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## Understanding "Sanctuary Cities"

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# UNDERSTANDING “SANCTUARY CITIES”

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HAYNES, ANNIE LAI, ELIZABETH M. MCCORMICK & JULIET P. STUMPF

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# UNDERSTANDING “SANCTUARY CITIES”

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**Abstract:** In the wake of President Trump’s election, a growing number of local jurisdictions around the country have sought to disentangle their criminal justice apparatus from federal immigration enforcement efforts. These localities have embraced a series of reforms that attempt to ensure immigrants are not deported when they come into contact with the criminal justice system. The Trump administration has labeled these jurisdictions “sanctuary cities” and vowed to “end” them by, among other things, attempting to cut off their federal funding.

This Article is a collaborative project authored by law professors specializing in the intersection between immigration and criminal law. In it, we set forth the central features of the Trump administration’s mass deportation plans and its campaign to “crack down” on sanctuary cities. We then outline the diverse ways in which localities have sought to protect their residents by refusing to participate in the Trump immigration agenda. Such initiatives include declining to honor immigration detainers, precluding participation in joint operations with the federal government, and preventing immigration agents from accessing local jails. Finally, we analyze the legal and policy justifications that

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local jurisdictions have advanced. Our examination reveals important insights for how sanctuary cities are understood and preserved in the age of Trump.

## INTRODUCTION

On July 26, 2017, Donald Trump announced before a crowd in Youngstown, Ohio that his administration was “launching a nationwide crackdown on sanctuary cities.”<sup>1</sup> In so doing, he was fulfilling a campaign promise to “end” sanctuary cities and pressure them to abandon their sanctuary policies by threatening to withhold federal funding.<sup>2</sup> Although President Trump’s definition of “sanctuary jurisdictions” has been imprecise, he has generally used the term to refer to those local jurisdictions that choose not to cooperate with federal deportation efforts.<sup>3</sup> Trump’s aim was and continues to be to punish those localities that do not help carry out his plans for mass deportation.

This Article—which is a collaboration among law professors specializing in the intersection between immigration and criminal law and enforcement—engages the growing national debate on so-called “sanctuary cities.”<sup>4</sup> We sought one another out for this multi-author project in order to

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<sup>1</sup> Alana Abramson, ‘I Can Be More Presidential Than Any President.’ *Read Trump’s Ohio Rally Speech*, TIME (July 26, 2017), <http://time.com/4874161/donald-trump-transcript-youngstown-ohio/> [<https://perma.cc/9HP4-ADFB>].

<sup>2</sup> *Full Text: Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016, 10:54 PM), <https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614> [<https://perma.cc/33MN-5W7A>]; see also *Donald Trump’s Contract with the American Voter*, DONALD J. TRUMP (Oct. 2016) [hereinafter *Trump’s Contract*], <https://assets.donaldjtrump.com/landings/contract/O-TRU-102316-Contractv02.pdf> [<https://perma.cc/E384-B85W>].

<sup>3</sup> See, e.g., Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter Interior Enforcement Executive Order]. In one place, the Executive Order appeared to define “sanctuary jurisdictions” as those that “willfully refuse to comply with 8 U.S.C. 1373.” *Id.* at 8801. Although, it was also susceptible to a reading that would encompass jurisdictions that decline to comply with immigration detainers or have “a policy or practice that hinders the enforcement of Federal law . . . .” *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 519–21 (N.D. Cal. 2017), *reconsideration denied*, 267 F. Supp. 3d 1201, 1211 (N.D. Cal. 2017).

<sup>4</sup> As other scholars concur, the term “sanctuary” lacks a single agreed upon definition. See, e.g., Barbara E. Armacost, “*Sanctuary*” *Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197; Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Networks*, MINN. L. REV. (forthcoming 2018) (manuscript at 8–13), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3038943](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3038943) [<https://perma.cc/T979-2GQ3>]. The Department of Justice (“DOJ”) has defined sanctuary cities in general terms as “jurisdictions that may have state laws, local ordinances, or departmental policies limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws.” U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN. AUDIT DIV., COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 7 n.44 (Jan. 2007), <https://oig.justice.gov/reports/OJP/a0707/final.pdf> [<https://perma.cc/WDU6-AYAC>]. The Center for Immigration Studies has developed on its own definition of “sanctuary” to construct a map and long list of both state and municipalities that are apparently “obstructing immigration enforcement.” Bryan Griffith & Jessica Vaughan, *Map 1: Sanctu-*

promote a deeper understanding of the struggle between restrictive federal immigration policymaking and local criminal justice priorities. In this Article, we analyze sanctuary policies that seek to disentangle federal immigration enforcement from local criminal justice systems.<sup>5</sup> Our overarching goal is to understand what jurisdictions are doing vis-à-vis criminal justice disentanglement and the rationales that support such initiatives.

Our Article makes three primary contributions to the literature on sanctuary cities.<sup>6</sup> First, we identify the elements of the enforcement apparatus the Trump administration is using to conduct mass deportations and attack sanctuary cities. Although the Obama administration deported large numbers of immigrants and significantly increased the use of immigration detention,<sup>7</sup> it was eventually forced to adopt reforms that had the effect of reducing local

*ary Cities, Counties, and States*, CTR. FOR IMMIGRATION STUDIES (July 27, 2017), <https://cis.org/Map-Sanctuary-Cities-Counties-and-States> [<https://perma.cc/895D-8RDJ>].

<sup>5</sup> SARAH S. HERMAN, CONG. RESEARCH SERV., STATE AND LOCAL “SANCTUARY” POLICIES LIMITING PARTICIPATION IN IMMIGRATION ENFORCEMENT 15–16 (Mar. 2017), <https://www.hsdl.org/?view&did=799960> [<https://perma.cc/Z8R9-VABT>] (discussing the decision by some state and local governments to refuse participation in immigration enforcement through “sanctuary” policies).

<sup>6</sup> For examples of important earlier scholarship on sanctuary cities, see SUSAN BIBLER COUTIN, *THE CULTURE OF PROTEST: RELIGIOUS ACTIVISM AND THE U.S. SANCTUARY MOVEMENT* (1993); PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* (2015); HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 58–59, 81–85 (2014); Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 75 (2012); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673 (2011) (describing certain state attempts at immigration reform as being constrained by “forced federalism”); Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313 (2015); Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247 (2012); Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159 (2016); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006) [hereinafter Pham, *Constitutional Right*]; Huyen Pham & Pham Hoang Van, *State-Created Immigration Climates and Domestic Migration*, 38 U. HAW. L. REV. 181 (2016); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Rick Su, *The Promise and Peril of Cities and Immigration Policy*, 7 HARV. L. & POL’Y REV. 299 (2013); Rose Cuison Villazor, *“Sanctuary Cities” and Local Citizenship*, 37 FORDHAM URB. L.J. 573 (2010).

<sup>7</sup> U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2015 YEARBOOK OF IMMIGRATION STATISTICS 103 (Dec. 2016), [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2015.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf) [<https://perma.cc/S973-LUDX>] (reporting that over 2.7 million immigrants were removed from the United States during the Obama administration); ALISON SISKIN, CONG. RESEARCH SERV., IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 13 (Jan. 2012), <https://fas.org/irp/crs/RL32369.pdf> [<https://perma.cc/MN3Q-LAM6>] (graphing the dramatic increase in the use of detention from 2001 to 2012).

law enforcement participation in federal immigration enforcement. These reforms are now being rolled back by a current administration that appears intent on setting new enforcement records,<sup>8</sup> in large part by co-opting the bureaucracy of local criminal justice systems. These mechanisms include actions such as accessing local jails to arrest immigrants, asking local jurisdictions to hold immigrants for deportation purposes, and deputizing local police to enforce immigration law. Our overview reveals a key insight crucial to understanding the current sanctuary debate: The debate over sanctuary cities, although more pronounced in the age of Trump, has history and roots that extend further back in time to transformations in immigration and criminal justice policy dating to the 1980s. One cannot understand sanctuary cities without understanding this history.

Second, based on our analysis of ordinances and policies from jurisdictions around the country, we provide a current typology of five major categories of sanctuary policies that the immigration enforcement programs and initiatives just described have inspired. The five policy types that have been adopted by jurisdictions to resist entanglement of state and local law enforcement in federal immigration enforcement include: (1) barring investigation of civil and criminal immigration violations by local law enforcement, (2) limiting compliance with immigration detainers and immigration warrants, (3) refusing U.S. Immigration and Customs Enforcement (“ICE”) access to local jails, (4) limiting local law enforcement’s disclosure of sensitive information, and (5) precluding local participation in joint operations with federal immigration enforcement. Whereas some jurisdictions had these types of policies in place well before Trump was elected,<sup>9</sup> many others adopted or reaffirmed such policies in the wake of the election. An important aspect of this component of our project is the compilation, in a public online library, of all the policies and laws that we considered in our re-

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<sup>8</sup> Since the 2016 presidential election there have been significant increases in “book-ins” and removals arising from interior immigration enforcement. See U.S. IMMIGRATION & CUSTOMS ENF’T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 10–12 (Dec. 2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> [<https://perma.cc/J57M-V7C3>]. The average daily detention population increased to 37,000 in fiscal year 2017, and President Trump’s budget for 2018 called for funding 48,000 beds. Laurel Wamsley, *As It Makes More Arrests, ICE Looks for More Detention Centers*, NAT’L PUB. RADIO (Oct. 26, 2017, 4:36 PM), <https://www.npr.org/sections/thetwo-way/2017/10/26/560257834/as-it-makes-more-arrests-ice-looks-for-more-detention-centers> [<https://perma.cc/FDR9-NKQ5>].

<sup>9</sup> See Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 546–48 (2017) (describing three “waves” of sanctuary policies during the period from the early 1980s to the mid-2010s); Pham, *Constitutional Right*, *supra* note 6, at 1382–87 (tracing the origins of sanctuary policies from the Central American refugee crisis of the 1980s to state and local laws enacted after the events of September 11, 2001).

search.<sup>10</sup> We recognize that the five types of measures we study complement other types of policies that localities may enact outside the criminal justice space to integrate immigrants into the broader social fabric of the community, such as policies that allow immigrants to receive in-state tuition or obtain driver's licenses.<sup>11</sup> We also recognize that jurisdictions can adopt reforms in the criminal justice space beyond those studied in this Article that have a beneficial impact on immigrants.<sup>12</sup>

Third, we examine some of the major legal and policy rationales that have driven localities time and time again to enact "sanctuary" policies. Following the November 2016 election, mayors, police chiefs, and other local officials—in some cases supported by officials at the state level—came forward to denounce Trump's vision of mass deportation.<sup>13</sup> They

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<sup>10</sup> See *Understanding "Sanctuary Cities"—Online Appendix: Home*, WESTMINSTER LAW LIBR. (last updated Apr. 8, 2018), <http://libguides.law.du.edu/c.php?g=705342> [<https://perma.cc/E2GZ-EPM5>]. The policies available in the online appendix can be sorted either by state or by the adoption date. See *id.* (follow "Policies sorted by state" or "Policies sorted by date" tabs).

<sup>11</sup> See, e.g., MOTOMURA, *supra* note 6, at 81–85 (describing a spectrum of policies that protect or integrate unauthorized migrants, including municipal identification cards, eligibility for driver's licenses, and resident tuition); Peter J. Spiro, *Formalizing Local Citizenship*, 37 FORDHAM URB. L.J. 559, 563–66 (2010) (describing various kinds of local policies supporting noncitizens, including noncitizen voting in local elections, extending welfare benefits and in-state tuition to noncitizens, and municipal identity cards available to all members of the local community, and acknowledging that "sanctuary" policies "may also spring from some sense of locally-delimited community," though in Spiro's view, "sanctuary" contrasts with these other measures because it is "about defeating federal immigration enforcement"); Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 877–88 (2015) (summarizing the range of policies advanced by states and localities to integrate immigrants).

<sup>12</sup> See, e.g., FAIR PUNISHMENT PROJECT ET AL., *THE PROMISE OF SANCTUARY CITIES AND THE NEED FOR CRIMINAL JUSTICE REFORMS IN AN ERA OF MASS DEPORTATION passim* (Apr. 2017), <http://fairpunishment.org/wp-content/uploads/2017/04/FPP-Sanctuary-Cities-Report-Final.pdf> [<https://perma.cc/ULT9-KGUW>] (urging cities committed to immigrant-protective policies to consider a range of changes to address problems with the criminal justice system); TANIA A. UNZUETA, MIJENTE, *EXPANDING SANCTUARY: WHAT MAKES A CITY A SANCTUARY NOW?* 1 (Jan. 2017), <https://drive.google.com/file/d/0B1xgI8UTis-QLUYtbndueGtVaVE/view> [<https://perma.cc/A4CM-WUKA>] (arguing that cities should address "the criminalization of Black people, transgender women, and other people of color as a part of the minimum standard in defining a city as a 'sanctuary' today").

<sup>13</sup> See, e.g., Kate Mather & Cindy Chang, *LAPD Will Not Help Deport Immigrants Under Trump, Chief Says*, L.A. TIMES (Nov. 14, 2016, 3:40 PM), <http://www.latimes.com/local/lanow/la-me-ln-los-angeles-police-immigration-20161114-story.html> [<https://perma.cc/3HLE-8TRT>] ("We are not going to engage in law enforcement activities solely based on somebody's immigration status. We are not going to work in conjunction with Homeland Security on deportation efforts. That is not our job, nor will I make it our job." (quoting Los Angeles Police Department ("LAPD") Chief Charlie Beck) (internal quotation marks omitted)); Liz Robbins, *On Staten Island, Immigrants 'Hope for the Best but Prepare for the Worst,'* N.Y. TIMES (Nov. 15, 2016), <https://www.nytimes.com/2016/11/16/nyregion/undocumented-latinos-meet-to-plan-for-uncertain-future.html> [<https://perma.cc/JR83-XH3F>] ("We are not going to sacrifice a half-million people who live amongst us who are part of our communities." (quoting New York City Mayor Bill de Blasio) (internal quotation marks omitted)); Gary Kane, *Philly's Sanctuary City Status Threatened*



made clear that “sanctuary” was necessary to prevent irreparable harm to their communities. Although the specific rationales of different jurisdictions are varied, they generally agree that immigrant protective policies are an important way to preserve local sovereignty, define local priorities, and enhance community trust in law enforcement. Such policies are also understood as crucial to protecting fundamental rights, such as the right to live free from racial profiling, illegal searches and stops, and arrests without probable cause. More to the core, many sanctuary city laws and policies are designed to embrace a diverse and inclusive vision of community. Finally, while often not the primary rationale, some localities have enacted “sanctuary” policies as a form of expressed disagreement with federal immigration policy.

Although we rely on the term “sanctuary” in this Article, we realize that the term is deeply contested and lacks a commonly accepted meaning.<sup>14</sup> The term sanctuary first emerged in the dominant immigrant rights discourse in the 1980s when it was associated with faith communities providing temporary sanctuary within churches to persons fleeing Central American violence.<sup>15</sup> The term reemerged as part of what has been called the New Sanctuary Movement in 2007, in which coalitions of faith-based and other groups sought to support and integrate members of the undocumented

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*Under Trump Administration*, METRO (Nov. 11, 2016), <https://www.metro.us/philadelphia/philly-s-sanctuary-city-status-threatened-under-trump-administration/zsJpkk---5u7en8W5aEanw> [<https://perma.cc/9E9A-DM5P>] (“We respect and live up to the Fourth Amendment, which means you can’t be held against your will without a warrant from the court signed by a judge.” (quoting Philadelphia Mayor Jim Kenney) (internal quotation marks omitted)); Journal North Staff, *Gonzales Reiterates Santa Fe’s Pro-Immigrant Stance After Trump’s Election Win*, ALBUQUERQUE J. (Nov 15, 2016, 6:04 PM), <https://www.abqjournal.com/889149/mayor-reiterates-santa-fes-pro-immigrant-stance-after-trumps-election-win.html> [<https://perma.cc/DG43-H73P>] (“[O]ur policy of human rights for all immigrants . . . has benefited our people, made us a safer, more cooperative community, and strengthened our economy . . . .” (quoting Santa Fe Mayor Javier Gonzales) (internal quotation marks omitted)).

<sup>14</sup> See Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 169 n.12 (2016) (noting that “[t]here is no definition of ‘sanctuary’ in federal law and there is a wide and diverse range of activities that might qualify as a ‘sanctuary’”); Virgil Wiebe, *Immigration Federalism in Minnesota: What Does Sanctuary Mean in Practice?*, 13 U. ST. THOMAS L.J. 581 (2017) (discussing varying meanings of sanctuary as applied to the home, church, schools, cities, and states on the federal level).

<sup>15</sup> See generally HILLARY CUNNINGHAM, *GOD AND CAESAR AT THE RIO GRANDE: SANCTUARY AND THE POLITICS OF RELIGION* (1995) (discussing the history and growth of the sanctuary movement in the southwest United States in the 1980s); Susan Bibler Coutin, *From Refugees to Immigrants: The Legalization Strategies of Salvadoran Immigrants and Activists*, 32 INT’L MIGRATION REV. 901, 906–09 (1998) (describing the social and legal impacts of the sanctuary movement by religious activists in 1980s); Norma Stoltz Chinchilla et al., *The Sanctuary Movement and Central American Activism in Los Angeles*, LATIN AM. PERSP., Nov. 2009, at 101 (providing important insights into the start of the sanctuary movement in Los Angeles).

community.<sup>16</sup> Today, many local governments have affirmatively adopted the “sanctuary” label.<sup>17</sup> Other jurisdictions have adopted similar policies with different labels—such as that of an “Inclusive City,”<sup>18</sup> a “Human Rights City,”<sup>19</sup> or a “Welcoming City”<sup>20</sup>—or eschewed labels altogether.<sup>21</sup> Recognizing the definitional tension, we nevertheless use the term “sanctuary” in this Article because it is the term that has been most commonly embraced by both the jurisdictions themselves and critics of local resistance to federal immigration enforcement.<sup>22</sup>

Not only is the word “sanctuary” contestable, but, as the title of our Article reflects, so is the concept of “sanctuary cities.” Although it is cities that adopted many of the early policies in solidarity with the faith-based sanctuary movement in the 1980s,<sup>23</sup> the current sanctuary landscape extends

<sup>16</sup> GRACE YUKICH, ONE FAMILY UNDER GOD: IMMIGRATION POLITICS AND PROGRESSIVE RELIGION IN AMERICA 13–38 (2013) (tracing the roots of the “New Sanctuary Movement” to a 2007 religious effort to humanize undocumented immigrants); Grace Yukich, *Constructing the Model Immigrant: Movement Strategy and Immigrant Deservingness in the New Sanctuary Movement*, 60 SOC. PROBS. 302, 306 (2013) [hereinafter Yukich, *Model Immigrant*] (same).

<sup>17</sup> See, e.g., Watsonville, Cal., Ordinance No. 1353-17 § 2 (May 9, 2017) [hereinafter Watsonville Ordinance], [http://libguides.law.du.edu/ld.php?content\\_id=3573928](http://libguides.law.du.edu/ld.php?content_id=3573928) [<https://perma.cc/N4KN-Z5NM>] (“The purpose of this ordinance is to reaffirm the City of Watsonville’s status as a Sanctuary City . . . .”); Boulder, Colo., Ordinance No. 8162, § 12-5-1(b)(7) (Jan. 3, 2017) [hereinafter Boulder Ordinance], [http://libguides.law.du.edu/ld.php?content\\_id=34430755](http://libguides.law.du.edu/ld.php?content_id=34430755) [<https://perma.cc/EG4M-56FX>] (adding code section stating “[t]he City of Boulder declares that it is a ‘sanctuary’ city”).

<sup>18</sup> See, e.g., McMinnville, Or., Res. 2017-03 (Jan. 10, 2017) [hereinafter McMinnville Resolution], [http://libguides.law.du.edu/ld.php?content\\_id=34431012](http://libguides.law.du.edu/ld.php?content_id=34431012) [<https://perma.cc/KRV7-EGZ8>].

<sup>19</sup> See, e.g., Richmond, Cal., Res. 106-16 (Dec. 6, 2016) [hereinafter Richmond Resolution], [http://libguides.law.du.edu/ld.php?content\\_id=34432066](http://libguides.law.du.edu/ld.php?content_id=34432066) [<https://perma.cc/59VH-PMQ2>].

<sup>20</sup> See, e.g., Chi., Ill., Code § 2-173-005 (2012) [hereinafter Chicago Welcoming City Ordinance], [http://libguides.law.du.edu/ld.php?content\\_id=34434721](http://libguides.law.du.edu/ld.php?content_id=34434721) [<https://perma.cc/628R-2VU9>].

<sup>21</sup> See, e.g., Denver, Co., City Council Bill No. 17-0940 (Aug. 31, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=35423250](http://libguides.law.du.edu/ld.php?content_id=35423250) [<https://perma.cc/6EHT-87ZJ>] (enacting disentanglement policy titled the “Public Safety Enforcement Priorities Act”). But “studiously avoiding” the term “sanctuary” did not convince the Trump administration, which included Denver when it launched “Operation Safe City,” a set of immigration raids that explicitly targeted “sanctuary cities.” Chris Walker, *ICE Raids Target ‘Sanctuary Jurisdictions,’ Including Denver*, WESTWORD (Sept. 29, 2017, 10:07 AM), [http://libguides.law.du.edu/ld.php?content\\_id=35423250](http://libguides.law.du.edu/ld.php?content_id=35423250) [<https://perma.cc/5489-G5LT>].

<sup>22</sup> While we focus on governmental forms of “sanctuary,” including legislative enactments and formal policy measures, others have noted a burgeoning of other forms of sanctuary, including that offered by churches and campus. Gulasekaram & Villazor, *supra* note 4, (manuscript at 30–33); see also Natasha Newman, Note, *A Place to Call Home: Defining the Legal Significance of the Sanctuary Campus Movement*, 8 COLUM. J. RACE & L. 122, 130–31 (2017).

<sup>23</sup> Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 50–52 (1994) (reporting cities that joined the sanctuary movement beginning in 1985, but also noting some state-level action); see also Cambridge, Mass., City Council Order No. 4 (Apr. 8, 1985), [http://libguides.law.du.edu/ld.php?content\\_id=34434956](http://libguides.law.du.edu/ld.php?content_id=34434956) [<https://perma.cc/T6RU-TW85>] (ordering “[t]hat Cambridge be declared ‘A Sanctuary City’”); Ithaca, N.Y., Human Servs. Comm. Res., Sanctuary for Salvadoran and Guatemalan Refugees (July 10, 1985), [http://libguides.law.du.edu/ld.php?content\\_id=3909](http://libguides.law.du.edu/ld.php?content_id=3909)

far beyond cities. Whereas some self-styled “sanctuary cities” exist today,<sup>24</sup> hundreds of today’s sanctuary policies have been enacted at the county level.<sup>25</sup> For example, several sheriffs that operate jails in more rural areas have decided to stop complying with immigration detainers.<sup>26</sup> Meanwhile, state-level sanctuary legislation is also on the rise.<sup>27</sup> Even towns and boroughs

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0895 [https://perma.cc/3NUX-HYLD] (declaring Ithaca “a ‘Sanctuary City’ for Salvadoran and Guatemalan refugees”); cf. Berkeley, Cal., Res. 52, 596-N.S. (Feb. 19, 1985), [http://libguides.law.du.edu/ld.php?content\\_id=35160626](http://libguides.law.du.edu/ld.php?content_id=35160626) [https://perma.cc/W7M6-DAE4] (“Declaring Berkeley a City of Refuge”); S.F., Cal., Res. No. 1087-85 (Dec. 27, 1985), [http://libguides.law.du.edu/ld.php?content\\_id=35739145](http://libguides.law.du.edu/ld.php?content_id=35739145) (declaring the same for San Francisco).

<sup>24</sup> See Watsonville Ordinance, *supra* note 17; Boulder Ordinance, *supra* note 17.

<sup>25</sup> See LENA GRABER & NIKKI MARQUEZ, IMMIGRANT LEGAL RES. CTR., SEARCHING FOR SANCTUARY: AN ANALYSIS OF AMERICA’S COUNTIES & THEIR VOLUNTARY ASSISTANCE WITH DEPORTATIONS 3–4 (Dec. 2016), [https://www.ilrc.org/sites/default/files/resources/sanctuary\\_report\\_final\\_1-min.pdf](https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf) [https://perma.cc/HJA8-ERJM] (arguing that counties are “the most important policy-makers in terms of establishing sanctuary policies” because “in the majority of the U.S., the county-level government manages the jails and the legal system, and that is where the greatest entanglement with immigration enforcement occurs”); KRSNA AVILA ET AL., IMMIGRANT LEGAL RES. CTR., THE RISE OF SANCTUARY: GETTING LOCAL OFFICERS OUT OF THE BUSINESS OF DEPORTATIONS IN THE TRUMP ERA 25 (Jan. 2018), [https://www.ilrc.org/sites/default/files/resources/rise\\_of\\_sanctuary-lg-20180201.pdf](https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf) [https://perma.cc/VP4P-MNQQ] (noting that “over 400 counties moved to decrease their engagement with ICE”); Juliet P. Stumpf, *D(E)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1280 (2015) (noting that “more than thirty Oregon counties” and “most counties in Colorado” announced they would no longer comply with immigration detainers).

<sup>26</sup> See, e.g., *National Map of Local Entanglement with ICE*, IMMIGRANT LEGAL RES. CTR. (Jan. 25, 2018) [hereinafter *National Map*], <https://www.ilrc.org/local-enforcement-map> [https://perma.cc/L8V7-NNH2] (showing numerous rural counties, including Garfield (WA), Park (WY), Butte (SD), Lake (OR), White Pine (NV), Baca (CO), and Lake of the Woods (MN) do not comply with immigration detainers).

<sup>27</sup> A.B. 4, ch. 570 § 1(d), 2013–14 Reg. Sess. (Cal. 2013) [hereinafter California TRUST Act], [http://libguides.law.du.edu/ld.php?content\\_id=34433552](http://libguides.law.du.edu/ld.php?content_id=34433552) [https://perma.cc/J24E-NZ7A]; H.B. 6659, Public Act No. 13-155, 2013 Reg. Sess. (Conn. 2013), [http://libguides.law.du.edu/ld.php?content\\_id=34434308](http://libguides.law.du.edu/ld.php?content_id=34434308) [https://perma.cc/X73B-BN92]. For a discussion of state-level criminal justice reform in California designed to protect immigrants, see Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017); see also FAIR PUNISHMENT PROJECT ET AL., *supra* note 12 (highlighting the ways states can play an important role in reforming the criminal justice system to protect noncitizens from deportation).

In other cases, states and localities have been pitted against one another. In Texas, for example, a coalition of cities and counties sued the State of Texas to enjoin enforcement of Texas’s S.B. 4, which forbade localities from establishing “sanctuary” policies and required them to cooperate with federal immigration authorities, for example by “comply[ing] with, honor[ing], and fulfill[ing]” immigration detainer requests. *City of El Cenizo v. Texas*, 885 F.3d 332 (5th Cir. 2018) (addressing litigation brought by local governments and officials); TEX. CODE CRIM. PROC. ANN. Art. 2.251(a)(1)–(2) (West 2017); see also Brianne Pfannenstiel, *Iowa ‘Sanctuary’ City Ban Signed into Law*, DES MOINES REGISTER (Apr. 11, 2018, 2:53 PM), <https://www.desmoinesregister.com/story/news/politics/2018/04/10/iowa-sanctuary-city-ban-becomes-law-sf-481-reynolds-signs/504176002/> [https://perma.cc/UK4X-SLUH] (describing similar anti-sanctuary law enacted in Iowa). In California, some localities have sided with the Trump administration in its stance against California’s “sanctuary” law. Sarah N. Lynch, *California County Joins Trump ‘Sanctuary City’ Lawsuit*, REUTERS

have enacted sanctuary policies.<sup>28</sup> The Trump administration's continued preference for the "sanctuary city" moniker, despite its lack of precision, may betray a strategic targeting of "liberal" urban centers.<sup>29</sup>

This Article proceeds in three parts. In Part I, we examine the current context—specifically, how the election of Donald Trump has catapulted so-called "sanctuary" jurisdiction policies to the forefront of the national debate over immigration policy.<sup>30</sup> We ground the current sanctuary debate in the rise of a "crimmigration" enforcement regime, and specifically, the increasing reliance on the criminal justice bureaucracy for federal immigration enforcement.<sup>31</sup> And we provide history essential to understanding the current moment. In Part II we introduce our typology of five primary types of criminal justice policies that local jurisdictions have adopted to disentangle their law enforcement systems from the federal immigration enforcement machinery.<sup>32</sup> Finally, in Part III we analyze six of the more significant legal and policy rationales that localities have offered to justify their adoption and maintenance of immigrant-protective "sanctuary" policies.<sup>33</sup>

## I. THE RISE OF CRIMMIGRATION

Ending "sanctuary cities" has been a central preoccupation of the Trump presidency since its inception. In order to carry out its plans for vastly expanding immigration enforcement, the Trump administration must se-

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(Mar. 27, 2018, 3:03 PM), <https://www.reuters.com/article/us-usa-justice-sanctuary-city/california-county-joins-trump-sanctuary-city-lawsuit-idUSKBN1H32SA> [<https://perma.cc/HU8B-64F6>]; see also Sarah Holder, *As California Protects Immigrants, Cities Revolt*, CITYLAB (Apr. 3, 2018), <https://www.citylab.com/equity/2018/04/california-cities-fight-their-sanctuary-state/556973> [<https://perma.cc/FMB8-PBLH>] (describing other anti-sanctuary actions taken by California localities). An important forthcoming article is expected to address such state-local conflicts over sanctuary. See Pratheepan Gulasekaram, Rose Cuison Villazor & Rick Su, *Anti-Sanctuary* (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3141293](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3141293).

