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# FRAGMENTING THE COMMUNITY: IMMIGRATION ENFORCEMENT AND THE UNINTENDED CONSEQUENCES OF LOCAL POLICE NON-COOPERATION POLICIES

NATASHIA TIDWELL<sup>†</sup>

## INTRODUCTION

The police seek and preserve public favor, not by catering to public opinion, but by constantly demonstrating absolute impartial service to the law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws.<sup>1</sup>

—*Sir Robert Peel, the “architect of modern policing”*

Sir Robert Peel’s idyllic vision of the police as an unbiased, non-partisan institution may seem anachronistic today. Our increasingly pluralistic society requires that police officials balance the competing interests of various groups while simultaneously remaining true to their law enforcement mission.<sup>2</sup> Our nation’s continued struggle with immigration

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<sup>†</sup> Associate Professor of Law, New England Law | Boston, former police lieutenant and federal prosecutor. This Article was borne out of many discussions with Cambridge Police Commissioner Robert Haas during my tenure as a member of his advisory board. My experience as a police officer during the nascent stages of the community policing movement in Cambridge also provided me with insight and inspiration for this topic. This Article benefitted greatly from discussions with my former law enforcement colleagues. I am particularly indebted to my colleagues at New England Law | Boston for their thoughtful and helpful comments and research ideas. I am also grateful to Nicole Melman for her excellent research assistance. New England Law | Boston graciously provided a summer research stipend to help complete this piece.

<sup>1</sup> GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 106 (1996) (quoting SIR ROBERT PEEL, PRINCIPLES OF LAW ENFORCEMENT (1829)).

<sup>2</sup> See Tom Tyler, *Governing Pluralistic Societies*, 72 LAW & CONTEMP. PROBS. 187, 187 (2009). Unlike monolithic societies linked by commonality of religious and social customs, today’s pluralistic societies generally do not share a “unified set of norms dictating right and wrong.” *Id.* Police authority is difficult to exert in modern

reform compounds the complexity of this already daunting challenge. From a constitutional standpoint, immigration law is a wholly federal matter. Practically speaking, however, state and local police officials play a significant role in the federal immigration enforcement regime. While the overwhelming majority of immigrants in the United States have legal status, a sizable portion of that population is undocumented.<sup>3</sup>

The federal government's increased reliance upon local police to assist in federal enforcement efforts, coupled with Congress's failure to pass meaningful reform, has transformed the local police chief into the "public face of the immigration debate in [his] community."<sup>4</sup> In that role, these officials struggle to strike the proper balance between "community" and "policing."<sup>5</sup> The controversy surrounding Secure Communities ("S-Comm."),<sup>6</sup> a federal initiative that calls for local police departments to share arrestee fingerprint data with immigration authorities, raises the question of whether the two competing concerns are mutually exclusive.

Initially trumpeted as a strategy for deporting the "worst of the worst," in other words, illegal immigrants previously convicted of violent felonies,<sup>7</sup> S-Comm. garnered national

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pluralistic society where there exists a "diversity of views about what is appropriate and reasonable." *Id.*

<sup>3</sup> There are approximately eleven million unauthorized immigrants living in the United States as of 2011. MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEPT OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1 (2012), available at [www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf); Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrants: 11.1 Million in 2011*, PEW RESEARCH HISPANIC TRENDS PROJECT (Dec. 6, 2012), <http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011>.

<sup>4</sup> See Chuck Wexler, *Foreword* to DEBRA A. HOFFMASTER ET AL., POLICE EXEC. RESEARCH FORUM, POLICE AND IMMIGRATION: HOW CHIEFS ARE LEADING THEIR COMMUNITIES THROUGH THE CHALLENGES, at xii (2010), available at [www.policeforum.org/library/immigration/PERFImmigrationReportMarch2011.pdf](http://www.policeforum.org/library/immigration/PERFImmigrationReportMarch2011.pdf).

<sup>5</sup> See *id.* (detailing study of six American cities with contentious local battles over immigration).

<sup>6</sup> *Secure Communities: Get the Facts*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY, [www.ice.gov/secure\\_communities/get-the-facts.htm](http://www.ice.gov/secure_communities/get-the-facts.htm) (last visited Aug. 18, 2014) [hereinafter SECURE COMMUNITIES]. For additional discussion of S-Comm. and other local non-cooperation policies, see *infra* notes 55–65.

<sup>7</sup> SECURE COMMUNITIES, *supra* note 6. As of August 31, 2012, more than 166,000 immigrants have been removed through S-Comm. *Id.* As of January 22, 2013, the capability for biometric information sharing with ICE through S-Comm

attention and became the subject of heated and bitter political discourse after several high-profile mistakes in implementation.<sup>8</sup> Critics charged that, in addition to encouraging racial profiling<sup>9</sup> and violating due process,<sup>10</sup> S-Comm. created the justifiable fear among immigrants, including those in the country legally, that cooperation with the police could lead to deportation. Faced with intense pressure to respond, government leaders in major metropolitan cities like New York and Chicago notified federal authorities of their intent to “opt out” of S-Comm.<sup>11</sup> This Article challenges the soundness of opting out and similar non-cooperation policies and argues that any benefit the police hope to gain in building relationships with immigrant communities must be counterbalanced against the potential fragmentation of the larger community where dissident voices are either ignored or derisively dismissed.

Part I traces the historical roots of the relationship between local police and federal immigration authorities, beginning with the changes in enforcement strategy precipitated by the September 11, 2001 attacks and leading up to the launch of S-Comm. The federal government’s increased reliance on local

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was activated in 3,181 jurisdictions. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEPT OF HOMELAND SEC., ACTIVATED JURISDICTIONS (2013) [hereinafter ACTIVATED JURISDICTIONS], available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

<sup>8</sup> See Kirk Semple, *Program To Have Police Spot Illegal Immigrants Is Mired in Confusion*, N.Y. TIMES, Nov. 10, 2010, at A26; see also Lee Romney, *U.S. To Investigate Secure Communities Deportation Program*, L.A. TIMES (May 18, 2011), <http://articles.latimes.com/2011/may/18/nation/la-na-secure-communities-20110519>; Maria Sacchetti, *Traffic Cases Settled, but Deportations Loom; Minor Offenders Snared in Immigration Program Aimed at Serious Crimes*, BOS. GLOBE, July 3, 2011, at 1.

<sup>9</sup> NAT’L IMMIGRATION FORUM, SECURE COMMUNITIES, available at [http://www.immigrationforum.org/images/uploads/Secure\\_Communities.pdf](http://www.immigrationforum.org/images/uploads/Secure_Communities.pdf) (last visited Aug. 18, 2014); see also Shadi Masri, *Current Developments, Executive Branch: ICE’s Initiation of Secure Communities Program Draws More Criticism Than Praise*, 25 GEO. IMMIGR. L.J. 533, 535–36 (2011).

<sup>10</sup> See AARTI KOHLI ET AL., THE CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 3–4 (2011), available at [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf). But see Peter H. Schuck, *Three States Short of a Secure Community*, N.Y. TIMES, June 23, 2011, at A27 (maintaining that, despite the flawed roll-out, S-Comm. is worth salvaging).

<sup>11</sup> See Letter from Mylan L. Denerstein, Counsel to the Governor, to John Sandweg, Counselor to the Sec’y, U.S Dep’t of Homeland Sec. (June 1, 2011), available at <http://www.governor.ny.gov/assets/Secure%20Communities.pdf>.

police to supplement its internal enforcement efforts has raised several Tenth Amendment concerns as the states struggle to define the proper scope of their “inherent authority” to act in immigration matters, with officials in some so-called sanctuary cities insisting that their inherent authority to enforce federal immigration law is commensurate with the sovereign right to refuse to cooperate.

Is opting out likely to succeed as a strategy for gaining the trust and cooperation of immigrants? Part II explores that question. Using the work of leading social psychologist Tom Tyler as a framework for discussion, I conclude that trust and cooperation are an outgrowth of individual perceptions of legitimacy. The quest for legitimacy, or those properties of a police department that “lead[] people to feel that [the department] is entitled to be deferred to and obeyed,”<sup>12</sup> has precipitated every major historical shift in policing, from the professional model to present-day community policing. These failed models and the promise of community policing are examined in Part III.

Ever since it emerged as *the* model of police reform in the late 1980s, community policing’s imprimatur has been bestowed upon a myriad of outreach strategies, particularly those aimed toward improving the fractured relationship between police and minority communities.<sup>13</sup> Tensions between police and minorities, fueled by decades of physical abuse and deceptive tactics, have contributed to an ethnic gap in the manner in which people view

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<sup>12</sup> Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 514 (2003).

<sup>13</sup> See CHI. POLICE DEPT., STRENGTHENING RELATIONS BETWEEN POLICE AND MINORITY COMMUNITIES: ENSURING ACCOUNTABILITY FOR EFFECTIVE POLICING IN CHICAGO’S DIVERSE NEIGHBORHOODS 1 (2000), available at <https://portal.chicago.police.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Other%20Reports/RaceRelations.pdf>; ROBERT WASSERMAN, GUIDANCE FOR BUILDING COMMUNITIES OF TRUST 3 (2010), available at [http://www.cops.usdoj.gov/files/RIC/Publications/e071021293\\_buildingcommtrust\\_revision.pdf](http://www.cops.usdoj.gov/files/RIC/Publications/e071021293_buildingcommtrust_revision.pdf) (“The Building Communities of Trust (BCOT) initiative focuses on developing relationships of trust between law enforcement . . . and the communities they serve, particularly immigrant and minority communities . . .”); *Community Relations Division*, L.A. POLICE DEPARTMENT, [http://www.lapdonline.org/inside\\_the\\_lapd/content\\_basic\\_view/2034](http://www.lapdonline.org/inside_the_lapd/content_basic_view/2034) (last visited Aug. 18, 2014) (stating that the “Community Relations Division continuously strives toward maintaining open avenues of discourse,” especially with minority communities).

the police.<sup>14</sup> Community policing represented a seismic shift in the police's approach to interacting with minorities, specifically in its prioritization of partnerships with affected communities and the solicitation of community input in shaping the department's enforcement agenda. The increased role of the community has fueled fears that the police, in seeking cooperation from various segments of the community, would ultimately become co-opted by the special interests of those highly vocal and politically active segments of the community.<sup>15</sup>

In Part IV, I argue that the dangers of co-optation increase exponentially when community-generated expansions of police discretionary authority, like opting out, are involved. In the past, similar expansions of discretionary authority have received harsh criticism from those who insist that the use of discretion fragments communities by creating winners and losers. According to critics, the "losers" are typically minorities and other disenfranchised groups. In the case of non-enforcement of immigration law, when the "winners" are a historically disenfranchised minority group, it is easy and convenient to derisively dismiss opponents as xenophobic or racist. The competing interests, attitudes, and agendas that exist within communities and between minority groups are largely ignored. It is these differences that the police should consider when promulgating policies designed to improve their relationships with one segment of the minority community.

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<sup>14</sup> See Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1221 (2000) ("African Americans are broadly viewed to perceive law enforcement with suspicion and distrust."); Krissah Thompson & Jon Cohen, *Trayvon Martin Case: Poll Finds Stark Racial Divide*, WASH. POST (Apr. 10, 2012), [http://www.washingtonpost.com/politics/trayvon-martin-case-poll-finds-stark-racial-divide/2012/04/10/gIQAETX8S\\_story.html](http://www.washingtonpost.com/politics/trayvon-martin-case-poll-finds-stark-racial-divide/2012/04/10/gIQAETX8S_story.html) (stating that five of ten whites say minorities are not equitably treated whereas eight of ten African Americans believe they are discriminated against). Perhaps the most famous example of the black/white divide came on the heels of the O.J. Simpson verdict. See Jennifer Auther, *American Press Reflects Racial Divide on Simpson Case*, CNN (Jan. 20, 1997, 9:45 PM), [http://articles.cnn.com/1997-01-20/us/9701\\_20\\_simpson.press\\_1\\_simpson-trial-dennis-schatzman-nicole-simpson?\\_s=PM:US](http://articles.cnn.com/1997-01-20/us/9701_20_simpson.press_1_simpson-trial-dennis-schatzman-nicole-simpson?_s=PM:US) ("Many blacks cheered when jurors declared Simpson innocent . . . Many whites shook their heads.").

