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### Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities

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# TRUST IN IMMIGRATION ENFORCEMENT: STATE NONCOOPERATION AND SANCTUARY CITIES AFTER SECURE COMMUNITIES

MING H. CHEN\*

## INTRODUCTION

The conventional wisdom, backed by legitimacy research, is that most people obey most of the laws, most of the time. This turns out to not be the case in a study of state and local involvement with immigration enforcement, especially the federal program in which the federal immigration enforcement agency, U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), identifies immigrants in state and county jails who may lack legal status and requests that local law enforcement agencies (LEAs) detain or hold those immigrants beyond their scheduled release for further investigation of their removability under civil immigration laws. Since the federal government's clarification that its detainer requests are voluntary, a significant and growing number of LEAs have declined to hold immigrants. The spread of states and local jurisdictions withholding cooperation ultimately led to a reworking of federal-state partnerships around immigration enforcement marked by the replacement of Secure Communities with the Priority Enforcement Program (PEP).<sup>1</sup>

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1. Immigration and Customs Enforcement (ICE) is the primary federal agency charged with immigration enforcement and deportation from the U.S. interior. Secure Communities, sometimes abbreviated as S-Comm, involves two components: first, it permits information sharing between ICE and the FBI and; second, it permits ICE requests for extended detention of immigrants identified within the database as lacking legal status. The program that replaced Secure Communities is named the Priority Enforcement Program (PEP). Memorandum from Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas Winkowski et al., Acting Dir., U.S. Immigration & Customs Enf't (Nov. 20, 2014) (on file with the U.S. Department of Homeland Security) [hereinafter *November 2014 Secure Communities Memo*]; *Secure Communities: Overview and Fact Sheet*, U.S. IMMIGRATION & CUSTOMS ENF'T., U.S. DEP'T OF HOMELAND SEC., [www.ice.gov/secure-communities](http://www.ice.gov/secure-communities) (last updated Oct. 7, 2015).

This Article is part of a scholarly project to examine cooperation with executive action and nonbinding federal policy. In other research, I have shown that states' perceptions of the federal Deferred Action for Childhood Arrivals (DACA) policy were integral to the subsequent enactment of integrative state policies that furthered the aims of DACA.<sup>2</sup> This Article extends those insights to another aspect of immigration policy. This Article makes three key contributions to scholarship. First, it offers a theoretical frame and empirical method for analyzing state cooperation with nonbinding federal policies, such as executive actions, that combines cooperative federalism with procedural justice theory. Second, it applies these theories to a timely study of the evolving norms of state and local engagement in immigration enforcement. Third, it extrapolates from the case study of evolving immigration detainer policy a model of state noncooperation as policy (re)making in immigration enforcement. It concludes with lessons for DHS's continued efforts to rebuild state-local cooperation in immigration enforcement.

## I. THEORETICAL FRAMEWORK: LEGITIMACY AND UNCOOPERATIVE FEDERALISM

### *A. Legitimacy and State Cooperation*

The concept of legitimacy is defined as the recognition of the executive branch's authority to govern as appropriate, proper, and just. This definition is based on classical conceptions of legitimacy originating with Max Weber. Weber defines a legitimate social order as one where everyday citizens perceive an obligation to obey legal authorities.<sup>3</sup> Socio-legal scholars extend this definition to the study of legal compliance, with a prominent example being Tom Tyler and his co-authors who state, "[L]egitimacy is the belief that the law and agents of the law are rightful holders of authority; that they have the right to dictate appropriate behavior and are entitled to be obeyed; and that laws should be obeyed simply because that is the right thing

2. See Ming H. Chen, *Beyond Legality: Understanding the Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. (forthcoming 2016) (examining legitimacy as motivation for state cooperation with DACA).

3. MAX WEBER, *ECONOMY AND SOCIETY* 215 (Guenther Roth & Claus Wittich eds., University of California Press 1968) (1922).

to do.”<sup>4</sup> This form of legitimacy is based on the justice of the procedures through which decisions are made, which studies consistently show have a substantial impact across a wide variety of contexts.<sup>5</sup> Legitimacy is also based on inferences about the character of an authority and especially the trustworthiness of one’s relationship with the authority; it is based on the assumption that knowing another’s character and motives tells us whether she will act reasonably in the future, whatever the outcome of the decision.<sup>6</sup> While legitimacy may be combined with other psychological motivations—and indeed, may overlap with other motivations—it is distinct: the essence of legitimacy is that the belief in institutional authority is *itself* a reason for obeying the law. That sense of fidelity to legitimate authority operates alongside, and in relationship to, legal contestation. It is the main subject of this Article.

Subsequent research recognizing the difficulty of addressing social problems without credible enforcement shifts the focus from obedience to mandatory law to deference to voluntary ones.<sup>7</sup> Whereas compliance is concerned with individual obedience to the law, cooperation is concerned with eliciting voluntary deference or furtherance of the law in group settings where adherence to a binding law is not necessarily required. Compliance is often motivated by the external threat of legal enforcement or promise of a reward; cooperation is *voluntarily* given (or withheld) and motivated by internal forces distinct from calculations of punishment or reward.<sup>8</sup> Shifting from compliance to cooperation leads to a changed focus on the internal motivational forces that lead people to undertake voluntary actions, many of them social motivations, and the discretionary quality of the actions taken. Rules and policies can create opportunities to cooperate or they can

4. Jonathan Jackson et al., *Why Do People Comply With the Law?*, 52 BRITISH J. CRIM. 1051, 1053 (2012). Tyler and his collaborators use empirical studies to demonstrate that everyday compliance with the law is shaped not only by instrumental concerns such as incentives and sanctions. It is also shaped by what people think about the procedural fairness of laws. TOM TYLER, *WHY PEOPLE OBEY THE LAW* 4 (Princeton University Press 2006) (1990). Many other studies of law and society have found similarly robust associations across cultural contexts and substantive areas.

5. TYLER, *WHY PEOPLE OBEY*, *supra* note 4, at 115–18, 174–78.

6. *Id.*; TOM TYLER & YUEN HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 58–64 (2002) (disaggregating process-based regulatory strategies into “motive-based trust” in authorities and procedurally just administration of laws).

7. TOM R. TYLER, *WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATION* 16–17 (2011) (explaining why the emphasis shifted).

8. *Id.* at 23–26, 34, 42–43 (Table 1 and subsequent discussions contrast rule adherence and cooperation under required and voluntary regimes).

constrain voluntary cooperation. Binding federal law (such as statutes and regulations) mandates behavior and can also preempt states from sharing in governance decisions, thereby constraining opportunities for voluntary cooperation. Nonbinding federal policies in cooperative federalism power-sharing arrangements create the conditions for voluntary cooperation. This Article uses the example of duly enacted federal regulations on immigration detainers that give states and localities an option to cooperate with federal immigration enforcement.<sup>9</sup>

Cooperation is foundational to society and therefore important to understand, explain, and cultivate.<sup>10</sup> Richard Fallon identifies three forms of legitimacy that roughly correspond to Tyler's motivations to cooperate: legal legitimacy, sociological legitimacy, and morality.<sup>11</sup> Legality is motivated by instrumental concerns, such as seeking legal benefits or avoiding legal sanctions. Sociological acceptance is normatively and procedurally motivated insofar as it reflects people's belief that the laws are fairly administered and that the authorities are trustworthy. Morality is motivated by substantive policy preferences. Importantly, the willingness to voluntarily cooperate with trustworthy authorities and fair procedures is a *signal of perceived legitimacy* rather than an incontrovertible claim. Unlike legality and morality, the sociological form of legitimacy rests on an internal definition. While it is difficult to maintain sharp distinctions between legitimacy, legality and morality in the presence of overlapping and mixed motivations,<sup>12</sup>

9. Some cooperative federalism definitions are more tightly constrained to instances where the federal government provides a block grant for states to administer in accordance with certain spending conditions or the federal government provides states and localities an opt-out with the understanding that the federal government will take over governance. My definition is more flexible and conforms to other scholars who invoke softer forms of cooperative federalism to study a broader array of power sharing agreements and policy contexts. Thanks to David Rubenstein for pointing out the distinction.

10. The main emphasis is on procedural forms of legitimacy because they can overcome substantive policy preferences when sufficiently strong. See also TYLER, *WHY PEOPLE OBEY*, *supra* note 4, at 6, 170–73 (“theories of procedural justice suggest that people focus on court procedures, not on the outcomes of their experiences . . . if a judge treats them fairly . . . people will react positively to their experience, whether or not they receive a favorable outcome”); TYLER, *WHY PEOPLE COOPERATE*, *supra* note 7, at 18 (“The core argument is that while people are clearly motivated by self-interest and seek to maximize their material rewards and minimize their material deprivations, there is a rich set of other, more social motivations that additionally shape people’s actions.”). Other definitions of legitimacy include legality and moral or substantive policy preferences. See, e.g., Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794 (2005) (describing three concepts of legitimacy).

11. Fallon, *supra* note 10, at 1794 (describing three concepts of legitimacy).

12. See Alan Hyde, *The Concept of Legitimacy in the Sociology of Law*, 1983 WIS. L. REV. 379, 382 (1983) (Hyde considers these distinctions inextricable and expresses skepticism of whether they can be disentangled from other explanations of compliance such as coercion and

the concept of legitimacy in the sociological sense is analytically distinct and worthy of consideration in its own right. Perceptions of legitimacy, legality, and morality can simultaneously be present, even if legitimacy can also operate independently of internal assessments that the law is legally defensible and enforceable or normatively desirable.<sup>13</sup> Also, as Fallon points out, legality and legitimacy can inform and sometimes constitute one another. He writes, “Sociological acceptance is a necessary condition for a . . . legal system to exist at all,” and claims to a law’s legality can operate as signals of legitimacy and help to build the perception of the law’s legitimacy.<sup>14</sup> Normative evaluations of a law’s morality or correspondence to one’s substantive policy preferences might also constitute or influence the perception that a law is legitimate.

Motivations for cooperation can be studied empirically. Observable indicia include attitudes of acceptance and cooperative behaviors.<sup>15</sup> In terms of attitudes, the key criterion is the individual’s sense of obligation to cooperate with legal authority—not merely out of a sense of compulsion, but because of a *belief* in the legitimacy of the legal authority that issues laws. Numerous empirical studies influenced by Tyler’s definition demonstrate that this form of legitimacy may be expressed as a belief in procedural justice—for example, if the legal authority was duly elected, the law duly enacted, or the implementation fairly administered—or motive-based justice when an official is deemed trustworthy. However, few studies have examined

self-interest). Fallon acknowledges the difficulty, but he maintains the possibility of disaggregating the three strands in a useful way. Cf. Fallon, *supra* note 10, at 1790–92 (“[L]aw does not rest on a single rock of legitimacy . . . but on sometimes shifting sands. Realistic discourse about constitutional legitimacy must reckon with the snarled interconnections among constitutional law, its diverse sociological foundations, and the felt imperatives of practical exigency and moral right.”).

13. Tyler’s studies show that cooperative behavior is *better* explained by procedural justice and motive-based trust than instrumental variables such as punishments and rewards connected with legality. This means that there is greater explanatory power for the variance in behavior. However, it does not deny that instrumental considerations such as legality influence behavior. TYLER, WHY PEOPLE OBEY, *supra* note 4, at 6; TYLER, WHY PEOPLE COOPERATE, *supra* note 7, at 18.

14. Fallon, *supra* note 10, at 1791 n.7.

15. Craig A. McEwen & Richard J. Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 LAW & POL’Y 257, 259 (1986) (delineating attitudinal and behavioral dimensions of legitimacy). McEwen and Maiman caution scholars not to infer too much from acquiescence by itself without additional evidence that cooperative behavior is motivated by an affirmative belief in legitimacy. This sense of caution is important and accompanies the Article’s reliance on public statements and legislative histories alongside the enactment of state policy.

immigration enforcement.<sup>16</sup> Survey-based studies of individuals' attitudes toward cooperation ask whether an individual feels it is okay to disobey a federal law; whether disobeying a law is sometimes justified; and what factors might cause someone to disobey.<sup>17</sup> This quantitative research design is adapted for qualitative study in this Article.

This Article adapts Tyler's framework in another way. It shifts the unit of analysis from individual to institutional cooperation, using states' decisions to cooperate or not cooperate with federal laws rather than the decisions of ordinary people. In doing so, this Article bridges the procedural justice, organizational compliance, and cooperative federalism literatures. Like individuals, public institutions decide whether or not to cooperate with federal laws based partly on their perceptions of the legitimacy of the federal law or their belief in the federal authorities that issued it. The cross-sectional analysis of state motivations for adopting their detainer policies corresponds to individual motivations. As with individuals, some of the state motivations for cooperating with federal policies are instrumental or self-serving ones—for example, obtaining funds from the federal government for necessary state programs or avoiding legal sanctions in the form of fines or other liability. Other motivations to cooperate are driven by normative commitments, both to procedural and substantive ideals. A notion of procedural justice entails recognition of the federal government's authority to issue commands or to fairly administer a program, notwithstanding independently held and sometimes contrary substantive policy preferences. Substantive policy concerns can complement these procedural grounds for accepting a federal policy. In immigration enforcement, public safety is key among them. Community solidarity is another, whether seen in community policing that relies on relationships between law enforcement and ordinary people

16. Major studies of procedural justice have been conducted in policing in Tom Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. SCI. & SOC. SCI. 84, 84 (2004); criminal law in TOM TYLER & JONATHAN JACKSON, *Future Challenges in the Study of Legitimacy and Criminal Justice*, in LEGITIMACY AND CRIMINAL JUSTICE 83, 83–84 (Justice Tankebe et al. eds., 2013); and tax law in Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599, 602 (2007). One of the only scholars studying procedural justice and immigration enforcement is Emily Ryo. Emily Ryo, *Less Enforcement, More Compliance, Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 622 (forthcoming 2015); Emily Ryo, *Deciding Whether to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 574, 574 (2013). See also Adam Cox & Thomas Miles, *Legitimacy and Cooperation: Will Immigrants Cooperate with Local Police Who Enforce Immigration Law?* (Univ. of Chi. Working Paper No. 534, Sept. 9, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2658265](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658265).

17. See, e.g., Ryo, *Norms and Economics*, *supra* note 16, at 589 (survey instrument and table summarizing survey results).

to report crimes, share information, and build a sense of community or civic engagement that calls on ordinary people to participate in civic channels and contribute resources of time, money, and commitment for the sake of the greater good. The state cooperation continuum models the decision-making process undertaken by individuals who translate their beliefs into behaviors and the policy outcomes that result.

