D(E)VOLVING DISCRETION: LESSONS FROM THE LIFE AND TIMES OF SECURE COMMUNITIES

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The devolution of immigration authority to line officers, touted as a strength of the Secure Communities program, planted the seeds of the program's downfall. Rising from the ashes of Secure Communities, the Priority Enforcement Program (PEP) set priorities for removal and also unveiled a potential antidote to the devolution of agency discretion. This Article details the rise of Secure Communities and describes the devolution of discretion that ultimately undermined the program. It then spotlights a little-noticed attribute of the PEP—one that addresses head-on Secure Communities' devolution of enforcement discretion to the lowest level. PEP attempts to recapture federal discretion to make macro-level policy decisions about immigration enforcement by siphoning discretion up the chain to higher-level federal officials. This hydraulic experiment in recapturing agency discretion will ultimately determine whether immigration enforcement priorities are doomed to devolution or poised to find a perch on higher ground.

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INTRODUCTION

The federal government launched the Secure Communities program in April 2008, touting it as the perfect marriage of federal, state, and local authority working together to maximize immigration enforcement.[1] U.S. Immigration and Customs Enforcement (ICE) designed the program to leverage state and local arrests of noncitizens by using technology to increase federal removals of "criminal aliens."[2] Using fingerprint data that state and local police gathered during routine booking procedures, the Secure Communities program automatically ran arrestees' fingerprints through federal databases to search for criminal histories and possible immigration violations.[3] If a search revealed a match, ICE would notify the relevant nonfederal law enforcement agency that it should hold the individual until ICE could assume custody.[4] Secure Communities rolled out county-by-county, gathering momentum as it expanded its reach. By the end of February 2015, Secure Communities had contributed to over 400,000 deportations.[5]

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1. *ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide: Initiative Aims to Identify and Remove Criminal Aliens from All U.S. Jails and Prisons*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Apr. 14, 2008), http://www.ice.gov/news/releases/ice-unveils-sweeping-new-plan-target-criminal-aliens-jails-nationwide-0.

2. *Id.*

3. *Id.*

4. *See ICE Detainers: Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Dec. 28, 2011), http://www.ice.gov/news/library/factsheets/detainer-faqs.htm ("Detainers are critical for ICE to be able to identify and ultimately remove criminal aliens who are currently in federal, state or local custody.").

5. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE'S USE OF IDENT/IAFIS INTEROPERABILITY: MONTHLY STATISTICS THROUGH JANUARY 31, 2015 1–2 (2015), *available at* https://www.ice.gov/sites/default/files/documents/FOIA/2015/sc_stats_YTD2015.pdf ("Since [U.S. Immigration and Customs Enforcement's (ICE)] use of IDENT/IAFIS Interoperability was first activated in Harris County, TX, on October 27, 2008, ICE has removed 406,441 aliens and 135,726 Level 1 convicted criminal aliens after identification through use of IDENT/IAFIS interoperability.").

By the spring of 2014, however, Secure Communities had lost its footing. Criticism of the program was legion.[6] Cities and states resisted federal enlistment of their law enforcement resources to aid the program and issued policies and legislation to limit its local effect.[7] Courts began to declare that one of the program's critical underpinnings raised serious constitutional questions. These courts paired the Tenth and Fourth Amendments to cast doubt on the constitutionality of the program's treatment of the federal immigration detainer, or ICE hold, as a mandatory order to nonfederal officers to prolong the detention of a person in state or local custody.[8] By November 2014, the Obama Administration had announced the end of the Secure Communities program.[9]

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6. *See infra* notes 15–19 (citing scholarly critiques of Secure Communities); *see also* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, Megan Mack, Officer, Office of Civil Rights & Civil Liberties, Philip A. McNamara, Assistant Sec'y for Intergovernmental Affairs 1–2 (Nov. 20, 2014) [hereinafter November 2014 Secure Communities Memo], *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (declaring that Secure Communities "has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation" and that "its very name has become a symbol for general hostility toward the enforcement of our immigration laws").

7. *See* Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 154–63 (2014) [hereinafter Lasch, *Rendition Resistance*] (providing an overview of the program and describing Santa Clara County, California Board of Supervisors' civil rights and Tenth Amendment concerns with the Secure Communities program and their efforts to opt out of enforcing it); *infra* notes 66–69 and accompanying text (describing states' and local governments' positive and negative reactions to the program).

8. *See, e.g.*, Galarza v. Szalczyk, 745 F.3d 634, 640–42, 645 (3d Cir. 2014) (construing the immigration detainer as a request to states and localities rather than as a requirement, thereby clearing the path to finding a municipality liable when it relied on an immigration detainer to hold a U.S. citizen); *see also* Miranda-Olivares v. Clackamas Cnty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (concluding that a county violated the Fourth Amendment when it relied on an ICE detainer to hold a noncitizen for two weeks); Morales v. Chadbourne, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (holding that detention pursuant to an immigration detainer issued "for purposes of mere investigation" is impermissible); Galarza v. Szalczyk, No. 10-CV-06815, 2012 WL 1080020, at *14–15 (E.D. Pa. Mar. 30, 2012) (denying qualified immunity to federal immigration officials for unlawful detention based on an immigration detainer), *vacated on other grounds*, 745 F.3d 634 (3d Cir. 2014).

9. November 2014 Secure Communities Memo, *supra* note 6, at 1–2 (ordering ICE to discontinue the program and, based on case law undermining detainer-based detentions, directing ICE to replace requests for detention with requests for notification to ICE of a person's release from state or local custody).

Like the proverbial phoenix, Secure Communities in its demise laid the ember of a next incarnation. In the same breath in which the Administration announced the end of Secure Communities, Administration officials revealed its replacement: the Priority Enforcement Program, or PEP.[10] Like Secure Communities, PEP relies on law enforcement arrests and national database mining to identify potential immigration violators. Two critical differences distinguish PEP from Secure Communities. First, PEP rolls back the use of the immigration detainer as a mandatory order to nonfederal authorities to hold noncitizens until ICE takes custody of them. Second, PEP establishes specific directives for how the Department of Homeland Security's (DHS) chain of command must manage PEP's national priorities for deporting noncitizens.[11] In other words, with PEP, the federal government seeks to reclaim the discretion over immigration enforcement priorities that Secure Communities devolved to the arresting line officer.

This Article addresses the question whether discretion over immigration enforcement decisions, once devolved, can be recaptured. It describes how the devolution of immigration authority, touted as a strength of Secure Communities, contained the hidden seeds of its demise by dispersing the discretion needed for a coherent national immigration enforcement policy. A little-noticed attribute of PEP addresses head-on the devolution of discretion to the arresting immigration or police officer by seeking to channel agency discretion back up the agency hierarchy. The Article argues that PEP's fate hangs on the success of this attempt to undo the devolution.

In so doing, this Article capitalizes on an important insight that Hiroshi Motomura shared in 2011. As Secure Communities began its meteoric rise, Professor Motomura described how federal programs created to increase deportations, like Secure Communities, were

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10. *Id.* at 3.

11. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement et al. 3–5 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [hereinafter November 2014 Prosecutorial Discretion Memo] (defining three descending levels of enforcement priorities, as follows: Priority 1 (threats to national security, U.S. border security, and public safety), Priority 2 (certain misdemeanants and new immigration violators), and Priority 3 (noncitizens with a final order of removal)).

magnifying the significance of law enforcement's decisions to arrest.[12] Secure Communities devolved the discretion to determine who would be subject to immigration law from federal policymakers to the lowest common denominator: nonfederal police officers and sheriffs making initial arrests.[13] Once arrested, it was highly likely that federal authorities would force the noncitizen to leave the country using the civil removal system, where federal authorities exercise much less discretion than in the criminal justice system where prosecutorial discretion is the norm.[14]

Since the publication of Motomura's influential article and during Secure Communities' active tenure, scholars have deeply analyzed the Secure Communities program.[15] Commentators have assessed the legality of the program,[16] its strengths and weaknesses,[17] the

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12. *See* Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842 (2011) [hereinafter Motomura, *The Discretion that Matters*] ("First, the discretion that matters in immigration enforcement has not been the discretion to prosecute, but the discretion to arrest. Second, arrests for civil or criminal violations do not lead separately to two systems of prosecution. Though arrests for criminal immigration violations can lead to criminal prosecution, the federal government may choose to initiate only civil removal proceedings."); *see also* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 130–31 (2014) [hereinafter MOTOMURA, IMMIGRATION OUTSIDE THE LAW] (predicting that state and local law enforcement will become "the federal system's gatekeepers" if they have discretion to stop and arrest unauthorized individuals).

13. *See* sources cited *supra* note 12.

14. *See* Motomura, *The Discretion that Matters*, *supra* note 12, at 1822 (explaining that "state and local criminal arrests are . . . likely to trigger federal civil removal" and that "[t]his allows state and local police to use arrest powers to decide who will be exposed to federal immigration enforcement").

15. *E.g.*, Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 606 (2012) (noting that "with the explosion of sub-federal involvement in immigration policing, it seems that states and localities are, in many cases, actually exercising the discretion that definitively shapes federal enforcement").

16. *See* Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 137–47 (2014) (arguing that the Secure Communities program creates a conflict between the state police power and the federal plenary power to regulate immigration); Rachel Zoghlin, *Insecure Communities: How Increased Localization of Immigration Enforcement Under President Obama Through the Secure Communities Program Makes Us Less Safe, and May Violate the Constitution*, 6 MOD. AM. 20, 27–29 (2010) (arguing that the practical implications of Secure Communities violate the Equal Protection Clause).

17. *See* Laura Donohue, *The Potential for a Rise in Wrongful Removals and Detention Under the United States Immigration and Customs Enforcement's Secure Communities Strategy*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 125, 132–35, 144–52 (2012) (critiquing the disparity between the objective of Secure Communities and its actual results—wrongful removals and detention); *see also* Lindsey J. Gill, Note, *Secure Communities:*

relationship between race and the program's rollout,[18] and the implications of its use of large-scale data technology.[19] However, little has been published about the end of the Secure Communities program or the introduction of PEP.[20] In particular, scholars have yet to take up the question whether devolution of discretion is merely unmanageable or whether ICE can undo devolution by recapturing at a higher level the power to make immigration enforcement policy.

The answer to whether there is an antidote to devolution unfolds in two Parts. Part I of this Article describes the rise of Secure Communities and the devolution of discretion that planted the seeds of the program's undoing. Secure Communities achieved the ultimate delegation downward of enforcement discretion and, as a result, deprived the executive branch of the ability to steer the course of immigration enforcement policy.

Part II describes how the Administration sought to recapture policymaking discretion by channeling it up the supervisory chain. This Part relates the demise of Secure Communities and the rise of PEP, which set priorities for removal decisions. It first describes

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Burdening Local Law Enforcement and Undermining the U Visa, 54 WM. & MARY L. REV. 2055, 2078–85 (2013) (advocating for reform of the Secure Communities program on the ground that the program constituted a "mass deportation scheme at the expense of community security and law enforcement nationwide"); Radha Vishnuvajjala, Note, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J. L. & SOC. JUST. 185, 206–09 (2012) (analyzing the effects of Secure Communities on undocumented immigrant women subjected to domestic violence, especially the effect of deterring them from contacting law enforcement about their experiences of abuse because they feared being fingerprinted).

18. *See* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 134–35 (2013) (identifying a "disparate impact," although not necessarily "disparate treatment," between the rollout of the program and the numbers of members of the Hispanic community who were subject to immigration enforcement under the program as compared to other ethnic populations).

19. Margaret Hu, *Big Data Blacklisting*, 67 FLA L. REV. (forthcoming Sept. 2015) (manuscript at 39) (on file with author) (describing Secure Communities as a "No Citizenship List" because "through erroneous database screening results, it appears that up to 5,880 U.S. citizens were mistakenly targeted for potential detention and deportation").

20. New scholarship on this topic is emerging. *E.g.*, Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Litigation Over Administrative Action on Immigration* (manuscript at 23–24), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2596049 (attributing DHS's lack of success over a five-year period in its "protracted efforts to ensure fidelity to its priorities and consistent application of prosecutorial discretion guidelines" to the agency's "inability to ensure that rank-and-file officers exercise discretion in a manner that is sufficiently uniform and consistent with its priorities and guidelines").

efforts from within the agency and outside of it to bridle the micro-discretion that Secure Communities conferred on line officers and then discusses the role of the courts in triggering the program's calamitous fall. Finally, it analyzes whether new variations on the Secure Communities model, like PEP, might be useful to our understanding of how discretion operates.

Throughout, Part II explores the challenges to returning discretion to the macro policymaking level once it has spilled down through the hierarchy, dispersed through the line-agent level, and crossed the boundaries of federalism to state and local police. Whether PEP is just Secure Communities in new clothing or an evolutionary leap in immigration enforcement policy depends wholly on the outcome of the government's experiment in the hydraulics of discretion.

We fixate on the phoenix's rise. But that blaze of glory can blind us to the cyclical demise in the phoenix's tale. If immigration enforcement is to avoid repeating the self-immolation of Secure Communities, DHS must fundamentally transform how it regulates its own immigration enforcement discretion. Implementing its immigration enforcement priorities requires as much attention to managing the devolution of enforcement discretion as it does to determining the substantive priorities in the first place. PEP maps this Minotaur's maze. It remains to be seen whether DHS will find its way.

I. THE RISE OF SECURE COMMUNITIES

Most of the attention on executive action in immigration law tends to focus on the reprieve from immigration enforcement that President Obama conferred in November 2014 on unlawfully present noncitizens in the form of the Deferred Action for Parental Accountability (DAPA) and the expansion of Deferred Action for Childhood Arrivals (DACA). Less attention has been paid to the other half of the executive branch's action on that same day. President Obama and the Secretary of the Department of Homeland Security also took major action in a set of memos that established priorities for immigration enforcement. These memos announced the end of Secure Communities and the creation of a new program, PEP, which shares some of the characteristics of Secure Communities.[21]

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21. *See* November 2014 Prosecutorial Discretion Memo, *supra* note 11, at 3–5 (setting out priorities); November 2014 Secure Communities Memo, *supra* note 6, at 1–3 (declaring the end of Secure Communities and detailing its replacement).