<sup>15</sup> David Thacher, *Conflicting Values in Community Policing*, 35 LAW & SOC'Y REV. 765, 770–71 (2001). This co-optation, according to Thacher, results from a police department's abandonment of "essential institutional values in order to secure outside support." *Id.* at 770.

## I. THE ROLE OF LOCAL POLICE IMMIGRATION ENFORCEMENT

While the Constitution vests the power to enact and enforce immigration law in the federal government,<sup>16</sup> state and local authorities have long played a role in our country's interior immigration enforcement efforts. Questions related to the scope of that role, including the ability of local executives to refuse or expand it, have intensified in recent years. Tensions reached a near boiling point when Immigration and Customs Enforcement ("ICE") signaled its intent to make S-Comm. mandatory for all jurisdictions in 2013,<sup>17</sup> leading local executives to announce plans to challenge the federal government's authority to require participation.<sup>18</sup> ICE has since made efforts to clarify its position,<sup>19</sup> but the picture remains murky.<sup>20</sup> The uncertainty surrounding the states' ability to opt out of federal immigration initiatives like S-Comm. is an outgrowth of the historical failure to clearly delineate the role each sovereign plays in this crucial area.

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<sup>16</sup> U.S. CONST. art. I, § 8, cl. 3–4.

<sup>17</sup> See Semple, *supra* note 8; Draft Memorandum from Riah Ramlogan, Deputy Principal Legal Advisor, U.S. Immigration & Customs Enforcement, to Beth N. Gibson, Assistant Deputy Dir., U.S. Immigration & Customs Enforcement (Oct. 2, 2010), available at <http://uncoverthetruth.org/wp-content/uploads/2012/01/Mandatory-in-2013-Memo.pdf>.

<sup>18</sup> Julia Preston & Steven Yaccino, *Policy on Immigrants Is Challenged by Chicago*, N.Y. TIMES, July 11, 2012, at A14 (Rahm Emanuel may refuse to turn "over illegal immigrants to federal agents if the immigrants do not have serious criminal convictions or outstanding criminal warrants.").

<sup>19</sup> See Letter from Daniel H. Ragsdale, Acting ICE Dir., to U.S. Representative Mike Thompson et al. (Feb. 25, 2014), available at <http://www.notonemoredeportation.com/wp-content/uploads/2014/02/13-5346-Thompson-signed-response-02.25.14.pdf> (admitting that requests from ICE for the detention of local arrestees suspected of violating immigration law are non-compulsory). Despite its clarification on the mandatory nature of detainers, ICE maintains its position that once a state submits information to one federal agency, such as the FBI through the NCIC, it cannot legally prevent the federal government from sharing it with another federal agency, like the DHS. Letter from John Morton, Dir., U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., to Jack Markell, Governor of Del. (Aug. 5, 2011), available at [http://gdata.s3-website-us-east-1.amazonaws.com/docs/213/275867/SGN\\_RSP\\_for\\_Jack\\_Markell.pdf](http://gdata.s3-website-us-east-1.amazonaws.com/docs/213/275867/SGN_RSP_for_Jack_Markell.pdf).

<sup>20</sup> See Michael Levenson, *Walsh Wants Boston Out of Immigrant ID Program*, BOS. GLOBE (Nov. 26, 2013), <http://www.bostonglobe.com/2013/11/26/mayor-elect-walsh-says-wants-boston-pull-out-secure-communities-program/BikbYna0qIGwMWmM06uPrO/story.html> (reporting that, despite deep dissatisfaction with the federal initiative, local executives continue to believe they lack the authority to opt out of S-Comm.).

A. *The Role of the States Under the Immigration and Nationality Act*

In the Immigration and Nationality Act (“INA”), the most comprehensive piece of federal immigration legislation to date,<sup>21</sup> Congress granted local and state police arrest authority for certain violations of immigration law, such as alien smuggling and unlawful entry or reentry.<sup>22</sup> Other INA provisions authorize local police to arrest previously deported felons but only upon receipt of approval to act from federal immigration authorities.<sup>23</sup> Even in the absence of an express congressional grant of authority, the federal government, through the Department of Justice (“DOJ”), has long recognized and sanctioned the power of local police to detain, for limited periods, those individuals

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<sup>21</sup> See 8 U.S.C.A. § 1101 (West 2014). In 1996, the INA underwent two key amendments that expanded the states’ authority to enforce federal immigration. The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) granted to the states the power to arrest and detain previously deported undocumented persons with prior felony convictions. See 8 U.S.C. § 1252(c) (2012). That same year, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”), which established a program for the cross-designation and training of local police officers in federal immigration law. See *id.* § 1357(g) (2012). For further discussion of the § 287(g) program, named for its statutory designation, see *infra* notes 30–58 and accompanying text.

<sup>22</sup> See 8 U.S.C. § 1324(a)(1)(A)(i), (iv) (2012). The alien smuggling provision grants arrest authority to “officers and employees of the [Immigration and Naturalization Service] designated by the Attorney General . . . and all other officers whose duty it is to enforce criminal laws.” *Id.* § 1324(c). Criminal immigration violations can be felonies and misdemeanors, and are punishable by imprisonment, deportation, or both. Unlawful entry is a misdemeanor punishable by fine or imprisonment for a maximum of six months for the first offense. See *id.* § 1325(a). Many states, including California, impose an “in-presence” requirement to the right of arrest for misdemeanor offenses like unlawful entry meaning, in effect, that a suspected alien would need to be apprehended while crossing the border into the United States in order for a valid arrest to occur. See *Gates v. L.A. Superior Court*, 238 Cal. Rptr. 592, 598 (Ct. App. 1987). Undocumented persons who have moved past the border and reached a place of repose are more properly characterized as being illegally present, a civil, rather than criminal, immigration violation punishable by removal rather than arrest. See Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. O.L.C. 26, 39 (1996) [hereinafter 1996 OLC Opinion] (“Absent an authoritative clarifying decision on this issue, however, warrantless arrests . . . for illegal entry violations must be considered legally invalid when the alien has already completed his entry into the United States.”). The Supreme Court declined an opportunity to address the confusion in *Immigration & Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 1047 n.3 (1984) (“We need not decide whether or not remaining in this country following an illegal entry is a continuing or a completed crime under § 1325.”).

<sup>23</sup> See 8 U.S.C. § 1252(c).



suspected of violating criminal immigration laws.<sup>24</sup> In a 1996 advisory opinion issued by its Office of Legal Counsel (“OLC”), the DOJ expressed its support for the states’ willingness to assist in the federal immigration enforcement effort while simultaneously affirming its belief that such matters should ideally be left in the hands of federal law enforcement officials.<sup>25</sup>

The DOJ’s tepid approval of state involvement in criminal immigration matters stands in stark contrast to its emphatically stated position regarding local police power to enforce civil violations of federal immigration law. In its 1996 Opinion, the OLC declared that local police lacked the authority to arrest or detain individuals who are deportable as a result of an expired visa or other change in immigration status.<sup>26</sup> According to the DOJ, these offenses, and others that could result in removal via the civil deportation process, were outside of the states’ jurisdictional purview, even in those instances when a warrant for deportation had issued against the suspected violator.<sup>27</sup> Six years later, in the wake of the terrorist attacks of September 11, 2001, the federal government’s priorities shifted dramatically as did the DOJ’s take on the states’ role in our country’s immigration enforcement efforts.

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<sup>24</sup> See 1996 OLC Opinion, *supra* note 22, at 28 (approving local police practice of detaining criminal suspects until such time as federal immigration authorities, such as Border Patrol, were able to assume custody). *But see* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1092 (2004) (arguing that the explicit provisions of the INA delineating the scope of local and state police authority evidence congressional intent to preempt exercises of authority not expressly granted).

<sup>25</sup> 1996 OLC Opinion, *supra* note 22, at 26, 28 (cautioning that the “proper investigation, processing, and arrest of suspected immigration violators generally requires the presence and assistance of [federal authorities]”).

<sup>26</sup> *Id.* at 26. Local police could be granted extra-jurisdictional arrest authority through the deputization process. See *id.* at 47 (“So deputized, such personnel would be empowered to make warrantless arrests of illegal immigration suspects and perform certain other INA enforcement tasks that they might not otherwise be authorized to do in their capacity as state officers.”).

<sup>27</sup> *Id.* at 27, 31. Even though violations of civil offenses such as overstaying a visa could result in the issuance of a warrant of deportation, the Office of Legal Counsel stated that local police had no authority to detain suspected violators in the absence of a criminal law violation. See *id.* The DOJ does, however, possess the statutory authority to extend civil detention authority to the states under the IIRIRA’s “mass influx” provision. 8 U.S.C. § 1103(a)(10) (2012).

B. *The “Inherent Authority” of the States in the Wake of the September 11th Attacks*

On September 11, 2001, a group of Middle Eastern terrorists carried out four coordinated suicide attacks against the United States, resulting in the deaths of nearly 3,000 people.<sup>28</sup> Soon after the attacks, law enforcement officials discovered that at least two of the nineteen terrorists, including suspected ringleader Mohammed Atta, were subject to civil deportation proceedings after having overstayed their immigration visas.<sup>29</sup> State and local police records also revealed that local police had detained the suspects on unrelated matters in the months preceding the attacks.<sup>30</sup> At the time, however, local police were neither privy to civil immigration data nor authorized to intervene in such matters.<sup>31</sup>

As a result of these and other perceived lapses, federal law enforcement priorities shifted, and resources, both financial and in the form of personnel, were redeployed.<sup>32</sup> The Department of Homeland Security (“DHS”) was created and the War on Terror supplanted the War on Drugs as our country’s preeminent law

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<sup>28</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE IMMIGRATION AND NATURALIZATION SERVICE’S CONTACTS WITH TWO SEPTEMBER 11 TERRORISTS, at 1 (2002) [hereinafter CONTACTS WITH TWO SEPT. 11 TERRORISTS].

<sup>29</sup> Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 ALB. L. REV. 179, 183–84 (2005) (detailing immigration violations committed by four of the nineteen 9/11 hijackers). Mohamed Atta and Marwan Alshehhi entered the country legally in June 2000, and as visitors, their visas expired six months after entry; however, each requested a change in status to students so that they might enroll in flight school in Florida. CONTACTS WITH TWO SEPT. 11 TERRORISTS, *supra* note 28, at 1.

<sup>30</sup> See JESSICA M. VAUGHAN & JAMES R. EDWARDS, JR., CTR. FOR IMMIGRATION STUDIES, THE 287(g) PROGRAM: PROTECTING HOME TOWNS AND HOMELAND 1 (2009) (detailing September 9, 2001 encounter between Maryland State Police and Ziad Jarrah, who hijacked and later piloted United Airlines Flight 93 as it crashed into a field near Shanksville, Pennsylvania); Kobach, *supra* note 29, at 184–85 (discussing motor vehicle stops of Mohammed Atta in the months leading up to the attacks).

<sup>31</sup> Kobach, *supra* note 29, at 187–88 (discussing both the lack of immigration information available to local law enforcement and also the lack of ability to make an arrest for the civil violation).