Admittedly, the correspondence between individual decision-making and institutional decision-making is not perfect. It is not always clear who speaks for the state as a public actor when the state's value preferences are internally divided.<sup>18</sup> Moreover, elected officials (such as a governor or sheriff) face pressure to get re-elected and can use public statements strategically, rather than explaining their thinking in a straightforward manner.<sup>19</sup> Yet the process-tracing analysis used in this Article emulates the methods commonly used for organizational and public policy analysis<sup>20</sup> and confirmatory evidence, such as stipulations in litigation and correspondence, and mitigates the limitations of public statements as evidence of state decision-making.

### *B. Uncooperative Federalism as Policymaking in Immigration Enforcement*

Studying institutional compliance and cooperative federalism together also yields the insight that the cooperation continuum extends

18. Political scientists routinely confront this challenge when examining Congress. See, e.g., Kenneth Shepsle, *Congress Is a They, Not an It: Legislative Intent as an Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–42 (1992) (pointing out collective action problems in entities comprised of multiple actors and conditions of divided government). Legal scholars and judges encounter reliability problems when using legislative history as a guide to legislative intent as well, though the use of legislative history in courts and scholarship is as well established as it is contested. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 18–19, 23–24, 29–37 (1997) (critiquing reliance on legislative history for purposes of discerning legislative intent). Cf. Stephen G. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863–64 (1992) (legislative history is a valuable guide to Congress' intended meaning); Robert A. Katzman, *Statutes*, 87 N.Y.U. L. REV. 637, 653 (2012) (same).

19. While important considerations, these obstacles are no more present in the study of state cooperation than when studying the political behavior of Congress. Granted state cooperation with federal laws is complicated by doctrines of preemption in some instances. This Article focuses on arenas of shared governance as compared with arenas where the federal government commands state compliance on the grounds of these doctrines.

20. Andrew Bennett, *Process Tracing and Causal Inference*, in RETHINKING SOCIAL INQUIRY (Henry Brady & David Collier eds., 2d ed. 2010) (endorsing case study methods such as process tracing and within-case analysis as legitimate means of social scientific explanation and advancing or evaluating alternative explanations for policy developments).



from willing embrace of federal policy and national standards<sup>21</sup> to uncooperative behavior that can revise, reshape or reject national standards.<sup>22</sup> By choosing to not cooperate with the federal policy, or by limiting participation, the state can weaken, slow, or redirect the federal mandate. In the context of immigration enforcement, where the federal government has increasingly enlisted state-local involvement, states and localities might resist a federal request to hold immigrants beyond their scheduled release for transfer to federal immigration custody by enacting state and local policies that independently govern detainer practices or by enacting executive orders or TRUST Acts that prohibit local cooperation under certain circumstances. And yet, in this Article, state resistance to federal detainer requests is not considered civil disobedience in a legal environment that makes cooperation voluntary; it is part of a cooperation continuum.<sup>23</sup>

A corollary of cooperation and noncooperation at the local level—borne of interaction and conversation between federal, state, and county officials—is policymaking.<sup>24</sup> The dynamic of states and localities reaffirming, revising, or rejecting federal policy can be described

21. A classic example of a statute embracing cooperative federalism is the Clean Air Act, which empowers California to set standards for the rest of the nation. Studies of over-compliance have focused on business firms that exceed environmental regulations. See, e.g., Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 336 (2004).

22. Uncooperative federalism is a variant of cooperative federalism. It is defined by Professors Jessica Bulman-Pozen and Heather Gerken to include instances where states act as dissenters, rivals, and challengers from their position as insiders and partners in policymaking rather than passively acquiescing to federal policy or resisting as policymaking outsiders or sovereigns. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1281 (2009).

23. While there has been scholarship describing the evolution of immigration detainers, few scholars have theorized detainer practices as a case study of voluntary cooperation. Instead, other scholars have studied voluntariness as a matter of detainer discretion. Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1106, 1160 (2013); Christopher Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 208–09 (2013); Juliet Stumpf, *Devolving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1262 (2015). Those analyzing these exercises of discretion have often assumed a binary view of legal compliance that posits the kinds of state-local resistance to detainer requests (or other sanctuary policies) as civil disobedience rather than a form of policymaking. Although I part ways with this conception, the binary formulation is especially understandable where, for many years, the federal government indicated that their requests were actually mandatory (rendering denials of those requests to be disobedient).

24. In legal scholarship on cooperative federalism, common analogies for this form of policymaking are to a layered or marbled cake. Robert Schapiro calls this polyphonic federalism, emphasizing the possibility of blending state-federal power to produce a distinct form of governance. ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 7, 92 (2009). Environmental scholars such as Ann Carlson and Kirsten Engel speak of dynamic or iterative federalism. Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. L. REV. 1097, 1099 (2009); Kirsten Engel, *Harnessing the Benefits of Dynamic*

in terms of policy learning or policy development.<sup>25</sup> State cooperation with a federal policy can reinforce and strengthen immigration policy writ large. Noncooperation can undermine, disrupt, or displace it.<sup>26</sup> Though it may seem counterintuitive, states acting uncooperatively serve as “servants and allies carrying out federal policy” just as they do when they act cooperatively.<sup>27</sup> Their influence stems from states’ and localities’ integral role as the servants of national policy, the hands and feet executing and implementing the heart of federal policies, and their insider status.

Uncooperative federalism . . . takes place in areas where states can take advantage of the connective ties that bind them to federal officials. While those ties may lead state officials to dissent in less forceful or radical terms [compared to those dissenting as outsiders], they also yield knowledge of the system and personal relations with the people best positioned to change the policy. If effective dissent requires one to know both what to say and to whom to say it, uncooperative federalism ought to be fairly effective.<sup>28</sup>

In the current example, uncooperative federalism led to significant reform of immigration law enforcement policy around immigration detainers.

*Federalism in Environmental Law*, 56 EMORY L.J. 159, 161 (2006) (also describing cooperative federalism as runners passing a baton). Cf. Adam Cox, *Enforcement Redundancy and the Future of Immigration Law* 32 (N.Y. Univ. Pub. Law & Legal Theory, Working Paper No. 394, 2013).

25. There is a parallel social science literature on policy learning, policy feedback, and policy diffusion that makes additional distinctions between vertical and horizontal diffusion, bottom-up and top-down diffusion, and snowball, pressure valve, and spill-over policy dynamics difficult to distinguish. See generally PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 17–53, 79–102 (2004); Frances Stokes Berry & William D. Berry, *Innovation and Diffusion Models in Policy Research*, in *THEORIES OF THE POLICY PROCESS* 365–66 (Paul Sabatier & Christopher Wiele eds., 3d ed. 2014); Keith Boecklman, *Influences of States on Federal Policy Adoption*, 20 POL’Y STUD. J. 365 (1992); Charles R. Shipan & Craig Volden, *Bottom Up Federalism*, 50 AM. J. POL. SCI. 825, 826–29 (2006). On immigration policy specifically, see generally KARTHICK RAMAKRISHNAN & PRATHEEPAN GULASEKARAM, *THE NEW IMMIGRATION FEDERALISM* 6 (2015); Monica Varsanyi & Doris Marie Provine, *Divergent States: Explaining Immigration Policy Trajectories in New Mexico and Arizona* (unpublished manuscript) (on file with author); Graeme Boushey & Adam Luedtke, *Immigrants Across the U.S. Federal Laboratory: Explaining State Level Innovation in Immigration Policy*, 11 ST. POL. & POL’Y Q. 390, 408 (2011); Laura B. Bozovic, *Immigration Policy in the American States: An Event History Analysis of State Adoption and Diffusion of the Cooperative Immigration Enforcement 287(g) Program* (2012) (unpublished Ph.D. dissertation, University of Alabama) (on file with University of Alabama Libraries, University of Alabama).

26. Sovereignty-laden images of uncooperative federalism include one form of government threatening the other, competitive versions where one crowds out the other, or other more conflicting versions in which states are viewed as “disobedient” or even renegade in its decision to not align with the federal government. In the sovereign realm, rather than servant realm, judicial doctrines such as preemption or anti-commandeering are sometimes necessary to mediate conflicts between state and federal exercises of power within shared zones of governance.

27. Bulman-Pozen & Gerken, *supra* note 22, at 1258.

28. *Id.* at 1288.

## II. RISE AND FALL OF SECURE COMMUNITIES AS STATE NONCOOPERATION

In broad perspective, dissatisfaction with federal immigration law has led to the adoption of state laws that reshape the policy landscape in both inclusionary and exclusionary ways. First, state laws and policies in forty-nine of fifty states voluntarily provide driver's licenses to undocumented immigrants who have obtained lawful presence designation from the federal government. An example of the lawfully present would be the DACA recipients, colloquially known as the DREAMers. These policies further immigrant inclusion and extend the reach of the federal government's underlying executive action.<sup>29</sup>

Second, elaborated in this Article, is the evolution of criminal immigration enforcement programs and specifically state and local resistance to the federal government's immigration detainer usage through the Secure Communities program. Over the last decade, federal immigration enforcement has adopted an enforcement strategy that focuses its limited resources on deporting "criminal aliens" who are high priorities for removal.<sup>30</sup> Partnerships between federal immigration authorities and LEAs have become an important part of immigration enforcement.<sup>31</sup> ICE touts Secure Communities' use of immigration detainers in jails as a cornerstone of these partnerships.<sup>32</sup>

29. Chen, *supra* note 2.

30. Jennifer Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 138, 139 (2009); César García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1472–73 (2013); Julia Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 369–70 (2006).

31. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 U.C.L.A. L. REV. 1819, 1849 (2011). More information about the 287(g) program that preceded Secure Communities and its impact on immigration enforcement is available. See MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 40 (2012); RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 30 (2011).

32. The use of immigration detainers predating and during Secure Communities can be traced through numerous government documents, some revealed retrospectively in conjunction with Congressional investigations and private litigation. See, e.g., Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency, 827 F. Supp. 2d 242, 259 (S.D.N.Y. 2011) (FOIA litigation resulting in revelation that ICE knew program was not voluntary despite contrary claims); U.S. IMMIGRATION & CUSTOMS ENF'T, SECOND CONGRESSIONAL STATUS REPORT COVERING THE FOURTH QUARTER FISCAL YEAR 2008 FOR SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 1 (2008) (listing the required components of Secure Communities); *November 2014 Secure Communities Memo*, *supra* note 1; Letter from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to Zoe Lofgren, Chairwoman, Subcommittee on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law (Sept. 7, 2010) (on file with the U.S. Department of Homeland Security) (responding to ICE's inconsistent

Since its origin, Secure Communities has been an information-sharing program that enables federal immigration enforcement to screen the fingerprints of every individual arrested and held in custody so that they can be checked against immigration records. Federal immigration authorities use this information in their effort to greatly increase interior deportations. If ICE learns from the database search that LEAs have someone in custody whom there is reason to believe is subject to removal, the federal government can request that the jail detain, or “hold,” the person beyond his scheduled release until federal immigration authorities can take custody in order to commence further investigation or initiate removal proceedings. The 2008 pilot program for Secure Communities operated in just fourteen jurisdictions. It expanded exponentially to reach 3,181 jurisdictions by 2013, with nearly one million detainers issued nationwide.<sup>33</sup>

*A. Shifting from Compliance to Cooperation: Immigration Detainer Requests and the Voluntariness of State-Local Cooperation, 2008 – 2010*

The first step in understanding immigration detainers as a case study of state noncooperation with federal immigration enforcement policy involves closely examining the implementation of Secure Communities and the government’s shifting stance regarding local discretion over the detainer decisions. Language in the Secure Communities’ detainer forms initially indicated that LEAs were *required* to obey federal requests.<sup>34</sup> While it was initially unchallenged,

responses to local efforts to “opt-out”). Christopher Lasch, Adam Cox, and other scholars provide summaries of this complicated history and explanations of critical documents, forms, and regulations. See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 98 (2013) (“the mandatory nature of Secure Communities was not initially made public”); Christopher Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 173 (2008–09) (describing Santa Clara’s opt-out campaign and FOIA litigation that demonstrated “DHS’ failure to adhere to the enforcement priorities it claimed” and “significant confusion about whether local participation in Secure Communities was mandatory or optional,” including the revelation that ICE officials had long known the program was not voluntary”); David Martin, *Resolute Enforcement Is Not Just for Restrictionists*, 30 J. L. & POL. 411, 444 (2015); Steven J. Mulroy, *“Hold” On: The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 CASE W. RES. L. REV. 815, 840 (2013); Stumpf, *Devolving Discretion*, *supra* note 23, at 1260; Stumpf, *Crimmigration Crisis*, *supra* note 30, at 391.

33. See U.S. DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OPERATIONS OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT’S SECURE COMMUNITIES 5 (2012), [https://www.oig.dhs.gov/assets/Mgmt/2012/OIG\\_12-64\\_Mar12.pdf](https://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-64_Mar12.pdf); *Secure Communities: Activated Jurisdictions*, U.S. DEP’T OF HOMELAND SEC., <http://ice.gov/secure-communities> (last visited Sept. 21, 2015); *Who Are the Targets of ICE Detainers?*, TRAC REPORTS (Feb. 20, 2013), <http://trac.syr.edu/immigration/reports/310/>.

34. 8 C.F.R. § 287 (1994).

this language led to criticism and challenges from localities and immigrants' rights advocates who wanted to opt-out of the controversial program.<sup>35</sup> In 2010, ICE began to issue conflicting statements about the voluntariness of these requests in response to numerous requests for clarification.<sup>36</sup> In a 2010 briefing to the Congressional Hispanic Caucus, ICE officials stated, "local law enforcement are not mandated to honor a detainer."<sup>37</sup> Thereafter, ICE clarified in its detainer regulations that Secure Communities is an "opt-in" program and cooperation and requests to detain were *voluntary*.<sup>38</sup> In litigation following the

35. David Martin points out that Secure Communities was initially implemented during a period when the undocumented population was growing and many states sought out tougher enforcement. As compared with the 287(g) task force agreements, Secure Communities was seen as a more flexible program with more safeguards against abuse. Martin, *supra* note 32, at 443. Faced with changing conditions and concerns about implementation, Santa Clara County became one of the first to opt-out. See Letter from David Venturella, Assistant Dir., U.S. Immigration & Customs Enft, to Miguel Marquez, Cty. Counsel, Cty. of Santa Clara (Sept. 27, 2010) (on file with the U.S. Department of Homeland Security). Sheriffs working in tandem with immigrants' rights groups prompted clarification of their ability to opt-out of the program. If they could not opt-out, these communities claimed the program violated the Tenth Amendment's Anti-Commandeering Clause and could also expose local jurisdictions to liability for other violations. Peter Markowitz and attorneys from the ACLU described the blend of litigation, community advocacy, and political negotiation that led to the crystallization of these claims as originating from in-prison advocacy, to developing theories of statutory interpretation and substantive law (state and federal law) in briefs and demand letters to sheriff's offices, to working with the media and community organizers to build political support that could influence mayors and governors, and to litigation (threatened or actual). Symposium, *Criminal Immigration: Crossing the Border Between Criminal Law and Immigration Law*, 92 DENV. U. L. REV. (2015). See also Stumpf, *Criminal Immigration Crisis*, *supra* note 30, at 412; Stumpf, *Devolving Discretion*, *supra* note 23, at 1260.

