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## Policing Immigration

*Adam B. Cox*<sup>†</sup> & *Thomas J. Miles*<sup>††</sup>

### INTRODUCTION

Today, local police are being integrated into federal immigration enforcement on a scale never seen before in American history. This transformation of immigration law is not the result of the high-profile efforts by Arizona and a few other states to regulate migrants. Instead, it is the product of a largely overlooked federal program known as “Secure Communities.” Launched four years ago, the program’s goal is simple: to check the immigration status of every single person arrested by local police anywhere in the country.

Secure Communities represents the future of immigration enforcement. It dramatically lowers the information cost of identifying immigration violators, accelerates the ongoing convergence of the immigration and criminal bureaucracies in the United States, and reshapes the structure of immigration federalism. Despite its significance, however, little is known about the program.

This Article, part of a larger project providing the first large-scale empirical evaluation of Secure Communities, uses the program’s rollout to explore a pervasive feature of criminal and administrative law that rarely lends itself to empirical examination—the role of discretion in policing. The breadth of discretion wielded by police and prosecutors is probably the single most important feature of modern law enforcement. Controlling that discretion—through judicial intervention, administrative design, and so on—has consequently become the central preoccupation of criminal and administrative law scholarship. For all that attention, however, we often have little sense of how law enforcement officials actually wield the discretion they possess. Anecdotes

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tal accounts abound, but systemic empirical evidence is rarely available. This is even truer with respect to immigration enforcement, which represents one of the largest and least studied law enforcement bureaucracies in the United States.

Secure Communities' rollout provides a unique opportunity to study the role of discretion in immigration enforcement. While the program is designed to check the immigration status of anyone arrested by local police anywhere in the country, resource limitations forced the federal government to stagger the program's activation across the country. Rather than activating the program simultaneously nationwide, Immigration and Customs Enforcement (ICE) rolled out the program on a county-by-county basis. As one would expect, senior administrators faced with limited resources made the explicit decision to target high-priority counties for early activation. The pattern of activation therefore provides a revealing look into the enforcement agency's priorities, showing us where around the country the government chose to concentrate its limited immigration resources.

Public debate about Secure Communities points to three potential sets of priorities that might have driven the geography of roll-out. ICE has said repeatedly that Secure Communities is a tool for preventing crime and removing serious "criminal aliens" from the country. That justification suggests that counties with the most serious crime problems and the largest number of noncitizens engaged in crime would be targeted for early activation. While crime is the putative focus, however, Secure Communities also makes enforcement cheaper by lowering the information cost of identifying immigration violators. Critics of the program have argued that this is the program's real aim—to identify cheaply more people in violation of immigration law whom the agency can then deport. If true, this priority should lead the agency to target the program at areas with high levels of immigration violators, rather than high levels of criminal offenders. Finally, many have suggested that bureaucrats worry as much about the political costs of their choices as they do the policy consequences. If this were true for those in charge of Secure Communities, we would expect that they would target activation in local communities that support the program while delaying activation in counties where the program might produce political backlash.

We test these three hypotheses about the use of discretion using the program's rollout data and extensive data regarding local crime rates, demography, and partisan politics. The analysis leads to three principal conclusions. First, the data undermine the government's claim that Secure Communities is principally about making communities more secure from crime. High-crime areas were, surprisingly, not a priority in the rollout. It is very difficult to square the lack of any meaningful correlation between early activation and local crime rates with the government's putative desire to target immigration

enforcement resources in a manner designed to reduce the incidence of serious crime by noncitizens.

Second, the data provide little support for the claim that the agency's use of discretion was driven more by local politics than federal policy. Many critics of local police involvement in immigration enforcement have argued that incorporating local police will result in the tail wagging the dog, with local governments determining immigration priorities. Whatever the force of this concern in contexts like *Arizona v United States*,<sup>1</sup> where Arizona wanted to involve itself in immigration enforcement without federal authorization, it does not appear to have much purchase here. There is little evidence that the pattern of rollout reflected local attitudes about immigration enforcement rather than federal priorities. This does not mean that politics were irrelevant: as we will see, proximity to the border was a powerful predictor of early activation, and some readers will likely see this prioritization as a reflection of politics rather than strictly policy. Nonetheless, there is little support for our first or third hypotheses.

Third, and perhaps most important, the data reveal that early activation in the program correlates strongly with whether a county has a large Hispanic population. This finding can be seen as support for the hypothesis that the rollout prioritized locations thought to have high levels of immigration violators, given both the demographics and politics of unauthorized migration. It is crucial to note, however, that the pattern of correlation between rollout and a community's Hispanic population persists even when we control for myriad other factors that might also be thought to be proxies for suspected immigration violators, such as a county's proximity to the border or its noncitizen or foreign-born population. Moreover, other demographic proxies for immigration violators, such as the local noncitizen or foreign-born population, predict the rollout sequence much less well than Hispanic population. These findings raise important questions about racial profiling in immigration enforcement. While the data should not be interpreted as evidence that the government intentionally singled out predominantly Hispanic communities for increased immigration enforcement, ICE's discretionary allocation of resources had the effect of concentrating enforcement in these communities.

As the exercise of discretion in immigration enforcement becomes more centralized within the immigration bureaucracy, patterns like the ones we find raise questions identical to those at the heart of debates in criminal justice today. In the arena of criminal justice, risk-based models of crime prevention have led to strategies like the NYPD's stop-and-frisk program—a program that has renewed the focus in criminal law scholarship on questions about which communities bear the brunt of the costs of crime prevention

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<sup>1</sup> 132 S Ct 2492 (2012).

strategies. Our findings about the pattern of Secure Communities' rollout suggests the need to start a parallel conversation about immigration enforcement. More generally, it highlights the oft-overlooked similarities between the structure of modern criminal and immigration enforcement—similarities that should, but have not yet, lead to the integration of scholarship on the two subjects.

The Article proceeds in three parts. Part I provides background on Secure Communities and the broader ongoing integration of criminal and immigration enforcement. Part II lays out and tests our hypotheses. Part III explores the implications of our findings.

### I. INTEGRATING THE CRIMINAL AND IMMIGRATION ENFORCEMENT SYSTEMS

Immigration and crime have been intimately linked in American law and politics for over a century. In 1875, the first restrictive immigration law passed by the federal government prohibited the entry of certain criminals and suspected prostitutes.<sup>2</sup> When Congress began adopting deportation laws in the early twentieth century, “criminal aliens” were again among the first targeted by the government.<sup>3</sup> And over the last twenty-five years the focus on deporting those who commit crimes has expanded dramatically. Today a broad swath of criminal convictions can make a noncitizen deportable—convictions ranging from serious offenses such as murder to minor drug crimes and other misdemeanors.<sup>4</sup>

While the connection between criminal convictions and immigration consequences is nearly as old as federal immigration law itself, over the last few decades a new sort of connection has developed between immigration law and criminal law. This new linkage concerns the enforcement bureaucracies of criminal and immigration law, rather than the primary rules of conduct that regulate noncitizens.

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<sup>2</sup> See Page Act of 1875 § 1, ch 141, 18 Stat 477. The statute prohibited certain felons and prostitutes from immigrating to the United States and criminalized the importation of prostitutes and “coolly” labor. Page Act §§ 3–5, 18 Stat at 477–48.

<sup>3</sup> See Immigration Act of 1917 § 19, Pub L No 64-301, ch 29, 39 Stat 874, 889–90:

[Making deportable] any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry.

See also Immigration Act of 1907 § 3, Pub L No 59-96, ch 1134, 34 Stat 898, 899–900 (making deportable women who engaged in prostitution within three years after entering the United States).

<sup>4</sup> See Adam B. Cox and Eric A. Posner, The Second-Order Structure of Immigration Law, 59 Stan L Rev 809, 836–39 (2007).

There is a growing convergence between the enforcement systems for immigration law and criminal law. This convergence is at odds with an old, conventional view about these regulatory domains. According to this old view, criminal law is the province of the states, while immigration law is exclusively within the control of the federal government. The old view was really never quite right.<sup>5</sup> Nonetheless, it was prominent in both regulatory practice and academic commentary for many decades. Recently, however, a host of factors—including a rise in unauthorized immigration and new thinking about cooperative federalism—have led to two prominent developments that challenge this neat division of labor.

The first development is the rise of state and local efforts to combat unlawful migration. Examples include Texas's attempt in the 1970s to deny free public school education to undocumented children,<sup>6</sup> California's bid in the 1990s to deny a variety of government benefits to all out-of-status noncitizens,<sup>7</sup> and the recent efforts by Arizona and a handful of other state to arrest, prosecute, and otherwise single out potentially deportable immigrants for unfavorable treatment.<sup>8</sup> These efforts have been largely unsuccessful. Many efforts were blocked in their entirety: the Supreme Court struck down Texas's statute in *Plyler v Doe* as a violation of the Equal Protection Clause,<sup>9</sup> and lower courts initially blocked California's Proposition 187 before the state abandoned its defense of the law.<sup>10</sup> More recently, the Supreme Court rebuffed Arizona's high-profile effort to get involved in enforcing immigration law. Earlier this summer, the Court struck down all but one of the central provisions of Arizona's SB 1070,<sup>11</sup> handing a big victory to the federal government and reaffirming a strong view of federal supremacy over immigration policy.<sup>12</sup>

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<sup>5</sup> For an discussion of the old view and the argument that it was not correct, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum L Rev 1833, 1839–40 (1993) (discussing the “myth” of exclusive federal, as opposed to state, authority over immigration and arguing that it ought to be dispelled).

<sup>6</sup> See 1975 Tex Sess Law Serv 896, codified at Tex Educ Code Ann § 21.031 (Vernon 1975), invalidated by *Plyler v Doe*, 457 US 202 (1982) (specifying that public schools should only admit children who are United States citizens or legal immigrants).

<sup>7</sup> See 1994 Cal Legis Serv Prop 187 (West) (excluding “illegal aliens” from various public services including publicly-funded health care and public schools).

<sup>8</sup> See, for example, Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), 2010 Ariz Sess Laws 113, as amended by Immigration and Border Security; Providing for Conditional Enactment, 2010 Ariz Sess Laws 211

<sup>9</sup> 457 US 202, 230 (1982) (holding that denying education to children necessitates a showing that it furthers some substantial state interest and that such a showing had not been made).

<sup>10</sup> See, , *League of United Latin American Citizens v Wilson*, 997 F Supp 1244, 1261 (CD Cal 1997) (finding most of Proposition 187 preempted by the federal immigration regulatory scheme); Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles*, LA Times A1 (July 29, 1999) (explaining that the California governor decided not to appeal the *Wilson* decision).

<sup>11</sup> 2010 Ariz Sess Laws 113.

<sup>12</sup> 132 S Ct 2510.

While these state and local initiatives have garnered most of the public and scholarly attention, they are in some ways a sideshow to a second development: the federal government's incorporation of the state criminal enforcement bureaucracy into the federal immigration enforcement system. This incorporation, which has roots that date back many decades, began picking up speed in the 1990s, when Congress passed statute authorizing the Attorney General to deputize state and local law enforcement officials to enforce immigration law.<sup>13</sup> Under this statutory provision, § 287(g) of the Immigration and Nationality Act (INA), the Attorney General has authorized local police in nearly seventy-five jurisdictions around the country to screen prisoners for immigration violations and, in some cases, to assist in street-level immigration enforcement.<sup>14</sup> These cooperative arrangements have been complemented by the Criminal Alien Program (CAP), under which federal immigration agents (rather than local police) interview arrestees in federal, state, and local jails and prisons to identify potentially deportable noncitizens.<sup>15</sup> As of early 2009, all foreign-born prisoners at roughly 14 percent of local jails and prisons were screened by ICE agents.<sup>16</sup>

Secure Communities, a new program launched in the fall of 2008, builds on these preliminary efforts at cooperative federalism. Its basic aim is in some ways quite similar to the earlier programs: like CAP and most 287(g) agreements, the goal is to provide immigration screening for people arrested by local law enforcement. But the scale of the program is dramatically different. While 287(g) agreements were in effect in fewer than seventy-five jurisdictions, and CAP was limited to screening prisoners in a tiny fraction of local jails (and then only if the prisoners had already been identified as foreign-born),<sup>17</sup> Secure Communities is vastly more ambitious: under the program, every single person arrested by a local law enforcement official anywhere in the country will soon be screened by the federal government for immigration

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<sup>13</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 133, Pub L No 104-208, 110 Stat 3009, 3009-563 to -564, codified at INA § 287(g).

<sup>14</sup> See Randy Capps, et al, Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement 9 (Migration Policy Institute Jan 2011), online at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf> (visited Oct 27, 2012).

<sup>15</sup> See Maureen A. Sweeney, Fact or Fiction: The Legal Construction of Immigration Removal for Crimes, 27 Yale J Reg 47, 73 (2010) (describing CAP's variety of programs aimed at both screening prison inmates and, where necessary, obtaining removal orders against them prior to their release from the criminal system).

<sup>16</sup> See US Immigration and Customs Enforcement (ICE), Secure Communities: Quarterly Report: Fiscal Year 2009 Report to Congress—First Quarter 3 (US Department of Homeland Security (DHS) Feb 17, 2009), online at [http://www.ice.gov/doclib/foia/secure\\_communities/congressionalstatusreportfy091stquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy091stquarter.pdf) (visited Oct 27, 2012).

<sup>17</sup> See notes 14-16.



violations. In short, Secure Communities is the largest expansion of local involvement in immigration enforcement in the nation's history.<sup>18</sup>

To provide screening in local jails and prisons, Secure Communities relies on a fundamentally different—and much less labor-intensive—approach than 287(g) agreements or CAP. Those programs required individual police officers or ICE agents to interview each prisoner personally in order to collect information and assess the person's status.<sup>19</sup> In contrast, the backbone of Secure Communities is an information sharing arrangement that permits ICE to use biometric identification to flag suspected immigration violators.