<sup>32</sup> See LISA M. SEGHETTI ET AL., CONG. RESEARCH SERV., RL32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 2 (2009). Prior to the attacks, the Immigration and Naturalization Service (“INS”) had fewer than 2,000 federal agents tasked with enforcing immigration laws in the United States. *Id.* After the attacks, the INS was merged with U.S. Customs Service into the Bureau of Immigration and Customs Enforcement (“ICE”), effectively doubling the number of available federal agents. *See id.*

enforcement imitative.<sup>33</sup> In addition to these internal structural changes, the federal government, the DOJ specifically, “reconsider[ed]” the 1996 OLC Opinion and its prohibition against local and state police enforcement of civil immigration violations.<sup>34</sup>

In a second OLC memorandum (“2002 OLC Memo”), the DOJ announced that, much like Dorothy and her red shoes,<sup>35</sup> the individual states—and their law enforcement representatives—were ordained with the “inherent authority” to enforce both civil and criminal immigration laws.<sup>36</sup> The DOJ withdrew the 1996 OLC Opinion, characterizing the earlier memorandum’s conclusion that local police were unauthorized to act in civil immigration matters as “mistaken” and unsupported by both the

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<sup>33</sup> Randolph Capps, *Local Enforcement of Immigration Laws: Evolution of the 287(g) Program and Its Potential Impacts on Local Communities*, in POLICE FOUNDATION, *THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES*, app. 155, 155 (2009). The INS was replaced by ICE. According to the Urban Institute, in its first few years of existence, ICE arrested approximately 5,000 undocumented persons per year during fiscal years 2006–2008—roughly ten times the pace of arrests affected by its predecessor, the INS. *See id.*

<sup>34</sup> Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Att’y Gen., U.S. Dep’t of Justice, on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 1–2 (Apr. 3, 2002) [hereinafter 2002 OLC Memo], available at <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf>.

<sup>35</sup> THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

<sup>36</sup> *See* 2002 OLC Memo, *supra* note 34, at 2–3 (“We therefore do not believe that the authority of state police to make arrests for violation of federal law is limited to those instances in which they are exercising delegated federal power. We instead believe that such arrest authority inheres in the states’ status as sovereign entities.”). Although the 2002 OLC Memo was drafted April 3, 2002, it was not publicly released until 2005. In *National Council of La Raza v. Department of Justice*, the Second Circuit ordered the DOJ to release the memorandum to counsel for the ACLU Immigrants’ Rights Project. 411 F.3d 350, 352 (2d Cir. 2005). The specific question presented in the 2002 OLC Memo was whether 18 U.S.C. § 1252(c), which criminalizes the reentry of previously deported illegal immigrants, preempted state arrest authority since it did not delegate authority. 2002 OLC Memo, *supra* note 34, at 8. For discussion and competing views of the constitutionality of inherent authority doctrine, compare Kobach, *supra* note 29, at 199, asserting that State police powers, unlike the federal government’s powers, are not specifically enumerated and therefore encompass any actions taken to protect the “lives, health, morals, comfort and general welfare” of its citizens, with Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 967 (2004), arguing that permitting states to choose whether to enforce federal immigration law will create a patchwork that violates the constitutional requirement of uniformity in enforcement of immigration law.

INA's legislative history and existing precedent.<sup>37</sup> In reaching its determination that the states possessed the inherent authority to enforce immigration law, the DOJ relied on the states' status as sovereign entities and adopted a "strong presumption" against interpretations of immigration law that would deny federal enforcement authorities the assistance that states might provide.<sup>38</sup>

C. *Cooperation Agreements: The 287(g) Program and S-Comm.*

On the heels of the 2002 OLC Memo, the federal government made a concerted effort to increase the role of local and state police in immigration enforcement.<sup>39</sup> One component of the federal government's strategy involved the revival of section 287(g), a provision of the 1996 INA amendment that authorized the Attorney General to enter into written agreements with state and local governments vesting local police with the power to perform the functions of a federal immigration officer.<sup>40</sup> Although it had been in existence since 1996, the 287(g) program received little or no attention, as governing officials in areas with heavy concentrations of new arrivals were reluctant to commit their police departments to full-scale immigration enforcement.<sup>41</sup> In the wake of the September 11th attacks, the political tide shifted and several jurisdictions, beginning with Florida,

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<sup>37</sup> See 2002 OLC Memo, *supra* note 34, at 2. Of the 1996 OLC Opinion's reliance on existing precedent, the DOJ went on to say, "On re-examination, we believe that the authorities we cited in the 1996 OLC Opinion provide no support for our conclusion that state police lack the authority to arrest aliens solely on the basis of civil deportability." *Id.* at 7. For examples of the judiciary's inability to provide clarity on this issue, compare *Gonzales v. City of Peoria*, 722 F.2d 468, 477 (9th Cir. 1983), stating that "nothing in federal law precluded [city] police from enforcing the criminal provisions of the Immigration and Naturalization Act" but that authority did not extend to civil violations, with *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984), stating that "[a] state trooper has general investigatory authority to inquire into possible immigration violations" and therefore, "the trooper's question about the green card was reasonable."

<sup>38</sup> See 2002 OLC Memo, *supra* note 34, at 11.

<sup>39</sup> Wishnie, *supra* note 24, at 1087.

<sup>40</sup> See 8 U.S.C. § 1357(g) (2012); Cynthia Smith, *287(g) and Secure Communities: The Facts About Local Immigration Law Enforcement*, U.S. CONF. OF CATHOLIC BISHOPS (May 2011), <http://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/stateandlocalimmigrationenforcement.cfm> [hereinafter U.S. CONF. OF CATHOLIC BISHOPS]; VAUGHAN & EDWARDS, *supra* note 30, at 3. With the establishment of the Department of Homeland Security ("DHS") in 2002, the vesting authority was transferred to the DHS Secretary. See 6 U.S.C. § 251 (2012).

<sup>41</sup> VAUGHAN & EDWARDS, *supra* note 30, at 4.

implemented 287(g) programs.<sup>42</sup> By 2008, there were sixty-two active 287(g) programs with an additional seventy-five awaiting implementation.<sup>43</sup>

Implementation of the 287(g) program begins upon the execution of a three-year Memorandum of Agreement (“MOA”) between the DHS and the local law enforcement agency (“LEA”). The MOA details the rights and responsibilities of each entity under the program and the policies and procedures required for its operation.<sup>44</sup> Interested jurisdictions are offered a choice of two 287(g) programs: the Task Force Officer (“TFO”) Model and the Detention Model.<sup>45</sup> Depending on the model being implemented, the LEA selects officers to receive the DHS-approved training in areas germane to that particular model, as well as a variety of other subjects including civil rights law and the protocols for public outreach and complaints.<sup>46</sup> When acting under the supervision of federal agents, local officers trained under the TFO Model are vested with the power and authority to make arrests for felony and misdemeanor violations of immigration law and to detain and question persons reasonably believed to be unlawfully present in the United States.<sup>47</sup> The Detention Model, primarily implemented in sheriff’s offices and other jailing houses, authorizes local officers to perform immigration-related functions when arrestees in their facilities are believed to be in violation of immigration law.<sup>48</sup>

The DOJ increased the program’s effectiveness when it began disseminating civil immigration information to local police departments through the Federal Bureau of Investigation’s National Crime Information Center (“NCIC”), the nation’s largest

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<sup>42</sup> See Capps, *supra* note 33, at 156.

<sup>43</sup> See *id.* at 157–58 (noting that the majority of jurisdictions participating are in the Southwest and the fewest are in the Northeast).

<sup>44</sup> See Memorandum of Agreement from the U.S. Dep’t of Homeland Sec. 1 (May 27, 2009) [hereinafter Homeland Memo 2009], available at [http://www.aclunv.org/files/New%20287g%20MOA%20\(standardized\).pdf](http://www.aclunv.org/files/New%20287g%20MOA%20(standardized).pdf).

<sup>45</sup> *Id.* app. at 17. There is evidence of a third, lesser utilized category, the Highway Patrol model whose main purpose is to “address the threat to public safety posed by alien smuggling on the nation’s highways.” See VAUGHAN & EDWARDS, *supra* note 30, at 10.

<sup>46</sup> Homeland Memo 2009, *supra* note 44, at 17–18.

<sup>47</sup> *Id.* at 19.

<sup>48</sup> *Id.* at 21–22. These functions, which include the interrogation of arrestees who are believed to be in the United States unlawfully and the service of arrest warrants for immigration violations, must be performed in accord with DHS enforcement priorities. See *id.*

criminal information database.<sup>49</sup> The accessibility of this information at the local level enhanced the ability of 287(g) departments to make arrests and detain suspected violators on behalf of federal authorities. However, this unfettered access to immigration data came at a cost, particularly to civil liberties.<sup>50</sup> Because the DHS initially failed to institute parameters limiting the type of offense justifying detention, critics charged that 287(g) officers were left largely to their own devices in investigating and detaining suspected offenders, including the determination of whom to stop and detain.<sup>51</sup>

Despite the allegations of racial profiling and other abuses, the 287(g) program continues to draw support and praise from participating departments.<sup>52</sup> However, these jurisdictions represent a small percentage of the country's total police force, leaving ICE with a limited number of "boots on the ground" to shore up its internal enforcement efforts. S-Comm., the second component of the DHS's local police outreach strategy, was designed to fill the void. In terms of raw numbers of

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<sup>49</sup> See Wishnie, *supra* note 24, at 1096–97 (questioning the legality of the DOJ's addition of civil immigration data to the Federal Bureau of Investigation's National Crime Information Center ("NCIC") due to the absence of approval to do so in the NCIC enabling statute). Established in 1967, NCIC, the so-called "lifeline of law enforcement," acts as an electronic clearinghouse for traditional law enforcement-related information such as criminal history files, fugitive and warrant records, missing person reports, stolen property reports, and the National Sex Offender Registry. *National Crime Information Center*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ncic> (last visited Oct. 27, 2014). Local and state police agencies in all fifty states and in the District of Columbia submit this information to the NCIC, which, upon request, makes the information available to law enforcement agencies nationwide, thus enabling police to apprehend wanted persons and recover stolen property in a streamlined and efficient manner. *See id.*

<sup>50</sup> U.S. CONF. OF CATHOLIC BISHOPS, *supra* note 40.

<sup>51</sup> *Id.* In 2009, the Obama administration amended the MOA to include a schedule of ICE's enforcement priorities designed to limit the scope of local discretionary authority. *See id.*

<sup>52</sup> NAT'L SHERIFFS' ASS'N, NATIONAL SHERIFFS' ASSOCIATION SUPPORTS U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) CRIMINAL ALIEN ENFORCEMENT PROGRAMS (2010), available at <http://www.sheriffs.org/sites/default/files/tb/resolutions/2010-7.pdf>; U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., WHAT OTHERS ARE SAYING... ABOUT SECURE COMMUNITIES (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/what-others-say.pdf>.

deportations, S-Comm., currently active in all fifty states and ninety-seven percent of jurisdictions nationwide, has proved an overwhelming success.<sup>53</sup>

Launched by the Bush administration in 2008, S-Comm. enabled ICE to increase its internal enforcement efforts without bearing the training costs and constitutional concerns that plagued the 287(g) program.<sup>54</sup> Unlike 287(g) participants, police in S-Comm. jurisdictions are not cross-designated as federal immigration agents and do not perform any enforcement function. Rather, through an enhancement of existing technology used for the submission of fingerprint data routinely collected during the booking process under the NCIC protocol, S-Comm. enables police departments to submit that same data to the DHS.<sup>55</sup> If an arrestee is subject to deportation for a civil or criminal violation of immigration law, the local department is notified of a match, and may, depending on the nature of the

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<sup>53</sup> ACTIVATED JURISDICTIONS, *supra* note 7. The only states that are not fully active are Alabama, Illinois, and Louisiana. *Id.* In fiscal year 2012, ICE removed 409,849 individuals, ninety-six percent of these removals fell into an ICE priority category. See *FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Dec. 21, 2012), <https://www.ice.gov/news/releases/1212/121221washingtondc2.htm>.