36. Many examples of the changing language on detainers are available. See Nat'l Day Laborer Org. Network, *supra* note 32, at 260; Memorandum from David Venturella, Assistant Dir., U.S. Immigration & Customs Enft, to the Cong. Hispanic Caucus (Oct. 28, 2010) (on file with the U.S. Department of Homeland Security). Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enft Agency, 827 F. Supp. 2d 242 (S.D.N.Y. 2011), and other investigations into ICE inconsistencies about the mandatory or voluntary nature of program upended confusing statements from ICE in 2010 that communities could *not* opt-out. Subsequent revelations from the release of documents pursuant to FOIA showed DHS' internal forms indicating that communities could opt-out. *NDLON v. US Immigration and Customs Enforcement Agency (ICE)*, CTR. CONST. RIGHTS, <https://ccrjustice.org/home/what-we-do/our-cases/national-day-laborer-organizing-network-ndlon-v-us-immigration-and-customs> (last visited Sept. 21, 2015); *Secure Communities is Optional*, Harris Says, UNCOVER THE TRUTH (Nov. 7, 2012), <http://uncoverthetruth.org>.

37. Correspondence and investigations described in *supra* notes 32, 35-36.

38. According to the Congressional Research Service, ICE detainer form I-247 has been revised three times since 2010 in response to controversy and litigation. KATE M. MANUAL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 12 (2014). Examples of forms include *Interim Policy Number 10074.1: Detainers*, CTR. FOR INVESTIGATIVE REPORTING, <http://cironline.org/sites/default/files/legacy/files/ICEdetainerpolicy.PDF> (last visited Sept. 21, 2014) and *Immigration Detainer – Notice of Action*, TRAC, SYRACUSE UNIV., [http://trac.syr.edu/immigration/reports/310/include/immigrant\\_detainer\\_form\\_12\\_2012\\_i-247.pdf](http://trac.syr.edu/immigration/reports/310/include/immigrant_detainer_form_12_2012_i-247.pdf) (last visited Sept. 21, 2014) (revised Form I-247). Even after these revisions and DHS clarifying guidance, some local law enforcement agencies took the position that detainers were

amended interpretation, ICE has revised its statements to say “[a] detainer is the mechanism by which the Service *requests* that the detaining agency notify the Service . . .” of an alien whose immigration status is questionable.<sup>39</sup>

Although the premise of voluntary action was far from straightforward, it was critical. Once states and counties realized they were not legally compelled to honor detainer requests and that cooperation was a matter of choice, a patchwork of responses arose. Studying these responses is the second step in understanding detainers as a case study of noncooperation.

### *B. State-Local Resistance to Secure Communities, 2011 – 2014*

As described in the background to the case study, the picture of state and local cooperation changed dramatically and fitfully. Notwithstanding ICE’s repeated clarifications of its detainer policy from 2010-2011, the number of federal requests for detainers initially remained high.<sup>40</sup> Rather, resistance took root in isolated communities. However, beginning in late 2012, the number of states and counties resisting detainer requests, or setting conditions on their responses to federal requests, began to mount.<sup>41</sup> According to the Catholic Legal Immigration Network, in 2013 and 2014 at least 259 localities (twenty-six cities and 233 counties) officially restricted the extent to which LEAs may hold individuals for transfer to ICE.<sup>42</sup> The trend continued until November 2014, when the Secure Communities’ demise limited federal detainer requests.<sup>43</sup> While the number of non-cooperating localities

mandatory until *Miranda-Olivares v. Clackamas Cty.* rearticulated they were indeed not mandatory. No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*3 (D. Or. Apr. 11, 2014).

39. *Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014) (citing 59 Fed. Reg. 42,407 (Aug. 17, 1994)). *Galarza* indicates that its holding is in keeping with ICE’s previous litigation position in *Vargas v. Swan*, 854 F.2d 1028, 1030 (7th Cir. 1988). *Id.* at 642.

40. ICE detainer requests peaked in 2011 and then decreased until 2012 when the drop off stabilized before becoming even steeper in 2013. See *Number of ICE Detainers Drops by 19 Percent*, TRAC REPORTS (July 25, 2013), <http://trac.syr.edu/immigration/reports/325/>.

41. Two good sources of information about state responses to ICE requests is the ILRC map, *Immigration Enforcement*, IMMIGRATION LEGAL RES. CTR., <http://www.ilrc.org/enforcement> (last visited Sept. 21, 2015), and the Catholic Immigrant Legal Network Report, *States and Localities That Limit Compliance with ICE Detainer Requests*, CATHOLIC LEGAL IMMIGRATION NETWORK (Oct. 2014), <https://cliniclegal.org/resources/articles-clinic/states-and-localities-limit-compliance-ice-detainer-requests-jan-2014> (listing states and counties that limited compliance with ICE detainers as of Oct. 2014).

42. See CATHOLIC LEGAL IMMIGRATION NETWORK, *supra* note 41.

43. This trend of declining detainers may accelerate with the November 2014 DHS guidance that ends Secure Communities and limits the routine practice of requesting detainers to instances unless the noncitizen presents a serious danger to the community or threat to security.

was far from a majority, it constituted the snowball leading to the avalanche that disrupted detainer practices. Understanding the thought processes and diffusion of state and local policies that fueled this bottom-up disruption is critical to understanding the conditions under which detainer policies evolved—and to what effect.

To preview the findings, this Article contends that states and counties lack the motivation to cooperate with ICE detainer requests when they perceive reasons to doubt the procedural justice of immigration detainers and when they mistrust the federal government, not only when they fear legal liability or possess contrary policy preferences. A theoretically-drawn sample of policy responses is examined from jurisdictions within Arizona, California, Florida, Nevada, Texas, and others with high immigrant populations and a range of substantive policy preferences (immigration population and policy preferences are both factors found to influence policy development in other literature). First, the Article examines public justifications for adopting particular detainer policies in the form of legislative histories, executive agreements, and public speeches. A cross-sectional analysis of these rationales revealed in these policy documents illustrates the presence of legitimacy, legality, and morality motivations. While the relative strength of these motivations cannot be ascertained from the research design, legitimacy is a prominent motivation. Sometimes it operates independently, and other times it operates in tandem with legality and morality. This first set of findings speaks to the importance of addressing legitimacy as a component (or “input”) of cooperation. Second, narratives of state and local policy adoption illustrate how LEAs translate beliefs into behaviors. This second set of findings illustrates variation in the extent of cooperation with federal law (an “output”), suggesting that cooperation runs along a continuum rather than functioning as a binary phenomenon. While the degree of cooperation cannot be predicted from the presence of a particular motivation, the narratives demonstrate the range of policy outcomes connected with various processes of institutional decision-making.

It clarifies the voluntariness of complying with the detainer request under other circumstances. *November 21 Secure Communities Memo*, *supra* note 1. Also, TRAC reports that the overall number of federal detainer requests has declined by one-third. *Immigration Detainers Decline 39 Percent Since FY 2012*, TRAC REPORTS (Mar. 2014), <http://trac.syr.edu/immigration/reports/370/>.

## 1. Attitudes/Motivations: Why States and Counties Do Not Cooperate

A cross-sectional analysis of the public justifications for adopting detainer policies reveals the presence of multiple motivations for withholding cooperation. Recognizing legitimacy among them reveals the significance of DHS addressing more than the legality or morality of detainers in its federal immigration enforcement strategies.

### Figure 1 summarizing factors influencing cooperation with non-binding federal policy

#### *Legality and Legal Threat*

Mandatory/request - feelings of voluntariness in cooperation

4<sup>th</sup> Amendment and jurisdictional liability for holding immigrant without probable cause

#### *Legitimacy*

Acceptance of executive authority to issue Secure Communities, enter state-local partnerships

Attitudes toward federal government's handling of immigration enforcement

#### *Morality and Substantive Preferences*

Pro- or anti-immigrant climate

Autonomous policy goals and institutional values

- Public Safety (release of dangerous immigrants into the community following sentence)
- Community trust and Solidarity

#### *Legitimacy*

The narratives of states and counties withholding cooperation from Secure Communities signal the program's loss of legitimacy. Consistent with Tom Tyler's legitimacy research, states and counties overwhelmingly cited their lack of respect for and confidence in the federal government's immigration enforcement efforts. This lack of respect was based on skepticism about the trustworthiness of the federal government's motives (for Tyler, motive-based trust) and the



sense that the program was procedurally defective and being administered unfairly (for Tyler, citizens' perception of being treated fairly).<sup>44</sup>

Secure Communities' history was shrouded in mystery and missteps that bred community mistrust from its inception. DHS implemented its enforcement program in communities using a variety of strategies, shifting over time from the use of Memorandums of Understanding (MOUs) to other types of negotiated agreements, and then altering the substance of the agreements to focus on cooperation with detainer requests rather than access to LEA databases.<sup>45</sup> These inconsistent and changing practices generated confusion over the mandatory or voluntary nature of local participation in federal immigration enforcement. Moreover, community advocacy within Santa Clara and other counties revealed misleading federal government statements about specific requirements for local participation, presumably in an effort to compel state cooperation with ICE detainer requests.<sup>46</sup> These revelations precipitated more counties seeking to opt-out from detainer requirements and calls for independent investigation of the program.<sup>47</sup> The resulting government, nonprofit, and investigative journalism reports show that DHS was not adhering to its stated aims of targeting criminal aliens through Secure Communities, with high numbers of detained immigrants having no serious criminal conviction.<sup>48</sup> The failure to tailor detainer requests to criminal convictions suggested ICE was using LEA as part of its general immigration enforcement effort, rather than adhering to its stated aims as a targeted program, and that it was compelling cooperation over community opposition.<sup>49</sup> Florida's Miami-Dade County was one of several counties

44. TYLER, WHY PEOPLE OBEY, *supra* note 4, at 4; TYLER & HUO, *supra* note 6, at 58–64.

45. Specific accounts of DHS' implementation of Secure Communities vary, but the basic facts and link between elusive policies and community confusion are recounted in multiple sources. See, e.g., Lasch, *supra* note 32, at 176; Cox & Miles, *supra* note 32, at 136 n.34; Martin, *supra* note 32, at 449.

46. See also Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency, 827 F. Supp. 2d 242, 247 (S.D.N.Y. 2011); UNCOVER THE TRUTH, <http://uncoverthetruth.org/> (last visited Sept. 21, 2015).

47. *Id.* See also *supra* note 32 (describing investigations).

48. TRAC reported that only 14% of ICE detainers issued in FY 2012-2013 involved serious criminals and only 47% involved persons with criminal violations at all. *Few ICE Detainers Target Serious Criminals*, TRAC REPORTS (Sept. 17, 2013), <http://trac.syr.edu/immigration/reports/330/>. Some of those lacking criminal convictions nonetheless met high priority criteria by virtue of being recent entries or repeat re-entries.

49. AM. CIVIL LIBERTIES UNION OF MD., RESTORING TRUST: HOW IMMIGRATION DETAINERS IN MARYLAND UNDERMINE PUBLIC SAFETY THROUGH UNNECESSARY ENFORCEMENT 20 (2012); AARTI KOHLI ET AL., UNIV. OF CAL., BERKELEY LAW SCH., SECURE COMMUNITIES BY THE NUMBERS 1 (2011); OPERATIONS OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S SECURE

that emphasized concerns about “trust” as a factor in its decisions to not grant ICE holds.<sup>50</sup> The “trust” issue looms large in the narratives of noncooperation, rendering it fitting that state laws restricting county cooperation were subsequently named as “TRUST” Acts (a double entendre referring to the lack of trust in the federal government and the state law’s purpose as rebuilding trust between LEAs and immigrant communities).

Some of the non-cooperating localities cited the program’s disproportionate treatment of immigrants without serious criminal convictions or longtime residents as reasons for declining detainer requests. Illustrations reported as evidence of disproportionality included the use of detainers for pre-conviction holds, sometimes after the triggering charges had been dropped or bail had been paid; holding U.S. citizens, Legal Permanent Residents, or other long-time residents with substantial community ties; and holding domestic violence victims and those with traffic stops that resulted in arrests for trivial reasons.<sup>51</sup> Although these are legally valid grounds for removal under the multifactor provisions in sections 212(a) and 237(a) of the Immigration and Nationality Act (INA), they challenged public perceptions of fairness and proportionality. Such harsh practices violated normative values of fairness and procedural justice both related and unrelated to violations of law. For example, Cook County, Illinois, premised its noncooperation on concerns that detention did not constitute “fair and equitable treatment” of immigrants apart from its concerns about legal violations or liability.<sup>52</sup>

### *Legality*

Although legality is intertwined with legitimacy in some cases, legality concerns expressed as lawfulness, legal sanctions, or adherence to legal norms are worthy of independent analysis as well. Other than the concerns over the mandatory versus voluntary nature of the

COMMUNITIES, *supra* note 33. David Martin credits these “mistakes in implementation” with the substantial opposition that followed. Martin, *supra* note 32, at 449.

50. See Memorandum from R.A. Cuevas, Jr., Cty. Att’y, Miami-Dade Cty., Fla., to Rebecca Sosa et al., Chairwoman, Bd. Cty. Comm’rs (Dec. 3, 2013) (on file with the County of Miami-Dade, Florida).

51. For a summary of the disproportionality argument, see Mark Noferi, *Mandatory Detention for U.S. Crimes: The Noncitizen Presumption Dangerousness* in DETENTION, RISK AND HUMAN RIGHTS (Robert Koulish et al. eds., 2014).