Traditionally, whenever a person is arrested and booked by a state or local law enforcement agency, his fingerprints are taken and forwarded electronically to the FBI. The FBI compares those prints against various national criminal information databases that return a “hit” if the person has a criminal history or outstanding warrants.<sup>20</sup> Under Secure Communities, the federal government forwards to the Department of Homeland Security (DHS) the fingerprints already being routed to the FBI. DHS then compares the person's fingerprints against a database designed to identify persons who have outstanding immigration violations, such as persons who are unlawfully in the country because they have overstayed their visas, or because they have been previously deported and have not been legally readmitted.<sup>21</sup> If the data-

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<sup>18</sup> The program appears set to supplant some of the earlier, more limited efforts at cooperation. For example, the Obama administration recently suggested that it will not renew its existing 287(g) agreements, instead letting them expire at the end of 2012. See Alan Gomez, Immigration Enforcement Program to Be Shut Down, USA Today (Feb 17, 2012), online at <http://www.usatoday.com/news/nation/story/2012-02-17/immigration-enforcement-program/53134284/1> (visited Oct 27, 2012) (explaining that DHS will not renew contracts with many local police agencies and will not sign new agreements). Explaining this decision, DHS emphasized that it prefers to channel local participation in immigration enforcement through Secure Communities. See *id.*

<sup>19</sup> For many years CAP therefore required ICE agents to travel to each local jail for interviews. In recent years in-person interviews have been replaced in some instances by remote interviews via telephone or videoconferencing equipment. But this streamlining still requires an available staff of ICE agents to conduct the interviews remotely—a need that led to the creation of the Detention Enforcement and Processing Offenders by Remote Technology (DEPORT) Center in Chicago—and, for videoconferencing, requires the installation of equipment in each local jail. See Maureen A. Sweeney, Fact or Fiction: The Legal Construction of Immigration Removal for Crimes, 27 Yale J Reg 47, 73 (2010) (describing the videoconferencing technology used by DEPORT).

<sup>20</sup> See David J. Venturella, Secure Communities: Identifying and Removing Criminal Aliens, 77 The Police Chief 40, 43 (Sept 2010) (explaining the standard process for sending fingerprints to the FBI and how Secure Communities enhances this system).

<sup>21</sup> The Automated Biometric Identification System (“IDENT”) database used by DHS is in some ways different than the criminal history databases relied on by the FBI because IDENT is designed to include records for lawful immigrants. The database includes all recent lawful immigrants, who have fingerprints taken at the point of entry to the United States, as well as noncitizens who have had previous contact with ICE (perhaps because they were arrested, placed in removal proceedings, or previously removed to another country). See US Visitor and Immigrant Status Indicator Technology Program (US-VISIT), Biometric Standards Requirements for US-VISIT: Version 1.0 1 (DHS Mar 15, 2010), online at [http://www.dhs.gov/xlibrary/assets/usvisit/usvisit\\_biometric\\_standards.pdf](http://www.dhs.gov/xlibrary/assets/usvisit/usvisit_biometric_standards.pdf) (visited Oct 27, 2012) (de-



base flags an arrestee as a potential immigration violator, ICE's Law Enforcement Support Center (LESC) assesses the person's status based on all available information; the ICE district office then decides whether to place a detainer on the person.<sup>22</sup> The detainer requests that the local agency hold the person for forty-eight hours in order to permit ICE to transfer the person to federal custody for the initiation of deportation proceedings.<sup>23</sup>

Secure Communities thus uses information sharing and biometric identity matching to dramatically reduce the labor required to screen arrestees. Nonetheless, while the technology made it conceivable that ICE could screen every arrestee in the country, it did not entirely automate the process of identifying and charging those believed to be in violation of immigration law. Database matches must still be evaluated by ICE agents trained to determine whether a noncitizen flagged by the database can be charged with being removable—a process that requires technicians at ICE's LESL to compile and analyze information from multiple databases, and in some cases could conceivably require that the suspect be interviewed.<sup>24</sup> This status determination must be made quickly enough for ICE to take action to apprehend the suspect while he remains in local police custody. Moreover, even if the suspect is deemed removable, local ICE offices must still determine whether charg-

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scribing IDENT as "US-VISIT's biometric database"); DHS, Privacy Impact Assessment for the Automated Biometric Identification System (IDENT) 2 (July 31, 2006), online at [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_usvisit\\_ident\\_final.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_ident_final.pdf) (visited Oct 27, 2012) (noting that the IDENT database maintains records of the biometric data of persons "encountered in DHS mission-related processes"). Because the database includes lawful immigrants, and even some immigrants who have since naturalized, a match in the database is not itself conclusive evidence that the arrestee is potentially deportable. Moreover, because some unlawful migrants have never had contact with ICE, a no-match in the database is not conclusive evidence that the person is a citizen or lawfully present.

<sup>22</sup> See ICE, Secure Communities: Quarterly Report; First Quarter FY 2009 at 3–4 (cited in note 16) (explaining how LESL provides information on aliens for local law enforcement agencies); ICE, 1st Quarterly Status Report (April–June 2008) for Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens 7 (DHS Aug 2008), online at [http://www.ice.gov/doclib/foia/secure\\_communities/congressionalstatusreportfy081stquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy081stquarter.pdf) (visited Oct 27, 2012).

<sup>23</sup> See 8 CFR § 287.7

<sup>24</sup> See ICE, 1st Quarterly Status Report (April–June 2008) at 7 (cited in note 22). For this reason, Secure Communities' relationship to the CAP program is quite complicated. It can be seen as a successor program to CAP, as a program operating in tandem with CAP, or as a biometric component of CAP itself, and agency documents sometimes describe the relationship between the programs in each of these three ways. See Is Secure Communities Keeping Our Communities Secure? Hearing before the Subcommittee on Immigration Policy and Enforcement of the House Committee on the Judiciary, 112th Cong, 1st Sess 8, 11–13 (2011) (statement of Gary Mead, Executive Associate Director for Enforcement and Removal Operations, ICE) ("Secure Communities Oversight Hearing") (describing Secure Communities as a successor to CAP, designed to address the latter's shortcomings); ICE, Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens; Strategic Plan 2–3 (DHS July 21, 2009), online at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesstrategicplan09.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesstrategicplan09.pdf) (visited Oct 27, 2012) (explaining the biometric data aspect of Secure Communities); ICE 1st Quarterly Status Report (April–June 2008) at 2 (cited in note 22) (describing Secure Communities as complementing CAP's operations).

ing the suspect is consistent with the agency's use of prosecutorial discretion, and must locate transportation resources and bed space necessary to take the person into custody.<sup>25</sup> These resource bottlenecks—combined with certain other technological challenges and the sheer scope of the task of communicating with the roughly thirty-one thousand booking locations around the country—all but guaranteed that simultaneous nationwide activation of Secure Communities was not an option.<sup>26</sup>

Instead, ICE rolled out the program, county by county, over the course of the last four years. The first handful of counties was activated on October 27, 2008.<sup>27</sup> Each month new counties have been added, and as of August 2012 3,074 counties—almost 97 percent of all of the counties in the United States—had been incorporated into Secure Communities.<sup>28</sup> Only 107 counties remained to be activated at the close of August, and ICE stated in May that it planned to activate all remaining stragglers in short order—well ahead of the rollout's initial timetable.<sup>29</sup>

While Secure Communities' activation has been staggered rather than simultaneous, the decision about which counties to activate first has been entirely the federal government's. This is also quite a departure from the earlier efforts at cooperative immigration enforcement, such as the 287(g) program. Under that program, individual states and local governments themselves decided whether they wanted to opt into the program. Unless both the local government and the Department of Justice agreed on the terms of coopera-

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<sup>25</sup> See ICE, Second Congressional Status Report Covering the Fourth Quarter Fiscal Year 2008 for Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens 20–23 (DHS Nov 7, 2008), online at [http://www.ice.gov/doclib/foia/secure\\_communities/congressionalstatusreportfy084thquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy084thquarter.pdf) (visited Oct 28, 2012) ICE, 1st Quarterly Status Report (April–June 2008) at 7 (cited in note 22).

<sup>26</sup> See, for example, ICE, Second Congressional Status Report: Fourth Quarter FY 2008 at 9–10 (cited in note 25) (noting the difficulties of coordinating among the wide variety of practices at tens of thousands of booking locations across the United States); ICE, 1st Quarterly Status Report (April–June 2008) at 7 (cited in note 22) (explaining various operational difficulties in implementing Secure Communities). Among the technological hurdles included the fact that many local jurisdictions did not have live scan fingerprint devices when the rollout commenced in 2008. See ICE, Second Congressional Status Report: Fourth Quarter FY 2008 at 10–11 (cited in note 25).

<sup>27</sup> See ICE, Secure Communities: IDENT/IAFIS Interoperability; Monthly Statistics through September 30, 2011 1 (DHS Oct 14, 2011), online at [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interoperability\\_stats-fy2011-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf) (visited Oct 27, 2012) (noting that the first county to be activated, Harris County, Texas, was activated on October 27, 2008); ICE, Secure Communities: Quarterly Report; First Quarter FY 2009 at 4–5 (cited in note 16) (listing counties in the initial deployment). Prior to that date, ICE operated a pilot program in a handful of counties in order to prepare for broader deployment. *Id.* at 4 (listing Boston, MA; Dallas County, TX; Harris County, TX; Wake County, NC; Henderson County, NC; Buncombe County, NC; and Gaston County, NC as early participants).

<sup>28</sup> See ICE, Activated Jurisdictions (DHS Aug 22, 2012), online at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (visited Oct 26, 2012).

<sup>29</sup> See Julia Preston, Despite Opposition, Immigration Agency to Expand Fingerprint Program, NY Times A10 (May 12, 2012) (noting that ICE officials sent emails to officials in states resistant to Secure Communities stating that the program would be implemented shortly in all outstanding jurisdictions).

tion, no arrangement under § 287(g) was possible.<sup>30</sup> In contrast, under Secure Communities counties are selected for activation by DHS regardless of whether they wish to participate.<sup>31</sup> Moreover, once activated, a local law enforcement agency has no real means of shirking or otherwise declining to participate in the program. As we explained above, the fingerprints that form the basis of the biometric identity check in Secure Communities are the very same fingerprint records that are provided by the local law enforcement agency to the FBI for purposes of criminal background checks. There is no way for a local government to forward these fingerprints for criminal purposes but prevent the FBI from sharing them with DHS. As a result, the only way for a local law enforcement agency to prevent the immigration check from taking place would be to stop fingerprinting altogether suspects who are arrested and booked into custody. It goes without saying that this is not an option for local law enforcement.<sup>32</sup>

The mandatory nature of Secure Communities was not initially made public.<sup>33</sup> When it was, swift criticism followed by some public officials and civil rights organizations.<sup>34</sup> Nonetheless, this feature of the program is advantageous from a research perspective. Because state and local governments cannot decline activation as a legal matter or avoid participation as a practical

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<sup>30</sup> INA § 287(g).

<sup>31</sup> See Preston, *Resistance Widens*, NY Times at A11 (cited in note **Error! Bookmark not defined.**) (referring to the ICE Director's announcement that the consent of local jurisdictions was not necessary for the federal government to implement Secure Communities).

<sup>32</sup> To be clear, we do not mean to suggest that there is nothing that local governments can do to resist the program. As one of us has written about elsewhere, and as we are exploring in other aspects of this project, local law enforcement agencies could resist participation by changing their arrest or bail practices. See Adam B. Cox and Eric A. Posner, *Delegation in Immigration Law*, 79 U Chi L Rev \*60–61 (forthcoming 2012).

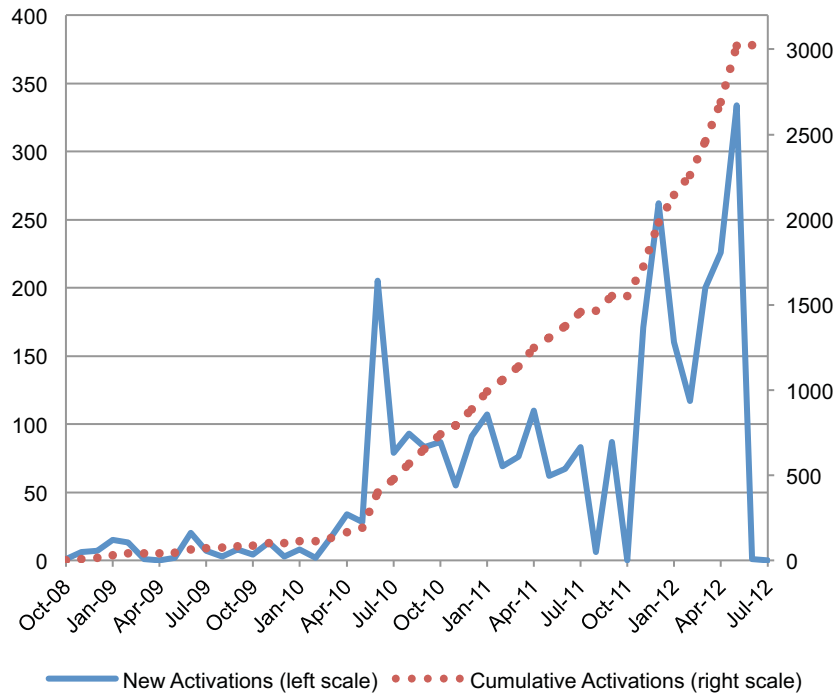
<sup>33</sup> See Office of Inspector General, *Communication Regarding Participation in Secure Communities* 4 (DHS Mar 2012), online at [http://www.oig.dhs.gov/assets/Mgmt/2012/OIG\\_12-66\\_Mar12.pdf](http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-66_Mar12.pdf) (visited Oct 27, 2012) (detailing the failure of DHS to provide clear guidance to the public and state and local governments regarding the mandatory nature of the program).