<sup>28</sup> See, e.g., BREWSTER, MASS., SPECIAL & ANNUAL TOWN MEETING WARRANT art. 31 (May 1, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=35739776](http://libguides.law.du.edu/ld.php?content_id=35739776) [<https://perma.cc/3YUP-TEMD>]; State College, Pa., Res. 1180 (Jan. 9, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=34436664](http://libguides.law.du.edu/ld.php?content_id=34436664) [<https://perma.cc/CKZ6-LLBN>].

<sup>29</sup> See, e.g., Ishaan Tharoor, *Trump and the Populists See Themselves at War with Big Cities*, WASH. POST (Mar. 20, 2017), [https://www.washingtonpost.com/news/worldviews/wp/2017/03/20/trump-and-the-populists-see-themselves-at-war-with-big-cities/?utm\\_term=.b4ca7345ee67](https://www.washingtonpost.com/news/worldviews/wp/2017/03/20/trump-and-the-populists-see-themselves-at-war-with-big-cities/?utm_term=.b4ca7345ee67) [<https://perma.cc/YS4D-DC9S>] (exploring role of anti-urban sentiment in the Trump administration's populism).

<sup>30</sup> See *infra* notes 34–165 and accompanying text.

<sup>31</sup> One of our co-authors, Juliet Stumpf, coined the term "crimmigration" in her seminal 2006 law review article on the topic. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

<sup>32</sup> See *infra* notes 181–248 and accompanying text.

<sup>33</sup> See *infra* notes 252–356 and accompanying text.

cure the participation of state and local law enforcement officials.<sup>34</sup> In engaging state and local officials, however, the administration is not starting from scratch. Since the 1980s the federal government has placed an ever-increasing amount of pressure on state and local officials to become involved in immigration enforcement. What began as an invitation to states and localities in the 1980s and 1990s became a near-command to turn over local residents for deportation by the end of Obama’s first term. Toward the end of the Obama administration, several important reforms were adopted in response to public outcry over the federal government’s actions. But, as we discuss in this Part, those reforms are now being undone by the new administration.<sup>35</sup>

### A. President Trump’s Promise to End Sanctuary Cities

One of Trump’s most common refrains during his campaign came in the form of a threat—that “[c]ities that refuse to cooperate with federal [immigration] authorities will not receive taxpayer dollars.”<sup>36</sup> After the inauguration, his administration moved quickly to implement the promises the President made on the campaign trail. On January 25, 2017, Trump signed two executive orders on immigration; one focused on border enforcement,<sup>37</sup> and the other was designed to vastly expand enforcement in the interior.<sup>38</sup>

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<sup>34</sup> The President directed ICE to hire 10,000 new agents. Interior Enforcement Executive Order, *supra* note 3, at 8800. Nevertheless, former Secretary of Homeland Security John Kelly thought that these targets would not be reached “within the next couple of years.” Associated Press, *Border Patrol May Loosen Lie-Detector Use in Hiring to Meet Trump’s Jobs Order*, THE GUARDIAN (Mar. 8, 2017, 6:37 PM), <https://www.theguardian.com/us-news/2017/mar/08/border-patrol-lie-detector-test-new-hires-trump-jobs-order> [<https://perma.cc/RYP7-R5AW>].

<sup>35</sup> See *infra* notes 98–100, 114–117, 149–154 and accompanying text. See generally Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3032662](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032662) [<https://perma.cc/9VUY-BJD2>] (cataloguing the ways immigration enforcement has intensified and become more extreme under the Trump administration).

<sup>36</sup> POLITICO, *supra* note 2; see also Amita Kelly & Barbara Sprunt, *Here Is What Donald Trump Wants to Do in His First 100 Days*, NAT’L PUB. RADIO (Nov. 9, 2017, 3:45 PM), <https://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days> [<https://perma.cc/PPU2-VFEE>] (noting Trump’s promise to “cancel all federal funding to Sanctuary Cities”).

<sup>37</sup> Exec. Order No. 13767, 82 Fed. Reg. 8793, 8794 (Jan. 25, 2017) (directing the U.S. Department of Homeland Security (“DHS”) Secretary to “take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border”).

<sup>38</sup> Interior Enforcement Executive Order, *supra* note 3, at 8800 (expanding priorities for enforcement to include any noncitizen with a criminal conviction, those charged with a crime, those thought to have committed acts that would constitute a crime, and any other person deemed a public safety threat by immigration officials). Reports circulated that the expanded priorities could cover up to 8 million people. See, e.g., Brian Bennett, *Not Just ‘Bad Hombres’: Trump Is Targeting Up to 8 Million People for Deportation*, L.A. TIMES (Feb. 4, 2017), <http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html> [<https://perma.cc/X8BF-8AR3>].

The executive order addressing interior enforcement also took direct aim at “sanctuary jurisdictions,” accusing them of “willfully violat[ing] Federal law in an attempt to shield aliens from removal from the United States.”<sup>39</sup> According to Trump’s order, “[t]hese jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.”<sup>40</sup> The interior enforcement executive order further charged the Attorney General and the Secretary of Homeland Security with ensuring that these jurisdictions “are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.”<sup>41</sup> Trump administration officials have even gone so far as to call for the arrest of city officials who are in charge of these “sanctuary cities.”<sup>42</sup>

The false characterization of sanctuary cities as dangerous and harmful was not unexpected.<sup>43</sup> Throughout his campaign, Trump relied on a rhetoric of immigrant criminality to support his harsh immigration enforcement proposals.<sup>44</sup> At his campaign launch in June 2015, Trump described Mexican

<sup>39</sup> Interior Enforcement Executive Order, *supra* note 3, at 8799.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 8801.

<sup>42</sup> Adam K. Raymond, *Acting ICE Director Wants to Arrest Politicians Running Sanctuary Cities*, N.Y. MAG. (Jan. 3, 2018, 10:34 AM) <http://nymag.com/daily/intelligencer/2018/01/acting-ice-director-wants-to-arrest-pols-in-sanctuary-cities.html> [<https://perma.cc/D6YW-DCUV>]. *But see* Michelle Ye Hee Lee, *Trump’s Fuzzy Math on Undocumented Immigrants Convicted of Crimes*, WASH. POST (Sept. 2, 2016), [https://www.washingtonpost.com/news/fact-checker/wp/2016/09/02/trumps-fuzzy-math-on-undocumented-immigrants-convicted-of-crimes/?utm\\_term=.87986e14c121](https://www.washingtonpost.com/news/fact-checker/wp/2016/09/02/trumps-fuzzy-math-on-undocumented-immigrants-convicted-of-crimes/?utm_term=.87986e14c121) [<https://perma.cc/6L7C-PLHD>] (citing data from the Migration Policy Institute showing that the number of undocumented immigrants with criminal convictions was less than half of what Trump claimed).

<sup>43</sup> The characterization has been consistently contracticed by empirical research showing that sanctuary jurisdictions are, on the whole, safer than non-sanctuary jurisdictions. *See, e.g.*, TOM K. WONG, CTR. FOR AM. PROGRESS, *THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY 1* (Jan. 2017), <https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf> [<https://perma.cc/V6FY-7M7G>] (concluding that “[c]rime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties”); MIKE MALES, CTR. ON JUVENILE & CRIMINAL JUSTICE, *WHITE RESIDENTS OF URBAN SANCTUARY COUNTIES ARE SAFER FROM DEADLY VIOLENCE THAN WHITE RESIDENTS IN NON-SANCTUARY COUNTIES 1* (Dec. 2017), [http://www.cjcj.org/uploads/cjcj/documents/white\\_residents\\_of\\_urban\\_sanctuary\\_counties.pdf](http://www.cjcj.org/uploads/cjcj/documents/white_residents_of_urban_sanctuary_counties.pdf) [<https://perma.cc/4UTW-G52L>] (concluding that White residents are safer in sanctuary areas and non-White residents “generally experience greater safety in counties with at least some sanctuary policies”); *see also* Andrew Forrester & Alex Nowrasteh, *Do Immigration Enforcement Programs Reduce Crime? Evidence from the 287(g) Program in North Carolina 13* (CATO Inst., Working Paper No. 52, 2018), <https://object.cato.org/sites/cato.org/files/pubs/pdf/working-paper-52-updated.pdf> [<https://perma.cc/7K23-4QLT>] (concluding that participation in the 287(g) program discussed Part I.C.2, *infra* notes 101–117 and accompanying text, “did not reduce crime in North Carolina”).

<sup>44</sup> Scholars conducting an analysis of Trump’s rhetoric during and after the campaign found it revealed a classic America as “fortress” trope:

immigrants as drug dealers and rapists: "They're bringing drugs. They're bringing crime. They're rapists."<sup>45</sup> After securing the Republican nomination, Trump gave a speech dedicated to immigration issues in Phoenix, Arizona in which he claimed there were "at least 2 million" so-called "criminal aliens" in the United States and pledged that his administration would have "[z]ero tolerance for criminal aliens. Zero. Zero. . . . Zero."<sup>46</sup>

Trump's identification of sanctuary cities as protecting "criminal aliens" appeared most powerfully in his campaign statements about the killing of Kathryn Steinle by an undocumented immigrant in 2015.<sup>47</sup> Trump mentioned Steinle and other citizens killed by immigrants when he accepted the Republican nomination, asking "where was sanctuary for Kate Steinle" and for "all the other Americans who have been so brutally murdered, and who have suffered so horribly?"<sup>48</sup> For Trump, Steinle's death was "another

Trump asserts that Fortress America is under attack; many of its cities and towns have been overrun by ruthless aggressors. Trump characterizes Mexico as the enemy that sent unauthorized immigrants as invaders. Trump represents himself as the hero, and Hillary Clinton represents the corrupt and sniveling politicians that let the nation come to this state of affairs.

CELESTE GÓMEZ ET AL., THE PRESIDENT'S INTENT: PRELIMINARY FINDINGS OF A CRITICAL DISCOURSE ANALYSIS OF TRUMP'S SPEECHES AND TWEETS FROM THE DATE OF HIS CANDIDACY TO MID-SEPTEMBER 2017, at 1 (Dec. 2017), <https://www.thepresidentsintent.com/full-report/> [<https://perma.cc/KZL7-7FGS>]. The myth of immigrant criminality has repeatedly been disproven by researchers. See Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, CRIMINOLOGY, Mar. 2018, at 1, 24 (reporting, based on longitudinal study spanning the 1990–2014 period, that "findings suggest . . . undocumented immigration over this period is generally associated with decreasing violent crime"); Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION POL'Y INST. (June 1, 2006), <http://www.migrationpolicy.org/article/debunking-myth-immigrant-criminality-imprisonment-among-first-and-second-generation-young> [<https://perma.cc/ZW44-HY86>] (demonstrating that "immigrants have the lowest rates of imprisonment for criminal convictions in American society").

<sup>45</sup> *Donald Trump Transcript: 'Our Country Needs a Truly Great Leader.'* WALL STREET J. (June 16, 2015, 2:29 PM), <http://blogs.wsj.com/washwire/2015/06/16/donald-trump-transcript-our-country-needs-a-truly-great-leader> [<https://perma.cc/7KM7-A35A>].

<sup>46</sup> Tara Golshan, *Transcript: Donald Trump's Speech Showed "Zero Tolerance" for Undocumented Immigrants*, VOX (Aug. 31, 2016, 11:27 PM), <https://www.vox.com/2016/8/31/12743880/donald-trump-immigration-policy-speech-transcript> [<https://perma.cc/WL5J-M7K3>].

<sup>47</sup> See *id.*

<sup>48</sup> *Full Text: Donald Trump 2016 RNC Draft Speech Transcript*, POLITICO (July 21, 2016, 6:21 PM), <https://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974> [<https://perma.cc/8CD9-7BEH>]. Three parents of victims (Mary Ann Mendoza, Sabine Durden, and Jamiel Shaw) spoke on the first night of the nominating convention. Jessica Hopper, *Family of People Killed by Undocumented Immigrants Speak Out at RNC*, ABC NEWS (July 18, 2016, 10:32 PM), <http://abcnews.go.com/Politics/family-people-killed-undocumented-immigrants-speak-gop-convention/story?id=40685407> [<https://perma.cc/6YJU-HR6Y>].

example of why we must secure our border immediately.”<sup>49</sup> Notably, more than two years after the incident, on November 30, 2017, a San Francisco jury acquitted Jose Ines Garcia Zarate—the man accused of shooting Kathryn Steinle—of all homicide charges.<sup>50</sup>

In carrying out the interior enforcement executive order, Department of Justice (“DOJ”) officials perpetuated President Trump’s rhetoric of immigrant criminality. For example, former DHS Secretary John F. Kelly issued an implementing memorandum declaring that “[c]riminal aliens routinely victimize Americans and other legal residents.”<sup>51</sup> Attorney General Jefferson Sessions repeated the President’s assertion that “[c]ountless Americans would be alive today—and countless loved ones would not be grieving today—if the policies of these sanctuary jurisdictions were ended.”<sup>52</sup> Invoking Kathryn Steinle’s death, and claiming that sanctuary policies “endanger the lives of every American” and “violate federal law,” Sessions vowed to implement the executive order by cutting funding to sanctuary jurisdictions.<sup>53</sup>

Statements conflating immigration and crime have become a mainstay of the Trump presidency. In July 2017, President Trump told community members in Suffolk County, New York that undocumented immigrants who commit crimes of violence are “animals” that render cities “bloodstained killing fields . . . .”<sup>54</sup> The Trump administration’s immigration plans have also highlighted the racial impacts of federal immigration enforcement poli-

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<sup>49</sup> Doug Stanglin, *Trump: San Francisco Shooting Case for Securing Border*, USA TODAY (July 4, 2015, 10:41 AM), <http://www.usatoday.com/story/news/nation/2015/07/04/donald-trump-san-francisco-killing-whipping-post/29694403/> [https://perma.cc/CL7P-M8KL] (internal quotation marks omitted).

<sup>50</sup> Holly Yan & Dan Simon, *Undocumented Immigrant Acquitted in Kate Steinle Death*, CNN (Dec. 1, 2017, 2:21 AM), <http://www.cnn.com/2017/11/30/us/kate-steinle-murder-trial-verdict/index.html> [https://perma.cc/67H3-Y8AD] (reporting that President Trump called the verdict “disgraceful” and that Attorney General Sessions blamed “San Francisco’s status as a sanctuary city” for Steinle’s death).

<sup>51</sup> Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan et al., Acting Comm’r, U.S. Customs & Border Prot. 4 (Feb. 20, 2017) [hereinafter Kelly Immigration Memo], [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) [https://perma.cc/VYH3-QL39].

<sup>52</sup> Jefferson Sessions, Attorney Gen., U.S. Dep’t of Justice, Remarks on Sanctuary Jurisdictions (Mar. 27, 2017) [hereinafter Sessions Remarks], <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-sanctuary-jurisdictions> [https://perma.cc/68YC-YQ87]; see also POLITICO, *supra* note 2.

<sup>53</sup> Sessions Remarks, *supra* note 52.

<sup>54</sup> Maggie Haberman & Liz Robbins, *Trump, on Long Island, Vows an End to Gang Violence*, N.Y. TIMES (July 28, 2017), <http://www.nytimes.com/2017/07/28/us/politics/trump-immigration-gang-violence-long-island.html> [https://perma.cc/5PKZ-XYMM]; see also Graham Lanktree, *Trump Says Immigrant Gang Members ‘Slice and Dice’ Young, Beautiful Girls*, NEWSWEEK (July 26, 2017), <http://www.newsweek.com/trump-says-immigrant-gang-members-slice-and-dice-young-beautiful-girls-642046> [https://perma.cc/L48E-8Z9N].



cy. Consistent with candidate Trump’s statements connecting Mexican nationals with crime,<sup>55</sup> anti-immigrant rhetoric has become a core component of a vocal white supremacist movement supporting Trump’s deportation policies.<sup>56</sup>

Within three months of Trump taking office, six jurisdictions filed lawsuits challenging his executive order’s anti-sanctuary provisions.<sup>57</sup> On April 25, 2017, a federal judge issued a nationwide injunction halting the executive order.<sup>58</sup> Undeterred, in July 2017 the DOJ announced that local jurisdictions that did not cooperate with federal immigration authorities would be denied their Byrne Justice Assistance Grants (“JAG”),<sup>59</sup> a leading source of federal funding for state and local criminal justice systems.<sup>60</sup> Several jurisdictions filed suit challenging this move by the DOJ.<sup>61</sup> The Seventh Cir-

<sup>55</sup> See *supra* notes 43–45 and accompanying text.

<sup>56</sup> Kristina M. Campbell, *A Dry Hate: White Supremacy and Anti-Immigrant Rhetoric in the Humanitarian Crisis on the U.S.-Mexico Border*, 117 W. VA. L. REV. 1081 (2015).

<sup>57</sup> See Complaint for Injunctive and Declaratory Relief Concerning Federal Executive Order 13768, *City of Richmond v. Trump*, No. 3:17-cv-01535-SK (N.D. Cal. Mar. 21, 2017); Complaint for Declaratory and Injunctive Relief, *Cty. of Santa Clara v. Trump*, No. 3:17-cv-00574 (N.D. Cal. Feb. 3, 2017); Complaint for Declaratory and Injunctive Relief, *City & Cty. of S.F. v. Trump*, No. 3:17-cv-00485-WHO (N.D. Cal. Jan. 31, 2017) [hereinafter S.F. Complaint]; Complaint for Declaratory and Injunctive Relief, *City of Chelsea v. Trump*, No. 1:17-cv-10214-GAO (D. Mass. Feb. 8, 2017); Complaint for Declaratory Relief, *City of Seattle v. Trump*, No. 2:17-cv-00497-BAT (W.D. Wash. Mar. 29, 2017); see also Lai & Lasch, *supra* note 9, at 557–62 (providing a more detailed examination of the current litigation surrounding anti-sanctuary defunding efforts).

<sup>58</sup> *Cty. of Santa Clara v. Trump (Santa Clara Preliminary Injunction)*, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017). On November 20, 2017, the district court granted summary judgment in favor of Santa Clara and San Francisco and entered and order permanently enjoining Section 9(a) of the Executive Order. *Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1201 (N.D. Cal. 2017). The case is currently pending before the Ninth Circuit Court of Appeals.

<sup>59</sup> *Welcome to BJA’s Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, BUREAU OF JUST. ASSISTANCE: OFFICE OF JUST. PROGRAMS, <https://www.bja.gov/jag/> [<https://perma.cc/EG6D-FUKD>].

<sup>60</sup> Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017) [hereinafter Sessions Press Release], <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> [<https://perma.cc/2BHF-62Q4>] (requiring jurisdictions, in addition to certifying compliance with 8 U.S.C. § 1373, to grant immigration authorities access to any detention facility to interview inmates about their immigration status and provide at least forty-eight hours advanced notice of the scheduled release date and time of any inmate to facilitate transfer of custody to ICE); see also McCormick, *supra* note 14, at 168–70 (discussing federal anti-sanctuary statutes, including 8 U.S.C. § 1373).

<sup>61</sup> See Complaint for Declaratory and Injunctive Relief, *State ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015 (N.D. Cal. Aug. 14, 2017) (No. 3:17-cv-04701), 2018 WL 1156774; Complaint for Declaratory and Injunctive Relief, *City & Cty. of S.F. v. Sessions*, No. 3:17-cv-04642-MEJ (N.D. Cal. Aug. 11, 2017); Complaint for Injunctive and Declaratory Relief, *City of Chicago v. Sessions*, No. 1:17-cv-05720 (N.D. Ill. Aug. 7, 2017); Complaint for Declaratory and Injunctive Relief, *City of Philadelphia v. Sessions*, No. 2:17-cv-03894 (E.D. Pa. Aug. 30, 2017); see also Lai

cuit Court of Appeals upheld a nationwide preliminary injunction barring the DOJ from withholding JAG funds based on two of three of the DOJ's immigration enforcement conditions.<sup>62</sup>

The campaign to “crack down” on sanctuary cities has also had a legislative component. In June 2017 the House of Representatives passed the No Sanctuary for Criminals Act, a law designed to punish resistant localities by withholding DOJ and DHS grant funds.<sup>63</sup> And, in March 2018, the administration filed suit to stop the implementation of three California immigrant protective laws: SB 54 (the “California Values Act”), AB 450 (the “Immigrant Worker Protection Act”), and AB 103.<sup>64</sup> Speaking about the lawsuit, Attorney General Sessions accused California of undermining the immigration system and promoting a “radical open borders agenda.”<sup>65</sup>

The Trump administration's rhetoric of immigrant criminality and efforts to malign sanctuary jurisdictions have obstructed critical understandings of the roots of sanctuary city policies. Administration officials have not backed down, even threatening criminal arrests of city officials and retaliation by expending increased enforcement resources in sanctuary jurisdictions.<sup>66</sup> In the next sections, we provide important background for the current debate about the role of local criminal justice actors in policing immigration.<sup>67</sup>

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& Lasch, *supra* note 9, at 559–61 (discussing developments in litigation challenging the Byrne JAG funding conditions).

<sup>62</sup> *City of Chicago v. Sessions*, No. 17-2991, 2018 WL 1868327, at \*18 (7th Cir. Apr. 19, 2018) (upholding District Court's injunction as to access and notice conditions). *See also City of Los Angeles v. Sessions*, No. 17-7215-R, 2018 WL 1771184, at \*8 (C.D. Cal. Apr. 11, 2018) (granting nationwide preliminary injunction preventing the DOJ from similarly disadvantaging localities that decline to participate in federal immigration enforcement in Community Oriented Policing Services (“COPS”) grants by awarding extra points for cooperation in scoring process).

<sup>63</sup> No Sanctuary for Criminals Act, H.R. 3003, 115th Cong., § 2(a) (2017). Similar proposals have been introduced in earlier years; none have become law. *See Lai & Lasch, supra* note 9, at 553 (cataloguing recent federal legislative proposals to target sanctuary jurisdictions).

<sup>64</sup> Complaint at 7–16, *United States v. California*, No. 2:18-cv-00490 (E.D. Cal. Mar. 6, 2018); *see also* Carrie Johnson, *Justice Department Sues California over Impending Immigration Enforcement*, NAT'L PUB. RADIO (Mar. 6, 2018, 9:01 PM), <https://www.npr.org/2018/03/06/591301485/justice-department-sues-california-over-immigration-laws> [<https://perma.cc/9SW3-Y3W2>].

<sup>65</sup> Thomas Fuller & Vivien Yee, *Jeff Sessions Scolds California in Immigration Speech: 'We Have a Problem'*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/sessions-california-immigration.html> [<https://perma.cc/V4B3-RRJ6>].

<sup>66</sup> *Acting ICE Director Wants Politicians in Charge of Sanctuary Cities Charged with Crimes*, CBS NEWS (Jan. 3, 2018, 11:51 AM), <https://www.cbsnews.com/news/acting-ice-director-wants-politicians-in-sanctuary-cities-charged-with-crimes/> [<https://perma.cc/MU79-HN5E>] (quoting acting ICE Director, Thomas Homan, as saying, in response to the effectuation of the California Values Act: “[t]hey're about to see a lot more special agents, a lot more deportation hours in the state of California”).

<sup>67</sup> *See infra* notes 68–165 and accompanying text.

### B. Crimmigration’s Origins

Over the past twenty years, local law enforcement agencies have increasingly been pressed to engage in federal immigration enforcement efforts. As we discuss, “crimmigration,” or the interweaving of immigration and criminal law, has led to the creation of interior immigration enforcement policies that depend on the resources of local police and prosecutors to expand the arrest and detention of noncitizens.<sup>68</sup> Understanding modern sanctuary policies thus first requires tracing how immigration came to be entangled with criminal law enforcement.

For much of our country’s history since the late nineteenth century, immigration enforcement efforts were focused at the border and carried out almost exclusively by federal officials.<sup>69</sup> U.S. Supreme Court cases also drew a distinction between the immigration system, which was civil in nature, and criminal punishment.<sup>70</sup> Together with cases limiting the ability of states to treat immigrants within their borders differently from citizens,<sup>71</sup> these precedents precluded states and localities from having any significant role in regulating the presence of noncitizens.<sup>72</sup> States and localities gener-

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<sup>68</sup> This entanglement of local criminal law systems with immigration enforcement has been well documented by scholars as part of a growing phenomenon. Stumpf, *supra* note 31, at 376; *see also, e.g.*, Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 *LAW & SOC’Y REV.* 241, 245–46 (2015); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 *COLUM. L. REV. SIDEBAR* 135, 135–36 (2009); Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 *UCLA L. REV.* 594 (2016); Ingrid V. Eagly, *Prosecuting Immigration*, 104 *NW. U. L. REV.* 1281, 1341–42 (2010); Mary Fan, *The Case for Crimmigration Reform*, 92 *N.C. L. REV.* 75, 126 (2013); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 *B.Y.U. L. REV.* 1457, 1513; Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 *HASTINGS WOMEN’S L.J.* 79 (1998); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 *GEO. IMMIGR. L.J.* 611, 614–15 (2003); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 *OHIO ST. L.J.* 599, 644–46 (2015).

<sup>69</sup> *Cf.* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1885)*, 93 *COLUM. L. REV.* 1833, 1834 (1993) (analyzing state regulation of transborder movement of persons prior to 1875 and concluding that it existed “primarily at the state level, but also supplemented by federal legislation”).

<sup>70</sup> *See generally* *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (holding that immigration proceedings, which determine “whether the conditions exist upon which congress has enacted that an alien . . . may remain within the country,” are civil in nature, and that “deportation is not a punishment for crime”); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 *N.C. L. REV.* 1557, 1571–78 (2008) (describing consolidation of immigration enforcement power in the federal government).

<sup>71</sup> *See generally* *Graham v. Richardson*, 403 U.S. 365, 376–80 (1971) (striking down state laws conditioning welfare on U.S. citizenship and residency); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding that San Francisco’s discriminatory application of a misdemeanor ordinance to Chinese residents violated the Equal Protection Clause).

<sup>72</sup> *See* Stumpf, *supra* note 70, at 1571–78. This doctrine of exclusive federal power over immigration concerns the relationship between the federal and state and local governments. It is not the same as the much-criticized “plenary power” doctrine, which addresses only the limits on

ally could not use immigration law to divest their noncitizen residents of membership.<sup>73</sup> And criminal law was applied, at least formally, to all defendants regardless of citizenship or immigration status.

This division of responsibility between largely federal governance of immigration and state power to enforce criminal law began to shift in the 1980s, when a fundamental reframing of the nature of immigration enforcement upset these long-established roles.<sup>74</sup> In the 1980s the Reagan administration's "war on drugs" provided politicians with an opportunity to promote a myth of immigrant criminality that would ultimately lead to an unprecedented entanglement of immigration enforcement with the criminal justice goals.<sup>75</sup> This conflation of immigrants with criminality paved the way for

federal power, holding that the federal government may exercise power in the immigration arena relatively unconstrained by constitutional norms such as equal protection. See MOTOMURA, *supra* note 6, at 113–71 (discussing federal, state, and local involvement in the enforcement of immigration laws and policies); Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. C.R. & C.L. 1, 18 n.88 (2013) (highlighting the various "intense scholarly criticism[s]" of the plenary power doctrine); Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 64 (2015) (concluding that modern Supreme Court jurisprudence has, without eliminating the plenary power doctrine, "silently moved away from anything that might be characterized as immigration exceptionalism" and continued to "bring U.S. immigration law into the legal mainstream"); Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 27 (2015) (observing that "immigration law scholars have been predicting the imminent demise of the plenary power doctrine for at least three decades"); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 934 (1995) (predicting that "[l]ittle by little, exceptions and qualifications will reduce the doctrine to a shadow of its former self without an express overruling of contrary precedent").

