts are not identically situated, as ICE arrests have not yet become a problem for federal courts. This difference is insufficient to make the federal courts “antagonistic” to the state courts.¹⁷⁶ That the privilege is thus universally followed¹⁷⁷ as a matter of comity¹⁷⁸ makes it a uniquely suitable solution to the federalism clash caused by immigration courthouse arrests.

173. *Id.* at 448 (quoting *Stewart v. Ramsay*, 242 U.S. 128, 130 (1916)).

174. *Id.* at 448.

175. *Wemme v. Hurlburt*, 289 P. 372, 373 (Or. 1930).

176. *Page Co.*, 261 U.S. at 447.

177. See *People ex rel. Watson v. Judge of Superior Court of Detroit*, 40 Mich. 729, 733 (1879) (“If any court were disposed to suffer its own process to be employed for such a purpose, any other court with competent authority should interfere to correct the wrong.”); *Parker v. Marco*, 32 N.E. 989, 989 (N.Y. 1893) (noting that a writ of protection “would be respected by all other courts”); *Sofge v. Lowe*, 176 S.W. 106, 108 (Tenn. 1915) (applying the privilege in an interstate setting, and concluding: “Justice, in such connection, is to be conceived of as a thing integral and not partible by state or jurisdictional lines; all courts must be presumed to interest themselves alike in promoting and keeping unhampered its fair administration The courts of this state will see to it that their processes are not used to thus embarrass the administration of justice in a sister state, and we shall expect the courts of other states to rule in reciprocation. Thus, by a species of comity, a common end will be served.”); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, 4A FEDERAL PRACTICE AND PROCEDURE § 1078 (4th ed. 2015) (addressing the privilege as applied to service of process on non-residents, stating that “the objectives of the immunity doctrine and notions of judicial cooperation dictate that state courts should grant immunity to persons who have entered the jurisdiction for the purpose of attending federal proceedings and that federal courts should quash service made on those who are in the jurisdiction to attend pending state proceedings” (footnotes omitted)).

CONCLUSION

The common-law privilege from arrest provides a rule of law that could break the federalism impasse caused by immigration courthouse arrests. This Essay has attended to the substance and grounding of the rule,¹⁷⁹ demonstrating that state and local courts have the power to regulate courthouse arrests and in doing so, would be pursuing policy goals recognized by state and federal courts. But numerous questions for future study remain.

First, what are the procedural mechanisms by which the privilege against courthouse immigration arrests can be invoked? Perhaps the most obvious mechanism suggested by the analysis here would be for a court to issue some form of writ of protection. But might the privilege also be implemented by state or local legislative enactments?¹⁸⁰

Second, what remedies are available for violations of the privilege (or of a writ of protection)? Certainly, the cases surveyed would suggest ICE agents making arrests in violation of the privilege might be held in contempt.¹⁸¹ But

178. A question beyond the scope of this Essay is whether federalism under the Constitution would *require* federal actors to refrain from interfering with state and local sovereign governments by making arrests in violation of the common-law privilege.

179. There are many nuances in American jurisprudence, not explored here, which are artifacts of the doctrine's migration into the question of interstate personal jurisdiction. I have attempted to canvass the core of the privilege from civil arrest, which came into American law largely unquestioned. *See, e.g.*, *Greer v. Young*, 11 N.E. 167, 169-70 (Ill. 1887) (distinguishing between the question at hand, involving service of process, and the entrenched doctrine of privilege from civil arrest); *Jenkins v. Smith*, 57 How. Pr. 171, 173 (N.Y. Supr. Ct. 1878) (noting “[i]t is also well settled that a resident witness is privileged from arrest, but not from the service of a summons.”).

180. There are some state statutes addressing privilege from arrest. *E.g.*, IDAHO CODE § 9-1303 (2017) (establishing privilege from arrest for subpoenaed witness); OR. REV. STAT. § 44.090 (2017) (same); ARIZ. REV. STAT. ANN. § 12-2213 (2017) (“A witness shall be privileged from arrest, except for treason, felony and breach of the peace, during his attendance at court, and in going to and returning therefrom, allowing one day for each twenty-five miles from his place of abode.”). Such statutes raise additional questions—are they supplements to the common-law privilege or displacements of it? *See, e.g.*, *Davis v. Hackney*, 85 S.E.2d 245, 247 (Va. 1955) (interpreting Uniform Act regarding out-of-state witnesses as enacted in aid of the common-law privilege). If the latter, can state or local legislatures displace the common-law privilege without violating separation of powers principles? *See, e.g.*, *State ex rel. Veskrna v. Steel*, 894 N.W.2d 788, 801 (Neb. 2017) (“It is for the judiciary to say when the Legislature has gone beyond its constitutional powers by enacting a law that invades the province of the judiciary.”).

181. This is certainly suggested by the common-law cases surveyed herein. *E.g.*, *Larned*, 12 F. at 594 (stating that the “offender may be punishable for contempt if the arrest is made in the actual or constructive presence of the court”); *Ex parte Hall*, 1 Tyl. at 281 (in case where a writ of protection was violated, holding “the constable be in mercy for his contempt

could a violation of the privilege also support discharge from custody,¹⁸² suppression of evidence or termination of immigration proceedings,¹⁸³ or a damages lawsuit?¹⁸⁴ Could declaratory or injunctive relief be available to prevent further violations?