<sup>54</sup> See U.S. CONF. OF CATHOLIC BISHOPS, *supra* note 40; see also U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., *BENEFITTING LAW ENFORCEMENT THROUGHOUT THE UNITED STATES* (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/lea-benefits.pdf>.

<sup>55</sup> *The Secure Communities Process*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Mar. 2, 2014) [hereinafter *Secure Communities Process*]. Each state has an agency that links to the FBI's NCIC and maintains responsibility for the state's criminal information records. Under S-Comm., this agency, the State Identification Bureau ("SIB"), enters into an MOA with ICE. When arrestees are processed at a local police department, their fingerprint data is submitted to the SIB, which, based on whether the department is participating in S-Comm., will forward the fingerprint cards to the FBI and DHS or to the FBI only if the arresting jurisdiction is not an S-Comm. participant. Memorandum of Agreement Between U.S. Dep't of Homeland Sec. Immigration & Customs Enforcement and State Identification Bureau 3 [hereinafter *Agreement with State Identification Bureau*], available at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesmoatemplate.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf). Because it is the state, rather than the individual police department that enters into the agreement, problems can arise in states where views on immigration policy are split among local cities. See Brooks Barnes, *California Sheriffs Oppose Bill on Illegal Immigrants*, N.Y. TIMES, Aug. 29, 2012, at A19; Sandra Hernandez, *California Lawmakers Take Aim at Secure Communities*, L.A. TIMES (June 9, 2012), <http://articles.latimes.com/2012/jun/09/news/la-ol-immigration-california-criminals-20120608>.

offense, be asked to detain the arrestee until custody is transferred to ICE.<sup>56</sup> Because local departments were required to submit fingerprint data for all arrestees rather than those suspected of being violators, ICE insisted that subjective evaluations of suspicion and the attendant allegations of racial profiling would be sharply reduced.<sup>57</sup>

The DHS further distinguished S-Comm. from the 287(g) program by touting the former's "risk-based" approach to immigration enforcement, one that prioritized the identification and removal of violent offenders that posed the greatest risk to community safety.<sup>58</sup> Under S-Comm.'s "three-level hierarchy" of offenses justifying removal, cases involving Level One offenders, that is, arrestees with prior convictions for aggravated felonies and similar offenses, were given precedence over those involving Level Two or Three offenders.<sup>59</sup> Although it prioritized the removal of so-called *criminal* aliens, the DHS stopped short of promising that enforcement would be limited to violent offenders.<sup>60</sup> The failure to do so,<sup>61</sup> coupled with high profile mistakes in implementation,<sup>62</sup> led to a wave of public criticism against S-Comm. In response, Homeland Security Secretary

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<sup>56</sup> *Secure Communities Process*, *supra* note 55; see also Agreement with State Identification Bureau, *supra* note 55, at 3–4. If ICE issues a detainer request, the LEA can hold the individual for up to forty-eight hours. See *Civil Rights and Civil Liberties, Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Aug. 21, 2014).

<sup>57</sup> *Civil Rights and Civil Liberties*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Mar. 2, 2014); see U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., *BENEFITTING LAW ENFORCEMENT THROUGHOUT THE UNITED STATES*, available at <http://www.ice.gov/doclib/secure-communities/pdf/lea-benefits.pdf>.

<sup>58</sup> See Agreement with State Identification Bureau, *supra* note 55, at 2.

<sup>59</sup> *Id.* at 2–3. Level One offenses are aggravated felonies, crimes involving national security, and related offenses; Level Two offenses are felonies and a few misdemeanors, such as traffic offenses; and Level Three offenses are predominately misdemeanors but also include extortion, military offenses, and election law violations. See *id.*

<sup>60</sup> *Id.* (stating that in cases involving Level Two and Three offenders, ICE would "continue[] to exercise discretion through its field offices in taking enforcement action . . . as each situation demands").

<sup>61</sup> See *Seiple*, *supra* note 8; see also *Romney*, *supra* note 8; *Sacchetti*, *supra* note 8.

<sup>62</sup> See *Shankar Vedantam, Call for Help Leads to Possible Deportation for Hyattsville Mother*, WASH. POST, Nov. 2, 2010, at B1 (chronicling story of Maria Bolanos, a twenty-eight-year old undocumented El Salvadoran woman detained by authorities after reporting an incident of domestic abuse to police in Prince George County).



Janet Napolitano acknowledged S-Comm.'s shortcomings but characterized reports of the program's failure to distinguish between violent offenders and misdemeanants as "unfounded" and "contrary to reality."<sup>63</sup>

As the murmur of discontent with S-Comm. grew to a roar, executives in major cities began to listen. In a letter to the DHS signaling his state's withdrawal from S-Comm., Illinois Governor Pat Quinn cited the thirty percent of arrestees in Illinois facing deportation that had "never been convicted of any crime, much less a serious one," as evidence of the "conflict between the stated purpose of Secure Communities and the implementation of the program."<sup>64</sup> One month later, in June 2011, New York Governor Andrew Cuomo suspended operation of S-Comm., noting that S-Comm. "compromis[es] public safety by deterring witnesses to crime and others from working with law enforcement."<sup>65</sup> California has conditioned local police compliance with S-Comm. upon state law requirements for treatment of undocumented immigrants.<sup>66</sup> These actions evidence the belief that

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<sup>63</sup> See Kyle Cheney, *Homeland Security Head Counters Patrick*, BOS. GLOBE (Oct. 6, 2011), [http://www.boston.com/news/local/massachusetts/articles/2011/10/06/napolitano\\_counters\\_secure\\_communities\\_claims\\_embraced\\_by\\_patrick/](http://www.boston.com/news/local/massachusetts/articles/2011/10/06/napolitano_counters_secure_communities_claims_embraced_by_patrick/). Napolitano ultimately convened the Homeland Security Advisory Council ("HSAC"), a task force of local police chiefs, academics, and various stakeholders in the immigration enforcement debate, to assess, among other things, S-Comm.'s impact on community policing and the efficacy of the enforcement priority schedule. Months later, a splintered task force issued several recommendations, chief among them that ICE consider withholding enforcement action based solely on minor traffic offenses. HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., TASK FORCE ON SECURE COMMUNITIES: FINDINGS AND RECOMMENDATIONS 22–23 (2011) [hereinafter *HOMELAND SEC. ADVISORY COUNCIL*], available at <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf>. A recommendation that ICE suspend enforcement action for misdemeanor offenses was not adopted. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., PROTECTING THE HOMELAND: ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 13–14 (2012), available at <http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf>.

<sup>64</sup> See Letter from Pat Quinn, Governor of Ill., to Marc Rapp, Acting Assistant Dir., Secure Cmty's., Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec. (May 4, 2011), available at [http://epic.org/privacy/secure\\_communities/sc\\_ill.pdf](http://epic.org/privacy/secure_communities/sc_ill.pdf).

<sup>65</sup> Letter from Mylan L. Denerstein, Counsel to the Governor, to John Sandweg, Counselor to the Sec'y, U.S. Dep't of Homeland Sec. (June 1, 2011), available at <http://www.governor.ny.gov/assets/Secure%20Communities.pdf>.

<sup>66</sup> See Information Bulletin from Kamala D. Harris, Att'y Gen., Cal. Dep't of Justice, to Execs. of State & Local Law Enforcement Agencies (June 25, 2015), available at [http://oag.ca.gov/sites/all/files/agweb/pdfs/law\\_enforcement/14-01\\_le\\_info\\_bulletin.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/law_enforcement/14-01_le_info_bulletin.pdf).

commensurate with the states' inherent authority to enforce federal immigration law is the sovereign right to refuse to cooperate.

#### D. *The Roots of Non-Cooperation*

Under the INA, the states are authorized, but not required, to assist in federal immigration enforcement.<sup>67</sup> This recognition of state autonomy is constitutionally rooted in the Tenth Amendment's anti-commandeering doctrine, which bars the federal government from enacting regulatory programs that convert state and local officials into de facto federal agents.<sup>68</sup> Congress can, and frequently does, condition the receipt of federal funds on a local jurisdiction's participation in a particular program, but it cannot compel the states to administer or implement federal policies.<sup>69</sup> Balanced against the states' freedom from federal overreach is the preemption doctrine, which strikes down state and local policies that disrupt or interfere with federal initiatives.<sup>70</sup> In the context of immigration enforcement, the line separating non-cooperation, permissible under anti-commandeering principles, and active interference, prohibited by the preemption doctrine, is somewhat blurred.

In so-called "sanctuary cities," state and local officials prohibit the use of local resources, monetary and otherwise, in the enforcement of federal immigration law.<sup>71</sup> The sanctuary movement began in the 1980s in reaction to the federal

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<sup>67</sup> See 8 U.S.C. § 1324(c) (2012); see also 1996 OLC Opinion, *supra* note 22, at 29 ("That the INA permits state police officers to make arrests and detentions does not mean that states must permit their police to do so. Rather, the INA enforcement authority of state police is subject to the provisions and limitations of state law." (citation omitted)).

<sup>68</sup> See U.S. CONST. amend. X. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*; see also *New York v. United States*, 505 U.S. 144, 178 (1992) (holding that Congress's power to legislate in a particular area does not include the authority to command the states to administer federal programs or to conscript state officers).

<sup>69</sup> *New York*, 505 U.S. at 166–68.

<sup>70</sup> See U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*; see also *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012) (detailing the scope of federal preemption doctrine).

<sup>71</sup> See Rose Cuison Villazor, "Sanctuary Cities" and Local Citizenship, 37 *FORDHAM URB. L.J.* 573, 576 (2010).

government's policies toward Central American countries and the refusal to grant asylum to persecuted refugees from El Salvador and Guatemala.<sup>72</sup> In its early days, the movement was led largely by clergy members who risked prosecution and imprisonment to shield undocumented refugees from detection and deportation.<sup>73</sup> By the 1980s, the sanctuary movement had moved out of the church and into the political arena with several municipalities using council resolutions, executive orders, and similar means to express their support for those providing refuge and to voice their opposition to United States' foreign policy, specifically as it related to Central and Latin America.<sup>74</sup>

Today, the sanctuary movement's base of protest has expanded beyond the perceived injustices of U.S. asylum policy and into federal immigration policy as a whole. When Congress sought to strengthen its non-cooperation prohibitions through more punitive regulations in the wake of the September 11th attacks, several jurisdictions reaffirmed their sanctuary status in response to what they viewed as the "drastic consequences" posed by the "counterproductive, misguided measures" contained within these proposed congressional regulations.<sup>75</sup> At the state

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<sup>72</sup> See *id.* at 583.

<sup>73</sup> See Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747, 747-48 (1986) (tracing historical and Biblical roots of the sanctuary privilege and criticizing its co-optation by modern day political activists). Federal law prohibits the harboring of undocumented persons. See 8 U.S.C. § 1324 (2012). In 1985, the first large-scale enforcement effort to stifle sanctuary movement yielded sixteen indictments and sixty arrests. See Carro, *supra*, at 748.

<sup>74</sup> See Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 311-16 (1989). The city of Cambridge, Massachusetts issued its "Sanctuary City Resolution" on April 8, 1985. Cambridge, Mass., City Council Order Number 4 (Apr. 8, 1985) ("RESOLVED: That the City of Cambridge not participate in any form in the compounding of injustice against refugees from El Salvador, Guatemala and Haiti or in the federal government's persecution of those, who in good faith, offer humanitarian assistance to the refugees . . .").