<sup>73</sup> See Stumpf, *supra* note 70, at 1557–58.

<sup>74</sup> A burgeoning scholarship has traced these developments in the intermeshing of immigration and criminal law and enforcement. See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1835–49 (2007); Eagly, *supra* note 68; Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 650–55 (2004); Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879, 882–88 (2015); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471–73 (2007); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 86–95 (2005); Stumpf, *supra* note 31.

<sup>75</sup> César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1360 (2014) (tracing the historical impact of the war on drugs on immigrant detention and positing that "the concerns that led Congress to prosecute the nascent 'war on drugs' were intertwined with concerns that immigrants were bringing the scourge of drug use and drug trafficking into cities across the country"); Vázquez, *supra* note 68, at 641–42 (describing the criminalization of immigrants as a spillover effect of war on drugs); see also Peter Andreas, *Redrawing the Line: Borders and Security in the Twenty-First Century*, 28 INT'L SECURITY 78, 87 (2003) (describing the "narcoticized" southern border); Miller, *supra* note 68, at 626 (describing the notion of the "U.S. border as a 'crime scene'").

local law enforcement participation in policing immigration.<sup>76</sup> The narrative of immigrants-as-criminals made it appear more natural for local law enforcement to become involved in immigration enforcement.<sup>77</sup>

As low-level drug crime became a national obsession, criminal arrests were converted into a gateway for deportation. This transformation of local criminal law enforcement missions was buttressed by changes in the immigration law, which attached the consequences of deportation to even low-level drug offenses. For example, in 1986, Congress passed the Anti-Drug Abuse Act, which provided—in Subtitle M, the Narcotics Traffickers Deportation Act—for the exclusion or deportation of virtually all immigrants who commit controlled substance offenses.<sup>78</sup>

In 1996, Congress took a bold step in the direction of merging federal immigration enforcement and local criminal enforcement by creating the 287(g) program.<sup>79</sup> The 287(g) program provides for voluntary partnerships in which local officers are deputized to perform certain immigration en-

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<sup>76</sup> Leo Chavez has argued that this immigrant “threat narrative” was constructed and replenished over the course of a century. See Leo R. Chavez, “Illegality” Across Generations: Public Discourse and the Children of Undocumented Immigrants, in CONSTRUCTING IMMIGRANT “ILLEGALITY”: CRITIQUES, EXPERIENCES, AND RESPONSES 84, 86 (Cecilia Menjivar & Daniel Kanstroom eds., 2014) (describing Latino threat narrative “which posits that Latinos, led by Mexicans and Mexican Americans, are unwilling to integrate socially, unwilling to learn English and U.S. culture, and preparing for a take over [of] the Southwest of the United States”). Nicholas De Genova provides an excellent account of the shifting legal responses to—or embodiments of—this threat narrative. Nicholas De Genova, *Immigration “Reform” and the Production of Migrant “Illegality,”* in CONSTRUCTING IMMIGRANT “ILLEGALITY,” *supra*, at 37, 39–58; see also GERALD P. LÓPEZ, UNDOCUMENTED MEXICAN MIGRATION: IN SEARCH OF A JUST IMMIGRATION LAW AND POLICY (1981) (tracing the history of undocumented Mexican migration to the United States); Gyung-Ho Jeong et al., *Cracks in the Opposition: Immigration as a Wedge Issue for the Reagan Coalition*, 55 AM. J. POL. SCI. 511, 514–15 (2011) (describing evolution of immigration from an economic issue to a social issue).

<sup>77</sup> See, e.g., Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1036, 1037 n.62 (2010) (noting that “fighting crime became a seemingly ‘obvious’ framework for responding to social problems,” including unauthorized immigration).

<sup>78</sup> Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, sec. 1751, 100 Stat. 3207-47 to -48 (amending what is known today as the Immigration and Nationality Act (“INA”) § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2012) and § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i)). In introducing the Anti-Drug Abuse Act, the legislators relied explicitly on the alleged connection between immigration and crime. See, e.g., 132 Cong. Rec. H6716-03 (daily ed. Sept. 11, 1986) (statement of Rep. Smith) (“Often, those dealing drugs have entered this country illegally and show absolutely no fear of United States law. . . . My amendment will help to alleviate this problem. It serves to enhance the performance of the Immigration and Naturalization Service’s Investigative Branch in its battle against illegal aliens who use our streets to peddle death.”).

<sup>79</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 133, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1357(g) (2012)). For a thoughtful discussion of 287(g) and other related programs, see Gerald P. López, *Don’t We Like Them Illegal?*, 45 UC DAVIS L. REV. 1711, 1782–90 (2012).

forcement functions under federal supervision.<sup>80</sup> At the same time, the immigration system expanded its reliance on detention and other tools that had traditionally been associated with criminal law enforcement.<sup>81</sup> In addition, immigration enforcement during this time period began to coincide increasingly with criminal prosecution of immigrants for illegal entry and reentry.<sup>82</sup>

The push to involve local police in federal immigration enforcement intensified after the September 11th terrorist attacks.<sup>83</sup> In 2002, the DOJ Office of Legal Counsel (“OLC”) issued an opinion stating that local law enforcement had “inherent authority” to enforce federal immigration laws, reversing a longstanding view that local police did not have the authority to make civil immigration arrests.<sup>84</sup> Immigration restrictionists supported this pro-enforcement policy change, arguing that that local police could play a valuable role as a “force multiplier” in the federal immigration enforcement effort.<sup>85</sup>

States and localities reacted in varied ways. Some local jurisdictions rushed to participate in the 287(g) program. A number of states and locali-

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<sup>80</sup> López, *supra* note 79, at 1782–90.

<sup>81</sup> See, e.g., García Hernández, *supra* note 75, at 1372–77 (characterizing detention as example of “penal norms” in immigration enforcement); Stumpf, *supra* note 31, at 386–91 (arguing that “[i]mmigration enforcement has come to parallel criminal law enforcement”).

<sup>82</sup> See Eagly, *supra* note 68, at 1352–53 (tracking the steady rise in immigration crime prosecution from 1923 to the present era); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 166–75 (2012) (describing rise in illegal entry and reentry prosecutions of immigration crimes since 1996).

<sup>83</sup> See generally Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, in IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE 181 (Ariane Chebel d’Appollonia & Simon Reich eds., 2008) (detailing efforts to enlist local law enforcement in federal immigration enforcement efforts after 9/11); Leisy Abrego et al., *Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-11/9 Era*, 5 J. ON MIGRATION & HUM. SECURITY 694 (2017) (discussing the legislative changes that paved the way for intensified criminalization of migrants after 9/11); Jennifer M. Chacón, *supra* note 74, at 1831 (describing “blurred boundaries” between immigration, crime, and national security control after 9/11); Gallya Lahav & Marie Courtemanche, *The Ideological Effects of Framing Threat on Immigration and Civil Liberties*, 34 POL. BEHAV. 477, 478 (2012) (discussing a “securitization of migration discourse” after 9/11) (internal quotation marks omitted); Miller, *supra* note 74, at 87–88 (describing post-9/11 allocation of crime-control resources to immigration control).

<sup>84</sup> Letter from David N. Kelley, U.S. Attorney, to Omar Jadwat, Esq., ACLU Immigrants’ Rights Project 9–10, 14–15 (July 22, 2005), <https://www.aclu.org/legal-document/olc-memo-state-and-local-law-enforcement-immigration-laws> [<https://perma.cc/GJ9W-DQ8T>].

<sup>85</sup> See, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181, 199–201 (2005) (proposing relying on criminal justice actors to vastly expand deportation and arguing that states have inherent authority to make immigration arrests deriving from state sovereign power); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 85–91 (concluding that state immigration laws are not preempted when they align with federal goals).

ties also passed their own restrictionist immigration measures,<sup>86</sup> many of which were premised on the association of immigrants with criminality.<sup>87</sup> As discussed in more detail in Part II, other jurisdictions resisted the push to entangle their local criminal justice systems,<sup>88</sup> maintaining instead that federal immigration enforcement is not the job of state and local law enforcement officials.<sup>89</sup> These policies—implemented in response to federal pressure—are now frequently labeled sanctuary policies.

### C. Crimmigration’s Enforcement Mechanisms

Central to the entanglement of local government resources with federal immigration policy are a core set of federal programs that put state and municipal law enforcement in the service of federal immigration enforcement goals. Each of these programs has inspired sustained legal and political controversy. Each has been given new life under the current administration.

This section introduces the principal federal enforcement mechanisms that play starring roles in the Trump administration’s crimmigration regime: the Criminal Alien Program, 287(g) agreements, ICE administrative warrants, the Secure Communities Program, and joint operations with local law enforcement. Understanding how these programs function and their resur-

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<sup>86</sup> As Linus Chan has explained, the purpose of some of these laws was to create a hostile environment that would cause immigrants to self-deport. See R. Linus Chan, *The Right to Travel: Breaking Down the Thousand Petty Fortresses of State Self-Deportation Laws*, 34 PACE L. REV. 814, 816 (2014).

<sup>87</sup> See, e.g., Jamie G. Longazel, *Rhetorical Barriers to Mobilizing for Immigrant Rights: White Innocence and Latina/o Abstraction*, 39 LAW & SOC. INQUIRY 580, 585–86 (2014) (discussing how Hazleton, Pennsylvania enacted restrictionist legislation in response to the construction of “an artificial and highly racialized crime wave”). Local enforcement of federal immigration law did not slow until the Supreme Court struck down most of Arizona’s immigrant policing law and limited the nonfederal role in immigration enforcement. *Arizona v. United States*, 567 U.S. 387, 410 (2012) (“Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances.”); see also *id.* at 413 (noting that detention of individuals by local law enforcement “solely to verify their immigration status would raise constitutional concerns”).

<sup>88</sup> See *infra* notes 181–248 and accompanying text; see also Rodríguez, *supra* note 6, at 600–05 (describing sanctuary laws and arguing that many serve “as direct legislative and administrative responses to the federal government’s expanding efforts to enlist state and local police voluntarily in the enforcement of immigration laws”).

<sup>89</sup> See generally MOTOMURA, *supra* note 6, at 113–44 (examining the role of state and local governments in both enforcing immigration laws and integrating unauthorized migrants); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 968 (2004) (suggesting that state and local involvement in the enforcement of immigration laws raised constitutional concerns); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088 (2004) (discussing the increasing involvement of local officials in the enforcement of immigration laws and the risk of “racial profiling and selective enforcement”).

gence under the current administration is critical to later understanding the sanctuary policies that we introduce in Part II.<sup>90</sup>

### 1. The Criminal Alien Program

The stated purpose of the Criminal Alien Program (“CAP”) is to identify, arrest, and deport “priority” noncitizens encountered in federal, state, and local prisons and jails.<sup>91</sup> Created in the 1980s, the program places ICE agents in participating local jails to identify individuals for deportation.<sup>92</sup> In conducting their work within the local jails, ICE agents may search biometric and biographic data, as well as interview arrestees and inmates.<sup>93</sup> In the period between 2004 and 2015, CAP was associated with at least 1,435,000 immigration arrests.<sup>94</sup>

CAP has triggered two key concerns. First, several researchers have provided evidence that CAP is associated with racial profiling practices by police. In a study conducted on the program’s implementation in Irving, Texas, CAP was associated with increased arrests of Latinos for minor offenses.<sup>95</sup> Second, although CAP was purportedly designed to go after serious criminals, research suggests that individuals without criminal records, or only minor convictions, were also targeted.<sup>96</sup> Indeed, documents obtained from ICE in response to a Freedom of Information Act request revealed that

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<sup>90</sup> See *infra* notes 181–248 and accompanying text.

<sup>91</sup> See *Immigration Enforcement: Criminal Alien Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (2018) [hereinafter *Criminal Alien Program*], <https://www.ice.gov/criminal-alien-program> [<https://perma.cc/N2SH-DW5C>]. CAP also pursues noncitizens who are not currently incarcerated but may meet the criminal removal grounds. *Id.*

<sup>92</sup> See WILLIAM A. KANDEL, CONG. RESEARCH SERV., INTERIOR IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAMS, app. B at 23 (Sept. 8, 2016), <https://fas.org/sgp/crs/homesecc/R44627.pdf> [<https://perma.cc/89E2-4BUL>].

<sup>93</sup> *Id.* at 10.

<sup>94</sup> *Id.* at 15 (listing number of arrests from CAP program for each year for which data was available from 2004 to 2015).

<sup>95</sup> TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM (Sept. 2009), [https://www.law.berkeley.edu/files/policybrief\\_irving\\_0909\\_v9.pdf](https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf) [<https://perma.cc/E75N-M5QA>] (documenting a correlation between the introduction of CAP in a local jail in Irving, Texas and the profiling of Latinos); see also Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REFORM 967, 968–69 (2015) (observing that the “group of noncitizens subject to removal tends to be racially skewed,” in part, because it reflects racially disparate impacts of the criminal justice system).

<sup>96</sup> See, e.g., GARDNER & KOHLI, *supra* note 95, at 4 (describing the incentive of local officers under the CAP program to make arrests for petty offenses, which would then lead to deportation).



seventy-nine percent of immigrants targeted by CAP had either no criminal record at all, or convictions for only traffic or minor offenses.<sup>97</sup>

The Trump administration has made clear that it plans to rely heavily on CAP to deport noncitizens.<sup>98</sup> According to the agency’s current website, immigrants identified through the program will be treated as a priority for deportation action.<sup>99</sup> In addition, the agency pledges to use CAP to identify immigrants to be “aggressive[ly] prosecut[ed]” by federal prosecutors for violations of criminal immigration laws.<sup>100</sup>

## 2. The 287(g) Program

In 1996, Congress enacted section 287(g) of the Immigration and Nationality Act (“INA”), which grants DHS the ability to enter into agreements with local law enforcement agencies to engage in immigration enforcement.<sup>101</sup> Pursuant to these optional written agreements, nonfederal officers receive training at local expense to carry out certain immigration enforcement functions, such as arrests and detention, to the extent consistent with state and local law.<sup>102</sup> The 1996 statute specifies that DHS must supervise the deputized officers and must also require, as a condition of the written agreement, that the deputized officers know and adhere to federal law regarding the federal function they are fulfilling.<sup>103</sup> The 287(g) program has a “task force model,” applying to street-level policing, and a “jail model,”

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<sup>97</sup> NAT’L DAY LABORER ORG. NETWORK ET AL., BRIEFING GUIDE TO “SECURE COMMUNITIES”—ICE’S CONTROVERSIAL IMMIGRATION ENFORCEMENT PROGRAM NEW STATISTICS AND INFORMATION REVEAL DISTURBING TRENDS AND LEAVE CRUCIAL QUESTIONS UNANSWERED 1–4 (Apr. 2011) [hereinafter NDLOM BRIEFING GUIDE], <https://ccrjustice.org/sites/default/files/assets/files/Secure%20Communities%20Fact%20Sheet%20Briefing%20guide%208-2-2010%20Production.pdf> [<https://perma.cc/F5H8-P9GJ>]; see also NYU SCH. OF LAW IMMIGRANT RIGHTS CLINIC ET AL., INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRATION DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 10 (July 2012), <http://www.immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf> [<https://perma.cc/4ZBK-9KJV>] (finding that 37% of noncitizens taken into custody through CAP had no criminal history).

<sup>98</sup> See Kelly Immigration Memo, *supra* note 51, at 3.

<sup>99</sup> *Criminal Alien Program*, *supra* note 91. See generally Ingrid V. Eagly, *Prosecution of Immigration Crime in the Trump Era*, 75 WASH. & LEE L. REV. (forthcoming 2018) (on file with authors) (outlining the Trump administration’s policy agenda to prosecute immigrants and refugees for crossing the border).

<sup>100</sup> *Criminal Alien Program*, *supra* note 91.

<sup>101</sup> Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208, sec. 133, § 287(g), 110 Stat. 3009, 3009–563 (codified at 8 U.S.C. § 1357(g) (2012)).

<sup>102</sup> 8 U.S.C. § 1357(g)(1), (3).

<sup>103</sup> *Id.* § 1357(g)(2).

which is mostly concerned with identifying and transferring inmates from local to immigration custody.<sup>104</sup>

The 287(g) program was widely criticized for fostering civil rights violations and failing to conform to federal enforcement priorities. In March 2010 the DHS Office of the Inspector General (“OIG”) reviewed the program and found, among other things, that ICE officers provided insufficient supervision, failed to consider a jurisdiction’s civil rights record before entering into a 287(g) agreement, and improperly implemented local immigration policies rather than federal priorities.<sup>105</sup> In 2011, a DOJ investigation concluded that the 287(g) program in Maricopa County, Arizona “created a ‘wall of distrust’ between officers and Maricopa County’s Latino residents . . . that has significantly compromised” community safety.<sup>106</sup> Among other practices, the investigation revealed evidence of racial profiling of Latino drivers and the initiation of immigration enforcement in response to “complaints that described no criminal activity, but rather referred . . . to individuals with ‘dark skin’ congregating in one area, or individuals speaking Spanish . . . .”<sup>107</sup>

In the wake of this controversy, the Obama administration announced in 2012 that it would stop renewing any 287(g) task force agreements.<sup>108</sup> The number of agreements under the program dropped by half,<sup>109</sup> leaving in

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<sup>104</sup> *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (Mar. 15, 2017), <https://www.americanimmigrationcouncil.org/research/287g-program-immigration> [<https://perma.cc/VU5V-2T4F>]. A third “hybrid” model, which combines elements of both, has not been frequently used. *Id.*

<sup>105</sup> U.S. DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-10-63, *THE PERFORMANCE OF 287(G) AGREEMENTS 8–34* (Mar. 2010) [hereinafter *OIG 287(G) REPORT*], [https://www.oig.dhs.gov/assets/Mgmt/OIG\\_10-63\\_Mar10.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf) [<https://perma.cc/8QHA-H83L>]; *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-109, *IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS* (2009), <http://www.gao.gov/new.items/d09109.pdf> [<https://perma.cc/7U7R-SPTX>].

<sup>106</sup> Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, to Bill Montgomery, Cty. Attorney, Maricopa Cty., Ariz. 2 (Dec. 15, 2011), [http://www.justice.gov/crt/about/spl/documents/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf) [<https://perma.cc/H87L-UT9M>].

<sup>107</sup> *Id.* at 2–3. An investigation into the 287(g) program of Alamance County, North Carolina revealed similarly disturbing evidence of racial profiling. Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, to Clyde B. Albright, Cty. Attorney, Alamance Cty., N.C. & Chuck Kitchen, Attorney, Turrentine Law Firm 5 (Sept. 18, 2012), <http://www.justice.gov/iso/opa/resources/171201291812462488198.pdf> [<https://perma.cc/7Y6D-EYV8>] (describing discriminatory traffic enforcement and checkpoint practices).

<sup>108</sup> *See* John Morton, Dir., U.S. Immigration & Customs Enf’t, Statement Regarding a Hearing on “U.S. Immigration and Customs Enforcement Fiscal Year 2013 Budget Request” Before the U.S. House of Representatives Committee on Appropriations and Subcommittee on Homeland Security 13 (Mar. 8, 2012), <http://www.aila.org/content/fileviewer.aspx?docid=38896&linkid=244574> [<https://perma.cc/9R22-JHM5>] (announcing that “ICE will begin by discontinuing the least productive 287(g) task force agreements . . . and will also suspend consideration of any requests for new 287(g) agreements”).

<sup>109</sup> News Release, U.S. Immigration & Customs Enf’t, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guide-

place only thirty-four section 287(g) agreements at the end of the administration.<sup>110</sup> All agreements were limited to officers providing jail support, rather than authorizing the kind of “task force” immigration policing in community settings that the Arizona abuses typified.<sup>111</sup>

The 287(g) program has been linked to racial profiling and distrust in local law enforcement. Amada Armenta’s insightful study of the Metropolitan Nashville Police Department’s participation in a 287(g) program underscores this concern. Through two years of field work, Armenta found that the enforcement of immigration law through a 287(g) program in the county jail undermined the Latino community’s trust in the police on the street.<sup>112</sup> The jail program also empowered some officers to be “unnecessarily punitive” and seek out and arrest Latino immigrants, a decision that could result in their deportation.<sup>113</sup>

President Trump campaigned on a promise to revive the 287(g) program.<sup>114</sup> Signaling a definitive shift in direction, President Trump’s executive order on interior enforcement directed DHS to pursue 287(g) agreements “to the maximum extent permitted by law.”<sup>115</sup> Since he took office, the number of 287(g) agreements has nearly doubled.<sup>116</sup> Eighteen of these additional agreements are in Texas.<sup>117</sup>

lines to Further Focus Resources (Dec. 20, 2012), <http://www.ice.gov/news/releases/1212/121221washingtondc2.htm> [<https://perma.cc/6NHP-UDCS>] (announcing that “ICE has . . . decided not to renew any of its agreements with state and local law enforcement agencies that operate task forces under the 287(g) program”).

<sup>110</sup> *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (2018) [hereinafter *287(g) Fact Sheet*], <https://www.ice.gov/factsheets/287g> [<https://perma.cc/PB6Y-ZJMQ>].

<sup>111</sup> See, e.g., OIG 287(G) REPORT, *supra* note 105, at 9 (expressing concern that ICE lacked assurance that the 287(g) program was meeting its intended purpose to target “aliens who pose the greatest risk to public safety and the community”).

<sup>112</sup> Amada Armenta, *Between Public Service and Social Control: Policing Dilemmas in the Era of Immigration Enforcement*, 63 SOC. PROBS. 111, 114–23 (2016) [hereinafter Armenta, *Between Public Service and Social Control*] (studying the implementation of 287(g) in Nashville, Tennessee). See generally AMADA ARMENTA, PROTECT, SERVE, AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT (2017) (finding that a 287(g) agreement at a Nashville, Tennessee jail from 2007–2012 most negatively affected immigrants arrested for minor infractions, and consequently undermined the community’s trust in local police authority).

<sup>113</sup> Armenta, *Between Public Service and Social Control*, *supra* note 112, at 119–22.

<sup>114</sup> See POLITICO, *supra* note 2 (“We will expand and revitalize the popular 287(g) partnerships, which will help to identify hundreds of thousands of deportable aliens in local jails.”).

<sup>115</sup> Interior Enforcement Executive Order, *supra* note 3, at 8800 (calling on DHS to enter into 287(g) agreements with local governments).

<sup>116</sup> *287(g) Fact Sheet*, *supra* note 110 (noting that there were sixty-one 287(g) agreements as of August 27, 2017). All are “jail enforcement” agreements. *Id.*

<sup>117</sup> News Release, U.S. Immigration & Customs Enf’t, ICE Announces 18 New 287(g) Agreements in Texas (July 31, 2017), <https://www.ice.gov/news/releases/ice-announces-18-new-287g-agreements-texas> [<https://perma.cc/EYL8-CMFW>] (noting that each of the new 287(g) agreements operate under a jail enforcement model).

### 3. ICE Administrative Warrants

As noted earlier, after the September 11th attacks, the OLC issued a memorandum reversing its view that local law enforcement had no “inherent authority” to enforce federal civil immigration law.<sup>118</sup> This threw open the door to immigration arrests by nonfederal officers even without a 287(g) agreement. Based on the OLC’s conclusion that local law enforcement did have such authority, the federal government began to enter thousands of records—relating to persons that immigration authorities believed had ignored a removal order or not complied with a requirement of the National Security Entry-Exit Registration System (“NSEERS”)—into the FBI’s National Crime Information Center (“NCIC”) database.<sup>119</sup> These records were added to an NCIC file called the Immigration Violators File (“IVF”).<sup>120</sup> Previously, the IVF contained only records of individuals with felony convictions who had unlawfully re-entered the United States following a prior deportation.<sup>121</sup>

Once the FBI started putting a large number of civil immigration records into the NCIC database, local law enforcement agencies began detaining individuals they encountered who had a “hit” in the database, which would typically appear in the database as an arrest warrant.<sup>122</sup> Nevertheless, unlike criminal arrest warrants, these ICE administrative arrest warrants are issued by an immigration officer, not a judge.<sup>123</sup> In addition, these adminis-

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<sup>118</sup> See *supra* notes 84–85 and accompanying text.

<sup>119</sup> HANNAH GLADSTEIN ET AL., *MIGRATION POL’Y INST., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002–2004*, at 7 (Dec. 2005), [https://www.migrationpolicy.org/pubs/MPI\\_report\\_Blurring\\_the\\_Lines\\_120805.pdf](https://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf) [<https://perma.cc/P2FW-HGEZ>]. The NCIC is a system used by law enforcement agencies to exchange criminal history information and identify individuals with outstanding wants and warrants. *Id.* at 3. NSEERS is a program that was created after September 11th that required certain people—largely males from majority Arab and Muslim nations—to report for registration and fingerprinting. *Id.*; see J. David Goodman & Ron Nixon, *Obama to Dismantle Visitor Registry Before Trump Can Revive It*, N.Y. TIMES (Dec. 22, 2016), <https://www.nytimes.com/2016/12/22/nyregion/obama-to-dismantle-visitor-registry-before-trump-can-revive-it.html> [<https://perma.cc/S5M6-2EEA>] (discussing current status of NSEERS program).

<sup>120</sup> GLADSTEIN ET AL., *supra* note 119, at 3.

<sup>121</sup> *Id.* at 6–7.

<sup>122</sup> See D.C. Metro. Police Exec. Order No. 17-010, *Administrative Warrants in NCIC* (Mar. 24, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=38629549](http://libguides.law.du.edu/ld.php?content_id=38629549) [<https://perma.cc/42JF-M2UQ>] (illustrating the difference between an NCIC response concerning an ICE administrative warrant and a criminal warrant).

<sup>123</sup> 8 C.F.R. § 287.5(e)(2) (2017) (authorizing various immigration enforcement officers to issue arrest warrants); see also *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249, 276 (D. Conn. 2008) (noting that administrative immigration warrant “was signed by . . . an ICE Agent intimately involved in the investigation” and “[n]o neutral magistrate (or even a neutral executive official) ever examined the warrant’s validity”).

trative warrants are issued not upon probable cause of a crime—the “usual predicate” for arrest by local law enforcement<sup>124</sup>—but instead upon probable cause of removability.<sup>125</sup>

In 2012, in *Arizona v. United States*, the Supreme Court put an end to the “inherent authority” theory for local enforcement of immigration law, clarifying that local law enforcement officials could not arrest or detain noncitizens based only on suspected removability except in very limited circumstances.<sup>126</sup> After *Arizona*, it was clear that local law enforcement had no legal basis to hold persons based only on an administrative warrant.<sup>127</sup> Compounding the problem for localities was the reality that the immigration records entered into the NCIC are often unreliable.<sup>128</sup>

Today, ICE administrative warrants remain in the NCIC database. They also sometimes accompany immigration detainers.<sup>129</sup> Because administrative warrants and detainers are often issued in reliance on informational databases, concerns over their accuracy and expansion are especially salient. As Anil Kalhan writes, these databases are accessible by a “large number of actors,” which can often result not only in errors, but extreme difficulty in correcting such errors.<sup>130</sup> Kalhan also warns of the tendency of the use of the databases to “morph[]” into an ever-increasing surveillance by the government.<sup>131</sup>

<sup>124</sup> *Arizona*, 567 U.S. at 407.

<sup>125</sup> U.S. DEP’T OF HOMELAND SEC., FORM I-200, WARRANT FOR ARREST OF ALIEN (2016) [hereinafter FORM I-200 WARRANT], [https://www.ice.gov/sites/default/files/documents/Document/2017/I-200\\_SAMPLE.PDF](https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF) [<https://perma.cc/YX4Q-M2Q6>] (reciting probable cause of removability).

<sup>126</sup> *Arizona*, 567 U.S. at 410, 455.

<sup>127</sup> WENDY WAYNE & ANTHONY J. BENEDETTI, MASS. COMM. FOR PUB. COUNSEL SERVS., IMMIGRATION IMPACT UNIT, A PRACTICE ADVISORY ON ICE USE OF ADMINISTRATIVE WARRANTS AND TRUE WARRANTS IN IMMIGRATION AND CRIMINAL ENFORCEMENT 1–2 (Feb. 19, 2013), <https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2014/07/ICE-Warrants-Practice-Advisory.pdf> [<https://perma.cc/U865-GHME>].

<sup>128</sup> GLADSTEIN ET AL., *supra* note 119, at 12–13 (noting that ICE was unable to confirm an immigration violation following a hit in the database in 42% of cases from 2002 to 2004).