<sup>34</sup> See, for example, National Day Laborer Organizing Network (NDLON), *Insecure Communities: Press Packet; Uncovering the Truth and Understanding the Deceptive Deportation Program* \*4–11 (2011), online at <http://ndlon.org/pdf/scommbrief.pdf> (visited Oct 27, 2012) (gathering information critical of Secure Communities, particularly its mandatory nature); *Uncover The Truth: ICE and Police Collaborations* (Center for Constitution Rights, NDLON, and Cardozo Law School 2012), online at <http://uncoverthetruth.org> (visited Oct 6, 2012) (advocating for the end of Secured Communities and other immigration policies). Part of what generated confusion about the mandatory nature was that DHS initially adopted a practice of entering into Memoranda of Understanding with state governments (though not with local governments or law enforcement agencies) prior to activation. As soon as some states began to resist signing these agreements, however, the government made clear that the agreements were not required because the program required no actions by state or local officials; all that was required was a rerouting of the fingerprint data stream among the federal agencies. See Preston, *Resistance Widens*, NY Times at A11 (cited in note **Error! Bookmark not defined.**); NDLON, *Insecure Communities* at \*4–11 (cited in note 34).

matter, activation provides more complete information about the federal government's priorities.

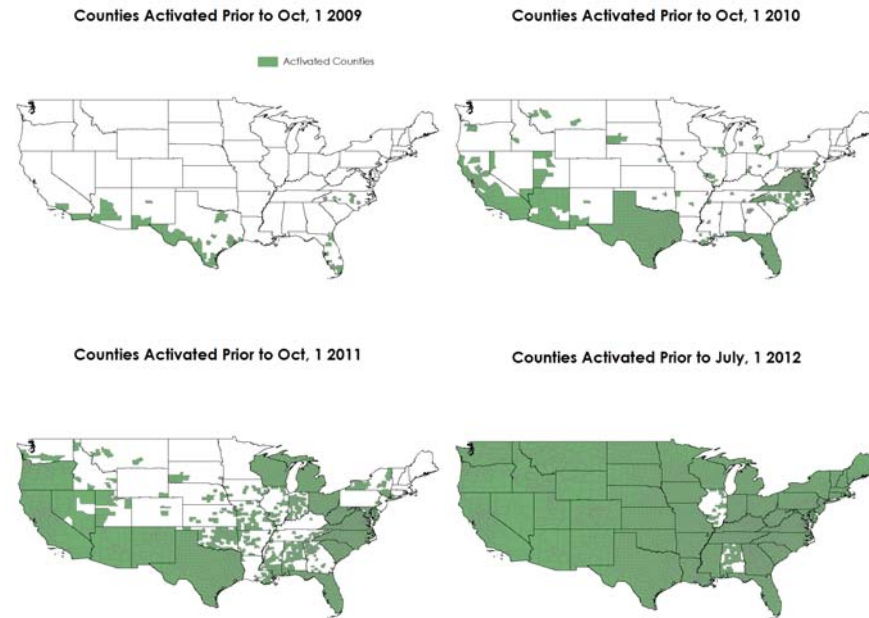
To provide an initial sense of the deliberate nature of DHS's selection of communities for activation, Figure 1 shows the sequence of county activations each month from October 2008 through July 2012. The left scale reports the number of new activations in each month; the right reports the cumulative number of activated counties. The program spread slowly in its first eighteen months. During that period, twenty or fewer counties were activated in each month. After a sharp spike in activations in June 2010, the program spread more rapidly. During the second eighteen months of the program, nearly one hundred counties were activated in each month. By the summer of 2011, roughly half of counties nationwide had been activated. Beginning in October 2011 and continuing to May 2012, the pace of activations accelerated once again. During this period, more than one hundred counties were activated in each month. By the summer of 2012, the number of monthly activations fell precipitously, with no activations occurring in some months, because very few counties that had not already been activated remained. By July 2012, the end of our study period, 97% of counties were active participants in Secure Communities.

FIGURE 1. NUMBER OF COUNTIES ACTIVATED UNDER SECURE COMMUNITIES: OCTOBER 28, 2008–JULY 31, 2012



While Figure 1 shows how the pace of activation has accelerated over time, what it cannot show is the dramatic way in which early and late activations differed. Figure 2 highlights these changes by mapping the cumulative activations in each twelve-month period following the beginning of the rollout. As the maps make clear, over time activations became much lumpier, with multiple counties within the same state frequently activated on the same date. During the program's first year the number of monthly activations was quite small. With such small numbers, it was rare for multiple counties within the same state to activate at the same time. Instead, scattered counties around the country were singled out for activation. As the rollout of the program progressed, however, it became increasingly common for several counties within one state to be activated simultaneously. And over time, more and more of these mass activations had the effect of bringing all the remaining inactive counties within a state into Secure Communities. In other words, early in the program's rollout activations can truly be characterized as county by county, while at the tail end of the rollout some activations were nearly statewide events.

FIGURE 2. PATTERN OF SECURE COMMUNITIES ACTIVATION



To get a better numerical sense for this pattern of mass activations, Table 1 reports the frequency of simultaneous activation events according to the proportion of counties within a state activated simultaneously and how far into Secure Communities' rollout the activation event occurred. The pattern is unmistakable. Mass activation events have become increasingly frequent as Secure Communities has neared its goal of nationwide coverage. For example, consider instances in which at least half of the counties in a state activated on the same day and, in so doing, brought the entire state into active status. No such events occurred during the first year of the program, but they have become increasingly frequent during later years. During the second year of the program, such mass-activation events occurred in two states and involved forty-six counties, which constituted 8 percent of counties activated during that year. During the third year of the program, such mass-activation events occurred in five states, and they included 208 counties or 23 percent of all counties activated during that period. In the last 10 months included in this study, such mass activations occurred in 26 states, encompassing 1,328 counties—over 90 percent of counties activated during that period. And as the table shows, the pattern remains unchanged regardless of the threshold chosen to define mass-activation events; raising it to 75 percent of a state's counties or lowering it to 25 percent does not alter the conclusion that early activations show a distinctly different pattern than later activations.

TABLE 1. FREQUENCY OF MASS ACTIVATIONS BRINGING ENTIRE STATE INTO ACTIVE STATUS

Percent of Counties in the State Activating on Same Date	Months since Launch of Secure Communities in October 2008			
	12 or fewer months (1)	13–24 months (2)	25–36 months (3)	37–46 months (4)
<u>25%</u>				
Number of Counties in Mass Activation	0	92	213	1,438
Counties in Mass Activations as a Percentage of All Counties Activated in this Period	0	16.2%	23.7%	97.6%
Number of States Brought into Complete Activation through these Mass Activations	0	3	7	30
<u>50%</u>				
Number of Counties in Mass Activation	0	46	208	1,328
Counties in Mass Activations as a Percentage of All Counties Activated in this Period	0	8.1%	23.1%	90.3%
Number of States Brought into Complete Activation through these Mass Activations	0	2	5	26
<u>75%</u>				
Number of Counties in Mass Activation	0	3	159	1,051
Counties in Mass Activations as a Percentage of All Counties Activated in this Period	0	0.5%	17.7%	71.4%
Number of States Brought into Complete Activation through these Mass Activations	0	1	4	22
Total Number of Counties Activated Nationwide during this Period	83	569	900	1,471

Figures 1 and 2, as well as Table 1, thus reveal a distinct evolution in the pattern of activation. In the first eighteen months or so of the program, the



pace of activations was slow, and early activations tended to pick off one or two counties within a state. The government did not seek to activate an entire state before moving on to another state. Instead, it carefully selected just one or two counties in each state for activation. Later on, as the pace of activations sped up, the process of selecting counties for activation clearly changed. The government did not simply accelerate the activation of scattered counties. Instead, the government shifted to mass activations in which all inactive counties remaining in a state were activated on the same date. This manner of activation implied a much quicker rate of adoption; in the last twelve months of our observation period, more counties were activated than during the first thirty months of the program. It also suggests that early activations were more deliberate and targeted.

## II. THE POLICY AND POLITICS OF TARGETED ENFORCEMENT

The pattern of Secure Communities' activation provides unique insight into the way a large, nationwide law enforcement agency wields discretion in order to satisfy its programmatic and political objectives. Constrained by limited resources, where did ICE initially concentrate its enforcement efforts? As a result of those decisions, what types of immigrants were most likely to be targeted by the program?

To develop hypothesis about Secure Communities' rollout strategy, it makes sense to begin with the public justifications for the program. As one might suspect from the name Secure Communities, agency officials have argued publicly that the program is designed to target enforcement resources at "criminal aliens" and to reduce crime.<sup>35</sup> When the program was unveiled in March 2008, it was described as "a multi-year initiative to more effectively identify, detain, and return removable criminal aliens."<sup>36</sup> This goal has been repeated time and again in press releases, in quarterly reports, and by agency officials from the head of Secure Communities up to Janet Napolitano, the Secretary of DHS.<sup>37</sup>

Prioritizing the removal of criminal offenders can be understood in two different ways. First, it may simply reflect the reality of resource constraints. As John Morton, the Director of ICE, has noted repeatedly, the government

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<sup>35</sup> See Secure Communities Oversight Hearing, 112th Cong, 1st Sess at 11(statement of Gary Mead)(cited in note 24)51 DHS, Press Release, Secretary Napolitano's Remarks on Smart Effective Border Security and Immigration Enforcement (Oct 5, 2011), online at <http://www.dhs.gov/ynews/speeches/20111005-napolitano-remarks-border-strategy-and-immigration-enforcement.shtm> (visited Oct 27, 2012).

<sup>36</sup> ICE, Press Release, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide (DHS Mar 28, 2008), online at <http://www.ice.gov/news/releases/0804/080414washington.htm> (visited Oct 27, 2012).

<sup>37</sup> See note 35 (citing statements made by Executive Associate Director of ICE Gary Mead and Secretary of DHS Janet Napolitano).

lacks the resources to remove every noncitizen who is in violation of immigration law.<sup>38</sup> The government must therefore decide which noncitizens in this large pool should be targets for deportation. Perhaps unsurprisingly, noncitizens who have committed serious crimes regularly top the list.

Second, Secure Communities' focus on criminal offenders may reflect the administration's determination that not all noncitizens who are in violation of immigration law should be deported. Recently the government has made explicit what has long been clear: that there is a distinction between those immigrants who are formally deportable and those whom the government actually wants to expend resources trying to deport.<sup>39</sup> Huge numbers of noncitizens are technically deportable, in part because the grounds of deportability have expanded dramatically over the years. But not all technically deportable noncitizens are considered undesirable by the government.<sup>40</sup> In fact ICE Director John Morton recently formalized this fact. Last June, he promulgated a memorandum on prosecutorial discretion directing line agents to decline to initiate removal proceedings against some noncitizens who are technically deportable, and describing in detail the factors that should be weighed in making the charging decision.<sup>41</sup> Around the same time, ICE also initiated a review of over 300 thousand pending deportation proceedings to decide which should be terminated.<sup>42</sup> And most recently, President Barack Obama announced that the administration would not seek to deport hundreds of thousands of unauthorized migrants who came to the United States as children and have led successful lives.<sup>43</sup>

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<sup>38</sup> See, for example, John Morton, Director, ICE, Memorandum for all Field Office Directors, Special Agents in Charge, Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011), online at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (visited Oct 27, 2012) (noting that prosecutorial discretion in instituting immigration proceedings against aliens is necessary because of the limited resources of ICE).

<sup>39</sup> See Julia Preston and John H. Cushman Jr., Obama to Permit Young Migrants to Remain in U.S., *NY Times* A1 (June 16, 2012) (explaining the Obama administration's recent decision to not seek deportation for certain young illegal immigrants). For one explanation of why the government might affirmatively prefer for some resident noncitizens to lack legal status, see Cox and Posner, 59 *Stan L Rev* at 851 (cited in note 4) (explaining that granting noncitizens legal status would decrease flexibility for the government in terms of immigration screening processes).

<sup>40</sup> In some ways this parallels the argument frequently made about American criminal law—that a large gap exists between legal and moral culpability. See, for example, William J. Stuntz, The Collapse of American Criminal Justice 1–8 (Belknap 2011); Josh Bowers, Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute, 110 *Colum L Rev* 1655, 1658–1661 (2010).

<sup>41</sup> See Morton, Memorandum, Exercising Prosecutorial Discretion at 2–5 (cited in note 38).

<sup>42</sup> See Christopher Goffard, Paloma Esquivel, and Teresa Watanabe, U.S. Will Review Cases of Illegal Migrants: Low-Risk Individuals, Including Students, the Elderly, and Crime Victims, Might Be Able to Avoid Deportation, *LA Times* A1 (Aug 19, 2011).

<sup>43</sup> See Preston and Cushman, Obama to Permit Young Migrants, *NY Times* at A1 (cited in note 39); Janet Napolitano, Secretary of Homeland Security, Memorandum for David V. Aguilar, Acting Commissioner US Customs and Border Protection, Alejandro Mayorkas, Director, US Citizenship and Immigration Services, John Morton, Director, ICE, Exercising Prosecutorial Discretion with Respect to

If Secure Communities is designed to target serious criminals in order to make communities more secure, as the government argues, than one would expect the rollout to reflect that fact. Without the ability to activate everywhere simultaneously, the government was forced to choose which communities to activate first. One prediction is that the government would bring the program online first in counties with the biggest crime problems—that is, places with the highest crime rates, or perhaps the highest rates of violent crime. Indeed, the executive director of Secure Communities has stated that the rollout would “initially focus[] on jurisdictions that have the highest estimated volumes of criminal aliens or criminal activity while remaining flexible.”<sup>44</sup> Of course, as the statement notes, the focus might not be only on counties that have high crime rates if the goal is to reduce crime using a program that incapacitates and deters only noncitizens. Instead, the agency might target communities that have both a high crime rate and a large number of noncitizens. Or the agency might employ more elaborate strategies to predict which communities have the highest numbers of noncitizens engaged in criminal activity. The strategic planning documents undergirding Secure Communities purport to do just this: they speak about the development of a “risk-based” rollout strategy that prioritizes activation in part based on a model designed to predict the number of noncitizens who will be arrested by local law enforcement.<sup>45</sup> While details about this model have not been made publicly available, crime-rate data appears to be a central component.<sup>46</sup>

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Individuals Who Came to the United States as Children 1 (June 15, 2012), online at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (visited Oct 27, 2012) (announcing the policy of prosecutorial discretion to not institute removal proceedings against certain young migrants).

