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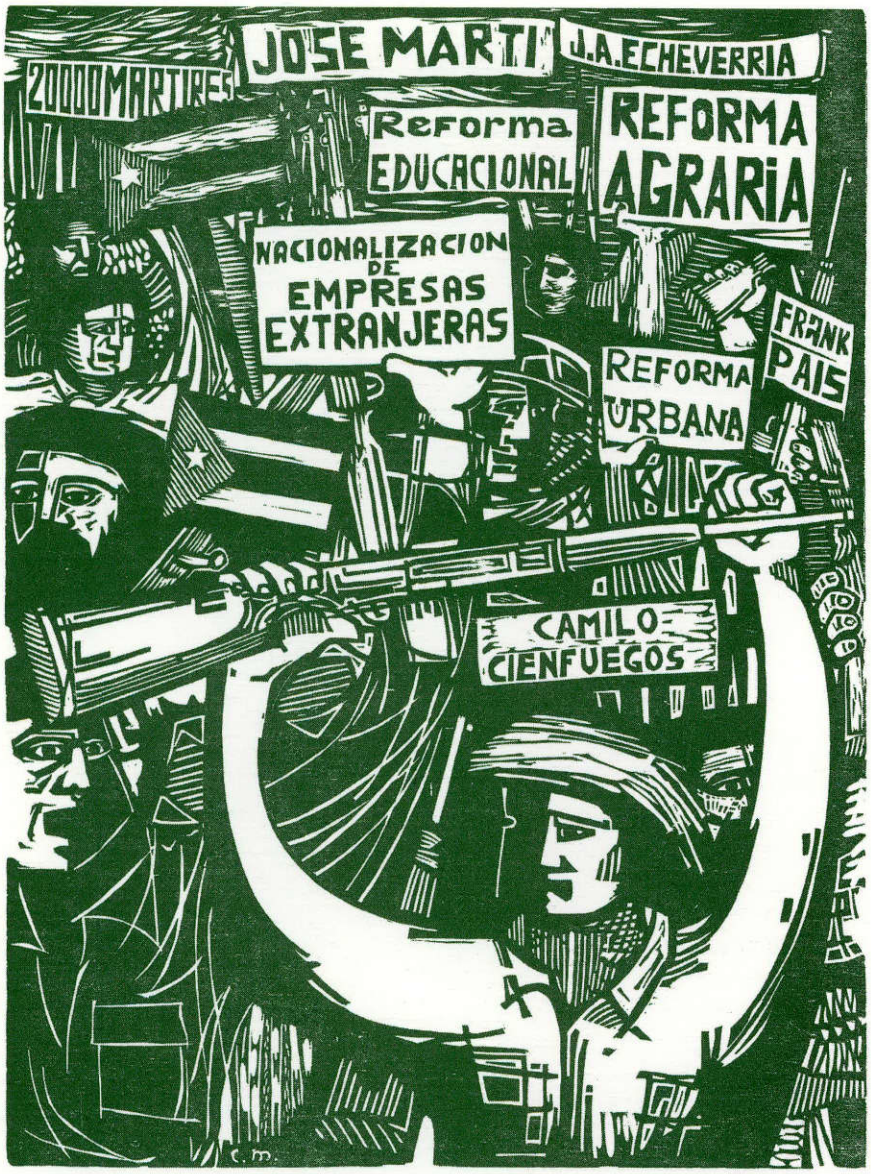

Declaración de la Habana

César Mazola Alvarez

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ARTICLES

CUBA'S CONSTITUTIONAL MOMENT

RAFAEL COX ALOMAR*

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I. INTRODUCTION

A. *A Constitutional Moment*

On April 16, 2016, during the inaugural session of the Communist Party's VII Congress, and less than a month after President Barack Obama's historic trip to Havana,[1] President Raúl Castro announced that a new constitutional reform was under way in Cuba.[2] Admittedly, President Castro's statement raised more questions than answers. Does "constitutional reform," in *post-Fidel* Cuba, mean replacing *in toto* the 1976 Constitution? Does it mean abrogating Article 3 of the constitutional text,[3] which constitutionalizes the irrevocability of the 1959 Revolution? Will this new episode of constitutional tinkering necessarily lead to the undoing of the island's communist superstructure? Will Cuba preserve the Communist Party's constitutional ascendancy under any new institutional design?[4] Will the constitutional rearrangement lead to structural changes in Cuba's internal governance? Will Cuba's *constitutional moment*, for instance, address the significant systemic infirmities afflicting the Cuban institutional landscape such as the problematic asymmetry of power subordinating the National Assembly of People's Power to the Council of State,[5] or the emaciation of the domestic judiciary at the hands of the legislative organ,[6] or even the utter absence of an effective

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1. Dan Roberts, *Obama lands in Cuba as first U.S. president to visit in nearly a century*, THE GUARDIAN (Mar. 21, 2016, 3:10 PM), https://www.theguardian.com/world/2016/mar/20/barack-obama-cuba-visit-us-politics-shift-public-opinion-diplomacy. Note that President Obama was the first U.S. president to visit Havana since Calvin Coolidge's 1928 trip.

2. *Cuba: Raúl Castro anuncia reforma constitucional*, DEUTCHSE WELLE (Apr. 16, 2016), http://www.dw.com/es/cuba-ra%C3%BAl-castro-anuncia-reforma-constitucional/a-19193443.

3. THE CONST. OF THE REPUBLIC OF CUBA, Feb. 15, 1976, arts. 3, 137. Article 3(3) of the Cuban Constitution must be read in tandem with its Article 137, both of which were incorporated into the Cuban constitutional text by the National Assembly of the People's Power on June 26, 2002. Article 3: "Socialism and the social revolutionary political system instituted in this Constitution, proven by years of heroic resistance against all kinds of aggression and the economic war engaged by the government of the mightiest imperialistic power that has ever existed, and having demonstrated its ability to transform the country and create an entirely new and just society, shall be irrevocable, and Cuba shall never return to capitalism." Article 137: "This Constitution can only be modified by the National Assembly of People's Power, by means of resolutions adopted by roll-call vote by a majority of no less than two-thirds of the total number of members; except [where the modification] regards the political, social and economic system, whose irrevocable character is established in Article 3 of Chapter I, and the prohibition against negotiations under aggression, threats or coercion by a foreign power as established in Article 11."

4. *Id.* art. 5. "The Communist Party of Cuba, a follower of Martí's ideas and of Marxism-Leninism, and the organized vanguard of the Cuban nation, is the highest leading force of society and of the state, which organizes and guides the common effort toward the goals of the construction of socialism and the progress toward a communist society."

5. *See, e.g.*, Juan Fernández Estrada, *Why does Cuba need a Constitution*?, 7, https://www.law.yale.edu/system/files/area/center/kamel/sela16_fernandez_cv_eng_20160324.pdf (last visited July 16, 2017).The Council of State enacts three times as much legislation as the National Assembly of People's Power, which in over 40 years has never exercised its judicial review authority and has only rarely rendered non-unanimous votes.

6. THE CONST. OF THE REPUBLIC OF CUBA, art. 75(c). Article 75(c) of the Cuban Constitution explicitly establishes that the National Assembly of People's Power is invested with, *inter alia*, the power to decide on the constitutionality of laws, decree-laws, decrees and all other general provisions. ("*Decidir acerca de la constitucionalidad de las leyes, decretos-leyes, decretos y demás disposiciones generales.*")

checks and balances system? From a procedural perspective, will the announced, yet unveiled, reform emerge from an open constitutional convention, ratified through a popular referendum, or through the dictates of the Communist Party's Political Bureau?

These are but a few of the very complex questions that immediately arise after a close perusal of the uncertainties surrounding the Cuban scenario. The time is, thus, ripe for strictly scrutinizing Cuba's constitutional repertoire. The future of the Cuban people rests in the balance.

B. The Roadmap

It is precisely against this background, as Cuba enters into a critical reassessment of its endogenous legal repertoire, that this article proposes an innovative reading of the ideological foundations of Cuba's constitutionalism, grounded on a rich historical and comparative legal analysis that brings to the fore the foundational, yet often unexplored, values and institutions that gave rise to Cuba's domestic legal topography. More importantly, this article parts ways with those voices that suggest Cuba's constitutional regeneration ought to give way to the blind importation of legal figures and institutions foreign to Cuba's formative trajectory. On the contrary, this article contends rather forcefully that the answers Cuba seeks as it embarks on its *constitutional moment* are to be found from within its rich (and syncretic) constitutional life—a life that clearly antedates the watershed of 1959. Part II traces the continental origins of Cuba's constitutionalism, first within the context of Spanish colonialism, and then during the course of the traumatic postcolonial and revolutionary periods. Part III weighs in on the structural challenges besieging Cuba, both from a legal and public policy perspective, as it embarks on its uncertain journey of constitutional restructuring.

II. The Doctrinal Foundations of Cuban Constitutionalism

The Spanish Colonial Period

A. The Council of Indies

The genesis of Cuba's legal tradition is found in medieval Spain. Discovered (albeit figuratively) during Columbus's first voyage to the Americas on October 27, 1492, Cuba

soon became an overseas possession of the Spanish Crown.[7] Then, the stage was set for a colonial entanglement that lasted 406 years—Cuba was Spain's oldest enclave in the Americas.[8]

Cuba's legal superstructure squarely belongs to the so-called Roman French civil law tradition,[9] tracing its origins back to legal institutions as ancient as Justinian's *Corpus Iuris Civilis*[10] and Alfonso X's *Siete Partidas*.[11] It would be impossible to grasp the historical evolution of Cuban law without paying heed to the discontinuous, and rather arbitrary, ways in which the Spanish Crown extrapolated its own endogenous legal institutions to its far-flung colony in the Caribbean. It is essential to note, moreover, that for the first 300 years of Spanish colonial rule, initially under the Catholic Kings,[12] and subsequently under their Hapsburg and Bourbon heirs, the Crown ruled over Cuba through a complex web of laws,

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7. *See*, SALVADOR MORALES, CONQUISTA Y COLONIZACIÓN DE CUBA: SIGLO XVI 5 (1984) (discussing Spain's colonization of Cuba); *see also* HUGH THOMAS, CUBA: THE PURSUIT OF FREEDOM (1971) (discussing Cuba's history from the British takeover of Havana in 1782 to the aftermath of the 1959 Cuban Revolution); JUAN BOSCH, DE CRISTÓBAL COLÓN A FIDEL CASTRO (12th ed. 2005) (overview of Spain's colonization of the Americas).

8. BERNSTEIN MAGOC, IMPERIALISM AND EXPANSIONISM IN AMERICAN HISTORY: A SOCIAL, POLITICAL, AND CULTURAL ENCYCLOPEDIA AND DOCUMENT COLLECTION 752 (2015); *see also* ALICIA CASTELLANOS ESCUDIER, FILIPINAS: DE LA INSURRECCIÓN A LA INTERVENCIÓN DE EE.UU. 1896-1898 (1998) (discussing the catalysts leading to the Philippines' insurrection against the U.S.'s military forces in the wake of the 1898 Spanish-American War); FERNANDO PICÓ, LA GUERRA DESPUÉS DE LA GUERRA (2nd ed. 1998)(discussing Puerto Rico's social, economic and political landscape at the time of the U.S.'s 1898 invasion). As shall be discussed in further detail below, following the signing of the Treaty of Paris, on December 10, 1898, the Spanish Kingdom relinquished in favor of the United States "all claim of sovereignty over and title to Cuba," while also ceding Puerto Rico (then a Spanish overseas province by virtue of the 1897 Autonomic Charter), Guam and the Philippines to the victor of the so-called Spanish- American War.

9. *See* Johannes San Miguel Giralt, *Derecho Romano Francés y Common Law: ¡A Escena!*, 27 REVISTA CUBANA DE DERECHO 79, 89–96 (2006) (discussing the foundational elements of Cuba's Roman French legal tradition).

10. *Id*; *see also* MANUEL TORRES AGUILAR, MANUAL DE HISTORIA DEL DERECHO 62–65 (2015).The *Corpus Iuris Civilis*, commonly known as Justinian's Code, was enacted in two separate installments in 527 A.D. and 534 A.D, respectively. Perhaps the most ambitious attempt at codification engineered during the very early Middle Ages, the *Corpus Iuris Civilis* was heavily influenced by, *inter alia*, Caracalla's legislation, the *Codex Gregorianus* (294 A.D.), the *Codex Hermogenianus* (314-324 A.D.), and the *Codex Theodosianus* (438 A.D.). It is essential to note that Justinian's codification effort, moreover, was at the heart of his geopolitical design for the recolonization of the Mediterranean, which resulted in Byzantium's re-annexation of the southern tip of the Iberian Peninsula.

11. LESLIE M. ALEXANDER, ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY 63. (Walter C. Rucker ed., 2010); *see also* MANUEL TORRES AGUILAR ET AL., MANUAL DE HISTORIA DEL DERECHO 142 (Manuel Torres Aguilar, ed. 2015); JOHN THOMAS VANCE, THE BACKGROUND OF HISPANIC-AMERICAN LAW 93–107 (1943). *Las Siete Partidas*, published under the auspices of Alfonso X (1252-1284) and perhaps the single most influential legal text produced in Castile during the Middle Ages, was an attempt at harmonizing Castile's complex legal repertoire, marred by internal inconsistencies due to an untrammeled degree of discontinuous syncretism. Hence, *Las Siete Partidas* compiled and synthesized legal principles found in Roman and Visigoth law, as well as in medieval canonical law and even in so-called Castilian customary law. It was officially sanctioned under the 1348 *Ordenamiento de Alcalá* available to Spanish courts and litigants until late 19th century.

12. 1 H. MICHAEL TARVER, THE SPANISH EMPIRE: A HISTORICAL ENCYCLOPEDIA 61–63. (Emily Slape ed., 2016).

decrees and *cédulas*, highly steeped in the Castilian legal tradition, under the exclusive jurisdiction of *el Real y Supremo Consejo de Indias* (Council of Indies).[13]

Originally established by order of Charles V as a subdivision of the Council of Castile (*el Real y Supremo Consejo de Castilla*)[14] in 1519, the Council of Indies outgrew the monarch's initial, rather limited, design.[15] The sheer magnitude of Spain's vast colonial project in the Americas, particularly after Cortés's and Pizarro's exploits in Mexico and Peru, respectively, led the Crown, in 1524, to decree the Council of Indies' complete independence from the Castilian Council.[16] Hence, from then on, until its suppression in 1834,[17] the Council of Indies controlled every aspect of Cuba's colonial life.[18] It exercised unencumbered legal authority over the island's executive, legislative, judicial, commercial, military, and even ecclesiastical affairs.[19]

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13. *Spanish Monarchical Constitution and Codes*, 63 THE ALBANY L. J. 350, 350 (1901); *see also* FELICIANO BARRIOS, LA GOBERNACIÓN DE LA MONARQUÍA ESPAÑOLA: CONSEJOS, JUNTAS Y SECRETARIOS DE LA ADMINISTRACIÓN DE CORTE (1556–1700) 545–56 (2015) (Analysis of the administrative structure of the Council of Indies and its interactions with the Spanish Crown.)

14. *See* SALUSTIANO DE DIOS, EL CONSEJO REAL DE CASTILLA: (1385–1522) 209 (1982 ed., 1953) (discussing the origins of the Council of Castile, and its subsequent role during the early days of Charles V's reign).

15. *See* JOHN THOMAS VANCE, BACKGROUND OF HISPANIC-AMERICAN LAW 129–30 (1943). Under the 1519 design, all colonial issues pertaining to the peninsula's trade with its newly acquired possessions were addressed to the *Casa de Contratación de Sevilla*—an institution under the aegis of the Council of Castile. Having nullified the Santa Fe Capitulations (*Capitulaciones de Santa Fe*) entered with Christopher Columbus in 1492, the Crown now exercised absolute control over the new territories.

16. *See* JOSÉ MARÍA OTS Y CAPDEQUI, HISTORIA DEL DERECHO ESPAÑOL EN AMÉRICA Y DEL DERECHO INDIANO 116 (1969) (Under the royal decree of August 1, 1524, the Council of Indies was put under the control of Cardinal García de Loaysa y Mendoza, Charles V's confessor).

17. HERBERT M. KRITZER, LEGAL SYSTEMS OF THE WORLD: A POLITICAL SOCIAL AND CULTURAL ENCYCLOPEDIA 1524 (Herbert M. Kritzer ed., 2002). While definitively disbanded in 1834, the Council of Indies was initially abolished under the 1808 and 1812 Bayonne and Cádiz Constitutions, respectively, only to be reinstituted during Ferdinand VII's absolutist restoration in 1814.

18. *Report on the Census of Cuba 1899,* U.S. WAR DEP'T 1, 43–44 (1899), https://archive.org/details/reportoncensusc01willgoog; *see also* ERNST SCHÄFER, EL CONSEJO REAL Y SUPREMO DE INDIAS (1935–1947) (analysis of the Council of Indies's internal structure and operation).

19. MOIRA B. MACKINNON & LUDOVICO FEOLI, REPRESENTATION AND EFFECTIVENESS IN LATIN AMERICAN DEMOCRACIES: CONGRESS, JUDICIARY AND CIVIL SOCIETY (Moira B. MacKinnon & Ludovico Feoli eds., 2013); *see also*, JORGE DE ESTEBAN, LAS CONSTITUCIONES DE ESPAÑA 25–26 (2000); FEDERICO BARRACHINA Y PASTOR, DERECHO FORAL ESPAÑOL (1911) (discussing Spain's *derecho foral*). The degree of centralization endured by Cuba, throughout the life of the Council, was a far cry from the more autonomous conditions of Spain's peninsular provinces. It is essential to note that the definitive political unification of Spain at the hands of Ferdinand and Isabella, following the fall of Granada in 1492 did not do away with the peninsula's legal heterogeneity—particularly in the realm of private law. Each region held on to its particular legal repertoire, while pledging allegiance to the Crown. Thus, while Spain denied Cuba any flexibility as to the articulation of an autochthonous legal tradition; Catalonia, Aragon, Navarre, Galicia, Valencia, Biscay and the Balearic Islands did enjoy such flexibility. Note that the superimposition of a more centralized governmental model, in the French mold, following the accession to the Spanish throne of Philip V of Anjou in 1700, did erode the ascendancy of the aforementioned regional legal systems.

The Council drafted all colonial legislation, appointed the colonial bureaucracy, while retaining impeachment authority, designed all colonial budgets, and, similar to the British Privy Council, also acted as the highest court of appeals for all Spanish colonies—including Cuba.[20] The avalanche of legislation, decrees and *cédulas* rendered by the Council of Indies soon evolved into an intricate corpus of public law, commonly known as *derecho indiano*,[21] which formed the basis for Cuba's early legal order, up to the first decades of the 19th century.[22]

European constitutionalism, together with the French codification project, would make a rather fleeting appearance on Cuban soil as a direct consequence of Napoleon's 1808 invasion of Spain.[23] Both the 1808 Bayonne Constitution,[24] granted by *l'empereur* to the Spanish people, and the 1812 Cádiz Constitution,[25] drafted by the Spanish *Cortes* in defiance of Napoleon's rule, were applied in Cuba.[26] The return of Ferdinand VII to Madrid in 1814,[27] following Napoleon's abdication pursuant to the Treaty of Fontainebleau,[28] put an end to the Cádiz liberal experiment,[29] turning the wheel back to absolutist rule under the firm grip of the ancient Council of Indies.

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20. 1 José Trías Monge, Historia Constitucional de Puerto Rico 13–14 (1980). The size of the Council of Indies increased through the centuries. Initially made up of one president and up to four or five councilors, by the end of the 17th century, its membership had increased to over 19 councilors.

21. *See* Robert C. Schwaller, Géneros de Gente in Early Colonial Mexico: Defining Racial Difference 51–55 (2016); *see also* Feliciano Barrios, La gobernación de la monarquía española: Consejos, Juntas y Secretarios de la Administración de Corte (1556-1700) 548 (2015). The Spanish Crown made various attempts to compile the encyclopedic panoply of legal instruments pertaining to the *derecho indiano*. The first compilation project was commissioned by Charles V, and published on November 20, 1542 (*Las Leyes Nuevas*). Charles's son, Philip II, ordered a second compilation, which came to light in 1571 (*Las Ordenanzas*). Finally, in 1680, during the reign of Charles II, the *Recopilación de las Leyes de Indias* came out as the most definitive work on *derecho indiano*.

22. *See* Ots y Capdequi, *supra* note 16, at 205. Together with the *derecho indiano*, which for the most part was public in nature, Castilian law did play a role in Cuba as an important source of private law. *See id.*

23. *See* de Esteban, *supra* note 19, 58. In May 1808, after forcing the abdication of Charles IV and Ferdinand VII, along with the surrender of their respective dynastic rights, Napoleon imposed his own rule on Spain (by appointing his brother Joseph as king) and a constitution of his own making, the Bayonne Constitution.

24. See *id.* at 101–20 (text of the Bayonne Constitution).

25. See *id.* at 121–75 (text of the Cádiz Constitution, proclaimed on March 18, 1812).

26. *Id.* at 113–14, 167–69. Like its Bayonne counterpart, the constitutional text drafted in Cádiz abolished the Council of Indies.

27. *Id.* at 59. Ferdinand VII returned to Spain, from imprisonment in France, on March 22, 1814.

28. *Napoleon Exiled to Elba,* History (Apr. 11, 2009), http://www.history.com/this-day-in-history/napoleon-exiled-to-elba. The Treaty of Fontainebleau was signed on April 11, 1814. Following the signing of the treaty, Napoleon was exiled to Elba.

29. *See* Esteban, supra note 19, at 122, 147–49. The 1812 Cádiz Constitution was an autochthonous legal instrument drafted by delegates from across the peninsula and its overseas American and Asian colonies. For the first time in Spain's constitutional history, this constitution explicitly subordinated the Crown to the popular will. Article 3 of the Cádiz constitutional text establishes that "sovereignty resides essentially within the Nation, and for that reason it alone enjoys the exclusive right of establishing its fundamental laws" ("*La soberanía reside esencialmente en la Nación, y por lo mismo pertenece a ésta exclusivamente el derecho de establecer sus leyes fundamentales*".)