<sup>129</sup> In an attempt to address a federal court decision that held ICE routinely exceeded the arrest authority granted to it by the INA, ICE enacted a policy requiring detainers to be accompanied by administrative warrants. U.S. IMMIGRATION & CUSTOMS ENF’T, POLICY NO. 10074.2: ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS ¶ 2.4 & n.2 (Mar. 24, 2017) [hereinafter ICE POLICY 10074.2], <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf> [<https://perma.cc/SUW8-DR8Q>] (citing *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1008–09 (N.D. Ill. 2016)).

<sup>130</sup> Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 73 (2014); see also Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1785 (2015) (setting out the underlying basis for errors in government screening databases and the consequences of such errors).

<sup>131</sup> Kalhan, *supra* note 130, at 77–78.

#### 4. The Secure Communities Program

In 2008 the federal government undertook another far-reaching effort to harness state and local criminal justice systems for federal immigration enforcement by activating the Secure Communities program. Secure Communities created an automatic information-sharing system that allowed DHS to engage in immigration enforcement by using the biometric data collected by local police and sheriffs. Once Secure Communities was activated across the country, the fingerprints of every person that state and local officials booked into custody were forwarded automatically from the FBI to DHS.<sup>132</sup>

Although the transmission of fingerprint data opened up local jails to DHS for the purposes of identifying enforcement targets, it was still necessary for DHS to take custody of its targets. For this, immigration officials relied on immigration “detainers,” which take the form of a piece of paper faxed or emailed from federal immigration officials to local officials.<sup>133</sup> The paper form used for detainers when the program began contained language suggesting compliance was mandatory, stating that federal regulations “require that you detain the alien.”<sup>134</sup>

The detainer form caused confusion about whether detainers were voluntary requests or mandatory commands to local officials.<sup>135</sup> This confusion was further perpetuated by DHS’s actions that suggested to jurisdictions that they could not “opt out” of participating in Secure Communities. Initially, DHS suggested that jurisdictions could stop fingerprints submitted for

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<sup>132</sup> *Secure Communities: FAQs*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/secure-communities> (select “What Is Secure Communities?” subheading) [<https://perma.cc/4XEY-4AB5>] (explaining that “[u]nder Secure Communities, the FBI automatically sends fingerprints to DHS to check against the immigration databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable, ICE takes enforcement action”).

<sup>133</sup> *Lopez-Aguilar v. Marion Cty. Sheriff’s Dep’t*, No. 1:16-cv-02457-SEB-TAB, 2017 WL 5634965, at \*6 (S.D. Ind. Nov. 7, 2017) (citing Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 *LOY. L.A. L. REV.* 629, 634 (2013)).

<sup>134</sup> See U.S. DEP’T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., FORM I-247 IMMIGRATION DETAINER—NOTICE OF ACTION (1997), [http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detainer%20Form%20\(April%201997\)%20\(Clean\).pdf](http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detainer%20Form%20(April%201997)%20(Clean).pdf) [<https://perma.cc/72TR-NEQA>] (stating that “[f]ederal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien”).

<sup>135</sup> DHS perpetuated this misunderstanding through various iterations of the detainer form. See generally Christopher N. Lasch, *Rendition Resistance*, 92 *N.C. L. REV.* 149, 205–09 (2013) (discussing the uncertainty surrounding the commanding or voluntary nature of an immigration detainer by analyzing different iterations of the form).

FBI checks from being transmitted to DHS.<sup>136</sup> When local communities tried to prevent the transmittal of fingerprints, however, they were told that participation in the program was mandatory.<sup>137</sup>

Secure Communities pushed nonfederal criminal justice officials to the front line of immigration enforcement in two ways. First, because any arrest could open the door to deportation, an encounter between a noncitizen and a police officer became a *de facto* brush with immigration enforcement.<sup>138</sup> Second, Secure Communities relied on police and sheriffs to hold noncitizens beyond their normal release. And because detainers were issued upon arrest (rather than conviction), Secure Communities regularly failed to meet its stated purpose of reducing crime rates,<sup>139</sup> often ensnaring noncitizens with no criminal conviction at all.<sup>140</sup>

Even before the Trump administration added Secure Communities to its toolbox, the program had attracted a litany of critiques leading the prior administration to abandon it. Although billed as making no change to the operation of local law enforcement agencies, Secure Communities did in effect turn local law enforcement officers into immigration agents. Secure Communities therefore exacerbated divisions between the police and local communities, making immigrant communities afraid to come into contact with the police.<sup>141</sup> In addition, Secure Communities was critiqued as en-

<sup>136</sup> M. Alex Johnson, *Cities, Counties Can't Stop Federal Immigration Checks*, NBC NEWS (Oct. 15, 2010, 6:13 AM), [http://www.nbcnews.com/id/39576754/ns/us\\_news-security/t/cities-counties-cant-stop-federal-immigration-checks/#.WsuqdkxFx-M](http://www.nbcnews.com/id/39576754/ns/us_news-security/t/cities-counties-cant-stop-federal-immigration-checks/#.WsuqdkxFx-M) [<https://perma.cc/4N8E-VF3W>] (discussing ICE documents that portrayed participation in Secure Communities as being contingent on a statement of intent by county and local governments).

<sup>137</sup> See Stumpf, *supra* note 25, at 1272–73; *Secure Communities: FAQ*, *supra* note 132 (following "Can a State or Local Law Enforcement Agency Choose Not to Have Fingerprints It Submits to the FBI Checked Against DHS's System?" subheading) (stating that "state and local jurisdictions cannot prohibit information-sharing" under Secure Communities).

<sup>138</sup> See MOTOMURA, *supra* note 6, at 128–31 (discussing how the discretion and influence of local authorities in conducting arrests ties into immigration enforcement); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1148–49, 1212–15 (2013) (describing the mechanics of Secure Communities and observing that a locality's model of noncitizen justice can vastly affect federal immigration enforcement outcomes); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (describing how arrests now lead to a range of consequences, including deportation).

<sup>139</sup> Elina Treyger et al., *Immigration Enforcement, Policing, and Crime: Evidence from the Secure Communities Program*, 13 CRIMINOLOGY & PUB. POL'Y 285 (2014) (concluding that there was no significant change in crime rates after the implementation of Secure Communities).

<sup>140</sup> See, e.g., NDLOM BRIEFING GUIDE, *supra* note 97; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, FEW ICE DETAINERS TARGET SERIOUS CRIMINALS (Sept. 2013), <http://trac.syr.edu/immigration/reports/330> [<https://perma.cc/8GFH-EX5E>] (reporting that 47.7% of those subject to immigration detainers over a sixteen-month period had no criminal conviction at all).

<sup>141</sup> See NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT 5–17 (May 2013), [https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure\\_Communities\\_Report\\_FINAL.pdf](https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf) [<https://perma.cc/ARA5-A5C2>] (report-

couraging race-based policing.<sup>142</sup> Finally, despite federal claims that Secure Communities made communities safer, a study of its implementation found that it had no impact on crime rates.<sup>143</sup>

In addition to policy-based critiques, a series of judicial decisions also raised legal questions about the use of immigration detainers.<sup>144</sup> In 2014, in *Galarza v. Szalczyk*, the Third Circuit held the County of Lehigh, Pennsylvania liable for violating the Fourth Amendment rights of Ernesto Galarza, a U.S. citizen improperly targeted by immigration officials and held by the County pursuant to an immigration detainer.<sup>145</sup>

*Galarza* and subsequent decisions made clear that local authorities could not be required by federal authorities to honor ICE detainer requests: compliance was voluntary.<sup>146</sup> Those decisions also made clear that localities that detained individuals based on ICE detainers exposed themselves to liability for illegally detaining individuals without a judicial warrant or probable cause in violation of the Fourth Amendment.<sup>147</sup> These and other concerns inspired many localities to decline to participate in the Secure Communities program and to enact local policies limiting their compliance with immigration detainers.<sup>148</sup>

ing on the impact of police involvement in immigration enforcement on Latinos' perceptions of public safety and their willingness to contact the police).

<sup>142</sup> See generally Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993 (2016); Vázquez, *supra* note 68. A 2014 study of the Secure Communities program found no significant impact on arrest rates by ethnicity, although the authors did discuss the obstacles to disaggregating arrest rates of whites and Latinos. Treyger et al., *supra* note 139, at 306–08.

<sup>143</sup> See Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 970 (2014) (finding that the Secure Communities program has no observable effect on the “overall rate of FBI index crime calls”).

<sup>144</sup> See Stumpf, *supra* note 25, at 1279–81.

<sup>145</sup> *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014).

<sup>146</sup> *Galarza*, 745 F.3d at 639–45; *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*4–\*8 (D. Or. Aug. 22, 2014) (relying on *Galarza* and other authorities in rejecting the notion that local officers' compliance with immigration detainers is mandatory); see also *Mercado v. Dall. Cty.*, 229 F. Supp. 3d 501, 514–15 (N.D. Tex. 2017) (collecting cases, and rejecting Dallas County's argument that holding individuals based on immigration detainers was required by federal law), *abrogated on other grounds by City of El Cenizo v. Texas*, 885 F.3d 332, 356 n.21 (5th Cir. 2018).

<sup>147</sup> See, e.g., *Galarza*, 745 F.3d at 640–42, 645 (concluding the detainer was a request to states and localities rather than an order, opening the door to municipal liability for unlawfully detaining a U.S. citizen); *Miranda-Olivares*, 2014 WL 1414305, at \*11 (county's reliance on an ICE detainer to hold a noncitizen for two weeks violated the Fourth Amendment); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (immigration detainer issued “for purposes of mere investigation” is impermissible).

<sup>148</sup> A state judge in Miami-Dade County recently held that even voluntary compliance with immigration detainers violated the Tenth Amendment when it was the result of the threat of funding cuts expressed in the Executive Order. *Lacroix v. Junior*, No. F201700376, 2017 WL 1037454, at \*6–\*7 (Fla. Cir. Ct. Mar. 3, 2017).



In 2014, noting “the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment,” DHS Secretary Jeh Johnson announced that the “Secure Communities program, as we know it, will be discontinued.”<sup>149</sup> The program was immediately replaced with a different program, the Priority Enforcement Program (“PEP”).<sup>150</sup> PEP’s most significant innovation was a modification of the detainer policy in effect under Secure Communities. Under PEP, the federal government often requested that local law enforcement notify ICE about the release of potentially deportable noncitizens rather than hold individuals past their release date.<sup>151</sup>

The Trump administration has reversed course by terminating PEP.<sup>152</sup> In its place, President Trump has revived the defunct Secure Communities program, which he characterizes as a “[g]ood program.”<sup>153</sup> As part of this transition back to Secure Communities, the Trump administration will place detainers on all immigrants who are arrested, regardless of the reason for arrest or the seriousness of any suspected conduct.<sup>154</sup>

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<sup>149</sup> Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec. to Thomas S. Winkowski et al., Acting Dir., U.S. Immigration & Customs Enft 1 (Nov. 20, 2014) [hereinafter *Secure Communities Memo*], [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) [<https://perma.cc/59ZT-9UNG>] (“Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting” police entanglement with Secure Communities).

<sup>150</sup> *Id.* at 1–3 (announcing the establishment of PEP). See generally Stumpf, *supra* note 25 (discussing the transition from Secure Communities to PEP).

<sup>151</sup> *Secure Communities Memo*, *supra* note 149, at 2; see also U.S. DEP’T OF HOMELAND SEC., FORM I-247N REQUEST FOR VOLUNTARY NOTIFICATION OF RELEASE OF SUSPECTED PRIORITY ALIEN, <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247N.PDF> [<https://perma.cc/EB89-ACWY>]. Although PEP was associated with an overall decrease in the number of detainers issued, the wholesale replacement of requests for detention with requests for notification did not take place. For example, from July through November 2015 only about 17.4% of federal actions to obtain custody were requests for notification only. Moreover, requests for notification were concentrated in jurisdictions that had already stopped holding individuals on detainers in part or in whole under Secure Communities. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LATEST DATA: IMMIGRATION AND CUSTOMS ENFORCEMENT DETAINERS (2017), <http://trac.syr.edu/phptools/immigration/detain/> [<https://perma.cc/R2CJ-G76D>].

<sup>152</sup> Interior Enforcement Executive Order, *supra* note 3, at 8801 (“The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014 . . .”).

<sup>153</sup> Golshan, *supra* note 46 (“We will restore the highly successful Secure Communities program. Good program.”); see also Interior Enforcement Executive Order, *supra* note 3, at 8801 (calling for reinstatement of Secure Communities Program).

<sup>154</sup> Golshan, *supra* note 46 (“We will issue detainers for illegal immigrants who are arrested for any crime whatsoever, and they will be placed into immediate removal proceedings if we even have to do that.”).

## 5. Other Joint Operations

In addition to the programs already described, the Trump administration plans to rely on a range of additional cooperative arrangements with local law enforcement to accomplish mass deportation. As Trump told the crowd in his Phoenix immigration speech: “2 million people. Criminal aliens. We will begin moving them out day one. As soon as I take office. Day one. In joint operations with local, state and federal law enforcement.”<sup>155</sup> Similarly, former DHS Secretary Kelly ordered that “task forces” that the federal government uses to enforce immigration law and enhance border security should “include participants from other federal, state, and local agencies . . . .”<sup>156</sup>

One type of joint operation is the 287(g) agreements already discussed, but there are many other similar programs that rely on local law enforcement to accomplish federal enforcement goals.<sup>157</sup> For example, Operation Community Shield is a joint operation that works together with local law enforcement to target street gangs for criminal prosecution and deportation.<sup>158</sup> This joint operation initiative has been expanded under the Trump administration and renamed the “National Gang Unit.”<sup>159</sup> Similarly, since 2003 ICE has run a National Fugitive Operations Team that works with lo-

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<sup>155</sup> *Id.* (“We will end the sanctuary cities that have resulted in so many needless deaths.”). The promise to “end” sanctuary cities was to be fulfilled by “cancel[ing] all federal funding to sanctuary cities” in Trump’s first 100 days in office. *See Trump’s Contract, supra* note 2.

<sup>156</sup> *See* Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan et al., Acting Comm’r, U.S. Customs & Border Prot. 12 (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf) [<https://perma.cc/K3H7-VCC7>] (“In addition, the task forces should include participants from other federal, state, and local agencies, and should target individuals and organizations whose criminal conduct undermines border security or the integrity of the immigration system, including offenses related to alien smuggling or trafficking, drug trafficking, illegal entry and reentry, visa fraud, identity theft, unlawful possession or use of official documents, and acts of violence committed against persons or property at or near the border.”).

<sup>157</sup> *See generally* PEW CHARITABLE TRS., IMMIGRATION ENFORCEMENT WITHIN THE NATION’S BORDERS: FEDERAL, STATE, AND LOCAL EFFORTS 6 (July 2014), <http://www.pewtrusts.org/~media/assets/2014/07/immigrationenforcementbriefjuly2014.pdf> [<https://perma.cc/69RS-76BX>] (describing different kinds of joint operations); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1579–98 (2010) (describing joint operations).

<sup>158</sup> *National Gang Unit: Operation Community Shield*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (2017), <https://www.ice.gov/national-gang-unit> [<https://perma.cc/XCG5-QF78>]; *see also* Jennifer M. Chacón, *Whose Community Shield? Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 321–33 (tracing the origin and expansion of Operation Community Shield and ICE’s reliance on lists of individuals identified as gang members based on criteria controlled by state and local police).

<sup>159</sup> *National Gang Unit, supra* note 158.

cal, state, and federal law enforcement to locate noncitizens with final orders of deportation.<sup>160</sup>

By facilitating local-federal cooperation, joint operations risk entangling jurisdictions in immigration enforcement. The Santa Cruz Police Department learned this in February 2017 when it participated in a joint raid following a five-year investigation with ICE’s gang initiative.<sup>161</sup> Although ICE told Santa Cruz that the operation would target dangerous gang members, individuals with no gang affiliation were arrested in the raid and deported by ICE.<sup>162</sup> These kinds of “collateral” arrests involuntarily involve local law enforcement in the routine enforcement of immigration law. In Los Angeles, advocacy groups have similarly raised concerns about participation of the Los Angeles Police Department (“LAPD”) participation in joint raids with the Homeland Security Investigations (“HSI”)<sup>163</sup> and Enforcement and Removal Operations division of ICE.<sup>164</sup> Although purportedly targeting gang and drug activity, such joint operations have resulted in the “collateral arrest” of noncit-

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<sup>160</sup> *Fact Sheet: ICE Fugitive Operations Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/doclib/news/library/factsheets/pdf/fugops.pdf> [<https://perma.cc/CG4H-JESH>]; *National Gang Unit*, *supra* note 158. See generally MARGOT MENDELSON ET AL., MIGRATION POL’Y INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE’S FUGITIVE OPERATIONS PROGRAM 1, 5–7 (Feb. 2009), <https://www.migrationpolicy.org/research/ice-fugitive-operations-program> [<https://perma.cc/B5F7-D6L2>].

<sup>161</sup> Although the Santa Cruz Police Department participated in the joint raid, the Santa Cruz County Sheriff steered clear when he was unable to obtain satisfactory guarantees that his deputies would not end up participating in immigration arrests. Hamed Aleaziz, ‘Collateral’ Immigration Arrests Threaten Key Crime Alliances, S.F. CHRON. (Apr. 28, 2017), <http://www.sfchronicle.com/bayarea/article/Collateral-immigration-arrests-threaten-key-11106426.php> [<https://perma.cc/9HZL-Z3XT>].

<sup>162</sup> Richard Winton & James Queally, *Santa Cruz and Federal Agents in War of Words over Whether a Gang Sweep Was Really a Secret Immigration Raid*, L.A. TIMES (Feb. 23, 2017, 9:20 PM), <http://www.latimes.com/local/lanow/la-me-ln-santa-cruz-ice-raid-20170223-story.html> [<https://perma.cc/H4C5-JZAK>].

<sup>163</sup> HSI is the “largest investigative unit” within the DHS. U.S. DEP’T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENF’T, BUDGET OVERVIEW: FISCAL YEAR 2018 CONGRESSIONAL JUSTIFICATION 63 (Oct. 2017), [https://www.dhs.gov/sites/default/files/publications/CFO/17\\_0524\\_U.S.\\_Immigration\\_and\\_Customs\\_Enforcement.pdf](https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf) [<https://perma.cc/SK2A-FFDM>]. Although it purports to be principally focused on “significant threats to the safety and security of the American public,” under the Trump administration its mission has expanded to include routine immigration arrests. *Id.*; Aleaziz, *supra* note 161 (reporting that HSI “is now mandated to make collateral immigration arrests of nontargeted individuals” encountered during HSI operations). Given that there are more HSI agents than ICE deportation officers, this expanded mission would “effectively double[] immigration enforcement officers in the U.S.” *Id.* (quoting Professor Pratheepan Gulasekaram).

<sup>164</sup> See Letter from ICE Out of LA Coal. et al. to Charlie Beck, Chief of Police, L.A. Police Dep’t (Apr. 26, 2016), <https://www.documentcloud.org/documents/3223904-2016-04-26-Letter-to-Chief-Beck.html> [<https://perma.cc/9BHF-ZNSG>].

izen residents for immigration purposes. Such a result conflicts directly with local sanctuary policies in place in Los Angeles.<sup>165</sup>

## II. “SANCTUARY” POLICIES IN AN ERA OF MASS DEPORTATION

Part I described the rise of crimmigration and introduced the major components of Trump’s deportation apparatus—CAP, administrative warrants, 287(g), Secure Communities, and other joint operations.<sup>166</sup> Collectively, these programs generate significant pressure on localities to make their law enforcement resources available for federal immigration enforcement. In Part II, we turn to an analysis of the policies of “sanctuary” jurisdictions in the United States. Specifically, we focus on how these policies function to protect community members and limit the involvement of local government institutions in furthering the Trump administration’s immigration agenda.<sup>167</sup>

In conducting our analysis, we collected a set of over 500 sanctuary policies spanning nearly four decades. To aid other researchers, we have made full text versions of the all of the laws and policies we collected available in an accompanying online library.<sup>168</sup> Our library of sanctuary policies focuses on those policies that explicitly address the degree to which local criminal justice systems and actors interact with federal immigration enforcement.<sup>169</sup>

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<sup>165</sup> *Id.*; see also David Noriega, *Under Trump, Sanctuary Cities May Not Be So Safe*, BUZZFEED NEWS (Dec. 8, 2016, 10:21 AM), [https://www.buzzfeed.com/davidnoriega/the-lapd-says-it-wont-work-with-feds-on-deportations-but-it?utm\\_term=.pqGW90PNJ#.xrQoEp9gA](https://www.buzzfeed.com/davidnoriega/the-lapd-says-it-wont-work-with-feds-on-deportations-but-it?utm_term=.pqGW90PNJ#.xrQoEp9gA) [<https://perma.cc/UPF3-BHH6>] (documenting instances of LAPD collaboration with HSI).

<sup>166</sup> See *supra* notes 68–165 and accompanying text.

<sup>167</sup> See *infra* notes 181–248 and accompanying text.

<sup>168</sup> See WESTMINSTER LAW LIBR., *supra* note 10.

<sup>169</sup> Some policies that nevertheless affect immigrants with criminal justice involvement exceed our definition of sanctuary policies because they don’t explicitly address the degree of interaction between local law enforcement and federal immigration enforcement, and therefore are not included in our collection of sanctuary policies. For example, we did not include policies that reduce sentences for low-level misdemeanors to less than 365 days in an attempt to alleviate immigration consequences of convictions. See, e.g., CAL. PENAL CODE § 18.5 (West Supp. 2018) (“Every offense which is prescribed by any law of the state to be punishable by imprisonment in a country jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days.”); Jon Murray & Noelle Phillips, *Denver Is Set to Change Its Sentencing Ordinance to Help Some Immigrants Avoid Deportation*, DENV. POST (Apr. 27, 2017, 4:35 PM), <https://www.denverpost.com/2017/04/27/denver-sentencing-reform-immigrants-deportation/> [<https://perma.cc/E6KN-7DVQ>]. Policies encouraging or affecting cite-and-release practices (in lieu of arrest) similarly can change the shape of the criminal justice-to-deportation pipeline, but often do not explicitly relate to immigration, and are therefore not included. See Eagly, *supra* note 138, at 1157–69 (describing various “alienage-neutral” policies in place in Los Angeles, California affecting immigrants).

We relied on a range of techniques to identify and collect our set of sanctuary policies for analysis. We identified many policies by scouring academic sources,<sup>170</sup> issue papers,<sup>171</sup> news articles,<sup>172</sup> and online collections of policies accumulated by advocacy groups across the political spectrum.<sup>173</sup> We also obtained copies of the policies through public records requests, communications with practitioners, and internet and other online research.<sup>174</sup> Because our authors have been engaged in scholarship, research, and advocacy relating to sanctuary policies, many policies (particularly those enacted in the last decade) were already known to us. Although we cannot claim to have surveyed every sanctuary policy, we believe our collection of policies provides the largest single collection available of the various policies that have been enacted since the 1980s.

Based on our review of the collected policies, we identified five principle types of legal and policy initiatives adopted by jurisdictions. These five types, which we discuss in Part II, are: (1) barring investigations into immigration violations; (2) limiting compliance with ICE detainers and administrative warrants; (3) limiting ICE's access to local jails; (4) limiting disclosure of sensitive information; and (5) declining to participate in joint operations.<sup>175</sup> We introduce each category of policy, drawing on examples

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<sup>170</sup> See, e.g., Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPPERDINE L. REV. 297, 297–98 & nn. 1–4 (1989) (identifying sanctuary provisions); Daniel D. McMillan, *City Sanctuary Resolutions and the Preemption Doctrine: Much Ado About Nothing*, 20 LOY. L.A. L. REV. 513, 516–17 & nn.19–21 (1987) (listing thirteen cities and one state, New Mexico, as self-identified "sanctuary" jurisdictions); Pham, *Constitutional Right*, *supra* note 6, at 1382–84 (examining sanctuary laws enacted in the 1980s); *id.* at 1386–91 (examining sanctuary laws passed after 9/11).

<sup>171</sup> See, e.g., MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RESEARCH SERV., STATE AND LOCAL "SANCTUARY" POLICIES LIMITING PARTICIPATION IN IMMIGRATION ENFORCEMENT (July 2015), <https://fas.org/sgp/crs/homesecc/R43457.pdf> [<https://perma.cc/M73M-QGRP>]; LISA M. SEGHEtti ET AL., CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 26 & nn.85–87 (Aug. 2006), <http://trac.syr.edu/immigration/library/P1072.pdf> [<https://perma.cc/KWD2-L8WZ>].

<sup>172</sup> See, e.g., James Coates, *In New Sanctuary Debate, Fine Line Divides Criminal, Refugee*, CHI. TRIB. (Dec. 29, 1985), [http://articles.chicagotribune.com/1985-12-29/news/8503300162\\_1\\_skid-row-ordinance-seattle-city-council](http://articles.chicagotribune.com/1985-12-29/news/8503300162_1_skid-row-ordinance-seattle-city-council) [<https://perma.cc/W7KP-VJE9>] (identifying eleven cities with "sanctuary ordinances").

<sup>173</sup> See, e.g., FED'N FOR AM. IMMIGRATION REFORM, SANCTUARY POLICIES ACROSS THE U.S. (Oct. 2013), <https://www.scribd.com/document/180487047/Sanctuary-Policies-Across-the-U-S> [<https://perma.cc/MJ5A-57C8>]; NAT'L IMMIGRATION LAW CTR., LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (Dec. 2008), <http://www.ailadownloads.org/advo/NILC-LocalLawsResolutionsAndPoliciesLimitingImmEnforcement.pdf> [<https://perma.cc/2W6T-DMBT>].

<sup>174</sup> We were able to search archived versions of local policies by using the Internet Archive Wayback Machine. See WAYBACK MACHINE, <http://web.archive.org>.

<sup>175</sup> In choosing the five most common policy types to analyze, we acknowledge that there are other important types of policies that also serve to disentangle the immigration system from local law enforcement. For example, policies to limit courthouse immigration arrests seem to be taking

of state laws, municipal ordinances and resolutions, and internal sheriff and police regulations and policies.<sup>176</sup>

The Trump presidency has driven localities to clarify their role in immigration enforcement. Local officials must consider how best to respond to the divisive racial tenor of the Trump administration's immigration policy pronouncements within their communities. But whereas some jurisdictions have newly embraced the sanctuary policies we discuss in this Part since the election, others have had such policies in place for decades.<sup>177</sup> In addition, some policies, such as detainer policies, developed in response to developments in federal law or policy that pre-date the Trump presidency.

Regardless of when these policies were enacted, they share some common characteristics. For example, the Trump administration has sought to bring sanctuary jurisdictions to heel by claiming that their policies violate 8 U.S.C. § 1373,<sup>178</sup> a provision of the federal code that prohibits localities from preventing their employees from exchanging citizenship or immigration status information of individuals with federal officials.<sup>179</sup> But, as our description of the policies in this Part makes clear, many disentanglement policies do not restrict the sharing of information about citizenship or im-

on greater importance. *See generally* Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J. F. 410, 410–14 (2017). For examples of courthouse policies, see New Mexico, Second Judicial Dist. Court, Policy No. 2017-SJDC-010 (Nov. 20, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=41672578](http://libguides.law.du.edu/ld.php?content_id=41672578) [<https://perma.cc/3AK2-PG96>] (prohibiting courthouse arrests except in narrow circumstances); *cf.* N.Y. Gov'r Exec. Order No. 170.1 (Apr. 25, 2018), [http://libguides.law.du.edu/ld.php?content\\_id=41665592](http://libguides.law.du.edu/ld.php?content_id=41665592) [<https://perma.cc/T2FM-72RW>] (prohibiting immigration arrests, except "when accompanied by a judicial warrant," in New York "state facilities").

<sup>176</sup> For an alternative approach to organizing policies addressing or limiting cooperation with federal immigration authorities, see generally Huyen Pham, *A Framework for Understanding Subfederal Enforcement of Immigration Laws*, 13 UNIV. ST. THOMAS L. REV. 508, 511–24 (2017) (introducing six models for local law enforcement participation in immigration enforcement based on the level of cooperation with federal immigration authorities).

<sup>177</sup> According to a study conducted by the Immigrant Legal Resource Center, as of 2016 over 600 counties across the country had in place some rules or regulations limiting local law enforcement participation in federal immigration enforcement. GRABER & MARQUEZ, *supra* note 25, at 11; *see also National Map, supra* note 26 (publishing a map that "shows the degree to which local law enforcement offer assistance to federal immigration authorities, as well as the degree to which localities have enacted laws or policies limiting their involvement in federal immigration enforcement").

