

UNDERSTANDING “SANCTUARY CITIES”

CHRISTOPHER N. LASCH, R. LINUS CHAN, INGRID V. EAGLY,
DINA FRANCESCA HAYNES, ANNIE LAI, ELIZABETH M.
McCORMICK, AND JULIET P. STUMPF

INTRODUCTION.....	2
I. PRESIDENT TRUMP’S PROMISE TO “END” SANCTUARY CITIES	7
II. THE RISE OF CRIMMIGRATION	12
A. <i>The Traditional Immigration Roles of Federal and State Officials</i>	12
B. <i>The Construction of Immigrants as Criminals</i>	14
C. <i>The Harnessing of State and Local Criminal Systems for Immigration Enforcement</i>	18
1. The Criminal Alien Program.....	19
2. The 287(g) Program	20
3. The Secure Communities Program.....	23
4. Other Joint Operations.....	26
III. “SANCTUARY” POLICIES IN AN ERA OF MASS DEPORTATION	28
A. <i>Barring Investigation of Civil and Criminal Immigration Violations by Local Law Enforcement</i>	30
B. <i>Limiting Compliance with Immigration Detainers and Administrative Immigration Warrants</i>	31
C. <i>Refusing ICE Access to Local Jails</i>	34
D. <i>Limiting Local Law Enforcement’s Disclosure of Sensitive Information</i>	36
E. <i>Precluding Local Participation in Joint Operations with Federal Immigration Enforcement</i>	39
IV. LEGAL AND POLICY RATIONALES FOR “SANCTUARY”	42
A. <i>Maintain Local Control Over Criminal Justice</i>	44
B. <i>Strengthen Community Trust</i>	48
C. <i>Prevent Unlawful Arrests</i>	51
D. <i>Safeguard Equal Protection</i>	55
E. <i>Promote Diversity and Inclusivity</i>	59
CONCLUSION.....	61

Draft: September 29, 2017

UNDERSTANDING “SANCTUARY CITIES”

CHRISTOPHER N. LASCH, R. LINUS CHAN, INGRID V. EAGLY,
DINA FRANCESCA HAYNES, ANNIE LAI, ELIZABETH M.
MCCORMICK, AND JULIET P. STUMPF*

Abstract: In the wake of Trump’s election, a growing number of local jurisdictions around the country have sought to disentangle their criminal justice system from federal immigration enforcement initiatives. These localities have embraced a series of reforms that protect immigrants from deportation when they come into contact with the criminal justice system. In response, President Trump and his administration have labeled these jurisdictions “sanctuary cities” and promised to “end” them by cutting off 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 his recently-announced campaign to “crack down” on “sanctuary cities.” We then outline the diverse ways in which localities have sought to protect their residents from deportation by refusing to participate in the Trump immigration agenda. Such initiatives include limiting compliance with 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 for sanctuary that local jurisdictions have advanced with increasing intensity since Trump’s election. These insights have important implications for how sanctuary cities are understood and preserved in the age of Trump.

As a complement to this Article, we have created a public online library of sanctuary policies that includes all the policies cited here and many more we considered in our research.

INTRODUCTION

On July 26, 2017, Donald Trump announced before a crowd in Youngstown, Ohio that his administration was “launching a nationwide crackdown on

* Christopher Lasch is an Associate Professor at the University of Denver Sturm College of Law. Linus Chan is an Associate Clinical Professor of Law at the University of Minnesota Law School. Ingrid Eagly is a Professor of Law at the UCLA School of Law. Dina Francesca Haynes is a Professor of Law at the New England School of Law. Annie Lai is an Assistant Clinical Professor of Law at the University of California, Irvine School of Law. Elizabeth McCormick is an Associate Clinical Professor of Law at the University of Tulsa College of Law. Juliet Stumpf is the Robert E. Jones Professor of Advocacy and Ethics at Lewis & Clark Law School. The authors thank Ellie Austin, Eunice Cho, Tigran Eldred, Bridget Galati, Dan Kanstroom, Ryan Knutson, Stephen Manning, Sarah Tischler, Nick Tischler, and Virgil Wiebe for their comments and feedback at various stages of this Article. Raquel Muscioni, Zach Nelson, and Phillip Shaverdian provided valuable research assistance.

Draft: September 29, 2017

sanctuary cities.”¹ In so doing, he was fulfilling a campaign promise to “cancel all federal funding to sanctuary cities” as a way to coerce localities to participate in immigration enforcement and punish those that pursue “sanctuary.”² Although Trump’s definition of “sanctuary city” has been imprecise, he has generally used the term to refer to those local jurisdictions that choose not to cooperate with federal deportation efforts.³ Trump’s aim was and continues to be to punish any localities who sit out on his plans for mass deportation, regardless of their reasons for enacting “sanctuary” policies.

This Article—which is a unique collaboration among law professors specializing in the intersection of immigration enforcement and criminal justice—engages the growing national debate on “sanctuary cities.” In it, we make three primary contributions to the literature.⁴ First, we deconstruct the elements of the

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

² DONALD J. TRUMP, DONALD TRUMP’S CONTRACT WITH THE AMERICAN VOTER (Oct. 2016), https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf [hereinafter TRUMP’S CONTRACT WITH THE AMERICAN VOTER].