B. *The Superimposition of the Spanish Codification Project*

From this period onwards, up until Spain's withdrawal from Cuba in 1898, the island's legal superstructure reflected the acute inconsistencies ingrained in the Spanish Kingdom's tumultuous political landscape. Torn by incessant civil strife at home[30] and insurrection abroad,[31] while considerably weakened by the acute ideological clash pitting absolutists against constitutionalists, both Ferdinand VII and his daughter, Isabella II, chose not to extend to Cuba (and the rest of the Spanish colonies) the same repertoire of limited constitutional liberties already available in the peninsula. At the colonial level, the Bourbons' absolutist entrenchment meant Cuba was left out of all subsequent Spanish constitutional experiments, namely the 1834 Royal Statute[32] along with the 1837,[33] 1845,[34] 1869,[35] and the 1876 Constitutions.[36] Thus, Cuban law throughout the 19th century effectively became an unintelligible hodgepodge, borrowing most of its public and private law from the

30. See Papers relating to the foreign relations of the United States, transmitted to Congress, with the annual message of the President, December 4, 1876, U.S. DEP'T OF STATE 442, 442–45 (1876), http://images.library.wisc.edu/FRUS/EFacs/1876/reference/frus.frus1876.i0027.pdf (discussing the catalysts behind the Carlist wars.) The untimely death of Ferdinand VII in 1833 opened up the floodgates of civil war in Spain. For the next four decades, Ferdinand's younger brother, Carlos María Isidro de Borbón, and his heirs and allies, would dispute Isabella II's and her son's (Alfonso XII) legitimate claim to the Spanish throne.

31. HISTORICAL DICTIONARY OF EUROPEAN IMPERIALISM 581 (James Stuart Olson et al. eds., 1991). Note that between 1810 and 1830, Spain lost all its possessions in the Americas, except for Cuba and Puerto Rico.

32. *See* Esteban, *supra* note 19, at 28-29. Proclaimed on April 1, 1834 at the beginning of Queen María Cristina's regency, the Royal Statute turned the liberal pendulum on its head. Absolutist in nature, it did away with the separation-of-powers arrangement established in Cádiz and constitutionalized the monarch's absolutist rule over the realm. The Royal Statute's reactionary ingredients led to its own demise in August 1836 following the revolt of *La Granja.*

33. *Id.* at 30, 194. The 1837 Constitution, established on June 18 of the same year, was the byproduct of a political compromise by the Crown to accommodate the idiosyncrasies of conservatives and moderates alike. It provided for a constitutional monarchy and established a bicameral legislative system, while protecting (albeit rudimentarily) the freedom of the press. Of significance to Cuba was the fact that the 1837 Constitution explicitly established that "the overseas provinces shall be ruled by special laws." (*Las provincias de Ultramar serán gobernadas por leyes especiales.*)

34. *Id.* at 30–31, 194. Under the premiership of General Ramón María Narváez, the 1837 Constitution was shelved, and a new constitutional instrument came to light on May 23, 1845. Once again, the reactionary elements of the Spanish military and gentry did away with the more progressive provisions of the late 1837 Constitution. For instance, the already limited freedom of the press was further diminished and the suffrage considerably curtailed. Moreover, it was made plain clear that the new constitutional text would not be applicable to Cuba. In identical fashion to the moribund 1837 Constitution, Article 80 of the new constitutional instrument stated, "[t]he overseas provinces shall be ruled by special laws." (*Las provincias de Ultramar serán gobernadas por leyes especiales.*)

35. *Id.* at 236. Even the more liberal 1869 Constitution, which came to light 9 months after the expulsion of Queen Isabella II from the throne on June 1 of the same year, made no provision for Cuba. Article 108 of Title X once again regurgitated the vague mantra that Cuba would have to wait for politico-constitutional reforms to come at a later date.

36. *Id.* at 276. Unsurprisingly the 1876 Constitution, which provided legal legitimacy to the Bourbon's restoration to the Spanish throne in the person of Alfonso XII, once again relegated Cuba to oblivion. Article 89 of the 1876 Constitution stated, "the overseas provinces shall be ruled by special laws." (*Las provincias de Ultramar serán gobernadas por leyes especiales.*)

archaic *derecho indiano,* as well as from more modern Spanish legislation,[37] such as the 1855 Law of Civil Procedure,[38] the 1870 Penal Code,[39] the 1872 Law of Criminal Procedure,[40] the 1885 Commerce Code,[41] the 1889 Civil Code,[42] and even the 1861 Mortgage Law,[43] all of which were made applicable to Cuba with considerable delay.

Cuba's long wait for a constitutional arrangement grounded on the Westminster model[44] came far too late, on November 25, 1897,[45] with Spain's desperate concession of the so-called Autonomic Charter.[46] Embroiled in the losing side of an epic struggle for national liberation, which since February 1895 reignited Cuba's protracted war of independence,[47] the

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37. *Id.* at 186, 200, 233, 273 (Article 4 of the 1837 Constitution, Article 4 of the 1845 Constitution, Article 91 of the 1869 Constitution, and Article 75 of the 1876 Constitution). All Spanish constitutions, following the Cádiz experiment, explicitly provided for the homogenous applicability throughout the realm of the code system.

38. CRAWFORD M. BISHOP & ANYDA MARCHANT, A GUIDE TO THE LAW AND LEGAL LITERATURE OF CUBA, THE DOMINICAN REPUBLIC AND HAITI 65 (1944). The 1855 Law of Civil Procedure was made applicable to Cuba on July 1, 1866 by the Royal Decree of December 9, 1865. Subsequently, the 1885 amendments to the Spanish Law of Civil Procedure were made extensive to Cuba on January 1, 1886.

39. SPAIN MINISTERIO DE ULTRAMAR, SPANISH RULE IN CUBA: LAWS GOVERNING THE ISLAND 35 (1896).The 1870 Penal Code was made applicable to Cuba on May 23, 1879. Note that the Spanish Penal Code survived the U.S. invasion of 1898 and the 1902 declaration of independence, remaining in full force and effect on Cuban soil until 1936.

40. *See Translation of the Law of Criminal Procedure for Cuba and Porto Rico*, DIVISION OF INSULAR AFFAIRS, U.S. WAR DEP'T xxxix (1901). Made applicable to Cuba on October 19, 1888.

41. Bishop & Marchant, *supra* note 38, at 20. The 1885 Commerce Code was made applicable to Cuba on May 1, 1886.

42. *Id.* The Spanish Civil Code was made applicable to Cuba, Puerto Rico and the Philippines on July 31, 1889. It entered into full force and effect in Cuba on November 5, 1889.

43. *Id.* at 109. The Mortgage Law (*Ley Hipotecaria*) was extended to Cuba to take effect on May 1, 1880.

44. *See* CONSTITUTION ACT, 1867, 30 & 31 VICT. CH. 3, *reprinted in* R.S.C. NO. 5 (1985). A close perusal of the Spanish Autonomic Charter confirms its foundational elements mirrored the British dominion model, as had been applied to Canada since 1867 pursuant to the British North America Act of that year.

45. See Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress *December 5, 1898*, U.S. DEP'T OF STATE 558, 617–44 (1898), http://images.library.wisc.edu/FRUS/EFacs/1898/reference/frus.frus1898.i0025.pdf (dispatch from U.S. Ambassador in Madrid, Stewart L. Woodford, sent to the U.S. State Department on this development, along with a copy of Práxedes Mateo Sagasta's official statement to the Cuban people and of the Charter itself). The archives reveal the U.S.'s interest in the new Cuban landscape, following the concession of the Autonomic Charter.

46. See CARMELO DELGADO CINTRÓN, IMPERIALISMO JURÍDICO NORTEAMERICANO EN PUERTO RICO (1898-2015) 83–92 (2015) (analysis of Madrid's political scenario during the months leading to the signing of the Autonomic Charter). The concession of the Autonomic Charter to Cuba and Puerto Rico was the byproduct of Spain's financial collapse and of the utter failure of Valeriano Weyler's draconian military tactics on the ground. Both liberal and conservative governments in Madrid consistently denied their Caribbean possessions of any meaningful installment of self-government. As late as 1895, the Abárzuza reforms were rejected for their alleged liberality. From a political perspective, the assassination of Spanish Conservative Premier Antonio Cánovas del Castillo, on August 8, 1897, and the resulting accession to power of the liberal Práxedes Mateo Sagasta enabled, albeit belatedly, the approval of an autonomic statute for the overseas colonies.

47. Richard B. Gray, *The Quesadas of Cuba: Biographers and Editors of José Martí y Pérez*, 22 THE AMERICAS 389, 391 (1966); RAIMUNDO LAZO, JOSÉ MARTÍ: SUS MEJORES PÁGINAS 47–48, 67–72 (México: Editorial Porrúa, 1992) (discussing Martí's ideas and values, as he embarked on Cuba's definitive war of independence). The last chapter of Cuba's war of independence began on February 24, 1895, under the leadership of José Martí—who together with General Máximo Gómez joined the insurgents on Cuban soil on April 11, 1895.

Spanish Crown's belated efforts at reigning in the insurgency by means of a constitutional solution failed. The stage was set for the United States' head-on collision with Spain, which irretrievably led to the so-called Spanish American War[48] and its momentous aftermath.[49]

C. *Cuba's Endogenous Constitutionalism*

Before going any further, it is essential to note that some of the more refined works of Cuban endogenous constitutionalism came to life during the turbulent years of the Cuban *fin de siècle*. Born in the battlegrounds of *Cuba libre,* and inspired on the ideas of Félix Varela,[50] Narciso López,[51] Carlos Manuel de Céspedes,[52] Ignacio Agramonte[53] and José Martí,[54] among others, the revolutionary constitutions of *Guáimaro* (1869),[55] *Baraguá*

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48. JAMES R. ARNOLD & ROBERTA WIENER, UNDERSTANDING U.S. MILITARY CONFLICTS THROUGH PRIMARY SOURCES 259–261 (2015). The U.S. declared war on Spain on April 20, 1898, following the explosion of the *Maine* in Havana's waters on February 15, 1898.

49. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901). By the end of the war, the U.S. had become a colonial power with significant control of the Western Hemisphere and the Pacific, where the acquisition of the Philippines and Guam significantly enhanced its geopolitical interests. From a purely domestic constitutional perspective, following the war the U.S. Supreme Court, in the so-called insular cases, validated the U.S.'s imperial project devising a new legal construct: the unincorporated territory, which "belongs" to the U.S. but is not "part" thereof, where the U.S. Constitution does not fully follow the U.S. flag and where Congress has made no promise of statehood.

50. *See generally* JOSEPH MCCADDEN, FELIX VARELA TORCH BEARER FROM CUBA 44–47, 72 (1969). Félix Varela (1788-1853) was a Cuban priest who fought both for the abolition of slavery and against Spanish colonialism on Cuban soil. A Cuban delegate to the Spanish *Cortes* during the liberal triennium of 1820-1823, Varela lived in exile all his adult life — first in New York and then in St. Augustine where he died at the age of 65. His remains today sit at the Aula Magna of the University of Havana.

51. *See generally* JOSE MANUEL CASTAÑÓN, CUBA: HABLA CONTIGO, SIGO HABLANDO CONTIGO 255 (2001). Narciso López de Urriola (1796-1851) was a Venezuelan general, of Basque descent, who designed Cuba's flag and coat of arms. Moreover, López attempted to overthrow the Spanish colonial regime by means of an armed invasion launched from the U.S. He was captured in Cuba and executed by Spanish forces on September 1, 1851.

52. RAUL EDUARDO CHAO, CONTRAMESTRE 7, 21 (2008). Carlos Manuel de Céspedes y del Castillo (1819-1874), the first president of the insurgent Cuban government, instituted on the basis of the 1869 *Guáimaro* Constitution, was a lawyer and small plantation owner from Oriente. Considered the father of the Cuban nation, Céspedes died in combat against Spanish units on February 27, 1874.

53. RAUL EDUARDO CHAO, BARAGUÁ: INSURGENTS AND EXILES IN CUBA AND NEW YORK DURING THE TEN YEAR WAR ON INDEPENDENCE (1868-1878) 362 (2009). Ignacio Agramonte y Loynaz (1841-1873) was a Cuban lawyer who rose to the rank of major general during the Ten Year War, where he commanded the Camagüey division. A member of the Republic in Arms' House of Representatives, Agramonte died an untimely death at the hands of the Spanish forces on May 11, 1873. The Law Faculty of the University of Havana today bears his name.

54. ALFRED J. LOPEZ, JOSÉ MARTÍ: A REVOLUTIONARY LIFE 160–64, 253 (2014). José Martí y Pérez was born in old Havana on January 28, 1853. The son of a peninsular father from Valencia and an islander mother from the Canary Islands, Martí was an ardent separatist, who at the age of 17 was already a political prisoner condemned to hard labor at the San Lázaro quarry in Havana. Following his deportation to Spain in 1871, Martí dedicated the rest of his life to Cuba's struggle for liberation. He was, undoubtedly, the intellectual architect of Cuba's definitive war of independence.

55. *See* FIDEL CASTRO, FIDEL CASTRO READER 333-342 (David Deutschmann ed., 2007). The *Guáimaro* Constitution, proclaimed on April 10, 1869, by the Cuban separatists headquartered in Oriente was Cuba's first autochthonous constitutional text. Modeled after the U.S.'s federal structure, it abolished slavery in all territory under insurgent control. It deposited, moreover, a significant quantum of authority in a House of Representatives to which President Cés-

(1878),[56] *Jimaguayú* (1895),[57] and *La Yaya* (1897)[58] stood as prominent illustrations of the profound imprint the more progressive French and Anglo-American constitutional doctrines had on the Cuban landscape of the time.[59]

The U.S. Military Period

D. American Military Rule

The anti-climactic denouement of Cuba's war of independence led, not to outright sovereignty as the late Martí had envisioned, but to four long years of military occupation under the watchful eye of the U.S. War Department.[60] From a purely legal perspective, the "little splendid war"[61] introduced in Cuba a brief, albeit confusing, period of constitutional balkanization. On the one hand, the Spanish Autonomic Charter applied in those provinces still under Spain's control, while the separatists' *Yaya* Constitution remained in full force and effect in *mambí*[62] territory. The fall of Santiago on July 16, 1898, at the hands of Theodore

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pedes' power, and that of the army generals, was subordinated. It expired following the signing of the 1878 Pact of Zanjón.

56. CARLOS MÁRQUEZ STERLING & MANUEL MÁRQUEZ STERLING, HISTORIA DE LA ISLA DE CUBA 97–101 (1975); *see also* Orestes Hernández Más, *El constitucionalismo revolucionario y su abandono en la república neocolonial*, 9 REVISTA CUBANA DE DERECHO 141, 141–52 (1975). The Baraguá Constitution, drafted on March 15, 1878, was the juridical expression of Maceo's rejection of the Zanjón capitulation. It infused temporary life on the revolutionary government on the basis of a much more centralized decision-making apparatus revolving around a directorate. It finally dissolved in 1880, with the end of the so-called *Guerra Chiquita*.

57. *See* Carlos Manuel Villabella Armengol, *De Guáimaro a La Habana: Historiografía de la organización del poder en el constitucionalismo cubano*, 32 REVISTA CUBANA DE DERECHO 5, 15-16 (2008). The *Jimaguayú* Constitution was established on September 18, 1895, shortly after the resumption of Cuba's war of independence. Drawing on past experiences, this constitutional text granted the military high command more flexibility and autonomy than its *Guáimaro* predecessor while concentrating political power on a governing council made up of the president, vice president and 4 secretaries of state.

58. *Id.* at 16. The *Yaya* Constitution, issued on October 30, 1897, strengthened the revolutionary government and provided further detail on areas as sensitive as the administration of civil justice and the concession of Cuban nationality.

59. ANDRÉS MARÍA LAZCANO, LAS CONSTITUCIONES DE CUBA 981–82 (1952). Note that the first known draft of a liberal constitution for Cuba, inspired on modern continental principles, was authored by Joaquín Infante in 1811.

60. NIGEL D. WHITE, THE CUBAN EMBARGO UNDER INTERNATIONAL LAW: EL BLOQUEO 19 (2014); *see also* DAVID F. HEALY, THE UNITED STATES IN CUBA 1898-1902 (1963) (analysis of the challenges facing the U.S. military commanders in Cuba during the 1898-1902 American occupation).

61. *See* WILLIAM ROSCOE THAYER THE LIFE AND LETTERS OF JOHN HAY 337 (1915) (discussing the origin of phrase coined by then U.S. Secretary of State John Hay); *See generally* MARGARET LEECH, IN THE DAYS OF MCKINLEY 151–347 (1959) (inside account of how President McKinley managed the Cuban crisis).

62. *See* MARK ABENDROTH, REBEL LITERACY: CUBA'S NATIONAL LITERACY CAMPAIGN AND CRITICAL GLOBAL CITIZENSHIP 29 (2009). The term "*mambí*" was initially used pejoratively by the more reactionary elements of the Spanish press, typecasting Cuban separatists as black brigands. In time, the term "*mambí*" was appropriated by the Cuban rebels themselves to describe their fellow freedom fighters. It, thus, became a term of honor.

Roosevelt's *Roughriders* superimposed on the Cuban terrain a third legal order premised on the vast body of military orders issued by the U.S. Army's high command on the ground. Moreover, the end of the hostilities, following Spain's peace offer,[63] led U.S. General Leonard Wood to issue a provisional constitution,[64] initially for Santiago and subsequently for the whole of Cuba, effectively abrogating the Spanish Autonomic Charter. This notwithstanding, on January 1, 1899, as Spain officially handed over Cuba to the McKinley Administration in Washington, Governor John R. Brooke's first order established that the Spanish Civil and Penal Codes, together with the Spanish Civil and Penal Procedural Laws, would remain in full force and effect on Cuban soil.[65] Soon thereafter in April 1899, Brooke abolished the old Spanish administrative court (*Tribunal de lo Contencioso Administrativo*), while establishing a Cuban Supreme Court (*Tribunal Supremo*).[66] By October 15, 1900, less than a month before the first meeting of Cuba's Constitutional Convention, Wood, who succeeded Brooke in the island's governorship on December 20, 1899, introduced the writ of *habeas corpus*.[67]

The Postcolonial Period

E. The 1901 Constitution

It was under the shadow of Wood's military rule that Cuba's first postwar endogenous constitution-making exercise took place. The 1901 Constitution, Cuba's first postcolonial constitutional text, was then the byproduct of an uneasy and asymmetrical geopolitical relationship.

Elected pursuant to General Wood's military orders, a Constitutional Convention made up of 31 delegates from across the island was convened in September 1900 to draft a constitution for the future Republic of Cuba.[68] The Convention's deliberations, which began on November 5, 1900, and finally adjourned on February 21, 1901,[69] produced a rather co-

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63. 1 THE ENCYCLOPEDIA OF THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS: A POLITICAL, SOCIAL, AND MILITARY HISTORY 467 (Spencer C. Tucker, James Arnold & Roberta Wiener eds., 2009). Spain's initial peace offer was extended to the U.S. Government on August 13, 1898, under the auspices of the French Republic.

64. George Kennon, *The Regeneration of Cuba*, NEW OUTLOOK, May 13, 1899, at 110.

65. Andry Matilla Correa, *Brevísima presentación histórica del Derecho Procesal en Cuba hasta 1976*, 42 REVISTA CUBANA DE DERECHO 5, 20 (2013).

66. *Id.* at 20-21.

67. *Id.* at 23.

68. LEONARD WOOD, MILITARY ORDER NO. 301 OF JULY 25, 1900, *reprinted in 1* ANNUAL REPORTS OF THE WAR DEPARTMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1900, 519 (Military Governor of Cuba on Civil Affairs, 1901). The 31 Cuban delegates were elected on the following basis: Pinar del Río: 3; La Habana: 8; Matanzas: 4; Santa Clara: 7; Puerto Príncipe: 2; and Santiago: 7.

69. *See, e.g.*, Andrés María Lazcano, *supra* note 59, at 66.

gent constitutional text. From a purely technical perspective, the 1901 Constitution crystallized a series of principles then unbeknownst to Cuba's legal culture. For instance, Title IV provided the Cuban people an enumerated bill of rights, which expounded on the rather limited catalog of rights General Wood offered the population in October 1898.[70] Structurally, this legal instrument replicated the republican form of government enshrined in the U.S. Constitution. A bicameral legislative branch, made up of a popularly elected senate and house of representatives,[71] would now stand on equal footing with a president chosen by the newly enfranchised Cuban electorate, who would act as head of state and government as well as commander in chief.[72] Of even greater significance was that, contrary to the U.S. Constitution, the Cuban text did openly provide for judicial review.[73] The Cuban judiciary was endowed, from the outset, with explicit constitutional authority to pass muster over the constitutionality of all statutes passed by the legislature.

The legitimacy of the 1901 experiment, however, was severely compromised by the McKinley Administration's requirement that the Cuban delegates to the Constitutional Convention incorporate the so-called Platt Amendment[74] as an appendix to the newly minted constitutional instrument. Under the strictures of Senator Platt's (R-Conn.) amendment to the 1901 U.S. Army Appropriations bill, the Republic of Cuba, as a pre-condition for independence, had no choice but to, firstly, grant the U.S. the right to intervene militarily on the island; secondly, surrender to the U.S. for the foreseeable future possession of the Isle of Pines (today Isle of Youth); and thirdly, sell or lease the U.S. "lands necessary for coaling or naval stations."[75]

To the chagrin of a sizeable proportion of the Cuban people, the delegates to the Convention, in a controversial 16-11 vote held on June 12, 1901, caved into the McKinley Administration's demands, thus finally incorporating the Platt Amendment as an appendix to the 1901 Constitution.[76] Hence, following the election and subsequent inauguration of President Tomás Estrada Palma, on May 20, 1902, the U.S. finally "transferred to the President and Congress of the Republic of Cuba the government and control of the island"[77] now under the aegis of the 1901 Constitution.