Secure Communities, and its transformation into PEP, is worth studying because of its experimentation with the de facto devolution of immigration enforcement power to state and local officers and federal immigration line agents.[22] This Part sketches the creation of Secure Communities and the obstacles it was meant to resolve.

A. *The Origins of Secure Communities*

The government introduced Secure Communities at a time when the scope of state and local authority to enforce immigration law was intensely controversial.[23] The prevailing understanding, backed by a series of Supreme Court decisions, was that the federal

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22. *See* Motomura, *The Discretion that Matters*, *supra* note 12, at 1856 (reasoning that programs like Secure Communities "threaten to usurp basic aspects of federal control over immigration enforcement" because "state and local decisionmakers will act as gatekeepers, filling the enforcement pipeline with cases of their choice for civil removal and possibly criminal prosecution as well").

23. *See, e.g.*, PRATHEEPAN GULASEKARAM, NO EXCEPTION TO THE RULE: THE UNCONSTITUTIONALITY OF STATE IMMIGRATION ENFORCEMENT LAWS 1, 2 (2011), *available at* https://www.acslaw.org/sites/default/files/Gulasekaram_-_No_Exception_to_the_Rule.pdf (contending that "[w]hile states may carve out limited regulatory power in the business-licensing area, the larger and more important field of immigration enforcement and policy should remain the sole province of the federal government"); 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) (describing several enforcement programs involving federal-state interaction, including Secure Communities); Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 353–56 (2008) (indicating that courts have generally agreed that the federal government has "the exclusive power to select immigrants"); Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 627 (2012) (arguing for use of a reverse anti-commandeering doctrine to protect federal immigration power from state and local encroachment); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 788 n.6 (2008) (contending that the Constitution permits shared federal-state immigration authority); Motomura, *The Discretion that Matters*, *supra* note 12, at 1825 (critiquing state and local officers' authority to arrest based on civil violations of federal immigration law); 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) (drawing a line between state and municipal legislation regulating immigration generally and nonfederal initiatives that do not interfere with federal authority, such as in-state tuition privileges); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1560–64 (explaining that some states sought to regulate immigration at the state level during the 1990s and early 2000s but that scholars and courts questioned whether federal law would preempt the states' efforts); 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) (contending that Congress lacks authority to extend federal immigration power to the states).

government, and not the states, held the power to regulate immigration.[24] Some argued, however, that there was room within federalism for state and local police to independently enforce immigration law.[25] In 2002, in a reversal of a long-established understanding,[26] the Bush Administration's Office of Legal Counsel opined that state and local law enforcement had inherent authority to make civil immigration arrests.[27]

In December 2007, Congress placed a contingency on ICE funding that required the agency to present a plan detailing how it would identify noncitizens "convicted of a crime, sentenced to imprisonment, and who may be deportable" and then effectuate their

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24. *See* Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (declaring that "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States"); *see also* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 606 (1889) (explaining that "[f]or local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"); Henderson v. Mayor of New York, 92 U.S. 259, 271–72 (1876) (adding that a state statute is void if it "invades" an area of law traditionally relegated to the federal government).

25. *See* Huntington, *supra* note 23, at 838–48 (explaining the concept of "immigration federalism" and suggesting that state and local governments, although perhaps "structural[ly]" preempted from participating in immigration matters, may, by statute, play a role in immigration enforcement); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 199–201 (2005) (arguing that states have inherent authority in the exercise of their state powers to arrest individuals for violating federal immigration laws); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 118 (2013) (noting that the Constitution does not expressly condone the federal exclusivity principle and explaining that federal exclusivity extends only to a narrowly-defined category of "immigration law" in contrast to broad concurrent federal and state authority over matters of "alienage").

26. *See* Memorandum from Teresa Wynn Roseborough, Deputy Assistant Att'y Gen., Office of Legal Counsel, to the U.S. Att'y for the S. Dist. of Cal. 27 (Feb. 5, 1996) (concluding that state police had authority to detain and arrest noncitizens for violations of the criminal but not the civil provisions of the Immigration and Nationality Act (INA)).

27. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to the U.S. Att'y Gen. 1–3, 13 (Apr. 3, 2002). In *National Council of La Raza v. Department of Justice*, the U.S. Court of Appeals for the Second Circuit ordered the U.S. Department of Justice to disclose a number of documents related to federal immigration policy, including the Bush Administration's opinion concerning state and local law enforcement's constitutional authority to make immigration arrests. 411 F.3d 350, 361 (2d Cir. 2005).

removal.[28] ICE responded with the Secure Communities program and piloted it in fourteen counties in October 2008.[29]

Secure Communities seemed to strike a middle ground between exclusive federal immigration power and unbounded state and local authority to regulate immigration.[30] It sought to take advantage of the encounters between noncitizens and state and local law enforcement by transferring those suspected of violating immigration law into federal custody, thereby maintaining enforcement discretion on a federal level.[31] The program was designed to overcome two barriers: (1) the difficulty of identifying whether there were noncitizens in nonfederal custody and (2) the necessity of maintaining nonfederal custody until federal agents could arrest the noncitizen.[32]

The federal government put established law enforcement databases to new use to address the first problem of identifying noncitizens in the custody of local law enforcement. Ordinarily after booking an individual, police submit the arrestee's fingerprint information to Federal Bureau of Investigations (FBI) and DHS databases to search for outstanding warrants. Secure Communities' innovation was to send matching fingerprints to ICE for comparison with immigration

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28. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2050 (2007); *see* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 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), *available at* http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy084thquarter.pdf (listing the required components of the plan).

29. AARTI KOHLI ET AL., CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 3, 16 n.16 (2011) (stating that ICE unrolled the Secure Communities program on a county-by-county basis).

30. *See* Chacón, *supra* note 15, at 603–05 ("With the nationwide implementation of the Secure Communities program and the growth of local laws targeting migrants, the role of state and local law enforcement in immigration has shifted nearly 180 degrees . . . .").

31. *Id.* at 603 ("The Secure Communities program . . . signals an important shift away from reliance on sub-federal discretion in enforcement, in favor of consolidating discretion at the federal level.").

32. For a detailed description of aspects of Secure Communities, see Cox & Miles, *supra* note 18, at 91–99 (detailing the Secure Communities rollout and the process by which local law enforcement share an arrestee's fingerprints with the Federal Bureau of Investigations (FBI), which then shares the fingerprints with the Department of Homeland Security (DHS) to determine whether the arrestee has legal status or should be detained pursuant to an immigration detainer); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826–28 (2015) (providing an overview of the program and its successor, the Priority Enforcement Program (PEP)).

databases and a determination whether to seek custody of the arrested individual.[33] Immigration agents had already started entering civil immigration warrants into these databases, resulting in state and local arrests both for crimes and civil immigration violations.[34] Secure Communities took advantage of these databases in a different way and used them to check all arrestees across the nation to identify removable noncitizens.[35]

To be successful, however, Secure Communities had to address the second problem—ensuring that the noncitizen remained in state or local custody until federal agents could arrest the noncitizen. Criminal authority to hold a noncitizen could lapse before a federal agent could arrive, either because there was insufficient evidence to hold the individual or because of a lack of prosecutorial will to proceed with a criminal case, among other reasons.[36] If criminal

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33. *See* Hu, *supra* note 19 (manuscript at 15–16) (describing Secure Communities' use of information that local and state law enforcement agencies submit to run biometric and biographical data of arrestees through federal government databases to determine whether an individual should be detained and deported).