52. Cook County, Ill., Ordinance 11-O-73 (Sept. 7, 2011); LENA GRABER, NAT’L IMMIGRATION PROJECT OF THE NAT’L LAWYERS GUILD, ALL-IN-ONE-GUIDE TO DEFEATING ICE HOLDS, APPENDIX IV: LETTERS FROM PUBLIC OFFICIALS OR ELECTED OFFICIALS ON IMMIGRATION DETAINERS 1–9 (2012); Jason Cade, *Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013).

program, a prominent legal argument surrounding detainers was the concern that immigration detainers violated the Fourth Amendment, which limits the federal government's power to conduct unreasonable searches and seizures.<sup>53</sup> Holding an immigrant in custody beyond the time when he would otherwise be released—if he posted bail, if his charges were dispensed, or if he served his sentence—is comparable to making a new arrest in violation of these requirements because LEAs generally lack the legal authority to make an arrest based on a purely civil immigration violation without probable cause or a warrant for criminal arrest.<sup>54</sup> These limitations function as substantive protections against government intrusion on individual privacy. Another Fourth Amendment requirement is that the federal government show that it has probable cause and execute a warrant for arrest, interposing a magistrate judge to evaluate probable cause.<sup>55</sup> The requirement promotes reliability by interposing an independent reviewer of probable cause and again checks government tyranny over individuals.

In exercising their choice to cooperate with detainer requests that fall short of these requirements, some states and localities grappled with the Constitutionality of holding immigrants or prolonging detention beyond scheduled release. Some states and counties objected to immigration detainers outright, as a matter lacking legal authority.<sup>56</sup> Others conditioned their response to stay within the bounds of legal authority. A Nevada sheriff said he was willing to hold immigrants *provided* that probable cause and a warrant existed, suggesting that his reluctance was not premised on the legality of holding immigrants for

53. U.S. CONST. amend. IV (protects people against “unreasonable searches and seizures” and requires that “no warrants shall issue, but upon probable cause”).

54. See *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 39 (D. R.I. 2014) (“Because the state court released Ms. Morales on bail, the RIDOC detention based on the ICE detainer constitutes a ‘new seizure’ and must meet all of the Fourth Amendment requirements.”); see also *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*9, \*11 (D. Or. Apr. 11, 2014) (“The seizures that allegedly violated her Fourth Amendment rights were not a continuation of her initial arrest, but new seizures independent of the initial finding of probable cause for violating state law . . . Thus, the Fourth Amendment applies to County’s detention of Miranda-Olivares after she was entitled to pre-trial release on bail and again after she was entitled to release after resolution of her state charges.”).

55. U.S. CONST. amend. IV.

56. Before enacting a TRUST Act in 2013, California passed a state law that would have barred the state from detaining individuals on behalf of ICE under nearly all circumstances, even if they were charged or convicted of a significant crime. Governor Brown vetoed this more expansive version of the law. *Recent Legislation: Immigration Law — Criminal Justice and Immigration Enforcement — California Limits Local Entities’ Compliance with ICE Detainer Requests — TRUST Act*, 127 HARV. L. REV. 2593, 2595 n.19, 2598 (2014) [hereinafter *Recent Legislation*].

ICE per se, but on the strength of the legal claim for holding the immigrant in a particular manner.<sup>57</sup> In a similar spirit, some counties limit the holding period to 48 hours rather than an indefinite time until ICE takes custody, or enact other conditions.<sup>58</sup>

Legitimacy research tells us that the loss of sociological acceptance imperils other forms of legitimacy as well. This intertwining relationship between legitimacy and legality explains why the general concern for fairness or procedural justice can also be articulated in terms of legal argument. In *Miranda-Olivares*, a federal court declared that detainers were not mandatory and that a state or county could be held liable under the Fourth Amendment.<sup>59</sup> The judicial reasoning shows that the fear of liability is certainly related to a loss of legitimacy and that in instances where a course of action has been ruled unconstitutional (or in grave constitutional doubt) there may be a near total loss of legitimacy. While such a ruling functionally eliminated the LEAs' choice to cooperate, the LEAs' noncooperation was neither automatic nor immediate. The legal losses engendered a loss in legitimacy once the laws encompassed values of fairness that matter *independently* of liability. The laws constituted legitimacy. It is in this same sense that Richard Fallon tells us that laws depend much more on their present sociological acceptance than upon the legality of their formal ratification in a legal system that utilizes *stare decisis*.<sup>60</sup>

Still while constitutional litigation brings the two concepts closer together, they are not always coextensive. Sometimes legitimacy can be separated from legality where litigation and legal threat are present. Within weeks of the *Miranda-Olivares* decision, fifty sheriffs in Oregon voluntarily announced that they would no longer hold people based on ICE detainers because of the risk of liability.<sup>61</sup> Two counties in Nevada (Washoe County and Reno) and South Tucson, Arizona

57. See Paul Johnson, *Nevada Sheriff Vows to No Longer Hold Illegal Immigrants Without Warrant*, SANCTUARY CITIES INFO (July 16, 2014), [http://sanctuarycities.info/sanctuary\\_state\\_nevada.htm](http://sanctuarycities.info/sanctuary_state_nevada.htm). The governor of Maryland similarly issued a memo limiting Maryland's compliance with ICE detainers unless "the requests have adequate support for a finding of probable cause under the Fourth Amendment." Letter from Martin O'Malley, Governor, St. of Md., to Gregg Hershberger, Sec'y, Dep't of Pub. Safety & Correctional Servs. (Aug. 27, 2014) (on file with the State of Maryland). More litigation supporting the probable cause requirement is emerging, although the requirement for a warrant remains unsettled.

58. See *infra* notes 100–04.

59. *Miranda-Olivares*, 2014 WL 1414305, at \*8.

60. Fallon, *supra* note 10, at 1790–92.

61. IMMIGRATION LEGAL RES. CTR., IMMIGRATION DETAINERS UPDATE (May 12, 2014), <http://www.ilrc.org/files/documents/immigration-detainers-update-may-2014.pdf>.

changed their practices pursuant to a legal settlement.<sup>62</sup> These and other counties specifically cited the threat of being held liable for an unlawful detention request given that the prolonged detention itself would result from the state or localities' voluntary action rather than a changed perception of legitimacy.<sup>63</sup> The fear of liability in these cases is an instrumental justification for cooperation distinct from general due process or legitimacy concerns.

### *Morality and Substantive Policy Preferences*

Concerns about the use of immigration detainers also manifested in reports about the program's morality insofar as it meets independent standards of policy soundness or fits with a state or counties' substantive values. These substantive values may either confirm or contradict procedural values; they are distinguishable from partisanship or politics.<sup>64</sup> Some of the most common substantive policy concerns associated with detainers included: effectiveness of the program, unintended consequences of the program, and costs associated with cooperation.

Many counties questioned the effectiveness of detainers as a measure of public safety or crime control. Some critics noted discrepancies between the program's stated priorities and targeted outcomes. For example, using public data, Santa Clara County, California and other counties seeking to opt-out cited statistics showing that 79% of those detained pursuant to Secure Communities had never been convicted of a serious or violent offense despite the program's ostensible focus on criminal aliens<sup>65</sup> and other reports focused

62. Press Release, Washoe Cty. Sheriff's Office, Sheriff Haley Announces the Washoe County Detention Facility Will No Longer Accept ICE Detainers (Sept. 10, 2014) (on file with the Washoe County Sheriff's Office). The Washoe County, Nevada Sheriff stated that he "took a serious look at the recent court rulings" and revised their policy to protect the county from legal liability for violations of constitutional rights. *Id.* Note: The adoption of policy due to legal threat suggests involuntary cooperation rather than voluntary cooperation.

63. See, e.g., *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (court found county could be civilly liable for unlawfully detaining immigrant for ICE because it was not required to comply and instead chose to do so). See also *Miranda-Olivares*, 2014 WL 1414305, at \*11.

64. Partisanship relates to the influence of political conditions and electoral incentives. While its effect on immigration enforcement policies is established in empirical studies, it should not be confused with the concepts of substantive policy or morality used in this Article. See, e.g., Daniel Chand & William Schreckhise, *Secure Communities and Community Values: Local Context and Discretionary Immigration Enforcement*, 41 J. ETHNIC STUD. 1621, 1635 (2015); Karthick Ramakrishnan & Tom Wong, *Partisanship Not Spanish*, in TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES. 1, 1 (Monica W. Varsanyi ed., 2010).

65. Letter from Miguel Marquez, Cty. Counsel, Cty. of Santa Clara, to George Shirakawa et al., Chairperson, Pub. Safety & Just. Comm. (Sept. 7, 2011) (on file with the County of Santa

on trivial offenses such as a traffic stop triggering arrest for driving without a license or the non-offense of being the victim of domestic violence.<sup>66</sup> Scholarly studies suggest a weak link between the activation of Secure Communities and crime control.<sup>67</sup> New York City officials expressed concerns about the criminal justice system becoming overburdened and diverted from its primary mission of law enforcement.<sup>68</sup> A Warren Center report indicated that Latinos are overrepresented in the Secure Communities program relative to their actual crime rates, despite the government's insistence that finger printing guards against racial profiling.<sup>69</sup>

Although an unintended consequence of detention, an Immigration Policy Report into Travis County, Texas revealed that detainers impede access to liberty on bail and lead to inadequate trial preparation and impeded attorney access.<sup>70</sup> Other undesirable yet unintended consequences include erosion of community trust and undermining the community policing relationships integral to public safety.<sup>71</sup> Contrary to these estimations, Texas' Harris County viewed ICE's presence in jails and its requests for detainers as a prophylactic device that could reduce public safety risks by avoiding the release of criminal aliens and grants ICE holds at high rates.<sup>72</sup>

Clara); see also Cox & Miles, *supra* note 32, at 89 (using empirical analysis to discount crime prevention as the primary motivation for Secure Communities rollout, despite putative purpose of preventing crime and removing criminal aliens). Cox, Miles, and many others accuse the federal government of using Secure Communities as a strategy to bolster immigration enforcement generally rather than accomplishing other stated objectives. *Id.*

66. Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Report Shows*, N.Y. TIMES (Apr. 16, 2014) (reporting on independent investigation of ICE records).

67. Cox & Miles, *supra* note 32, at 89 (using empirical analysis to demonstrate that high-crime areas were not a priority in Secure Communities rollout).

68. Jason Cade, *Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1776–77 (2013) (discussing impact of detainers on criminal justice systems).

69. KOHLI ET AL., *supra* note 49, at 6.

70. Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, IMMIGRATION POL. CTR. (Feb. 2010), <http://www.immigrationpolicy.org/special-reports/criminal-alien-program-immigration-enforcement-travis-county-texas>.

71. See, e.g., Memorandum from R.A. Cuevas, Jr., Cty. Att'y, Miami-Dade Cty., Fla., to Rebeca Sosa et al., Chairwoman, Bd. Cty. Comm'rs (Dec. 3, 2013) (on file with the County of Miami-Dade, Florida). Florida's Miami-Dade County adopted a binding resolution of limited compliance in 2013, citing that blanket compliance, among other factors, could undermine public safety and trust between immigrants and police in the community. *Id.*

72. Lomi Kriel, *Immigration Screening Still Used in Texas as Other Agencies Withdraw*, HOUS. CHRON. (Oct. 16, 2014), <http://www.houstonchronicle.com/news/houston/article/Immigration-screening-still-used-in-Texas-as-5828422.php>.

Distinct from morality, substantive concerns about the cost to jails of prolonging detention without reimbursement of housing and administrative costs from the federal government were raised by those who cooperated and those who did not. California frequently cited these costs and sought reimbursement from the federal government through its TRUST Act.<sup>73</sup> The *Longview News Journal* and *Texas Tribune* published detention costs in its newspaper, even though the cost considerations have not changed the states' practices.<sup>74</sup> Again, Harris County houses more than 30,000 undocumented immigrants at a cost of more than \$49.6 million—the highest costs of 245 jails statewide and among the highest detainer rates in the country—and yet it continues to issue ICE holds.<sup>75</sup> A state law requires the cost tracking for the sake of facilitating federal reimbursement, consistent with a vision of federal-local partnerships in immigration enforcement.<sup>76</sup>

Some of the substantive policy concerns overlap legitimacy concerns. For example, the specter of the federal government imposing on county jails without reimbursing associated costs or imposing on individuals without respecting Fourth Amendment liberties could raise constitutional concerns or legal liability. The illegitimacy of a law enforcement operation motivated by racial profiling or unable to stick to its stated enforcement priorities could raise substantive moral concerns as well as procedural ones. Tom Tyler and Yuen Huo report on ethnic minorities' special experiences with law enforcement, suggesting that it is harder to overcome long histories of motive-based mistrust and ineffectiveness of crime reduction in minority communities.<sup>77</sup>

73. Judith A. Greene, *The Cost of Responding to Immigrant Detainers in California*, NAT'L IMMIGRATION JUST. CTR. (Aug. 22, 2012), <https://immigrantjustice.org/sites/immigrantjustice.org/files/Justicestrategies—Cost%20of%20Responding%20to%20detainers%20in%20CA.pdf> (estimating cost to LA County of \$113 per day).

74. Sarah Thomas, *Officials Grapple with Costs of Jailing Undocumented Immigrants*, LONGVIEW NEWS J. (Oct. 16, 2013), <http://www.news-journal.com/news/2013/oct/16/officials-grapple-with-costs-of-jailing-undocumented>; Edgar Walters & Dan Hill, *Texas Jails Housed Fewer Immigrants in 2013*, TEX. TRIB. (Mar. 4, 2013), <http://www.texastribune.org/2014/03/04/texas-jails-house-fewer-undocumented-immigrants>.

75. *Id.* Harris County spokespersons qualified these cost estimates by noting that some costs would have been borne for the underlying conviction apart from the ICE hold and that others are reimbursed through the State Criminal Alien Assistance Program. *Id.*

76. *Id.* (noting that "Senate Bill 1698 requires jails to track the number of inmates held on federal detainers along with the number of days those prisoners are housed and how much the county pays to hold them").

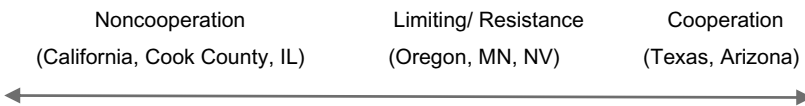
77. TYLER & HUO, *supra* note 6 at, 141–52; David Kirk et al., *The Paradox of Law Enforcement in Immigration Communities: Does Tough Immigration Enforcement Undermine Public Safety*, 641 ANNALS AM. ACAD. POL. SCI. & SOC. SCI. 79 (2012) (recent trends toward strict local enforcement of immigration laws may actually undercut public safety by creating a cynicism of

Partisanship-motivated allegiance to a pro-immigration enforcement or anti-federal intrusion policy position could also enter the equation. However, some of the legitimacy research defines the motivation to cooperate on the basis of trustworthiness *despite* contrary substantive preferences. Least of all in these cases, policy concerns can be voiced independent of perceptions of legitimacy or legality.