<sup>75</sup> See Cambridge, Mass., City Council Order Number 16 (May 8, 2006). The object of the Cambridge City Council's scorn was the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, a congressional initiative that included the following provisions: unlawful status would become a felony offense, 700 miles of fences would be built on the southern border, state and local enforcement agencies would be declared to have inherent authority to enforce immigration laws, and those entering without documents would be held without bond. See generally Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). The new sanctuary movement retained some of its religious roots. See Kara L. Wild, Note, *The New Sanctuary*

level, both Alaska and Oregon have passed legislation prohibiting the use of state resources in the enforcement of federal immigration law.<sup>76</sup>

A less controversial approach to non-cooperation was at issue in *City of New York v. United States*, which involved New York City's Executive Order 124, a provision barring city employees from sharing immigration data with federal authorities.<sup>77</sup> The case arose in the days following the passage of 8 U.S.C. § 1373, a federal statute prohibiting such local measures.<sup>78</sup> On the heels of the bill's enactment, New York City Mayor Rudolph Giuliani challenged its constitutionality on anti-commandeering grounds. Specifically, Giuliani argued that New York City's sovereign right to refuse to participate in the federal immigration enforcement program included the authority to forbid city employees from aiding the federal government, even on a voluntary basis.<sup>79</sup> To the extent that § 1373 infringed upon that right, according to Giuliani, it exceeded the scope of Congress's authority.<sup>80</sup>

In denying Giuliani's claim, the Second Circuit appeared to divide State responses to federal regulatory programs into two categories: passive non-cooperation and passive resistance, with only the former afforded Tenth Amendment protection.<sup>81</sup> The court held that New York City's policy of prohibiting voluntary cooperation by its employees could actively "frustrate effectuation" of the federal immigration program and as such was

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*Movement: When Moral Mission Means Breaking the Law, and the Consequences for Churches and Illegal Immigrants*, 50 SANTA CLARA L. REV. 981, 995 (2010) (detailing arrest and later deportation of Mexican national who took sanctuary in Chicago's United Methodist Church).

<sup>76</sup> See SEGHETTI ET AL., *supra* note 32, at 22.

<sup>77</sup> 179 F.3d 29, 31 (2d Cir. 1999).

<sup>78</sup> See *id.* 8 U.S.C. § 1373 specifically provides:

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

8 U.S.C. § 1373 (2012).

<sup>79</sup> See *City of New York*, 179 F.3d at 34. At the time, New York City's Executive Order 124 prohibited city employees from voluntarily providing federal immigration authorities with information concerning undocumented persons. N.Y.C., EXEC. ORDER NO. 124, CITY POLICY CONCERNING ALIENS (1989).

<sup>80</sup> *City of New York*, 179 F.3d at 34.

<sup>81</sup> *Id.* at 35.

barred by the Supremacy Clause.<sup>82</sup> To hold otherwise would give license to the states' use of the Tenth Amendment's anti-commandeering shield as a sword with which the states could "hold the [federal government] hostage by selectively withholding voluntary cooperation as to a particular program(s)."<sup>83</sup>

Executive Order 124 was revoked in 2003 and replaced with Executive Order 34.<sup>84</sup> The "don't tell" provision at issue in *City of New York* was removed but the "don't ask" provision, which limits the circumstances under which city employees can inquire about an individual's citizenship status, remained operative.<sup>85</sup> In the preamble to Executive Order 34, Mayor Michael Bloomberg touched on the city's need to maintain "public trust and confidence" in city government and its "commitment to protecting its residents and visitors" in the event of a crime.<sup>86</sup> To that end, Bloomberg directed the police department to institute its own "don't ask" policy barring citizenship inquiries of crime victims and witnesses and limiting other inquiries to the investigation of "illegal activity other than mere status as an undocumented alien."<sup>87</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> *See id.* Despite its victory as a defendant in *City of New York*, the federal government has adopted a "let sleeping dogs lie" approach when addressing its reluctance to bring preemption challenges against sanctuary policies and similar local ordinances. *See* Stephen Dinan & Kara Rowland, *Justice: Sanctuary Cities Safe from Law; Arizona's Policy 'Actively Interferes'*, WASH. TIMES (July 15, 2010), <http://www.washingtontimes.com/news/2010/jul/14/justice-sanctuary-cities-are-no-arizona/?page=all> (contrasting the DOJ's refusal to challenge sanctuary ordinances with its efforts to strike down, on preemption grounds, Arizona's immigration enforcement statute). In 2006, upon enactment of the Violence Against Women Act and Department of Justice Reauthorization Act, the Inspector General of the DOJ was required to provide Congress with a list of cities and localities with sanctuary policies that receive funds from the State Criminal Alien Assistance Program. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT NO. 07-07, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 7 (2007); SEGHETTI ET AL., *supra* note 32, at 19.

<sup>84</sup> *See* N.Y.C., EXEC. ORDER NO. 34, CITY POLICY CONCERNING IMMIGRANT ACCESS TO CITY SERVICES § 1 (2003).

<sup>85</sup> *See id.* § 3(a).

<sup>86</sup> *See id.* at pmb1.

<sup>87</sup> *See* N.Y.C., EXEC. ORDER NO. 41, CITY-WIDE PRIVACY POLICY AND AMENDMENT OF EXECUTIVE ORDER NO. 34 RELATING TO CITY POLICY CONCERNING IMMIGRANT ACCESS TO CITY SERVICES § 4 (2003). In its original form, Executive Order 34 made no mention of the police department's collection and dissemination of citizenship data. *See* N.Y.C. EXEC. ORDER NO. 34, *supra* note 84, § 4. Six months later, the order was amended and the "don't ask" provision was inserted. *See id.*

While acknowledging the need for local cooperation with federal immigration authorities, Executive Order 34 also recognized the importance of establishing and maintaining trusting relationships with the city's immigrant community. Polling data reveals that while nearly three-quarters of police chiefs believe that immigration enforcement is a federal responsibility, an equal number regularly communicate with ICE about potential immigration violations.<sup>88</sup> For them, striking the proper balance between "community" and "policing" is a vexing challenge that raises the question of whether the two competing concerns are mutually exclusive. Before examining the efficacy of community policing, and by extension opting out as a strategy for fostering trust and cooperation amongst immigrant groups, the smaller question of why people cooperate with the police warrants discussion.

## II. GAINING TRUST AND COOPERATION THROUGH LEGITIMACY

"The heart of the law enforcement function... is one of legitimacy."<sup>89</sup>

Why do people trust in and cooperate with the police? Leading social psychologist Tom Tyler advances two theories. First, the instrumental model posits that people are motivated to cooperate with the police by their own self-interest: fear of punishment or expectation of benefit.<sup>90</sup> Viewed from this perspective, opting out and other non-cooperation strategies will produce the desired result because the targeted community, undocumented immigrants, is shielded from federal immigration enforcement and thereby incentivized to trust in and cooperate with local police. But federal immigration authorities do not

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<sup>88</sup> SCOTT H. DECKER ET AL., *Immigration and Local Policing: Results from a National Survey of Law Enforcement Executives*, in POLICE FOUNDATION, *THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES*, at app. G 169, 175–76 (2009). Of the departments surveyed, most admitted that despite the frequent communication with ICE, no formal agreement exists between their department and the federal government. *See id.* at 175.

<sup>89</sup> SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* 14 (1977).

<sup>90</sup> *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008).

operate in a vacuum.<sup>91</sup> Assuming that local police are willing and able to dissociate themselves completely from federal authorities, it is unlikely that those impacted by federal enforcement action would appreciate the distinction enough to apportion accountability to federal authorities and maintain trust in local police.<sup>92</sup>

Even if the police are successful in gaining trust and cooperation, the benefits of non-cooperation from an instrumental perspective are likely to be short-lived. At some point, an individual will find that his interests are better served by breaking, rather than complying, with the law.<sup>93</sup> Empirical evidence supports what parents of young children have known for centuries: Compliance secured by reward or fear of punishment rarely lasts.<sup>94</sup> If instrumental appeals were successful in offering long-term solutions to crime problems, police officials could control crime by simply controlling the deployment of societal resources.<sup>95</sup> Such an approach is both unreliable and likely to result in the rapid depletion of much needed resources.<sup>96</sup>

Tyler's second theory of cooperation, the social norms or normative model, suggests that individual attitudes toward the police are shaped by perceptions of legitimacy or those properties of a police department that "lead[] people to feel that [the department] is entitled to be deferred to and obeyed."<sup>97</sup> Once achieved, a police department's legitimacy influences individual levels of compliance and also impacts the community's willingness to trust and cooperate with the police.<sup>98</sup> Having long

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<sup>91</sup> See HOMELAND SEC. ADVISORY COUNCIL, *supra* note 63, at 24.

<sup>92</sup> See Phillip Atiba Goff et al., *Crossing the Line of Legitimacy: The Impact of Cross-Deputization Policy on Crime Reporting*, 19 PSYCHOL. PUB. POL'Y & L. 250, 256 (2013) (citing empirical data indicating that perceptions of law enforcement's legitimacy can be harmed by a policy even when police themselves oppose that policy).

<sup>93</sup> TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 21 (1999).

<sup>94</sup> See Tyler & Fagan, *supra* note 90, at 234.

<sup>95</sup> TYLER, *supra* note 93.

<sup>96</sup> See Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 88 (2004).

<sup>97</sup> Sunshine & Tyler, *supra* note 12.

<sup>98</sup> *Id.*

accepted that they cannot realistically detect and prevent all crime, police officials rely upon these external mechanisms of social control to fulfill their law enforcement mission.<sup>99</sup>

Legitimacy is both hard to define and to evaluate. As Tyler explains, the police “preoccupation” with legitimacy has masked sharply divergent views about legitimacy’s precise meaning and how best to achieve and maintain it.<sup>100</sup> The steady growth of our country’s immigrant population adds another layer of complexity to the task of predicting whether a specific policing strategy, like opting out, will foster relationships of trust and cooperation. Many immigrants arrive in the United States from countries in which the rule of law has all but collapsed.<sup>101</sup> For those who are here illegally, preconceived notions of governmental authority exacerbate the fear of deportation, rendering undocumented persons increasingly vulnerable to fraud, violence, and other criminal acts.<sup>102</sup> Local police departments, the first line of defense against such predatory offenses, are handcuffed by the unwillingness of crime victims and witnesses to trust the police enough to step out from the shadows, particularly when the local police are perceived as an adjunct of the larger federal immigration enforcement regime.<sup>103</sup>

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<sup>99</sup> See Tyler & Fagan, *supra* note 90.

<sup>100</sup> Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 338–41 (2011). Tyler’s work represents the dominant theoretical framework, but other social scientists view legitimacy’s fundamental question as “whether a power-holder is *justified in claiming the right to hold power* over other citizens.” Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 124 (2012).

<sup>101</sup> See Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT’L & COMP. L. 715, 723 (2004) (discussing rule of law crisis in Mexico and citizen perceptions of inequality and corruption); see also Tom Tyler, *Governing Pluralistic Societies*, 72 LAW & CONTEMP. PROBS. 187, 187 (2009). Tyler’s study of immigrant attitudes toward the police has related primarily to the impact on legitimacy of police anti-terrorism initiatives in Muslim communities. See Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC’Y REV. 365, 366 (2010).

<sup>102</sup> See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid To Call the Police*, 91 IOWA L. REV. 1449, 1450–54 (2006); see also INT’L ASS’N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 21 (2007).

<sup>103</sup> See M.C.C. IMMIGRATION COMM. MEMBERS, M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 5–6 (2006); Raymond C. Davis, *Organizing the Community for Improved Policing*, in POLICE LEADERSHIP IN AMERICA: CRISIS AND OPPORTUNITY 88–89 (William A. Geller ed., 1985) (describing police chief’s efforts to secure



Can legitimacy be achieved through opting out or similar non-cooperation strategies? Part III examines the benefits and potential costs of opting out as a community policing initiative. As an exercise of discretionary authority under the community preferences or political approach to legitimacy, opting out is likely to result in short-term support for the police from certain segments of the community. However, history suggests that when the police internalize values that please some groups at the expense and in opposition to others, they risk their integrity and ultimately their legitimacy in the eyes of both groups.<sup>104</sup> If the establishment of enduring relationships of trust and cooperation with immigrant communities is the goal, the police must seek alternative roads to legitimacy that, while harder to achieve, are more likely to withstand the shifting political winds that grip our nation's immigration reform debate.