34. *See* HANNAH GLADSTEIN ET AL., MIGRATION POLICY INST., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002–2004 6–7 (2005) (citing 8 U.S.C. § 1252c (2012)) (describing the use of fingerprints gathered by state and local law enforcement to identify unlawfully-present noncitizens and the increased number of deportations that followed); *see also* Jonathan Peterson, *INS Fugitives to Be Listed on FBI Database*, L.A. TIMES, Dec. 6, 2001, http://www.latimes.com/la-120601immig-story.html (highlighting the new role of fingerprinting technology in immigration enforcement).

35. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) SECURE COMMUNITIES (SC) STANDARD OPERATING PROCEDURES (SOP) 4 (2009), *available at* http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf (outlining the Secure Communities program's standard operating procedures and stating that "[a]s appropriate, the local [law enforcement agency] will submit a Criminal Ten-Print Submission"); *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities (last visited May 11, 2015) (reporting that the rollout of Secure Communities began in 2008 and was complete in January 2013). Adam Cox and Thomas Miles have argued that the national scope of the program "is both further evidence of the power of the president over immigration policy and an additional means of centralizing the use of discretion within the executive branch." Cox & Miles, *supra* note 18, at 132.

36. *See e.g.*, Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014) (prohibiting the use of a detainer to hold a U.S. citizen after police dropped the underlying criminal charges); Miranda-Olivares v. Clackamas Cnty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (holding that it was unconstitutional for local law enforcement to detain a noncitizen for over two weeks after she was eligible for bail); *see also* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in*

authority lapsed before federal agents could arrest the noncitizen under immigration laws, criminal justice actors had no basis to continue to hold the noncitizen.

Secure Communities solved this problem through an innovative though constitutionally questionable use of the immigration "detainer," an enforcement tool created in the 1980s as part of the drug war laws.[37] Immigration agents issued the immigration detainer to cause another federal, state, or local law enforcement agency to hold an arrested noncitizen until federal immigration authorities could take the person into custody.[38]

To cast the widest net, however, the detainer needed the power to compel the federal, state, or local criminal authority to hold the noncitizen. This was true for two reasons. First, a detainer mandating that the criminal justice actor maintain custody of the noncitizen bridged the gap between the moment the actor's criminal authority to hold the noncitizen lapsed and the moment that federal immigration authorities took custody of the noncitizen. Second, a rule that the detainer was mandatory counteracted any resistance that states or localities had to honoring the detainers.

At first, the executive branch touted Secure Communities as a model of success. The Secure Communities program operated during a period that saw the highest rates of deportation in U.S.

Local Enforcement, 88 N.Y.U. L. REV. 1126, 1157 (2013) [hereinafter Eagly, *Criminal Justice for Noncitizens*] (designating as "alienage-neutral" the model developed in Los Angeles County, California in which criminal justice actors deliberately exercise discretion in ways that limit the potential effects on criminal adjudication of immigration status and enforcement); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1307–08 (2010) [hereinafter Eagly, *Prosecuting Immigration*] (delineating the interaction between pretrial detention and the detainer and noting that noncitizens who had won orders releasing them on criminal bail could remain in custody because of the detainer).

37. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751(d), 100 Stat. 3207, 3207-47 to -48 (codified at 8 U.S.C. § 1357) (amending INA section 287 to allow nonfederal law enforcement to request that ICE issue detainers for noncitizens arrested for violating controlled substances laws when nonfederal law enforcement had reason to believe the noncitizens were in the United States unlawfully); Lasch, *Rendition Resistance*, *supra* note 7, at 203–04 (describing the origins of the detainer).

38. *See* 8 C.F.R. § 287.7(a)(1) (2014) (stating that "[a]ny authorized immigration officer may at any time issue a Form I-247, Immigration Detainer–Notice of Action, to any other Federal, State, or local law enforcement agency"); *cf.* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 182–85 (2008) (arguing that the detainer regulation exceeds the boundaries of the statute).

history.[39] The federal government seemed to have cracked the tough nut of interaction between state and federal officials in enforcing immigration law by permitting both federal and nonfederal officials to exercise arrest discretion semi-autonomously.[40] This seemingly cooperative federalism[41] allowed the federal government to reap the harvest of police arrests of noncitizens and detainer decisions of line-level immigration agents. ICE reported that by August 31, 2012, the government had deported over 166,000 noncitizens identified by Secure Communities.[42]

B. *Trouble in Paradise: The Double Devolution of Discretion*

Even as it was rolled out, Secure Communities became a lightning rod for controversy.[43] The double devolution of enforcement discretion to federal immigration line officers and to nonfederal criminal justice authorities was at the root of the controversy. As explained below, this double devolution threatened the autonomy of cities and states and undermined relationships between police and communities of color, resulting in resistance to Secure Communities on multiple fronts.

The use of criminal databases for immigration enforcement purposes raised questions about how police would respond to the program. Commentators observed that unfettered collaboration between criminal justice actors and immigration enforcement agents would delegate excessive enforcement discretion to police.[44] As

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39. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-708, SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED, GEN. ACCOUNTING OFFICE (GAO) 15 tbl.2 (2012) (attributing about twenty percent of ICE removals in 2011 and early 2012 to Secure Communities).

40. *See* Chacón, *supra* note 15, at 597–606 (discussing state and local integration into immigration enforcement and noting that "[s]tate and local law enforcement had become the primary point of contact for many noncitizens coming into contact with the removal system and the federal executive branch has been the main architect of this new order").

41. *See* Cox & Miles, *supra* note 18, at 93 (describing Secure Communities as building on preliminary efforts at cooperative federalism).

42. *Secure Communities: Get the Facts*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/get-the-facts.htm (last visited May 11, 2015).

43. *See, e.g.*, Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 645–46 (2012) (raising concerns about false arrests and discriminatory policing toward Latinos).