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70. *See id.* at 531-33 (Wood's provisional constitution provided for the right to peacefully assemble; religious freedom; due process of law; compensation from expropriation; protection from self-incrimination, cruel and unusual punishment and unreasonable searches and seizures; and afforded the writ of *habeas corpus*.)

71. Constitución de la Republica de Cuba, art. 44 (1901).

72. *Id.* art. 65.

73. *Id.* art. 83, §4.

74. *See* Louis A. Perez, *Cuba c. 1930–59*, in 7 THE CAMBRIDGE HISTORY OF LATIN AMERICA: 1930 TO THE PRESENT 419, 419 (Leslie Bethell ed., 1990).

75. Platt Amendment, ch. 803, 31 Stat. 897. It is worth noting that the U.S.'s possession of Guantánamo finds its initial legal basis in the discredited Platt Amendment.

76. *The Platt Amendment is Accepted by Cuba*, N.Y. TIMES, June 13, 1901, at 1.

77. U.S. DEP'T. OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 268 (1906).

The 1901 Constitution survived, relatively unscathed, for the next three decades despite the pervasive civil wars and endemic political chaos that scarred Cuban life during the postcolonial period.[78]

F. The Interwar Constitutional Crisis

In 1928, besieged by the global collapse of the sugar markets and a boisterous political opposition at home, the Gerardo Machado Administration, for the first time in Cuba's postcolonial history, amended the constitutional text by means of an *ultra vires* mechanism in order to unilaterally extend the president's term, modify the line of presidential succession and reconfigure the composition of the island's legislature.[79] Not only did this preposterous maneuver plant the seeds of Machado's downfall in August of 1933,[80] but more importantly, opened the floodgates for future legal instability, sending shockwaves through Cuba's constitutional superstructure.

Following the implosion of Machado's regime, a provisional government under Carlos Manuel de Céspedes passed Decree No. 1298 on August 24, 1933,[81] restoring the 1901 Constitution in its entirety. The toppling of Céspedes' interim government, shortly thereafter, led to additional rounds of constitutional modifications of dubious legality.[82]

G. The 1940 Constitution

It was precisely this downward spiral, of chaotic proportions, the catalyst leading to Cuba's second Constitutional Convention. This new constitution-making exercise started in November 1939 with the election of delegates to the new Convention and finished on June 8, 1940.[83] The new constitutional text entered into full force and effect on October 10, 1940.[84]

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78. *See,* Ciro Bianchi Ross, AGENDA DE LA REPÚBLICA (2015) (discussing the events shaping the first decades of Cuba's so-called neocolonial period).

79. *See* LAZCANO Y MAZÓN, *supra* note 59, at 586–87, for President Machado's Decree of May 11, 1928.

80. *See generally*, Philip Dur & Christopher Gilcrease, *U.S. Diplomacy and the Downfall of a Cuban Dictator: Machado in 1933*, 42 J. OF LATIN AMERICAN STUD. 255 (2002) (discussing how various maneuvers by the United States government led to the overthrow of President Machado).

81. *See* LAZCANO Y MAZÓN, *supra* note 59, at 608–12 (discussing how Decree No. 1298 invalidated Machado's extension of his first term in office to 1931 and eliminated the presidential reelection provision the former president had incorporated into the constitutional text).

82. See Fabricio Mulet Martínez, *El desarrollo constitucional en Cuba durante los años 1933-1939*, 43 REVISTA CUBANA DE DERECHO 71 (2014), for a detailed analysis of this tumultuous period and its effects on Cuba's constitutional structure.

83. Carlos Manuel Villabella Armengol, *Una nueva mirada al constitucionalismo cubano desde los modelos constitucionales y la periodización de la República*, 44 REVISTA CUBANA DE DERECHO 30 (2014).

84. The text of the 1940 Constitution was first published in Cuba's *Gaceta Oficial* on July 8, 1940.

Cuba's 1940 Constitution, inaugurated along with Fulgencio Batista's first administration,[85] while maintaining the republican imprint of its predecessor, was a more progressive legal instrument than the old 1901 Constitution. From a substantive perspective, it reflected the more advanced legal values of its times.[86] The 1940 Constitution's Title IV (*Derechos Fundamentales*), Title V (*De la Familia y la Cultura*) and Title VI (*Del Trabajo y la Sociedad*) provided the Cuban people, if only theoretically, with an extensive bundle of social, economic and political rights, then unavailable in a significant number of developing countries.[87]

H. The Schism of 1952

Nevertheless, the dissonances of the past came to life once again in 1952 with the collapse of this brief experiment. Batista's *coup* of March 10, 1952, not only put an end to the upcoming presidential election[88] but forever changed Cuba's political and legal jigsaw puzzle.

Batista, as Machado before him, upon regaining absolute control of the island, modified the supreme law of the land. Under the new Constitutional Law of April 4, 1952,[89] the Cuban legislature was now stripped of all meaningful authority, while the checks and balances system ingrained in Cuba's republican form of government was completely shattered.[90] A Council of Ministers with power to amend the constitutional text as it saw fit was now presided by Batista himself, who effectively wielded all legislative and executive authority.[91] The conditions were, thus, ripe for the flourishing of the 26th of July Movement (*Movimiento*

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85. Although universally regarded as Cuba's strongman since the early 1930's, Fulgencio Batista was finally elevated to the presidency of the Cuban Republic on July 14, 1940. Batista was born in Oriente on January 16, 1901. He joined the military at a relatively early age. By 1928 the young sergeant was assigned to Camp Columbia, in the outskirts of Havana, where 5 years later, he played a decisive role in toppling the Machado regime. By late August 1933, Batista led the so-called "sergeants' revolt" against the Céspedes interim government, and appointed himself head of the armed forces with the rank of colonel. On the expiration of his presidential term in 1944, Batista exiled himself to the U.S. from where he returned in 1948 to the Cuban Senate to prepare his 1952 presidential campaign. On March 10, 1952, he successfully orchestrated a *coup* and for the next 6 years exercised absolute control over Cuba — only to see his government fall at the hands of the Castro Revolution. He died in Spain on August 6, 1973.

86. Note that the 1940 Constitution was drafted at a time when Keynesian economics drove the Roosevelt Administration's economic policy at home, and when the Allied Powers embraced, at least in appearance, a discourse flavored by the rights of man (including individual and collective rights), which in time would inspire the drafters of the 1945 UN Charter and the 1948 Universal Declaration of Human Rights.

87. CONSTITUTION OF THE REPUBLIC OF CUBA (1940), arts. 43-46 & 60-86. The 1940 Constitution explicitly afforded protection to the family, pregnant women, children and youth, while placing considerable emphasis on the state's responsibility to educate and care for the disadvantaged populations. It also extended the social protections afforded to workers with respect to minimum wage, social security benefits, and labor rights.

88. CRAIG ROSENBRAUGH, THE LOGIC OF POLITICAL VIOLENCE: LESSONS IN REFORM AND REVOLUTION 191 (2004). Note that Cuba's presidential elections had been scheduled for June 1, 1952.

89. Villabella Armengol, *supra* note 83, at 33.

90. *Id.*

91. *Id.*

26 de Julio)[92] and the definitive triumph of the Cuban Revolution on January 1, 1959, under the leadership of Fidel Castro Ruz.[93]

The Revolutionary Period

I. The 1959 Fundamental Law

The Revolution's first attempt at resuming constitutional order in Cuba came on February 7, 1959, with the signing by interim President Manuel Urrutia Lleó of the so-called Fundamental Law of Cuba (*Ley Fundamental de Cuba*).[94] Initially intended as a transitional or provisional instrument, the Fundamental Law was in full force and effect in Cuba for the next 17 years until its replacement by the 1976 Constitution, which is still the supreme law of the land.[95]

Substantively, the Fundamental Law reproduced the 1940 Constitution, with regards to the availability of the wide panoply of social and economic rights guaranteed therein,[96] while providing for a complete re-engineering of Cuba's governmental structure, both at the national and municipal levels.

More specifically, the Fundamental Law amended *in toto* Article 119 of the 1940 Constitution, explicitly suppressing both the Republic's Senate and House of Representatives. From then on, all legislative power would be exercised by a new Council of Ministers.[97]

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92. The 26th of July (1953) Movement takes its name from the date of Castro's attack on the Moncada barracks in Santiago. Moncada, a fortress built by the Spanish, was then the headquarters of the Antonio Maceo Infantry Regiment.

93. Jeffrey M. Elliot and Mervyn M. Dymally, FIDEL BY FIDEL: AN INTERVIEW WITH DR. FIDEL CASTRO RUZ 6-7 (2009).

94. See FUNDAMENTAL LAW OF CUBA 1959 (Washington: Organization of American State's Secretariat, 1959).

95. MASS MEDIA AND THE CARIBBEAN, 131 (Surlin and Soderlund, eds., 1990). Years later, on February 24, 1975, and only a few months prior to the enactment of the 1976 Constitution, Fidel admitted that in 1959, conditions in Cuba did not allow for a constitution-making exercise on the basis of socialist principles. ("*Es posible que diez años atrás, dada todavía la lucha de clases tan fuerte que existía en nuestro país, dada la actividad contrarevolucionaria relativamente poderosa, no hubiéramos podido aplicar, con la misma libertad, criterios que están en esta Constitución.*") See *Palabras pronunciadas por el Primer Secretario del P.C.C. y Primer Ministro del Gobierno Revolucionario, Comandante en Jefe, Fidel Castro, en el acto de entrega del Anteproyecto de Constitución*, 11 REVISTA CUBANA DE DERECHO 55 (1976).

96. FUNDAMENTAL LAW OF CUBA, *supra* note 94, at 6–8. Pursuant to Articles 21, 24, and 25 of the 1959 Fundamental Law, tailor-made sanctions were added to the constitutional text against those citizens who collaborated with the Batista regime. *Id.* The application of the death penalty was widely expanded and people deemed to be Batista collaborators were sanctioned with confiscation of property without compensation.

97. *See id.* art. 119, at 33 ("The Legislative Power is exercised by the Council of Ministers.").

The Council of Ministers, moreover, effectively wielded all legislative, executive and administrative authority.[98]

Similarly, Titles XV (*Del régimen municipal*) and XVI (*Del régimen provincial*) of the 1940 Constitution, which provided for an elaborate regime of autonomy for municipalities and provinces, were redesigned. The Council of Ministers was now endowed with authority to unilaterally delineate their positioning within Cuba's governmental tapestry.[99]

More decisively, the drafters of the Fundamental Law did away, in its entirety, with the amendment mechanism at the heart of the 1940 Constitution.[100] Under the Fundamental Law, the Council of Ministers alone could amend the constitutional text.[101]

Both structurally and substantively, the Fundamental Law proved utterly inadequate. As a threshold matter, it failed to provide a coherent legal framework upon which to institutionalize the socialist superstructure the Revolution intended to perpetuate on Cuban soil. The text's evident shortcomings came to light through the avalanche of special legislation the Council of Ministers passed during this period in a clear attempt at harmonizing the constitutional text to the new realities on the ground.[102] Unsurprisingly, the swift superimposition of new legal figures and institutions, in the mold of Eastern European and Soviet socialism, which were unavailable in the Cuban constitutional text, created an inherent disconnect between the Fundamental Law and the Revolution's ideological compass.

J. The 1976 Constitution

By the early 1970's, it was clear that Cuba required a fresh constitutional text that could reflect the Revolution's legal principles while instilling cohesiveness across Cuba's le-

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98. *Id.* at 33–35. The 1959 Fundamental Law did provide for a cosmetic president, but his executive authority was considerably diminished by the Council of Minister's overwhelming powers. *See id.* arts. 125–26. During this period, the Cuban presidency was held by Manuel Urrutia Lleó (January 2, 1959–July 17, 1959) and Osvaldo Dorticós Torrado (July 18, 1959–December 2, 1976). *Cuba*, WORLDSTATESMAN.ORG, http://www.worldstatesmen.org/Cuba.html (last visited Apr. 15, 2017). Fidel acted as prime minister, at the helm of the Council of Ministers, from February 1959 until his investiture as president of the newly established Council of State in December 1976. *Id.*

99. FUNDAMENTAL LAW OF CUBA, *supra* note 94, arts. 198–201, at 60.

100. CONSTITUTION OF THE REPUBLIC OF CUBA (1940), arts. 285-86.

101. *See* FUNDAMENTAL LAW OF CUBA, *supra* note 94, arts. 232–33. Under the new mechanism, the constitutional instrument could be amended by a two-thirds majority vote of the Council of Ministers, ratified by a similar vote at three successive Council meetings, and with the approval of the president of the Republic.

102. Paramount among this corpus of special legislation was, for instance, the 1959 Agrarian Reform Law. Carlos Villabella Armengol, *Una Nueva Mirada al Constitucionalismo Cubano desde los Modelos Constitucionales y la Periodización de la República*, 44 REVISTA CUBANA DE DERECHO 19, 38 (2014).

gal landscape. It was precisely against this background, that in 1974,[103] the Council of Ministers and the Political Bureau of the Cuban Communist Party initiated the process leading to the proclamation, on February 24, 1976,[104] of Cuba's current constitution.

By all accounts, the main goal behind this new exercise was to, in the words of Fidel Castro, "institutionalize"[105] the Revolution. In so doing, Article 1 of the 1976 Constitution made it clear that "Cuba is a socialist state."[106] More specifically, this opening salvo was directly intertwined to Article 5, which in no uncertain terms proclaimed that the "Communist Party of Cuba, Martian* and Marxist-Leninist, the organized vanguard of the Cuban nation, is the superior leading force of society and of the state."[107] Article 53, moreover, left no room for equivocation by providing that the "freedoms of speech and the press of the citizens are recognized *in keeping with the objectives of a socialist society*."[108]

Structurally, the 1976 Constitution redesigned Cuba's governmental architecture, while ratifying the island's definitive abandonment of the republican form of government, which since 1959 had altogether disappeared. A National Assembly of People's Power (*Asamblea Nacional del Poder Popular*) was now erected as the "supreme organ of the Cuban state's power."[109] Elected to 5-year terms,[110] the deputies of the National Assembly of People's Power would select from among their peers the members of the newly created Council of State.[111] The 1976 Constitution also required the president of the Council of State

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103. JORGE I. DOMINGUEZ, CUBA: ORDER AND REVOLUTION 243–44 (1979). On October 22, 1974, the Council of Ministers and the Political Bureau of the Communist Party announced the appointment of a mixed commission, made up of ministers and party leaders, tasked with the responsibility of producing the first draft of the 1976 Constitution. *Id.*

104. *Id.* The proclamation of the 1976 Constitution was the denouement of a process originally initiated on February 24, 1975 when the Executive Committee of the Council of Ministers, together with the Political Bureau of the Cuban Communist Party, published a draft of the constitutional text. *Id.* at 243. Following a period of consultation, the constitutional draft was approved by the First Party Congress in December 1975, and approved by the Cuban electorate on February 24, 1976, garnering the approval of 97.7% of the voters. *Cuba*, WIPO, http://www.wipo.int/wipolex/en/details.jsp?id=10663 (last visited Apr. 15, 2017).

105. *Palabras pronunciadas por el Primer Secretario del P.C.C. y Primer Ministro del Gobierno Revolucionario, Comandante en Jefe, Fidel Castro, en el acto de entrega del Anteproyecto de Constitución*, 11 REVISTA CUBANA DE DERECHO 54 (1976). On February 24, 1975 Fidel suggested: "In discussing this Constitution, our people will be able to feel proud. The Revolution will take a great historical step towards its institutionalization, towards ending the provisional nature of the Revolutionary Government." ("*Nuestro pueblo podrá sentirse orgulloso cuando se discuta esta Constitución. La Revolución dará un gran paso histórico hacia la institucionalización, hacia el cese del carácter provisional del Gobierno Revolucionario.*"). Also refer to Professor Leonardo Pérez Gallardo's illuminating introduction to the definitive Commentary on the 1987 Cuban Civil Code, where he suggests that the enactment of the new Code, 11 years after the 1976 Constitution, was the "culmination of a process of institutionalization." LEONARDO PÉREZ GALLARDO, COMENTARIOS AL CÓDIGO CIVIL CUBANO TOMO 1 (2013).

106. CONST. OF CUBA (1976), art. 1.

* This term is used in reference to the ideas of José Martí.

107. *Id.* art. 7.

108. *Id.* art. 53 (emphasis added).

109. *Id.* art. 69 *et. seq.*

110. *Id.* art. 72.

111. *Id.* art. 74.

to act as Cuba's head of state and government,[112] as well as commander in chief of the armed forces.[113] More importantly, the Council of State was given authority under Article 90 of the 1976 Constitution to enact decree-laws in between the two yearly sessions of the National Assembly of People's Power,[114] as well as the quasi-judicial power to render legally binding opinions on all applicable laws.[115]

The Council of Ministers, for its part, endured a profound transformation. The Council no longer embodied the supreme constitutional body of the Cuban Republic; its members would now be chosen by the president of the Council of State,[116] who would also preside over it.[117]

One of the more salient aspects of the new constitutional experiment was its treatment of the Cuban judiciary. While the 1959 Fundamental Law provided for a Court of Constitutional and Social Guarantees with jurisdiction to determine the constitutionality of laws and decree-laws,[118] under Cuba's 1976 Constitution the power of judicial review rested squarely in the hands of the National Assembly of People's Power.[119] Different from the republican configuration of the 1901 *ancien régime*, pursuant to which the judiciary, legislative and executive all enjoyed identical constitutional status as co-equal branches, the 1976 Communist Constitution subordinated the judiciary to the National Assembly of People's Power.[120]

The monumental implosion of the "iron curtain,"[121] as the 1989 fall of the Berlin wall so vividly foreshadowed, together with the sudden death of the Soviet Union, brought Cuba's communist experiment to a period of acute uncertainty and systemic infirmity. Opening, thus, a complex Pandora's Box which to this day has not been closed.[122]

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112. *Id.* Fidel Castro became president of Cuba's Council of State, and hence head of state, following the resignation of President Dorticós in 1976. An enormous degree of centralization was nurtured under this arrangement, whereby the leadership of the Communist Party also fell in the hands of the head of state and commander in chief of the armed forces.

113. CONST. OF CUBA, *supra* note 106, art. 93(g).

114. *Id.* art. 90(c).

115. *Id.* art. 90(ch).

116. *Id.* art. 93(d).

117. *Id.* art. 96.

118. FUNDAMENTAL LAW OF CUBA, *supra* note 94, art. 160.

119. CONST. OF CUBA, *supra* note 106, art. 75(c).

120. *Id.* art. 121.

121. Winston Churchill, Address at Westminster College: The Sinews of Peace (Mar. 5, 1946).

122. See Philip Brenner et al., A CONTEMPORARY CUBA READER: THE REVOLUTION UNDER RAUL CASTRO 423 (2nd ed. 2014). The fall of the communist bloc opened up what is commonly known in Cuba as the "special period," which goes from 1989 until the late 1990s—when the late Venezuelan President Hugo Chávez agreed to deliver close to 100,000 oil barrels a day to Cuba for a nominal price. During the most acute years of the special period, Cuba saw an alarming collapse of its import activity. Alarming rates of inflation and a mass exodus of young Cubans severely contracted the island's growth. It is against this background that on October 10, 1991, the Communist Party's IV Congress

As of the time of this writing, an intense debate is raging in Havana on the degree to which Cuba's constitutional repertoire should evolve to meet the gargantuan economic and geopolitical challenges besieging the island today.

III Conclusion

The Post-Fidel Period: A Pandora's Box?

Cuban constitutionalism is no stranger to the judicial enforcement of constitutional norms, the horizontal separation of governmental powers, and the transubstantiation of public international law into domestic law or even to basic notions of participatory democracy; values ingrained at the core of Western legal thought. These values have percolated Cuba's endogenous legal culture since before the proclamation of the *Guáimaro* Constitution under the leadership of Céspedes and the 1868 generation. Yet, Cuba's endless cycles of institutional boom and bust —- more often than not the unavoidable consequence of fierce ideological struggles at the heart of Cuban society —- have left these values under intense and continuous siege.

Céspedes' short-lived yet monumental liberal experiment, immortalized in the text of Cuba's first autochthonous constitution, brought to life on Cuban soil (albeit theoretically) concepts as basic as the separation of constitutional powers, the independence of the judiciary, and even the harmonious coexistence of domestic law alongside the law of nations.[123]

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opened the door for amending the 1976 Constitution. This directive led to the approval by the National Assembly of People's Power, on July 12, 1992, of a series of amendments to the constitutional text. Among the more prominent amendments was the recognition of new types of proprietary rights under so-called mixed companies (*empresas mixtas*) and economic associations (*asociaciones económicas*) between Cuban nationals and foreigners. For a complete analysis of the process leading to the 1992 amendments see, among others, Juan Escalona Reguera, *En torno a la Ley de Reforma Constitucional*, 8 Revista Cubana de Derecho 3-12 (1992). Also see Félix Pérez Milán, *Motivos para una reforma*, 7 Revista Cubana de Derecho 3-7 (1992). On June 26, 2002, the National Assembly of People's Power unanimously approved a new set of amendments to the Cuban Constitution. First, new language was added to Article 3 affirming the Revolution's irrevocability. ("*El socialismo y el sistema político y social revolucionario establecido en esta Constitución . . . es irrevocable, y Cuba no volverá jamás al capitalismo.*") Second, and perhaps more importantly, Article 137 now precludes the National Assembly of People's Power from passing any future amendment to the Constitution that could imperil the irrevocable nature of the Revolution. ("*Esta Constitución sólo puede ser reformada por la Asamblea Nacional del Poder Popular . . . excepto en lo que se refiere al sistema político, social y económico, cuyo carácter irrevocable lo establece el Artículo 3 del Capítulo I . . .*").