<sup>44</sup> Venturella, 77 *The Police Chief* at 44 (cited in note 20) (emphasis added) (laying out the basic elements of Secure Communities and plans for its development). This statement suggests a focus on crime rates—though it also suggests that rollout was sufficiently “flexible” to incorporate non-crime-related factors. It also highlights that, in addition to focusing on areas with high levels of “criminal activity,” the agency might target areas with the highest rates of crime by noncitizens, or with large numbers of “criminal aliens.” See *id.* While in practice the rate of immigrant offending is unknown, the government might pursue this strategy by targeting areas with both (a) high crime rates and (b) a high fraction of noncitizen population. We discuss this possibility below. See Part II.C. In future work, we will show that the serial nature of the Secure Communities rollout makes it possible to draw inferences about the rate of immigrant offending.

<sup>45</sup> Department of Homeland Security Appropriations for 2010, Hearing on Priorities Enforcing Immigration Law before the Subcommittee on Homeland Security of the House Committee on Appropriations, 111th Cong, 1st Sess 915, 943, 953 (2009) (statement of David Venturella, Executive Director of Secure Communities, ICE) (“Priorities Enforcing Immigration Law Hearing”) (indicating that increased deployment of biometric identification technology would result in more data, which would allow ICE to target priority areas with more precision, enabling them to “predict and forecast the locations where we may encounter the greatest numbers of current and future criminal alien populations”); ICE, Secure Communities: Strategic Plan at 2–3 (cited in note 24) (indicating that the agency was “initiating risk-based deployment to cover increasing percentages of the estimated criminal alien population”); ICE, 1st Quarterly Status Report (April–June 2008) at 7–8 (cited in note 22) (explaining that the risk-based implementa-

Despite its moniker, of course, crime reduction and public safety is not the only plausible goal Secure Communities might be designed to pursue. While this has been the agency's standard justification for the program, many critics of Secure Communities have argued that the government is instead using Secure Communities to target "illegal immigration," or simply to make deportations cheaper.<sup>47</sup> Reducing the cost of immigration enforcement is clearly one advantage of tacking mandatory immigration screening onto every local arrest. If efficiency were the goal, one would predict that the government would initially direct the program's limited resources to areas with large numbers of noncitizens who are in violation of immigration law, regardless of whatever they had engaged in criminal activity. Relatedly, the government might target areas with large numbers of unauthorized migrants, or some other subset of all immigration violators. In fact, ICE itself has repeatedly

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tion plan for Secure Communities is determined at least partly on historical data on violent criminal aliens).

<sup>46</sup> See ICE, Criminal Alien Population Projection Analysis (CAPPA) Projected Arrests and Releases—County Level (DHS Nov 2010), online at <http://www.ice.gov/doclib/foia/reports/cappa-projected-arrests-releases-county-level.xls> (visited Oct 27, 2012) (forecasting, in an Excel document, annual noncitizen releases from the custody of non-ICE law enforcement). According to agency documents, the CAPPA analysis included FBI violent crime statistics for 2007; 2000 US Census percentages of foreign-born, noncitizen populations; apprehensions and charging documents issued by ICE's own Detention and Removal Operations (DRO); and "CAP Limited Coverage, High-Risk Assessment for Tier 2 facilities," presumably some internal analysis drawn from Tier 2 (second highest-risk) federal, state, and local prisons and jails. ICE, Secure Communities: Quarterly Report; First Quarter FY 2009 at 30 (cited in note 16) (listing several factors in determining the criminal alien population, and thus the relative need for Secure Communities, in various locations). Later congressional reports note refinements to the model. See, for example, ICE, Secure Communities: Quarterly Report; Fiscal Year 2009 Report to Congress—Third Quarter 26 (DHS Aug 27, 2009), online at [http://www.ice.gov/doclib/foia/secure\\_communities/congressionalstatusreportfy093rdquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy093rdquarter.pdf) (visited Oct 27, 2012) (describing recent attempts to both leverage new sources of data and verify existing data in order to refine criminal alien population estimates); ICE, Secure Communities: Quarterly Report; Fiscal Year 2009 Report to Congress—Second Quarter 26 (DHS June 1, 2009), online at [http://www.ice.gov/doclib/foia/secure\\_communities/congressionalstatusreportfy092ndquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy092ndquarter.pdf) (visited Oct 27, 2012) (noting that ICE is compiling statistics from surveys of jails and prisons in order to further refine criminal alien population estimates).

<sup>47</sup> See, for example, Pat Quinn, Governor of Illinois, Letter to Marc Rapp, Acting Assistant Director of Secure Communities, Secure Communities Program 1 (May 4, 2011), online at [http://epic.org/privacy/secure\\_communities/sc\\_ill.pdf](http://epic.org/privacy/secure_communities/sc_ill.pdf) (visited Oct 27, 2012) (pointing out that while the agency had implied that only those aliens convicted for serious offenses would be targeted by Secure Communities, "more than 30% of those deported from the United States, under the program, have never been convicted of any crime, much less a serious one"); Julia Preston, States Resisting Program Central to Obama's Immigration Strategy, NY Times A18 (May 6, 2011) (describing the criticism of Secure Communities by various state officials who do not want the program implemented in their jurisdictions); ACLU Statement on Secure Communities, ACLU Blog of Rights (ACLU Nov 10, 2010), online at <http://www.aclu.org/immigrants-rights/aclu-statement-secure-communities> (visited Oct 27, 2012) (outlining the chief criticisms related to the "nationwide controversy" over Secure Communities); Dan Frosch, In Colorado, Debate Over Program to Check Immigration History of the Arrested, NY Times A16 (July 30, 2010) (quoting Cheryl Little, Executive Director for the Florida Immigrant Advocacy Center in Miami: "ICE claims, as it has done for years, that it is targeting dangerous criminals. Yet the program screens the fingerprints of anyone arrested by local police, not just those convicted of crimes").

identified one set of immigration violators as a target of Secure Communities: “[R]epeat violators who game the immigration system, those who fail to appear at immigration hearings, and fugitives who have already been ordered removed by an immigration judge.”<sup>48</sup>

It would be difficult, if not impossible, for the government to target directly communities with large numbers of immigrant violators or unauthorized immigrants. There are no reliable local measures of immigrant violators generally, or even of unauthorized population specifically. The national estimates of unauthorized population produced by the Pew Center and other organizations are subject to considerable uncertainty, and that uncertainty multiplies if one attempts to decompose the numbers into smaller units of geogeography.<sup>49</sup> For this reason, states are the smallest units for which the Pew Center produces estimates of unauthorized population.<sup>50</sup>

Nonetheless, were the government interested in targeting the unauthorized it could rely on other variables that are correlated with the unauthorized population. Proximity to the southern border is one potential correlate, given that a large fraction of unauthorized migrants enter across the southern border and live in border regions.<sup>51</sup> A second is a community’s noncitizen or

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<sup>48</sup> ICE, Secure Communities: The Basics (DHS Aug 31, 2012), online at [http://www.ice.gov/secure\\_communities/#top](http://www.ice.gov/secure_communities/#top) (visited Oct 27, 2012). See also ICE, Secure Communities: Quarterly Report; Fiscal Year 2011 Report to Congress—First Quarter 7 (DHS Mar 1, 2011), online at [http://www.ice.gov/doclib/foia/secure\\_communities/congressionalstatusreportfy111stquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy111stquarter.pdf) (visited Oct 27, 2012); ICE, Secure Communities: Quarterly Report; Fiscal Year 2010 Report to Congress—First Quarter 6 (DHS Mar 1, 2010), online at [http://www.ice.gov/doclib/foia/secure\\_communities/congressionalstatusreportfy101stquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy101stquarter.pdf) (visited Oct 27, 2012); ICE, Secure Communities: Quarterly Report; Second Quarter FY 2009 at 30 (cited in note 46); Secure Communities: Quarterly Report; First Quarter FY 2009 at 26 (cited at note 16).

<sup>49</sup> Jeffrey S. Passel and D’Vera Cohn, Unauthorized Immigrant Population: National and State Trends, 2010 3 (Pew Hispanic Center Feb 1, 2011), online at <http://www.pewhispanic.org/files/reports/133.pdf> (visited Oct 27, 2012). See also Michael Hoefler, Nancy Rytina, and Bryan Baker, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011 1 (DHS Office of Immigration Statistics Mar 2012), online at [http://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) (visited Oct 27, 2012).

<sup>50</sup> Jeffrey S. Passel and D’Vera Cohn, A Portrait of Unauthorized Immigrants in the United States 1 (Pew Hispanic Center Apr 14, 2009), online at <http://www.pewhispanic.org/files/reports/107.pdf> (visited Oct 27, 2012) (.

<sup>51</sup> See, for example, Passel and Cohn, Portrait of Unauthorized Immigrants at 21 (cited in note 50) (noting that Mexicans make up the largest portion of unauthorized immigrants and that unauthorized Mexican immigrants are generally concentrated in the South and Southwest). DHS Secretary Janet Napolitano officially made border areas a priority for activation in March 2009, when she announced the Southwest Border Security Initiative. But her stated reason for this prioritization was to “crack down on Mexican drug cartels and target the violence they are spawning.” DHS, Press Release, Secretary Napolitano Announces Major Southwest Border Security Initiative (Mar 24, 2009), online at [http://www.dhs.gov/ynews/releases/pr\\_1237909530921.shtm](http://www.dhs.gov/ynews/releases/pr_1237909530921.shtm) (visited Oct 27, 2012); Priorities Enforcing Immigration Law Hearing, 111th Cong, 1st Sess at 931–32 (statement of Mary M. Forman, Director of Office of Investigations, ICE) (cited in note 45) (describing Secretary Napolitano’s March 24, 2009 press release announcing the Southwest Border Security Initiative as a response to increased drug cartel violence in Mexico); DHS, Press Release, Secretary Napolitano Announces Secure Communities Deployment to

foreign-born population—though the latter measure includes naturalized citizens and both proxies includes lawful migrants as well as those who are in violation of immigration law. A third potential proxy is the size of a community’s Hispanic population. Nearly half of all immigrants living in the United States today are of Hispanic origin, and more than three-quarters of all unauthorized immigrants are from Central or South America.<sup>52</sup>

Of course, all of these proxies are both over- and under-inclusive. For example, while most unauthorized migrants are Hispanic, the vast majority of Hispanic residents in the U.S. are not unauthorized. Nonetheless, there is some evidence that the government is using imperfect proxies to evaluate progress under the rollout. In DHS’s 2011 appropriations report for Congress, for example, the agency emphasized as a key Secure Communities accomplishment from 2009 the deployment of biometric technology to “approximately 31 percent of the estimated nationwide number of the foreign born non citizen population.” The goals for 2010 included “covering approximately 96 percent of the estimated nationwide number of the foreign born non citizen population.”<sup>53</sup> Notably, the agency’s own chosen metric here is not the population of immigration violators; nor is it the population of noncitizens engaged in criminal activity or convicted of crimes. Instead, the agency touts coverage of areas with large numbers of noncitizens.<sup>54</sup> We should note, of course, that the twin objectives of immigration and crime control are not mutually exclusive. One could imagine the program pursuing both goals to a certain extent—perhaps a realistic assumption in a world where agency officials regularly single out both violent criminal offenders and repeat immigration offenders as the highest priority enforcement targets. Moreover, as we noted above, even if the government’s ulti-

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All Southwest Border Counties, Facilitating Identification and Removal of Convicted Criminal Aliens (Aug 10, 2010) online at [http://www.dhs.gov/ynews/releases/pr\\_1281457837494.shtm](http://www.dhs.gov/ynews/releases/pr_1281457837494.shtm) (visited Oct 27, 2012) (announcing the implementation of Secure Communities in twenty-five southwest border counties); Secure Communities: Quarterly Report, Second Quarter FY 2009 at 8–9 (cited in note 46). See also Secure Communities Oversight Hearing, 112th Cong, 1st Sessat 13 (statement of Gary Mead) (cited in note 24) (“Since 2008, ICE has expanded . . . Secure Communities from 14 jurisdictions to more than 1,729 today, including every jurisdiction along the Southwest border.”) (emphasis added).

<sup>52</sup> See Eileen Patten, Statistical Portrait of the Foreign-Born Population in the United States, 2010, table 6 (Pew Hispanic Center Feb 21, 2012), online at <http://www.pewhispanic.org/2012/02/21/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2010/#6> (visited Oct 27, 2012) (showing that 18,817,105 of 39,916,875 immigrants reported their ethnicity as Hispanic); Passel and Cohn, Portrait of Unauthorized Immigrants at 21 (cited in note 50) (noting that 59 percent of unauthorized migrants are from Mexico, 11 percent are from other Central American countries, and 7 percent are from South America).

<sup>53</sup> *Id.* at 68–69 (highlighting ICE plans for fiscal years 2010 and 2011).

<sup>54</sup> ICE, Salaries and Expenses: Fiscal Year 2011; Overview—Congressional Justification 67–68 (DHS), online at [http://www.ice.gov/doclib/foia/secure\\_communities/fy2011overviewcongressionaljustification.pdf](http://www.ice.gov/doclib/foia/secure_communities/fy2011overviewcongressionaljustification.pdf) (visited Oct 27, 2012) (highlighting key ICE achievements in fiscal year 2009).



mate focus were purely crime control, such a focus might not lead the government to rely exclusively on crime rates to determine rollout strategy. Nonetheless, these slightly different hypotheses about the government's means and ends all point to the same broad conclusions about what we should expect of the rollout strategy: the crime reduction strategy leads to targeting communities with high crime rates, and the immigration enforcement strategy leads to targeting communities with high levels of some proxy for immigration violators.