44. *See* Jain, *supra* note 32, at 830 (explaining that domestic arrests provide law enforcement officers a greater opportunity to "selectively examin[e]" which members of the noncitizen population should be prioritized and deported); Motomura, *The Discretion that Matters*, *supra* note 12, at 1858 (asserting that the

Ingrid Eagly has pointed out, immigration enforcement powers are greater on the civil side than the criminal side, which motivates law enforcement to draw on those expanded civil powers rather than criminal powers and provides an incentive "to expan[d] . . . the civil immigration law and corresponding civil enforcement powers to avoid criminal rules meant to restrain police behavior."[45]

Opposing pressure came from nonfederal governments concerned about the use of their criminal justice resources in the service of immigration enforcement. One of the early battles waged over Secure Communities was whether states and localities were obliged to participate in sharing the information that their officers gathered and that immigration officials mined using the national databases.[46] As the number of noncitizens who were deported as a consequence of the Secure Communities program rose, controversy flared over its legality and efficacy. By 2010, several cities and counties had declared that they were opting out of Secure Communities.[47] DHS

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federal government should reevaluate programs allowing for greater state and local law enforcement of the immigration laws in order to prevent "regional and local prejudices" from defining immigration enforcement); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 977–78 (2004) (warning that recognizing a nonfederal power to enforce criminal but not civil immigration laws creates an incentive for police to expand their discretion by "manufactur[ing]" probable cause for a criminal violation). *But see* Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1337–40 (2012) (noting that local enforcement programs such as Secure Communities provide distinct advantages to the federal government because they enable state and local police to locate potential deportable noncitizens more easily and to determine whether deportation is desirable in light of the noncitizens' individual criminal records and the broader local conditions in the community).

45. Eagly, *Prosecuting Immigration*, *supra* note 36, at 1289.

46. *See* Lasch, *Rendition Resistance*, *supra* note 7, at 154–63 (relating the history of counties and cities that sought to opt out of Secure Communities because they had civil rights and Tenth Amendment concerns with the program and were "disillusion[ed]" with the federal government).

47. *See, e.g.*, Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 152–54 (2011) (noting that several cities and communities, including New York City, declined to participate in the Secure Communities program out of concern that state policing of immigration violations would lead to racial profiling); Editorial, *Confusion Over Secure Communities*, N.Y. TIMES (Oct. 5, 2010), http://www.nytimes.com/2010/10/05/opinion/05tue3.html (acknowledging that several communities had opted out of the program but questioning their legal authority to do so); Shankar Vedantam, *No Opt-Out for Immigration Enforcement*, WASH. POST (Oct. 1, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007268.html (indicating that because local law enforcement has a need to know arrestees' criminal histories,

soon announced, however, that because the Memorandum of Agreement was signed at the state level, localities within a signing state would not be able to opt out.[48]

These latter critiques of Secure Communities were, at bottom, concerned with the increased enforcement discretion placed in the hands of state and local criminal justice actors. In fact, the program represented two assignments of discretion. The first was a devolution of discretion to the states. Specifically, the program devolved discretion to state and local criminal justice actors from federal immigration authorities by relying on police to make initial arrest decisions.[49] The second was a devolution of discretion from a higher tier of supervision to the lowest tier within a government agency—namely, the line officer.

Hiroshi Motomura has classified discretion in immigration enforcement into two categories: macro and micro.[50] The federal government exercises macro-discretion in immigration law when it "set[s] enforcement priorities and support[s] them with funds and other resources."[51] Federal immigration officials exercise micro-discretion when they "decide whether to pursue the removal of a noncitizen after she has been identified" as potentially removable.[52] Criminal authorities exercise micro-discretion when they make the decision to make an arrest.[53]

The architecture of Secure Communities devolved macro-discretion to set immigration enforcement priorities to both federal immigration agents and nonfederal rank-and-file police officers. This delegation was de facto rather than de jure: while the program did not explicitly delegate the setting of enforcement priorities to

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states cannot realistically choose to withhold arrestees' fingerprints from the FBI and, therefore, from ICE).

48. Chapin, *supra* note 47, at 142; *see* Lasch, *Rendition Resistance*, *supra* note 7, at 158–59 (describing localities' backlash after Secure Communities documents were publicly released and "reveal[ed] that ICE officials had long known that the program was not voluntary" (alteration in original) (internal quotation marks omitted)).

49. *See* Jain, *supra* note 32, at 830 (noting that "[a]rrests provide a way for immigration enforcement officials to delegate enforcement responsibilities to state and local police, who, in turn, take responsibility for some of the work of identifying and removing unauthorized noncitizens from the interior of the United States").

50. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 12, at 27.

51. *Id.* at 129.

52. *Id.*

53. *Id.*

immigration agents and police, the structure of the program accomplished that delegation.[54]

On the nonfederal side of the line, relying on fingerprints meant that Secure Communities devolved to the micro level—i.e., to the case-by-case decisions of the arresting police officer—what otherwise would have been federal discretion to decide on a policymaking level which categories of noncitizens to prioritize for immigration enforcement.[55] The program's reliance on fingerprints freed police officers from both federal and nonfederal constraints on their discretion to arrest. As a nonfederal criminal justice actor, the arresting police officer operated outside of the federal chain-of-command, and so long as there was no state or local policy on immigration-related arrests, the officer could choose whether to arrest as an immigration enforcement action.[56] Moreover, an immigration enforcement arrest circumvented the traditional function of prosecutorial discretion as a check on police power whereby the prosecutor deters undesirable police conduct by declining to pursue cases that are marred by a flawed or unpalatable arrest.[57]

On the federal side, the detainer devolved the macro-discretion to decide which arrested noncitizens to prioritize, or how to pursue them, to immigration agents. This micro-discretion constituted a delegation of macro-discretion because by delegating the detainer power to the line immigration agent, Secure Communities established a de facto policy of maximizing deportation rates. Two factors contributed to the upward pressure on deportation rates: (1) line immigration agents operated under performance metrics and within an agency culture that emphasized removal rates[58] and (2)

54. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 462 (2009) (discussing a de facto delegation of power from Congress to the President to exercise prosecutorial discretion).

55. *See* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 12, at 79 (stating that Secure Communities required arrestees to be fingerprinted and then cross-referenced with DHS's biometric immigration database).

56. *Id.* at 129 (explaining that while the federal government initially makes a macro-decision about what level of resources to provide to "border and interior enforcement," local law enforcement officers will often exercise micro-discretion in making the initial decision to arrest an individual).

57. *See* Eagly, *Criminal Justice for Noncitizens*, *supra* note 36, at 1172–73 (describing one jurisdiction's "direct filing system" in which prosecutors are made available to review a police officer's allegations before an individual is officially booked, thereby avoiding the detention of noncitizens on questionable grounds and any interaction with federal immigration officers).

58. *See* Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 224–25 (2014)

immigration line agents exercised the micro-discretion to decide whether to continue to detain a particular noncitizen in state and local custody. On its face, the detainer form could be issued merely upon an agent's certification that ICE was investigating the status of the individual in police custody.[59] Permitting issuance of a detainer on the strength of an open-ended declaration of investigation meant that line-level ICE agents could issue detainers without having to consult higher-level edicts about which noncitizens were enforcement priorities.[60] In other words, despite the existence of macro-level enforcement policies, the mandatory immigration detainer gave the line immigration agent the ultimate power to decide whom to prioritize for enforcement.

The combination of the unrestricted use of the law enforcement databases and the immigration detainer created a double devolution of discretion to line immigration agents and police officers. It also meant that there was little to no oversight over how line agents and police officers were exercising their authority to enforce immigration law. This double devolution was, in effect, a de facto delegation of priority-setting power from the top of the executive branch all the way down to the lowest level of the federal and state law enforcement hierarchy.[61]

(explaining that ICE tied its detention and deportation officers' performance metrics to the number of cases they processed or charged and concluding that "the pressure to hit these metrics pervasively shaped the work of the agency's front-line operators" and defined the agency's culture and mission as committed to "capturing and deporting criminals").