<sup>178</sup> Lai & Lasch, *supra* note 9, at 557–62 (describing the Trump administration's use of § 1373 against sanctuary jurisdictions).

<sup>179</sup> 8 U.S.C. § 1373 (2012) (providing that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual"). Section 1373 is arguably unenforceable. *See infra* notes 222–226 and accompanying text.

migration status and therefore cannot run afoul of § 1373.<sup>180</sup> Under federal law, localities have discretion to decide whether they will engage in local policing activity that may result in deportation.

#### *A. Barring Investigation of Civil and Criminal Immigration Violations*

Perhaps the most common type of sanctuary policy is a requirement that police not investigate civil or criminal immigration violations.<sup>181</sup> These types of internal policies, which have been called “don’t police” policies,<sup>182</sup> are important given that local law enforcement officers can act as deportation “gatekeepers” when they arrest noncitizens.<sup>183</sup> Such policies generally prevent law enforcement from asking questions about immigration status or otherwise enforcing civil immigration law violations.<sup>184</sup> Some “don’t police” policies go further and prevent police from investigating criminal immigration law violations.<sup>185</sup>

An early example of a “don’t police” policy is the LAPD’s “Special Order Number 40,” issued by Chief Daryl Gates in 1979.<sup>186</sup> Special Order 40 prohibits officers from “initiat[ing] police action with the objective of discovering the alien status of a person.”<sup>187</sup> In addition, it prevents officers from arresting or booking persons for illegal entry into the United States under 8 U.S.C. § 1325.<sup>188</sup> Similarly, in 1989, San Francisco adopted a “City and County of Refuge” ordinance that provides that state and local officials “have no duty . . . to enforce the civil aspects of the federal immigration laws.”<sup>189</sup> More recently, in 2008, the City of Hartford, Connecticut enacted

<sup>180</sup> See generally Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 254–64 (2016) (discussing such policies).

<sup>181</sup> *Id.*; see also Eisha Jain, *Understanding Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 161 (2017) (noting that protective policing practices can help to ameliorate the collateral consequences that flow from arrest).

<sup>182</sup> Eagly, *supra* note 180, at 258.

<sup>183</sup> Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1856 (2011) (noting that the “core problem” with local enforcement of immigration is that it makes local police and sheriffs “act as gatekeepers” in the immigration system).

<sup>184</sup> Eagly, *supra* note 180, at 261–64.

<sup>185</sup> *Id.*

<sup>186</sup> Office of the Chief of Police, L.A. Police Dep’t, Special Order No. 40, Undocumented Aliens (Nov. 27, 1979) [hereinafter LAPD Special Order], [http://libguides.law.du.edu/ld.php?content\\_id=34432079](http://libguides.law.du.edu/ld.php?content_id=34432079) [<https://perma.cc/22MQ-KNBT>].

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> S.F., Cal., Ordinance No. 375-89 (Oct. 24, 1989) [hereinafter S.F. Ordinance], [http://libguides.law.du.edu/ld.php?content\\_id=34432127](http://libguides.law.du.edu/ld.php?content_id=34432127) [<https://perma.cc/8CPS-HLVE>] (internal quotation marks omitted). New York City made similar observations about federal responsibility for immigration enforcement in enacting Executive Order 124. See N.Y.C., N.Y., Exec. Order No. 124 (Aug. 7, 1989) [hereinafter NYC Exec. Order], [http://libguides.law.du.edu/ld.php?content\\_id=](http://libguides.law.du.edu/ld.php?content_id=)

an ordinance restricting any employee from “inquir[ing] about . . . confidential information,” including immigration status, except when “necessary to the provision of the city service in question.”<sup>190</sup>

Some states have also restricted their police agencies from enforcing civil immigration law. In 1987, Oregon passed a state law prohibiting law enforcement throughout the state, including political subdivisions of the state, from enforcing civil immigration law.<sup>191</sup> In 2014 the State of Vermont passed a law requiring that all local law enforcement agencies adopt a “model fair and impartial policing policy” that prohibits policing civil immigration violations.<sup>192</sup> Among other restrictions, the model policy adopted in 2017 specifies that local law enforcement in Vermont may not: (1) ask for a “person’s civil immigration status unless it is necessary to the ongoing investigation of a criminal offense”; (2) use suspicion of a person’s undocumented status as a basis for initiating contact, detaining, or arresting that person; or (3) attempt “to enforce federal criminal law” where the only violation is “unauthorized presence in the country[,] . . . a civil infraction.”<sup>193</sup> And, in 2017, the California Values Act was enacted, similarly prohibiting local law enforcement from expending resources “to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes . . . .”<sup>194</sup>

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34436598 [https://perma.cc/5NHT-TTYU] (“Federal law places full responsibility for immigration control on the federal government. With limited exceptions, the City therefore has no legal obligation to report any alien to federal authorities. The executive order, in recognition of this lack of obligation and the importance of providing the services covered herein, requires City agencies to preserve the confidentiality of all information respecting law-abiding aliens to the extent permitted by law.”).

<sup>190</sup> Hartford, Conn., Mun. Code ch. 2, art. XXI, §§ 2-925 to -929 (2008) [hereinafter Hartford Ordinance], [http://libguides.law.du.edu/ld.php?content\\_id=34434291](http://libguides.law.du.edu/ld.php?content_id=34434291) [https://perma.cc/NDX9-Z9X8].

<sup>191</sup> OR. REV. STAT. § 181A.820 (West Supp. 2017) (formerly ORE. REV. STAT. § 181.850, enacted Laws 1987, c. 467, § 1).

<sup>192</sup> 2014 Vermont Laws No. 193, § 3 (S. 184) (June 17, 2014), [http://libguides.law.du.edu/ld.php?content\\_id=35254870](http://libguides.law.du.edu/ld.php?content_id=35254870) [https://perma.cc/BFW4-VS6K] (amending VT. STAT. ANN. tit. 20, § 2366). The 2014 legislation required the State Criminal Justice Training Council to develop a model fair and impartial policing policy, and further required each law enforcement agency in Vermont to adopt a policy “that includes, *at a minimum*, the elements” of the model policy. *Id.* (emphasis added).

<sup>193</sup> VT. CRIMINAL JUSTICE TRAINING COUNCIL, MODEL FAIR AND IMPARTIAL POLICING POLICY ¶¶ VIII, IX (2017) [hereinafter 2017 VERMONT MODEL POLICING POLICY], [http://libguides.law.du.edu/ld.php?content\\_id=41582278](http://libguides.law.du.edu/ld.php?content_id=41582278) [https://perma.cc/65SB-SCMY]. The model policy also specifies that law enforcement may not “arrest or detain any individual based on an immigration ‘administrative warrant’ or ‘immigration detainer.’” *Id.* ¶ VIII(d).

<sup>194</sup> CAL. GOV’T CODE § 7284.6 (West Supp. 2018) (enacted as part of California S.B. 54 (Oct. 5, 2017)).



### B. Limiting Compliance with Immigration Detainers and Administrative Warrants

Federal pressure to participate in immigration enforcement has prompted a second type of local disentanglement policy: limiting compliance with immigration detainers and administrative immigration warrants. Given the Secure Communities program’s reliance on immigration detainers, declining these federal requests has become a prominent way by which localities are expressing resistance to the program.

Practices limiting detainer compliance are found in a range of local ordinances, state laws, and internal policing directives. Early examples of such policies typically stopped short of denying all requests to extend detention for deportation purposes. For example, the California and Connecticut TRUST Acts mandated that localities decline detainers unless issued against persons with certain criminal charges or convictions.<sup>195</sup> Similarly, local policies in Cook County, Illinois and New York City included numerous criminal history-based exceptions to the general rule of not complying with immigration detainers.<sup>196</sup>

More recent policies now provide that jurisdictions not honor any detainer unless it is accompanied by a judicial warrant or other documentation establishing probable cause of a crime. For example, the Alameda County Sheriff’s Office has announced that it will decline all immigration detainers from ICE, distinguishing between “an arrest warrant signed by a judge, and an immigration detainer signed by an ICE Agent.”<sup>197</sup> The weight of judicial

<sup>195</sup> CAL. GOV’T CODE § 7282 (West 2018); CONN. GEN. STAT. § 54-192h (2017).

<sup>196</sup> See Cook Cty., Ill. Ordinance No. 11-O-73 (Sept. 7, 2011) [hereinafter Cook Ordinance], [http://libguides.law.du.edu/ld.php?content\\_id=34434520](http://libguides.law.du.edu/ld.php?content_id=34434520) [<https://perma.cc/Z87Y-MJBS>] (allowing detainer compliance where target of detainer “is convicted of a serious or violent felony offense for which he or she is currently in custody” or “has been convicted of a serious or violent felony within 10 years of the request, or was released after having served a sentence for a serious or violent felony within 5 years of the request, whichever is later”); N.Y.C., N.Y., Local Law No. 62 (Nov. 22, 2011) [hereinafter NYC Local Law 62], [http://libguides.law.du.edu/ld.php?content\\_id=34436609](http://libguides.law.du.edu/ld.php?content_id=34436609) [<https://perma.cc/5YE9-VNM4>] (including numerous crime-based exceptions to non-compliance with detainers).

<sup>197</sup> Memorandum from Colby Staysa, Captain, Alameda Cty. Sheriff’s Office, to Det. & Corr. Pers. (May 21, 2014) [hereinafter Alameda Memorandum], [http://libguides.law.du.edu/ld.php?content\\_id=34432481](http://libguides.law.du.edu/ld.php?content_id=34432481) [<https://perma.cc/7DEK-CN8V>]; see also Cook Ordinance, *supra* note 196 (allowing no compliance with detainers whatsoever, absent written agreement for reimbursement of costs); Walla Walla Cty. Sheriff’s Office, Special Order No. 2014-002 (Apr. 29, 2014), [http://libguides.law.du.edu/ld.php?content\\_id=34437104](http://libguides.law.du.edu/ld.php?content_id=34437104) [<https://perma.cc/3GVN-RUMM>] (ordering the Walla Walla County Sheriff’s Office to cease holding individuals in custody “when the only authority for such custody is a request contained in a DHS ICE immigration detainer” unless there is “independent information” from a law enforcement agency establishing “sufficient legal basis for detention, such as probable cause or a confirmed warrant”); CTY. SHERIFFS OF COLO., WHAT AUTHORITY DO SHERIFFS HAVE RELATING TO IMMIGRATION LAW? 1 (Dec. 2016), [http://libguides.law.du.edu/ld.php?content\\_id=34434218](http://libguides.law.du.edu/ld.php?content_id=34434218) [<https://perma.cc/SP5Z-SELL>] (“Outside of

decisions now firmly establishes that the federal government cannot require jurisdictions to comply with detainers.<sup>198</sup> Courts have also made clear that holding someone on a detainer amounts to a new arrest that must comply with the Constitution.<sup>199</sup>

In addition, many jurisdictions have implemented policies prohibiting detention based not only on immigration detainers but also on administrative immigration warrants for arrest. The Princeton Police Department, for example, has a General Order prohibiting police from “arrest[ing] or otherwise detain[ing] persons” based on an ICE administrative warrant contained in the NCIC database.<sup>200</sup> An administrative arrest warrant is a document issued by an ICE official stating that the officer has determined there is probable cause to believe that an individual is subject to removal.<sup>201</sup> Unlike criminal arrest warrants, administrative arrest warrants are neither issued by a judge nor based on sworn testimony, and the statute and regulation that

legally recognized exigent circumstances, we cannot hold persons in jail at the request of a local police officer or a federal agent. To do so, would violate the 4th Amendment to the US Constitution.”); Karl S. Leonard, *A Special Message from Sheriff Karl Leonard*, CHESTERFIELD CTY. SHERIFF’S OFFICE (Oct. 12, 2015), [http://libguides.law.du.edu/ld.php?content\\_id=34436987](http://libguides.law.du.edu/ld.php?content_id=34436987) [<https://perma.cc/7SK7-2A7X>] (explaining that “an ICE detainer request is not issued by the court” and therefore “is not a legal document allowing the Sheriff’s Office to legally detain an inmate for additional time unrelated to the original criminal charge”); Alameda Memorandum, *supra* (declaring that the Sheriff’s Office would henceforth decline immigration detainers from ICE, and distinguishing between “an arrest warrant signed by a judge, and an immigration detainer signed by an ICE Agent”).

<sup>198</sup> See *supra* notes 145–146 and accompanying text.

<sup>199</sup> See Secure Communities Memo, *supra* note 149, at 2 n.1 (citing cases for this proposition).

<sup>200</sup> Princeton, N.J. Police Dep’t, General Order, Enforcement of Immigration Laws 3 (Nov. 11, 2013) [hereinafter Princeton PD General Order], [http://libguides.law.du.edu/ld.php?content\\_id=34435940](http://libguides.law.du.edu/ld.php?content_id=34435940) [<https://perma.cc/2H8H-ZRHT>] (“Officers shall not arrest or otherwise detain persons who are entered in the NCIC/SCIC system by [ICE] unless the entry is for an actual criminal arrest warrant . . . . An NCIC/SCIC immigration status warning hit is not an arrest warrant and as such, officers have no authority to detain or arrest on the basis of an immigration status warning.”); see also Hartford Ordinance, *supra* note 190, § 2-928 (“Hartford police officers shall not make arrests or detain individuals based on administrative warrants for removal entered by ICE into the National Crime Information Center database.”); GRAND ISLE CTY. SHERIFF’S DEP’T, FAIR AND IMPARTIAL POLICING POLICY ¶ 5 (2016), [http://libguides.law.du.edu/ld.php?content\\_id=34437064](http://libguides.law.du.edu/ld.php?content_id=34437064) [<https://perma.cc/LRZ9-CEGH>] (“Administrative warrants, immigration detainers, and requests for notification issued by Immigration and Customs Enforcement (ICE) have not been reviewed by a neutral magistrate and do not have the authority of a judicial warrant. Therefore, Grand Isle County Sheriff’s Department members shall not comply with such requests.”) (internal quotation marks omitted); NEW ORLEANS POLICE DEP’T, OPERATIONS MANUAL, ch. 41.6.1, ¶¶ 15–16 (Sept. 25, 2016) [hereinafter NOPD POLICY], [http://libguides.law.du.edu/ld.php?content\\_id=34434807](http://libguides.law.du.edu/ld.php?content_id=34434807) [<https://perma.cc/6LJ4-AL6A>] (providing that “members shall take no action against an individual in response to an ICE administrative warrant” but allowing for execution of *criminal* warrants).

<sup>201</sup> FORM I-200 WARRANT, *supra* note 125.

mention these warrants identify no standard of proof for their issuance.<sup>202</sup> Until March 2017, DHS did not even require ICE officials to obtain an administrative warrant before issuing a detainer.<sup>203</sup> The lack of judicial and constitutional safeguards for administrative arrest warrants arguably render the federal government’s reliance on them constitutionally suspect.<sup>204</sup> But even if they properly authorize ICE to conduct an arrest, they do not necessarily authorize local authorities to do so.<sup>205</sup>

### C. Refusing ICE Access to Jails

Another way in which local jurisdictions have protected immigrants is by declining to let ICE agents enter their local jails. Indeed, the CAP program introduced in Part I relied on local jail access to interview and deport inmates held in local custody.<sup>206</sup> Information obtained from in-person interviews of inmates is also significant for the Secure Communities program, as it supplements data available through the fingerprint-sharing function.

Limiting ICE access to jails was a critical part of New York City’s effort to disentangle local law enforcement from ICE. On February 14, 2015, immigration authorities were shut out of the New York City jail at Riker’s Island pursuant to New York City Local Law 58, which prohibited federal officials from “maintain[ing] an office or quarters on land over which the [Department of Corrections] exercises jurisdiction, for the purpose of investigating possible violations of civil immigration law . . . .”<sup>207</sup>

<sup>202</sup> See 8 U.S.C. § 1226(a) (2012); 8 C.F.R. § 287.5(e)(3) (2017).

<sup>203</sup> ICE POLICY 10074.2, *supra* note 129, ¶ 2.4.

<sup>204</sup> See *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249, 276 (D. Conn. 2008) (finding an ICE detainer was a “warrantless” arrest because its validity had not been inspected by a “neutral magistrate [or] . . . executive official”); see also *United States v. Toledo*, 615 F. Supp. 2d 453, 455, 457 n.2 (S.D. W. Va. 2009) (treating ICE warrant as invalid because it could not be executed by local law enforcement officials); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1252–53 (E.D. Wash. 2017), *appeal dismissed as moot sub nom. Sanchez Ochoa v. Campbell*, 716 Fed. App’x 741 (9th Cir. 2018) (noting infirmities in administrative warrant in that it was not issued by a neutral official and provided no factual details to support probable cause determination).

<sup>205</sup> The Supreme Court has noted that administrative immigration arrest warrants are “executed by federal officers who have received training in the enforcement of immigration law.” *Arizona v. United States*, 567 U.S. 387, 408 (2012) (citing 8 C.F.R. §§ 241.2(b), 287.5(e)(3) (2012)).

<sup>206</sup> See, e.g., Letter from Jim McDonnell, Sheriff, Cty. of L.A., to Bd. of Supervisors, Cty. of L.A. (Sept. 22, 2015), [http://libguides.law.ucla.edu/ld.php?content\\_id=16697631](http://libguides.law.ucla.edu/ld.php?content_id=16697631) [<https://perma.cc/PLA2-35CM>] (describing a policy under which ICE would be permitted to interview certain jail inmates and “allowed access to all inmates” during the release process); Vanessa Rancano, *Fresno Sheriff’s ICE Partnership May Give a Glimpse of Trump-Era Deportations*, KQED NEWS (Mar. 3, 2017), <https://www.kqed.org/news/2017/03/03/fresno-sheriffs-ice-partnership-may-give-a-glimpse-of-trump-era-deportations/> [<https://perma.cc/H43B-ETTV>] (describing partnership between Fresno Sheriff and ICE that allows for interviews of immigrants in the jail).

<sup>207</sup> N.Y.C., N.Y., Local Law No. 58, § 4 (Nov. 14, 2014), [http://libguides.law.du.edu/ld.php?content\\_id=35216927](http://libguides.law.du.edu/ld.php?content_id=35216927) [<https://perma.cc/878M-V6JJ>]; see also Mayor Bill de Blasio Signs into

Similar measures are now in place in other jurisdictions. For example, in Cook County, Illinois and Richmond, California ICE agents are not allowed to enter the local jails without a criminal warrant or other legitimate law enforcement purpose other than civil immigration enforcement.<sup>208</sup> In the District of Columbia, local law enforcement may not provide ICE “an office, booth, or any facility or equipment for a generalized search of or inquiry about inmates . . . .”<sup>209</sup> Santa Clara, California will not allow ICE agents to enter their county jails for “investigative interviews or other purposes . . . .”<sup>210</sup>

And, although not an absolute bar to jail access, some policies have attempted to create a procedural firewall between noncitizens and federal immigration authorities by requiring a *Miranda*-type warning in the event ICE seeks to interview inmates. As one example, the California TRUTH Act requires inmates be provided with a “written consent form” and be given the opportunity to decline an ICE interview or have a representative present before proceeding.<sup>211</sup> These sorts of protections help fill a gap created by

Law Bills to Dramatically Reduce New York City’s Cooperation with U.S. Immigration and Customs Enforcement Deportations, NYC.GOV (Nov. 14, 2014), <http://www1.nyc.gov/office-of-the-mayor/news/520-14/mayor-bill-de-blasio-signs-law-bills-dramatically-reduce-new-york-city-s-cooperation-with/0> [<https://perma.cc/5WXE-FW7R>].

<sup>208</sup> Cook Ordinance, *supra* note 196 (“Unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes . . . .”); RICHMOND POLICE DEP’T, POLICY MANUAL ¶ 428.2.4 (Aug. 2013), [http://libguides.law.du.edu/ld.php?content\\_id=34433110](http://libguides.law.du.edu/ld.php?content_id=34433110) [<https://perma.cc/TK4A-UBJ8>] (prohibiting ICE from accessing holding facilities without “federal warrant or order signed by a judge” and prohibiting access to police booking records without supervisor’s authorization); *see also* ORLEANS PARISH SHERIFF’S OFFICE, IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) PROCEDURES (June 21, 2013) [hereinafter ORLEANS PARISH POLICY], [http://libguides.law.du.edu/ld.php?content\\_id=34434891](http://libguides.law.du.edu/ld.php?content_id=34434891) [<https://perma.cc/BN2N-8KHK>] (“Absent a criminal warrant or court order transferring custody, no ICE agent shall be permitted into the secure area of the Intake and Processing Center.”).

<sup>209</sup> D.C. Act 19-379 (June 15, 2012), [http://libguides.law.du.edu/ld.php?content\\_id=34434376](http://libguides.law.du.edu/ld.php?content_id=34434376) [<https://perma.cc/DEF4-KHH8>].

<sup>210</sup> Santa Clara Cty., Cal., Policy Res. No. 2011-504, Exhibit A, § 3.54 (Oct. 18, 2011) [hereinafter 2011 Santa Clara Policy], [http://libguides.law.du.edu/ld.php?content\\_id=34432167](http://libguides.law.du.edu/ld.php?content_id=34432167) [<https://perma.cc/E2GV-QV8W>] (mandating that ICE agents “shall not be given access to individuals or be allowed to use County facilities for investigative interviews or other purposes”).

<sup>211</sup> A.B. 2792, ch. 768, 2015–16 Reg. Sess. (Cal. 2016), [http://libguides.law.du.edu/ld.php?content\\_id=34433572](http://libguides.law.du.edu/ld.php?content_id=34433572) [<https://perma.cc/N832-HKMJ>]; *see also* D.C. Act 19-379, *supra* note 209, sec. 2, § 7(d)(1) (prohibiting the District from “permit[ting] an ICE agent to conduct an individualized interview of an inmate without giving the inmate an opportunity to have counsel present”); D.C., Mayor’s Order No. 2011-174 (Oct. 19, 2011), [http://libguides.law.du.edu/ld.php?content\\_id=34434367](http://libguides.law.du.edu/ld.php?content_id=34434367) [<https://perma.cc/WA3P-XLBB>] (requiring, prior to interview of inmate by ICE, “a disclosure to the inmate that all information provided to federal agents, including ICE agents, may be used in a criminal, immigration, deportation, or other collateral cases”); ORLEANS PARISH POLICY, *supra* note 208 (requiring as precondition to ICE interviews of inmates held by the sheriff that ICE “notify the subject inmate’s attorney, provide a reasonable opportunity for counsel to be

federal court decisions extending the booking exception for *Miranda* to questioning by ICE agents—even if the information elicited is inculpatory—so long as there is an administrative purpose to the questioning.<sup>212</sup>

#### D. Limiting Disclosure of Sensitive Information

Many sanctuary jurisdictions have sought to impose limits on the unnecessary sharing of sensitive information about their residents. Sensitive information may include citizenship and immigration status as well as other information that residents would be fearful of being disclosed to third parties.<sup>213</sup>

Two types of limitations on the sharing of sensitive information appear in the local policies we studied. First, some jurisdictions limit the sharing of confidential information about residents by city or county officials, including law enforcement, to encourage residents to feel safer when accessing local services or interacting with local government authorities. These limitations can encompass information about citizenship or immigration status, but often are not limited to such.<sup>214</sup> Hartford’s restriction on disclosure of “confidential information,” for example, encompasses an individual’s sexual orientation, status as a victim of domestic violence or sexual assault, status as a crime witness, receipt of public assistance, as well as immigration status and “all information contained in any individual’s income tax records.”<sup>215</sup> Los Angeles takes a functional approach, protecting personally identifying information, described as information the City possess which could allow someone to determine citizenship or immigration status.<sup>216</sup>

Second, local jurisdictions have established policies declining to provide information in response to requests by ICE about the release dates of

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present during the interview, and certify to OPSO that this notice and opportunity has occurred”); PHILA. DEP’T OF PRISONS, INMATE CONSENT FORM—ICE INTERVIEW (on file with authors).

<sup>212</sup> See Anjana Malhotra, *The Immigrant and Miranda*, 66 SMU L. REV. 277, 322–23 (2013) (discussing the overreliance on the subjective purpose of questioning in applying the booking exception to *Miranda*).

<sup>213</sup> See NAT’L IMMIGRATION LAW CTR., SAMPLE LANGUAGE FOR POLICIES LIMITING THE ENFORCEMENT OF IMMIGRATION LAW BY LOCAL AUTHORITIES 3, 6 (Nov. 2004), <http://www.aildownload.org/advo/NILC-SampleLanguageForPolicies.pdf> [<https://perma.cc/KN6W-DNQK>] (defining “confidential information” to include immigration status as well as sexual orientation, status as a victim of domestic violence or sexual assault, receipt of public benefits, and all information disclosed in income tax records).

<sup>214</sup> See, e.g., Hartford Ordinance, *supra* note 190, § 2-926 (defining “confidential information” to include immigration status); *id.* § 2-929 (limiting disclosure of “confidential information”); Seattle, Wash., Res. No. 31730, § 1(M) (Jan. 30, 2017) [hereinafter Seattle Resolution], [http://libguides.law.du.edu/ld.php?content\\_id=34437121](http://libguides.law.du.edu/ld.php?content_id=34437121) [<https://perma.cc/L24Q-TXTY>]; Los Angeles, Cal., Exec. Directive No. 20 (Mar. 21, 2017) [hereinafter L.A. Directive], [http://libguides.law.du.edu/ld.php?content\\_id=35642839](http://libguides.law.du.edu/ld.php?content_id=35642839) [<https://perma.cc/LE8K-MXGN>].

<sup>215</sup> Hartford Ordinance, *supra* note 190, § 2-926.

<sup>216</sup> L.A. Directive, *supra* note 214, at 4.

inmates held in local jails.<sup>217</sup> By not notifying immigration authorities about the time and place of an individual's release from custody, these jurisdictions are refusing to facilitate the individual's arrest by ICE. For example, a 2011 Cook County, Illinois ordinance directed that, without a "criminal warrant" or "legitimate law enforcement purpose . . . not related to the enforcement of immigration laws," County officials "shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty."<sup>218</sup> New York City similarly requires a judicial warrant as a requisite to notification of release dates.<sup>219</sup>

The Trump administration has claimed that policies limiting the exchange of information between local officials and federal immigration officials violate federal law, pointing to 8 U.S.C. § 1373.<sup>220</sup> But many of the policies that the administration has criticized on this basis do not limit the sharing of citizenship and immigration status information and thus fall outside the reach of § 1373. This is particularly true of policies that limit notification of release dates of individuals in local custody.<sup>221</sup>

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<sup>217</sup> These policies are sometimes a part of broader policies limiting compliance with ICE detainers, which also cover ICE's requests for prolonged detention of inmates otherwise entitled to release. See *supra* notes 195–205 and accompanying text (discussing resistance to complying with immigration detainers).

<sup>218</sup> Cook Ordinance, *supra* note 196; see also NYC Local Law 62, *supra* note 196, § 9-131(b)(1) (prohibiting notification in certain circumstances); ORLEANS PARISH POLICY, *supra* note 208 (prohibiting sheriffs from notifying ICE of release dates); 2011 Santa Clara Policy, *supra* note 210 ("County personnel shall not expend County time or resources responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates.").

<sup>219</sup> See NYC Local Law 62, *supra* note 196, § 9-131(b)(1).

<sup>220</sup> See *supra* note 186 and accompanying text; Sessions Remarks, *supra* note 52 (pointing to § 1373 in support of the claim that sanctuary jurisdictions "violate federal law").

<sup>221</sup> *Steinle v. City & Cty. of S.F.*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017). The court in *Steinle* explained that the restrictions of § 1373 are plain, and that "no plausible reading of [§ 1373's] 'information regarding . . . citizenship or immigration status' encompasses the release date of an undocumented inmate." *Id.* (quoting 8 U.S.C. § 1373(a)). Many other types of disentanglement likewise do not implicate § 1373's narrow mandate because they do not address "information regarding . . . citizenship or immigration status." *Id.* (internal quotation marks omitted). For examples, policies that prohibit police from investigating the civil immigration status of local residents, see *supra* notes 181–194 and accompanying text, do not violate § 1373 because they regulate the circumstances in which officers may *inquire* into citizenship and immigration status, not whether they can maintain or voluntarily share that information with federal authorities. Likewise, policies that determine whether local law enforcement should detain inmates beyond their release date at the request of federal immigration officials, see *supra* notes 195–205 and accompanying text, do not implicate § 1373 because such policies are directed at whether local law enforcement may take action, i.e., hold someone based on suspected immigration status, rather than at communication with ICE. See *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 731 (Ct. App. 2009) (holding that LAPD Special Order Number 40 "addresses only the initiation of police action and arrests for illegal entry," and § 1373 "does not address the initiation of police action or arrests for illegal entry; it addresses only communications with ICE").