123. Article 14 of the 1869 *Guáimaro* Constitution delegated to the House of Representatives of the Republic in Arms the power to ratify treaties with foreign powers. Under Article 18 of the *Guáimaro* text, however, the president of the Cuban Republic in Arms was the only governmental official with authority to negotiate and sign treaties. Moreover, the power to appoint and receive ambassadors, plenipotentiary ministers and consuls was, similarly, entrusted to the president.

Notwithstanding the institutional implosion of Céspedes' foundational project, its juridical values did find an echo in a new tapestry of endogenous legal instruments. Martí's *Bases del Partido Revolucionario Cubano*[124] and his invaluable *Manifiesto de Montecristi*,[125] the ideological subtext to Cuba's nationalist movement, openly embraced (although obliquely) notions of institutionality, social equilibrium, civic restraint and participatory democracy.[126] Both *Jimaguayú*[127] and *Yaya*,[128] as *Guáimaro* before them, provided, at least in principle, for horizontality among the constitutional branches of government, judicial independence and the transubstantiation of treaties into domestic Cuban law.[129] Moreover, these autochthonous constitutional formulations were put together by constituent assemblies. While obviously influenced by Anglo-American and Roman-French legal traditions, these instruments, more so than the 1901 and 1940 postcolonial constitutions, bring to the surface rather vividly the often unseen building blocks of Cuban constitutionalism.

Cuba's *constitutional moment*, thus, requires not the recolonization of Cuba's legal culture with utterly foreign socio-political institutions, but rather a critical (un-ideological) reassessment of values that for far too long have survived, more often than not hidden from plain view, amidst the vagaries of authoritarianism, unforeseen geostrategic variables and the uneven cycles of the global economy.

In the final analysis, Cuba's *constitutional moment* is as much an exercise in self-discovery as it is a bold, albeit uncertain, attempt at nation building under the most trying of circumstances.

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124. José Martí published the platform of the Cuban Revolutionary Party in New York on March 14, 1892. ("Article 4: The Cuban Revolutionary Party does not propose to perpetuate in the Cuban Republic, either with new forms or with changes that are more apparent than essential, the authoritarian spirit and bureaucratic composition of the colony, but to build, in the frank and cordial exercise of man's legitimate capabilities, a new and sincerely democratic nation able to defeat, through the order that stems from meaningful work and a balance of social forces, the dangers of sudden liberty in a society built upon slavery.").

125. The Montecristi Manifest was signed by José Martí and Máximo Gómez on March 25, 1895 in the Dominican Republic.

126. JON STERNGASS, JOSÉ MARTÍ 76, 86-87 (2006).

127. Articles 9 and 10 of the 1895 *Jimaguayú* Constitution reproduced the *Guáimaro* arrangement, whereby the president of the Republic in Arms was granted authority to negotiate and sign treaties with foreign powers as well as to appoint and receive ambassadors, plenipotentiary ministers, and consuls. The power to ratify treaties with foreign powers, however, now gravitated to a newly established governing council with plenary executive authority over the Republic in Arms.

128. Article 22(15) of the 1897 *Yaya* Constitution, contrary to the *Jimaguayú* instrument, vested in the governing council alone the power to negotiate, sign and ratify treaties with foreign sovereigns. Pursuant to this constitutional provision, it was for the governing council to appoint, on an *ad hoc* basis, those commissioners who would negotiate a given treaty on Cuba's behalf. Ratification lay squarely in the governing council's hands.

129. *See, Jimaguayú* Const arts. 1, 7, 23; *See, Yaya* Const. arts. 17, 22.

Sanctuary Cities and the Demise of the Secure Communities Program

Katlyn Brady

I. Introduction

So-called "sanctuary cities" became a flashpoint in the immigration debate after Juan Francisco Lopez-Sanchez, an undocumented immigrant, murdered Kathryn Steinle.[1][2] Lopez-Sanchez was deported five times prior to shooting Steinle.[3] San Francisco arrested Lopez-Sanchez four months prior to the shooting, but the city did not notify Immigration and Custom Enforcement (ICE) before his release.[4] This was not an oversight because San Francisco does not honor ICE detention requests known as ICE detainers.[5] Immediately following Steinle's murder, the national debate focused on the existence of these sanctuary cities.[6] Generally, sanctuary cities refer to jurisdictions that do not fully cooperate with federal immigration agencies, most commonly by refusing to honor ICE detainers or notification requests.[7] In these cities, detainees are released without notifying ICE of their immigration status.

Although ICE detainers have been used for decades,[8] their use came to national attention because they were an integral part of the federal immigration program known as

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1. Stephanie Condon, *Senate Democrats Block "Sanctuary City" Bill*, CBS News (Oct. 20, 2015, 2:10 PM), http://www.cbsnews.com/news/senate-takes-up-sanctuary-city-bill-obama-issues-veto-threat//.

2. Melissa Chan, *Kathryn Steinle, Shot Dead by Felon in San Francisco*, NY Daily News, (last updated Jul. 10, 2015, 11:24 AM), http://www.nydailynews.com/news/national/kate-steinle-killed-felon-san-francisco-laid-rest-article-1.2287802.

3. *Id.*

4. *Id.*

5. Michael Pearson, *What's a "Sanctuary City" and Why Should You Care?*, CNN (Jul. 8, 2015, 7:38 AM), http://www.cnn.com/2015/07/06/us/san-francisco-killing-sanctuary-cities//.

6. *Id.*

7. Condon, *supra* note 1.

8. Kate M. Manuel, *Immigration Detainers: Legal Issues*, Cong. Research svcs., 1 (May 7, 2015)

Secure Communities[9] and continued to be used in a subsequent federal program, Priority Enforcement Program (PEP).[10] President Bush initiated Secure Communities in 2008 and following the 2008 election, President Obama greatly expanded the program. In 2014, President Obama replaced Secure Communities with PEP in order to address the concerns, such as not prioritizing immigrants by their level of criminal risk, of Secure Communities critics.[11] President Trump re-instated Secure Communities shortly after coming into office.[12]

Currently, there are over two hundred localities, including entire states, cities, and counties that fall under the definition of sanctuary city.[13] There is no legal definition for a sanctuary city; instead, these jurisdictions generally have "policies or laws that limit the extent to which law enforcement and other government employees will go to assist the federal government on immigration matters."[14] While San Francisco has held this distinction for over two decades, most localities considered to be sanctuary cities adopted a policy of non-compliance only within the last few years. This includes Las Vegas, Nevada, which announced in July 2014 that it would no longer honor ICE detainers unless accompanied with a warrant signed by a judge.[15] The Las Vegas Metropolitan Police Department ("LVMPD") stated that recent court decisions have raised Constitutional concerns about ICE detainers, and until the courts clarify the concerns the department would not honor them.[16] Although the LVMPD cited recent court rulings, neither the Ninth Circuit Court of Appeals, nor the Nevada Supreme Court has ruled on the issue.

Through this paper, I intend to prove that while litigation was the primary cause of some localities' refusal to honor ICE detainers, several other issues, including skyrocketing costs and community opposition, contributed to this position. This article will provide background information on the origins of ICE detainers and describe how a detainer works. Further, it will explore the creation of the federal Secure Communities policy and how it created the initial societal, constitutional, and budgetary concerns. I will then discuss how the Obama Administration attempted to make Secure Communities mandatory and detail the eventual discontinuation of the program. I will address the primary court cases that the majority of

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9. *Secure Communities*, IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/secure-communities (last accessed April 13, 2017).

10. *Priority Enforcement Program*, IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/pep (last accessed April 13, 2017).

11. Sarah Childress, *Obama's Immigration Plan Includes End to Secure Communities*, PBS, http://www.pbs.org/wgbh/frontline/article/obamas-immigration-plan-includes-end-to-secure-communities/ (last accessed April 13, 2017).

12. Alex Nowrasteh, *Trump Order Reestablishes "Secure Communities"*, CATO INSTITUTE, https://www.cato.org/blog/trump-executive-order-reestablishes-secure-communities (last accessed April 13, 2017).

13. Pearson, *supra* note 5.

14. *Id.*

15. Press Release, Las Vegas Metropolitan Police Department, The LVMPD Will No Longer Detain Persons on Federal Immigration Holds (July 14, 2014) (available at https://www.ilrc.org/sites/default/files/resources/las_vegas_pd.pdf).

16. *Id.*

jurisdictions, including the federal government, cited as the basis for their decision to abandon ICE detainers. Next, I will discuss how different groups responded to Secure Communities and how these groups influenced policy makers. Finally, I will analyze the financial cost of ICE detainers, the stress it placed on localities and how many of the same concerns that plagued Secure Communities went on to plague PEP.

A locality's reason for refusing to honor an ICE detainer matters because it may determine if a locality participates in PEP and other potential programs. This is especially important to the federal government as it attempts to achieve comprehensive immigration reform. Specifically, will localities that refuse ICE detainers because of a moral or political stance be unlikely to honor ICE detainers even if the constitutional deficiencies are corrected or budgetary concerns addressed? Will localities that refuse to honor ICE detainers solely because they fear liability be more likely to honor ICE detainers that correct constitutional deficiencies or indemnify liability? This is especially important given that a number of localities cite liability as the justification for abandoning ICE detainers. Further, will localities that refuse ICE detainers because of the added expense of holding immigrants be more willing to honor detainers in the future if the federal government agrees to pay the added expense?

II. Controversey Surrounding the Immigration Debate and Sanctuary Cities

The Senate Gang of Eight led the last push for comprehensive immigration reform at the federal level.[17] The Gang of Eight consisted of four Democratic Senators and four Republican Senators, including former presidential candidate Marco Rubio.[18] Ultimately, the proposed reform failed in 2013 over concern that the law did not secure the border.

Citing inactivity by Congress, President Obama used his executive power to influence the immigration debate. The biggest change occurred in 2012 with the announcement of the Deferred Action for Childhood Arrivals (DACA). The program targets young undocumented immigrants that entered the country prior to their sixteenth birthday and successfully graduated high school or gained a high school equivalent degree. The program grants the applicant a two-year deferral of a removal action and the applicant is able to reapply every

17. *See* Alan Gomez & Susan Davis, *'Gang of Eight" Immigration Bills Clears Senate Hurdle*, USA Today, (last updated Jun. 11, 2013, 2:52 PM), http://www.usatoday.com/story/news/politics/2013/06/11/senate-begins-immigration-debate/2411509//.

18. *Id.*

two-years, assuming the applicant has not lost eligibility. It is estimated that approximately 1.2 million immigrants qualify for the deportation relief.[19]

Following the creation of the DACA program, President Obama relied on executive authority to end the Secure Communities program that drastically expanded the use of ICE detainers.[20] Again relying on executive authority, President Obama created PEP, which altered, but did not abandon, the use of ICE detainers.[21] The danger of relying on executive action to create policy is that the next president can repeal such policies because they are not law and people that relied on the previous program will be left without recourse. The next president could choose to increase the use of ICE detainers or apply greater pressure on localities that have so far resisted compliance.

Following the 2015 murder of Kathryn Steinle, Congress again considered immigration litigation. Senate Republicans attempted to pass a law they called "Kate's Law", which would defund any locality considered a sanctuary city.[22] Both Senator Cruz and Senator Rubio, former presidential candidates, supported the bill. However, Senate Democrats referred to the bill as "The Donald Trump Act" and successfully blocked its passage, leaving the current status quo in place.[23]

Following the defeat of Kate's Law, sanctuary cities remained a hot button issue, especially during the 2016 presidential election. Then-presidential candidate Donald Trump attempted to disparage sanctuary cities by highlighting crimes committed by undocumented immigrants.[24] In one case, the police charged an undocumented man with a DUI resulting in death, but ICE failed to issue a detainer because he did not have "prior significant misdemeanor or felony conviction record."[25] After posting bond, the man fled and has not been located since.[26] Stories like that one were used by Trump in his campaign and have increased the spotlight on localities that refuse to honor ICE detainers. Opposition to sanctuary cities

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19. Kyla Calvert Mason, *Why Obama's Immigration Announcement is Also About Education*, PBS NEWSHOUR (Nov. 20, 2014, 3:09 PM), http://www.pbs.org/newshour/updates/obamas-immigration-announcement-also-education-story//.

20. Sarah Childress, *Obama's Immigration Plan Includes End to "Secure Communities"*, PBS FRONTLINE (Nov. 21, 2014), http://www.pbs.org/wgbh/frontline/article/obamas-immigration-plan-includes-end-to-secure-communities//.

21. *Id.*

22. Elise Foley, *Senate Republicans Fail in Push to Punish 'Sanctuary Cities'*, HUFFINGTON POST (Oct. 20, 2015, 02:57 PM), http://www.huffingtonpost.com/entry/senate-republicans-sanctuary-cities_56265805e4b08589ef48f859.

23. *Id.*

24. Allison Graves & Neelesh Moorthy, *Who Were the Victims of Illegal Immigrants Trump Named at the RNC*, POLITIFACT (Jul. 21, 2016, 11:03 PM), http://www.politifact.com/truth-o-meter/article/2016/jul/21/who-were-victims-illegal-immigrants-trump-named-rn//.

25. *Id.*

26. *Id.*

is not limited to Republicans alone; Democratic nominee Hillary Clinton stated she does not support localities that refuse to honor ICE detainers.[27]

III. ICE DETAINERS

ICE detainers have been used since the 1950s,[28] but prior to 1986, the Immigration and Nationality Act ("INA") did not contain explicit authorization for detainers; instead they were issued pursuant to the executive branch's "general authority".[29] The ICE detainer in its modern form has been used since 1984.[30] There are several options on which to base an ICE detainer. One in particular has been the basis of litigation and concern: an ICE officer can state that he/she has "[d]etermined that there is reason to believe the individual is an alien subject to removal from the United States."[31] The ICE officer can then request that law enforcement, "[m]aintain custody of the subject for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow the Department of Homeland Security ("DHS") to take custody of the subject."[32] The immigration officer, not a member of the judiciary, then signs the ICE detainer, but does not have to certify that the detention is based on probable cause.[33] An immigration officer may then inform the person detained that an ICE detainer was issued against him, but this is not a requirement.[34] Practically, this process begins when local law enforcement sends an arrestee's fingerprints to ICE or the FBI. The FBI will then send the fingerprints to ICE. After viewing the fingerprints, ICE issues a detainer to local law enforcement requesting the person detained be held.

Most law enforcement agencies do not know or ask about the immigration status of those arrested, and because of the complexity of immigration laws, most are unable to determine a person's immigration status, let alone determine which noncitizens are removable. This complexity makes most local law enforcement hesitant to be involved with enforcing immigration laws and prior to the introduction of Secure Communities, local law enforcement rarely participated in the enforcement of immigration laws.

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27. *Clinton, California lawmakers condemn San Francisco's 'sanctuary' policy*, FOX NEWS (Jul. 8, 2015), http://www.foxnews.com/politics/2015/07/08/clinton-california-lawmakers-condemn-san-francisco-sanctuary-policy.html.

28. KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES, at 2 (2015).

29. *Id.*

30. *Id.*

31. Immigration Detainer – Notice of Action, DEP'T. OF HOMELAND SECURITY, https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf, at 1.

32. *Id.*

33. *Id.*

34. Manuel, *supra* note 27, n. 48.

ICE signed documents titled Memorandum of Agreements with various localities, including states, which required that law enforcement agencies submit the fingerprints of all those arrested to federal law enforcement.[35] Those fingerprints are then submitted to the FBI's Criminal Justice Information Services (CJIS). If the fingerprints return a match, the FBI alerts the Law Enforcement Support Center, which is administered by ICE.[36] The information is then forwarded to an ICE field officer who determines if an individual is removable and issues an ICE detainer.[37] Theoretically, the local agency would only have to hold the person detained for an additional 48 hours while the fingerprints are checked, but as discussed in greater detail below, this detention often lasts weeks.

Between 2012 and 2014, over 500,000 ICE detainers were issued.[38] However, while nearly 280,000 ICE detainers were issued in 2012, fewer than 70,000 were issued in 2014.[39] In 2014, the federal government reported that state and local law enforcement declined to honor 10,182 ICE detainers.[40] These numbers do not include notices sent by ICE requesting that a locality inform ICE before releasing a detained person.

This dramatic drop can be partially explained by the Obama Administration's decision to end the controversial Secure Communities program.[41] However, it may also be explained by the growing backlash against ICE detainers, as noted in Section IV of this article and the problems that these detainers caused on localities. Additionally under PEP, ICE is supposed to request that localities notify ICE before releasing a detained person suspected of being in the country illegally, as opposed to issuing a detainer request, unless a prior order of removal has been entered.

IV. The Effect of Secure Communities on Ice Detainers and Civil Rights

DHS launched Secure Communities in March 2008 as a tool to identify and deport undocumented immigrants.[42] By 2011, DHS reported it received over 11 million fingerprint

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35. *Secure Communities Standard Operating Procedures*, U.S. Dep't of Homeland Security, at 3 (2014).

36. *Id.* at 7.

37. *Id.*

38. Transactional Records Access Clearinghouse, *Number of ICE Detainers Issued by State and Time Period*, 2014, Syracuse Univ., http://trac.syr.edu/immigration/reports/370/include/table2.html.

39. *Id.*

40. DeptDep't. of Homeland Security, End of Year Statistics (Dec. 19, 2014), http://www.dhs.gov/news/2014/12/19/dhs-releases-end-year-statistics.

41. Jeh Jonson, *Secure Communities*, Dep't. of Homeland Security, (Nov. 20, 2014).

42. *Secure Communities: A Fact Sheet*, American Immigration Council (2011), http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet.

submissions from local police and removed over 142,000 people.[43] This number does not include those immigrants that were in removal proceedings but had yet to be removed.

Although Secure Communities was presented to localities as an optional program, it quickly became apparent that the federal government believed it was mandatory. In October 2010, then-DHS Secretary Janet Napolitano stated that the FBI automatically shared fingerprints it received from local law enforcement with ICE regardless of the localities' stance on Secure Communities.[44] Following this statement, several localities believed that ICE detainers were mandatory and felt compelled to honor them. ICE stated that Secure Communities was intended to "prioritize the removal of criminal aliens, those who pose a threat to public safety, repeat immigration violators, and the most dangerous and violent offenders."[45] However, ICE itself acknowledged that at least 26% of those removed had no criminal conviction.[46] Evidence began to grow that showed "the path to deportation increasingly beg[an] with a traffic stop."[47] Suddenly, local law enforcement agencies were responsible for arresting and holding those suspected of violating immigration laws despite receiving no immigration law training.This disparity and lack of prioratization is one of the key arguments activists used to convince localities to no longer honor ICE detainers.

In 2011, the federal government established the Task Force on Secure Communities to evaluate the program's effectiveness.[48] The task force held information-gathering sessions with several organizations and private citizens.[49] Overwhelmingly, the speakers focused on several civil rights issues concerning Secure Communities.[50] Specifically, the speakers stated that the program resulted in the removal of people for minor offenses, removal of victims of crimes, separation of families, and it deterred victims from reporting crimes to the police because they feared deportation.[51] These concerns weighed heavily on elected officials and community leaders, especially those in jurisdictions that apply community policing or have large minority populations so a growing number of law enforcement agencies chose to oppose participation in the program. Further, activists used these issues to push localities to

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43. *Id.*

44. Elise Foley, *Obama Faces Growing Rebellion Against the Secure Communities Deportation Program*, HUFFINGTON POST (Apr. 24, 2014, 07:43 AM), http://www.huffingtonpost.com/2014/04/24/secure-communities_n_5182876.html.

45. *Id.*

46. *Id.*

47. Amelia Fischer, *Secure Communities, Racial Profiling & Suppression Law in Removal Proceedings*, 19 TX. HISP. J.L. & POL'Y. 63, 64 (2013) (describing the effect of Secure Communities on local law enforcement).

48. *Task Force on Secure Communities Findings and Recommendations*, HOMELAND SECURITY ADVISORY COUNCIL at 4, (2011).

49. *Id.*

50. *Id.* at 6.

51. *Id.*

abandon ICE detainers issued without probable cause unless accompanied by a judicial warrant.[52]

A major concern among opponents of Secure Communities and PEP was the fear that ICE detainers would encourage the use of racial profiling. Research showed that in some areas, over 82% of people ordered removed had clean or minimal criminal records.[53] Further, research demonstrated that perhaps as many as 60% of people removed under Secure Communities had no criminal histories or only traffic violations.[54] These numbers suggest that people were arrested not because of an underlying or previous crime, but because officers may have relied on race when conducting stops.[55] Several different groups, including the American Immigration Lawyers Association, feared this would exacerbate preexisting racial profiling issues that police departments are attempting to correct.[56] Most concerning is a study by the Berkeley Law School's Warren Institute that found that after Irving, Texas implemented Secure Communities, arrests of Hispanic people for traffic violations increased by 223%.[57] Civil rights groups and other community activists often pointed to stories of long-time residents being taken from their families and being deported for minor offenses.

In New Orleans, DHS found that local law enforcement was arresting migrant workers for immigration purposes and holding them for immigration officers.[58] In Maricopa County, Arizona, officers were allegedly trained to consider "Mexican ancestry" when determining if a person was in the country illegally.[59] The Gang of Eight, as a part of the comprehensive immigration reform legislation, proposed a prohibition on the use of race or ethnicity as a factor in law enforcement decisions, such as traffic stops.[60] The prohibition died with the bill.

Proponents of ICE detainers argue that the detainers inherently prevent racial profiling because they rely on fingerprints instead of a suspect's race to determine immigration

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52. *See* Juliet P. Stumpf, *D(E)volving Discretion: Lessons From the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1280 (2015) (discussing the decisions of law enforcement agencies to limit or refuse cooperation with immigration detainers).

53. Fischer, *supra* note 47, at 67(describing the effect of Secure Communities on local law enforcement).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 68.

58. Jolene Elberth, *Immigrants Demand End to Racial Profiling by Local Police*, NEW ORLEANS WORKERS' CENTER FOR RACIAL JUSTICE (Oct. 19, 2015), http://nowcrj.org/2015/10/19/immigrants-demand-end-to-racial-profiling-by-local-police//.