59. *See* Miranda-Olivares v. Clackamas Cnty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *1 (D. Or. Apr. 11, 2014) (quoting immigration detainer Form I-247's checkbox indication that DHS had "initiated an investigation to determine whether [Miranda-Olivares] is subject to removal from the United States" (alteration in original) (internal quotation marks omitted)). The current version of the form requires that an immigration officer issuing the detainer has at least one reason to believe that the noncitizen is removable. *Department of Homeland Security Immigration Detainer – Notice of Action*, DEP'T OF HOMELAND SECURITY 1 (Dec. 2012), http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf; *see* Lasch, *Rendition Resistance*, *supra* note 7, at 205–08 (describing the evolution of mandatory and discretionary language on the immigration detainer form).

60. *See* Lasch, *Rendition Resistance*, *supra* note 7, at 204–05 (discussing ICE's position that the federal government has "unbridled authority" under federal immigration laws to issue an immigration detainer to any state, local, or federal law enforcement agency).

61. Thanks to David Rubenstein for this valuable insight.

II. MANAGING DISCRETION: LESSONS FROM SECURE COMMUNITIES

The fall of Secure Communities began slowly and finished with a clatter. It was, in a way, a victim of its own design in that its high deportation rate motivated opponents to uncover its legal and consequential flaws. The devolution of enforcement discretion to immigration and criminal line officers, in particular, fed the resistance to the program that led to its ultimate end.

This Part analyzes what we can learn from the demise of Secure Communities. Once discretion devolves from the macro level and disperses throughout the rank-and-file line officers in the form of micro-discretion, can it be put back in the bottle?

A. *Bottling Discretion*

Two significant reactions to Secure Communities constitute attempts to unspill the macro-discretion to determine enforcement priorities.[62] These attempts came from two independent sources: high-level federal immigration officials and state and local legislatures.

The federal attempt to recapture macro-discretion over enforcement decisions came in June 2011 after criticism of Secure Communities was legion. Former ICE Director John Morton released a memorandum refining the priorities for ICE's prosecution and removal of noncitizens and requiring that ICE undertake a review of pending cases for compliance with those priorities.[63] Morton later issued guidelines restricting ICE officers to issuing detainers only in circumstances when arrestees fit those priorities.[64] Despite the

62. *See* Dara Lind, *The Government Can't Enforce Every Law. Who Gets to Decide Which Ones It Does?*, VOX (Mar. 31, 2015), http://www.vox.com/2015/3/31/8306311/prosecutorial-discretion (describing top-down and bottom-up modes of discretionary enforcement in immigration law).

63. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel 4–5 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf; *see* Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 49 (2013) (narrating the creation of the Morton memos and concluding that they constituted "an expanded list of factors the agency should consider when rendering prosecutorial discretion decisions" with "a preference for such discretion to be exercised as early in the process as possible").

64. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel 1–2 (Dec. 21, 2012), *available at* http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

fanfare that accompanied the issuance of the Morton memos, they had a markedly minimal effect.[65]

State and local communities tended to react to Secure Communities in one of two ways.[66] The State of Arizona exemplified the first reaction, infamously embracing Secure Communities as consistent with its stance that its criminal law enforcement officers had inherent immigration enforcement authority.[67] By contrast, a few vocal states and localities responded by removing the discretion that its police officers had to use Secure Communities for immigration enforcement purposes or curbing the effect of the federal detainer.[68] As early as 2010, Washington, D.C. and cities and counties in Illinois, New York, and California reacted to Secure Communities by enacting legislation or policies that restricted routine compliance by local criminal justice actors with federal immigration detainers.[69] When examining these nonfederal statutes

65. *See* Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of Dream Act Students*, 21 WM. & MARY BILL RTS. J. 463, 540 (2012) (detailing the circumstances surrounding the development of the Morton memos and concluding that the review Morton had mandated "was underwhelming by any measure" and that the deferred action that the memos contemplated "was used more sparingly than had been the case in President George Bush's presidency"); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 24 (2014) (observing that one challenge of relying on the Morton memos to advance prosecutorial discretion "is the fact that the enforcement arm of DHS does not support this policy").

66. *See* Rubenstein, *supra* note 25, at 143–44 (characterizing protectionist and restrictionist state responses to Secure Communities as structural forms of dissent from federal approaches to immigration enforcement and concluding that "[p]roviding space for dissenting action—whether protectionist or restrictionist—can . . . be a virtue").

67. *See* Arizona v. United States, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., concurring in part and dissenting in part) (contending that Arizona has the "inherent power to exclude persons from its territory"); *see also* Eagly, *Criminal Justice for Noncitizens*, *supra* note 36, at 1171–80 (describing Harris County, Texas as a full participant in Secure Communities and detailing the ways the county took immigration status into account in increasing criminal consequences for undocumented immigrants charged with crimes).

68. *See, e.g.*, Eagly, *Criminal Justice for Noncitizens*, *supra* note 36, at 1207–09 (noting that in California, the state legislature proposed to limit operation of the program).

69. *See, e.g.*, CHI., ILL., CODE §§ 2-173-005, 2-173-042 (2012) (establishing "the City's procedures concerning immigration status and enforcement of federal civil immigration laws" and declaring that "no agency or agent shall . . . arrest, detain or continue to detain a person solely on the belief that the person is not present legally in the United States, or that the person has committed a civil immigration violation"); COOK COUNTY, ILL., CODE § 46–37(a) (2011) ("The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with

and policies, Christopher Lasch noted that most jurisdictions that resisted federal imposition of immigration detainers "simultaneously insist[ed] upon a power of discretion over which detainers to enforce."[70] In other words, in a move that paralleled the high-level federal attempt to channel immigration enforcement discretion to the macro level, states and localities sought to channel the discretion to participate in immigration enforcement from the rank-and-file upward to a policymaking level where macro-discretion resided. Here, though, a state or local entity such as the state legislature, city council, or board of supervisors exercised the macro-discretion to decide whether or how to use its resources to enforce immigration law.[71]

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the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed."); D.C. CODE § 24-211.07(b) (2014) (stating that the District of Columbia will comply with a detainer only if it is reimbursed for its compliance and if the individual is over eighteen years old and has been convicted of a dangerous crime); N.Y.C., N.Y., ADMIN. CODE § 9-131 (2012) (providing that New York City Department of Corrections will not honor a detainer unless presented with a warrant for the individual's arrest or the person has been convicted of a serious crime or added to a terrorist screening database); SANTA CLARA, CAL. BD. OF SUPERVISORS POLICY MANUAL § 3.54 (2014) (declaring that Santa Clara County will honor a detainer for an individual over eighteen years of age if the federal government reimburses the county and requests in writing that the individual be detained and if the individual has been convicted of a serious or violent crime); *Annotated Agenda: Berkeley City Council Meeting*, BERKELEY CITY COUNCIL (Oct. 30, 2012), http://www.ci.berkeley.ca.us/Clerk/City_Council/2012/10Oct/City_Council__10-30-2012_%E2%80%93_Regular_Meeting_Annotated_Agenda.aspx ("The Berkeley Police Department will not honor requests by [ICE] to detain a Berkeley jail inmate for suspected violations of federal civil immigration law."); *see also* Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J. L. & POL'Y 281, 288–89 (2013) [hereinafter Lasch, *Preempting Detainer Enforcement*] (noting that California's Attorney General issued guidance to law enforcement stating that detainers are discretionary on the ground that the state's resources would be commandeered if detainers were mandatory); Brent Begin, *San Francisco County Jail Won't Hold Inmates for ICE*, S.F. EXAMINER (May 6, 2011), http://www.sfexaminer.com/sanfrancisco/san-francisco-county-jail-wont-hold-inmates-for-ice/Content?oid=2174504 (announcing that "San Francisco . . . will start releasing illegal immigrants arrested for low-level crimes from jail even if federal officials notified through a controversial fingerprint identification program request that they be held for a deportation hearing").