Furthermore, § 1373 arguably amounts to an unconstitutional intrusion on state sovereignty.<sup>222</sup> At a minimum, it must be construed narrowly to avoid unduly infringing on state sovereignty.<sup>223</sup> In *City of New York v. United States*, the only federal court decision to directly address § 1373’s constitutionality, the Second Circuit rejected New York City’s facial challenge to § 1373 but acknowledged that applying § 1373 to bar “generalized confidentiality policies that are necessary to the performance of legitimate municipal functions” could run afoul of the Tenth Amendment.<sup>224</sup> Following the decision, the City Mayor issued precisely the kind of “generalized confidentiality policy” the court suggested would be permissible,<sup>225</sup> and as discussed earlier, other jurisdictions have followed suit.<sup>226</sup>

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<sup>222</sup> See Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 159–64 (2012) (arguing that § 1373 imposes information-sharing requirements that violate Tenth Amendment’s anti-commandeering principle); see also Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities Is Unconstitutional*, WASH. POST (Jan. 26, 2017), [https://www.washingtonpost.com/news/voikh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm\\_term=.3db1ce3a9223](https://www.washingtonpost.com/news/voikh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.3db1ce3a9223) [<https://perma.cc/65MX-UXB8>] (arguing that § 1373 violates the Tenth Amendment because it is an attempt by the federal government “to prevent states from controlling their employees’ use of information that ‘is available to them only in their official capacity’”). The City and County of San Francisco, in its lawsuit challenging President Trump’s executive order threatening to defund sanctuary jurisdiction, has argued that § 1373 is facially unconstitutional. S.F. Complaint, *supra* note 57, at 20 (arguing § 1373 cannot be constitutionally applied to prohibit confidentiality requirements in San Francisco’s Sanctuary City law “enacted to further legitimate local interests grounded in the basic police powers of local government and related to public health and safety”).

<sup>223</sup> See Letter from Christopher N. Lasch et al., Assoc. Professor, Univ. of Denver Sturm Coll. Of Law, to Bob Goodlatte, Chairman, Comm. on the Judiciary & Zoe Lofgren, Ranking Member, Subcomm. on Immigration & Border Sec. 6–10 (Sept. 26, 2016), <http://docs.house.gov/meetings/JU/JU01/20160927/105392/HRG-114-JU01-20160927-SD003.pdf> [<https://perma.cc/BDT7-BPNZ>] (arguing § 1373 must be “construed narrowly” to avoid “serious constitutional concerns”).

<sup>224</sup> *City of New York v. United States*, 179 F.3d 29, 36–37 (2d Cir. 1999) (emphasis added). The Second Circuit explained that New York’s policy, far from being a generalized confidentiality provision, “single[d] out a particular federal policy for non-cooperation while allowing City employees to share freely the information in question with the rest of the world.” *Id.* at 37.

<sup>225</sup> N.Y.C., N.Y., Exec. Order No. 41 (Sept. 17, 2003), [http://libguides.law.du.edu/ld.php?content\\_id=34436585](http://libguides.law.du.edu/ld.php?content_id=34436585) [<https://perma.cc/AX85-X8S4>]; McCormick, *supra* note 14, at 188–89; see also Winnie Hu, *Mayor Widens Privacy Rights for Immigrants*, N.Y. TIMES (Sept. 18, 2003), <http://www.nytimes.com/2003/09/18/nyregion/mayor-widens-privacy-rights-for-immigrants.html> [<https://perma.cc/CCE2-SHL4>] (discussing Mayor Bloomberg’s 2003 executive order).

<sup>226</sup> See *supra* note 214 (collecting policies); see also New Haven Dep’t of Police Serv., General Order No. 06-2, Disclosure of Status Information: Policies and Procedures ¶ III.B (Sept. 22, 2006) [hereinafter New Haven PD Order], [http://libguides.law.du.edu/ld.php?content\\_id=34434251](http://libguides.law.du.edu/ld.php?content_id=34434251) [<https://perma.cc/TC76-62RY>] (justifying non-disclosure policy on the ground that “[o]btaining pertinent information may in some cases be difficult or impossible if some expectation of confidentiality is not preserved, and preserving confidentiality in turn requires that the department regulate the use of such information by its employees”); S.F. Complaint, *supra* note 57, at 20 (arguing § 1373 cannot be constitutionally applied to prohibit confidentiality requirements in San Francisco’s Sanctuary City law “enacted to further legitimate local interests grounded in the basic police powers of local government and related to public health and safety”).

In addition to the examples discussed above, Santa Ana, California recently passed an ordinance with broad confidentiality protections distinguishable from the problematic policy at issue in *City of New York*. The Santa Ana City Council decreed that sensitive information would not be disclosed unless required by law, but the ordinance defines “sensitive information” broadly to include:

any information that may be considered sensitive or personal by nature, including a person’s status as a victim of domestic abuse or sexual assault; status as a victim or witness to a crime generally; citizenship or immigration status; status as a recipient of public assistance; sexual orientation; biological sex or gender identity; or disability.<sup>227</sup>

Local confidentiality policies such as Santa Ana’s are particularly important in the Trump era. The Trump administration has abandoned policies previously in place under the Obama administration that allowed certain immigrants to be considered for a favorable exercise of prosecutorial discretion, including victims, witnesses, and those who had experienced violations of their civil rights, employment, or housing rights.<sup>228</sup> These and other individuals who have important reasons to interact with local government officials will no longer receive protection from deportation if they end up in the hands of ICE.

### *E. Precluding Participation in Joint Operations with Federal Immigration Enforcement*

A fifth type of sanctuary policy limits local participation in joint operations with federal immigration officials. Joint operations are collaborative law enforcement efforts in which federal law enforcement relies on local law enforcement to provide boots on the ground. When joint operations target immigrants for deportation, local law officials become participants in the federal government’s deportation efforts.

Local law enforcement is under renewed pressure in the Trump era to designate local officers to enforce immigration law through a common type

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<sup>227</sup> Santa Ana, Cal., Ordinance No. NS-2908 §§ 3–4, 9 (Jan. 17, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=34432113](http://libguides.law.du.edu/ld.php?content_id=34432113) [<https://perma.cc/2HEA-QGU2>]. The limitation applies to all city agencies and employees, including law enforcement.

<sup>228</sup> See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All Field Office Dirs. et al. (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf> [<https://perma.cc/7GYJ-N2NH>].



of joint operation, 287(g) agreements.<sup>229</sup> Sanctuary jurisdictions have responded by declaring their intent not to participate in this program.<sup>230</sup> For example, Seattle’s “Welcoming City” resolution, which was adopted following President Trump’s inauguration, clarifies that the city “will reject any offer from the federal government to enter into a Section 287(g) agreement.”<sup>231</sup> In 2012 the town of Amherst, Massachusetts adopted a similar policy that explicitly prohibits 287(g) agreements.<sup>232</sup> The New York State Attorney General’s Office has also distributed a “model sanctuary” policy that, among other provisions, provides that local law enforcement “shall not perform the functions of a federal immigration officer or otherwise engage in the enforcement of federal immigration law—whether pursuant to § 1357(g) of Title 8 of the United States Code or under any other law, regulation, or policy.”<sup>233</sup>

Beyond 287(g) agreements, there are other types of joint operations that may involve immigration enforcement as well, such as when local police team up with HSI’s “National Gang Unit” or the “National Fugitive Operations Team.”<sup>234</sup> Some jurisdictions have barred local participation in such joint operations. Often, such policies prohibit local criminal justice

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<sup>229</sup> See DORIS MEISSNER ET AL., *MIGRATION POL’Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 112–13 (Jan. 2013), <https://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery> [<https://perma.cc/N3DK-Z4NH>] (describing DHS partnerships with local law enforcement).

<sup>230</sup> 287(g) agreements cannot be entered without local consent. See 8 U.S.C. § 1357(g)(9) (2012) (“Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.”).

<sup>231</sup> Seattle Resolution, *supra* note 214, § 1(B). Moreover, the resolution requires the Seattle Police Department (“SPD”) and the Law Department to examine the city’s “mutual aid agreements” with other jurisdictions and propose “amendments to the City’s mutual aid agreements with jurisdictions that have not explicitly rejected offers to enter into a Section 287(g) agreement to be consistent with the SPD and The City of Seattle’s position related to focusing its limited law enforcement resources on criminal investigations rather than civil immigration law violations.” *Id.* § 1(C).

<sup>232</sup> Amherst, Mass., Article 29. Petition Article—Bylaw Regarding Sharing of Information with Federal Agencies (May 21, 2012) [hereinafter Amherst Resolution], [http://libguides.law.du.edu/ld.php?content\\_id=34434966](http://libguides.law.du.edu/ld.php?content_id=34434966) [<https://perma.cc/PBM5-SV4P>] (providing that the Town of Amherst “shall not participate in federal law enforcement programs relating to immigration enforcement, including but not limited to, Secure Communities, and cooperative agreements with the federal government under [which] town personnel participate in the enforcement of immigration laws, such as those authorized by Section 287(g) of the Immigration and Nationality Act”).

<sup>233</sup> ERIC T. SCHNEIDERMAN, N.Y. OFFICE OF THE ATTORNEY GEN., *GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS* 9 (Jan. 2017, & Supp. Mar. 2017), [http://libguides.law.du.edu/ld.php?content\\_id=35849877](http://libguides.law.du.edu/ld.php?content_id=35849877) [<https://perma.cc/X7FD-2JSJ>].

<sup>234</sup> See *supra* notes 157–160 and accompanying text (introducing two joint operation programs that rely on coordination between federal immigration officials and local law enforcement officers).

agencies from participating in “civil” immigration enforcement,<sup>235</sup> but some jurisdictions’ negative experiences with joint operations have pushed them even further.

In Oakland, California, for example, one of the nation’s early sanctuary city resolutions called on city employees to refrain from providing assistance or cooperation “relating to the alleged violations of the civil provisions of the immigration laws.”<sup>236</sup> In 2007, Oakland reaffirmed its “City of Refuge” status through a resolution condemning the immigration raids taking place under the administration of President George W. Bush.<sup>237</sup> The 2007 resolution maintained the same focus on disentangling city officials from civil immigration enforcement while explicitly allowing joint operations “in matters involving criminal activity and the protection of public safety.”<sup>238</sup> A resolution passed in the wake of the 2016 presidential election likewise maintained a distinction between civil and criminal enforcement, condemning cooperation with respect to the former but not the latter.<sup>239</sup>

Six months into the Trump presidency, however, Oakland changed course. The City Council resolved to “immediately” cancel a memorandum of understanding with HSI that allowed local officers to be designated as “U.S. Customs Title 19 Task Force Officers.”<sup>240</sup> In support of the resolution canceling the MOU, the council cited the Trump administration’s plans for mass deportation and ICE’s “willing[ness] to lie . . . to their local law en-

<sup>235</sup> In New Mexico, for example, the Doña Ana County Commissioners passed a resolution stating that “no County funds or resources” would be used for immigration enforcement, and specifically prohibiting “[a]ssisting or cooperating, in one’s official capacity,” with federal operations “relating to alleged violations of the civil provisions of the federal immigration law.” Doña Ana Cty., N.M., Bd. of Comm’rs, Res. No. 2014-91 (Sept. 9, 2014), [http://libguides.law.du.edu/ld.php?content\\_id=34435968](http://libguides.law.du.edu/ld.php?content_id=34435968) [<https://perma.cc/G3KX-ETQC>]; see also Boulder Ordinance, *supra* note 17 (prohibiting use of city funds to “assist with any investigation into a person’s immigration status” or “assist in the detention of any person based on a person’s suspected immigration status”); Office of Wash. Governor Jay Inslee, Exec. Order No. 17-01 ¶ 8 (Feb. 23, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=34437156](http://libguides.law.du.edu/ld.php?content_id=34437156) [<https://perma.cc/A7WC-LBSL>] (broadly prohibiting use of “agency or department monies, facilities, property, equipment, or personnel for the purpose of targeting or apprehending persons for violation of federal civil immigration laws”); NOPD POLICY, *supra* note 200, ¶¶ 6, 7 (“In the event a member receives a request to support or assist in a civil immigration enforcement action he or she shall report the request to his or her supervisor, who shall decline the request and document the declination in an interoffice memorandum to the Superintendent through the chain of command.”).

<sup>236</sup> Oakland, Cal., Res. No. 63950, at 2–3 (July 8, 1986), [http://libguides.law.du.edu/ld.php?content\\_id=39060312](http://libguides.law.du.edu/ld.php?content_id=39060312) [<https://perma.cc/9C2R-6YE7>].

<sup>237</sup> Oakland, Cal., Res. No. 80584, at 2 (May 15, 2007) [hereinafter Oakland Resolution], [http://libguides.law.du.edu/ld.php?content\\_id=34432505](http://libguides.law.du.edu/ld.php?content_id=34432505) [<https://perma.cc/4479-EA2V>].

<sup>238</sup> *Id.*

<sup>239</sup> Oakland, Cal., Res. No. 86498, at 2 (Nov. 29, 2016), [http://libguides.law.du.edu/ld.php?content\\_id=39018764](http://libguides.law.du.edu/ld.php?content_id=39018764) [<https://perma.cc/V7XJ-8TXC>].

<sup>240</sup> Oakland, Cal., Res. No. 86860, at 1–2 (July 18, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=39019055](http://libguides.law.du.edu/ld.php?content_id=39019055) [<https://perma.cc/2EAS-P5DH>].

forcement partners (e.g. Santa Cruz Police Department).” The last reference was to a February 2017 joint operation between Santa Cruz officials and HSI.<sup>241</sup>

Oakland soon determined to go beyond even this step. Although it had been directed to terminate its MOU with HSI, on August 16, 2017, the Oakland Police Department provided traffic control for an HSI raid that resulted in the arrest of members of a Guatemalan family in West Oakland.<sup>242</sup> Following a public outcry, in 2018 the City Council reframed Oakland’s policy to eliminate all cooperation with immigration enforcement, whether related to civil or criminal violations.<sup>243</sup> Oakland’s Mayor Libby Schaaf also took affirmative steps to warn residents of an impending ICE raid in February 2018.<sup>244</sup>

Santa Cruz adopted a resolution in 2007, declaring that “to the fullest extent possible by law, the City of Santa Cruz shall not cooperate with ICE and shall prohibit the use of City funds or resources for any Federal immigration enforcement.”<sup>245</sup> On the eve of Trump’s inauguration, the city council reaffirmed that no city resources or assistance would be used to aid federal immigration enforcement efforts, and explicitly prohibited local officials from “assisting with or participating in any immigration enforcement operation or joint operation . . . .”<sup>246</sup> The City soon learned that would be insufficient when the Santa Cruz Police Department’s joint raid with ICE in

<sup>241</sup> See *supra* notes 161–162 and accompanying text.

<sup>242</sup> Memorandum from Brian M. Hofer, Chair, Privacy Advisory Comm’n, City of Oakland, Cal., to Privacy Advisory Comm’rs (Oct. 5, 2017), [https://oaklandprivacy.org/wp-content/uploads/2017/10/PAC\\_-\\_ICE\\_Raid\\_Memo.pdf](https://oaklandprivacy.org/wp-content/uploads/2017/10/PAC_-_ICE_Raid_Memo.pdf) [<https://perma.cc/5M4A-HVSC>] (describing events of August 16).

<sup>243</sup> Oakland, Cal., Res. No. 87036 (Jan. 16, 2018), [http://libguides.law.du.edu/ld.php?content\\_id=39153876](http://libguides.law.du.edu/ld.php?content_id=39153876) [<https://perma.cc/F7HD-TH35>] (resolving that “OPD shall not provide law enforcement assistance, including traffic support, to ICE, including any subdivision of ICE, in any capacity, except to respond to a public safety emergency”). The California Values Act also limits local law enforcement participation in joint task forces if “the primary purpose of the joint law enforcement task force is [] immigration enforcement.” CAL. GOV’T CODE § 7284.6 (West Supp. 2018).

<sup>244</sup> This step by Oakland’s Mayor reportedly caused the Department of Justice to investigate possible obstruction-of-justice charges against Mayor Schaaf and set off a heated media-media exchange between Attorney General Sessions and Mayor Schaaf, but so far has not resulted in any action by federal authorities. See Thomas Fuller, *Who Is Libby Schaaf, the Oakland Mayor Who Warned of Immigration Raids?*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/us/oakland-mayor-libby-schaaf.html> [<https://perma.cc/JNY3-YKFL>]; Kimberly Veklerov et al., *Attorney General Blasts Oakland Mayor Schaaf, She Fires Back*, SFGATE (Mar. 7, 2018, 8:48 PM), <https://www.sfgate.com/bayarea/article/Jeff-Sessions-to-Oakland-Mayor-Libby-Schaaf-12735135.php> [<https://perma.cc/KA98-SPAW>].

<sup>245</sup> Santa Cruz, Cal., Res. No. NS-27,504 (Apr. 10, 2007), [http://libguides.law.du.edu/ld.php?content\\_id=38569294](http://libguides.law.du.edu/ld.php?content_id=38569294) [<https://perma.cc/5EVU-UWFM>].

<sup>246</sup> Santa Cruz, Cal., Res. No. NS-29,187 (Jan. 10, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=39154376](http://libguides.law.du.edu/ld.php?content_id=39154376) [<https://perma.cc/K3A3-7P4R>].

February 2017, less than a month after the city council's resolution, resulted in the deportation of community members with no gang ties.<sup>247</sup> This prompted the city council to quickly enact an ordinance specifically prohibiting such joint operations.<sup>248</sup>

### III. LEGAL AND POLICY RATIONALES FOR "SANCTUARY"

The imminent threat of deportation has caused more localities to move toward implementing more of the protective policies discussed in Part II.<sup>249</sup> In addition, the administration's attacks on sanctuary cities appear to have prompted local leaders to articulate more precisely their reasons for maintaining such policies.<sup>250</sup> In Part II we described some of the different policies localities have adopted to distance their employees from federal immigration enforcement efforts.<sup>251</sup> Part III analyzes the legal and policy rationales for these immigrant protective criminal justice policies.

In identifying the rationales that support sanctuary policies, we focus on expressly articulated rationales found in the language of the policies themselves, including in their preambles, whereas clauses, or findings sections.<sup>252</sup> We chose this methodology for two reasons. First, sanctuary policies themselves have an important expressive function.<sup>253</sup> They are statements made by local officials to their communities, and the words that are used indicate the expressive function being served. Just as there is a meaningful difference between a jurisdiction that explicitly declares itself a "sanctuary" and one that does not,<sup>254</sup> there is a meaningful difference be-

<sup>247</sup> See *supra* notes 161–162 and accompanying text.

<sup>248</sup> Santa Cruz, Cal., Ordinance No. 2017-06 (Mar. 14, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=39154393](http://libguides.law.du.edu/ld.php?content_id=39154393) [<https://perma.cc/FPU8-39E6>].

<sup>249</sup> See *supra* notes 181–248 and accompanying text.

<sup>250</sup> See *infra* notes 259–356 and accompanying text. See generally Eagly, *supra* note 180 (describing common policy rationales for what she terms "immigrant protective policies" in the criminal justice system).

<sup>251</sup> See *supra* notes 181–248 and accompanying text.

<sup>252</sup> See, e.g., Cook Ordinance, *supra* note 196 (justifying its detainer policy in a whereas clause concerned with confusion about "the proper boundaries of the relationship between local law enforcement" and ICE); Seattle Resolution, *supra* note 214 (setting forth in the preamble and first "whereas" clause the rationale that the resolution would further inclusion and integration). We did not attempt to mine legislative histories or other contemporaneous materials to determine whether there were additional *sub rosa* rationales that were not expressed in the policies.

<sup>253</sup> See Rodríguez, *supra* note 6, at 605 (noting that jurisdictions with sanctuary laws make expressive claims by promoting a "self-conception as immigrant-friendly" and sanctuary laws constitute "critical integration measures"); Emily Ryo, *On Normative Effects of Immigration Law*, 13 STAN. J. C.R. & C.L. 95, 109 (2017) (arguing that ambivalence and conflict over immigration may lead the public to perceive immigration policies "not only as a source of reliable information about immigration and immigrants, but also as an embodiment of the community's consensus on immigrants' proper 'place' in society").

<sup>254</sup> See *supra* notes 17–22 and accompanying text.

tween a jurisdiction that prohibits its police from participating in immigration enforcement in order to conserve local criminal justice resources and another that does so in order to foster community trust. Second, stated rationales can materially inform what substantive policy provisions are adopted. For example, a sanctuary policy that is primarily motivated by a desire to encourage crime victims and witnesses to report crime may be susceptible to carve outs based on criminal history.<sup>255</sup> But if a locality's disentanglement policy is grounded in a commitment to diversity and inclusion, that may give stakeholders a stronger basis to argue against provisions that treat members of the community differently based on prior criminal history.<sup>256</sup>

Applying this approach, the six most significant policy rationales that emerged from our research are: (1) the conviction that localities (and not the federal government) should control their own criminal justice priorities and resources; (2) a desire to avoid unlawful arrests and detentions; (3) the concern that entangling police with immigration enforcement erodes trust among minority community members; (4) a commitment to preventing improper discrimination in policing based on race, ethnicity or national origin; (5) a desire to further diversity and inclusion; and (6) a wish to express disagreement with federal immigration policy. There are, of course, other policy rationales that would support a jurisdiction's decision to disentangle local law enforcement from immigration enforcement,<sup>257</sup> but we focus here on the most commonly invoked rationales for the policy types introduced in Part II.

In featuring expressed policy rationales, we acknowledge that there is not always a neat and discernible connection between the expressed rationales and the sanctuary policy actions taken. This can occur because multiple

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<sup>255</sup> See Cook Ordinance, *supra* note 196 (allowing detainer compliance in some cases involving serious or violent felony offenses); NYC Local Law 62, *supra* note 196 (including numerous crime-based exceptions to non-compliance with detainers).

<sup>256</sup> See Seattle Resolution, *supra* note 214 (prohibiting any participation by Seattle in 287(g) agreements and refusing compliance with detainer requests unless accompanied by a criminal warrant issued by a federal judge or magistrate).

<sup>257</sup> A desire to avoid family separation and economic disruption are examples of rationales that occur in some policies but are not developed in this Article. See, e.g., Multnomah Cty., Or., Res. No. 2013-032 (Apr. 4, 2013) [hereinafter Multnomah Resolution], [http://libguides.law.du.edu/ld.php?content\\_id=34436634](http://libguides.law.du.edu/ld.php?content_id=34436634) [<https://perma.cc/YA3X-CYWQ>] ("Multnomah County families are being separated and isolated by deportation, and in many cases, these removals are disrupting and damaging the lives and support networks of spouses, children and young adults who are US citizens."); King Cty., Wash., Ordinance No. 17706, § 1(A) (Dec. 10, 2013) [hereinafter King County Ordinance], [http://libguides/law.du.edu/ld.php?content\\_id=34437163](http://libguides/law.du.edu/ld.php?content_id=34437163) [<https://perma.cc/2F6T-653T>] (noting testimony concerning the "dislocation of families, the loss of jobs and housing, economic loss to families and the community, and harms to children" caused by immigration detainers); Berkeley, Cal., Res. No. 63,711-N.S. (May 22, 2007), [http://libguides.law.du.edu/ld.php?content\\_id=34432521](http://libguides.law.du.edu/ld.php?content_id=34432521) [<https://perma.cc/2PEM-R39K>] (noting separation of children from parents caused by ICE raids, and "increased climate of fear and intimidation among Latino families and students" caused by deportations).

rationales support a single policy action, or because the written document does not draw explicit connections between rationales and actions. Additionally, we recognize that, although we attempt to ascertain identifiable categories of rationales, there can be some slippage across the categories that we introduce.

Although the Trump administration has attempted to paint sanctuary cities as undermining public safety and defying the rule of law,<sup>258</sup> this Part reveals the sound legal principles and considered policy judgments that underlie the six common rationales that we outline here. Sheriffs, police chiefs, mayors, and governors have defended their sanctuary policies not only as legally and practically justified, but also as a necessary moral and ethical response to the administration's policies. Further, the Trump administration's reliance on white nationalist rhetoric has fostered greater awareness about the need for sanctuary policies that address discrimination and multiculturalism.

#### *A. Maintain Local Control Over Criminal Justice*

One common rationale cited by local policymakers for sanctuary policies is the idea that local criminal justice resources should be allocated based on local, not federal, priorities. This rationale is grounded in three principles: a distinction between criminal and immigration law, an understanding that immigration is a generally a federal responsibility, and the Tenth Amendment guarantee of freedom from federal commandeering of local resources.

As described earlier, cases dating back to the late nineteenth century have separated civil deportation law from criminal law and imposed strict scrutiny on subfederal regulation that discriminated on the basis of alienage.<sup>259</sup> This jurisprudence placed responsibility for immigration enforcement with the federal government and largely prevented states from treating citizens and noncitizens differently in the enforcement of criminal laws.<sup>260</sup>

The Supreme Court's landmark Tenth Amendment jurisprudence of the 1990s rounded out support for disentanglement policies. The Court's decisions in *New York v. United States*<sup>261</sup> and *Printz v. United States*<sup>262</sup> established that the federal government may not compel or coerce states into participating

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<sup>258</sup> See, e.g., Press Release 17-826, U.S. Dep't of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> [<https://perma.cc/2ZCZ-BBLU>].

<sup>259</sup> See *supra* notes 69–73 and accompanying text.

<sup>260</sup> See *supra* notes 69–73 and accompanying text.

<sup>261</sup> 505 U.S. 144 (1992).

<sup>262</sup> 521 U.S. 898 (1997).

in a federal regulatory program.<sup>263</sup> Today, these decisions support the prerogative of states to resist requests by federal authorities to detain community members for transfer to ICE or otherwise do the federal government’s bidding. For example, jurisdictions that have adopted “don’t police” policies barring their own officers from participating in immigration enforcement have insisted that enforcing immigration laws is the federal government’s responsibility.<sup>264</sup> San Francisco noted in adopting its “City and County of Refuge” ordinance in 1989 that state and local officials are under no obligation “to enforce the civil aspects of the federal immigration laws.”<sup>265</sup> Pittsburgh based its 2004 direction that police “[r]efrain from participating in the enforcement of federal immigration laws” on the rationale that immigration laws “are solely the responsibility of the federal government . . . .”<sup>266</sup> The same rationale has bolstered sanctuary policies that bar disclosure of sensitive information. In justifying its policy on nondisclosure of sensitive information, the City of New Haven, Connecticut declared that “[a] community member’s potential status as an undocumented immigrant has no relation to the mission or goals of the New Haven Police Department.”<sup>267</sup>

Relatedly, policies limiting compliance with detainers and administrative warrants have also been justified by the rationale of maintaining local autonomy over criminal justice resources. For local jurisdictions, the federal government’s attempts to press local officers into federal service conflict with their desire to preserve scarce resources for local priorities.<sup>268</sup> An ex-

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<sup>263</sup> See *id.* at 925 (holding that “the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs”); *New York*, 505 U.S. at 166 (noting that “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts”).

<sup>264</sup> Cook Ordinance, *supra* note 196; see also Santa Clara Cty., Cal., Res. No. 2010-316 (June 22, 2010) [hereinafter Santa Clara Resolution], [http://libguides.law.du.edu/ld.php?content\\_id=34432102](http://libguides.law.du.edu/ld.php?content_id=34432102) [<https://perma.cc/2WJD-FHF6>] (noting that “the enforcement of federal civil immigration law is the responsibility of the federal government and not of the County”).

<sup>265</sup> S.F. Ordinance, *supra* note 189. New York City similarly connected federal responsibility for immigration enforcement to its enactment of Executive Order 124. See NYC Exec. Order, *supra* note 189, at 3 (“Federal law places full responsibility for immigration control on the federal government. With limited exceptions, the City therefore has no legal obligation to report any alien to federal authorities. The executive order, in recognition of this lack of obligation and the importance of providing the services covered herein, requires City agencies to preserve the confidentiality of all information respecting law-abiding aliens to the extent permitted by law”).

<sup>266</sup> Pittsburgh, Pa., Bill No. 2004-0295 (Apr. 26, 2004) [hereinafter 2004 Pittsburgh Resolution], [http://libguides.law.du.edu/ld.php?content\\_id=34436690](http://libguides.law.du.edu/ld.php?content_id=34436690) [<https://perma.cc/9X9M-XZUR>].

<sup>267</sup> New Haven PD Order, *supra* note 226; see also NYC Exec. Order, *supra* note 189.