Third, what is the relation between the privilege and other constitutional provisions guaranteeing individual rights¹⁸⁵ or trial rights for civil or criminal litigants,¹⁸⁶ or prescribing the structures of government?¹⁸⁷

of the Court”); *Long’s Case*, 2 Mod. 181 (committing officer to the Fleet prison for making arrest in the yard of the court).

182. *E.g.*, *Larned*, 12 F. at 591 (noting an English common-law remedy whereby “writ of privilege” would result in prisoner’s discharge); *id.* (collecting cases where discharge was accomplished by motion or by plea in abatement); *Thompson’s Case*, 122 Mass. 428, 430 (1877) (noting that “any one arrested in violation of privilege may, like any other person unlawfully imprisoned or restrained of his liberty, be discharged by this court, or by any justice thereof, in the exercise of the general power to issue writs of habeas corpus.” (citations omitted)); *Ex parte Hall*, 1 Tyl. At 281 (granting habeas petition and ordering discharge of the prisoner).
183. *See, e.g.*, *Bramwell v. Owen*, 276 F. 36 (D. Or. 1921) (quashing service made in violation of the privilege and dismissing suit); *Larned*, 12 F. at 594 (allowing a plea in abatement of civil suit initiated in violation of the privilege because such remedy “in our opinion is necessary to the due administration of justice, that this immunity extends to all kinds of civil process, and affords an absolute protection” (citation omitted)).
184. *See, e.g.*, Mary E. O’Leary, *11 Immigrants Arrested in 2007 Raids in New Haven Win \$350K Settlement with Feds, Won’t Be Deported*, NEW HAVEN REG. (Feb. 14, 2012), <http://www.nhregister.com/news/article/11-immigrants-arrested-in-2007-raids-in-New-Haven-11527436.php> [<http://perma.cc/VU9K-3422>] (reporting the settlement of claims alleging, *inter alia*, wrongful arrests by ICE agents).
185. *See supra* notes 153-155 and accompanying text (describing the use of common-law authorities to inform Fourth Amendment analysis); *see also* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003) (arguing that law enforcement policies that deter noncitizens from reporting crimes may be unconstitutional).
186. Trial rights implicated could include the right to a public trial; the right to testify, see *Diamond v. Earle*, 105 N.E. 363, 363 (Mass. 1914) (noting that a party’s right to testify on his own behalf might be “hampered by the hazard that he may become entangled in other litigation”); the right to compulsory process, see *Halsey v. Stewart*, 4 N.J.L. 366, 367-68 (N.J. 1817) (noting that the privilege enables a litigant “to procure, without difficulty, the attendance of all such persons as are necessary to manifest his rights”); the right to be present at critical stages of the case, see *Parker v. Marco*, 32 N.E. 989, 989 (N.Y. 1893) (“It is the right of the party, as well as his privilege, to be present whenever evidence is to be taken in the action which may be used for the purpose of affecting its final determination.”); and the right to present claims or defenses.
187. *See* *New York v. United States*, 505 U.S. 144, 155 (1992) (describing Tenth Amendment inquiry into “whether [the federal government] invades the province of state sovereignty reserved by the Tenth Amendment.”); U.S. CONST. art. IV, § 4 (directing the United States to “guarantee to every State . . . a Republican Form of Government . . .”).

And finally, could the privilege be applied or extended to protect other government institutions by preventing arrests at probation offices, administrative courts, public legislative assemblies or offices, or government offices where benefits are sought or distributed?¹⁸⁸

* * *

The search for a solution to the courthouse-immigration-arrests problem requires blowing the dust off ancient treatises and delving into centuries-old English cases. But there is a good reason the existence of the privilege from arrest now comes as breaking news. The privilege receded from the body of modern law not because the doctrine fell by the way, but rather because the practice of commencing civil litigation with an arrest did.¹⁸⁹ The privilege from arrest was firmly entrenched and undisputed in both English and American jurisprudence when the need for its application waned, and the courts moved on to busy themselves with questions concerning extension of the doctrine to the service of civil process. *Arrests* under circumstances in which the privilege would apply all but disappeared.¹⁹⁰

The need to resort to ancient authority stands not as evidence of weakness in the doctrine, but rather as an attestation to how aberrational courthouse immigration arrests are. The poor instincts of those who have directed these arrests, and those who have defended them, desperate to harness local criminal systems even at the risk of harming their integrity, stand rebuked by this rule that has been “sustained by [an] almost unbroken current of authority.”¹⁹¹ Those who have expressed outrage at ICE’s courthouse arrests and decried the harm they threaten to state and local courts, on the other hand, are fully vindicated by the privilege, its unquestioned status, and its policy justifications that echo undiminished across the centuries.

Their outrage, it seems, would have been shared by judges in every age.

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188. Other privileges from arrest, such as that for state legislators, *see* *Thompson’s Case*, 122 Mass. 428 (involving legislative privilege), or relating to elections, *e.g.* KY. CONST. § 149 (“Voters, in all cases except treason, felony, breach of surety of the peace, or violation of the election laws, shall be privileged from arrest during their attendance at elections, and while they are going to and returning therefrom.”), exist to protect government functions.

189. *See supra* note 71.

190. *Id.*

191. *Greer*, 11 N.E. at 187.

A COMMON-LAW PRIVILEGE TO PROTECT STATE AND LOCAL COURTS DURING THE
CRIMMIGRATION CRISIS

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