70. Lasch, *Preempting Detainer Enforcement*, *supra* note 69, at 290.

71. *See* Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629, 678 (2013) (detailing state and local measures to remove local law enforcement from immigration enforcement and respond to concerns that greater local enforcement promotes racial profiling, consumes local resources, and discourages noncitizens from cooperating with the police); Lasch, *Preempting Detainer Enforcement*, *supra* note 69, at 288–89 (explaining that state and

Litigation intensified over the scope and legality of the immigration detainer.[72] In March 2014, the U.S. Court of Appeals for the Third Circuit in *Galarza v. Szalczyk*[73] held that state and local criminal justice actors were not required to comply with immigration detainers and that a contrary interpretation would violate the Tenth Amendment anti-commandeering principle.[74] The court allowed the plaintiff, a U.S. citizen held for three days on an immigration detainer, to proceed with his suit for civil damages against the county that had arrested him and continued to hold him after he had posted bail.[75] The Third Circuit's decision in *Galarza* was significant because of the clarity of its holding and its use of the Tenth Amendment to interpret the detainer statute and regulations and because it was a decision of a federal court of appeals.

The tipping point for Secure Communities, however, was a magistrate judge's decision in favor of a noncitizen whom the county had discouraged from posting bail because she would nonetheless remain in custody pursuant to an immigration detainer.[76] In *Miranda-Olivares v. Clackamas County*,[77] the U.S. District Court for the District of Oregon held that a county violated the Fourth Amendment when it relied on an ICE detainer to hold the plaintiff for two weeks until her criminal case concluded and ICE

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local bodies often justify limiting local law enforcement of immigration laws by citing the Tenth Amendment's prohibition on commandeering states' resources for federal enforcement purposes); Lasch, *Rendition Resistance*, *supra* note 7, at 160 (describing the Santa Clara, California Board of Supervisors' refusal to honor the immigration detainer unless an arrestee was suspected of a serious crime and the government paid for the individual's detention).

72. *See, e.g.*, Morales v. Chadbourne, 996 F. Supp. 2d. 19, 40 (D.R.I. 2014) (characterizing ICE detainers as "not mandatory" because "[s]ubsection (d) . . . titled 'Temporary detention at Department request,' comes only after subsection (a)'s 'general' detainer definition as a 'request'" (citation omitted)); Buquer v. City of Indianapolis, No. 1:11-CV-00708-SEB, 2013 WL 1332158, at *3 (S.D. Ind. Mar. 28, 2013) ("A detainer is not a criminal warrant, but rather a voluntary request that . . . automatically expires at the end of the 48-hour period."); *see also* Lasch, *Preempting Detainer Enforcement*, *supra* note 69, at 288 & n.32 (compiling four federal district court cases challenging compliance with immigration detainers).

73. 745 F.3d 634 (3d Cir. 2014).

74. *Id.* at 640–43.

75. *Id.* at 636, 645.

76. *See* Miranda-Olivares v. Clackamas Cnty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *10–11 (D. Or. Apr. 11, 2014) (holding that the plaintiff was deprived of her Fourth Amendment rights when she was detained without probable cause pursuant to an immigration detainer); *see also Morales*, 996 F. Supp. 2d at 39 (invalidating an immigration detainer issued "for purposes of mere investigation").

77. No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

could take custody of her.[78] The case struck a nerve nationally with states and localities for two reasons. First, unlike the erroneous detention of a U.S. citizen in *Galarza*, *Miranda-Olivares* concerned the typical Secure Communities detainee: a noncitizen of unknown immigration status.[79] Second, the decision in *Miranda-Olivares* opened the door for municipal liability under both federal civil rights law and state tort law.[80]

The decision in *Miranda-Olivares* sparked immediate, accelerated resistance to the immigration detainer. Between April 11 and May 2, 2014, more than thirty Oregon counties declared they would no longer comply with ICE detainers.[81] Philadelphia, Pennsylvania and the State of Maryland announced limitations on detainers shortly thereafter,[82] and most counties in Colorado and California as well as several counties in Northeast and Midwest states announced that they would limit cooperation or refuse to honor immigration detainers.[83]

On November 20, 2014, the Obama Administration announced a new program to defer the removal of unlawfully present parents of U.S. citizens and lawful permanent residents and to expand the coverage and duration of DACA for qualified noncitizen youth who were unlawfully present in the country.[84] DHS also declared in a set

78. *Id.* at *9, 11.

79. *Id.* at *1.

80. *Id.* at *12 (granting summary judgment as to liability based on a violation of the plaintiff's Fourth Amendment rights but denying summary judgment as to the false imprisonment claim because the county had acted under an erroneous belief that the ICE detainer and detainer regulations provided apparent authority to detain). Because the opinion itself corrected the erroneous belief that the county had authority to detain, the county faced future liability for false imprisonment if it continued to treat the detainer as mandatory.

81. *See Recent Developments on ICE Holds in Oregon*, IMMIGRANT L. GROUP, http://www.ilgrp.com/iceholds (last visited May 11, 2015) (providing a map of counties in Oregon that required compliance with constitutional requirements before authorizing detention as of May 2, 2014).

82. 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?hp&_r=0.

83. *See Immigration Enforcement*, IMMIGRANT LEGAL RESOURCE CENTER, http://www.ilrc.org/enforcement (last visited May 11, 2015) (showing a map of counties, cities, and states that have limited compliance with immigration detainers).

84. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. 3–4 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf (expanding DACA for immigrants who came to the United States as children and

of memos from Secretary Jeh Johnson that it would prioritize the removal of noncitizens with criminal convictions and those who had recently entered unlawfully.[85]

One of the DHS memos revealed the fate of Secure Communities. Secretary Johnson announced that the government would discontinue Secure Communities and replace it with the Priority Enforcement Program, acronymed PEP.[86] Like Secure Communities, PEP established a specific set of enforcement priorities that create a hierarchy of criminal convictions or unlawful entries.[87] It identified the highest enforcement priority as noncitizens who pose threats to national security, U.S. border security, and public safety; a second priority level that includes certain misdemeanants and new immigration violators; and a lowest level that consists of noncitizens with final orders of removal.[88]

The substantive hierarchy of PEP's enforcement priorities is important, and other scholars have elegantly parsed its latticework.[89] The means by which DHS has declared that it will implement these priorities, however, reveals a fresh approach to the devolution of discretion that may hold lessons, for better or for worse, for understanding whether the agency can gather the scattered shards of its enforcement discretion and elevate them to the policy-setting level of macro-discretion.