In addition to potential programmatic objectives, such as targeting serious criminals or reducing the cost of immigration enforcement, political objectives or pressures may also have shaped the use of discretion in Secure Communities' rollout. Some communities have applauded the idea of checking immigration status as part of the criminal process.<sup>55</sup> A number of states have even required such checks in the absence of any federal agreement or program.<sup>56</sup> In contrast, other communities have objected to Secure Communities. They have argued that the program undermines community policing by making local citizens wary of the police and imposes significant detention costs on local governments asked to hold prisoners in local jails until ICE agents take custody.<sup>57</sup> These complaints have garnered national media attention, with prominent governors such as Deval Patrick and Pat Quinn arguing that Secure Communities should not be implemented in their states.<sup>58</sup>

If agency officials are sensitive to the possibility of political support or backlash against their program, as the literature on cooperative federalism suggests will often be the case,<sup>59</sup> then we would predict that the program would be activated first in communities that supported increased immigration enforcement, with activation delayed for communities that opposed the enforcement measure. Here too, the hypothesis finds support in the agency's public statements: agency documents state that early activation may be priori-

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<sup>55</sup> See generally What Others Are Saying... about Secure Communities (ICE June 2011), online at <http://www.ice.gov/doclib/secure-communities/pdf/what-others-say.pdf> (visited Oct 27, 2012) (collecting comments supportive of Secure Communities from across the country).

<sup>56</sup> See, for example, SB 1070 § 2, codified at Ariz Rev Stat Ann § 11-1051(B) (requiring law enforcement officials to check the immigration status of individuals they encounter in the course of their duties and whom they suspect are in violation of immigration law).

<sup>57</sup> See, for example, Quinn, Letter, Secure Communities Program at 1 (cited in note 47).

<sup>58</sup> See Deval L. Patrick, Hillel Moral Voices Lecture (Apr 30, 2012), online at <http://www.mass.gov/governor/presooffice/speeches/20120430-tufts-moral-voices-immigration.html> (visited Oct 27, 2012); Elise Foley, Massachusetts Rejects Secure Communities Immigration Enforcement Program, Huffington Post (June 6, 2011), online at [http://www.huffingtonpost.com/2011/06/06/massachusetts-rejects-immigration-enforcement-program\\_n\\_871970.html](http://www.huffingtonpost.com/2011/06/06/massachusetts-rejects-immigration-enforcement-program_n_871970.html) (visited Oct 27, 2012).

<sup>59</sup> See, for example, Roderick M. Hills Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich L Rev 813, 816 (1998).



tized for those communities that have expressed an interest in partnering with ICE.<sup>60</sup>

As a starting point, therefore, we approach the activation data with three quite different hypotheses about the role discretion may have played in the program's implementation. Two of the hypotheses focus on the possibility that officials pursued implementation in places where the social need was considered greatest from a policy perspective—though the policy need can be understood in at least two different ways, depending on whether the focus is on serious criminals or not. The other hypothesis focuses on the possibility that officials pursued implementation in places where the political benefits were biggest and the risk of backlash the smallest.

### III. TESTING THE HYPOTHESES

To test these hypotheses, as well as other questions that we will explore in future work, we collected a large set of data related to both immigration and criminal enforcement. For purposes of this article we assembled the data into a cross-section of US counties. For each county, the data include four large sets of information:

Secure Communities operational data. Through a Freedom of Information Act (FOIA) request, we secured comprehensive statistics for Secure Communities that ICE collected as part of its implementation of the program. When combined with publicly available data, these statistics cover the period from October 2008 through July 2012. For this Article, the most relevant data provide the date on which Secure Communities was activated in each county around the country. But the data are far richer than this. They also include a tremendous amount of operational data concerning the program. On a county-by-month basis, the data include a wealth of information about the investigative, charging, and dispositional stages of enforcement, including: number of submissions; number of hits in the IDENT immigration database;<sup>61</sup> number of persons against whom ICE initiated removal proceedings; and number of removals. Moreover, this county-by-month data is further broken down by offense category, making it possible to separate serious offenders from minor offenders from persons with no criminal convictions.

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<sup>60</sup> See ICE, *1st Quarterly Status Report (April–June 2008)* at 7–8 (cited in note 22).

<sup>61</sup> The IDENT database includes persons who have lawfully immigrated to the United States in recent years, as well as persons who have had an enforcement encounter with ICE. Thus, even over the time period it covers the IDENT database is both over- and under-inclusive as a source of information about immigration violators. Many lawful immigrants and citizens are in the database, and unauthorized migrants who have never been deported are unlikely to be in it. See note 21.

Demographic data. From the State and Census County QuickFacts file,<sup>62</sup> we assembled a variety of county-level demographic data. These data include each county's racial composition, foreign-born population, crime rate, level of wealth and poverty, population density, police force size, and level of support for the Republican presidential candidate in 2004.

Immigration lawmaking and enforcement data. Using publicly available data, we collected information on cooperative enforcement agreements entered into by local governments pursuant to § 287(g) of the INA. Using data generously provided by Huyen Pham and Pham Hoang Van, we assembled information on recent state and local legislation relating to immigration enforcement.<sup>63</sup>

Criminal enforcement data. From the Uniform Crime Reports, we assembled data on both offending and arrest rates. These data are reported each month by every law enforcement agency in the country. Both the offense and arrest data are broken down by offense type and provide information on the race of persons arrested (though the demographic information does not include coding on Hispanic origin). We aggregated individual law enforcement agency data up to the county level for the year 2007, the year before Secure Communities was implemented.<sup>64</sup>

#### A. The Basic Patterns

To test our hypotheses about Secure Communities, we begin with some summary statistics about the differences between early- and late-activating

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<sup>62</sup> See USA Counties (US Census Bureau), online at <http://censtats.census.gov/usa/usa.shtml> (visited Oct 15, 2012); USA Counties Information, (US Census Bureau), online at <http://www.census.gov/support/USACdata.html> (visited Oct 15, 2012).

<sup>63</sup> This data was collected by Pham and Pham as part of their project studying the adoption of local immigration laws and the local political climate for migrants. For parts of their research, see generally Huyen Pham and Pham Hoang Van, The Economic Impact of Local Immigration Regulation: An Empirical Analysis, 32 *Cardozo L Rev* 485 (2010); Huyen Pham and Pham Hoang Van, Measuring the Climate for Immigrants: A State-by-State Analysis, in Gabriel Jack Chin and Carissa Hessick, eds, Illegals in the Backyard: State and Local Regulation of Immigration Policy (NYU forthcoming 2012).

<sup>64</sup> The FBI releases the Master Arrest and Offense files on a lagged basis, so 2011 data will not become available until late 2012 or early 2013. See FBI, Uniform Crime Reports: UCR Publication Schedule (Tentative), online at <http://www.fbi.gov/about-us/cjis/ucr/publication-schedule> (visited Oct 27, 2012) (providing the approximate dates on which various crime-related statistics and reports will be released by the FBI).

counties. The government has said repeatedly that it targeted high-priority areas for early activation. As a result, the counties in which Secure Communities was first activated provide revealing information about the government's highest priorities for the program. Moreover, as we explained earlier, ICE activated only a very small number of scattered counties in the first twelve months of the program—slightly more than 3 percent of all counties. The slow rollout of the program highlights the deliberateness of the choices made in launching the program and permits us to use county-level data about crime and demographics to see whether the rollout patterns are consistent with the various goals the government might have pursued.

In these summary statistics we focus on our first two hypotheses: targeting crime and criminal violators on the one hand, and targeting immigration violators on the other. (We add our third hypothesis—targeting pockets of local political support—in the later sections.) Our prediction above was that the first goal would lead the government to target high-crime communities for early activation, while the second goal would lead the government to target proxies for immigration violators, such as border proximity, noncitizen population, or perhaps Hispanic population.

TABLE 2. COMPARING THE CHARACTERISTICS OF  
EARLY AND LATER ACTIVATING COUNTIES

Characteristic	Counties Activated within First 12 Months of Program (1)	Counties Activated Later (2)	Difference of (1) – (2)
County is on Southern Border with Mexico	.265 (.078)	.0023 (.0014)	.263** (.078)
County is on the Gulf of Mexico	.133 (.044)	.015 (.080)	.118** (.038)
Fraction of Population Noncitizen	.095 (.007)	.025 (.003)	.070** (.007)
Fraction of Population Hispanic	.379 (.091)	.068 (.016)	.312** (.080)
Log Violent Crime Rate	5.832 (.114)	4.717 (.207)	1.115** (.240)
Log Property Crime Rate	7.930 (.072)	6.917 (.255)	1.013** (.265)
N	83	2,994	3,077

\*\*p<0.05 Note: The table reports means, with standard errors in parentheses.

Table 2 tests these simple predictions by comparing crime rates, fractions of the noncitizen and Hispanic population, and border proximity by date of activation. The first row shows that counties activated within the first

twelve months of Secure Communities were concentrated along the southern border. Counties along the southern border with Mexico represent only 1 percent of all US counties, but they accounted for nearly 27 percent of the counties activated during the first year of Secure Communities. After the first year, these border counties accounted for only about one-quarter of one percentage point of counties activated. The concentration of activations is unmistakable and highlights the fact that the overwhelming majority of counties along the southern border with Mexico were activated during Secure Communities' first year. Counties adjacent to the Gulf of Mexico were also more likely to activate during the first year of the program.

The third and fourth rows show that locations activated in the first year also had higher proportions of noncitizens and Hispanics in their populations. The magnitudes of these differences were substantial. Noncitizens accounted for 9.5 percent of persons in counties activated during the first year of Secure Communities, compared to only 2.5 percent in counties activated later. In other words, the proportion of the noncitizens in communities activated earliest was more than three times that of communities activated later.

The differences with respect to the proportion of Hispanics in the population were still larger. Hispanics constituted 37.9 percent of the population in early-activating counties and only 6.8 percent in counties activating later. That is, the fraction of Hispanics in counties activated during the first year of Secure Communities was more than five times that of counties activated later. A remarkable feature of this difference is that it cannot be fully explained by the concentration of early activations in border counties. Border counties comprise about 27 percent of early activations, and a higher fraction of their population is Hispanic than the average among other counties. Yet, even if border counties were populated entirely by Hispanics, the average fraction of Hispanic population in early-activating counties would not exceed 27 percent. Instead, the nearly 38 percent share of Hispanics in early-activating counties can only be explained by the fact that the government targeted counties that were not on the southern border but that did have proportionately large Hispanic populations. These demographic differences suggest that Secure Communities may have been directed in part at counties where more immigration violators were expected to be found.

The final two rows of Table 2 contemplate the other possible policy objective of Secure Communities: crime control. They compare the rates of violent and property crimes in early- and later-activating counties. Consistent with conventional practice in the academic literature, the crime rates are expressed as natural logarithms of the crime rate scaled up by 100 thousand. Crime rates vary widely across jurisdictions, and this convention places less

weight on outlying locations with extremely high or low crime rates.<sup>65</sup> Early-activating counties had higher rates of both violent and property crime, and the differences are statistically meaningful. The difference suggests that Secure Communities may have been directed in part at counties with more severe crime problems.

As mentioned above, the hypotheses about the goals of Secure Communities are not mutually exclusive, and Table 2 provides some support for both hypotheses about enforcement priorities. But the table also shows that the speed of activation correlates more strongly with certain county characteristics than with others, suggesting that one objective of the program had higher priority. The differences in crime rates were more modest than those in the measures of immigration enforcement. For example, the difference of just over one log point for the violent crime rate appears small. When expressed in levels, the violent crime rate in the first counties to activate is double that of later-activating counties. Still, this difference is much smaller than the 300 percent difference in the proportion who are noncitizens or the 500 percent difference in the proportion who are Hispanic. The upshot is that the different county characteristics of early activators suggest that both general immigration enforcement and crime control priorities shaped Secure Communities' rollout. But the selection of counties appears more consistent with the desire to target immigration violators generally—rather than just those engaged in serious criminal activity—because early activations targeted counties close to the border and counties with a high proportion of noncitizen and Hispanic persons in the population.

#### B. Hazard Analysis

Summary statistics offer some clues about the enforcement priorities of Secure Communities, but they do not control for numerous other factors that are potentially relevant. To better assess whether the patterns in Table 2 are robust to other influences, we proceed to multivariate analysis.

In this Section, we present estimates from survival or hazard models, which are particularly well suited to the analysis of the rollout of Secure Communities. Hazard models have two important advantages for present purposes. First, they allow us to focus directly on how much time passes before a county is activated under Secure Communities. Waiting time provides the best information about the government's prioritization because the length of time until activation measures the temporal sequencing of the program's rollout. Alternative approaches, such as binary measures of whether

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<sup>65</sup> For an explanation of the use of natural logarithms of the crime rate rather than the crime rate itself, see Lance Hannon, Peter Knapp, and Robert DeFina, *Racial Similarity In the Relationship between Poverty and Homicide Rates: Comparing Retransformed Coefficients*, 34 Soc Science Rsrch 893, 898–901 (2005).

the program has been activated in a county, are not appropriate because the program will eventually operate nationwide. We measure waiting times as commencing in October 2008, the first month of Secure Communities' rollout, and ending when the individual county activates.

The second advantage of hazard analysis is that it produces robust results even when the event of interest—here activation—has not yet occurred for some members of the sample. At the time of our study, 3 percent of counties in the United States had not yet activated the program. Even though these counties are (right) censored—in that the event of interest has not yet occurred for them—hazard analysis permits the outcomes for these counties to be related to a set of explanatory variables.<sup>66</sup>

In the analysis that follows, the hazard function for a county is the risk of the event (activation) occurring at time  $t$ , conditional on having survived (not activated) until that time.<sup>67</sup> The specific hazard models presented here are Cox proportional hazard models, which are widely used because they avoid bias by not making an arbitrary assumption about the baseline hazard.<sup>68</sup> The relationship of an explanatory variable to the hazard (or risk) of the event is more easily interpreted with hazard ratios—that is, the ratio of a risk of a particular event relative to the baseline risk—and for that reason, Table 3 reports hazard ratios. Hazard ratios of greater than one imply that the variable is associated with an increased hazard or shorter waiting time, and a hazard ratio of less than one suggests the variable is associated with a lower hazard or longer waiting time.