## 2. Behaviors: Cooperation-Noncooperation Continuum

The remainder of Part II provides narratives of policy adoption, specifically tracing how states and localities came to their detainer policies and to what effect. The case studies show that noncooperative behavior is the product of institutional decision-making that translates beliefs into behaviors. The case studies showcase variation in the degree of cooperation that can be displayed along a continuum.

### Figure 2 Spectrum of State Noncooperation with Detainers



### *States and Counties Withholding Cooperation*

As relayed in the cross-sectional analysis of detainer practice, many of the counties who declined to honor detainer requests did so through the elimination or curtailment of their own discretion over detainees. Cook County, Illinois serves as an illustrative example. Cook County has contested federal immigration enforcement going back to Chicago's self-declaration as a sanctuary city in 2006.<sup>78</sup> Facing questionable threats from the federal government that it would cut off reimbursement of costs for LEA cooperation with the State Criminal Alien Assistance Program (SCAAP) unless Cook County cooperated with its detainer requests, Cook County nevertheless held its

the law in immigrant communities); Rodolfo D. Saenz, *Another Sort of Wall-Building: How Criminal Migration Affects Latino Perceptions of Immigration Law*, 28 GEO. IMMIGR. L.J. 477 (2013) (understanding Latino perceptions of immigration policies is crucial to encouraging more adherence to immigration law and fostering a sense of belonging to U.S. society).

78. Cade, *supra* note 68, at 1817 nn. 364–65 (describing Cook County policies); see also Letters exchanged between Toni Preckwinkle, Pres., Cook Cty. Bd. & John Morton, Dir., U.S. Dep't of Homeland Sec. (Jan. 4, 2012–Apr. 9, 2012) (on file with the U.S. Department of Homeland Security) (discussing county policy of noncooperation with immigration detainees).



stance.<sup>79</sup> Cook County passed an ordinance in 2011, seeking to opt-out rather than cooperate with ICE detainers.<sup>80</sup> The broad refusal reflected all three concerns: legality, legitimacy, and contrary substantive policy. In 2012, the Director of DHS, John Morton, sent a letter to the President of the Cook County Board of Commissioners to “express my serious concerns with the Ordinance,” claiming that it hinders ICE’s ability to enforce the nation’s immigration laws<sup>81</sup> and that it violates INA section 1373(a), which provides that a “local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”<sup>82</sup> The President of the Cook County Board of Commissioners, Toni Preckwinkle, defended the legality of its local ordinance with a series of letters explaining that she doubted the federal government’s authority to compel Cook County’s cooperation. Preckwinkle pointed out that the portion of the law that John Morton cited was preceded by the phrase, “Notwithstanding any other provision of Federal, State, or local law.”<sup>83</sup> Cook County’s local law “outlines limitations for utilizing County staff and resources to respond to ICE inquiries,”<sup>84</sup> thus limiting rather than expanding ICE’s detainer policy. The president of Cook County’s Board also challenged the ICE detainers because they violate norms of procedural fairness and policy soundness. The policies treat people unequally based on their immigration status. ICE agents may access detainees if they have a criminal warrant unrelated to the detainee’s immigration status, but the proper way to address public safety is to detain individuals using proper procedures related to their immigration status.<sup>85</sup> The president reiterated that the Cook County Ordinance “was passed to ensure that detainees in Cook County are granted fair and equitable

79. SCAAP provides federal payments to states and localities that incur costs for imprisoning undocumented aliens with criminal convictions for at least four consecutive days during the reporting period. The DOJ and DHS administer the program. U.S. BUREAU OF JUST. ASSISTANCE, F.Y. 2013 SCAAP GUIDELINES AND APPLICATION (2013).

80. Cook County, Ill., Ordinance 11-O-73 (Sept. 7, 2011).

81. Letter from John Morton, Dir., U.S. Dep’t of Homeland Sec., to Toni Preckwinkle, Pres., Cook Cty. Bd. (Jan. 4, 2012) (on file with the U.S. Department of Homeland Security).

82. *Id.*

83. Letter from Toni Preckwinkle, Pres., Cook Cty. Bd., to John Morton, Dir., U.S. Dep’t of Homeland Sec. (Jan. 19, 2012) (on file with the U.S. Department of Homeland Security) (defending policy of noncooperation against ICE Director Morton’s efforts to terminate it).

84. *Id.*

85. Letter from John Morton to Toni Preckwinkle, *supra* note 81; Letter from Toni Preckwinkle to John Morton, *supra* note 83.

access to justice, regardless of their immigration status.”<sup>86</sup> Cook County also supported its ordinance on legitimacy and morality grounds in the media.<sup>87</sup>

Another way to withhold cooperation is for the state to eliminate local discretion over detainers. The states of California, Connecticut, Illinois, Rhode Island, and Washington, D.C. enacted state legislation restricting cooperation under certain circumstances for reasons that mix legitimacy and morality. Each state prohibited county cooperation with certain detainer requests, rather than leaving it solely up to the counties to come up with their own policies and practices. In 2013, California enacted legislation restricting LEAs from cooperating with ICE detainer requests unless an individual committed a serious offense (defined as a violent felony) that would render him a high priority for immigration enforcement.<sup>88</sup> California counties responded in a variety of ways, although the TRUST Act requirements became its legal foundation for cooperation.<sup>89</sup> The Governor’s endorsements of the legislation reveal that California also acted upon its perceived lack of federal legitimacy for the Secure Communities program.<sup>90</sup> When the Trust Act got to Governor Brown’s desk, he signed it proudly and said: “While Washington waffles on immigration,” he said, “California’s forging ahead.”<sup>91</sup> Several policy justifications comport with California’s “package” pro-immigrant inclusion positions on a bundle of issues extending beyond enforcement, including the belief that immigration status is irrelevant to the general applicability of state law or the sense of belonging as a *de facto* state citizen.<sup>92</sup> Illinois Governor Pat Quinn

86. *Id.*

87. Kari Lyderson, *Documents Reveal Pressure to Comply with Program to Deport Immigrants*, N.Y. TIMES (Mar. 26, 2011), [http://www.nytimes.com/2011/03/27/us/27cncimmigration.html?\\_r=0](http://www.nytimes.com/2011/03/27/us/27cncimmigration.html?_r=0) (explaining Cook County view that Secure Communities violates spirit of sanctuary ordinance).

88. See Assemb. B. 4, 2013-2014 Leg., Reg. Sess. (Cal. 2013).

89. San Francisco complied with the Act by maintaining its own, stricter, countywide standards. San Bernardino County’s Sheriff John McMahon, who opposed the Trust Act, declared his intention to “enact the letter of the new state law without endangering the spirit of federal law.” Kern County Sheriff Donny Youngblood also vowed to defy the Trust Act. *Recent Legislation*, *supra* note 56, at 2595.

90. Patrick McGreevy, *Gov. Brown Signs Another Bill Easing Conditions for Immigrants*, L.A. TIMES: L.A. NOW (Oct. 5, 2013, 11:20 AM), <http://stoptheicemonster.org/victory-gov-brown-signs-the-trust-act/>.

91. *Id.*

92. See Assemb. B. 4, 2013-2014 Leg., Reg. Sess. (Cal. 2013). See generally Karthick Ramakrishnan & Allan Colbern, *The California Package of Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POL’Y MATTERS 1 (2015).

took a similarly bold stance in his executive order broadly forbidding cooperation with immigration detainer requests.<sup>93</sup>

### *States and Counties Conditioning Their Cooperation*

Other jurisdictions have adopted a more measured approach toward cooperation, ironically one with discernible impact on federal as well as local detainer practice. Rather than enacting blanket prohibitions on cooperation, judicial challenges have clarified the scope of their obligations to cooperate with detainer requests. In *Miranda-Olivares v. Clackamas County*, an immigrant charged with domestic violence challenged her detention for 19 hours beyond resolution of the dispute against the county's defense that "federal law *requires* this custom and practice because ICE detainers (Form I-247) are issued pursuant to 28 C.F.R. § 287.7 which . . . *mandates* the detention of a suspected alien by [an LEA] for up to 48 hours."<sup>94</sup> The court sided with the detainee, emphasizing that the additional holding period constituted a new seizure without a new warrant.<sup>95</sup> The court pointed out that no federal circuit court had interpreted ICE detainers as anything but a request.<sup>96</sup> Following the decision, ICE spokesmen Barbara Gonzalez said the agency would continue to work "cooperatively" with Oregon law enforcement.<sup>97</sup> Still, Oregon dramatically limited its use of detainers thereafter.

More than 250 localities nationwide have voluntarily or involuntarily limited their cooperation with federal detainer requests via policy or informal practice since *Miranda-Olivares* and other litigation setting boundaries around their permissible scope.<sup>98</sup> For example, Colorado

93. ILL. EXEC. DEP'T., EXECUTIVE ORDER ESTABLISHING GOVERNOR'S NEW AMERICANS TRUST INITIATIVE (2015).

94. *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*3 (D. Or. Apr. 11, 2014) (emphasis added). The court further noted that the county's continuation of detention based on the ICE detainer constituted new, "prolonged warrantless, post-arrest, pre-arraignment custody." *Id.* at \*9 (quoting *Pierce v. Multnomah Cty.*, 76 F.3d 1032, 1043 (9th Cir. 1996)).

95. *Id.*

96. *Id.* at \*7 (citing *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014)).

97. Julia Preston, *Sheriffs Limit Detention of Immigrants*, N.Y. TIMES (Apr. 18, 2014), [http://www.nytimes.com/2014/04/19/us/politics/sheriffs-limit-detention-of-immigrants.html?\\_r=1](http://www.nytimes.com/2014/04/19/us/politics/sheriffs-limit-detention-of-immigrants.html?_r=1).

98. Amanda Peterson Beadle, *Why 250 Counties Have Stopped Honoring ICE Detainers*, IMMIGRATION IMPACT (Sept. 22, 2014), <http://immigrationimpact.com/2014/09/22/why-250-counties-have-stopped-honoring-local-ice-detainers>. See also *Recent Developments on ICE Holds in Oregon*, IMMIGRATION LAW GRP. (May 20, 2014), <http://www.ilgrp.com/iceholds> (listing of 250 counties that limit compliance as of Sept. 2014); *Immigration Enforcement*, IMMIGRATION LEGAL RES. CTR., <http://www.ilrc.org/enforcement> (last visited Sept. 21, 2015).

has no statewide detainer prohibition policy and yet sheriffs in every county have voluntarily limited detainer cooperation through changed practices and policies.<sup>99</sup> Some of these limitations include refusing to go beyond the 48-hour ICE requested hold,<sup>100</sup> defining serious crimes that qualify for a hold (e.g., violent crimes, violent felonies, gang members),<sup>101</sup> requiring probable cause or a criminal warrant for non-immigration related criminal offenses,<sup>102</sup> and seeking reimbursement for detention-related costs.<sup>103</sup> These conditions for cooperation become the basis for revised detainer policy and practices.

99. Press Release, Am. Civil Liberties Union, All Colorado Jails Now Reject Federal Immigration Detainers (Sept. 18, 2014) (on file with the American Civil Liberties Union). See also Letter from Am. Civil Liberties Union to the Colorado Sheriffs (Apr. 29, 2014) (on file with the American Civil Liberties Union) (calling into question legal authority to detain people for up to 6 days at ICE's request); Maha Kamal, *The Latest Information on ICE Detainer Policies in Colorado*, MEYER LAW OFFICE, P.C., <http://themeyerlawoffice.com/ice-detainers/> (last visited Sept. 23, 2015); Kiela Parks, *Is Your County Sheriff Still Honoring Detainer Requests from Immigration and Customs Enforcement?*, AM. CIVIL LIBERTIES UNION OF COLO. (May 8, 2014), <http://aclu-co.org/blog/map-ice-detainers> (displaying map of Colorado counties no longer honoring ICE detainer requests).

100. Boulder County, Los Angeles County, Santa Clara County, San Francisco County, Connecticut TRUST Act, and the Rhode Island Governor's Executive Order limit holds to 48-hours or less. See S.F., Cal., Ordinance No. 204-13 (amendments to Chapter 121 of the Administrative Code) (Sept. 24, 2013); Connecticut TRUST Act, H.R. 6659, 2014 Gen. Assemb., (Conn. 2014); BOULDER COUNTY SHERIFF'S OFFICE JAIL DIVISION, NO. J933: POLICY ON ICE HOLDS (May 21, 2014); SANTA CLARA COUNTY BOARD POLICY MANUAL 3.54 (2011); Letter from Lincoln D. Chafee, Governor, R.I., to Ashbel T. Wall, Dir., R.I. Dep't of Corrections, Ordering Implementation of ICE Detainer Policy (July 17, 2014) (on file with the Rhode Island Immigration Legal Resource Center); Letter from John Scott, L.A. Cty. Sheriff, to Am. Civil Liberties Union, Describing Detainer Policy (June 26, 2014).

101. Chicago, Los Angeles, San Francisco, Santa Clara, the California TRUST Act and the Connecticut TRUST Act define ICE's serious offenses as recent convictions for violent felonies. Chi., Ill., Ordinance No. 2-173 (amendment to Title 2-713 of the Municipal Code) (July 25, 2012); Letter from John Scott to Am. Civil Liberties Union, *supra* note 100; S.F., Cal., Ordinance No. 204-13 (amendments to Chapter 121 of administrative code) (Sept. 24, 2013); SANTA CLARA POLICY MANUAL, *supra* note 100; California TRUST Act, Assemb. B. 4 (Oct. 5, 2013); H.R. 6659, *supra* note 100.

102. A probable cause finding by a magistrate judge is required by San Francisco County and Clackamas County, Oregon. S.F., Cal., Ordinance No. 204-13 (amendments to Chapter 121 of the Administrative Code) (Sept. 24, 2013); Letter from Craig Roberts, Sheriff, Clackamas Cty., Suspending Placement of I-247 Immigration Detainers (Apr. 16, 2014) (on file at <http://www.clackamas.us/sheriff/images/2014-04-16-SheriffRobertsLetterOnCourtDecision.pdf>). A criminal warrant is required by Governor's orders in Illinois and Rhode Island. Ill. Exec. Ord. No. 15-02 (Jan. 5, 2015); Letter from Lincoln D. Chafee to Ashbel T. Wall, *supra* note 100. County policies in Los Angeles County, Santa Clara County, Cook County, Illinois (including City of Chicago), and Boulder County also require warrants. H.R. 6659, *supra* note 100; Chi., Ill., Ordinance No. 2-173 (amendment to Title 2-713 of the Municipal Code) (July 25, 2012); Cook County, Ill., Ordinance 11-O-73 (Sept. 7, 2011); SANTA CLARA POLICY MANUAL, *supra* note 100; BOULDER COUNTY SHERIFF'S OFFICE, *supra* note 100; Letter from John Scott to Am. Civil Liberties Union, *supra* note 100.