<sup>268</sup> See, e.g., Cook Ordinance, *supra* note 196 (“Cook County can no longer afford to expend taxpayer funds to incarcerate individuals who are otherwise entitled to their freedom”); 2010 Santa Clara Resolution, *supra* note 264 (noting that “in this time of economic difficulties, the Board of Supervisors remains committed to maximizing public safety, public health and vital services”); Multnomah Resolution, *supra* note 257 (noting that the “uncompensated detention of individuals

ample is the 2011 Cook County Ordinance, which created an absolute requirement that the sheriff decline any detainer request in the absence of a written agreement with federal officials guaranteeing reimbursement of the costs of compliance.<sup>269</sup> To date, the federal government has refused to reimburse local law enforcement for the significant costs associated with honoring detainees.<sup>270</sup>

Although the anti-commandeering argument was an obvious fit for justifying limits on street-level immigration policing by localities,<sup>271</sup> relatively few jurisdictions explicitly invoked it until the height of Secure Communities under the Obama administration in 2011 and then later under Trump.<sup>272</sup> Until then, there was little need to resort to the anti-commandeering argument because the federal government had not yet attempted to directly co-opt local law enforcement into immigration enforcement without localities' consent.

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in county jails, for violations of civil immigration laws, places an undue burden on the county” and that “unmitigated compliance with ICE detainees requests has the potential of further straining the resources of the Multnomah County Sheriff’s Office and occupying scarce and costly jail beds that should be reserved for those who pose the greatest threat to public safety”); *see also* Eagly, *supra* note 180, at 291–94 (discussing policies limiting entanglement due to budgetary constraints).

<sup>269</sup> Cook Ordinance, *supra* note 196; *see also* 2010 Santa Clara Resolution, *supra* note 264 (noting that “the enforcement of federal civil immigration law is the responsibility of the federal government and not of the County”); 2004 Pittsburgh Resolution, *supra* note 266 (requesting mayor to direct police to “[r]efrain from participating in the enforcement of federal immigration laws which are solely the responsibility of the federal government”) (emphasis in original).

<sup>270</sup> *See, e.g.*, California TRUST Act, *supra* note 27, § 1(B) (“State and local law enforcement agencies are not reimbursed by the federal government for the full cost of responding to a detainee, which can include, but is not limited to, extended detention time and the administrative costs of tracking and responding to detainees”); Phila., Pa., Exec. Order No. 1-14 (Apr. 16, 2014), [http://libguides.law.du.edu/ld.php?content\\_id=34436655](http://libguides.law.du.edu/ld.php?content_id=34436655) [<https://perma.cc/D5Z7-6L4D>] (noting that “the Secure Communities program shifts the burden of federal civil immigration enforcement onto local law enforcement, including shifting costs for detention of individuals in local custody who would otherwise be released”); Memorandum from R.A. Cuevas, Jr., Cty. Attorney, to Rebeca Sosa et al., Chairwoman, Bd. of Cty. Comm’rs, Miami-Dade Cty., Fla. (Dec. 3, 2013) [hereinafter Miami-Dade Resolution], [http://libguides.law.du.edu/ld.php?content\\_id=34434395](http://libguides.law.du.edu/ld.php?content_id=34434395) [<https://perma.cc/QF63-FSZC>] (reciting costs to Miami-Dade taxpayers of detainer compliance and pointing out that “the federal government does not directly reimburse Miami-Dade County” for those costs).

<sup>271</sup> *See* Gardner, *supra* note 6, at 331 (describing the “slate of immigrant sanctuary policies passed after 2001 and predicated on the Court’s interpretation of the Tenth Amendment in *Printz*”).

<sup>272</sup> Two early exceptions were Lawrence, Kansas and Milwaukee, Wisconsin. *See* Lawrence, Kan., Res. No. 6541 (Apr. 20, 2004), [http://libguides.law.du.edu/ld.php?content\\_id=34434777](http://libguides.law.du.edu/ld.php?content_id=34434777) [<https://perma.cc/MY2G-LN69>] (explicitly citing *Printz* in resolution affirming Lawrence’s “strong support for the rights of immigrants and oppos[ing] measures that single out individuals for legal scrutiny or enforcement activity based on their country of origin”); Milwaukee, Wis., File No. 031413 (Mar. 2, 2004), [http://libguides.law.du.edu/ld.php?content\\_id=34437224](http://libguides.law.du.edu/ld.php?content_id=34437224) [<https://perma.cc/5D5G-MJBL>] (noting the city’s opposition to “any unfunded federal mandates instructing local police to attempt to enforce the complex civil immigration laws of the U.S.”).



The Third Circuit’s 2014 decision in *Galarza v. Szalczyk* vindicated the claims of jurisdictions that had grounded anti-detainer policies in the Tenth Amendment.<sup>273</sup> The district court had declined to hold the county liable for U.S. citizen Ernesto Galarza’s detention, even though it was unsupported by probable cause because, in its view, detainers “impose[d] mandatory obligations on state or local law enforcement agencies . . . including municipalities, to follow such a detainer once it is received.”<sup>274</sup> The Third Circuit reversed.<sup>275</sup> Relying on *New York* and *Printz*, the court held that understanding “a federal detainer filed with a state or local [law enforcement agency] [as] a command to detain an individual on behalf of the federal government, would violate the anti-commandeering doctrine of the Tenth Amendment.”<sup>276</sup> Detainers, the court said, must therefore be understood as “only requests that state and local law enforcement agencies detain suspected [noncitizens] subject to removal.”<sup>277</sup> Subsequent cases have followed *Galarza*’s Tenth Amendment reasoning to conclude that the federal government cannot command localities to hold individuals on its behalf.<sup>278</sup>

The Trump administration has sidestepped the court decisions about state sovereignty and threatened to cancel federal funding if sanctuary jurisdictions do not cooperate with immigration enforcement efforts. As discussed earlier, these efforts to withhold federal funds have likewise generally not been tolerated by the courts.<sup>279</sup> The value of local autonomy will likely continue to play a significant role in sustaining sanctuary policies in the years to come.<sup>280</sup>

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<sup>273</sup> See *Galarza v. Szalczyk*, 745 F.3d 634, 638 (3d Cir. 2014).

<sup>274</sup> *Id.* (citations omitted) (summarizing district court holding).

<sup>275</sup> *Id.* at 645.

<sup>276</sup> *Id.* at 644.

<sup>277</sup> *Id.* at 645.

<sup>278</sup> See, e.g., *Mercado v. Dall. Cty.*, 229 F. Supp. 3d 501, 514 (N.D. Tex. 2017) (citing cases that agree with *Galarza*), *abrogated on other grounds by City of El Cenizo v. Texas*, 885 F. 3d 332, 356 n.21 (5th Cir. 2018)

<sup>279</sup> See *supra* notes 57–62 and accompanying text.

<sup>280</sup> The rationale of local control is not without its downsides. The “states’ rights” frame has historically been associated with conservative recalcitrance to federal reform efforts, including in the civil rights arena. With respect to the treatment of immigrants, local autonomy is sometimes deployed in defense of anti-immigrant measures. Nevertheless, such assertions of local control are frequently bounded by equality principles acting either directly through the Equal Protection Clause or indirectly through the doctrine of preemption. See, e.g., Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 1, 40–51 (2013) (arguing that “immigrant equality is an essential—and forgotten—ingredient in contemporary Supremacy Claus analysis”); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1730–46 (2010) (describing how anti-discrimination arguments on behalf of undocumented immigrants tend to be obliquely asserted through institutional competence claims like preemption).

### B. Prevent Unlawful Arrests

A second important rationale for sanctuary policy is avoiding unlawful arrests. While local officials were of course familiar with limitations on arrest authority in the criminal context, they initially did not appreciate such concerns as applied to their entanglement with federal immigration authorities. It took constitutional litigation to reveal that unlawful arrests are a key issue for localities considering sanctuary policies.

The concern over unlawful arrests comes from three related lines of cases. The first line of cases established that local officials generally do not have authority to make civil immigration arrests. As described in Part I, when the federal government began to encourage states and localities to participate in immigration enforcement after 9/11, some jurisdictions eagerly embraced that role on the theory that they possessed “inherent authority” to enforce federal immigration laws.<sup>281</sup> When the Supreme Court struck down much of Arizona’s immigration enforcement law as preempted by federal law in 2012, it confirmed that the power of local law enforcement to make immigration arrests is limited to the specific circumstances enumerated by Congress.<sup>282</sup> An example of a policy basing disentanglement on this lack of federal authorization is the 2013 general order of the Princeton Police Department,<sup>283</sup> which provided that: “State and local police have no authority to arrest and detain a person for a civil violation. There are federal agencies specifically charged with the enforcement and application of the complex immigration laws and regulations.”<sup>284</sup>

The second line of cases supporting sanctuary policies to prevent unlawful arrests addressed the application of Fourth Amendment protections to detention by local authorities on an immigration detainee. As discussed in Part I, the Secure Communities program was terminated by the Obama administration largely because of “the increasing number of federal court decisions that

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<sup>281</sup> See generally Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011) (explaining the “mirror image” theory and arguing its unconstitutionality as inconsistent with longstanding precedent).

<sup>282</sup> *Arizona*, 567 U.S. at 410 (“Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances.”); *id.* at 413 (observing that nonfederal law enforcement arrests of individuals “solely to verify their immigration status would raise constitutional concerns”).

<sup>283</sup> Princeton PD General Order, *supra* note 200.

<sup>284</sup> *Id.* at 2; see also VT. CRIMINAL JUSTICE TRAINING COUNCIL, MODEL FAIR AND IMPARTIAL POLICING POLICY ¶ V(B) (2016) [hereinafter 2016 VERMONT MODEL POLICING POLICY], [http://libguides.law.du.edu/ld.php?content\\_id=34437002](http://libguides.law.du.edu/ld.php?content_id=34437002) [<https://perma.cc/CRM4-SM7X>] (noting “Federal law does not grant local and state agencies authority to enforce civil immigration law”); NOPD Policy, *supra* note 200, ¶ 4 (“The enforcement of civil federal immigration laws falls exclusively within the authority of the United States Immigration and Customs Enforcement agency (ICE).”).

hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment.<sup>285</sup> These decisions, many of which followed the Third Circuit’s decision in *Galarza*,<sup>286</sup> established that detention on an immigration detainer constitutes a warrantless arrest.<sup>287</sup> As with any other warrantless arrest, the Fourth Amendment requires such seizures to be justified. Suspicion of a civil immigration violation alone generally would not justify an arrest by local officials.<sup>288</sup> In April 2014 a federal judge in Oregon made clear that the decision to comply with federal immigration officials’ requests to prolong the detention of inmates otherwise entitled to be released could violate the Fourth Amendment.<sup>289</sup> The prolonged custody of the plaintiff, Maria Miranda-Olivares, was not the exceptional detention of a U.S. citizen but rather a prototypical target of a detainer: a noncitizen whom ICE wished to investigate as removable.<sup>290</sup> Immediately following the Oregon court decision, a wave of counties across the country, now facing the potential for liability for hundreds of unlawful arrests, declared they would no longer

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<sup>285</sup> See Secure Communities Memo, *supra* note 149, at 2 & n.1 (citing cases).

<sup>286</sup> See *supra* notes 144–148 and accompanying text (describing the line of cases concluding that police violated the Fourth Amendment by holding individuals in custody pursuant to immigration detainers).

<sup>287</sup> *E.g.*, *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*9 (D. Or. Aug. 22, 2014) (holding that “detention based on the ICE detainer embarked Miranda-Olivares on a subsequent and new ‘prolonged warrantless, post-arrest, pre-arraignment custody’”); *id.* at \*11 (“Absent probable cause, that detention was unlawful.”); see also *Moreno*, 213 F. Supp. 3d at 1005 (noting federal government’s concession that detention “pursuant to an ICE immigration detainer constitutes a warrantless arrest”).

<sup>288</sup> See *Arizona*, 567 U.S. at 407 (“If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent”); see also, *e.g.*, *CTY. SHERIFFS OF COLO.*, *supra* note 197 (noting that “Colorado Sheriffs do not have the authority to enforce federal laws”). Consistent with this line of reasoning, a federal district court held Indiana’s law authorizing its law enforcement officials to arrest and detain persons subject to immigration detainers likely violated the Fourth Amendment because it would “authorize[] the warrantless arrest of persons for matters and conduct that are not crimes.” *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 919 (S.D. Ind. 2011) (preliminary injunction); see also *Villars v. Kubiowski*, 45 F. Supp. 3d 791, 807 (N.D. Ill. 2014) (noting that after *Arizona v. United States*, the law is settled that local officials cannot prolong detention on the basis of suspected *civil* immigration violations, and whether local officials can prolong detention on the basis of suspected *criminal* immigration violations remains an open question) (citing *Santos v. Frederick Cty. Bd. of Comm’rs*, 725 F.3d 451, 464 (4th Cir. 2013)); *Roy v. Cty. of Los Angeles*, CV1209012ABFFMX, 2018 WL 914773, at \*23 (C.D. Cal. Feb. 7, 2018) (holding that detaining inmate who was otherwise entitled to release, based on immigration detainer, was new arrest that sheriff could only justify if there was “probable cause to suspect that the individuals were involved in criminal activity”). *But see City of El Cenizo*, 885 F.3d at 355–56 & n.21 (reversing district court’s conclusion that detention on an immigration detainer violated the Fourth Amendment because probable cause of a crime was lacking, and disavowing similar district court decisions).

<sup>289</sup> *Miranda-Olivares*, 2014 WL 1414305, at \*11.

<sup>290</sup> See *id.* at \*9.

accede to any ICE detainer requests.<sup>291</sup> Sheriffs like those in Clark County, Washington and the City and County of San Francisco relied explicitly on these federal decisions in crafting policies limiting compliance with immigration detainers.<sup>292</sup>

Finally, a third important line of cases built on the notion, reflected in some sanctuary policies, that civil immigration arrests by local officials must not only be authorized by federal law but by state or local law as well.<sup>293</sup> This theory that immigration arrests had to be separately authorized under state law is what carried the day in *Lunn v. Commonwealth*.<sup>294</sup> In *Lunn*, the Massachusetts Supreme Court held that because Massachusetts law did not authorize state and local law enforcement “to arrest and hold an individual solely on the basis of a Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody,” they could not honor such federal detainers as a matter of state law.<sup>295</sup> The Illinois

<sup>291</sup> Jennifer Medina, *Fearing Lawsuits, Sheriffs Balk at U.S. Request to Hold Noncitizens for Extra Time*, N.Y. TIMES (July 5, 2014), <https://www.nytimes.com/2014/07/06/us/politics/fearing-lawsuits-sheriffs-balk-at-us-request-to-detain-noncitizens-for-extra-time.html> [https://perma.cc/B4PK-E44T] (reporting the decision by cities and counties across the country to refuse to honor detainer requests following an Oregon court ruling that a sheriff had violated a woman’s civil rights by holding her in response to an ICE detainer request).

<sup>292</sup> Clark Cty. Sheriff’s Office, Written Directive (Apr. 30, 2014), [http://libguides.law.du.edu/ld.php?content\\_id=34437175](http://libguides.law.du.edu/ld.php?content_id=34437175) [https://perma.cc/JF5K-SEPM] (“As a result of the [*Miranda-Olivares* decision], and upon review of legal counsel, the Clark County Sheriff’s Office shall cease to hold individuals in custody when the only authority is a request from DHS ICE in the form of a detainer.”); Ross Mirkarimi, San Francisco Sheriff’s Dep’t, No Immigration and Customs Enforcement Detainers (May 29, 2014), [http://libguides.law.du.edu/ld.php?content\\_id=34432181](http://libguides.law.du.edu/ld.php?content_id=34432181) [https://perma.cc/T3P8-58PJ] (announcing policy of honoring ICE detainers only if accompanied by “judicial determination of probable cause or with a warrant of arrest”) (referencing *Galarza* and *Miranda-Olivares*); see also News Release, Lane Cty. Sheriff’s Office, Lane County Sheriff’s Office Changes Policy on Immigration and Customs Enforcement (ICE) Detainers (Apr. 21, 2014), [http://libguides.law.du.edu/ld.php?content\\_id=34436626](http://libguides.law.du.edu/ld.php?content_id=34436626) [https://perma.cc/7QU9-UUAF] (“In response to a recent federal court decision, the Lane County Jail will no longer hold inmates on Immigration and Customs Enforcement (ICE) Detainers without a warrant or a court order.”) (referencing *Miranda-Olivares*); CTY. SHERIFFS OF COLO., *supra* note 197 (noting that “the courts have ruled that we have no authority to hold arrestees on administrative holds that have not been reviewed and approved by federal judges or magistrates”) (referencing *Galarza* and *Miranda-Olivares*).

<sup>293</sup> See, e.g., Princeton PD General Order, *supra* note 200 (“Local police agencies must comply with the laws of their own municipalities and states as well as the policies imposed by the police agency. State law may not authorize local police to detain persons for immigration violations . . . .”); 2016 VERMONT MODEL POLICING POLICY, *supra* note 284, ¶ V(B) (noting “state law does not grant local and state agencies authority to enforce civil immigration laws”); Associated Press, *Some Colorado Sheriffs Ending Immigrant Detainers*, DAILY MAIL (Apr. 29, 2014), <http://www.dailymail.co.uk/wires/ap/article-2616407/Some-Colorado-sheriffs-ending-immigrant-detainers.html> [https://perma.cc/Q9PS-4KPN] (reporting email from Boulder County Sheriff stating there is “no state statutory authority for holding people on detainers”).

<sup>294</sup> 78 N.E.3d 1143 (Mass. 2017).

<sup>295</sup> *Id.* at 1156–58, 1160; see also Order Granting Plaintiffs’ Motion for Preliminary Injunction, *Cisneros v. Elder*, No. 2018CV30549, at 10–11 (Dist. Ct. Colo. El Paso Cty. Mar. 19, 2018)

Trust Act, enacted in August 2017, is an example of a post-*Lunn* sanctuary policy.<sup>296</sup> Starting from the premise “that State law does not currently grant State or local law enforcement the authority to enforce federal civil immigration laws,” the act forbids detaining a person “solely on the basis of any immigration detainer or non-judicial immigration warrant.”<sup>297</sup>

The individual and cumulative effect of these doctrinal developments has been dramatic. Today, they support policies barring local officers from holding individuals for any amount of time based on a detainer or administrative immigration warrant. Significantly, because of their grounding in broad questions about the legality of civil immigration arrests effected by local officers, these policies leave little room for carveouts based on criminal history and instead broadly prohibit local officers from taking action based on suspected removability.

### C. Strengthen Community Trust

A third widely proffered justification for sanctuary policies is that entangling street-level policing with immigration enforcement erodes community trust. Community trust is critical for effective policing programs.<sup>298</sup> As the Major Cities Chiefs Association warned in 2006, the entanglement of local police in immigration enforcement can “undermine the level of trust and cooperation between local police and immigrant communities,” creating a divide that undermines public safety.<sup>299</sup>

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(holding plaintiffs demonstrated a likelihood of success on their claim that a Colorado sheriff lacked the authority to make civil immigration arrests pursuant to immigration detainers and that such arrests violated the Colorado Constitution).

<sup>296</sup> S.B. 31, 100th Gen. Assemb., Reg. Session (Ill. 2017).

<sup>297</sup> *Id.*

<sup>298</sup> See generally DORIS MARIE PROVINE ET AL., POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES (2016) (examining the evolution of immigration enforcement from federally-managed border to control to a more widespread, piecemeal local law enforcement system).

<sup>299</sup> CRAIG E. FERRELL, JR. ET AL., M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 6 (June 2006), [https://www.majorcitieschiefs.com/pdf/MCC\\_Position\\_Statement.pdf](https://www.majorcitieschiefs.com/pdf/MCC_Position_Statement.pdf) [<https://perma.cc/SM3R-S6E6>]; Conn. Judiciary Comm., Joint Favorable Report, Bill No. HB-6659 (Apr. 22, 2013), <https://www.cga.ct.gov/2013/jfr/h/2013HB-06659-R00JUD-JFR.htm> [<https://perma.cc/23YB-JD7K>]. Sanctuary jurisdictions have also relied on the testimony of community members and community organizations for support about the chilling effect of deportation fears on crime reporting. See, e.g., King County Ordinance, *supra* note 257, § 1(A); Multnomah Resolution, *supra* note 257 (noting “[d]ocumented public testimony has demonstrated that members of our community are not reporting crimes . . . for fear of deportation through the Secure Communities program and I-247 Immigration Detainers”); Miami-Dade Resolution, *supra* note 270. For more information about the relationship between sanctuary policies and public safety, see *supra* note 43.

Social science research has found that involving local law enforcement with immigration policing can strain relationships between community members and police.<sup>300</sup> That fear can cause immigrants and individuals in mixed status families to refrain from coming forward as victims of, or witnesses to, crime.<sup>301</sup> Consistent with these findings, in the months following President Trump's election, the LAPD observed a drop in reporting of sexual assaults and spousal abuse among Latinos, leading the department to believe "deportation fears may be preventing Hispanic members of the community from reporting when they are victimized."<sup>302</sup>

The concern that entanglement can undermine community trust has supported a range of sanctuary policies. For example, a general order issued by the New Haven, Connecticut Department of Police Service in 2006 limited police officers' ability to inquire into immigration status,<sup>303</sup> prohibited enforcement of civil immigration law,<sup>304</sup> and limited disclosure of information to federal immigration officials.<sup>305</sup> The policy was justified in part based on the community trust rationale:

The department relies upon the cooperation of all persons, both documented citizens and those without documentation status, to achieve our goals of protecting life and property, preventing crime and resolving problems. Assistance from immigrant populations is especially important when an immigrant, whether documented or not, is the victim of or witness to a crime. These persons must feel comfortable in coming forward with information and in filing reports.<sup>306</sup>

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<sup>300</sup> Marjorie S. Zatz & Hilary Smith, *Immigration, Crime, and Victimization: Rhetoric and Reality*, 8 ANN. REV. L. & SOC. SCI. 141, 150 (2012) (concluding that "laws and policies involving local police in immigration enforcement have thwarted community policing and other efforts to cultivate improved relations with communities that include significant numbers of immigrants").

<sup>301</sup> See THEODORE, *supra* note 141, at 5–17 (linking police involvement in immigration enforcement with Latinos' perceptions about public safety and their reluctance to contact police).

<sup>302</sup> News Release, L.A. Police Dep't, Decline in Reporting of Crime Among Hispanic Population (Mar. 21, 2017), [http://www.lapdonline.org/home/news\\_view/61998](http://www.lapdonline.org/home/news_view/61998) [<https://perma.cc/GNS6-PUTA>].

<sup>303</sup> New Haven PD Order, *supra* note 226, ¶¶ II.C.1–2 (allowing inquiry into immigration status only while "investigating criminal activity").

<sup>304</sup> *Id.* ¶¶ II.C.4–5. The general order permitted officers to investigate and enforce federal immigration crimes. *Id.* ¶ II.C.3.

<sup>305</sup> *Id.* ¶ III.B (justifying non-disclosure policy on the ground that "[o]btaining pertinent information may in some cases be difficult or impossible if some expectation of confidentiality is not preserved, and preserving confidentiality in turn requires that the department regulate the use of such information by its employees").

<sup>306</sup> *Id.* ¶ II.A

Interest in protecting community trust has supported not only street-level policies disentangling policing, but also jail-level policies against complying with immigration detainers. For example, Milwaukee County’s 2012 resolution prohibiting the use of detainers in county jails relied on the assertion that “when local law enforcement honors all ICE detainer requests, including those that target non-criminal aliens, community residents become less likely to cooperate with local agencies, eroding public trust and unnecessarily hindering the law enforcement abilities of [Milwaukee County Sheriff’s Office] [d]eputies on patrol.”<sup>307</sup>

Similarly, the California TRUST Act, a 2013 state-level sanctuary law, explicitly justified its policy on ways in which immigration enforcement can threaten community trust, warning that entanglement will make “immigrant residents who are victims of or witnesses to crime, including domestic violence, . . . less likely to report crime or cooperate with law enforcement when any contact with law enforcement could result in deportation.”<sup>308</sup> This concern about harming community trust led to a broad prohibition on honoring ICE detainer requests except in circumstances involving individuals charged with or convicted of certain criminal offenses.<sup>309</sup> Boston’s Trust Act is a similar example of a sanctuary policy based in part on a desire to protect community trust in law enforcement:

When local law enforcement officials indiscriminately honor all ICE civil immigration detainer requests, including those that target non-criminal aliens, immigrant residents are less likely to cooperate and public trust erodes, hindering the ability and effectiveness of Boston’s police force.<sup>310</sup>

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<sup>307</sup> See, e.g., Milwaukee, Wis., File No. 12-135 (2012) [hereinafter 2012 Milwaukee Resolution], [http://libguides.law.du.edu/ld.php?content\\_id=34437215](http://libguides.law.du.edu/ld.php?content_id=34437215) [<https://perma.cc/ETZ4-DJ2C>]; see also Multnomah Resolution, *supra* note 257 (noting that the “deterioration of trust in local government, as a result of ICE’s Secure Communities program and I-247 Immigration Detainers, hampers the county’s ability to provide public safety”) (emphasis added).

<sup>308</sup> California TRUST Act, *supra* note 27, § 1(d); see also LONI HANCOCK, CHAIR, CAL. SEN. COMM. ON PUB. SAFETY, IMMIGRATION DETAINERS 7 (July 2, 2013), [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201320140AB4](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB4) (follow “07/01/13- Senate Public Safety” hyperlink to download) [<https://perma.cc/VR8M-G6UX>] (noting that California localities had complained that participating in Secure Communities was costly and harmed law enforcement relationships with the community).

<sup>309</sup> California TRUST Act, *supra* note 27, § 1(d).

<sup>310</sup> Bos., Mass., An Ordinance Establishing a Boston Trust Act (June 27, 2014) [http://libguides.law.du.edu/ld.php?content\\_id=34435561](http://libguides.law.du.edu/ld.php?content_id=34435561) [<https://perma.cc/V5A6-SD83>] (“When local law enforcement officials indiscriminately honor all ICE civil immigration detainer requests, including those that target non-criminal aliens, immigrant residents are less likely to cooperate and public trust erodes . . .”).

And as in California, this concern about undermining trust between police and immigrant communities led to a refusal to honor ICE detainer requests except in limited circumstances.<sup>311</sup>

Like the policy justification that localities should control local resources, the community trust rationale supports an array of policy types. The community trust rationale, however, particularly resonates with the following policy types introduced in Part I: barring investigation of immigration status, declining detainers, and declining to provide sensitive information. Each of these policies inserts a wedge of neutrality between a locality's criminal justice system and federal immigration enforcement. At the same time, some scholars have warned against placing too great an emphasis on community trust as a justification for disentanglement policies, as it draws on the idea that immigrants are "innocents needing protection from the police," thus affirming the logic of crime and punishment for those, including immigrants, who do not meet exacting "standards of respectability."<sup>312</sup> The call for a return to "healthy relationships between police and communities may [also] ring hollow for [people of color and others] who are targeted by the police whether or not ICE is collaborating with them."<sup>313</sup>

#### D. Safeguard Equal Protection

Many jurisdictions have adopted disentanglement measures for a fourth reason: to promote the equal protection of law.<sup>314</sup> The Fourteenth Amend-

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<sup>311</sup> *Id.* (allowing adherence to an immigration detainer request for up to forty-eight hours in cases involving individuals with a criminal warrant, a conviction for a violent crime, a felony conviction within ten years, current registration on the list of sex offenders, or placement on the federal government's terrorist watchlist).

<sup>312</sup> Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 651–53 (2016) (internal quotation marks omitted).

<sup>313</sup> *Id.* at 653.