### III. COMMUNITY POLICING AND THE QUEST FOR LEGITIMACY

Despite initial aspirations of autonomy, early American police departments were viewed as instruments of political control, with police chiefs in major cities like New York and Chicago serving as figureheads for ward bosses who made hiring decisions and dictated enforcement priorities.<sup>105</sup> As agents of the political machine, police officers regularly abused their authority for personal gain and in maintenance of the political status quo.<sup>106</sup> For the latter part of the nineteenth century and well into the twentieth century, a disgruntled public viewed the police as bastions of inefficiency and corruption.<sup>107</sup> Early reformers saw technological advances like the motorized patrol car and structural changes such as the advent of the civil service system as major steps toward much-needed professionalism in law enforcement.<sup>108</sup>

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Hispanic community support by declaring publicly that police would not associate with federal immigration authorities). *But see* VAUGHAN & EDWARDS, *supra* note 30, at 18–20 (describing the “chilling effect” myth).

<sup>104</sup> Thacher, *supra* note 15, at 792–93.

<sup>105</sup> See KELLING & COLES, *supra* note 1, at 73.

<sup>106</sup> *See id.*

<sup>107</sup> *See id.* at 73–74.

<sup>108</sup> *See id.* at 76–79. The drawbacks of the civil-service system, which depoliticized hiring and promotional processes, were illustrated in the aftermath of the Rodney King beating at the hands of Los Angeles Police Department officers when then-Chief Daryl Gates, a civil service appointee, was held largely unaccountable for

The professional model of policing, as it came to be known, succeeded in removing the corrupting effect of politics from policing with its technical and unbiased approach to crime suppression. As exemplified by Sergeant Joe Friday of television's *Dragnet* and his "just the facts" approach to crime control, police officers held communities at arms-length and eschewed personal interaction.<sup>109</sup> The advent of the motorized patrol car rendered foot patrols obsolete. The 911 system and the rapid response culture it spawned grew to dominate policing and the public's expectation of how and how quickly police services would be received.<sup>110</sup>

Among the many collateral consequences of this rigid data-driven approach, in which enforcement priorities were set relative to crime rates, was the alienation of minorities, specifically those in urban ghettos where the police were viewed as an occupying force.<sup>111</sup> During the mid-to-late sixties, the growing tensions between blacks and the police boiled over, resulting in prolonged periods of civil unrest.<sup>112</sup> The black community's mistrust of and resentment toward the police was deep-seated and, to some extent, reciprocated.<sup>113</sup> The interest of minorities in equal protection of the law seemed incompatible

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his failure of leadership. *See id.* at 81. For in-depth treatment of the shift from the political to the professional model, *see id.* at 76-77.

<sup>109</sup> *See* STEVE HERBERT, *CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY 21* (2006).

<sup>110</sup> *See* KELLING & COLES, *supra* note 1, at 89.

<sup>111</sup> *See* Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v Morales*, 1998 U. CHI. LEGAL F. 197, 203-04 (1998); Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1771-72 (2006). The 911 system also fostered increased feelings of isolation for individual officers and a false sense of security in a public that, having grown accustomed to rapid response by the police, was less inclined to take appropriate measures to protect themselves and their families. *See* KELLING & COLES, *supra* note 1, at 94-102.

<sup>112</sup> *See* Michael D. Reisig, *Community and Problem-Oriented Policing*, 39 *CRIME & JUST.* 1, 13-14 (2010) (citing National Advisory Commission on Civil Disorders report concluding that, amongst inner-city blacks, the police were perceived as instruments of "white power, white racism, and white repression"); Christopher Cooper, *An Afrocentric Perspective on Policing*, in *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 362, 366 (Roger G. Dunham & Geoffrey P. Alpert eds., 6th ed. 2010).

<sup>113</sup> *See* KELLING & COLES, *supra* note 1, at 88 (describing the police "thin blue line" mentality whereas entire segments of society, particularly minority youth, are viewed as "the enemy").

with the work of the police, particularly when the era's prevailing policing strategy, the professional model, was aimed at crime control by any means necessary.<sup>114</sup>

#### A. *The Emergence of Community Policing*

Beyond the professional model's alienation of minority communities was mounting evidence of the 911 system's inefficiency in controlling crime.<sup>115</sup> In the mid-1980s, progressive police leaders launched a series of new programs designed to expand the work of the police beyond the law enforcement function.<sup>116</sup> These initiatives, grouped collectively under the heading of community policing, were designed to enhance police responsiveness to crime, fear of crime, and the deteriorating quality of life in urban neighborhoods.<sup>117</sup> Unlike the traditional policing model, where police departments allocated resources to combat what they deemed to be serious crime, police were now encouraged to collaborate with the community in developing strategies to address crime and those conditions that, when permitted to fester, contributed to a sense of unlawfulness that permeated the entire community.<sup>118</sup>

The advent of community policing saw the return of foot patrols and other remnants of policing's early days. "Beat cops" were permanently assigned to individual neighborhoods where they maintained frequent contact with, and were readily identifiable by, those living and working in their patrol area.<sup>119</sup> This renewed commitment to beat integrity fostered the belief in the officer and the neighborhood resident that they were each stakeholders in the community's success. Through his outreach efforts, the beat cop developed a "reservoir of respect and

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<sup>114</sup> See Kenneth Aaron Betsalel, *Police Leadership and the Reconciliation of Police-Minority Relations*, AM. J. POLICE, 1990, at 66 ("In essence, the conflict between minorities and police from this perspective is between competing value claims of individual liberty versus the need for social order."). To some, the problem seemed intractable. See *id.* at 65-66 (citing early prognostications of failure for police initiatives designed to improve police minority relations).

<sup>115</sup> See KELLING & COLES, *supra* note 1, at 70-71.

<sup>116</sup> See Herman Goldstein, *Toward Community-Oriented Policing: Potential, Basic Requirements, and Threshold Questions*, 33 CRIME & DELINQ. 6, 6-7 (1987).

<sup>117</sup> See *id.* at 7.

<sup>118</sup> See Reising, *supra* note 112, at 1-2.

<sup>119</sup> See Goldstein, *supra* note 116, at 9-10.

support” that would ultimately assist him in addressing neighborhood problems without relying on traditional means of coercive force.<sup>120</sup>

Today, community policing, the “preeminent reform agenda of modern policing,”<sup>121</sup> has become part of our cultural vernacular. Its imprimatur has been bestowed upon a myriad of outreach strategies, from the deployment of foot patrol officers to the creation of storefront police substations. In many departments, these efforts are geared primarily toward improving the fractured relationship between police and minority communities.<sup>122</sup> The police chief’s commitment and the level of community participation dictate whether community policing operates solely as the function of a specialized group of officers or as a precinct-wide philosophy that infuses the work of the entire department..<sup>123</sup>

### *B. Political Legitimacy and the “New” Community Policing*

While these variations in scope make it difficult to evaluate community policing’s success, community policing programs are readily distinguishable by the degree in which the community participates in the decision-making process.<sup>124</sup> At the highest level, categorized by former police chief and noted criminologist Gary Corder as the “philosophical dimension” of community policing, citizens have open access to police departments and the opportunity to influence how they are policed.<sup>125</sup> This approach, or the “new community policing,”<sup>126</sup> recognizes the right and

<sup>120</sup> See *id.* at 10.

<sup>121</sup> See Gary W. Corder, *Community Policing Elements and Effects*, in *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 432, 432 (Roger G. Dunham & Geoffrey P. Alpert eds., 6th ed. 2010).

<sup>122</sup> See CHI. POLICE DEP’T, *supra* note 13; WASSERMAN, *supra* note 13 (“The Building Communities of Trust (BCOT) initiative focuses on developing relationships of trust between law enforcement . . . and the communities they serve, particularly immigrant and minority communities . . .”); *Community Relations Division*, *supra* note 13 (stating that the “Community Relations Division continuously strives toward maintaining open avenues of discourse,” especially with minority communities).

<sup>123</sup> See Corder, *supra* note 121, at 433 (describing various dimensions of community policing).

<sup>124</sup> Goldstein, *supra* note 116, at 24–25.

<sup>125</sup> See Corder, *supra* note 121, at 433–34.

<sup>126</sup> Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 *GEO. L.J.* 1153, 1160–61 (1998). The new community

responsibility of individual communities to participate in their own self-governance by setting enforcement priorities that reflect their shared values.<sup>127</sup> Legitimacy is achieved where the legal authority of the police to act is augmented by community support for and validation of police policies that restore or preserve the quality of life in affected areas.<sup>128</sup>

In this way, the new community policing represents a departure, but not a complete break, from the political model of policing in that it requires police officials to solicit support from and forge partnerships with affected segments of the community, including business leaders, housing organizations, and civil rights groups.<sup>129</sup> Much like the political bosses of the past, these new partners possess their own internal values, agendas, and constituencies.<sup>130</sup> Tailoring police services to meet the diverse needs of these external groups can yield positive results for police executives seeking community support, but it can also erode the legitimacy of the police in the eyes of those community members who perceive the police as having been co-opted by the special interests of the highly vocal and politically active segments of the community.<sup>131</sup>

The potential costs of co-optation increase dramatically when the police solicit community support for policies that expand or constrict the scope of their discretionary authority. The use of discretion, generally disfavored by early leaders of the police

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policing differs from its predecessor in its treatment of minorities, particularly African Americans, who have increased political clout. *Id.* at 1161.

<sup>127</sup> See David H. Bayley, *Community Policing: A Report from the Devil's Advocate*, in COMMUNITY POLICING: RHETORIC OR REALITY 225, 235 (Jack R. Greene & Stephen D. Mastrofski eds., 1991) ("Community policing is indeed democratic policing. Strategic choices by departments as well as activities of individual officers are worked out under community policing in a consensual manner with a responsible public.").

<sup>128</sup> See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 653-54 (1997).

<sup>129</sup> See Albert J. Reiss, Jr., *Shaping and Serving the Community: The Role of the Police Chief Executive*, in POLICE LEADERSHIP IN AMERICA: CRISIS AND OPPORTUNITY 61, 67 (William A. Geller ed., 1985).

<sup>130</sup> See Stephen D. Mastrofski, *Eying the Doughnut: Community Policing and Progressive Reform*, 12 AM. J. POLICE 1, 14-15 (1993) (reviewing MALCOLM K. SPARROW ET AL., BEYOND 911: A NEW ERA FOR POLICING (1990)).

<sup>131</sup> See Thacher, *supra* note 15. This co-optation, according to Thacher, results from a police department's abandonment of "essential institutional values in order to secure outside support." *Id.* at 770.

reform movement,<sup>132</sup> has always been a hallmark of community policing.<sup>133</sup> With the emergence of the new community policing, however, discretion has become politicized because the community is now an active participant in shaping the scope and breadth of the police department's discretionary authority.<sup>134</sup> Chicago's attempt to curb gang violence illustrates the intended benefits and hidden costs that flow from expansions of discretionary authority under the community preferences or political model of legitimacy.

### C. *The New Community Policing in Action: The Chicago Gang Ordinance*

In 1992, the Chicago City Council took "aggressive action" to stem criminal street gang activity—thought by many to be the root cause of an alarming increase in the city's murder and violent crime rates.<sup>135</sup> During a series of emotionally charged and bitterly contested public hearings, residents spoke of the intimidating presence of gang members within the community and expressed frustration with the police department's inability or perceived unwillingness to take enforcement action.<sup>136</sup> To

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<sup>132</sup> See Joseph Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 586–87 (1960).