103. Cook County, Illinois, Santa Clara County, and San Francisco County require federal reimbursement. Cook County, Ill., Ordinance 11-O-73 (Sept. 7, 2011); S.F., Cal., Ordinance No.

### *State Cooperation*

LEAs can also cooperate with ICE holds, either *de facto* or by policy design granting ICE detainees.<sup>104</sup> Texas is an example of a state in which all counties cooperate with ICE detainer requests on the basis of *de facto*, local decisions (despite internal dissent in the county housing Austin, a liberal outpost).<sup>105</sup> While the counties acknowledge that they are not required to obey under federal law, they justify their choices to honor detainer requests because they fundamentally endorse the vision of shared federal-state-local immigration enforcement authority. Many Texan sheriffs believe the state has an important role to play in detaining undocumented citizens and also that the federal government should remain involved.<sup>106</sup> This balancing of state-federal interests is reflected in the issue of payment of costs associated with detainees, which are tallied pursuant to a state bill that requires jails to track these costs as a means of prompting the federal government to reimburse local governments for those costs.<sup>107</sup> The *Texas Tribune* and *Longview News Journal* published a comprehensive list of the costs associated with keeping undocumented immigrants behind bars, but Texas did not use the cost counting as a reason to opt out of honoring detainees. Instead, it counted costs to increase federal accountability for the fiscal effects of detainees, not to rewrite those policies.<sup>108</sup> To the extent that the high cost of housing

204-13 (amendments to Chapter 121 of the Administrative Code) (Sept. 24, 2013); SANTA CLARA POLICY MANUAL, *supra* note 100.

104. Prior to Secure Communities, the federal government relied on 287(g) agreements that empowered state and local law enforcement to directly enforce federal immigration law. Those agreements fell into disfavor after the 2012 Supreme Court decision in *Arizona v. United States*, and were significantly defunded in the 2013 appropriations.

105. See *States and Localities That Limit Compliance with ICE Detainer Requests*, CATHOLIC LEGAL IMMIGRATION NETWORK (Oct. 2014), <https://cliniclegal.org/resources/articles-clinic/states-and-localities-limit-compliance-ice-detainer-requests-jan-2014> (listing states and counties that limited compliance with ICE detainees as of Oct. 2014). In response to the question "How many sheriff's offices in Texas do not participate in this program?" the Sheriff's Office stated that it is "not aware of any Texas Sheriff who has decided that they will no longer honor federal detainees or not send in fingerprints *in accordance with the law*." *ICE Detainers FAQs*, TRAVIS CTY. SHERIFF'S OFFICE, <https://www.tcsheriff.org/inmate-jail-info/ice-detainers-faqs> (last visited Sept. 24, 2015).

106. As an example, a spokesperson for the Harris County Sheriff's office described the local practice of immigration detainees by saying: "At large, urban jails like Harris County's, ICE picks up Monday through Friday." Edgar Walters & Dan Hill, *Texas Jails Housed Fewer Immigrants in 2013*, TEX. TRIB. (Mar. 4, 2013), <http://www.texastribune.org/2014/03/04/texas-jails-house-fewer-undocumented-immigrants>.

107. S.B. 1698, 82d Leg. (Tex. 2011).

108. See Thomas, *supra* note 74; Walters & Hill, *supra* note 74.

immigrants beyond their anticipated stay was a concern, it was outweighed by Texas' belief in the legitimacy of the state-federal enforcement arrangement.

Apart from cost, Texan counties support the policy soundness of LEAs issuing immigration detainers—a convergence of local and federal policy that makes cooperation easier—especially due to their strong concerns for border control and public safety risks presented by criminal aliens. As one conservative immigration organization pointed out:

Enforcement opponents argue that localities could save money by refusing to comply with ICE detainers. Many Texas sheriffs disagree, citing the potential threat to the public of releasing criminal aliens and the need for enforcement to deter cross-border criminal activity, including human and drugsmuggling that are encouraged when the government tolerates illegal immigration.<sup>109</sup>

The Travis County Sheriff Greg Hamilton is cognizant of legal challenges to immigration detainers.<sup>110</sup> Still, the sheriff's office defends the county's decision as being within the scope of lawful activity because there is no risk of extended detentions when ICE operates *within* the jail and makes requests prior to release.<sup>111</sup> Harris County Sheriff Adrian Garcia, whose county leads the state in detainers and who has been a vocal supporter of their use,<sup>112</sup> similarly believes that state cooperation with federally-requested immigration detainers are legitimate and are only called into question when the policies are not properly or carefully implemented. He defends his county's use of detainers within the jails, prior to release, on similar grounds to Travis County's reasoning.<sup>113</sup>

In contrast to Texas's uniform, though localized, policies, Arizona counties adopt a patchwork of policies on immigration detainers in the years since its pro-immigration enforcement law, SB 1070, was struck

109. Jessica Vaughan, *Texas Data Confirm Declining Deportations, Cost of Alien Crime*, CTR. IMMIGRATION STUDIES (Mar. 5, 2014), <http://cis.org/vaughan/texas-data-confirm-declining-deportations-cost-alien-crime>.

110. Press Release, Travis Cty. Sheriff's Office, Sheriff Greg Hamilton Continues Honoring ICE Detainers (2014) (on file at <https://www.tcsheriff.org/about/media-relations/press-releases/2014/261-sheriff-greg-hamilton-continues-honoring-ice-detainers>).

111. *Id.* See also Lomi Kriel, *Immigration Screening Still Used in Texas as Other Agencies Withdraw*, HOUS. CHRON. (Oct. 16, 2014), <http://houstonchronicle.com/news/houston-texas/houston/article/Immigration-screening-still-used-in-Texas-as-5828422.php>.

112. *Id.*

113. *Id.*

down in 2012.<sup>114</sup> Most famously, Maricopa County (including Phoenix) grants the highest number of detainers in the nation.<sup>115</sup> The Sheriff of Maricopa County, Joe Arpaio, has been an avid supporter of the Secure Communities program and believes that immigration detainers are a legitimate and necessary program.<sup>116</sup> Despite the November 2014 executive actions ending Secure Communities and lawsuits finding racial profiling in his immigration enforcement efforts, he continues to cooperate to the fullest extent possible with ICE and exhorts the federal government to do more to enforce immigration laws.<sup>117</sup> While not every Arizonan county cooperates with detainers to the extent of Maricopa County, most counties tend to cooperate with federal detainer policy and share the sense that states and the federal government both have a place in immigration enforcement. South Tucson is a lonely exception that limits compliance following settlement of a lawsuit challenging its practices, suggesting that South Tucson is accommodating evolving legal norms rather than acceding voluntarily.<sup>118</sup>

114. Arizona has a history of robust immigration enforcement. SB 1070 strengthened state immigration enforcement in several ways, on the theory that the state would compensate for the federal government's lax enforcement of immigration law. *Arizona v. United States* enjoined most SB 1070 provisions, including a provision permitting warrantless arrest for probable cause that a person committed crimes that would make him removable. See 132 S. Ct. 2492, 2497, 2507 (2012). Since 2012, many 287(g) agreements that empowered states to initiate these kinds of immigration-related arrests have been terminated and emphasis has shifted toward the use of federal ICE holds under Secure Communities.

115. *Immigration Holds at Maricopa County Jail in Arizona Top Nation, Study Says*, HUFFINGTON POST (Feb. 26, 2013), [http://www.huffingtonpost.com/2013/02/26/immigration-holds-at-maricopa-county-jail\\_n\\_2767417.html](http://www.huffingtonpost.com/2013/02/26/immigration-holds-at-maricopa-county-jail_n_2767417.html).

116. See, e.g., *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 772 (9th Cir. 2014) (holding that Proposition 100, which precludes bail for certain felony offenses for unlawfully present non-citizens, violates substantive due process); *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) (granting preliminary injunction prohibiting detaining or stopping individuals for traffic stop based solely on suspicions of unlawful presence). Sheriff Arpaio sued President Obama following the November 2014 executive actions, but his lawsuit was dismissed for lack of standing. *Arpaio v. Obama*, 27 F. Supp. 3d 185 (D.D.C. 2014).

117. *Id.*

118. South Tucson limited its detainer practices as the result of a lawsuit brought on behalf of a detainee by the ACLU. As part of the settlement, South Tucson made it unlawful to detain an individual unless there is probable cause to suspect that the individual has committed or is about to commit a crime. See SOUTH TUCSON POLICE DEPT., IMMIGRATION POLICY 3 (2014). The lawsuit stemmed from SB 1070, which was struck down. *Arizona*, 132 S. Ct. at 2510.

### III. RESTORING TRUST IN IMMIGRATION ENFORCEMENT: STATE NONCOOPERATION AND SANCTUARY CITIES AFTER SECURE COMMUNITIES

Part II provided an in-depth look at states and localities rewriting immigration enforcement policy by declining to cooperate with federal detainer requests. This Part narrates the next stage of policy development: the federal government's efforts to restructure its partnership with LEAs while simultaneously limiting local influence in response to pressure from below. The policy developments illustrate the limits of top-down federal executive action and specifically what happens when states and localities refuse to cooperate with federal policy from below.

#### A. PEP Policy Reforms, November 2014

After confronting years of criticism, the federal government reformulated its immigration detainer policies by rescinding Secure Communities and substituting PEP through an executive action in November 2014.<sup>119</sup> Although the premise of federal-state-local partnership in both immigration enforcement programs is the same, and FBI and ICE will continue to share fingerprint data for purposes of identifying potentially removable individuals, the revamped detainer policy scales back ICE's requests for state-local cooperation. The November 2014 immigration executive action announced "[t]he Secure Communities program, as we know it, will be discontinued."<sup>120</sup> In its place, PEP limits federal requests for immigration detainers in important respects. First, rather than asking LEAs to *hold* detained immigrants beyond their scheduled release from jail, ICE seeks *notification of release dates* from LEAs of scheduled release in most circumstances.<sup>121</sup> Second, ICE will only request an LEA hold an immigrant for transfer of custody in "special circumstances," such as

119. For example, numerous congressional and executive investigations led to an ICE report. U.S. IMMIGRATION & CUSTOMS ENF'T, ICE OFFICE OF THE DIR., PROTECTING THE HOMELAND: ICE RESPONSE TO SECURE COMMUNITIES TASK FORCE FINDINGS AND RECOMMENDATIONS 2 (2012). The report cites misunderstandings regarding role of local law enforcement, perceived inconsistencies between S-Comm goals and outcomes for high and low level bureaucracies (e.g. binding criteria and field enforcement), and unintended consequences for communities. It concludes with a section asking "Whether to suspend S-Comm." *Id.* at 10, 12, 13.

120. *November 2014 Secure Communities Memo*, *supra* note 1.

121. *Id.*; *Request for Voluntary Notification of Release of Suspected Priority*, U.S. DEP'T OF HOMELAND SEC.,



when the immigrant in custody has been convicted of a serious crime or poses a national security risk *and* there is probable cause that the immigrant is subject to a final removal order.<sup>122</sup> The Revised Form I-247D for detainees also asks that the LEA hold the named individual for no more than 48 hours, without listing exceptions.<sup>123</sup> Other details of PEP's operation will be worked out through additional guidance and developing practice. Whatever else changes, these two policy changes alone should result in fewer and more tailored federal detainee requests. A Migration Policy Report estimates that the more precise and narrowly-tailored priorities memo in combination with PEP will reduce the total number of deportations from the interior by approximately 25,000.<sup>124</sup>

While the substantive changes are somewhat significant,<sup>125</sup> what is most noteworthy about the November 2014 fall of Secure Communities is the way it reached its demise. The DHS memo itself credits the federal-state-local controversies with providing specific ideas for policy development, implying that the federal government learned

[https://www.aclu.org/files/field\\_document/I-247N%20Request%20for%20Notification%20SAMPLE.pdf](https://www.aclu.org/files/field_document/I-247N%20Request%20for%20Notification%20SAMPLE.pdf) (last visited Sept. 24, 2015) (Form I-247N – Request for Voluntary Notification of Release of Suspected Priority Alien). This newly-drafted form requires ICE to state the basis for suspecting that an individual falls within ICE's enforcement priorities related to criminal conviction or national security. It does not reference enforcement priorities based on civil immigration violations only, such as recent border crossing.

122. *November 2014 Secure Communities Memo*, *supra* note 1; *Immigration Detainer – Notice of Action*, U.S. DEP'T OF HOMELAND SEC., <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf> (last visited Sept. 24, 2015) (Form I-247D Immigration Detainer – Request for Voluntary Action). This revised form requires ICE to specify the criminal conviction or national security risk that renders the immigrant a high priority under the DHS enforcement guidance *and* to explain why ICE believes there is probable cause that the individual is removable. CRIMMIGRATION, <http://crimmigration.com> (last visited Sept. 23, 2015).

123. *November 2014 Secure Communities Memo*, *supra* note 1; *Immigration Detainer – Notice of Action*, U.S. DEP'T OF HOMELAND SEC., <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf> (last visited Sept. 24, 2015) (Form I-247D Immigration Detainer – Request for Voluntary Action).

124. This number could be offset by increased apprehensions at the border, which are a higher priority under the 2014 DHS memo. Marc Rosenblum, *Understanding the Potential Impact of Executive Action on Immigration Enforcement*, MIGRATION POLICY INST. (July 2015), <http://www.migrationpolicy.org/research/understanding-potential-impact-executive-action-immigration-enforcement>.

125. Immigration experts disagree on how meaningful the changes will be. *See, e.g.*, César García Hernández, *PEP v. Secure Communities*, CRIMMIGRATION (July 8, 2015), <http://crimmigration.com/2015/07/07/pep-vs-secure-communities/>; Gabriela Mendez, *Let's Have a PEP Talk: Is This S-Comm 2.0?*, IMMIGRATIONPROF BLOG (May 28, 2015), <http://lawprofessors.typepad.com/immigration/2015/05/lets-have-a-pep-talk-is-this-s-comm-20.html>; *Cf.* Suzy Khimm, *Building a Kinder, Gentler Deportation Machine*, NEW REPUBLIC (July 28, 2015), <http://www.newrepublic.com/article/122387/building-kinder-gentler-deportation-machine>; Rosenblum, *supra* note 124.

from state and local feedback.<sup>126</sup> This federal government's responsiveness toward local resistance is conspicuous evidence that uncooperative federalism influenced federal policy development. That is, states and localities (often at the behest of immigration advocates) voiced their dissatisfaction and their concerns were heard—at least in the two respects described and incorporated into the revamped policy. The DHS memo mentions the state and local resistance to Secure Communities on Fourth Amendment and other grounds as part of its justification for ending the program:

[Secure Communities] has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws. Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation.<sup>127</sup>

Going beyond its references to the Fourth Amendment litigation, the DHS memo expressly references the lack of public confidence in immigration detainer practices and seems to recognize the value of public participation and trust-building between LEAs and federal law enforcement in its closing paragraph:

[A]cquainting state and local governments, and their law enforcement components, with this policy change will be crucial to its success. I therefore direct the Assistant Secretary for Intergovernmental Affairs to formulate a plan and coordinate an effort to engage state and local governments about this and related changes to our enforcement policies. I am willing to personally participate in these discussions.<sup>128</sup>

Whether or not DHS can succeed in rebuilding community trust around partnerships with law enforcement—especially among those who fundamentally disbelieve that LEAs should be involved in immigration enforcement or who fundamentally challenge civil immigration detention—the DHS memo recognizes that substantive reform will not be enough; it is not just what happens that needs to change, but *the way things happen* that needs to change.