<sup>314</sup> See, e.g., LAPD Special Order, *supra* note 186 (adopting disentanglement policy in part because "the Constitution of the United States guarantees equal protection to all persons within its jurisdiction"); Takoma Park, Md., Ordinance No. 2007-58 (Oct. 29, 2007), [http://libguides.law.du.edu/ld.php?content\\_id=34435656](http://libguides.law.du.edu/ld.php?content_id=34435656) [<https://perma.cc/4USY-4YAD>] (basing disentanglement in part on equal protection); King County Ordinance, *supra* note 257 § 1(F) (adopting policy limiting detainer-based detention in part to "further advance the county policy of providing all county residents with fair and equal access to services, opportunities and protection"); Cook Cty., Ill., Res. 07-R-240 (June 5, 2007), [http://libguides.law.du.edu/ld.php?content\\_id=34434649](http://libguides.law.du.edu/ld.php?content_id=34434649) [<https://perma.cc/GPW6-ANYS>] (adopting policy limiting inquiry into immigration status by county sheriffs, relying in part on the county's "dedicat[ion] to providing all of its residents with fair and equal access to the services, opportunities, and protection county government has been established to administer"); OAKLAND POLICE DEP'T, TRAINING BULLETIN: ENFORCEMENT OF CIVIL IMMIGRATION LAWS 1 (June 25, 2008), [http://libguides.law.du.edu/ld.php?content\\_id=35757904](http://libguides.law.du.edu/ld.php?content_id=35757904) [<https://perma.cc/TH8J-QRRC>] (declaring commitment "to equal enforcement of the law and equal service to the public regardless of immigration status").



ment to the U.S. Constitution declares that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>315</sup> Under the Equal Protection Clause, classifications based on race, ethnicity, nationality, and alienage are subject to strict judicial scrutiny, and any attempt by state and local governments to discriminate on those grounds will ordinarily be struck down.<sup>316</sup> Title VI of the Civil Rights Act likewise imposes clear obligations on state and local officials to ensure that no program or activity receiving federal financial assistance denies benefits or otherwise discriminates “on the ground of race, color, or national origin.”<sup>317</sup> Additionally, states and localities may have their own anti-discrimination laws.<sup>318</sup> Policies that distance local policing from immigration enforcement have accordingly been enacted in some cases to ensure that these legal commands are satisfied.

Sanctuary jurisdictions recognize that involving police and sheriff’s departments in immigration enforcement efforts heighten the risk of discriminatory policing. First, law enforcement officers who engage in immigration policing may be more likely to treat community members differently on the basis of citizenship or immigration status. Furthermore, in determining whom to target for further investigation, officers may employ perceived proxies for immigration status like race, ethnicity, and English-language ability.<sup>319</sup> As a result, citizens as well as noncitizens can be subject to equal protection violations. The Town of Amherst, Massachusetts made this point when explaining the motivation for its disentanglement policy. The sanctuary policy adopted by the town in 2012 rejected local participation in immigration enforcement programs and specifically noted that the

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<sup>315</sup> U.S. CONST. amend. XIV, § 1.

<sup>316</sup> As the Supreme Court famously observed more than a century ago:

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886). *See also* Graham v. Richardson, 403 U.S. 365, 372 (1971) (determining that state classifications based on alienage “are inherently suspect and subject to close judicial scrutiny”); Korematsu v. United States, 323 U.S. 215, 216 (1944) (stating “that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect”).

<sup>317</sup> 42 U.S.C. § 2000d (2012).

<sup>318</sup> *See, e.g.*, Amherst Resolution, *supra* note 232 (adopting policy of declining detainees requesting prolonged detention of inmates who would otherwise be released, in part on grounds that the Secure Communities program “violates the Town of Amherst Bylaws, including the Human Rights Bylaw”).

<sup>319</sup> *Id.*; *see also* Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1545–47 (2011) (discussing the use of race as proxy for citizenship).

Secure Communities program “explicitly promot[e]s discrimination on the basis of nation of origin and implicitly promotes discrimination on the basis of race, color, and socio-economic status . . . .”<sup>320</sup>

Law enforcement leaders have long recognized that the elimination of bias in policing requires a proactive approach.<sup>321</sup> Police agencies around the country are already facing a crisis of legitimacy as a result of police brutality and discrimination in criminal justice administration.<sup>322</sup> Conscious of these dynamics, disentanglement policies are often adopted as part of a broader effort to avoid bias in policing.<sup>323</sup>

Consider Vermont’s state law requiring that local police not engage in immigration enforcement.<sup>324</sup> This law was precipitated in part by specific instances of discriminatory traffic stops of noncitizens.<sup>325</sup> For example, a Vermont sheriff’s department paid nearly \$30,000 to settle a case in which the state’s Human Rights Commission found that a sergeant had illegally detained a Mexican national after a traffic stop, “chiefly because of his nationality and skin color,” and held him for about an hour to contact the Border Patrol.<sup>326</sup> This and other similar incidents prompted the state legislature to mandate that all jurisdictions adopt fair and impartial policing practices and order the crafting of a model policy.<sup>327</sup>

Threaded throughout Vermont’s model policy are anti-bias and equality rationales for its disentanglement provisions. The model policy states that police “shall not use an individual’s personal characteristics [as a reason] to

<sup>320</sup> Amherst Resolution, *supra* note 232. The fact that discrimination cannot be confined to undocumented residents and is broadly based on race and ethnicity is consistent with scholar Kevin R. Johnson’s view that the treatment of noncitizens affords a window into current racial attitudes. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1114 (1998).

<sup>321</sup> See, e.g., INT’L ASS’N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 153–55 (Sept. 2006), <http://www.theiacp.org/Protecting-Civil-Rights-A-Leadership-Guide-for-State-Local-and-Tribal-Law-Enforcement#> (follow “Part 1,” “Part 2,” “Part 3” to access report chapters).

<sup>322</sup> See, e.g., Nick Bayer, *Poll Shows Millennials Increasingly Worried About Police Brutality, Criminal Justice*, HUFFINGTON POST (Aug. 16, 2016, 6:10 PM), [https://www.huffingtonpost.com.mx/entry/millennials-police-criminal-justice-poll\\_us\\_57b38ceee4b04ff883994fef](https://www.huffingtonpost.com.mx/entry/millennials-police-criminal-justice-poll_us_57b38ceee4b04ff883994fef) [<https://perma.cc/6YDV-H834>].

<sup>323</sup> See, e.g., 2010 Santa Clara Resolution, *supra* note 264 (finding that “laws like Arizona’s SB 1070 erode the relationship of trust between immigrant communities and local governments [and] subject individuals to racial profiling” and noting that the Board of Supervisors seeks “to protect the rights of all County residents to be free from discrimination”).

<sup>324</sup> See *supra* notes 192–193 and accompanying text (stating the specific laws that prohibit Vermont police officers from engaging in civil immigration enforcement).

<sup>325</sup> Kathleen Masterson, *Vermont Sheriff Department Pays to Settle Instance of Discrimination*, VPR (June 14, 2016), <http://digital.vpr.net/post/vermont-sheriff-department-pays-settle-instance-discrimination#stream/0> [<https://perma.cc/74RK-E2MY>].

<sup>326</sup> *Id.*

<sup>327</sup> See *supra* note 192.

ask about or investigate [a person’s] immigration status.”<sup>328</sup> Noting that the Fourth Amendment and analogous provisions of Vermont’s Constitution “apply equally to all individuals residing in Vermont,”<sup>329</sup> the model policy prohibits Vermont law enforcement from initiating or prolonging stops based on civil immigration matters, such as suspicion of undocumented status.<sup>330</sup> Similarly, it instructs that Vermont officers “shall not facilitate the detention of undocumented individuals or individuals suspected of being undocumented by federal immigration authorities for suspected civil immigration violations.”<sup>331</sup>

Vermont is not alone in grounding its policing policy in equal protection rationales. Other jurisdictions have adopted “don’t police” policies after finding that local law enforcement participation in immigration policing led to racial profiling and discrimination. For instance, jurisdictions like East Haven, Connecticut, New Orleans, Louisiana and Maricopa County, Arizona have each adopted “don’t police” policies following litigation over discriminatory police practices that resulted in substantial settlements, consent decrees or injunctions.<sup>332</sup> More broadly, equal protection principles

<sup>328</sup> 2017 VERMONT MODEL POLICING POLICY, *supra* note 193, ¶¶ VIII(a), IX(a).

<sup>329</sup> *Id.* ¶ VIII.

<sup>330</sup> *Id.* ¶ VIII(c).

<sup>331</sup> *Id.* ¶ VIII(b).

<sup>332</sup> *See, e.g.*, Agreement for Effective and Constitutional Policing, *United States v. Town of East Haven*, No. 3:12-cv-01652-AWT (D. Conn. Dec. 21, 2012); Consent Decree Regarding the New Orleans Police Department ¶ 183, *United States v. City of New Orleans*, No. 2:12-cv-1924 (E.D. La. July 24, 2012) (requiring New Orleans Police Department (“NOPD”), among other measures to achieve “bias-free policing,” to ensure that NOPD officers “not take law enforcement action on the basis of actual or perceived immigration status” and “not question victims of, or witnesses to, crime regarding their immigration status.”); NOPD POLICY, *supra* note 200, ¶¶ 2, 3 (“Members shall not initiate an investigation or take law enforcement action on the basis of actual or perceived immigration status, including the initiation of a stop, an apprehension, arrest, or any other field contact. . . . NOPD members shall not make inquiries into an individual’s immigration status, except as authorized by this Chapter.”); Supplemental Permanent Injunction/Judgment Order ¶ 28(b), *Ortega Melendres v. Arpaio*, No. CV-07-02513-PHX-GMS (D. Ariz. Oct. 2, 2013) (requiring, as a remedy for violations of the Fourth and Fourteenth Amendment rights of class members, that the Maricopa County Sheriff’s Office (MCSO), among other things, not “detain[] any individual based on actual or suspected ‘unlawful presence’” or initiate any immigration-related investigation without reasonable suspicion or probable cause of a crime, and obtain supervisor approval before initiating any such investigation or contact with ICE or Border Patrol); Evan Lips, *East Haven Board of Police Commissioners Approves \$450,000 Settlement*, NEW HAVEN REGISTER (June 10, 2014, 10:42 PM), <http://www.nhregister.com/general-news/20140610/east-haven-board-of-police-commissioners-approves-450000-settlement> [<https://perma.cc/43M3-7CQV>] (reporting on policy adopted in response to DOJ lawsuit alleging that the East Haven Police Department had engaged in systematic discrimination of Latinos requiring officers to “not undertake immigration-related investigations and [] not routinely inquire into the specific immigration status of any person(s) encountered during normal police operations.”); *see also* News Release, ACLU Washington, Victory in Lawsuit: Spokane Police Will No Longer Unlawfully Detain Immigrants (Jan. 10, 2018), <https://www.aclu-wa.org/news/victory-lawsuit-spokane-police-will-no-longer>

also support policies that guard against policing practices that systematically deprive certain communities of police services.<sup>333</sup> As referenced earlier, some sanctuary policies have been justified by a desire to ensure “fair and equal access” to services and protection for all members of a community, including immigrants and U.S. citizens in mixed-status families who may be concerned that a call to the police could lead to deportation of a parent or spouse.<sup>334</sup>

Finally, the equal protection rationale can sustain disentanglement policies that go beyond the “don’t police” category to address participation in joint operations. The City and County of San Francisco recently withdrew from the FBI’s Joint Terrorism Task Force, in part based on “concerns that participation in the task force might violate local laws protecting immigrants and religious minorities.”<sup>335</sup> As a spokesperson for the San Francisco Police Department explained, “[w]e want all persons to feel comfortable in contacting SFPD . . . to report crimes and emergencies without concern as to their immigrations status.”<sup>336</sup>

### *E. Promote Diversity and Inclusivity*

Following the election of President Trump, the friction between federal immigration policy and the vision of inclusive communities held by many localities has intensified. The federal government’s deportation agenda is now seen by many as anti-immigrant, at a minimum, and even implicitly or overtly racist.<sup>337</sup> This has spurred a new wave of immigrant protective poli-

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unlawfully-detain-immigrants [https://perma.cc/L4HH-8FSP] (describing settlement whereby City of Spokane, Washington, following an incident where officers referred a traffic accident victim to Border Patrol because he was Latino, “has agreed to modify its policies to clarify, among other things, that police officers shall not contact, question, delay, detain or arrest an individual be[cause] s/he is suspected of violating immigration laws”) (internal quotation marks omitted).

<sup>333</sup> See *Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010) (“[D]iminished police services, like the seat at the back of the bus, don’t satisfy the government’s obligation to provide services on a nondiscriminatory basis.”); *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000) (“There is a constitutional right . . . to have police services administered in a nondiscriminatory manner—a right that is violated when a state actor denies such protection to disfavored persons.”); *Grenier v. Stratton*, 44 F.Supp.3d 197, 203–04 (D. Conn. 2014) (“The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.” (internal quotation marks omitted)).

<sup>334</sup> King County Ordinance, *supra* note 257, § 1.

<sup>335</sup> Ellen Nakashima, *San Francisco Police Department Pulls Out of FBI Anti-Terrorism Task Force*, WASH. POST (Mar. 10, 2017), [https://www.washingtonpost.com/world/national-security/san-francisco-police-department-pulls-out-of-fbi-anti-terrorism-task-force/2017/03/10/62e05bcc-fd09-11e6-8f41-ea6ed597e4ca\\_story.html?utm\\_term=.976e502469e6](https://www.washingtonpost.com/world/national-security/san-francisco-police-department-pulls-out-of-fbi-anti-terrorism-task-force/2017/03/10/62e05bcc-fd09-11e6-8f41-ea6ed597e4ca_story.html?utm_term=.976e502469e6) [https://perma.cc/F97C-A7SW].

<sup>336</sup> *Id.*

<sup>337</sup> See *supra* notes 34–165 and accompanying text (discussing the rise of “crimmigration”); see also *Joint Statement from California Legislative Leaders on Result of Presidential Election*, KEVIN

cymaking rooted in a fifth rationale: promoting the values of diversity and inclusivity.<sup>338</sup>

The diversity and inclusivity rationale is related to but distinct from the more legalistic emphasis on equality and nondiscrimination that is seen in some disentanglement policies. It reflects a respect for and appreciation of diverse communities, even embodying a certain solidarity with those who have been historically marginalized. It recognizes that immigration enforcement today spreads across workplaces, homes, schools, and neighborhoods,<sup>339</sup> and adversely impacts entire communities, including citizens as well as noncitizens.<sup>340</sup> The rationale also embraces a broad view of inclusiveness, taking care not to single out certain groups of immigrants as more deserving than others.<sup>341</sup>

A 2016 enactment from Santa Monica, California reveals the vitality of the diversity and inclusivity rationale for inspiring disentanglement policies. Following the election, Santa Monica’s mayor declared that the Trump administration’s actions did not “align with our vision of diversity and inclusion,” and the city passed a resolution that used the city’s embrace of individuals of diverse religious, racial, national or ethnic origin, gender, and

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DE LEÓN (Nov. 9, 2016), <http://sd24.senate.ca.gov/news/2016-11-09-joint-statement-california-legislative-leaders-result-presidential-election> [<https://perma.cc/S8FP-F2AF>] (describing Californians’ votes against Trump as “overwhelmingly reject[ing] politics fueled by resentment, bigotry, and misogyny”); *see also* Seattle Resolution, *supra* note 214, at 3 (noting the “alarming” level of “anti-immigrant and anti-refugee rhetoric during the 2016 Presidential campaign, racist hate speech toward immigrant and refugee communities, and anti-immigrant and anti-refugee policies proposed by the current Presidential administration”).

<sup>338</sup> *See generally* Eagly, *supra* note 180, at 298–99 (noting emergence of equality-based reform movements).

<sup>339</sup> MOTOMURA, *supra* note 6, at 146 (noting that when some “states and localities” adopt laws that “insulate migrants from federal enforcement,” they “reflect efforts to include unauthorized migrants in communities built through interactions in neighborhoods, schools, and workplaces”).

<sup>340</sup> Rachel Rosenbloom’s important work discussing the deportation of United States citizens has revealed the “enduring fragility of the citizen-alien distinction that forms the bedrock of immigration law” and ongoing role of “race in the construction of . . . citizenship.” Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1969–70, 2015, 2018–20 (2013). For instance, the Chicago Welcoming ordinance lays out in its purpose statement, “[t]he City Council further finds that assistance from a person, whether documented or not, who is a victim of, or a witness to, a crime is important to promoting the safety of all its residents.” Chicago Welcoming City Ordinance, *supra* note 20.

<sup>341</sup> *See generally* Serin D. Houston & Charlotte Morse, *The Ordinary and Extraordinary: Producing Migrant Inclusion and Exclusion in US Sanctuary Movements*, 11 STUD. SOC. JUST. 27, 27 (2017) (arguing that traditional sanctuary framing come “with the cost of limiting activist support only to particular groups of migrants, flattening the performances of migrant identities, and positioning migrants as perpetually exterior to the US”); Yukich, *Model Immigrant*, *supra* note 16 (discussing inclusiveness of the original sanctuary movement).

sexual identity or orientation as a touchstone for a new policing policy.<sup>342</sup> On that basis, and acknowledging the diverse foreign-born population in the city, Santa Monica crafted a resolution that wove together most of the sanctuary policies discussed in Part II: a “don’t police” provision, a broad prohibition on the use of city resources for civil immigration enforcement, and a nondisclosure provision to protect the privacy of residents from a variety of segments of the community.<sup>343</sup> In announcing these policies, the mayor made clear that disentangling Santa Monica from immigration enforcement was part of a larger strategic plan to “maintain[] a diverse and inclusive city.”<sup>344</sup>

The diversity and inclusivity rationale has the capacity to undergird the full typology of common disentanglement policies. This rationale has supported numerous detainer policies,<sup>345</sup> restrictions on participating in joint operations, and broadly crafted resolutions to prevent local criminal justice resources from being diverted for immigration enforcement.<sup>346</sup>

<sup>342</sup> Letter from Ted Winterer, Mayor, Santa Monica, Cal., to Resident of Santa Monica (Mar. 1, 2017) [hereinafter Winterer Letter], <https://beta.smgov.net/strategic-goals/inclusive-diverse-community/diversity> [<https://perma.cc/6LW2-2BXC>].

<sup>343</sup> Santa Monica, Cal., A Resolution of the City Council of Santa Monica Embracing Diversity, Rejecting Hate and Discrimination, Clarifying the City’s Role in Enforcing Federal Immigration Law, and Promoting an Environment in Which Fear and Intimidation Do Not Chill Cooperation with Local Law Enforcement and Other First Responders (Feb. 28, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=35254558](http://libguides.law.du.edu/ld.php?content_id=35254558) [<https://perma.cc/G5J4-Z545>].

<sup>344</sup> Winterer Letter, *supra* note 342, at 2.

<sup>345</sup> See, e.g., King County Ordinance, *supra* note 257, ¶ 7 (grounding detainer policy in part on county’s “dedicat[ion] to providing all of its residents fair and equal access to services, opportunities and protection” and county’s “fair and just principle” meant to ensure “everyone feels safe to live, work and play in any neighborhood”); 2010 Santa Clara Resolution, *supra* note 264 (beginning by describing Santa Clara as “home to a diverse and vibrant community of people representing many races, ethnicities, and nationalities, including immigrants from all over the world”); Multnomah Resolution, *supra* note 257 (grounding detainer policy in similar findings).

<sup>346</sup> See, e.g., McMinville Resolution, *supra* note 18 (declaring McMinville “an Inclusive City that embraces, celebrates, and welcomes the collective contributions to the prosperity of the City of all persons” and prohibiting the use of city resources for immigration enforcement); Maplewood, N.J., Res. No. 3-17 (Jan. 3, 2017), [http://libguides.law.du.edu/ld.php?content\\_id=34435908](http://libguides.law.du.edu/ld.php?content_id=34435908) [<https://perma.cc/BM5D-F3Y5>] (declaring the “Township of Maplewood has long embraced and welcomed individuals of diverse racial, ethnic, religious and national backgrounds” and resolving not to “expend Township funds or resources” for immigration enforcement). Lansing, Michigan’s proposed sanctuary resolution was crafted in the City Council’s Ad Hoc Committee on Diversity and Inclusion that was formed for that purpose. See Lawrence Cosentino, *Promise and Peril*, LANSING CITY PULSE, <http://lansingcitypulse.com/print-article-14223-permanent.html> [<https://perma.cc/T2H2-UL7E>] (proposing to bar “assisting or voluntarily cooperating with investigation or arrest procedures, public or clandestine, relating to alleged violations of immigration laws” and cooperating with ICE “to perform immigration law enforcement functions to identify, process and detain immigration offenders they encounter during their regular, daily, law-enforcement activity”).

### F. Express Disagreement with Federal Immigration Policy

Finally, our catalogue of stated rationales for sanctuary policies would be incomplete if it did not acknowledge a sixth rationale: explicit disagreement with federal immigration policy. Many of the sanctuary policies of the 1980s, for example, were express responses to what was perceived as the federal government’s unjust treatment of Central American asylum-seekers.<sup>347</sup> In the post-9/11 period, sanctuary policies were often a way that localities registered opposition to the USA PATRIOT Act,<sup>348</sup> to federal immigration raids,<sup>349</sup> and to Congress’s failure to enact comprehensive immigration reform.<sup>350</sup>

Disagreement with federal immigration policy continued to serve as a rationale for sanctuary policies during the Obama administration. Jurisdictions regularly cited the failure of Secure Communities to achieve its stated priorities—particularly before the legal problems with detainers were fully exposed—as a reason for declining requests for detainer-based detention.<sup>351</sup> Jurisdictions that used failed federal policy as a basis for enacting policies concerning immigration detainers often stopped short of declining requests for detention altogether.<sup>352</sup> This had the effect of imposing local immigra-

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<sup>347</sup> See *supra* note 23 and accompanying text; Pham, *Constitutional Right*, *supra* note 6, at 1382–87.

<sup>348</sup> See, e.g., Balt., Md., Bill No. 03-1122, J. City Council Balt. 3335, 3336 (May 19, 2003), [http://libguides.law.du.edu/ld.php?content\\_id=34435679](http://libguides.law.du.edu/ld.php?content_id=34435679) [<https://perma.cc/S4SR-NAZ6>] (finding that “federal policies adopted since September 11, 2001, including provisions in the USA PATRIOT Act . . . and related executive orders, regulations and actions threaten fundamental rights and liberties”).

<sup>349</sup> See, e.g., Oakland Resolution, *supra* note 237 (stating opposition to immigration raids and calling for a moratorium); Mayor & Council of Princeton, N.J., Res. No. 2004-R271 (Nov. 10, 2004), [http://libguides.law.du.edu/ld.php?content\\_id=34435922](http://libguides.law.du.edu/ld.php?content_id=34435922) [<https://perma.cc/BH4T-EHTM>] (responding to October 2004 raid and expressing strong disapproval); see also Gardner, *supra* note 6, at 326 (noting that “most of the policy actions taken between 2006 and 2008 expressed concern that home raids by ICE damaged the relationship between police and local immigrant communities”).

<sup>350</sup> See, e.g., Oakland Resolution, *supra* note 237 (finding that “local legislative action is an important way for cities . . . to positively influence the continuing national discussion about immigration reform”).

<sup>351</sup> See, e.g., Cook ordinance, *supra* note 196 (noting that “ICE detainers are routinely imposed on individuals without any criminal convictions or whose cases are dismissed”); COUNCIL OF D.C., COMM. ON THE JUDICIARY, REPORT ON BILL 19-585, “IMMIGRATION DETAINER COMPLIANCE AMENDMENT ACT OF 2012,” at 4 (May 8, 2012), <http://dcclims1.dccouncil.us/images/00001/20120604161227.pdf> [<https://perma.cc/8585-9HNL>] (Chairman Phil Mendelson reporting to all Council members) (noting that “[w]hile ICE has stated that the [Secure Communities] program was meant to target the most serious criminals, there are still reports nationwide of individuals who were arrested—not convicted—for minor crimes, and then ended up held under an ICE detainer and eventually caught up in deportation proceedings”).

<sup>352</sup> For example, in 2012 Milwaukee adopted a policy of responding to detainer requests depending on the criminal history of the targeted individual. 2012 Milwaukee Resolution, *supra* note

tion enforcement priorities on a federal government viewed as incapable of making measured enforcement choices on its own.<sup>353</sup>

Policies enacted since the 2016 election offer more recent examples of political resistance. The City of Richmond, California, for example, positioned itself in opposition to President Trump and his immigration policies by passing a resolution finding that “President-elect Donald Trump ran a campaign on a message of hate and bigotry,” and stating that “no matter the threats made by President-elect Trump, Richmond will continue our sanctuary polices.”<sup>354</sup> Officials in South Orange, New Jersey also passed a sanctuary ordinance after the election, viewing the label as a “badge of honor” in the current political climate.<sup>355</sup>

Although we highlight this recurrent rationale, care should be taken not to dismiss sanctuary policies as simply statements in opposition to the federal government. Our research reveals that sanctuary cities are pursuing affirmative policy choices that are theirs to make.<sup>356</sup> Seen in this light, disentanglement is not simply an attempt to frustrate federal policy, but an effort to ensure that local governments and the federal government can operate independently in their respective policymaking arenas.

307 (noting that “despite ICE’s prioritization of certain classes of criminal aliens, ICE detainees are routinely imposed on individuals without any criminal convictions or whose cases have been dismissed, resulting in possible deportation proceedings against non-criminal aliens”); *see also*, e.g., King County Ordinance, *supra* note 257, ¶¶ 10–11 (reporting that 78% of detainees received at the King County adult jail between 2008 and 2011 targeted persons with no prior criminal history, and limited detainee compliance to those convicted of a “violent or serious crime”).

<sup>353</sup> This policy rationale for limiting local involvement in immigration enforcement embraces the idea that immigration enforcement is related to local public safety. In contrast to more inclusive frameworks, *see supra* notes 337–346 and accompanying text, this policy rationale accepts the idea that immigrants can be sorted into “deserving” and “undeserving” along an axis of criminality. As Ingrid Eagly has put it: “[I]ntegration-framed criminal justice policy debates have focused on whether the federal government is in fact deporting criminals, or whether the crimes committed by deportees are in fact serious. Even worse, the dominant conversation on integrating worthy immigrants has given way to allowing ‘criminal aliens’ to be used as what Rebecca Sharpless calls a ‘foil’ to advocate on behalf of immigrant-friendly policies only for law-abiding immigrants that everyone agrees should be integrated.” Eagly, *supra* note 180, at 290 (citing Rebecca Sharpless, “Immigrants Are Not Criminals”: *Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 692 (2016)).

<sup>354</sup> *See* Richmond Resolution, *supra* note 19.

<sup>355</sup> Jessica Mazzola, *Why a Town That Has Never Been Approached by ICE Is Now a ‘Sanctuary City’*, NJ.COM (Feb. 16, 2017, 9:09 AM), [http://www.nj.com/essex/index.ssf/2017/02/why\\_a\\_town\\_that\\_has\\_never\\_been\\_approached\\_by\\_ice\\_i.html](http://www.nj.com/essex/index.ssf/2017/02/why_a_town_that_has_never_been_approached_by_ice_i.html) [<https://perma.cc/LZA9-B5VV>].

<sup>356</sup> *See supra* notes 261–346 and accompanying text. In a forthcoming article, Jason Cade describes sanctuary policies as a “front-line” effort to restore legitimacy, fairness, and accuracy in the administration of federal immigration law under the Trump presidency. *See generally* Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. UNIV. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3053609](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3053609) [<https://perma.cc/L68Y-QW68>].



In conclusion, the rich array of rationales for sanctuary policies that this Part has laid out illustrates that sanctuary policies rest on a nuanced theoretical framework. Our discussion of these rationales also demonstrates that different localities may rely on different or multiple rationales for their sanctuary policies. Finally, Part III highlights some of the practical consequences of entanglement that localities are responding to. Detainer policies, for example, may be grounded on the practical reality of avoiding liability for constitutional rights violations. Similarly, retaining local control over local criminal justice resources may have financial consequences because most joint operations, including through 287(g) agreements, require the investment of considerable local resources.

### CONCLUSION

The Obama administration deported a record 2.7 million people over the course of eight years. The Trump administration promises to ratchet up both the level and modes of enforcement. In the words of former White House Press Secretary Sean Spicer, the President has removed the “shackles” from enforcement agents.<sup>357</sup> This unshackling of deportation resources has raised the stakes of the “sanctuary city” debate, prompting local jurisdictions to confront hard questions about whether and how to disentangle local criminal justice actors from federal immigration enforcement efforts and protect their residents from the harm and disruption of detention and deportation.

The goal of this Article has been to present the facts necessary for a fuller understanding of the complex issues embedded in the sanctuary debate. Our examination of local resistance to federal immigration enforcement initiatives reveals that the Trump administration’s broad claim that sanctuary policies flout federal law are misplaced. The actions that jurisdictions have undertaken to effectuate disentanglement are supported by deeply rooted rationales designed to achieve a multiplicity of local policy goals. Indeed, many jurisdictions adopted disentanglement policies specifically to comply with federal law, sometimes even as a remedial measure for apparent constitutional violations. The only specific federal law cited by opponents of sanctuary policies as being undermined—8 U.S.C. § 1373—is narrow in scope, and jurisdictions have worked to craft their disentanglement policies to avoid violating it. Far from finding a legal conflict that must be reconciled in favor of the administration, our Article shows that sanctuary

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<sup>357</sup> Nicholas Kulish et al., *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html> [<https://perma.cc/8KES-S3C7>].

cities are engaging in activity that falls within their long-established domain of local criminal justice policymaking.