To test our three hypotheses, the hazard models in Table 3 include explanatory variables tracking county demography, proximity to the border, crime, and potential political support for Secure Communities.<sup>69</sup> The models also include fixed effects for each state, though these are not reported in the tables in order to conserve space.<sup>70</sup>

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<sup>66</sup> See S. W. Lagakos, *General Right Censoring and Its Impact on the Analysis of Survival*, 35 *Perspectives in Biometry* 139, 139 (1979).

<sup>67</sup> Slightly more formally, the hazard is specified as  $h_i(t, \mathbf{X}_i) = h_0(t)\exp(\mathbf{X}_i\boldsymbol{\beta})$ , where  $\mathbf{X}_i$  are county  $i$ 's observed characteristics and  $\boldsymbol{\beta}$  is a vector of coefficients. The term  $\exp(\mathbf{X}_i\boldsymbol{\beta})$  shifts the baseline hazard function, with a positive coefficient indicating that the explanatory variable increases the hazard.

<sup>68</sup> See generally D.R. Cox, *Regression Models and Life Tables*, 34 *J Royal Stat Society Series B (Methodological)* 187 (1972).

<sup>69</sup> As described above, we follow the convention of expressing crime rates in natural logarithms. For counties with zero values for crime rates, we also followed the convention of replacing the missing values for these log crime rates with zeroes and including an indicator variable taking a value one when such substitutions were made. We do not report in the tables below the estimates for these indicator variables.

<sup>70</sup> The inclusion of fixed effects for states ensures that our results are driven by county-level characteristics rather than state-level characteristics. The inclusion of fixed effects is particularly important in light of a fact we documented earlier—that later activations were more likely to be lumpy, state-wide affairs.

TABLE 3. ESTIMATING THE TIME UNTIL ACTIVATION

County Characteristic	(1)	(2)	(3)	(4)	(5)	(6)
County is on Southern Border with Mexico	4.187** (1.006)	—	4.859** (1.480)	4.191** (1.037)	4.190** (1.021)	4.103** (.908)
County is on the Gulf of Mexico	1.581 (.575)		1.619 (.623)	1.584 (.586)	1.582 (.574)	1.587 (.581)
Fraction of Population Hispanic	2.166** (.565)	3.282** (1.124)	—	2.132** (.556)	2.152** (.556)	2.205** (.582)
Fraction of Population Noncitizen	.937 (1.205)	.607 (.797)	3.848 (4.066)	—	—	1.257 (1.497)
Fraction of Population Foreign-Born	—	—	—	—	.970 (1.130)	
Change in Fraction of Population Hispanic 2000–2010	—	—	—	—	—	.432 (.758)
Fraction of Population Black	.570 (.268)	.508 (.250)	.529 (.256)	.570 (.268)	.570 (.268)	.584 (.277)
Log Violent Crime Rate	1.025 (.024)	1.201 (.023)	1.028 (.024)	1.025 (.024)	1.025 (.024)	1.026 (.024)
Log Property Crime Rate	1.013 (.020)	1.021 (.021)	1.013 (.020)	1.013 (.021)	1.013 (.020)	1.013 (.020)
Log Population Density	1.231** (.043)	1.246** (.043)	1.231** (.043)	1.231** (.045)	1.231** (.041)	1.231** (.042)
Log Income per Capita	.945 (.117)	.936 (.130)	.904 (.111)	.943 (.129)	.945 (.118)	.951 (.115)
Fraction in Poverty	.474 (.348)	.603 (.381)	.521 (.348)	.472 (.359)	.473 (.350)	.458 (.354)
Fraction of Vote in 2004 for President Republican	.750 (.403)	.746 (.461)	.723 (.401)	.749 (.407)	.749 (.406)	.775 (.378)
Count of Local Anti-Immigrant Legislation	.997 (.082)	.987 (.084)	.997 (.082)	.997 (.082)	.997 (.082)	.999 (.084)
Local 287(g) Agreement	4.164** (1.493)	4.441** (1.681)	4.109** (1.458)	4.159** (1.487)	4.162** (1.498)	4.151** (1.498)

\*p&lt;0.10, \*\*p&lt;0.05

Note: The table reports hazard ratios, with standard errors in parentheses. “N” = 3,077. Estimates for state fixed effects are not reported in order to conserve space.



### 1. Immigration enforcement.

The first set of explanatory variables in Table 3 explores the striking pattern in the summary statistics—that county demographics and border proximity, much more than crime rates, appear to be highly correlated with activation. These patterns hinted that the rollout might not have been targeted exclusively at crime reduction. As we will see below, the hazard models in Table 3 confirm some of these patterns, but undermine others in surprising and potentially troubling ways.

The strongest correlates of activation remain location on the southern border and the fraction of the population that is Hispanic. The hazard models show that a county's location on the border with Mexico is strongly correlated with a high risk of activation. The estimates imply that counties on the southern border have a hazard rate of activation roughly four times higher than that of other counties.

The fraction of Hispanics in the county population also strongly predicts activation. For example, the estimate in column (1) implies that a ten percentage-point increase in the share of Hispanics in a county's population corresponds to a 8.0 percent jump in the hazard for Secure Communities activation.<sup>71</sup> This result confirms that the pattern seen in the summary statistics of Table 2 for the Hispanic share of the population does not diminish when we control for other factors that might influence activation. Moreover, to alleviate the concern that this correlation is an artifact of some unobserved characteristic that correlates with minority population more generally, we provide for a sort of placebo test by including in the model a measure of the black population. Because this measure of race lacks the salience in contemporary debates about immigration enforcement that Hispanic ethnicity carries, one would not expect it to correlate with activation. Consistent with this intuition, the estimate for black population is less than one, implying that counties with proportionately more black residents were activated later on average rather than being prioritized for early activation. In addition, each estimate for a county's black population is statistically insignificant, indicating that it unlike Hispanic ethnicity does not have a statistically significant correlation with the timing of activation.

The correlations for border proximity and Hispanic population are also robust. In every specification in Table 3 that includes these variables, the estimates are statistically significant and relatively stable in magnitude. Of course, these variables correlate strongly with each other; counties along the border have proportionately much larger Hispanic populations than the national average. To gauge how sensitive the estimate for each of these variables is to the presence of the other, column (2) reports an equation in which

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<sup>71</sup> To see this, note that  $\ln(2.166) = 0.7729$ , and  $\exp(0.7729 \cdot 1) = 1.0804$ .

both indicators for the southern border were dropped, and column (3) reports an estimate in which the variable for Hispanic population was dropped. The exclusions add to the magnitude of the remaining variable's estimate but not enormously so: dropping the border variables raise the hazard ratio for the Hispanic share of the population from 2.166 to 3.282, while dropping the Hispanic variable raises the hazard ratio for the southern border from 4.187 to 4.859. Moreover, if we reestimate the equation excluding border counties from the sample entirely, the estimates are relatively unchanged. The estimated hazard ratio for the Hispanic share in particular remains statistically significant and largely unchanged at 2.135 (standard error = 0.665). These estimates show that although these two county characteristics are correlated, each plausibly captures a different influence on the risk of activation.

In the summary statistics above, a county's noncitizen population was also correlated with activation—though more weakly than Hispanic population or border proximity. In the hazard models, however, the relationship between noncitizen population and activation is flipped on its head. The hazard ratio for noncitizens is in some models less than one. This means that, rather than increasing the likelihood of activation, a larger share of noncitizens in a county modestly reduces the likelihood of activation. For example, the hazard ratio of .937 in column (1) implies that a ten percentage-point increase in the share of noncitizens in a county's population lowers the hazard by about one percentage point.<sup>72</sup>

The direction of this estimate is surprising, even counterintuitive. The central function of Secure Communities is to check the status of noncitizens through fingerprints, and on one theory this technology would promise the greatest benefit where there were the greatest numbers of noncitizens. Yet noncitizen population does not predict activation. Moreover, the results for noncitizens contrast sharply with the estimates for Hispanic population. If taken at face value, they indicate that early activation targeted counties with large Hispanic populations but did not target counties with large noncitizen populations.

Of course, a crucial caveat to these estimates is that they reflect the effect of noncitizens' population share after controlling for the Hispanic share and other county characteristics. As mentioned above, Hispanic ethnicity and noncitizen status are highly correlated in these data, and thus, any correlation between noncitizens and activation may be captured to a large extent by the presence of the Hispanic share variable. The results provide some reason to believe this is the case. When the Hispanic share variable is excluded from the set of explanatory variables in column (3), the estimate for noncitizens'

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<sup>72</sup> To see this, note that  $\ln(0.937) = -0.651$ , and  $\exp(-0.651 \cdot 0.1) = 0.994$ . This indicates that a county with a share of noncitizens that is ten percentage points greater than the baseline has a hazard that is 85 percent that of the baseline.

share changes direction, implying that a ten percentage-point increase in the proportion of noncitizens in the county raises the risk of activation by 14 percent.<sup>73</sup> For this reason, it would be inappropriate to advance a strong claim that Hispanic ethnicity accelerated activation while noncitizen status slowed it.

That said, it is important to note that Hispanics' share of a county's population appears to be a more powerful predictor of activation than noncitizens' share of the population. Just as any correlation between noncitizens and activation may be captured to a large extent by the presence of the Hispanic share variable, the opposite could be said about the noncitizens variable. But while the presence of the Hispanic variable eliminates the correlation between noncitizen population and activation (and in fact suggests an inverse correlation), the opposite is not true: the presence of the noncitizens' variable does not impair the correlation between ethnicity and the activation hazard. Column (4) shows that when the measure of noncitizens is excluded from the equation, the estimated hazard ratio for Hispanics' share falls only modestly from 2.166 to 2.132. Thus, Hispanic population does appear to exert a greater influence on the estimate for noncitizens than vice versa.

Perhaps even more important, none of the estimates for noncitizens' share attain statistical significance—not even in column (3) when the Hispanic variable is excluded from the equation and the noncitizen estimate connotes a positive relationship with the activation hazard. In contrast, the estimates for Hispanics' population share are positive and statistically significant in every single model. These patterns suggest that the time-until-activation correlates more closely with the proportion of Hispanics in a county than with the proportion of noncitizens.<sup>74</sup>

## 2. Crime control.

The second set of variables tests our second hypothesis about the objectives of Secure Communities: its relationship to crime control. If crime control was a key objective of the program, we would predict that locations with higher crime rates should have activated sooner.<sup>75</sup> The summary statistics in Table 2 provided some evidence for this hypothesis. But the hazard analysis undermines this support. Once we control for other influences on activation,

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<sup>73</sup> To see this, note that  $\ln(3.848) = 1.348$ , and  $\exp(1.348 \cdot 0.1) = 1.144$ .

<sup>74</sup> Replacing noncitizen population with foreign-born population produces the same results. The model in column (5) replaces the measure of noncitizens with the fraction of foreign-born persons in the population. Perhaps unsurprisingly, the foreign-born and noncitizen variables are highly correlated, and the estimates from using one measure are essentially identical to those from using the other. These results suggest that the activation hazard correlates with the fraction of Hispanics in a county rather than either the fraction noncitizen or the fraction foreign-born.

<sup>75</sup> See text accompanying notes 35–.

local crime rates are not consistently correlated with the decision to activate Secure Communities.

As in the summary statistics, Table 3 includes two principal measures of crime rate: the (log) rate of violent crime and the (log) rate of property crime. Given Secure Communities' putative focus on violent crime, we would predict that the violent crime rate, but perhaps not the property crime rate, would be associated with early activation. In fact, however, neither measure of crime predicts early activation. The hazard ratios for both violent and property crime hover around the baseline risk of one, and none of these estimates attain statistical significance. These estimates imply that, contrary to our prediction, crime rates are not closely related to the activation hazard—a surprising result. In order to explore the apparent irrelevance of crime rates in more depth, Table 4 presents a series of additional models that examine more closely why crime rates have such a weak relationship to the speed of activation.

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TABLE 4. THE RELATIONSHIP BETWEEN CRIME AND TIME UNTIL ACTIVATION

County Characteristic	(1)	(2)	(3)	(4)	(5)
County is on Southern Border with Mexico	4.187** (1.006)	4.214** (1.010)	4.126** (.939)	3.813** (.949)	5.341** (1.663)
County is on the Gulf of Mexico	1.581 (.575)	1.582 (.574)	1.558 (.551)	1.511 (.494)	1.550 (.541)
Fraction of Population Hispanic	2.166** (.565)	2.163** (.569)	2.084** (.574)	2.148** (.538)	2.194** (.553)
Fraction of Population Noncitizen	.937 (1.205)	.928 (1.202)	.869 (1.139)	1.079 (1.520)	2.190 (2.887)
Log Violent Crime Rate	1.025 (.024)	1.033 (.025)	—	1.027 (.024)	1.060** (.028)
Log Property Crime Rate	1.013 (.020)	—	.995 (.018)	.997 (.022)	1.083** (.025)
Log Murder Rate	—	—	.979 (.034)	—	—
Log Rape Rate	—	—	1.025 (.026)	—	—
Log Aggravated Assault Rate	—	—	.995 (.020)	—	—
Log Robbery Rate	—	—	1.082 (.032)	—	—
Log Police Officers per Capita	—	—	—	1.013 (.100)	—
Log Population Density	1.231** (.043)	1.232** (.043)	1.202** (.045)	1.257** (.058)	—
Log Income per Capita	.945 (.117)	.950 (.118)	.886 (.111)	.925 (.121)	1.266 (.189)
Fraction in Poverty	.474 (.348)	.476 (.351)	.391 (.293)	.489 (.344)	.213** (.173)

\*p&lt;0.10, \*\*p&lt;0.05

Note: The table reports hazard ratios, with standard errors in parentheses.  $N = 3,077$ , except for column (2) where  $N = 2,827$ . The baseline regression in column (1) is identical to the baseline regression in column (1) of Table 3. Estimates for some variables in the baseline model are not reported in order to conserve space.