59. Alexandra Aguilera, *AZ Police Officers Unclear Standards Hurting Minorities*, ARIZONA SONORA NEWS (Apr. 29, 2015), http://arizonasonoranewsservice.com/az-police-officers-unclear-standards-hurting-minorities//.

60. Stephen Dinan, *Immigration Bill Bans Racial Profiling by Federal Law Enforcement*, THE WASHINGTON TIMES (Apr. 17, 2013), http://www.washingtontimes.com/news/2013/apr/17/immigration-plan-bans-racial-profiling-federal-law/.

status. They note that all suspects, regardless of race, have their fingerprints submitted to ICE. Therefore, race is not considered prior to issuing an ICE detainer. However, critics of ICE detainers use statistics to demonstrate that minorities are more likely to be arrested due to racial profiling, thus more likely to have their fingerprints submitted to ICE.

Religious organizations, most notably the Roman Catholic Church, also oppose Secure Communities. The name sanctuary city is derived from a religious movement in the 1980s that shielded immigrants from deportation by offering sanctuary in a church. In response to Secure Communities, an interfaith effort was formed to shield immigrants from deportations.[61] One of these early groups that organized opposition to Secure Communities and ICE detainers was the Catholic Church. In 2011, the Office of Migration Policy and Public Affairs for the United States Conference of Catholic Bishops put out a report that was heavily critical of both ICE detainers and Secure Communities.[62] The Conference of Catholic Bishops called for numerous reforms, including using detainers for post-conviction relief and allowing non-government organizations to participate in the program at the local level.[63] Catholic groups, including archbishops, helped organize protests. Further, as one of the largest religious institutions in the world, the Catholic Church helped lend credibility to activists and could rely on moral authority to influence political actors. Although the church opposed Secure Communities and the use of ICE detainers for several reasons, its primary concern was the effect detainers and deportations on families and congregants. Specifically, the Archbishop of San Francisco stated in 2012, "we cannot stand idle while our families are being torn apart by unjust immigration policies."[64]

The Catholic Church is not the only religious group that has opposed Secure Communities. In 2012, the 77th General Convention of The Episcopal Church passed a resolution calling for an end to Secure Communities.[65] In Colorado, Reverend Anne Dunlap of the United Church of Christ stated, "Secure Communities does nothing but target communities of color and terrorize them. And as persons of faith we find this to be unconscionable."[66]

Like civil rights groups, religious organizations feared racial profiling and worried that families were often destroyed by deportations. Titled the "New Sanctuary Movement,"

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61. Amanda Sakuma, *Safe Haven Keeps Immigrant Families Together*, MSNBC (JunJune 25, 2014, 5:07 PM), http://www.msnbc.com/msnbc/daniel-neyoy-sanctuary-keeping-families-together.

62. Cynthia Smith, *287(g) and Secure Communities: The Facts about Local Immigration Law Enforcement*, United States Conference of Catholic Bishops (May 2011), http://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/stateandlocalimmigrationenforcement.cfm.

63. *Id.*

64. Monica Clark, *Catholics Protest Secure Communities Program*, National Catholic Reporter (Feb. 17, 2012), at 9.

65. Rev. Paula Jackson, *Halt Unjust Immigration Enforcement*, The Archives of the Episcopal Church (July 2012), http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2012-D059.

66. Megan Verlee, *'Secure Communities' Brings Controversy*, Colorado Public Radio (Jan. 7, 2011), http://www.cpr.org/news/story/secure-communities-brings-controversy.

activists sought to prevent congregants from being deported.[67] The New Sanctuary Movement successfully lobbied Philadelphia Mayor Michael Nutter to forbid law enforcement from honoring ICE detainers.[68] Supporters of the New Sanctuary Movement stated that they opposed Secure Communities and the deportation of those with families because it was "morally wrong".[69] Specifically, in Arizona, a leader of a Presbyterian church stated, "We felt compelled by our faith to welcome them into our church and shelter them and to begin a campaign to get their orders of deportation removed."[70]

Additionally, religious organizations were in the unique position of calling to a higher law when lobbying elected officials. The decision by these religious organizations to shield immigrants from deportation often attracted media attention. This allowed activists to use compelling stories of families being torn apart to put additional focus on the elected officials that still honored ICE detainers. Nonchristian religious groups, like Jewish Synagogues, participated in the protest against Secure Communities.[71] This put elected officials in the uncomfortable position of being forced to criticize religious organizations for their support of the sanctuary movement, putting them at risk of a political backlash.

In 2012, San Francisco Archbishop George Niederauer said, "[w]e cannot stand idle while our families are being torn apart by unjust immigration policies . . . It is important that we keep working together to end [Secure Communities]."[72] In San Francisco, the new poster child of the sanctuary city issue, a Catholic Assemblyman, introduced legislation to allow communities to opt out of Secure Communities.[73]Assemblyman Tom Ammiano summed up many of the organizations' beliefs when he said, "it is a matter of social justice."[74]

As the 2011 DHS task force noted, a major concern of local law enforcement was the effect Secure Communities had on victims and witnesses. Ada Williams Price, Policy Director for OneAmerica, stated, "immigrants stop calling the police during emergencies when

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67. *Id.*

68. *Id.*

69. *Id.*

70. Astrid Galvan, *Churches revive sanctuary for immigrants*, AUSTIN-AMERICAN STATESMAN (Sep. 14, 2014), http://www.pressreader.com/usa/austin-american-statesman-sunday/20140914/283442074672355.

71. Jack Jenkins & Esther Yu-Hsi Lee, *Faith Groups Challenge Federal Immigration Authorities by Providing Sanctuary to Immigrants*, THINKPROGRESS (Sep. 26, 2014), http://thinkprogress.org/immigration/2014/09/26/3570441/places-worship-openly-protecting-immigrants//.

72. Monica Clark, Archbishop joins immigrants' rally against federal deportation program, NATIONAL CATHOLIC REPORTER (Jan. 31, 2012), https://www.ncronline.org/news/archbishop-joins-immigrants-rally-against-federal-deportation-program.

73. *Id.*

74. *Id.*

they know that Border Patrol will follow close behind."[75] In many situations, the effect of Secure Communities on victim reporting was measurable. The University of Illinois at Chicago found that an overwhelming 70% of undocumented immigrants stated they were less likely to report crimes to law enforcement.[76] Further, nearly one in three U.S.-born Hispanics stated they were less likely to report crimes to the police because they feared police would use it as an excuse to inquiry into the immigration status of their friends and family.[77] In 2011, New York State Senator Bill Perkins stated that Secure Communities "decreases the ability of local law enforcement to work effectively, contributing to a mistrust of law enforcement."[78]

Civil rights organizations resorted to the classic tool of litigation to challenge Secure Communities. Two cases specifically heralded the end of Secure Communities. The first was and still is the only federal appellate decision to address Secure Communities and the mandatory nature of ICE detainers. The Third Circuit, in March 2014, determined that ICE detainers are not mandatory, but merely requests, and therefore jurisdictions that honored them were liable for any potential constitutional violations.[79] In the second case, a federal district judge in Oregon agreed with the Third Circuit's decision that detainers were not mandatory, and held local law enforcement liable for detaining the plaintiff pursuant to an ICE detainer.[80] This decision was rendered in April 2014, and by July 2014, the LVMPD announced it would no longer honor ICE detainers absent probable cause.[81]

V. The End of Secure Communities and Continuation of ICE Detainers

In November 2014, The Obama Administration announced the end of Secure Communities and its plans to replace it with PEP.[82] The announcement noted two primary reasons the program was discontinued. First, a growing number of sheriffs, mayors, and governors refused to cooperate with the program. Second, a growing number of courts "re-

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75. Van Le, *Immigration Experts: Crime Victims and Witnesses are Collateral Damage of "Secure Communities"*, America's Voice (Aug. 24, 2011), http://americasvoice.org/press_releases/immigration_experts_crime_victims_and_witnesses_are_collateral_damage_of_sc/.

76. Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, Department of Urban Planning Policy, Univ. of Il. at Chicago, (2013).

77. *Id.*

78. State Sen. Bill Perkins, *Secure Communities Making Our Communities Insecure and Unsecure*, N.Y. Amsterdam News (Aug. 24, 2011), http://amsterdamnews.com/news/2011/aug/17/secure-communities-making-our-communities.

79. Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014).

80. Miranda-Olivares v. Clackamas Cty., No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

81. Press Release, Las Vegas Metropolitan Police Department,. *The LVMPD Will No Longer Detain Persons On Federal Immigration Holds* (July 14, 2014), available at http://www.lvmpd.com/Portals/0/news/2014/071414Release PO183.pdf.

82. Jonson, *supra* note 41.

jected the authority of state and local law enforcement agencies to detain immigrants pursuant to federal detainers issued under the current Secure Communities program."[83] The Obama Administration recognized the combination of states refusing to honor detainers and the threat of litigation and decided to end Secure Communities.

The primary constitutional concern surrounding Secure Communities and ICE detainers is that detainers are issued without judicial warrants, and often without probable cause, in violation of the 4th Amendment of the U.S. Constitution.[84] That is, ICE detainers do not require probable cause to hold an individual, nor do detainers require the signature of an independent judicial officer.[85] This article does not address the constitutionality of ICE detainers; instead, it seeks to discover what role litigation played in ending Secure Communities, and the continued use by the federal government of ICE detainers. This first warrants a review of several cases cited by the federal government and other jurisdictions as causing Secure Communities' demise.

The Third Circuit delivered the first judicial blow to Secure Communities and provided a powerful argument for activists. Although the Third Circuit did not address the constitutionality of ICE detainers, it found that detainers were not mandatory.[86] As addressed previously, the federal government presented Secure Communities as a mandatory program and, therefore, localities believed that ICE detainers were also mandatory. More importantly for advocates and localities, the Third Circuit refused to dismiss a constitutional violation claim against the county because it held that ICE detainers are not mandatory and counties are therefore not shielded from liability. The county conceded that, as applied to the plaintiff, the policies were unconstitutional, but argued that the mandatory nature of ICE detainers provided immunity for the county because it was implementing federal law.[87] By ruling that ICE detainers were voluntary, the Third Circuit stripped away the county's only protection. Other localities now faced potential liability for any constitutional or statutory violations should they honor an ICE detainer. Some states like California announced that they considered Secure Communities voluntary because, if it were mandatory, it would violate the state's 10th amendment rights.[88] This is exactly what happened in *Miranda-Olivares v. Clackamas County*.

In *Clackamas County*, the plaintiff alleged that by keeping her in custody pursuant to an ICE detainer, county jail officials violated her due process rights under the 14th Amend-

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83. *Id.*
84. Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 127 (2015).
85. *Id.*
86. Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014).
87. Miranda-Olivares v. Clackamas Cty., at *12.
88. Daniel C. Vock, *Backlash Grows Against Federal Immigration Screening at Jails*, THE PEW CHARITABLE TRUST (Sep. 25, 2013), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/09/25/backlash-grows-against-federal-immigration-screening-at-jails.

ment, and her right to be free from unreasonable seizure under the 4th Amendment.[89] The district court granted the plaintiff's motion for summary judgment on her 4th Amendment claim, but denied her 14th Amendment claim. Miranda-Olivares was informed that even if she posted bail, she would not be released due to the ICE detainer. The court noted that the county was not entitled to immunity because compliance with the detainer was not mandatory. The court found a violation of the 4th Amendment because the ICE detainer did not establish probable cause. The detainer only stated that it initiated an investigation into her immigration status, and the county therefore should have known there was no probable cause to hold her. Ultimately, the court awarded Miranda-Olivares $30,000 in damages and the cost of her legal fees.[90]

Although *Miranda-Olivares v. Clackamas County* was not the first case to question the constitutionality of ICE detainers, it quickly became one of the most influential. It is important to note that other cases also questioned the legality of ICE detainers; this case, however, is the most heavily cited as causing the decline in jurisdictions honoring ICE detainers. The federal government cited this case in the announcement ending Secure Communities.[91] Only five days after the decision, the Oregon counties of Multnomah, Clackamas, and Washington announced they would no longer honor ICE detainers.[92] These counties specifically referenced the district court's decision. This is not unexpected or surprising considering these counties fall under the jurisdiction of the Oregon federal district court. This decision, however, affected jurisdictions well outside of Oregon.

Activists in western states viewed the decision as a "death-knell" for ICE detainers.[93] Specifically, Santa Cruz County in California revised its policy of honoring ICE detainers because it feared being held liable.[94] The effect of the ruling is especially clear in Santa Cruz because the county previously refused to support California's TRUST Act, which limited the ability of jurisdictions to comply with ICE detainers.[95] In fact, following the decision, all 58 of California's counties revisited their policies of honoring ICE detainers absent probable

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89. Miranda-Olivares v. Clackamas Cty., at *1.

90. Steve Mayes, *Woman at center of landmark immigration case settles suit that changed jail holds in state, nation*, THE OREGONIAN .), (May 18, 2015, 3:47 PM), http://www.oregonlive.com/clackamascounty/index.ssf/2015/05/woman_at_center_of_landmark_im.html.

91. Johnson, *supra* note 41.

92. Press Release, Clackamas Cty. Sheriff's Office,., *Multnomah, Clackamas And Washington County Sheriff's Offices Announce Suspension Of I-247 Detainer Placements After Court Ruling*. (Apr. 16 2014, 5:01 PM) (available at http://www.clackamas.us/sheriff/pressreleases/2014-04-06-CCSOPR-CourtRuling.html).

93. Jason Hoppin, *Santa Cruz County Reverses Course on Immigration Holds*, SANTA CRUZ SENTINEL NEWS (May 12, 2014), http://www.santacruzsentinel.com/general-news/20140512/santa-cruz-county-reverses-course-on-immigration-holds.

94. *Id.*

95. *Id.*

cause.[96] Orange County acknowledged it stopped honoring ICE detainers as a result of the case.[97]

Several counties in Colorado announced that because of the decision in *Miranda-Olivares v. Clackamas County*, they would no longer honor ICE detainers.[98] Boulder County Sheriff Joe Pelle stated, "This recent court decision in Oregon is a game changer regarding ICE holds on detainers."[99] Following the ruling in April 2014, over 100 agencies in eighteen states announced they would no longer honor ICE detainers absent a judicial warrant.[100] The largest county in Iowa[101], Polk County, announced that despite a long-standing policy of honoring ICE detainers, it would no longer do so because of the Oregon ruling.[102] LVMPD also revised its long-standing policy of honoring ICE detainers after the decision.[103] Las Vegas joined Secure Communities in 2008 but in 2014 announced it would no longer honor ICE detainers.[104] Sheriff Gillespie announced that this decision was not a political one, but was instead based upon recent court rulings.[105] Although Sheriff Gillespie did not specifically mention *Miranda-Olivares v. Clackamas County*, the LVMPD decision came less than three months after the court decision.

Following the death of Kate Steinle, the LVMPD continued to work with ICE in a limited fashion but would not "adhere to a policy or adhere to a procedure that could potentially jeopardize someone's constitutional rights."[106] This strongly suggests that litigation and constitutional concerns motivated LVMPD to discontinue honoring ICE detainers.

While court rulings have contributed to the increasing the number of jurisdictions that do not honor ICE detainers, litigation alone does not fully explain why Secure Commu-

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96. *Id.*

97. Yvette Cabrera, *Court Case is Changing Policies on Immigration Holds*, VOICE OF OC (June 3, 2014), http://voiceofoc.org/2014/06/court-case-is-changing-policies-on-immigration-holds/.

98. Ivan Moreno, *Some Colorado Sheriffs Ending Immigration Detainers*, CBS DENVER (Apr. 21, 2014, 4:21 PM), http://denver.cbslocal.com/2014/04/29/some-colorado-sheriffs-ending-immigrant-detainers/.

99. *Id.*

100. John Couwels, *Lawsuit Fears Cause Cops to Turn Down Feds' Immigration Checks*, CNN POLITICS (Aug. 3, 2014, 3:15 PM), http://www.cnn.com/2014/08/01/politics/customs-immigration-detainers//.

101. *See 2010 US Census Iowa Counties Population*, IOWA SEC'Y OF STATE, https://sos.iowa.gov/elections/pdf/2010census/counties.pdf (list of counties in Iowa by population).

102. Grant Rodgers, *Polk County Stops Honoring Some ICE Requests to Hold Immigrants*, THE DES MOINES REGISTER (July 25, 2014, 7:14 PM), http://www.desmoinesregister.com/story/news/crime-and-courts/2014/07/25/undocumented-immigrants-polk-county-immigration-and-customs/13180211/.

103. Press Release, Las Vegas Metropolitan Police Department, *The LVMPD Will No Longer Detain Persons On Federal Immigration Holds*, (July 14, 2014), available at http://www.lvmpd.com/Portals/0/news/2014/071414ReleasePO183.pdf.

104. Aaron Barker & Craig Huber, *Citing Courts, Metro Changes Policy on Immigration Holds*, FOX 5 KVVU-TV (Sept. 22, 2014, 9:48 PM), http://www.fox5vegas.com/story/26015458/metro-stops-detaining-people-on-ice.

105. *Id.*

106. Karen Castro, *Metro Weighs in on 'Sanctuary City' Controversy*, LAS VEGAS NOW (Jul. 21, 2015), http://www.lasvegasnow.com/news/metro-weighs-in-on-sanctuary-city-controversy/159872967.

nities was ended and why jurisdictions continue to refuse ICE detainers. Much like some counties in California, Las Vegas and Southern Nevada are increasingly multicultural. The *Las Vegas Review Journal* reported that undocumented immigrants accounted for 7.6 percent of Nevada's total population[107] and 10.2 percent of the Nevada workforce are undocumented immigrants.[108] Sheriff Gillespie sat on the federal task force that reviewed Secure Communities and would have been aware of the community policing complaints that accompanied the detainers. Therefore, it is possible that the LVMPD viewed the litigation as a way to cease cooperation with a program that could have negatively impacted a significant number of its residents.

VI. The Influence of Organized Opposition on the Creation of "Sanctuary Cities"

Although litigation contributed to the acceleration of localities abandoning Secure Communities and ICE detainers, it does not explain why localities opted out of enforcement before 2014, when the majority of litigation took place. Opposition to Secure Communities and ICE detainers started well before the federal courts began addressing immigration detainers. Beginning in 2011, Cook County, Illinois, and Santa Clara County, California, passed laws refusing to honor ICE detainers.[109] This suggests that judicial decisions accelerated a preexisting trend of nonenforcement of ICE detainers and may have provided a convenient cover for any political blowback.[110] By clarifying that ICE detainers were not mandatory, federal courts gave localities the ability to opt out if they chose to do so. Illinois became the first state to entirely opt out of the program in 2011.[111] Governor Pat Quinn of Illinois stated that he withdrew the state's cooperation with ICE because the program was not just targeting those convicted of serious crimes, but also those convicted only of minor crimes.[112] However, 26 localities in Illinois continued to participate in Secure Communities, reflecting the confusion created by the federal government's conclusion that the program was mandatory.[113] Governor Quinn provided reasons to oppose both Secure Communities and the Priority Enforcement Program. Namely, that many of those held by ICE detainers have

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107. Michelle Rindels, *Nevada Has Top Share of Unauthorized Immigrants*, The Las Vegas Review-Journal (Nov. 18, 2014), http://www.reviewjournal.com/news/nevada/nevada-has-top-share-unauthorized-immigrants.

108. *Id.*

109. Spencer Amdur, *How Local Governments are Hacking Immigration Reform*, The Atlantic (May 13, 2014), http://www.theatlantic.com/politics/archive/2014/05/state-and-local-governments-make-their-own-immigration-reform/362823//.

110. Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 Geo. L.J. 125, 166-67 (2015).

111. Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, The New York Times (May 5, 2011), http://www.nytimes.com/2011/05/06/us/06immigration.html?_r=0.

112. Letter from Pat Quinn to Marc Rapp (May 4, 2011), *Re: Secure Communities*, available at http://big.assets.huffingtonpost.com/Quinn_DHS.pdf.

113. *Id.*

no criminal history or were convicted only of minor offenses and that the program failed to live up to its stated purpose of targeting serious criminals. .

San Francisco's sheriff Michael Hennessey opposed the program because it was eradicating the trust between law enforcement and immigrant communities.[114] A growing fear among police agencies and other activists was that witnesses or victims would not report crimes because they feared deportation.[115] California passed the TRUST Act in October 2013, which limited the ability of local law enforcement to cooperate with Secure Communities.[116] The 2013 TRUST Act stated that local law enforcement cannot honor an ICE detainer unless "the individual has been convicted of a serious or violent felony," or "the individual has been convicted of a felony punishable by imprisonment in the state prison."[117] The bill contained a number of common complaints about Secure Communities, and those complaints were used as the basis for altering the State's participation in Secure Communities.[118] Complaints included that the federal government does not reimburse the full cost of honoring a detainer, that detainers are not supported by probable cause, and that Secure Communities harmed community policing policies by damaging cooperation between local law enforcement and immigrant communities.[119] This decision was not met with universal praise; some argued that by restricting local law enforcement cooperation with federal immigration officers, violent criminals would be released to the public instead of being held and deported.[120]

At first, Massachusetts refused to sign the memorandum of understanding necessary to implement Secure Communities, since the federal government did not make it clear whether the program was mandatory.[121] However, Massachusetts was forced to participate in

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114. *Id.*

115. Michelle Waslin, *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, IMMIGRATION POLICY CENTER, https://www.americanimmigrationcouncil.org/sites/default/files/research/Secure_Communities_112911_updated.pdf, at 13 (updated Nov. 2011).

116. Elise Foley & Roque Planas, *Trust Act Signed in California to Limit Deportation Program*, HUFFINGTON POST (OCT. 5, 2013, 4:14 PM), http://www.huffingtonpost.com/2013/10/05/trust-act-signed_n_4050168.html.