B. From the Ashes of Secure Communities: Lessons from PEP

Secure Communities paved two roads in devolving the federal macro-discretion to set enforcement priorities: first, to the micro-discretion of the state or local officer deciding whom to arrest, and second, to the line immigration agent deciding whom to hold in custody using the immigration detainer. PEP represents an attempt to reverse both devolutions.

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providing guidance for deferred action of adults "who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the [Administration's] November 20, 2014" policy memorandum).

85. November 2014 Secure Communities Memo, *supra* note 6, at 1.

86. *Id.* at 2–3.

87. November 2014 Prosecutorial Discretion Memo, *supra* note 11, at 1, 3–4.

88. *Id.*

89. *See* Jain, *supra* note 32, at 827–29 (characterizing PEP's changes as a continued effort by ICE to prioritize removal of those individuals who have criminal records, may have recently entered the country, or have failed to adhere to removal orders).

As PEP rises from Secure Communities' ashes, it will confront several challenges. First, it will encounter a body of immigration enforcement officers accustomed after Secure Communities to exercising on the micro level the agency's discretion to set enforcement priorities. Second, it will face a nation of states and localities that are strongly divided over whether their own police forces should exercise de facto discretion to participate in the enforcement of immigration law.

These are challenges that, in hindsight, might not have existed had the agency retained the macro-discretion to create and manage its enforcement priorities. PEP's attempt to undo Secure Communities' double devolution of discretion thus deserves a closer look.

PEP's first innovation targeted Secure Communities' double devolution of discretion to rank-and-file immigration agents as well as nonfederal arresting police officers. After restricting immigration agent enforcement activities to particular categories of noncitizens, Secretary Johnson's priority-setting memo required immigration enforcement agents to obtain clearance from a higher level of authority, such as the ICE Field Office Director, U.S. Customs and Border Patrol (CBP) Sector Chief, or CBP Director of Field Operations, before departing from the prioritized list of categories.[90] The memo informed the agency heads that DHS will make publicly available statistics on compliance with the enforcement priorities in order to ensure transparency.[91]

With this move, PEP turned the de facto devolution of enforcement discretion into a de jure policy that policymakers exercise macro-level immigration enforcement discretion. Requiring clearance before departing from the priorities siphons discretion from the micro level of the individual immigration agent to the macro level of priority setting because it places a greater burden on line agents to obtain permission to pursue noncitizens suspected of immigration violations but who fall outside of those priorities. It also establishes a default rule in favor of declining enforcement for those cases. Depending on how the memo is implemented, if permission must be sought every time an agent desires to depart from the priorities, then the process itself will dampen departure from those priorities.

If PEP is successful in recapturing the priority setting that Secure Communities diffused to rank-and-file immigration agents, it will also

90. November 2014 Prosecutorial Discretion Memo, *supra* note 11, at 5–6.
91. *Id.* at 1.

dam the micro-discretion that Secure Communities devolved to state and local police officers. Assuming that PEP's administrative hurdle to departing from the priorities encourages immigration agents to follow the priorities, it will likely have a domino effect on police decisions. Without the reward of immigration prosecutions for arrests of nonpriority noncitizens, state or local police are less likely to use criminal arrests as a means of initiating the enforcement of immigration law outside of the enforcement priorities.

PEP's second innovation, heavily curtailing the use of the immigration detainer, similarly addresses the double devolution of discretion but more directly impacts nonfederal immigration enforcement.[92] Responding explicitly to the criticism of Secure Communities, its constitutional foundering, and its status as "a symbol for general hostility toward the enforcement" of the immigration laws,[93] the DHS Secretary demoted the immigration detainer in two ways. First, he limited ICE's authority to seek the transfer of a noncitizen from nonfederal to ICE custody to circumstances meeting either the higher of PEP's priority levels or a high-level official's determination that the noncitizen posed a national security risk.[94] Like the limits on departing from the priorities, the Secretary's directive constrains the discretion of immigration agents and will have a secondary dampening effect on police discretion to make arrests for immigration purposes.

The second way that the Secretary curtailed the immigration detainer affirms the efforts of states and localities that had sought to recapture their own macro authority to set priorities for their law enforcement officers. Secretary Johnson overtly demoted the detainer from a federal mandate to a request, thus acknowledging the nonfederal discretion to decline the request that many state legislatures and municipalities had claimed.[95] He also directed ICE to replace requests for detention of an arrestee with requests that

92. *See* November 2014 Secure Communities Memo, *supra* note 6, at 1 (ordering the end of the Secure Communities program); *see also* Ming H. Chen, *Understanding the Legitimacy of Executive Action: Secure Communities and States*, 90 CHI-KENT L. REV. (forthcoming 2015) (manuscript at 21) (on file with author) (observing that "in the move from Secure Communities to PEP, . . . DHS narrows the detainer program along several lines vetted by litigation challenges to the preexisting detainer requests").

93. November 2014 Secure Communities Memo, *supra* note 6, at 1.

94. *Id.* at 2.

95. *See supra* note 69 (quoting several examples of state and community legislative efforts to establish procedures for selective enforcement of the program).

state or local criminal authorities notify ICE of an individual's pending release. For ICE to request that criminal authorities detain a noncitizen, the noncitizen must have a final removal order or the officer must have sufficient probable cause to find that the person is removable.[96] These directives narrow the broad channel from criminal arrest to immigration custody that the mandatory detainer established.

Even if it succeeds in its goal of recapturing policymaking discretion over immigration enforcement, PEP will face another challenge: the risk that the public will perceive DHS's attempt to wrest discretion from the micro to the macro level as an abdication of its duty to enforce immigration law. PEP nevertheless takes a new and significant step in exercising macro-discretion. It does not stop, as did the Morton memos, at exercising its macro-discretion by merely articulating the agency's priorities and requesting that line agents follow them. It also directly addresses the largest obstacles to enacting those priorities, namely the status quo in which those choices have devolved to the lowest levels of micro-discretion.

CONCLUSION

One lesson from the transformation of Secure Communities from the flagship of DHS's enforcement initiatives to its more humble descendant in PEP may be most useful for advocates and policymakers. That lesson capitalizes on another of Hiroshi Motomura's insights: that immigration law favors procedure.[97] Framing substantive enforcement priorities is critical, but the process by which those priorities are managed is at least as important. If the agency can succeed in implementing this mandate to constrict authority to the top of the chain of hierarchy, then PEP will make an important advance in putting the genie of discretion back in its proverbial bottle.

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96. *Id.*

97. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992) (contending that the federal courts, faced with the government's plenary power over immigration, have invalidated decisions on procedural due process grounds to ensure that constitutional norms are preserved); *see also* Chen, *supra* note 92 (manuscript at 22) (predicting that PEP's more limited detainer requests for notification will seem more legitimate than Secure Communities on procedural and substantive grounds and therefore generate greater compliance).