Table 4 explores three potential problems with Table 3's estimates about the relevance of crime rates. The first stems from the close correlation between violent crime and property crime. If violent crime is, as agency officials suggest, the program's highest priority, then the inclusion of both violent and property crime in the model might, because of their close correla-

tion, mask a strong relationship between activation and violent offenses. The equation in column (2) excludes the property crime rate from the set of explanatory variables, and the resulting estimates reject this possibility. The exclusion of property crime from the model has virtually no effect on the estimate for violent crime (or any of the other parameter estimates for that matter).

A second possibility is that our estimates are sensitive to the precise measures of crime employed. The model in column (3) replaces the total violent crime rate with those of its constituent subcategories: murder, rape, aggravated assault, and robbery. For three of these offense categories, the estimated hazard ratios for these offense categories are close to one, implying no relationship to the activation hazard, and are statistically insignificant. The one offense category showing a statistically significant correlation with the activation hazard is robbery. But the magnitude of the estimated relationship is small. It implies that a 10% increase in the (log) rate of robbery over the sample average raises the hazard by 1.9 percent above the baseline hazard.

A third concern arises from the potential relationship between crime and other controls in the model. For example, it is possible that border proximity and crime are correlated. If so, then perhaps ICE targeted high crime areas by targeting the border, such that we should count the correlation between border proximity and early activation as evidence of a crime-control agenda. It is certainly true that agency officials, right up to DHS Secretary Janet Napolitano, said publicly that activation along the southern border would be pursued as part of a strategy to disrupt violence related to international drug cartels.<sup>76</sup> Table 3 already explored this possibility by testing the sensitivity of the model to the presence of the border location variable. Were that variable highly correlated with local crime rates, its presence might mask a link between rollout timing and crime. But the estimates in column (2) of Table 3 suggest this is not the case. Omitting the border proximity variable has a negligible effect on the hazard ratios for the crime variables, and does not elevate them to statistical significance.

Introducing other measures potentially correlated with crime similarly has no effect. For example, crime rates and policing tend to move together, as jurisdictions with more severe crime problems react by hiring more officers. But the results in column (4) of Table 4 show that including a measure of officers per capita has no effect on the estimated hazard ratio for violent or property crime. Moreover, while criminologists have long observed that both

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<sup>76</sup> See DHS, [Secretary Napolitano Announces Secure Communities Deployment](#) (cited in note 51). At the level of public justification this explanation is complicated by the fact that the prioritization of border areas was not announced by Secretary Napolitano until a number of months after Secure Communities' rollout began. The timing of the Secretary's statements undercuts the likelihood that the early rollout was designed to use border location as a proxy for crime.

income levels and population density correlate with crime rates—in part because crime is more common in cities—their presence is not wholly responsible for the effectively zero estimates for the crime rates.<sup>77</sup> As the estimates in Table 4 show, income levels are largely unrelated to the likelihood of activation. Population density does have a consistently positive effect, raising the possibility that the estimated relationship between crime and activation is sensitive to the inclusion of the control for population density, but column (5) shows that excluding the measure of population density has a modest effect on the estimates for the crime rates.<sup>78</sup> When population density is excluded from the model, the estimated hazard ratios for property and violent crime both exceed one and attain statistical significance. But the size of their implied effects is smaller than those of the demographic and border variables. Raising the (log) rate of property crime by 10% above its sample mean implies a 5.7 percent increase in the hazard over its baseline. For violent crime, the comparable figure is 2.8 percent. In short, Table 4 suggests that the basic findings in Table 3 are not sensitive to our choice about how to measure crime rates or to the inclusion or exclusion of other variables that are correlated with crime.

Of course, as Part II's discussion of potential hypotheses makes clear, simply targeting high crime rate communities is not the only way that immigration agencies might have used Secure Communities to target crime reduction and the removal of "criminal aliens." Using crime rates to set rollout strategy is one plausible strategy. But the agency might have preferred in an ideal world to prioritize rollout in areas that have both high crime rates and large numbers of noncitizens. If that was in fact the strategy, then the models in Table 3 risk understating the significance of crime rates for rollout timing. To test this possibility directly, Table 5 adds to the baseline model from Table 3 terms that interact both the Hispanic and noncitizen population with crime rates.

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<sup>77</sup> See, for example, Ronald W. Beasley and George Antunes, *The Etiology of Urban Crime: An Ecological Analysis*, 11 *Criminology* 439, 448 (1974) (showing that population density is a strong, positive correlate of crime rates).

<sup>78</sup> Although not shown in Table 3, removing per capita income and the poverty rate from the model has a similar effect on the estimates for the crime rates.



TABLE 5. MIXED ENFORCEMENT STRATEGY AND TIME UNTIL ACTIVATION

County Characteristic	(1)	(2)	(3)	(4)	(5)
Fraction of Population Hispanic	1.854** (.709)	1.854** (.709)	2.182** (.554)	2.111** (.544)	2.210** (.605)
Fraction of Population Noncitizen	.541 (.715)	.541 (.715)	.188 (.231)	.042** (.060)	.909 (1.194)
Fraction of Population Black	.572 (.272)	.572 (.272)	.537 (.257)	.536 (.258)	.517 (.276)
Log Violent Crime Rate	1.009 (.006)	1.008 (.022)	1.006 (.024)	1.000 (.023)	1.012 (.024)
Log Violent Crime Rate x Second Quartile of Demographic	1.015* (.009)	1.009 (.006)	1.005 (.007)	1.007 (.006)	1.003 (.011)
Log Violent Crime Rate x Third Quartile of Demographic	1.032** (.015)	1.015* (.009)	1.013 (.011)	1.018* (.010)	1.017 (.012)
Log Violent Crime Rate x Fourth Quartile of Demographic	1.039 (.030)	—	1.049** (.015)	—	1.016 (.018)
Log Violent Crime Rate x 75 <sup>th</sup> – 90 <sup>th</sup> of Demographic	—	1.032** (.015)	—	1.054** (.015)	—
Log Violent Crime Rate x Top Decile of Demographic	—	1.039 (.030)	—	1.093** (.038)	—
Demographic Interacted: Fraction of Population . . .	Hispanic	Hispanic	Noncitizen	Noncitizen	Black

\*p&lt;0.10, \*\*p&lt;0.010

Note: The table reports hazard ratios, with standard errors in parentheses. “N = 3,077. Except for the two interaction terms, the baseline regression in column (1) is identical to the baseline regression in column (1) of Table 3. Estimates for all other variables are not reported in order to conserve space.

The models in Table 5 interact the violent crime rate with a series of indicator variables that identify where in the distribution of a particular demographic measure a county falls. For example, the model in column (1) interacts the violent crime rate with indicators for whether a county falls within one of the top three quartiles of the fraction of population that is Hispanic. Adding these interaction terms allows us to test the hypothesis that ICE prioritized counties that had both very high crime rates and very large noncitizen populations—a sort of skimming off the cream theory of rollout. If ICE pursued such a strategy, the hazard ratios on the interaction terms should grow as we move up the demographic quartiles. In theory, the hazard ratio should be largest for the interaction term that reflects the highest concentration of the relevant demographic—here the interaction terms that reflect the top decile of the relevant characteristic.

The model in column (1) offers weak support for this hypothesis. The hazard ratios on the interactions terms are all slightly greater than one, and they are larger in counties with proportionately larger Hispanic populations. For example, the hazard ratio on the interaction of violent crime with the second quartile of Hispanic population is 1.015, and for top quartile, it is 1.039. By contrast, the main effect of the violent crime rate has a hazard ratio that is almost exactly one, implying that aside from the interaction terms, varying the rate of violent crime has no impact on the hazard for activation. Taken at face value, the estimates suggest that a higher violent crime rate slightly accelerated the activation time in counties with a relatively large Hispanic population and had almost no impact on the time-until-activation in other counties. Raising the (log) rate of violent crime by 10% over the sample mean implies a less than one percentage point increase over the baseline hazard rate for a county with a Hispanic population in the lowest quartile, but it implies a 1.8 percent increase over the baseline hazard rate for a county with a Hispanic population in the highest quartile. The model in column (2) provides a further test by looking at counties with the very highest share of Hispanic population—counties in the top decile. Its pattern is similar to that seen in column (1).

Columns (3) and (4) present estimates of analogous interactions for the fraction of the population that is noncitizen, and here, the patterns are somewhat more pronounced. The effect of a higher crime rate on the activation hazard is larger when noncitizens comprise a larger fraction of a county's population. Again, the violent crime rate has almost no effect on the activation hazard in counties with few noncitizens. But as the share of noncitizens in a county grows, the impact of the violent crime rate on the speed of activation rises monotonically. The model in column (4) implies that raising the (log) rate of violent crime by 10% over the sample mean in a county with a noncitizen population in the top decile raises the activation hazard by 4.3 percent over the baseline hazard rate. Unlike the earlier interactions with the Hispanic population, the interaction terms with the noncitizen population are statistically significant. These results are consistent with the hypothesis that ICE prioritized for activation counties with higher rates of violent crime and proportionately larger noncitizen populations.

The final column of Table 5 presents a type of placebo test. It includes interactions of the violent crime rate with measures of fraction of a county's residents who are black. As noted above, we would not expect the size of a county's black population to relate to the speed of activation. The estimates in column (5) confirm this prediction. The interactions do not correlate with strongly with the timing of activation, and their presence has no effect on the estimates for the other variables. The absence of a correlation for these ra-

cial variables should give some confidence that the patterns for ethnicity and citizenship status are not spurious.

The results in Table 5 lend support to the view that ICE assigned higher priority for activation to counties with both proportionately more noncitizens and higher violent crime rates. While crime rates themselves do not appear to predict rollout, crime does matter in those areas that have large noncitizen populations.

That said, it is important to note that controlling for these interactions does not undermine estimated effect of other influences we identified earlier. Even in the models in Table 5, the fraction of the county population that is Hispanic and the proximity to the southern border remain strongly related to the speed of activation. In fact, they remain the strongest predictors: the implied magnitude of these influences is much larger than the interaction of violent crime and the size of the noncitizen population. Thus, the possibility that ICE prioritized counties with proportionately more noncitizens and higher violent crime rates can explain only a part of the observed pattern of activation. The most powerful explanations remain the two identified earlier: the county's Hispanic population fraction and its proximity to the border.

### 3. The politics of rollout.

The final explanatory variables in Table 3 investigate our third hypothesis about the activation of Secure Communities—that the degree of local political support is a crucial predictor of early activation. The large literature on cooperative federalism suggests that such support may be relevant. The difficulty, of course, is that it is hard to gauge directly which local communities favor increased immigration enforcement of this sort and which oppose it. We therefore test several potential measures.

The first rough measure of local attitudes is the vote share the Republican presidential candidate received in the 2004 election. At least in recent years, support for the Republican Party (and ideological conservatism more generally) is significantly correlated with opposition to immigration and support for increased immigration enforcement.<sup>79</sup> Nonetheless, Table 3 shows that local support for Republicans does not correlate meaningfully with activation. The estimates for Republican vote share are statistically insignificant

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<sup>79</sup> See, for example, Pratheepan Gulasekaram and S. Karthick Ramakrishnan, *The Importance of the Political in Immigration Federalism* \*4 (forthcoming 2012), online at [http://www.karthick.com/workingpapers\\_assets/GR-submission-2-23.pdf](http://www.karthick.com/workingpapers_assets/GR-submission-2-23.pdf) (visited Oct 27, 2012) (noting that the partisan composition of a location is correlated with immigration regulation and that Republican areas are more likely to have strong immigration laws); Pew Research Center, *Trends in American Values: 1987–2012; Partisan Polarization Surges in Bush, Obama Years* 11–12, 20 (Pew Research Center June 4, 2012), online at <http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf> (visited Oct 27, 2012) (showing the wide difference of values related to immigration between supporters of President Barak Obama and those of Mitt Romney).

in every regression. Moreover, if the point estimates were taken at face value, they would imply an effect opposite of the one anticipated, as the hazard ratio is less than one in every specification.

A potentially more precise measure of local sentiment is a count of the number of anti-immigrant laws enacted locally. Rather than forcing us to rely on partisanship in the presidential election as a proxy, this measure permits us to observe directly the actions taken by local politicians that relate to immigrants and immigration enforcement. The tally of local anti-immigrant legislation was generously provided by Huyen Pham and Pham Hoang Van, who collected the information as part of a project to create an index capturing each state's climate for immigrants.<sup>80</sup> The more precise measure of attitudes on immigration provided by local legislation also fails to correlate with activation. The hazard ratios are statistically insignificant in every specification and are very close to one in all instances. Perhaps surprisingly, the presence of local anti-immigrant legislation does not have a meaningful influence on the timing of a county's activation.

Nor do other potential measures of local sentiment.<sup>81</sup> Recent work by political scientists suggests that communities in which the Hispanic population has grown most rapidly might be those in which a political backlash and calls for stricter immigration enforcement are more likely to occur.<sup>82</sup> The

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<sup>80</sup> Pham and Pham, *Measuring the Climate for Immigrants* (cited in note 63). The paper by Pham and Pham includes counts of both pro- and anti-immigrant legislation at the county level. We excluded the small number of local laws categorized as pro-immigrant. In addition, while their paper also includes state-level legislation, that legislation is coextensive with our state fixed effects and was therefore omitted.