[T]he police should operate in an atmosphere which exhorts and commands them to invoke impartially all criminal laws within the bounds of *full enforcement* . . . . Responsibility for the enactment, amendment, and repeal of the criminal laws will not, then, be abandoned to the whim of each police officer or department, but retained where it belongs in a democracy—with elected representatives.

*Id.* at 586–87 (footnotes omitted).

<sup>133</sup> See Stephen D. Mastrofski et al., *Law Enforcement in a Time of Community Policing*, 33 CRIMINOLOGY 539, 541 (1995). Because full enforcement of the law in every instance is neither practical nor likely to produce the desired result, community policing encourages police officials to seek alternatives to arrest when devising strategies to combat crime and maintain public safety. *Id.*

<sup>134</sup> See Kahan & Meares, *supra* note 126, at 1169–70.

<sup>135</sup> Memorandum from Eleanor D. Acheson, Assistant Att'y Gen., to the Solicitor Gen. (May 21, 2008).

<sup>136</sup> See *City of Chicago v. Morales*, 527 U.S. 41, 100–01 (1999) (Thomas, J., dissenting).

confront and cure these "social ills,"<sup>137</sup> the City Council passed the Gang Congregation Ordinance, a measure prohibiting loitering in public areas by suspected gang members.<sup>138</sup>

The anti-loitering ordinance was controversial from its inception, particularly in its expansion of police discretionary authority to stop those reasonably believed to be gang members or those found loitering in public places with suspected gang members.<sup>139</sup> In a preemptive strike against what many viewed as the very real possibility of large-scale harassment and profiling, the expansive grant of discretionary authority was offset by procedural limitations within the ordinance itself as well as internal police guidelines that strictly defined both the areas in which the ordinance could be enforced and the number of officers qualified to make arrests for its violation.<sup>140</sup> With these safeguards in place, officers were guided in the exercise of their discretionary authority and were, according to the ordinance's supporters, accountable to the community for any failure to exercise their discretion in a principled manner.<sup>141</sup>

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<sup>137</sup> *Id.* at 101. (Thomas, J., dissenting).

<sup>138</sup> CHI., ILL., MUNICIPAL CODE § 8-4-015 (1992). The Gang Congregation Ordinance stated, in pertinent part:

Whenever a police officer observes a member of a criminal street gang engaged in gang loitering with one or more other persons in any public place . . . [the police officer shall] order all such persons to disperse and remove themselves from within sight and hearing of the place at which the order was issued . . . .

*Id.* § 8-4-015(a). The ordinance defined loitering as "remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities." *Id.* § 8-4-015(d)(1).

<sup>139</sup> *See Morales*, 527 U.S. at 62 n.34 (plurality opinion). Of the sixty-six named defendants in the series of cases ultimately consolidated into *Morales*, thirty-four were accused of violating the measure by being in the presence of a gang member. *Id.*

<sup>140</sup> *See* Chi., Ill., Police Dep't Gen. Order No. 92-4 (Aug. 8, 1992). Under departmental policy, arrest authority was delegated to a select group of specially trained officers who were authorized to enforce the ordinance in those designated areas with demonstrated gang problems. Meares & Kahan, *supra* note 111, at 200.

<sup>141</sup> *See id.* at 211. Despite the built-in protections, a divided Supreme Court struck down the Chicago ordinance, finding that the measure vested too much discretionary authority in the police. *Morales*, 527 U.S. at 64. Of the six opinions in the case, Justice Stevens's opinion striking down the ordinance for its failure to limit police discretionary authority was the only one to garner majority support. *See id.* at 45-64.

While the Chicago ordinance enjoyed widespread community support,<sup>142</sup> it had more than its share of detractors, particularly from within the legal academy. Because of the illusory nature of “community,” critics bemoaned police officials’ ill-conceived reliance on “community” preferences in the adoption of discretionary policies.<sup>143</sup> Communities, or “group[s] of people with a common history, common beliefs and understandings,” are increasingly rare in modern society.<sup>144</sup> Even where a genuine community can be identified, its preferences will invariably alienate the “misfits, dissidents, and outsiders” within that same community.<sup>145</sup> The resulting fragmentation compromises the legitimacy of the police.<sup>146</sup> These same concerns apply with equal force to opting out.

#### IV. OPTING OUT AND THE FRAGMENTATION OF COMMUNITIES

To be sure, the Chicago ordinance and other anti-vagrancy statutes merit additional scrutiny due in large part to the long-standing constitutional concerns raised by the expansion of police discretionary authority to identify and arrest potential lawbreakers.<sup>147</sup> Although opting out does not trigger that same

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<sup>142</sup> Meares & Kahan, *supra* note 111, at 199. *But see* Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 217–18 (1998) (questioning Meares and Kahan’s claims of broad support for the anti-gang ordinance among African Americans). For Meares and Kahan’s response to the allegation that they overstated the level of African American support for the Chicago loitering ordinance, see Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245, 246–47 (1998).

<sup>143</sup> See Carol S. Steiker, *More Wrong Than Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 49, 55 (Joshua Cohen & Joel Rogers eds., 1999); David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1085–86 (1999); Michael S. Scott, *Community Justice in Policing*, 42 IDAHO L. REV. 415, 435 (2006).

<sup>144</sup> See Carl B. Klockars, *The Rhetoric of Community Policing*, in COMMUNITY POLICING: RHETORIC OR REALITY 241, 247–48 (Jack R. Greene & Stephen D. Mastrosfski eds., 1991).

<sup>145</sup> Cole, *supra* note 143, at 1082–83.

<sup>146</sup> See Thacher, *supra* note 15, at 766, 768.

<sup>147</sup> See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (striking down a Jacksonville, Florida vagrancy ordinance for vagueness because “it encourages arbitrary and erratic arrests and convictions”). Years before *Papachristou* was decided, Justice Douglas, who went on to author the Court’s opinion, denounced vagrancy and loitering statutes and other devices used against “consumers of injustice,” like minorities, who lacked “the prestige to prevent an easy



rights-based apprehension, the “hydraulic pressures of apparent social imperative” that overwhelmed the residents of Chicago and their police department are just as forceful and potentially hazardous here.<sup>148</sup> In the context of immigration enforcement, police policy is shaped by an extra-political collaboration of unelected decision makers: the police and those advocating for more expansive immigration policies.<sup>149</sup> By opting out, police executives risk missing the trees—the conceivable loss of their own legitimacy—in the forest of good will generated by their political benevolence.<sup>150</sup> The resulting backlash evidences a growing hostility toward the very group the police set out to protect.

#### A. *Immigration and the Growing Disconnect Between the Police and the Public*

As recent maneuvering in our nation’s capital demonstrates, reaching consensus on immigration enforcement remains an elusive goal.<sup>151</sup> Like their congressional representatives, the

laying-on of hands by the police.” William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 13–14 (1960).

<sup>148</sup> Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 870–71 (1999).

<sup>149</sup> See Wesley G. Skogan, *Everybody’s Business*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 58, 60–61 (Joshua Cohen & Joel Rogers eds., 1999).

<sup>150</sup> Politics do indeed make strange bedfellows, as evidenced by the overwhelming support for opting out from the same groups that forcefully oppose the exercise of community-generated discretionary authority in other contexts. Compare Letter from Steven Brown, R.I. Affiliate, Am. Civil Liberties Union, et al., to Angel Taveras, Mayor-Elect, Transition Office (Dec. 30, 2010), available at [http://riaclu.envisionbeta.net/images/uploads/SComm\\_Letter\\_To\\_Taveras\\_2011.pdf](http://riaclu.envisionbeta.net/images/uploads/SComm_Letter_To_Taveras_2011.pdf) (urging “Providence [to refrain] from participating in . . . Secure Communities”), with Brief for American Civil Liberties Union as Amicus Curiae Supporting Respondents, *City of Chicago v. Morales*, 527 U.S. 41 (1999) (No. 97-1121) (urging the Supreme Court to strike down Chicago’s anti-gang ordinance because “police officers [were] left completely to their own devices, without standards, in determining when to enforce and when not to enforce the ordinance”).

<sup>151</sup> See Lauren Fox, *For Some in GOP, Immigration Reform Moving Too Fast*, U.S. NEWS (Mar. 20, 2013), <http://www.usnews.com/news/articles/2013/03/20/for-some-in-gop-immigration-reform-moving-too-fast> (criticizing the Senate’s “Gang of Eight” immigration reform outline as occurring too quickly). Compare Elise Foley, *Tom Tancredo Bashes Rand Paul for Immigration Stance, Sticks to ‘Self-Deport’ Strategy*, HUFFINGTON POST (Mar. 22, 2013, 6:09 PM), [http://www.huffingtonpost.com/2013/03/22/tom-tancredo-rand-paul-immigration\\_n\\_2935485.html](http://www.huffingtonpost.com/2013/03/22/tom-tancredo-rand-paul-immigration_n_2935485.html) (arguing that “strict enforcement of employer sanctions and allowing local police to cooperate in immigration enforcement will encourage most illegals to . . . ‘self deport’”), with Rand Paul, *Sen. Rand Paul: Trust but Verify on Immigration Reform*, WASH. TIMES

public at large is similarly fragmented with polling data revealing a wide disparity in views both nationwide and within immigrant communities.<sup>152</sup> At the local level, the contentious immigration debate presents a confusing picture for police officials dealing with conflicting community expectations.<sup>153</sup> In other contexts, according to these executives, citizens have deferred to the authority of the police where policymaking is concerned. When enforcement policies involve immigration, however, the decision-making process is met with skepticism that in some cases results in litigation.<sup>154</sup>

In San Francisco, the community was splintered by a single traumatic event that changed previously ambivalent attitudes toward the city's long-standing sanctuary status. Anthony Bologna, a married father of three, and two of his sons were fatally shot while driving in the family car.<sup>155</sup> The lone witness to

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(Feb. 8, 2013), <http://www.washingtontimes.com/news/2013/feb/8/sen-rand-paul-trust-verify-immigration-reform/> (calling for prioritizing STEM Visas, expanding work VISA program, and normalizing "the status of the 11 million undocumented citizens so they can join the workforce").

<sup>152</sup> PEW HISPANIC CTR., PEW RESEARCH CTR., *A NATION OF IMMIGRANTS: A PORTRAIT OF THE 40 MILLION, INCLUDING 11 MILLION UNAUTHORIZED 4* (2013), available at [www.pewhispanic.org/files/2013/01/statistical\\_portrait\\_final\\_jan\\_29.pdf](http://www.pewhispanic.org/files/2013/01/statistical_portrait_final_jan_29.pdf) (stating twenty-eight percent of adults believe "illegal immigration should be given to tighter restrictions . . . while 27% say creating a path to citizenship should be given the priority"); MARK HUGO LOPEZ ET AL., PEW HISPANIC CTR., PEW RESEARCH CTR., *ILLEGAL IMMIGRATION BACKLASH WORRIES, DIVIDES LATINOS*, at i (2010), available at <http://pewhispanic.org/files/reports/128.pdf> ("A small majority (53%) says they should pay a fine but not be deported. A small minority (13%) says they should be deported, and a larger minority (28%) says they should not be punished."). The same "political disconnect" can be found between the general public and the legal academy. See Peter H. Schuck, *The Disconnect Between Public Attitudes and Policy Outcomes in Immigration*, in *DEBATING IMMIGRATION* 17, 17, 27–28 (Carol M. Swain ed., 2007).

<sup>153</sup> See DECKER ET AL., *supra* note 88, at 169–70; see also HOFFMASTER ET AL., *supra* note 4, at iii (examining the disjointed nature of police community communications vis-a-vis immigration policy in six major cities).