126. See *November 2014 Secure Communities Memo*, *supra* note 1 (referencing Fourth Amendment litigation).

127. See *Id.*

128. *Id.*

### B. PEP Implementation, July 2015 to Present

Restoring trust in the legitimacy of immigration enforcement will be the central issue in the vitality of immigration detainers going forward with PEP implementation. The policy feedback between state-local detainer practice and federal policy suggests how. While legitimacy and legality were intertwined, legitimacy became the central issue in the demise of Secure Communities. Legitimacy functioned in tandem with lawsuits because the grave constitutional harms at issue invoked legitimacy concerns; the Fourth Amendment is substantive and also concerned with procedural due process, which is a core component of legitimacy in Tom Tyler's research. Litigation over FOIA disclosures underscored mistrust of government motives, another key component. It could also be that judicial declarations of a policy's legality send signals about the policy's legitimacy in a legal system governed by judicial norms that considers past legal interpretations a source of legitimate authority.<sup>129</sup> In either explanation, legality bolstered legitimacy by influencing state and local perceptions of federal authority, not *solely* or *automatically* because a federal court bound states and localities to the conclusion that state and local cooperation with federal immigration detainers requests is illegal. Confronted with a nonbinding federal policy that depends on voluntary cooperation for its successful implementation, legality and legitimacy constitute one another and together function as constraints on cooperative policy-making.

Given that PEP will inherit state and local skepticism of the Secure Communities program that it replaced, the Obama administration has significant work to do around the use of executive action to prompt states and counties to prolong custody beyond scheduled release. Presumably the DHS guidance stating that the Secure Communities program will be discontinued sends a message to those who distrusted it that DHS is making a fresh start. As an *L.A. Times* article said in its description of the policy change, "For the immigrant advocates who for years have been calling on President Obama to curtail deportations, the Secure Communities program symbolized what was

129. Richard Fallon explains this partly as the product of a tradition of precedent and *stare decisis* in which past legal interpretations constitute a source of legitimate authority. Fallon, *supra* note 10, at 1793. It is also partly a product of strategic uses of illegitimacy. *Id.* at 1818 ("[W]hereas an ascription of legal legitimacy often claims *less* than that a judicial judgment was correct, an allegation of illegitimacy almost invariably implies *more* than that a legal judgment was merely incorrect.").

wrong with the nation's immigration enforcement strategy."<sup>130</sup> As Chris Newman of the National Day Laborer Organizing Network (which had challenged Secure Communities in court) said, "There's finally recognition that the Secure Communities experiment was a failure."<sup>131</sup> Making substantive changes to an admittedly failed program suggests respect for the rule of law and signals the federal government's responsiveness to the content of the concerns, even if not all of them. Whether critics will embrace Secure Communities' replacement, which some derisively refer to as Pep-comm to underscore its similarities to its predecessor, depends partly on its effectiveness and fidelity to its stated objectives—the President's focus on "Felons, not families. Criminals, not children"<sup>132</sup>—and the fairness of its implementation among other things. As crime and immigration scholar Eisha Jain notes, "[in] the immigration context, the link between arrests and deportation can serve to *legitimate* immigration enforcement choices by demonstrating that immigration enforcement officials are focusing on 'criminal aliens,' and not on those who may be seen as having more compelling claims to membership, such as long-term unauthorized immigrants who have had no contact with the criminal justice system."<sup>133</sup> César García Hernández, a scholar of crime and immigration who is critical of civil detention generally, cautiously notes that limitations on detainers that exempt those lacking criminal convictions and national security risk represents "a step in the right direction" toward a less punitive immigration enforcement approach.<sup>134</sup> While limitations on the scope of detainers and limitations on use will not change the overarching structure of state-local-federal partnership in immigration enforcement<sup>135</sup> or the mission of targeting criminal aliens

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

131. *Id.*

132. In the announcement, President Obama went on to compare his prioritization with the kind of prioritization that all law enforcement undertakes, everyday (also in keeping with Tyler's legitimacy criteria of building identification with local/frontline officials). *The President Speaks on Fixing America's Broken Immigration System*, WHITE HOUSE (Nov. 20, 2014) <https://www.whitehouse.gov/photos-and-video/video/2014/11/20/president-speaks-fixing-americas-broken-immigration-system>.

133. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 831 (2015).

134. García Hernández qualifies the statement by saying that ICE is still off-course, even if stepping in right direction. García Hernández, *supra* note 125.

135. Vigorous disagreement about the bigger picture of state involvement in local law enforcement and preemption battles dominates current literature. See, e.g., Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 353–56 (2008); Margaret Hu,

for deportation,<sup>136</sup> they can reign in excess and safeguard against illegality. This will be especially true if ICE takes seriously the manner of documenting and validating probable cause that an individual is removable, perhaps by interposing an independent verifier of cause that approximates the probable cause procedures to execute a warrant in criminal court.<sup>137</sup> The probable cause showing and warrant is garnering even more attention following San Francisco's release of a Juan Francisco Lopez-Sanchez, an undocumented immigrant with prior felony convictions and removal orders, who killed U.S. citizen Kathryn Steinle shortly after his release.<sup>138</sup> Lopez-Sanchez was released from jail despite ICE's requests to hold him pursuant to a local sanctuary policy that prevented ICE holds without warrant on the same day that PEP implementation was scheduled to begin. The events sparked a firestorm of controversy over the balance of crime control and community discretion in immigration enforcement that includes congressional hearings over mandatory federal immigration

*Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 627 (2012); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34 (2007); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1560–64 (2007–08); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 551–52 (2001). Cf. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 788 n.6 (2008); Martin, *supra* note 32, at 454–55 (believes in “carefully structured fed-state cooperation” and says PEP only makes sense as an interim measure to “stop the bleeding”). The President's Task Force on 21<sup>st</sup> Century Policing generally questions the involvement of LEAs with federal immigration enforcement and specifically recommends that ICE discontinues notification and transfer requests under PEP. U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING 18 (2015) [hereinafter REPORT OF THE PRESIDENT'S TASK FORCE].

136. See Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1579–98 (2010) (on asymmetries of procedural protections in civil immigration enforcement); Ingrid Eagley, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281 (2010); Steve Legomsky, *Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 469–70 (2007). García Hernández says: “PEP isn't a panacea for the severity of modern immigration law enforcement. Many migrants will still be sanctioned twice—once by the criminal justice system and a second time by the immigration law regime. Hundreds of thousands will continue to find themselves sucked into the immigration detention and removal pipeline annually.” García Hernández, *supra* note 125.

137. David Martin suggests that immigration judges or magistrate judges could perform such a check. Martin, *supra* note 32, at 457.

138. Lee Romney et al., *Fatal Shooting of S.F. Woman Reveals Disconnect Between ICE, Local Police*, L.A. TIMES (July 6, 2015), <http://www.latimes.com/local/crime/la-me-sf-shooting-20150707-story.html>.

detainers,<sup>139</sup> legislative proposals to suspend federal funding for localities with sanctuary policies,<sup>140</sup> and community forums to re-evaluate sanctuary policies in Los Angeles, San Francisco, and elsewhere.<sup>141</sup>

The initial sentiment stirred up by Steinle's killing—against Sanctuary Cities with noncooperation policies and in favor of more stringent federal immigration enforcement—has calmed as public attention turns toward the presidential campaigns and other issues. However, the pendulum shift is from opposition to the feds toward a more balanced approach. Investigations into non-detainer policies following Steinle's killing—in Los Angeles, for example, where ICE agents have been readmitted to jails—mean that communities recognize they need to be active partners in policymaking, not merely protestors against federal policy. The kinds of policies they are setting in place resemble the critical elements of PEP: a more fine-grained consideration of serious convictions in ICE's decision to request cooperation and an equally-fine grained consideration on the part of local jails to grant or not grant those requests.

Procedurally, the effect of the changed political climate is to bolster the credibility of ICE. The concerns about recidivism are not unfounded, as it turns out. DHS' willingness to remain open to community partnership, rather than cracking down, will be important as communities formulate responses. Still, recognizing the lineage of the two detainer programs, rather than reacting to the more recent uproar over the Steinle killing, could ease PEP implementation on

139. DHS Secretary Jeh Johnson and ICE Director Sarah Saldana repeatedly emphasized in their congressional testimony the need for "cooperation" with local authorities, rather than mandatory immigration detention. *Immigration Enforcement Oversight: Hearing on Immigration Before H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Jeh Charles Johnson, Secretary, U.S. Dep't of Homeland Security) (on video at <http://www.c-span.org/video/?327074-1/homeland-security-secretary-jeh-johnson-testimony-oversight-hearing>).

140. Legislative proposals immediately following the Karthyn Steinle killing include passage of H.R. 3009 Enforce the Law for Sanctuary Cities Act and proposed Kate's Laws in the House and Senate. H.R. 3009, 114th Cong. (2015). Congress' efforts to enact legislation stalled upon return from recess in fall 2015, with the failure of S.2146, 114th Cong. (2015).

141. Kate Linthicum & Lee Romney, *L.A. County Considers New Immigration Program for Jails in Light of S.F. Slaying*, L.A. TIMES (July 19, 2015), <http://www.latimes.com/local/california/la-me-immigration-jails-20150720-story.html>; Laura M. Holson, *San Francisco Votes the Keep Shielding Immigrants From Deportation Officials*, N.Y. TIMES (Oct. 20, 2015), [http://www.nytimes.com/2015/10/21/us/san-francisco-votes-to-keep-shielding-immigrants-from-deportation-officials.html?\\_r=2](http://www.nytimes.com/2015/10/21/us/san-francisco-votes-to-keep-shielding-immigrants-from-deportation-officials.html?_r=2); Alice Popovici, *Will Sanctuary Cities Survive*, CRIME REPORT (July 23, 2015), <http://www.thecrimereport.org/news/articles/2015-07-will-sanctuary-cities-survive>.

procedural grounds.<sup>142</sup> The noncooperation seen in the state and local resistance to Secure Communities presents a playbook for building PEP in its wake that is not significantly altered by recent events. Immigrants' rights advocates might continue to be skeptical of the sincerity or trustworthiness of ICE given the origins of the program, its confusing and changing signals to community over Secure Communities implementation, its uneven execution of state-local cooperation agreements, and its continued use of detainer techniques deemed unfair to immigrants and damaging to community trust. Upon release of PEP guidance, the ACLU and a dozen civil and immigrants' rights organizations issued a letter expressing concern to DHS Secretary Jeh Johnson.<sup>143</sup> The tenor of their objections are both substantive and procedural, and their subtext suggests damaged relationships too broken for repair. Chastened by the Steinle killing and hampered by Congress' proposals to penalize local communities for not cooperating with federal immigration enforcement and to strengthen federal immigration enforcement by making detainers mandatory (rather than continue down the path of making federal enforcement more reliant on local cooperation through PEP), immigration advocates issued a second letter reminding Congress that "[g]ood policies are made over time, by examining our shared values and opinions, and by working toward equality and justice for all people."<sup>144</sup> In other words, the immigration advocates caution overreacting to the Steinle killing with retributive policies, even as they recognize that rebuilding trust is an

142. Legal analysts disagree about how similar PEP will be to Secure Communities. Martin, *supra* note 32, at 457. The ACLU lays out an interpretation and approach toward PEP that would improve upon Secure Communities. Memorandum from the Am. Civil Liberties Union on DHS' Discontinued Secure Communities Program, Detainer Reforms, and PEP (Dec. 17, 2014) (on file with the American Civil Liberties Union). Others have been more skeptical that there will be a meaningful difference between the programs. IMMIGRATION LEGAL RES. CTR., ORGANIZER ALERT: LIFE AFTER "PEP-COMM" 1, 2–3 (2014); Emily Creighton, *Do the President's New Enforcement Policies Really Mark the End of Secure Communities*, IMMIGRATION IMPACT (Dec. 30, 2014), <http://immigrationimpact.com/2014/12/30/do-the-presidents-new-immigration-policies-really-mark-the-end-of-secure-communities/>; Ted Hessen, *Top Immigration Officials Pitch New Fingerprint-Sharing Program To Wary Activists*, FUSION (May 10, 2015), <http://fusion.net/story/132279/top-immigration-officials-pitch-new-fingerprint-sharing-program-to-wary-activists/>; *Let's Have a PEP Talk: Is this Secure Communities 2.0?*, IMMIGRATIONPROF BLOG (May 21, 2015), <http://lawprofessors.typepad.com/immigration/>.

143. Letter from Am. Civil Liberties Union et al., to Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec. (June 17, 2015) (on file with the American Civil Liberties Union) ("Short of discontinuing detainers and notifications, ICE and the local law enforcement agencies that respond to detainers or notifications will continue to incur liability for making illegal arrests and jeopardize polic[e]-community trust.").

144. Immigrants' rights organizations, led by the National Immigration Law Center and United We Dream, wrote in opposition to a House bill to block funding for sanctuary cities. See Letter from Nat'l Immigration Law Ctr., to Members of Cong. (July 20, 2015) (on file with author).

ongoing process. The sobering message from Steinle's killing is that cooperation is a two-way affair and protest by itself is not a policy. They need to become partners in policymaking.