117. Cal. Gov't Code § 7282.5(a)(1)-(2).

118. *See generally* California Bill Analysis, A.B. 4 Sen., 9/4/2013 (states several reasons to oppose Secure Communities, including damage to community policing, failure to prioritize seious offenses, and cost of complying with Secure Communities).

119. *See id.* (Stating concerns, including the untimely release of continued offenders).

120. Daniel C. Vock, *Backlash Grows Against Federal Immigration Screening at Jails*, THE PEW CHARITABLE TRUST (Sep. 25, 2013), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/09/25/backlash-grows-against-federal-immigration-screening-at-jails.

121. Elise Foley, *Massachusetts Rejects Secure Communities Immigration Enforcement Program*, HUFFINGTON POST (June 6, 2011, 3:31 PM), http://www.huffingtonpost.com/2011/06/06/massachusetts-rejects-immgration-enforcement-program_n_871970.html.

Secure Communities once the federal government announced that it was mandatory.[122] Many in Massachusetts opposed Secure Communities because it risked damaging or destroying community policing.[123] On a statewide level, Massachusetts continues to honor ICE detainers, but six cities have passed ordinances refusing to cooperate with ICE detainers.[124] Eventually, Governor Patrick ordered the state to not comply with detainer requests, but subsequent Governor Charlie Baker reversed this decision when he took office.[125] Massachusetts is one of the few localities that refused to participate in Secure Communities, but then participated in PEP.[126]

In 2011, Governor Cuomo made New York the second state to refuse to participate in Secure Communities.[127] New York State Senator Bill Perkins called for an end to Secure Communities because it often resulted in the deportation of those with little to no criminal record.[128] State Senator Perkins stated that he opposed Secure Communities because the families in his district are "at risk of being torn apart because of the draconian policies set forth by programs such as Secure Communities."[129] Correspondingly, Gov. Cuomo stated that he rejected Secure Communities because of the impact on families, immigrant communities, and law enforcement.[130]

Connecticut passed its version of the TRUST Act in 2013.[131] The purpose of the act was to improve relations between Connecticut's immigration communities and local law enforcement. Connecticut cited a recent study, in which 44 percent of respondents reported that they are less likely to contact police officers if they have been the victim of a crime because they fear they will be asked about immigration status, and 38 percent stated that they felt afraid to leave their homes because local law enforcement is assisting with immigra-

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122. Andy Metzger, *Gov. Deval Patrick to Uphold Secure Communities Program in Massachusetts* STATE HOUSE NEWS SERVICE (May 10, 2012), http://www.masslive.com/politics/index.ssf/2012/05/gov_deval_patrick_to_uphold_sc.html.

123. Letter from Mary E. Heffernan, Sec'y, Exec. Office of Pub. Safety and Sec., to Marc Rapp, Acting Dir., Secure Cmtys. (June 3, 2011) (available at http://big.assets.huffingtonpost.com/Massachusetts_Rapp.pdf.

124. Aaron Morrison, *Massachusetts Immigration Reform 2015: Statewide 'Sanctuary City' Policy Pushed by Lawmakers , has Bipartisan Opposition*, INT'L BUSINESS TIMES (Oct. 29, 2015, 4:22 PM), http://www.ibtimes.com/massachusetts-immigration-reform-2015-statewide-sanctuary-city-policy-pushed-2162288.

125. Eric Levenson, *State Police can Can Now Detain Undocumented Immigrants for Feds*, BOSTON.COM (June 2, 2016), https://www.boston.com/news/politics/2016/06/02/baker-police-immigration.

126. *Id.*

127. Elise Foley, *N.Y. Quits Secure Communities Immigration Enforcement Program, Andrew Cuomo Announces*, HUFFINGTON POST (Aug. 1, 2011, 5:20 PM), http://www.huffingtonpost.com/2011/06/01/new-york-quits-secure-communities_n_869969.html.

128. Perkins, *supra* note 79.

129. *Id.*

130. Foley, *supra* note 135.

131. Jesse Jacgar, *Connecticut Unanimously Passes TRUST Act to Limit Deportations*, UUMASS ACTION (Jun. 3, 2013), http://www.uumassaction.org/connecticut-unanimously-passes-trust-act-to-limit-deportations/.

tion enforcement.[132] The legislators did not mention constitutional or legal concerns, but instead stated that "the vast majority of our undocumented residents are hardworking and law-abiding, and should not fear that interacting with local police could lead to their deportation."[133] Connecticut was motivated to act by the story of Jose Maria Islas, who lived in Connecticut for eight years before being ordered removed for a crime that was dismissed.[134]

In 2012, the District of Columbia rejected participation in Secure Communities and passed legislation refusing to honor ICE detainers.[135] The ordinance passed in D.C. stated that only those convicted of serious crimes can be detained under ICE detainers, and ICE must reimburse the city for costs associated with the program.[136] This suggests that financial concerns may have at least partially motivated the cities to move away from ICE detainers. Financial concerns will be discussed in more detail in Section VII of this article.

Most surprisingly, law enforcement that initially supported Secure Communities increasingly began to oppose the program.[137] Community policing, which has been adopted across the United States, depends on trust and cooperation between the community and local law enforcement.[138] Officers feared that by becoming involved with the enforcement of immigration laws, the trust between law enforcement and immigrant communities would be eroded.[139] This fear has been validated in several studies. After the implementation of Secure Communities, a survey found that 44 percent of Latinos reported they were less likely to call the police.[140]

The federal task force that examined Secure Communities reached a similar conclusion. It found that local law enforcement agencies believed the program was disrupting the police-community relationship.[141] The report noted that if "trust is broken in some communities, [ ] victims, witnesses and other residents [ ] become fearful of reporting crime or ap-

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132. *Id.*

133. *Id.*

134. *Id.*

135. Cristina Costantini & Elisa Foley, *D.C. Passes Bill to Restrict Secure Communities Immigration Enforcement Program*, HUFFINGTON POST (July 10, 2012, 7:17 PM), http://www.huffingtonpost.com/2012/07/10/dc-immigration-law-secure-communities-ice_n_1663214.html; *see also* Leslie B. Rojas, *What exactly does the TRUST Act do?*, 89.3 KPCC (July 7, 2012), http://www.scpr.org/blogs/multiamerican/2012/07/06/8235/what-exactly-does-the-trust-act-do/ (explaining the Trust Act).

136. *Id.*

137. Stumpf, *supra* note 52.

138. Theodore, *supra* note 77 at 17.

139. Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT. L. REV. 13, 33 (2016).

140. Carol Rose & Laura Rotolo, *Somerville's Smart Immigration Move—and Why the Rest of Mass. Should Follow*, WBUR 90.0 (May 21, 2014), http://cognoscenti.wbur.org/2014/05/21/secure-communities-carol-rose-and-laura-rotolo.

141. Homeland Security Advisory Council *supra* note 48 at 24.

proaching the police."[142] The report noted that immigrants feared that contacting the police would put themselves and their families at risk of deportation.[143] The Los Angeles County Sheriff's Department Chief of Police, James Lopez, stated that the program eroded trust within the community and made undocumented immigrants avoid reporting crimes.[144] Other police chiefs concurred with Dayton Ohio's Chief who told his not to ask or check on the immigration status of victims and witnesses.[145]

VII. The Financial Side-Effect of ICE Detainers and Its Influence on "Sanctuary Cities"

It is important to note that ICE does not pay the costs of incarceration once there is "actual assumption of custody."[146] This means ICE will not reimburse a locality for costs associated with holding an individual pursuant to an ICE detainer.[147] The ICE detainer itself states that a locality should not hold an individual for more than 48 hours, excluding weekends and holidays. Therefore it seems that, on average, a locality bears the cost of only an additional two-day incarceration. However, it quickly became apparent that two-days was not the average length of retention. In California, individuals held pursuant to an ICE detainer were held on average an additional 20 days longer than other suspects.[148] This delay results in an added expense of thousands of dollars per immigrant detained.[149] This occurs because suspects who are not subject to an ICE detention often post bail, but suspects subject to ICE detainers do not post bail because they know that they will not actually be released. This is the situation that led to the lawsuit in *Miranda-Olivares*.[150] The plaintiff's family was ready and willing to post her 500 dollar bail, but the jail refused her payment because she was subject to an ICE detainer.[151] Additionally, ICE does not indemnify or reimburse localities that are sued as the result of ICE detainers.[152] The jail in Clackamas

142. *Id.*
143. *Id.*
144. Esther Yu-Hsi Lee, *In Immigrant-Heavy Cities, Law Enforcement Leaders say Executive Action Will Make Communities Safer*, Think Progress (Dec. 16, 2014), http://thinkprogress.org/immigration/2014/12/16/3602254/sheriffs-immigrants-executive-action/.
145. *Id.*
146. 8 C.F.R § 287.7(c)(West 2017).
147. Letter from David Venturella, ICE Assistant Dir., U.S. Immigration and Customs Enf't, to Miguel Marquez, Gen.General Counsel, Cty. of Santa Clara (2010) (on file with author and at https://immigrantjustice.org/sites/immigrantjustice.org/files/Detainers%20-%20ICE%20response%20to%20Santa%20Clara.pdf).
148. Judith A. Green, *The Cost of Responding to Immigration Detainers in California*, Justice Strategies (August 22, 2012), http://www.justicestrategies.org/sites/default/files/publications/Justice%20Strategies%20LA%20CA%20Detainer%20Cost%20Report.pdf at 2.
149. *Id.* at 3–4.
150. *Miranda-Olivares v. Clackamas City*, at * 2.
151. *Id.*
152. Venturella, *supra* note 157.

County was required to pay to house the plaintiff for an additional two weeks despite her willingness and ability to pay bail. This creates a financial disincentive for localities to comply with ICE detainers. Honoring ICE detainers can cost localities millions of dollars a year that ICE currently does not reimburse. Further, honoring ICE detainers can lead to lawsuits holding localities liable for detaining immigrants. Therefore, localities have very little financial incentive to participate in this now voluntary enforcement tool.

In 2012, it was estimated that California alone spent nearly 65 million dollars annually holding suspects pursuant to an ICE detainer.[153] In a report issued by the DHS Office of Inspector General, the agency claimed that a survey of Secure Communities' jurisdictions did not report any incarceration costs, and only a small minority reported even a minimal increase in incarceration costs.[154] However, this may be due to how the agency calculates costs. It is difficult to count the number of suspects that decided or refused to post bond because they were subject to an ICE detainer.

Cook County, Illinois was one of the first jurisdictions to opt-out of the then voluntary Secure Communities program.[155] Cook County stated it costs 143 dollars per day to detain someone and as a result of Secure Communities the county spent an additional 15 million per year detaining immigrants pursuant to a detainer.[156] Although ICE has claimed that Secure Communities does not create any additional costs, it offered to pay Cook County for additional costs caused by ICE detainers, perhaps because ICE recognized that localities are less likely to honor detainers if it causes a measurable increase in costs.[157] Specifically, ICE offered to pick up suspects on the same day they post bail, thereby reducing the cost of housing a suspect for the additional time spent incarcerated.[158] ICE Director Jon Morton stated, "ICE officers would immediately take custody of detainees on the same day of their scheduled release, provided the County gives ICE 24-hour advance notice." However, this does not address the fact that many immigrants simply choose to not post bail knowing they would be transferred to another facility instead of being released. ICE Director Morton has suggested creating a working group to identify the specifics of reimbursing the County in the rare occasions that additional costs are incurred by the County.[159] Cook County rejected that

153. Judith A. Greene, *The Cost of Responding to Immigration Detainers in California*, JUSTICE STRATEGIES (Aug. 22, 2012), http://www.justicestrategies.org/sites/default/files/publications/Justice%20Strategies%20LA%20CA%20Detainer%20Cost%20Report.pdf.

154. *Operations of U.S. Immigration and Customs Enforcement's Secure Communities*, DEP'T. OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., (Apr. 2012), https://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-64_Mar12.pdf.

155. Maria Inés Zamudio, *Holding penalty*, THE CHICAGO REPORTER, http://chicagoreporter.com/holding-penalty/.

156. *Id.*

157. Antonio Olivo, *Cook County Bucks Immigration Officials*, CHICAGO TRIBUNE (Sep. 8, 2011), http://articles.chicagotribune.com/2011-09-08/news/ct-met-county-immigration-policy-2-20110908_1_illegal-immigrants-detainers-sanctuary-ordinances.

158. *Id.*

159. *Id.*

offer, not based on budgetary concerns, but now because of ideological concerns. After receiving ICE's offer to pay, Cook County Board President Toni Preckwinkle stated, "[w]hat is troubling to me . . . is a policy which treats people differently under the law solely based on their immigration status."[160] This shift represents why it is important to understand the reasoning behind a localities decision. ICE's offer to pay should have resolved the financial issue Cook County faced, and Cook County should have returned to honoring ICE detainers.

The increased cost was not isolated in California and Illinois. In 2012, a study showed that suspects in Colorado held pursuant to an ICE detainer were held on average 22 days longer than those without detainer requests.[161] A bill introduced in the Colorado legislature in 2011, which would have eliminated state funding for communities that refused to participate in Secure Communities, died due to the combined opposition of immigration activist and rural communities.[162] Although the County Sheriffs of Colorado supported Secure Communities, they noted that at least 17 counties in Colorado would be unable to afford the necessary technology to process finger prints.[163] Rural counties that were expected to support the program's focus on deporting convicted criminals viewed it instead as another "unfunded mandate."[164] Colorado spent nearly 13 million dollars per year enforcing ICE detainers.[165] The money spent on ICE detainers exceeded the cost of putting 200 more police officers on the street.[166] Over the course of two years, Harris County in Texas spent approximately 50 million dollars holding people pursuant to ICE detainers.[167] In Washington, the University of Washington found that Secure Communities cost an additional 3 million dollars per year because suspects subject to a detainer remain in jail an additional 29.2 days.[168] All of these costs have provided a disincentive for communities to comply with Secure Communities.

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160. *Id.*

161. Nancy Lofholm, *Immigration-Report Law a High Cost for Colorado, Study Shows*, THE DENVER POST (Dec. 5, 2012), http://www.denverpost.com/ci_22130338/study-shows-immigration-reporting-law-has-high-cost.

162. Joseph Boven, *Secure Communities Participation Won't be Forced by Colorado*, THE COLORADO INDEPENDENT (Apr. 19, 2011), http://www.coloradoindependent.com/84760/secure-communities-participation-wont-be-forced-by-colorado.

163. *Id.*

164. *Id.*

165. *Misplaced Priorities: SB90 & the Costs to Local Communities*, COLORADO FISCAL INSTITUTE (Dec. 1, 2012), http://www.coloradofiscal.org/misplaced-priorities-sb90-the-costs-to-local-communities/.

166. *Id.*

167. Kiah Collier, *Harris County Jail Brings in Highest Number of Undocumented Inmates*, HOUSTON CHRONICLE (last updated Oct. 17, 2013, 9:29 PM), http://www.houstonchronicle.com/news/houston-texas/texas/article/Harris-County-Jail-brings-in-highest-number-of-4905303.php.

168. Douglas Epps, *Secure Communities Costscost Taxpayers, Hurtshurt Families*, THE NEWS TRIBUNE (Nov. 16, 2014), http://www.thenewstribune.com/opinion/opn-columns-blogs/article25893943.html.

The federal government could have alleviated the financial concerns for localities by offering to reimburse the total cost of holding someone pursuant to an ICE detainer. However, as discussed above, ICE detainers are not issued until the suspect posts bond and is set to be released. Often, suspects simply do not post bond because they know they will continue to be held. Additionally, it is questionable if ICE could have afforded to reimburse all localities for participating in Secure Communities or for participating in the Priority Enforcement Program. Because reimbursing California prisons for the cost of housing immigrants would run into the hundreds of millions of dollars, it seems the cost would be prohibitively expensive. Further, it would be reasonable to assume that once one county secures an agreement for reimbursement, others across the nation would request similar payments.

This cost does not take into account the growing number of settlements that local governments are being required to pay. As discussed above, Clackamas County, Oregon paid over $30,000 to settle claims relating to an ICE detainer.[169] Further, Jefferson County, Colorado agreed to pay $40,000 to a man held for 47 days on an ICE detainer.[170] Dona Ana County, New Mexico paid over $35,000 to two sisters held on an immigration detainer.[171] The increasing likelihood of legal liability combined with the costs of detaining suspects is making the program prohibitively expensive for many localities, including those that would otherwise support the program.

VIII. Priority Enforcement Program

After repealing Secured Communities, the Obama Administration announced the implementation of a new program, PEP. Secretary Johnson announced that under PEP, instead of relying on ICE detainers, ICE officers should instead request that the locality notify ICE of a pending release during the time the immigrant is in custody.[172] However, the new program had several similarities to Secure Communities and continued to use ICE detainers.[173] To address previous constitutional concerns over ICE detainers, the immigration officer should specify that the immigrant is subject to a final order of removal or "there is other sufficient probable cause to find that the person is a removable alien, thereby addressing the

169. Mayes, *supra* note 98.

170. The Associated Press, *ACLU Says Colo. Immigrant Settles Detention Case*, Denver Post (May 17, 2011, 6:35 AM), http://www.denverpost.com/2011/05/17/aclu-says-colo-immigrant-settles-detention-case-2/.

171. Amanda P. Beadle, *Legal Concerns Push Counties to Limit ICE Detainers*, Immigration Impact http://immigrationimpact.com/2014/06/19/legal-concerns-push-counties-to-limit-ice-detainers/.

172. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement (Nov. 20, 2014) (on file with author and at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.)

173. Kate Linthicum, *Obama Ends Secure Communities Program as Part of Immigration Action*, L.A. Times (Nov. 21, 2014, 4:00 AM), http://www.latimes.com/local/california/la-me-1121-immigration-justice-20141121-story.html.

Fourth Amendment concerns."[174] The memorandum describes using ICE detainers as special circumstances but does not otherwise clarify or provide guidance on when an ICE officer should use an ICE detainer. In his memorandum, Secretary Johnson announced that prosecutorial discretion should be applied "to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest: whom to detain or release."[175] The memorandum noted that discretion should be exercised as early in the process as possible in order to preserve government resources that would be better spent on high priority removal cases.[176] Thus, under PEP there are two notable changes intended to address the constitutional concerns and political criticism: the use of notification instead of detainers and prioritizing the detention and removal of felons.

The first change to PEP from Secure Communities was that the government no longer asked local agencies to hold people who had not been convicted of a major crime or did not have an order of deportation issued against them. Instead, they would simply notify DHS when the person was scheduled for release.[177] In this way, ICE detainers were reserved for cases that had sufficient evidence to find probable clause and avoid constitutional challenges.

The second change to PEP was the creation of priority groups for deportation. PEP outlined the three priority categories.[178] Priority One is described as threats to national security, border security, and public safety.[179] This category includes those suspected of espionage or terrorism, immigrants apprehended at the border, immigrants convicted of gang activity, and those convicted of aggravated felonies.[180] Detainers were to be used first for Priority One detainees before being used for the other categories. By focusing Priority One on people convicted of serious felonies, terrorism, and gang activities, ICE focuses resources on people who are a danger to the community, as opposed to people convicted of minor traffic crimes. However, PEP did not restrict the use of detainers to those that fall into Priority One.

Priority Two is described as misdemeanants and new immigration violators.[181] The memorandum states that these immigrants represent the second highest priority for apprehension and removal. Immigrants that fall into this group include people convicted of three or more misdemeanors, people convicted of a significant misdemeanor (which includes domestic violence, sexual abuse, drug crimes, and offenses for which the individual was sen-

174. Johnson, *supra* note 172.
175. *Id.* at 2.
176. *Id.*
177. *Id.*
178. *Id.* at 3.
179. *Id.*
180. *Id.*
181. Johnson, *supra* note 41.

tenced to time in custody of 90 days or more), and those apprehended in the United States after unlawfully re-entering the United States.[182] As Priority Two does not require felony convictions, it may run afoul of state laws such as the TRUST Act or the D.C. ordinance. However, by relying on multiple misdemeanors, or a conviction for drugs or sexual abuse, PEP may avoid some of the criticism that Secure Communities received. As much of the criticism from social activist and religious organizations focused on the argument that Secure Communities was targeting otherwise law abiding immigrants, focusing on people who have violated serious crimes addresses many of the concerns raised by Secure Communities.

Finally, the lowest priority group is described as 'other immigration violations.'[183] Immigrants in this group includes people who have been issued a final order of removal on or after January 1, 2014.[184] The memorandum states they should be removed unless they qualify for a form of relief, or there are factors suggesting that the immigrant is not an enforcement priority.[185] Although these immigrants are described as the lowest priority, the memorandum states that nothing in this memorandum "should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein."[186] The memorandum concluded that immigration officers may pursue removal of an immigrant if removing the immigrant would serve an important federal interest.[187] It appears that immigrants removed under this category would cause the greatest backlash because the only crime committed by immigrants in this group is the initial illegal entry.

Additionally, the memorandum stated that resources should not be used to detain immigrants "who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is not otherwise in the public interest."[188] It appears that the memorandum was designed primarily to respond to the social and financial arguments opponents advanced, as it did not address the constitutional issues raised by some courts. Instead, the memorandum prioritizes removal in an attempt to conserve resources and ensure funds are primarily spent on removing those with violent criminal convictions. This addresses the concern that detainers are largely used on people who commit only minor crimes. However, as discussed below, PEP suffered from implementation issues similar to those suffered by Secure Communities, and because detention is left to the discretion of immigration officials, people considered to be in the lowest priority group are still targeted.

182. *Id.*
183. *Id.* at 4.
184. *Id.*
185. *Id.*
186. *Id.* at 5.
187. *Id.*
188. *Id.*

The government failed to address the financial costs that many states and localities have pointed to.