<sup>154</sup> See *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 722–23 (Ct. App. 2009) (seeking to enjoin Los Angeles police chief from enforcing police policy precluding police from asking crime victims and witnesses about their immigration status and from making arrests for unlawful entry into the United States); *Fonseca v. Fong*, 84 Cal. Rptr. 3d 567, 570 (Ct. App. 2008) (challenging San Francisco police chief's "disregard[]" of local health and safety code provision requiring that police notify federal authorities upon the arrest of any non-citizen for a specified drug offense); see also HOFFMASTER ET AL., *supra* note 4, at 40. Both *Sturgeon* and *Fonseca* were dismissed prior to trial.

<sup>155</sup> *Bologna v. City & Cnty. of S.F.*, 121 Cal. Rptr. 3d 406, 408 (Ct. App. 2011).

the crime was Bologna's other son, Andrew.<sup>156</sup> Within weeks of the murders it was revealed that the suspect, Edwin Ramos, a gang member with a long juvenile record of violent offenses, was also an undocumented immigrant who had escaped deportation due to sanctuary policies that prohibited the release of juvenile offender information to federal immigration authorities.<sup>157</sup> The news ignited a firestorm of public backlash against city officials and the local police department.<sup>158</sup> Political operatives on both sides of the aisle seized the opportunity to use the tragedy to advance their agendas.<sup>159</sup>

When these partisan battles erupt, the police erode their legitimacy by taking sides. Equally damaging is the tendency to demonize those community members who express opposition. For instance, in Santa Ana, California, former police Chief Raymond Davis instituted a policy of non-cooperation with federal immigration authorities.<sup>160</sup> According to Chief Davis, doing so was necessitated by the need to "generate strong police-community collaboration."<sup>161</sup> Not surprisingly, the decision was

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<sup>156</sup> *Id.* 408–09.

<sup>157</sup> *Id.* at 409. *But see* Demian Bulwa, *S.F. Family's Murderer Killed Before, FBI Was Told*, SFGATE (July 1, 2012, 11:25 AM), <http://www.sfgate.com/crime/article/S-F-family-s-murderer-killed-before-FBI-was-told-3676718.php?page=2> (alleging that F.B.I., and not local police, failed to report Ramos to immigration authorities after learning of his involvement in a gang murder several years before the Bologna slayings). Federal authorities refused to comment on the allegation. *See id.* A suit filed by the surviving members of the Bologna family against the city of San Francisco and its police department was dismissed. *See Bologna*, 121 Cal. Rptr. 3d at 410.

<sup>158</sup> *See* Jaxon Van Derbeken, *Family Blames Sanctuary Policy in 3 Slayings*, SFGATE (Aug. 23, 2008, 4:00 AM), <http://www.sfgate.com/default/article/Family-blames-sanctuary-policy-in-3-slayings-3272118.php>.

<sup>159</sup> *See* John Coté, *San Francisco Sanctuary Rule Change Moves Ahead*, SFGATE (Oct. 6, 2009, 4:00 AM), <http://www.sfgate.com/default/article/San-Francisco-sanctuary-rule-change-moves-ahead-3214469.php>; *see also* Nina Martin, *No Sanctuary for Danielle Bologna*, S.F. MAG. (Oct. 21, 2011), <http://www.modernluxury.com/san-francisco/story/no-sanctuary-danielle-bologna>.

<sup>160</sup> *See* Davis, *supra* note 103.

<sup>161</sup> *Id.* at 88. At the time, Santa Ana had seen its minority—predominately Hispanic—population increase more than fifty percent in a span of a few short years. *See id.* at 88–89.

met with some resistance.<sup>162</sup> What was surprising, however, was Chief Davis's characterization of opposition groups as the "white power structure."<sup>163</sup>

When the police expand their discretionary authority in the enforcement of the law, as was the case in Chicago, critics rightly observed that the use of discretion fragments the community by creating winners and losers.<sup>164</sup> History has shown that the "losers" are typically minorities and other disenfranchised groups.<sup>165</sup> When the "winners" are a historically disenfranchised minority group, as is the case with opting out, it is easy for police executives like Chief Davis to derisively dismiss opponents as xenophobic or racist.<sup>166</sup> In doing so, these officials ignore the competing interests, attitudes, and agendas that exist between minority groups, differences that the police should consider when promulgating policies designed to improve their fractured relationships with one segment of the "minority community."

#### B. *The Tenuous Relationship Between African Americans and Immigrants*

Community policing arose from the ashes of the urban riots of the 1960s when the relationship between police and the minorities, particularly African Americans, reached its breaking point. Empirical data suggests that community policing has succeeded in improving attitudes toward the police among

<sup>162</sup> *See id.*

<sup>163</sup> *Id.* at 88 ("In Santa Ana, the police leadership has been condemned by the white power structure because of our strong move to secure Hispanic community support . . .").

<sup>164</sup> Cole, *supra* note 143, at 1082–83.

<sup>165</sup> *See id.*

Discretion makes selection possible; the salient point is that someone will always be the loser in the selection process, and that the losers will generally be those without effective political power. In some communities, the losers might be racial minorities; in others they might be immigrants or young people; in still others they might be people with political or cultural values that depart from the majority's. But every "community" will have its misfits, dissidents, and outsiders.

*Id.*

<sup>166</sup> *See* INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 102, at 18–19. This statement is not to downplay or deny the reality that some opposition to expansive immigration policies is fueled by racial animosity. *See id.* at 18 (citing federal intelligence reports that indicate "former and current members of hate groups, which advocate violence against immigrants" have joined groups that "have linked security concerns with illegal immigration").

minorities.<sup>167</sup> Viewed myopically as ameliorative efforts to repair, restore, and establish trusting relationships between the police and the minority community, strategies such as opting out escape scrutiny or meaningful discussion because the targeted beneficiaries are themselves minorities. However, intra-minority group dynamics are not so easily encapsulated.<sup>168</sup>

The tension between native blacks and immigrants is as old as immigration itself. In the post-antebellum South, newly freed slaves seeking job opportunities faced stiff competition from European immigrants, prompting Booker T. Washington to urge white American employers to cast their buckets down in the large pool of available black labor.<sup>169</sup> What sets the current immigration debate apart from its predecessor is the coalition of blacks and today's immigrants—largely Hispanic—an alliance that some contend inhibits honest discourse about the impact of illegal immigration on African Americans.<sup>170</sup>

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<sup>167</sup> See RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 169–71 (2006). Studies indicate that blacks express higher levels of support for community policing initiatives than whites and Hispanics; when asked, blacks expressed desire for “more police (1) interaction with neighborhood residents, (2) involvement in community programs, and (3) engagement with teenagers.” *Id.* at 169. For Meares and Kahan's response to the allegation that they overstated the level of African American support for the Chicago loitering ordinance, see Meares & Kahan, *supra* note 1.

<sup>168</sup> Joel F. Handler, *It's Not So Simple*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 45, 47–48 (Joshua Cohen & Joel Rogers eds., 1999) (citing intra-minority group conflict as a major precipitating factor in the Los Angeles riots).

<sup>169</sup> See Booker T. Washington, Address at the Atlanta Cotton States and International Exposition: Atlanta Compromise Speech (Sept. 18, 1895), available at <http://americanradioworks.publicradio.org/features/sayitplain/btashington.html>.

To those of the white race who look to the incoming of those of foreign birth and strange tongue and habits for the prosperity of the South, were I permitted I would repeat what I have said to my own race, “Cast down your bucket where you are.” Cast it down among the eight millions of Negroes whose habits you know, whose fidelity and love you have tested in days when to have proved treacherous meant the ruin of your firesides. Cast down your bucket among these people who have, without strikes and labor wars, tilled your fields, cleared your forests, builded [sic] your railroads and cities, and brought forth treasures from the bowels of the earth, and helped to make possible this magnificent representation of the progress of the South.

*Id.*

<sup>170</sup> See Carol M. Swain, *The Congressional Black Caucus and the Impact of Immigration on African American Unemployment*, in DEBATING IMMIGRATION 175, 178–79 (Carol M. Swain ed., 2007) (criticizing Congressional Black Caucus's failure to openly discuss the negative economic impact of illegal immigration on African

From this failure to address hard questions about the competing interests of minority groups, double standards emerge.<sup>171</sup> Ostensibly benign attempts to foster better relationships with immigrants can very easily be perceived as “bending the law so as not to offend,”<sup>172</sup> an approach far removed from the traditional reactive mode of policing deployed in black communities. Ultimately, the perceived lack of evenhanded enforcement weakens the rule of law and erodes the legitimacy of the police.<sup>173</sup> It can also exacerbate existing tensions between African Americans and immigrants.<sup>174</sup>

### CONCLUSION

The quest for legitimacy has precipitated every major historical shift in policing, from the professional model to present day community policing. The public’s frustration with and open hostility toward a politicized police force spurred the crisis of legitimacy and led to the reform era of policing.<sup>175</sup> Reformers responded by abandoning the political model of policing in favor of the professional model in hopes that trust would flow from the perceived legitimacy of a newly-detached police force that was disentangled from political machinations.<sup>176</sup> The professional era failed when police executives discovered that public levels of support for or trust in the police as an institution rarely equated

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Americans despite majority support for stricter immigration enforcement amongst their constituents); see also Schuck, *supra* note 152, at 23–24 (discussing neutralization of black civil rights organizations based on political liberalism and alliances with pro-immigrant groups).

<sup>171</sup> DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 9 (1999).

<sup>172</sup> See Bayley, *supra* note 127, at 232.

<sup>173</sup> *Id.* at 231.

<sup>174</sup> See Scott Cummings & Thomas Lambert, *Anti-Hispanic and Anti-Asian Sentiments Among African-Americans*, 78 SOC. SCI. Q. 338, 340 (1997) (describing support among African Americans in California for Proposition 187, a measure aimed at restricting state assistance to illegal immigrants); see also Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 107–08 (2007) (noting the absence of African Americans from immigrant support rallies and calling for an open dialogue between black and Hispanic leaders to address simmering animosities between the two groups).

<sup>175</sup> See WALKER, *supra* note 89.

<sup>176</sup> See Schulhofer et al., *supra* note 100, at 339.

with statistical measures of crime-fighting success, particularly in minority communities where attitudes of mistrust toward the police were pervasive.

Community policing offers police executives the opportunity to make real inroads with traditionally underserved communities. However, the police cannot abandon essential values to secure community support.<sup>177</sup> As Tyler and others have suggested, regulation does not undermine legitimacy.<sup>178</sup> Rather, perceptions of legitimacy are formed by the methods police use to enforce the law. Trust and cooperation flow from individual beliefs that the procedures involved in the decision-making process are neutral, evenhanded, and consistent.<sup>179</sup> Community policing and immigration enforcement can co-exist, but it will require the police to accept that policing cannot always be popular.<sup>180</sup> The police exist in modern society because of our continued need for an institution "with a virtually unrestricted right" to use force, oftentimes lethal force, to maintain order.<sup>181</sup> To reconcile ourselves to that uncomfortable reality, we, as a society, employ "concealments" to foster the appearance of the police as something other than what they actually are.<sup>182</sup> Opting out is one such concealment.

For local police, full enforcement of immigration law may not be the appropriate response in every situation, but it should remain an option. The community must trust that the police will exercise their discretionary authority in a responsible manner. In turn, the police must remain accountable to the community for any failures. Only then can true legitimacy be achieved. When discretionary policies are shaped by community preferences, legitimacy lasts only as long as the next election cycle.

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<sup>177</sup> See Thacher, *supra* note 15.

<sup>178</sup> See Sunshine & Tyler, *supra* note 12 (police legitimacy includes "credible sanctioning threats for those who break rules").

<sup>179</sup> See TYLER, *supra* note 93, at 161-62 (police can gain compliance from the public "for their decision and rules by making and implementing them in ways that the public thinks is fair").

<sup>180</sup> See Bayley, *supra* note 127, at 236 ("[P]olicing cannot always be popular and must always be equitable.").

<sup>181</sup> Klockars, *supra* note 144, at 257.

<sup>182</sup> See *id.*