Troubled relationships can be rehabilitated and restored under the right circumstances. Although they were writing before the Steinle killing, David Martin and Cristina Rodríguez remain optimistic about the promise of DHS' revamped approach and community outreach. In a recent article for a symposium journal, Martin holds out hope that certain cooperative elements of Secure Communities that "thread the needle" between LEAs overzealous immigration enforcement (relative to ICE priorities) and disruption of LEAs primary mission of criminal law enforcement by cities with noncooperation or sanctuary policies could again be used under "more auspicious conditions."<sup>145</sup> By this Martin means changed political conditions that permit restoration of cooperative relationships in enforcement, such as a combination of reduced undocumented migration, broad legalization, and resolute enforcement. What it takes to realize those conditions is hard to predict, but the enhanced credibility of ICE's mission and the desperate need for a coordinated approach toward enforcement after the Steinle killing may turn out to be a critical ingredient. As Rodríguez says in an article for the same symposium journal, "[n]ow that DHS has reformulated its approach to enforcement in light of the multi-faceted criticism of Secure Communities, the turn toward cooperation and away from confrontation requires local officials to respond in kind."<sup>146</sup> Some immigration advocates will never sign on to a vision of immigration enforcement involving active participation from LEAs, especially a vision involving civil detention. However, other immigration advocates may move forward from the Steinle killing understanding that cooperation is a two-way endeavor that involves the federal government reaching out just as much as it involves communities reaching back. Introspection within communities about what constitutes a sanctuary city and which detainer policies strike the right balance between community trust, crime control, and cooperative immigration enforcement is painful and involves not always constructive finger pointing—feds versus states, county sheriffs versus city officials, us versus them. But the more nuanced reflection about whether and how

145. Martin, *supra* note 32, at 438, 453 (auspicious conditions and gradual restoration of wider cooperation).

146. Cristina Rodríguez, *Toward Détente in Immigration Enforcement*, 30 J. L. & POL. 505, 518 (2015) (manuscript 13–14).



to engage with the DHS' invitation to cooperate is a positive development, even if cities may not all decide to accept. Indeed, the lack of uniformity is baked into the design of PEP; the Migration Policy Institute characterizes PEP's ambitions as "replacing uniform national information-sharing and detainer models with individualized jurisdictional protocols", with the goal—but not the guarantee—of encouraging more counties to opt-in again.<sup>147</sup>

However communities respond to DHS' invitation to cooperate with its enforcement efforts, an invitation issued in earnest following the Steinle killing that ironically occurred the same day that PEP was scheduled for full implementation, DHS' message that "we hear you" aligns nicely with democratic norms that are both procedural and substantive in character. The framework of cooperation and the language of partnership, seeking buy-in from the bottom-up, is also consistent with the styles of regulatory responsiveness that have proved more effective than old-styles of mandates and commands from the top-down.<sup>148</sup> Demonstrating that the federal government is respecting those not legally-bound to follow is particularly important for an executive action—an instrument vulnerable to claims of unilateralism, usurpation, and overreaching. It builds the sense of the government's "respect-worthiness" and "responsiveness" and fosters cooperation. The ICE Director who took charge shortly after the detainer policies changed has not always done well on this front, and the Obama administration is showing that it takes seriously the need to maintain improved relationships with its partners in crime control.<sup>149</sup>

147. Marc Rosenblum, *Understanding the Potential Impact of Executive Action on Immigration Enforcement*, MIGRATION POLICY INST. (July 2015), <http://www.migrationpolicy.org/research/understanding-potential-impact-executive-action-immigration-enforcement>.

148. John Braithwaite and Ian Ayres place such nonbinding guidance in the middle of a pyramid of regulation that ranges from command and control to self-regulation. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 19 (1992).

149. ICE Director Sarah Saldaña might have undermined some community trust when she responded "Amen" to a congressional query about whether she thought Congress should "clarify the law" to require state and local law enforcement to lock up immigrants at the request of ICE. Saldaña recanted the next day, conceding that her response contradicted Secretary Johnson's observation that an increasing number of federal court decisions hold that detention based on ICE requests to state and local law enforcement agencies violates the Fourth Amendment. See Press Release, U.S. Immigration & Customs Enf't, Statement from U.S. Immigration and Customs Enforcement Director Sarah R. Saldaña (Mar. 20, 2015) (on file with the U.S. Immigration and Customs Enforcement).

It is still too early to systematically study state and local responses to PEP implementation or opine on PEP's successes or failures.<sup>150</sup> Much will depend on the implementation of its provisions, including novel ones calling for notification and vaguely familiar ones that permit ICE holds under "special circumstances" and the manner in which probable cause is documented and validated.<sup>151</sup> No number of released PEP forms can make that clear. Internal quality control will remain an issue as LEAs exercise discretion as they implement the new criteria. Also at issue will be the reaction of LEAs to ICE's requests under PEP, partly conditioned on the political and legal climate. As Jain notes,

enforcement necessarily depends on whether jails cooperate with ICE notification requests prior to the release of inmates. Widespread refusal to comply with detainers played a role in undermining the efficacy of Secure Communities—a fact that ICE acknowledged in transitioning to the Priority Enforcement Program. If local law enforcement agencies continue to ignore ICE's new requests for notification, then immigration enforcement officials will have limited ability to apprehend suspected unauthorized immigrants, even after reviewing their arrest information.<sup>152</sup>

In other words, cooperation will fail. At the same time, local communities' reflexive opposition to ICE requests will also impede trust and effective policymaking. They need to show that they are being reasonable for the DHS to remain open to their active partnership. Already, immigration advocates are highlighting TRAC statistics showing that requests for detainers under PEP may be down, but they are not tailored to seriousness of convictions—meaning they would not have prevented Steinle's killing and that the decreased rates are less important than the perceptions of fairness in the meting out of detainer requests.<sup>153</sup>

Based on the legitimacy theory developed in this Article, state and local responses to continuing federal requests for detention or notification post-PEP could go a number of ways. LEAs may continue

150. Preliminary data show a decrease in ICE detainer requests under PEP, but local responses to those requests will require monitoring before patterns can be discerned. See *Further Decrease in ICE Detainer Use*, TRAC REPORT (Aug. 28, 2015), <http://trac.syr.edu/immigration/reports/402/>.

151. César García Hernández and David Martin suggest that probable cause should be strengthened for both ICE notification and ICE holds. García Hernández, *supra* note 125; Martin, *supra* note 32, at 455.

152. Jain, *supra* note 133, at 833.

153. Rosenblum, *supra* note 147.

to withhold cooperation for fear of continuing jurisdictional liability, unresolved concerns about the trustworthiness of ICE, or steadfast conviction about the futility of eroding trust between local police and immigrant communities.<sup>154</sup> Some LEAs might show *greater* cooperation with disciplined detainer requests that seem more legitimate on procedural and substantive grounds, especially if ICE can establish that they are tailoring requests and not merely lowering the overall number of requests, or choose to cooperate when faced with threats of legal or political reprisal for not doing so. Yet others might be less cooperative with detainer requests on the theory that the federal government's respect-worthiness is diminished by the DHS' own admission that the Secure Communities program was illegitimately administered and procedurally defective or that PEP implementation remains insufficiently responsive to preexisting concerns. Congress' divisive proposals to penalize Sanctuary Cities raise the stakes of concession. Some might feel increased trust toward the federal government if it maintains the DHS' more open and responsive style of regulation, notwithstanding recent events. Only time will tell.

At the risk of overly speculating about *whether* states will cooperate with PEP, legitimacy theory sheds light on *how* they will make their decisions. A recent strand of Tom Tyler's legitimacy research focuses on cooperation in the context of law enforcement and legal authorities—defined as police, courts, and the law—rather than more generalized settings such as traffic offenses, speeding tickets and parking fines.<sup>155</sup> As with the original research, Tyler's new research is designed to shed light on decisional factors *beyond* instrumental and normative motivations. The new studies reveal two forms of voluntary action that directly help the police, and legitimacy matters to them both: (1) cooperation by voluntarily providing the police information relevant to public safety objectives, and (2) civic engagement and community investment in local police activities.<sup>156</sup> In the context of post-PEP immigration law enforcement, both types of discretion and

154. Around the same time that the Steinle murder took over headlines, the American Immigration Council released a much-publicized report showing that immigrants are typically not criminals. See WALTER EWING ET AL., *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* 1–2 (2015).

155. TYLER, *WHY PEOPLE COOPERATE*, *supra* note 7, at 32–45, 66 (Chapter 4: Cooperation with legal authorities defined as the police, the courts, and the law).

156. This discussion of civic engagement overlaps Tom Tyler's discussion of cooperation with political authorities, e.g. when communities will go along with the president based on his institutional authority, as opposed to when local officials will go along with federal immigration officials based on the same. *Id.* at 81.

voluntary cooperation are salient. PEP relies on counties and local jails to voluntarily disclose critical information about immigration status in response to ICE's request for notification of the impending release of persons they have probable cause to believe are removable under the enforcement criteria. Prior experience with 287(g) agreements and other predecessors to the Secure Communities and PEP programs have shown that ICE cannot obtain custody for civil immigration enforcement proceedings nearly as efficiently or effectively without LEA-federal government partnership. On the issue of civic engagement and community investment, the promised openness of the federal government to community input following the cessation of Secure Communities renders it keenly dependent on the community's opinions of the federal government's reputation. Right now there is disagreement within communities at-large about whether they ought to encourage policies and practices of cooperation with detainers post-PEP. The president's Task Force on Policing names as Pillar One in its report "building trust and legitimacy," and it invokes Tyler's research for this philosophical foundation toward improved policing.<sup>157</sup> The Task Force Report admonishes the DHS to decouple federal immigration enforcement and local policing activities, specifically mentioning notifications and requests to transfer.<sup>158</sup> Still, many acknowledge that PEP coupled with the new enforcement priorities represents a significant shift toward an immigration enforcement strategy that is more sensitive to the realities of undocumented migration, fairer to long-time residents, and effective in crime control and community protection.<sup>159</sup> The real test of PEP's legitimacy, however, will come once PEP is fully implemented in all jurisdictions and empirical study can be undertaken of whether and why states and localities choose to cooperate with it.<sup>160</sup>

157. REPORT OF THE PRESIDENT'S TASK FORCE, *supra* note 135, at 1 ("When any part of the American family does not feel like it is being treated fairly, that's a problem for all of us.").

158. *Id.* at 18; Letter from Am. Civil Liberties Union et al., to Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec. (June 17, 2015) (on file with the American Civil Liberties Union); Press Release, Judiciary Comm. Chairman Bob Goodlatte, Goodlatte: Implementation of Priority Enforcement Program Endangers Our Communities (June 23, 2015) (on file with the U.S. House of Representatives).

159. Jerry Markon, *Obama Administration Scales Back Deportations in Policy Shift*, WASH. POST. (July 2, 2015), [http://www.washingtonpost.com/politics/dhs-scales-back-deportations-aims-to-integrate-illegal-immigrants-into-society/2015/07/02/890960d2-1b56-11e5-93b7-5eddc056ad8a\\_story.html](http://www.washingtonpost.com/politics/dhs-scales-back-deportations-aims-to-integrate-illegal-immigrants-into-society/2015/07/02/890960d2-1b56-11e5-93b7-5eddc056ad8a_story.html).

160. Similar empirical studies of 287(g) agreements exist. See HEATHER CREEK & STEPHEN YODER, WITH A LITTLE HELP FROM OUR FEDS: UNDERSTANDING STATE/FEDERAL COOPERATION ON IMMIGRATION ENFORCEMENT 1-3 (2010); Katherine M. Donato et al., *Police Arrests in a Time of Uncertainty: Impact of 287(g) on Arrests in a New Immigrant Gateway*, in AM. BEHAV. SCI. 1, 1

## CONCLUSION

Ultimately, the changing pattern of cooperation with Secure Communities on the basis of intertwining legitimacy and legality suggests a policy cycle with substantive and procedural dimensions. The diffusion of substantive policy changes and procedural reforms from Secure Communities to its PEP replacement—and the interruption of Steinle’s killing by an immigration release despite a detainer request—illustrates policy learning between federal, state, and county government. The policy influence loops from the federal government to states and localities (in the form of ICE detainer requests), from states and localities back to the federal government (in policies that accept, condition, or decline to follow detainer policy), and from the federal government back to the states and localities (in PEP’s modified terms for detainer requests). Presumably policy will cycle again as state responses to ICE detainer requests under PEP set the conditions for continuing requests. If states seem thoughtful and reasonable, ICE may meet them in turn; if they seem reflexive and recalcitrant in spite of harmful events, ICE may become more indiscriminate in their requests. Ultimately, policy development may be slowed but not stalled by shocks like the Steinle killing and congressional intervention. Once a policy cycle is in motion, its momentum is not easily impeded, even if it is not unalterable.

Cooperative governance continually remakes immigration enforcement policy, adapting to changing political and legal conditions. Immigration detainers provide a rich study of the process by which these policies evolve. The study can and should be extended as PEP is implemented in cities and counties across the nation. The combined case study heralds lessons for other federal laws calling upon state and local cooperation for their successful execution. Within immigration law, that includes DACA and the still unfolding litigation over the Deferred Action for Parental Arrivals (DAPA) program.<sup>161</sup> States

(2014); U.S. DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., THE PERFORMANCE OF 287(g) AGREEMENTS: FY 2011 UPDATE (2011); MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(g) STATE AND LOCAL IMMIGRATION ENFORCEMENT 18–19 (2011) (showing only half detained under 287(g) committed serious crime); Tara Watson, *Enforcement and Immigrant Location Choice* (Nat’l Bureau of Econ. Research, Working Paper No. 19626, 2013) (287(g) task force model doubles likelihood of immigrants to move); Paul G. Lewis et al., *Why Do Some City Police Departments Enforce Federal Immigration Law?*, J. PUB. ADMIN. RES. & THEORY 1, 10 (2012) (studying 2007-2008 police checks for violent crime versus traffic stops).

161. *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015).

have shown broad acceptance of DACA in their policymaking on drivers' licenses, higher education, and health care.<sup>162</sup> Whether they will continue to do so, if the injunction is lifted on the DAPA program, remains to be seen. It will depend critically on President Obama's reputation after litigation that stirs up concerns about the legitimacy of executive action. Beyond immigration, it includes health care and the environment and other policies premised on executive actions and reliant on state cooperation for their successful implementation. State compliance with the Affordable Care Act has been uneven, with indications that President Obama's forcefulness in pushing through the legislation has had lasting consequences even as the Supreme Court upholds the law's legality.<sup>163</sup> State cooperation with environmental regulations after the Supreme Court's limiting of agency power could follow a parallel track to DAPA.<sup>164</sup> Trust in the legitimacy of one's policymaking partners matters wherever law hinges on public acceptance rather than solely on assertions of power, which is to say legitimacy matters nearly everywhere.

162. Chen, *supra* note 2.

163. King v. Burwell, 135 S. Ct. 2480 (2015).

164. Mich. v. Envtl. Prot. Agency, 135 S. Ct. 2699 (2015).