Switching to PEP resulted in a decrease in the number of ICE detainers issued, but recent data shows that the program failed to follow the priorities created by Secretary Johnson, leaving itself open to the same opposition that resulted in the ending of Secure Communities. The Transactional Records Access Clearinghouse ("TRAC") at Syracuse University found that ICE issued 7,993 immigration detainers in April 2015, which was 30 percent fewer than those issued in October 2014 before Secure Communities was cancelled.[189] However, TRAC noted that the number of ICE detainers were steadily falling since peaking in March 2011.[190] Most importantly, TRAC found that after the implementation of PEP, ICE detainers were still not used according to the priority categories. Specifically, approximately only 30 percent of detainers issued during April 2015 were used on immigrants convicted of a crime.[191] Only 19 percent of immigrants detained on an ICE detainer were convicted of a felony, meaning they fell into Priority One enforcement.[192] Instead, nearly 70 percent of those detained pursuant to a detainer had no criminal conviction of any type.[193] Despite the announced goal of PEP being the targeting of those with felony convictions, TRAC found that prior to the implementation of PEP, nearly half of all detainers were used for immigrants with criminal convictions. After implementation, that number fell to 30 percent.[194] Thus, despite the acknowledgement that Secure Communities was ended because of opposition to the detainers, the implementation of PEP failed to address concerns about which people are targeted and instead continued to generate controversy.

In an August 2016 report, TRAC found that the reforms implemented by Secretary Johnson as part of the PEP rollout have been largely ignored.[195] This report examined data from the first two months of 2016 and found that half of ICE detainers[196] issued in January and February targeted immigrants without a criminal record.[197] Further, despite stating that ICE detainers, as opposed to ICE notifications, would only be used in special circumstances, TRAC found that ICE issued detainers in four out of every five cases.[198] Therefore, under PEP, instead of relying primarily on notification requests and using detainer requests only in

189. *Further Decrease in ICE Detainer Use*, SYRACUSE UNIV. (August 28, 2015), http://trac.syr.edu/immigration/reports/402/.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Detainer Program Largely Ignored by Field Officers*, SYRACUSE UNIV. (August 9, 2016), http://trac.syr.edu/immigration/reports/432/.

196. The TRAC report refers to detainers such as I-247 after the form used to issue a detainer.

197. *Reforms of ICE Detainer Program*, SYRACUSE UNIV., http://trac.syr.edu/immigration/reports/432/.

198. *Id.*

special circumstances, it appears that ICE field agents continued to rely primarily on detainers. Once TRAC analyzed the underlying convictions for those detained pursuant to an ICE detainer, it found that the majority of convictions did not fall into the Priority One category.[199] TRAC broke down the different convictions underlying the ICE detainers and found that the most common conviction was for driving under the influence of liquor.[200] The third most common underlying conviction was described as a traffic offense, which would not appear to fall into either Priority One or Priority Two enforcement.[201] Major reforms intended to blunt the criticism that accompanied Secure Communities were ignored.

It appeared that the stated purpose of PEP proved effective in encouraging some localities to continue honoring ICE detainers. Hudson County, New Jersey recently voted to continue participating in PEP.[202] While advocacy groups and religious institutions opposed the decision, the county found that PEP "significantly narrows the category of individuals who may be 'flagged' for an ICE 'detainer.'"[203] Activists repeated the same complaints logged against Secure Communities, namely that immigrants detained for traffic charges or those stopped at crime scenes will be detained instead of focusing on more serious criminals.[204] In Monterey County, California the Sheriff, Steve Bernal, stated he would permanently implement PEP, noting that he implemented PEP in response to the shooting of Kate Steinle.[205] Sheriff Bernal stated he was able to comply with both California's TRUST Act and PEP by continuing to refuse all detainer requests, but allowing an ICE officer to have a desk at the jail, which gives agents the ability to detain an immigrant as soon as they are released without requiring a detainer to be issued.[206] Following the controversy surrounding the shooting death of Kate Steinle, San Francisco implemented a limited version of PEP to ensure compliance with the TRUST Act.[207] Under the new policy, San Francisco would honor notification requests when the immigrant has been charged with a serious or violent crime and a judge has found there is probable cause the suspect committed the crime.[208]

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199. *Id.*

200. *Few ICE Detainers Target Serious Criminals*, SYRACUSE UNIV. (Sept. 17, 2013), http://trac.syr.edu/immigration/reports/330/.

201. *Id.*

202. Nancy Benecki-Hawkins, *Hudson County Extends Immigration Program*, THE JERSEY JOURNAL (last updated Jul. 17, 2016), http://www.nj.com/hudson/index.ssf/2016/07/hudson_county_extends_immigration_program_addvocate.html.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Josh Siegel, *1 Year after Steinle Death, San Francisco Unveils Immigration Policy, Kunveils immigration policy, eeping 'Sanctuary' Protections*, THE DAILY SIGNAL (Jun. 2, 2016), http://dailysignal.com/2016/06/02/1-year-after-steinle-death-san-francisco-unveils-immigration-policy-keeping-sanctuary-protections/.

208. *Id.*

Other localities that refused to support Secure Communities were lured back by PEP. Philadelphia mayor Jim Kenney issued an executive order barring police from following a detainer or notification request "unless the person is being released 'after conviction for a first or second degree felony involving violence and the detainer is supported by a judicial warrant.'"[209] Secretary Johnson traveled to Philadelphia and spoke with Mayor Kennedy in an attempt to convince him to support PEP but was unsuccessful.[210] Secretary Johnson also visited Cook County, Illinois, which opted out of Secure Communities primarily based on cost, in an unsuccessful attempt to convince county commissioners to implement PEP.[211]

IX. The Future of ICE Detainers

In order for ICE to convince localities that rejected ICE detainers under Secure Communities to honor ICE detainers, it will need to address the reasons localities abandoned it. Opposition to current ICE detainers and Secure Communities falls into a few key groups. There are those that oppose ICE detainers based on civil rights concerns; then there are those that oppose ICE detainers because of the financial cost placed on localities; some oppose ICE detainers because of constitutional concerns; finally, some oppose detainers because they are ineffective and have contributed to an erosion of community trust in law enforcement.

Financial costs may initially appear to be easily rectified. PEP attempted to address this issue by directing field agents to focus resources on those that fall into a higher priority group. But data has shown that under PEP, the majority of immigrants detained had no criminal conviction and could only fall into the lowest priority category. Additionally, instead of relying on ICE notifications, field officers are still overwhelmingly relying on ICE detainers, which increases the cost of housing immigrants. This does not address the issues raised by Cook County that it cost nearly 15 million a year to honor the detainers under Secure Communities. Assuming that DHS is willing to make a promise to pay localities, it appears unlikely that there are funds to do so. As noted, the primary cost of these detainers comes from the fact that immigrants often do not post bail once subject to a detainer, which forces the localities to continue housing them. DHS may reduce costs to localities by issuing ICE notifications instead of detainers. Under this approach, ICE would pick up the immigrant after their regularly scheduled release, which would not increase costs to localities. But given

209. Anna Orso, *Kennedy Blasts Pat Toomey's 'Fearmongoring' Around Sanctuary Cities Policy*, Politifact (Jul. 8, 2016), http://www.politifact.com/pennsylvania/statements/2016/jul/08/pat-toomey/kenney-blasts-pat-toomeys-fearmongering-around-san/.

210. *Id.*

211. *Id.*

the lack of trust between localities and DHS created by Secure Communities, many localities have refused to honor notification requests.

Localities that oppose ICE detainers because of their effect on community policing will be harder to convince to enforce ICE detainers because the opposition comes not just from community groups, but law enforcement as well. This relates to the belief that ICE detainers rely on racial profiling and encourage officers to arrest those who appear to be undocumented immigrants.[212] While proponents of Secure Communities argue that by relying on fingerprints they avoid racial profiling, activists argue that police instead arrest individuals they believe to be removable in order to get finger prints to check.

Localities that believe the program results in the deportation of victims and witnesses are unlikely to enforce ICE detainers. This is especially true in localities that focus on community policing and are attempting to increase cooperation and trust with law enforcement. Here, it is more difficult for ICE to reform the program in a way that appeases these localities. Reports that demonstrate Latinos and other immigrant groups are less likely to report crimes undermine the rationale behind Secure Communities. Communities will not enforce a policy that relies on racial classifications.

DHS has attempted to address the narrative that families are being torn apart by ICE detainers. In remarks given by President Obama on the same day PEP was announced, he said, "we're going to keep focusing enforcement resources on actual threats to our security. Felons, not families."[213] Unfortunately, it appears that the statistics reported demonstrated that the phrase "felons, not families" did not come to fruition. However, given the current backlash to sanctuary cities, there may be an opening for proponents to push a new narrative.

People that opposed Secure Communities from a civil rights perspective are unlikely to support future programs unless significant changes are made. It appears that ICE detainers used under both Secure Communities and PEP are unacceptable to most activists. Opposition stems from fears of racism, objections to current immigration policies, religious or moral beliefs, and a commitment to the civil rights of minority groups. For many, opposition to ICE detainers stems from overall opposition to current immigration policy. Therefore, their objection to Secure Communities will need to be addressed with some form of comprehensive immigration reform.

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212. Azadeh Shahshahani, *ICE Detainers Are Unfunded Mandate and Threaten Public Safety*, HUFFINGTON POST (last updated Jan. 5, 2015, 6:15 PM), http://www.huffingtonpost.com/azadeh-shahshahani/ice-detainers-are-unfunded-mandate-and-thraten-public-safety_b_6110952.html.

213. President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014) (transcript available at https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration).

It appears that PEP did nothing to address the constitutional and legal issues surrounding ICE detainers. When considering implementing the new policy, the superintendent of Anne Arundel County Department of Detention Facilities, Terry Kokolis, stated he would honor detainer notifications, "[b]ut we will not detain them on the basis of just having a detainer. I'm not going to put Anne Arundel in the bull's-eye for potential litigation."[214] The Clackamas-County lawsuit opened the door for liability because it found that the ICE detainer request lacked probable cause. Although PEP detainers should only be issued if there is sufficient probable cause to do so, the memorandum does not provide any guidance on what constitutes probable cause. Further, nothing in the ICE detainer reveals what basis provides the probable cause for each detainer that is issued. Thus, localities may still be exposed to liability under the existing program.

X. Conclusion

The debate over Secure Communities and ICE detainers continues. Recently Congress attempted to pass legislation defunding sanctuary cities.[215] The criticisms that resulted in the ending of Secure Communities have continued. Currently, it appears that the status quo is unsustainable. Although some states, such as California, do not support enforcement of ICE detainers, other states allow each county or city to decide. This has led to inconsistent policies and confusion. Unfortunately, given the current political climate in Washington D.C., immigration reform is unlikely. However, DHS can take several steps to convince at least some of the localities to begin enforcing ICE detainers. If DHS continues to ignore the various groups and arguments against ICE detainers, it risks losing more localities to non-enforcement. The combined force of favorable rulings on detainers, increasing costs, and opposition has placed ICE on the defensive.

The research has demonstrated that the initial demise of Secure Communities and the continued trend towards the non-enforcement of ICE detainers has several causes. Social activists succeeded in convincing a number of states and localities to opt-out of Secure Communities and the enforcement of ICE detainers. Immigration activists, civil rights activists, and religious organizations successfully drew attention to the fact that a large percentage of those deported did not have criminal convictions or had only minor convictions, which created compelling stories that could be wielded against the program. These efforts convinced some elected officials that the federal government misled them and that immigration detainers were eroding community trust. Further, these activists succeeded in demonstrating that

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214. John Fritze, *Maryland Localities Mixed on new Federal Immigration Program*, The Baltimore Sun (Aug. 11, 2015, 8:39 PM), http://www.baltimoresun.com/news/maryland/bs-md-immigration-counties-20150811-story.html.

215. Carl Hulse, *Congress Prepares to Vote on Defunding 'Sanctuary Cities'*, First Draft (Oct. 20, 2015, 6:20 AM), http://www.nytimes.com/politics/first-draft/2015/10/20/congress-prepares-to-vote-on-defunding-sanctuary-cities/.

the program made communities less safe because it made immigrants and people of Latino descent less likely to report crimes to local law enforcement.

Pursuing litigation that focused on the mandatory nature of ICE detainers proved to be highly successful. In this way, litigation was a highly effective tool for immigration rights advocates. It allowed them to return their focus to convincing elected officials to again opt-out of Secure Communities and to refuse to honor ICE detainers. Additionally, litigation provided immigration rights advocates another line of attack to present to elected officials: that local law enforcement will be held liable for detaining suspects pursuant to an ICE detainer that lacks probable cause. Reminiscint of prior civil rights movements, it may take further federal court rulings invalidating ICE detainers before the majority of localities abandon them. Although courts have not addressed the constitutionality of Secure Communities and ICE detainers, advocates nonetheless effectively demonstrated that localities that enforced ICE detainers do so at their peril.

Despite these victories, ICE detainers are honored in the majority of localities. This demonstrates that without a litigation victory at the federal appellate level or comprehensive immigration reform, activists opposing the detainers are at a disadvantage. As the election of Donald Trump demonstrated, the tide of public opinion can easily be turned against the immigrants' rights movement, even though opponents of Secure Communities and ICE detainers successfully blocked proposed legislation that would have defunded sanctuary cities. As ICE detainers have survived different administrations and changing programs, it seems unlikely the federal government is willing to abandon them. It is clear that there are groups supporting the continued use of ICE detainers.

TEACHING SPANISH TO LAW SCHOOL STUDENTS: CONSIDERATIONS IN DEVELOPING A LEGAL SPANISH COURSE

DIANA GLICK

The Limited English Proficient (LEP) population of the United States continues to grow; recent census data shows that there are 60 million U.S. residents who speak a language other than English at home, while 25 million speak English "less than very well."[1] California alone is currently home to almost seven million people who speak English "less than very well."[2] The inability to speak and understand English presents challenges to those who seek to use the California legal system to protect or assert their personal rights or economic interests. From 2009 through 2013, there were over 700,000 interpreter service days provided to the courts by Spanish interpreters, representing approximately 70% of all interpreter service days.[3] Spanish is by far the most common non-English language spoken in California; the next five most common languages represented in interpreter service days are Vietnamese, Korean, Mandarin, Farsi, and Cantonese.[4] There are a variety of initiatives underway in California designed to increase access to the courts and to the legal system for LEP court users, including the translation of key documentation, increasing interpreter coverage, and seeking out technological solutions to access challenges.[5] One approach that has received less scholarly attention is the training of law students to provide services directly to LEP individuals in their native languages here in the United States.

I came to the law as a second career after having spent the better part of a decade working as a freelance translator and teaching both English and Spanish classes, including Medical Spanish. Shortly after graduating from law school, and inspired by the possibility of combining my language and legal skills, I developed and proposed a Legal Spanish class at U.C. Davis King Hall School of Law and have had the privilege of teaching it during the fall

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1. *See Language Access Plan Implementation Task Force*, CAL. CTS, http://www.courts.ca.gov/LAP.htm (last visited April 23, 2017).
2. *Id.*
3. *Language Need and Interpreter Use Study*, 2015 NAT'L CTR. FOR STATE CTS 7.
4. *Id.*
5. *See Strategic Plan for Language Access in the California Courts*, CAL. CTS. (2015), *available at* http://www.courts.ca.gov/LAP.htm.

semester for six years. This paper shares some hard-earned wisdom about teaching Spanish to law school students, provides ideas and considerations for structuring Spanish law school courses, and offers some thoughts about the future of law school education in Spanish and other non-English languages as part of a broader movement to increase access to justice for LEP individuals.

I. THE FRAMEWORK

There is a growing interest in law schools around the country in teaching Spanish to law students. A review of course descriptions available on law school websites indicates that there are a variety of ways law schools are introducing the instruction of Spanish: courses taught as two-week seminars,[6] classes offered exclusively to study the practice of law in civil law countries,[7] programs offering continuing legal education credit for both students and professionals,[8] and other programs offered specifically for attorneys who plan to work with Spanish-speaking clients in the United States.[9] There are also several courses that appear to combine instruction in civil law systems with the teaching of skills to practice law in the United States.[10] The University of Denver Sturm College of Law appears to have the most fully-developed Legal Spanish program in the United States with a host of course offerings and opportunities to practice abroad and provide domestic representation of the LEP court population.[11]

Law school course content in Spanish appears to break down into two broad categories: content that highlights civil law process and procedure, and content for students who intend to practice law in the United States directly with Spanish-speaking clients. The latter courses tend to be rooted in state law and often focus on key vocabulary and cultural competence in serving the Spanish-speaking population in this country.

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6. *JD Program*, THE UNIV. OF MISS. SCH. OF LAW, http://law.olemiss.edu/academics-programs/j-d-program/ (last visited Apr. 23, 2017).

7. *655 Spanish for Legal Studies*, DUKE UNIV. SCH. OF LAW, https://law.duke.edu/academics/course/655/ (last visited Apr. 23, 2017).

8. *Spanish for Lawyers*, AM. UNIV. WASH. COLL. OF LAW, https://www.wcl.american.edu/spanish/index.cfm (last visited Apr. 23, 2017).

9. *Law Course Catalog: Law in Spanish*, LEWIS & CLARK LAW SCH., https://law.lclark.edu/courses/catalog/law_275.php (last visited Apr. 23, 2017).

10. *Law 7982- Legal Spanish I*, UNIV. OF CONN. SCH. OF LAW, https://www.law.uconn.edu/academics/courses/LAW7982/legal-spanish-i (last visited Apr. 23, 2017); *Law 7983- Legal Spanish II*, UNIV. OF CONN. SCH. OF LAW, https://www.law.uconn.edu/academics/courses/LAW7983/legal-spanish-ii (last visited Apr. 23, 2017); *624 - Legal Spanish for U.S. Lawyers (2)*, UNIV. OF THE PAC. MCGEORGE SCH. OF LAW, http://www.mcgeorge.edu/Students/Academics/Courses/Course_Descriptions.htm?course_number=624 (last visited April 23, 2017).

11. *Lawyering in Spanish Course Description*, UNIV. OF DENV. STURM COLL. OF LAW, https://www.law.du.edu/index.php/lawyering-in-spanish/course-descriptions (last visited April 23, 2017).

In his inspiring article about training law students to be bilingual practitioners, Jayesh M. Rathod posits that a true cultural understanding of terminology must be rooted in an understanding of civil law systems and how legal concepts play out in those systems[12]. Creating a cultural and legal context for legal terminology is of benefit both to the student who is learning new terms and, ultimately, for LEP clients who need a complicated or esoteric legal concept explained. While I do not dispute that there are tremendous benefits to a comparative law approach regarding increasing cultural understanding, I have taken a different direction for my course. My class has been developed and delivered as a language course, drawing exclusively on U.S. and California law for content and context. This approach was intentional and devised after much consideration regarding what I bring to the class as a professor and the specific skills I wish to impart to my students.

My reasoning was partially based on the fact that bilingual attorneys do not necessarily need to understand a foreign legal system to help LEP court users in the United States. While most Spanish-speaking LEP court users are recent immigrants from a civil law country, it is estimated that 19% are U.S. born.[13] For recent immigrants, it is impossible to know how much experience that person may have with the legal system in their country of origin. We do not know whether an analogy to the legal system of their particular country of origin would make sense or fall flat. I also tried to envision the setting in which an attorney's bilingualism will come into play. Is the attorney entering a contract for representation in a civil matter that will extend over a period of months and provide ample opportunity for delving into a deeper understanding of the process? Or is the client waiting in a long line at a Superior Court hoping to finalize his divorce papers with the assistance of a self-help center attorney who will have limited time to dedicate to his particular case and may only be able to offer help with filling out forms and filing documents? For Legal Aid, juvenile dependency attorneys, and public defenders who have large caseloads, communication in any language must be swift and accurate.

While I have not chosen to employ a comparative law approach to my own course, there are several courses currently taught in U.S. law schools that combine instruction in civil law systems with instruction on vocabulary necessary to represent LEP litigants in the United States. This approach has one key benefit from an instructional standpoint: there is a dearth of high-quality source materials available in Spanish about the law and legal processes in the United States, as compared with articles, descriptions, codes and legal decisions in Spanish from Latin American countries. The materials available domestically, with some exceptions, tend to be translated from English with varying quality. This makes providing high quality and appropriate reading selections a challenge, but not impossible.

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12. Jayesh M. Rathod, *The Transformative Potential of Attorney Bilingualism*, 46 U. MICH. J. L. REFORM 863, 912 (2013).

13. Jie Zong & Jeanne Batalova, *The Limited English Proficient Population in the United States*, MIGRATION POLICY INST., (July 8, 2015), http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states.

During my first two years teaching the course, I experimented with a couple of textbooks, but ultimately abandoned them altogether in favor of developing my own materials. I have developed my own context-based grammar review exercises. I relied on the generosity of many organizations and authors who have given me permission to use their articles and other materials in class.

An additional threshold consideration is the level of Spanish proficiency that students need to have to benefit from the class. While introductory language classes are taught in colleges every day to those without any background in the language, those courses tend to be structured to provide repeated exposure to the language over the semester or quarter. In other words, a Spanish One course might be offered five days a week for 50 minutes a day. By contrast, a typical two-unit law school course at U.C. Davis will be offered on a single day of the week for two hours. This type of schedule is less conducive to introductory language instruction. Law schools are not set up with language laboratories that provide all the technology now considered *de rigueur* in college-level foreign language instruction. Finally, it would be very challenging to bring introductory Spanish students to a level of proficiency with the language in a single semester (or even two) that would allow them to work successfully with legal terminology and concepts.

For these reasons, my class has required students to be native Spanish-speakers or to "have achieved proficiency in Spanish through study or experiences in a Spanish-speaking country." Anecdotal evidence suggests that leading with "native Spanish-speakers" has actually scared away students with sufficient background in Spanish to be successful in the class. When non-native speakers contact me during registration to inquire whether they are eligible, I very rarely turn anyone away—the fact that they are reaching out speaks to their motivation and desire to participate, which usually translates into hardworking and engaged students. However, I do ask about their years of study, whether they have traveled in Spain or Latin America, and whether they are comfortable with Spanish-language news sources. Based on these factors, I try to provide an honest assessment to students regarding whether they will be successful in and benefit from the class.