<sup>81</sup> In addition to political sentiment, we also attempted to test for local financial incentives. Some critics of Secure Communities have argued that local governments with excess jail capacity will have an incentive to participate in order to get paid for housing immigrant detainees identified by the program. See, for example, Chris Kirkham, *Private Prisons Profit from Immigration Crackdown, Federal and Local Law Enforcement Partnerships*, Huffington Post (June 7, 2012), online at [http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement\\_n\\_1569219.html](http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement_n_1569219.html) (visited Oct 27, 2012); Jessica M. Vaughan and Russ Doubleday, *Subsidizing Sanctuaries: The State Criminal Alien Assistance Program* 1 (Center for Immigration Studies Nov 2010), online at <http://www.cis.org/articles/2010/subsidizing-sanctuaries.pdf> (visited Oct 27, 2012). While this potential financial payoff for participating is hard to calculate—and many counties have complained that federal reimbursements for detention do not cover their costs—we examined the pattern of activations for the fifty counties with the largest prison systems. Within that set, counties with prisons operating below capacity activated a statistically insignificant twenty-six days earlier than counties with prisons operating at or above capacity. Nineteen counties with capacity exceeding 100 percent activated in an average of 565.2 days, while 31 counties with less than 100 percent capacity activated in an average of 539.0 days. Running our basic hazard model using these fifty counties (and leaving out state fixed effects) yields a hazard ratio of 1.00 (standard error = .00859) for the percentage of prison capacity, which is also consistent with the presence of excess bed space having no effect on rollout.

<sup>82</sup> See Martin Halla, Alexander F. Wagner, and Josef Zweimüller, *Does Immigration into Their Neighborhoods Incline Voters Toward the Extreme Right? The Case of the Freedom Party of Austria* \*1–3, 27 (University of Zurich Department of Economics Working Paper No 83, July 1, 2012), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2103623](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103623) (visited Oct 27, 2012) (finding that Austri-

equation in column (6) of Table 3 tests this hypothesis by including a variable for the change in Hispanics' share of the population over the past decade. The estimated hazard ratio for this variable is statistically insignificant and, like the Republican vote share, is less than one, contrary to the backlash hypothesis. Also, the inclusion of the growth measure has little effect on the estimates for the other variables.

The only potential measure of local support that does correlate with activation is whether a local government has a 287(g) cooperative enforcement agreement with the federal government. The presence of a 287(g) agreement in a county corresponds to an estimated increase in the activation hazard of roughly four times over the baseline hazard. That said, the relationship between 287(g) agreements and activation is far from clear evidence of a connection between activation and local political support. The willingness of local law enforcement to enter into such an agreement may reflect local political support for increased immigration enforcement—support that in turn influenced activation. Alternatively, the connection between 287(g) agreements and activation may simply reflect operational efficiency. Local police participating in the 287(g) program already have an established relationship with federal officials, and the existence of this relationship may facilitate an early activation of Secure Communities.

Regardless of the political variable employed, therefore, the estimates for these variables provide little support for the hypothesis that local political support or opposition was a factor in activation. There are, of course, other minor wrinkles. Some might argue, for example, that the border proximity variable should be interpreted as a political variable, as proximity to the border might correlate with increased local support for immigration enforcement. Certainly there are high-profile instances of border state politicians complaining loudly about the failure of federal immigration enforcement. On balance, however, the basic patterns in the hazard models do not provide much support for the hypothesis that political support was a crucial factor in Secure Communities' rollout.

#### IV. DISCRETION, PREDICTION, AND THE FUTURE OF IMMIGRATION ENFORCEMENT

Immigration enforcement has long been criticized as ad hoc and arbitrary, with the possibility of punishment for violating the immigration code turning more on happenstance or the caprice of low-level bureaucrats rather

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an communities with a higher proportion of low- and medium-skilled immigrants were more likely to support the nationalist Freedom Party of Austria).

than anything else.<sup>83</sup> The principle that “like cases must be treated alike,” often taken as central to the very idea of justice,<sup>84</sup> has seemed to many to be honored only in the breach when it comes to immigration law.

Whatever the historical accuracy of claims about the disorganization of immigration enforcement, it is clear that today there is an ongoing project to systematize and centralize the exercise of discretion within the immigration bureaucracy. Perhaps the most prominent example of this trend is President Obama’s announcement that his administration will not seek to deport many young people who came to the United States without authorization as children.<sup>85</sup> But this recent development is far from an election-year outlier. Instead, it is but a piece of a much broader effort to regulate the use of prosecutorial discretion within the agencies that administer immigration policy.<sup>86</sup> Moreover, these efforts have deep roots in a central structural feature of modern immigration law. Modern immigration law effectively renders huge numbers of noncitizens presumptively deportable—a structural feature that delegates tremendous policy-making authority to the executive.<sup>87</sup>

The rollout of Secure Communities is both further evidence of the power of the president over immigration policy and an additional means of centralizing the use of discretion within the executive branch.<sup>88</sup> Before Secure Communities, people arrested by local police were screened for immigration violations in only a small number of communities around the country.<sup>89</sup> Soon such screening will be universal. Local officials will have no power to pick and choose directly which arrestees get screened (though, of course, they do have the power to decide whom to arrest). And for those arrestees who are identified as potentially deportable, the consolidation of the screening func-

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<sup>83</sup> For a few recent versions of this decades-long critique, see, for example, Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (2007); Peter H. Schuck, *The Transformation of Immigration Law*, 84 *Colum L Rev* 1, 69 (1984).

<sup>84</sup> David A. Strauss, *Must Like Cases Be Treated Alike?* \*18–19 (Chicago Public Law and Legal Theory Working Paper No 24, May 8, 2002), online at <http://www.law.uchicago.edu/files/files/24.strauss.like-cases.pdf> (visited Oct 27, 2012); H.L.A. Hart, *The Concept of Law* 155 (Clarendon 1961).

<sup>85</sup> See Preston and Cushman, *Obama to Permit Young Migrants*, *NY Times* at A1 (cited in note 39) (describing President Obama’s announcement that the US government will not institute removal proceedings against certain immigrants who entered the United States at a young age, including those with high school degrees or past military service).

<sup>86</sup> See Morton, Memorandum, *Exercising Prosecutorial Discretion* at 4 (cited in note 38) (setting out, in a memorandum to ICE personnel, a list of factors to consider when deciding whether to prosecute immigration-related offenses).

<sup>87</sup> See Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law*, 119 *Yale L J* 458, 463 (2009) (noting that roughly one-third of all noncitizens living in the United States are deportable at the option of the executive, giving the president broad de facto authority to set immigration policy).

<sup>88</sup> See DHS, *Secretary Napolitano’s Remarks* (cited in note 35) (contrasting Secure Communities with earlier ad hoc approaches).

<sup>89</sup> See text accompanying notes 2–13.

tion facilitates the more uniform exercise of discretion. If DHS chooses, it can more frequently ensure that like cases are treated alike.<sup>90</sup>

These changes in immigration enforcement parallel important trends in modern criminal law. In both prosecutors' offices and law enforcement agencies, efforts are underway in many places to discipline the vast discretion historically held by the individual prosecutor and the lone cop on the beat. Prominent prosecutors' offices have begun adopting internal controls designed to promote the more uniform administration of justice.<sup>91</sup> Major police forces have increasingly come to rely on data-driven models of crime prevention and officer accountability.<sup>92</sup> DHS, which houses both the prosecuting arm and police force for immigration law, has drawn on both of these developments in structuring Secure Communities.

In all of these contexts, the benefits of centralizing discretion often come with hidden costs. As Bernard Harcourt and others have noted in the criminal context, for example, these more "rational" models of policing can often obscure the ways in which seemingly neutral rules can in practice concentrate the burdens of law enforcement on minority communities.<sup>93</sup> Our findings about Secure Communities suggest that this may be precisely what happened during the program's rollout. Early activation under the program is highly correlated with the size of a county's Hispanic population—a possibility that has been obscured by both the official justifications for Secure Communities and the less-than-transparent "risk-based" model that DHS has said it used to set activation priorities.<sup>94</sup>

The tight correlation under Secure Communities between activation and ethnicity is obviously troubling. Nor can it be dismissed as an artifact of the government's focus on the border or on areas containing large pockets of

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<sup>90</sup> We are exploring whether there is evidence that the agency is actually doing just this as part of our larger empirical assessment of Secure Communities. See Adam B. Cox and Thomas J. Miles, The Future of Immigration Federalism (on file with authors).

<sup>91</sup> See Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 *Stan L Rev* 869, 915–21 (2009) (describing the use of internal review and structural separation in various US Attorney's offices to limit discretion and improve accountability); Center on the Administration of Criminal Law, Establishing Conviction Integrity Programs in Prosecutors' Offices: A Report of the Center on the Administration of Criminal Law's Conviction Integrity Project 4–5 (NYU School of Law 2012), online at [http://www.law.nyu.edu/ecm\\_dlv4/groups/public/@nyu\\_law\\_website\\_centers\\_center\\_on\\_administration\\_of\\_criminal\\_law/documents/documents/ecm\\_pro\\_073583.pdf](http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_centers_center_on_administration_of_criminal_law/documents/documents/ecm_pro_073583.pdf) (visited Oct 27, 2012) (proposing various reforms in prosecutors' offices aimed at reducing the risk of wrongful convictions).

<sup>92</sup> The rise in the role of prediction and systematization in law enforcement has been documented by Professor Bernard Harcourt, who has given it the (slightly pejorative) label "actuarial justice." Bernard E. Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age 2–3 (Chicago 2007). The trend has even penetrated deeply into pop culture, with the cult crime show The Wire revolving centrally around CompSTAT—a real-world data-analysis tool designed to help police departments allocate resources efficiently and centralize discretion within their organizations.

<sup>93</sup> See Harcourt, Against Prediction at 4–6 (cited in note 92).

<sup>94</sup> See note 45 and accompanying text.



noncitizens. Instead, as the detailed analysis in Part III demonstrated, the correlation between activation and Hispanic population is extremely persistent: it remains large and statistically significant even when we control for border proximity and myriad other factors on which the government might have relied in deciding where to target its limited enforcement resources.

To be sure, our findings do not necessarily mean that those designing the rollout strategy engaged in racial profiling. In the parlance of equal protection jurisprudence, the data reveal a disparate impact, but cannot identify disparate treatment—the intentional singling out of a racial or ethnic group. Still, one can imagine that some might defend the resulting pattern on the ground that, regardless of the government’s motive, singling out predominantly Hispanic communities for increased immigration enforcement is “rational” because the number of immigration violators in a community is correlated with the size of the Hispanic population. A number of commentators have argued in other contexts that racial profiling is perfectly rational and should be lawful—so long as the government relies on accurate statistical generalizations about the profiled group.<sup>95</sup> And many years ago the Supreme Court suggested that Hispanic ethnicity could in fact be used by law enforcement officers as a factor in determining whether there is reasonable suspicion that a person has violated immigration law.<sup>96</sup>

Figuring out whether targeting Hispanic communities in the rollout is consistent with “rational” profiling, understood in the above sense, is well beyond the scope of this paper. We should note, however, that the data in our larger empirical study of Secure Communities cast some doubt on such a claim.<sup>97</sup> For while the rollout itself correlates highly with the fraction of a county’s population that is Hispanic, the fraction of that county’s submissions that yield matches against ICE’s biometric database does not.<sup>98</sup> In other words, “hit rates” under the program do not appear to correlate meaningfully with a county’s Hispanic population. Yet if the proportion of a county that was Hispanic were truly correlated with the proportion of the county that

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<sup>95</sup> See, for example, Heather Mac Donald, *Are Cops Racist? How the War against the Police Harms Black Americans* 9–10, 28–29 (Ivan R. Dee 2003) (arguing that racial profiling may be an effective law enforcement tool when based on correct statistical assumptions); Frederick Schauer, *Profiles, Probabilities, and Stereotypes* 18–19 (Belknap 2006) (distinguishing between statistically sound and unsound generalizations about people).

<sup>96</sup> See *United States v Brignoni-Ponce*, 422 US 873, 884–87 (1975) (holding that apparent ethnicity could be one factor, but not the sole factor, in a stop); cf. *United States v. Montero-Camargo*, 192 F.3d 946 (1999) (holding that Hispanic ethnicity could no longer be a factor in the reasonable suspicion calculus because of post-*Brignoni-Ponce* changes to the demography of border areas).

<sup>97</sup> As we noted earlier, our dataset includes comprehensive statistics on the productivity of Secure Communities in each community where it was activated—including the number of monthly submissions, hits, arrests by ICE agents, and, ultimately, deportations. See Part III.

<sup>98</sup> See Adam B. Cox and Thomas J. Miles, *The Future of Immigration Federalism* (on file with authors).



was in violation of immigration law, then all else equal one would expect hit rates to correlate with ethnicity.

Ultimately, our aim is not to resolve fully the concerns raised by the pattern of Secure Communities' rollout. Instead our principal goal has been descriptive—to provide the first large-scale empirical study of the way in which discretion has been wielded in the most important immigration enforcement initiative adopted in recent history. Our findings have important implications for Secure Communities itself, raising questions about the program's putative focus on crime and revealing a troubling correlation between ethnicity and the program's deployment. More broadly, our findings highlight important similarities between the structure of modern criminal and immigration enforcement, findings that we hope will spur the integration of scholarship on both subjects.

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## APPENDIX

TABLE 1. SUMMARY STATISTICS OF MAIN VARIABLES

Variable	Mean (Standard Deviation)
County is on Southern Border with Mexico	.009 (.097)
County is on Gulf of Mexico	.018 (.133)
Percent Population Hispanic	.076 (.127)
Change in Percent Population Hispanic 2000–2010	.022 (.024)
Percent Population Noncitizen	.027 (.036)
Log Violent Crime Rate	4.747 (1.761)
Log Property Crime Rate	6.994 (1.987)
Log Population Density	3.748 (1.678)
Log Income per Capita	10.290 (.229)
Poverty Rate	15.099 (6.222)
Percent of Vote in 2004 for President Republican	.603 (.126)
Percent Population Black	.090 (.143)
Count of Local Anti-Immigrant Legislation	.040 (.314)
Local 287(g) Agreement	.015 (.121)
Log Police Officers per Capita	2.058 (.646)

Note:  $\underline{N}$  = 3,077, except for police per capita where  $\underline{N}$  = 2,827. Means and standard deviations in parentheses.