As I will describe in greater detail in this article, despite the relatively high level of Spanish required to participate in the course, it remains primarily a language course. It is firmly anchored in the principles of second-language acquisition with legal vocabulary and concepts serving as the context for language learning.

II. Lessons Learned in the Classroom

Lesson No. 1: The Complicated Role of Translation

I take the feedback of my students seriously and try to create a setting that allows feedback to come naturally and continually. During my first year of teaching, my students

shared that they were expecting more translation practice, and perhaps some direct instruction in the art of translation and interpretation. This surprised me because as a Spanish-speaking attorney in practice, I always sought a clear delineation between the legal profession and the linguistically-based professions of translation and interpretation. The benefit of a Spanish-speaking attorney is not the possibility of having an interpreter with legal knowledge on one's side, rather, it is the ability to provide direct services in the first language of the client without linguistic impediments in the attorney/client relationship.

However, because of these comments, I have done more to explain the mechanisms of interpreter and translator work to my students, and, in some years, had an interpreter come into the class as an invited guest to talk about how attorneys can work most effectively with interpreters in legal settings. I have also worked into my class a hybrid skill that I find bilingual attorneys must repeatedly employ: sight translation.

Sight translation is an area that has received less scholarly attention than interpretation and translation, but has been defined by the National Council on Interpreting in Health Care as "the oral rendition of text written in one language into another language" that "is usually done in the moment."[14] This organization further notes that the following skills are necessary in sight translation: "the ability to comprehend written text in one language (reading skills) and the ability to produce an oral or signed rendition in another language (speaking or speech production skills)."[15]

For example, an attorney going over a judge's order (written in English) with a Spanish-speaking client would need to perform a sight translation. The hearing is over and the client is ready to depart with a written order from the judge in hand, but does not understand what the order says or what it means. If the court-appointed interpreter is available and willing to do so, he or she can walk the client through the judge's order. However, a bilingual attorney can also read the order in English and verbally translate it for the client in Spanish. This communication is not strictly interpretation as interpretation traditionally involves only the spoken word; nor will the attorney provide a complete written translation. Instead, there is a verbal translation, many times "on the fly," as attorney and client are winding up their court appearance.

Sight translation in the legal context is truly a hybrid skill and can involve many mental switchbacks. An example of this would be filling out a Judicial Council form, which is required to file a conservatorship petition. Sitting with my Spanish-speaking client, I would need to read the form in English, translate each question into Spanish orally and frame various questions for my client, hear and understand the answer in Spanish, and then retrans-

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14. NAT'L COUNCIL ON INTERPRETING IN HEALTH CARE, SIGHT TRANSLATION AND WRITTEN TRANSLATION GUIDELINES FOR HEALTHCARE INTERPRETERS 4 (2009).

15. *Id.*

late the answer into English to write on the form. Questions requiring a yes/no answer would create more work in the question ("Does the petitioner have an adverse interest. . ."), than the answer itself. But, open-ended questions ("Describe specific reasons why the proposed conservatee is unable to care for him or herself. . .") could require quite a bit of comprehension in Spanish of the spoken answer and translation into English on to the written form.

The importance of basic sight translation skills for bilingual attorneys has led me to incorporate opportunities to practice this skill into the activities of the weekly class. Examples of this include a scenario very similar to the one described above with the conservatorship petition and accompanying forms. Another example is an exercise I created in which students, working in pairs, give each other a short set of instructions, first taking an English "legalese" version and explaining it in plain English (L1 to L1), then from English into Spanish (L1 to L2), and finally explaining brief instructions provided in Spanish "legalese" using a clarified version of Spanish (L2 to L2).

LESSON NO. 2: THE ROLE OF GRAMMAR

Each group of students brings their own unique range of skills in Spanish. This presents a challenge to create a course that is as finely-tuned as possible to fit the needs of each Spanish level represented in the room. Sometimes, I encounter outright eye-rolling when I start with something as simple as *ser* vs. *estar*, though I might hear privately from other students that they are grateful for the review. This is where an understanding of the social pressures of the second-language classroom, in addition to what Krashen calls the "affective filter," are helpful in structuring an environment that is conducive to learning Spanish.[16] The affective filter hypothesis posits that three elements are critical to the ability of a student to acquire a second language: high motivation, self-confidence and low anxiety.[17]

For better or for worse, law students are accustomed to high levels of pressure and high expectations. Their own expectations of their performance can create a fear of speaking up and actively using a second language in the classroom, just as they might sit in abject terror awaiting the professor's call to provide the details of a case under discussion in a traditional law school classroom. The fact that there are native Spanish speakers in the classroom can add to the intimidation factor.

One way to even the playing field is to dedicate time to the study of grammatical concepts, which tends to balance out the room because non-native speakers are much more likely to have received some direct grammar instruction and know explicit grammar rules precisely because they have learned Spanish as a second language. My goal is to review the

16. STEPHEN D. KRASHEN, PRINCIPLES AND PRACTICE IN SECOND LANGUAGE ACQUISITION 31 (1982).
17. *Id.*

grammar in tandem with the introduction of legal concepts in a way that provides the greatest number of students an "*i+1*" experience.[18] In other words, I want students to understand the input and be challenged by the material sufficiently enough to push them on in their language acquisition process without discouraging them or setting them up for failure.

Another and perhaps even more important way to set the stage for active participation in the classroom is to attempt to lower the students' affective filter by expressly setting a tone of mutual respect. I sometimes share a story of my own experience speaking in front of a class full of students in another country and being laughed at because of my accent. I make a point to explicitly ask for mutual respect and support from the group as we are each at different stages with our acquisition of the Spanish language, and we have much to learn from one another, provided that we can foster an environment that is collaborative and low-stress. I am proud to say that my law students have consistently honored this request, and I have enjoyed teaching six groups of high-quality students who support each other and take their language-learning seriously.

LESSON NO. 3: WHO IS THE TEACHER AND WHO IS THE STUDENT?

I have taught language courses to many different types of students, including aspiring nurses and doctors, college undergraduates, young professionals, and eleven-year-olds. In every one of those settings, I have been cognizant of the fact that my role as teacher is not to impart information. Rather, my job is to inspire my students to acquire skills and seek out information on their own. My job in the language classroom is to set the stage, provide the tools, and get out of my students' way as they get down to the business of learning.

This is never more obvious than in the Legal Spanish classroom where many of my students are already providing direct services to clients through clinics and internships and are fast becoming subject matter experts in a variety of fields. Students participating in clinics, in particular, can contribute to the Spanish terminology taught in the classroom because they know exactly what clients say and understand in Spanish to denote particular terms and concepts—*restraining order, green card, continuance*. The dictionary is no longer my go-to resource for terms when I have access to the living language through my students. Although my inclination as a language teacher is to teach "correct" Spanish, there is no denying that sometimes achieving communication requires a willingness to use a term that may not be considered "correct" but certainly conveys meaning.

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18. The concept of "i + 1" is part of Krashen's input hypothesis, that language acquisition is facilitated with the introduction of comprehensible input in the second language; this allows the student to focus on meaning over form. Put another way, "our assumption has been that we first learn structures, then practice using them in communication, and this is how fluency develops. The input hypothesis says the opposite. It says we acquire by 'going for meaning' first, and as a result, we acquire structure" (*id.* at 21). The goal of i + 1 is to ensure that some of the input contains structures that are slightly above the level of proficiency of the learner such that it propels the language student toward the next level of comprehension.

One challenging and engaging way of approaching the study of Spanish legal vocabulary is to introduce my students to the world of "false friends." While often taught in language courses as "cognates" and "false cognates," I prefer to use the terms "friends" and "false friends" because false cognates have different *etymologies* in addition to different *meanings*. In the case of false friends, these words may share the same etymology, but have slightly different meanings in practice (making them very unfriendly for the language student). The goal of my course is always to improve and enhance communication, so sharing some of these word pairs that can be deceptively similar is a way to teach both vocabulary and contrasting legal concepts. There are many examples of these false friends in the legal realm. For example:

> adjudicar (to allocate, or assign)/adjudicate (to settle a dispute judicially)
> ejecutar (to perform a contract)/execute (to perform *or* enter into a contract)
> crimen (serious crime, felony)/crime (misdemeanor/minor crime or a felony offense)

Another aspect of my course that has evolved over the last few years is the substantive legal content of the class. When I began the course, I focused on specific areas of law that I thought would be of greatest interest to my students and mirrored some of the university's clinical offerings. This focus meant that I was trying to teach vocabulary and concepts mainly in family law and immigration, in addition to Probate, Torts, Housing, Civil Rights, and Employment. While I still track many of these areas in my syllabus for purposes of introducing key vocabulary, I now place greater emphasis on what I call "broader legal topics." These are issues that span a variety of areas of law and that have a more universal application for attorneys. One example is the issue of confidentiality. I have developed classroom exercises that guide my students in explaining confidentiality rights and limitations to clients in Spanish. Another is the contract for legal representation. We spend time looking at contracts and practicing the negotiation of fees and the explanation of terms and conditions in Spanish. Other examples of these broader issues include *Miranda* rights, unbundled legal services contracts, and various alternative dispute resolution options.

III. Unique Aspects of Teaching Future Members of the California Bar

There are several aspects of practicing law in California that are important to consider when developing a Legal Spanish course. For example, the Judicial Council of California publishes over 1,000 forms that are used for a variety of proceedings in superior and appellate courts. Some of these forms have been translated (many into Spanish and some into Tagalog, Chinese, Korean, Vietnamese, and Russian), but our superior courts will only accept filings in English. California also has state consumer protection laws designed to pro-

tect LEP individuals who negotiate consumer contracts in their first languages. Finally, there are ethics rules that govern the conduct of California attorneys and that directly address the representation of LEP clients.

First, the forms: because many forms are already translated into Spanish, there are a variety of ways to use these documents for teaching purposes. One project that I have assigned is to fill out the main petition for divorce in Spanish (the FL-100 S) for an imaginary client and compile a list of the other forms that the client will be required to fill out and submit for an initial filing for dissolution. Another is to use the Spanish version of a Probate form (the GC-314 S) to ask questions of another student posing as the client, then fill the answers in on the English version. Most attorneys who practice in California will encounter these forms at some point, as they drive many proceedings. Being comfortable with the content of forms in two languages and understanding how to convey important information on the forms for LEP clients represents a tremendous advantage of the bilingual attorney in California.

Since 1976, California's Civil Code has contained an important provision regarding the negotiation of contracts in five specific languages (Spanish, Chinese, Tagalog, Vietnamese, and Korean). The law states that when a contract is negotiated by a person in a trade or business "primarily" in one of these languages, he is required to "deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, that includes a translation of every term and condition in that contract or agreement."[19] The types of contracts included in this mandate expressly include contracts for legal services.[20] These are important considerations for attorneys to ensure that their LEP clients' rights have been upheld, in addition to guiding their own work in negotiating and entering into contracts for legal representation with LEP individuals.

Another critical aspect of every Legal Spanish course should be the ethical boundaries of the bilingual attorney in representing LEP clients. It is important for attorneys to understand the delineations between their work and that of an interpreter or a translator and not to get pulled into interpretation work during court appearances or mediations.

Also, as with all attorneys, it is important for bilingual attorneys to ensure that communication is achieved with clients and that they are providing competent representation.[21] The State Bar of California issued a formal ethics opinion that addressed the question: "Is an attorney acting competently if the attorney undertakes representation of a client when the

19. *See* CAL. CIV. CODE § 1632(b) (Deering LEXIS through Ch. 4 of 2017 Legis. Sess.).
20. *See* CAL. CIV. CODE § 1632(b)(6) (Deering LEXIS through Ch. 4 of 2017 Legis. Sess.).
21. *See* CAL. RULES OF PROF. CONDUCT 3-110 (CAL. STATE BAR 2004); CAL. RULES OF PROF. CONDUCT 3-500 (CAL. STATE BAR 1997).

attorney is not able to communicate directly with the client in a language clearly understood by that client?"[22] This ethics opinion sets forth important parameters for the attorney-client relationship when the client has limited English proficiency and the attorney does not speak the first language of the client. The opinion notes that "difficulty in communication can occur even between those who speak the same language since a client may not immediately grasp the import of the words used by counsel."[23] This acknowledgment rightly places emphasis on the importance of effective and actual communication, and suggests that attorneys may call upon the services of interpreters, translators, and, if necessary, can refer a client to the services of a bilingual attorney who speaks the first language of the LEP client. While this opinion does not directly contemplate the responsibilities of the *bilingual* attorney, it is does outline important considerations for all attorneys and suggests that even attorneys who are bilingual need to be mindful that they are achieving actual communication and know when to "call in reinforcements" if there is any question of a gap in that communication.

IV. CULTURE

In the field of foreign language instruction, one controversial topic has always been the teaching of culture—should we attempt it, and if so, how? How can we guard against stereotyping large groups of individuals? How can we avoid "exoticizing" other countries, which, instead of building bridges to other worldviews, makes LEP individuals seem foreign and strange? These questions become even more problematic when considering how to teach culture for purposes of a Legal Spanish course in which my students are preparing to practice as bilingual attorneys with Spanish-speaking residents of California.

Some language acquisition scholars reject the notion that culture can be effectively taught in a classroom at all.[24] Others consider the explicit teaching of culture to be a condition precedent of language learning because "without culture, language would be dead and without language, culture would have no shape."[25]

Many scholars have identified differences in how culture can and should be taught. The *foreign language classroom* has students who tend to be a more culturally homogenous group voluntarily seeking out the acquisition of a foreign language. In contrast, the *second language classroom* is comprised of students from a variety of backgrounds seeking to acquire a second language in a country or setting in which that language is dominant. They

22. *See* Cal. State Bar Standing Comm. on Prof. Resp. and Conduct, Formal Op. 1984–77 (1984).
23. *Id.*
24. S. Ipek Kuru Gonen & Sercan Saglam, *Teaching Culture in the FL Classroom: Teachers' Perspectives*, INT'L J. OF GLOB. EDUC., July 2012, at 26, 27.
25. Wenying Jiang, *The Relationship Between Culture and Language*, ELT J., Oct. 2000, at 328, 328.

may need to acquire the second language for purposes of social or professional survival. The dynamics of culture and cultural learning are vastly different in these two settings. In the former, culture may be perceived as a distant curiosity, represented by strange foods and colorful currency. In the latter, the stakes are much higher with students needing to gain cultural competency and at the same time possibly fearing assimilation into the dominant culture.[26]

Interestingly, the Legal Spanish classroom at a U.S. law school does not fall neatly into either of these groups. Some of my students are already native speakers of Spanish who are acquiring grammar and technical skills in their first language. In general, U.C. Davis law students are a diverse group, making them more like a classroom of second language learners. On the other hand, the decision to study Spanish is fully voluntary and certainly not necessary to graduate, pass the Bar or become a practicing attorney, thus making my students more like foreign language learners. Any attempt to categorize these learners is complicated by the fact that the culture I must impart to them is our very own: that of individuals living in California who come from a variety of social and cultural paradigms and who speak Spanish as their first language. Recent immigrants to California who speak Spanish are likely to have originated from a handful of Latin American countries and come from a variety of socioeconomic backgrounds. They may be interacting with the legal system on a voluntary or an involuntary basis. How would I even begin to understand, much less try to synthesize and teach, "the culture" of LEP Spanish-speakers in California?

I wish I could say that I have found an approach in the classroom that honors the rich variety of cultures of Spanish-speaking peoples, while at the same time illuminating key similarities and differences that are critical to understand to provide competent representation to LEP litigants. Instead, I can only say that my approach has been to recast the cultural paradigm. I have tried to focus on the one element that truly divides a bilingual attorney from a Spanish-speaking client: we are attorneys and our clients are not. I have moved away from attempting to tie Spanish-speaking residents of California to a country or to the "Latin American" culture, and instead have focused on bridging the gaps that exist between all attorneys and their clients, and doing so in Spanish. I have also explored with my students how certain cultural perceptions can exacerbate misunderstandings.

One example is a classroom exercise that examines concepts of time. I have created a scenario in which there is a misunderstanding between an attorney and a client over a meeting time. The misunderstanding is made worse by the ways, in general, that different cultures perceive and relate to time. I ask my students to practice negotiating this situation, while

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26. R. Michael Paige et al., *Culture Learning in Language Education: A Review of the Literature*, *in* CULTURE AS THE CORE: INTEGRATING CULTURE INTO THE LANGUAGE EDUCATION 173, 189–190 (D. Lange & R. M. Paige eds., 2003).

avoiding judgment and simultaneously acknowledging the frustration that can arise over these differences.

Another example relates to the confusion that can arise because of the way that surnames function in most (but not all!) Spanish-speaking countries. Many citizens of Latin American countries have, and frequently use, both a maternal and a paternal last name. Understanding the existence and the order of these names is important. My students examine a sample birth certificate and marriage certificate from a Latin American country and answer questions about last names and lineage. I have also found instances in the news describing confusion over maternal and paternal last names and in one case how this misunderstanding led prosecutors to bring unwarranted charges because of a mistaken identity.

Ahmad argues that cultural competence for attorneys requires "a process for acquiring, testing, and refining the lawyer's own cultural understandings" resulting in "a consciousness of the complexity of culture and the development of a framework for cultural analysis."[27] While maintaining strict "vigilance against essentialism,"[28] I have sought to create opportunities for my students to develop a consciousness of their own culture(s) and reflect on the cultural assumptions that they bring to their interactions with clients.

Instead of making culture specific to a foreign country, I have approached it from a trouble-shooting perspective, considering how cultural differences might affect an attorney in practice working with Spanish-speaking clients. Being a "cultural broker" is an important skill of the bilingual attorney, and is critical to achieving effective communication, and providing competent representation. By translating certain cultural generalizations into areas of potential conflict and confusion in the attorney-client relationship, I have attempted to navigate the tricky waters of teaching culture and broach conversations that I believe have tangible value to the practice of law. While I continually strive to learn both from my students and colleagues about how culture can and should be considered in the context of the Legal Spanish classroom, this problem-solving approach is, so far, my best answer.

V. FINAL THOUGHTS: WHERE ARE WE HEADED?

The California judiciary is engaged in a multi-year effort to make California courts more accessible for LEP litigants. Following the approval of the Strategic Plan for Language Access by the Judicial Council in January 2015, Chief Justice Tani Cantil-Sakauye appointed

27. Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1081 (2007).

28. *Id.*

a statewide task force, consisting of representatives of the courts, interpreters and other stakeholders, to implement the 75 recommendations of the plan.

Meanwhile, law schools around the country are adding Legal Spanish courses of a variety of stripes to their course offerings. Proponents are not only making the case for the bilingual attorney, but proposing new and exciting ways to integrate language instruction into the law school curriculum.[29] For example, Rathod's approach builds additional time into a traditional bar class to teach the subject matter in Spanish (in his case, an Employment Law course with an extra, optional hour, where students receive instruction in employment law in Spanish). This is a very attractive model for both professor and student because it allows the bilingual professor to teach his or her subject matter of choice in Spanish and allows the student to focus in on a single area of interest, acquire the specialized terminology for that area, and learn the concepts firsthand in Spanish. Among the existing models of "Legal Spanish" currently being taught, this appears to hold the most promise for providing high-quality legal instruction in a non-English language. Additionally, there may be room for more classes like my own, which are based on the principles of language acquisition and take a broader approach to substantive legal content. These courses could easily be offered in languages other than Spanish and the legal content that forms the basis for the comprehensible input can be adjusted to satisfy a variety of interests.

Law schools have a critical role to play in statewide language access efforts by increasing course offerings in Spanish and other languages. They could also develop programs of study leading to a commendation like the California Department of Education's "seal of biliteracy" for high school graduates.[30] Such a "seal" on a law school diploma could represent a level of proficiency demonstrated through testing or a specific number of language courses, in addition to a certain number of hours of internship experience in another country, or in the representation of non-English speaking clients.

The development of criteria for the denomination of "bilingual attorney" would help the Bar exert quality control measures over attorneys who provide direct representation in another language. If a Bar specialization for bilingual attorneys were created, it would incentivize the professionalization of attorneys who can provide services in more than one language, and provide assurances to LEP consumers that their bilingual attorney has a defined set of skills in the second language.

The possibilities for combining forces among law schools, law school clinics, self-help centers, legal aid organizations, language professionals, and courts are truly limitless. Any effort to standardize the translation of legal terminology in non-English languages would

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29. Jayesh M. Rathod, *The Transformative Potential of Attorney Bilingualism*, 46 U. MICH. L. J. 863, 900 (2013).
30. *State Seal of Biliteracy*, CAL. DEP'T. OF ED., http://www.cde.ca.gov/sp/el/er/sealofbiliteracy.asp (last visited April 23, 2017).

benefit from the contributions of law students representing LEP individuals in their clinical work and staffing self-help centers and legal services offices. A law school could join efforts with the university's language department or interpreter training program to house and manage a databank of translated terms.

In many cases, court interpretation training programs are part of a university's extension office and there may be ways to develop connections between the law school and the extension program that would result in a cross-pollination of ideas, programs and services. One example is the placement of interpreters in law school clinical programs to provide interpretation for client interviews and workshops. Another would be to open certain law school course offerings to interpreters-in-training to help them hone their vocabulary skills. Finally, interpreters-in-training could participate in mock trial events to allow both the future interpreters and future attorneys practice the conduct of court proceedings with the participation of LEP litigants and witnesses.

In addition, law schools could collaborate with language departments and schools of medicine or nursing to jointly develop language courses designed for future legal and medical professionals. This type of cross-disciplinary approach has the potential to increase the number of fully prepared bilingual doctors, nurses, and attorneys to serve the growing number of LEP individuals in the country.

As law schools add foreign language courses and legal instruction in other languages to their course offerings, I expect that there will be a growing number of legal and language scholars grappling with the issues I have set forth in this paper. My hope is that law schools will continue to seek out ways to leverage the talents of bilingual law students and faculty to prepare more attorneys to provide direct representation in Spanish and other languages and to be active participants in efforts to enhance access to the legal system for LEP court users.