³ See, e.g., Exec. Order 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (Jan. 25, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf> [hereinafter Exec. Order on Interior Enforcement] (defining “sanctuary jurisdictions” as those that “willfully refuse to comply with 8 U.S.C. 1373”). The term “sanctuary” or “sanctuary city” is not defined by statute, nor does it have a commonly accepted meaning. The Congressional Research Service 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.” MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., “SANCTUARY CITIES”: LEGAL ISSUES 1 (Jan. 15, 2009), <https://www.ilw.com/immigrationdaily/news/2011,0106-crs.pdf>. A restrictionist group, the Center for Immigration Studies, presents a “map” and a long list of both state and municipalities as being “sanctuary” cities without providing any definition of sanctuary city. BRYAN GRIFFITH & JESSICA VAUGHAN, CENTER FOR IMMIGRATION STUDIES MAP: SANCTUARY CITIES, COUNTIES, AND STATES (Jan. 2016), <http://cis.org/Sanctuary-Cities-Map>. While some jurisdictions have affirmatively adopted the “sanctuary” label, others have offered variations, such as “Fourth Amendment City,” “Human Rights City,” or “Welcoming City.”

⁴ For examples of important earlier scholarship on sanctuary cities, see HIROSHI MOTOMURA, IMMIGRATION OUTSIDE OF THE LAW (2014); PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM (2015); Stella Elias Burch, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013); 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); Trevor George Gardner, *The Promise and Peril of*

enforcement apparatus that the Trump administration has been using to conduct mass deportations and attack sanctuary cities. Although the Obama administration deported large numbers of immigrants,⁵ the Trump administration is well on its way to setting new records by undoing many of the reforms instituted towards the end of the Obama years and by trying to force local jurisdictions to participate in his plans. By analyzing the various actions taken by the administration since the election, we sketch out the major components of the current enforcement apparatus, such as entering local jails to arrest immigrants, asking local jurisdictions to hold immigrants for deportation purposes, and deputizing local police to enforce the immigration law.

Second, drawing on examples of ordinances and policies from jurisdictions around the country, we provide a current typology of the major categories of policies that have been adopted by jurisdictions to resist entanglement of state and local officials in the federal immigration enforcement apparatus.⁶ Although jurisdictions adopting these policies have been crudely labeled “sanctuary cities,” we define what local jurisdictions are actually doing by analyzing and categorizing their initiatives more precisely. Such initiatives include restraining

the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case, 34 ST. L. UNIV. 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 (2014); 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); Huyen Pham & Pham Hoang Van, *State-Created Immigration Climates and Domestic Migration*, 38 U. HAW. L. REV. 181, 195 (2016) (constructing a comprehensive index of the immigration climate in states and localities); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 600-05 (2008); Rick Su, *The Promise and Peril of Cities and Immigration Policy*, 7 HARV. L. & POL’Y REV. 299, 303-05 (2013); Rose Cuison Villazor, “*Sanctuary Cities*” and *Local Citizenship*, 37 FORDHAM URB. L.J. 573 (2010).

⁵ DEP’T OF HOMELAND SECURITY, 2015 YEARBOOK OF IMMIGRATION STATISTICS 103 (Dec. 2016), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf (reporting that over 2.7 million immigrants were removed from the United States during the years of the Obama administration).

⁶ While we appreciate that states have also taken significant steps to protect their residents from immigration enforcement, this Article focuses on local initiatives. For a discussion of state-level 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 IMMIGRANT LEGAL RESOURCE CENTER, THE PROMISE OF SANCTUARY CITIES AND THE NEED FOR CRIMINAL JUSTICE REFORMS IN AN ERA OF MASS DEPORTATION (2017), <http://fairpunishment.org/wp-content/uploads/2017/04/FPP-Sanctuary-Cities-Report-Final.pdf> (discussing reforming the criminal justice system as imperative to ensuring safe places for all citizen and non-citizen residents).

local law enforcement from initiating independent immigration enforcement activity, limiting compliance with immigration detainers, precluding participation in joint operations with the federal government, and preventing immigration agents from accessing local jails. While many of these laws and policies were in place well before Trump was elected,⁷ others were adopted in the wake of the election.⁸

Third, we identify the major legal and policy rationales that have motivated localities to enact and defend their “sanctuary” policies. Following the election, mayors, police chiefs, and other local officials—often supported often by their state government—came forward to denounce Trump’s vision of mass deportation.⁹ They made clear that “sanctuary” was necessary to prevent irrepa-

⁷ For a discussion of earlier periods of sanctuary policy in the United States, see Norma Stoltz Chinchilla, Nora Hamilton and James Loucky, *The Sanctuary Movement and Central American Activism in Los Angeles*, 36 *LATIN AMERICAN PERSPECTIVES* 101 (2009) (providing important insights into the start of the sanctuary movement in Los Angeles); Susan Bibler Coutin, *From Refugees to Immigrants: The Legalization Strategies of Salvadoran Immigrants and Activists*, 32 *THE INTERNATIONAL MIGRATION REV.* 901, 907- (1998) (describing the beginning of the sanctuary movement by religious activists in 1982); Annie Lai & Christopher N. Lasch, *Bringing Crimmigration’s Teachings to the Sanctuary City Defunding Debate*, 58 *SANTA CLARA L. REV.* __ (forthcoming 2017) (delineating three waves of sanctuary policies); Pham, *The Constitutional Right Not to Cooperate?*, *supra* note 4, 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).

⁸ As a complement to this Article, we have created a public online library of sanctuary policies. See ONLINE APPENDIX FOR “UNDERSTANDING ‘SANCTUARY CITIES’” <http://libguides.law.du.edu/c.php?g=705342>.

⁹ See, e.g., Kate Mather & Cindy Chang, *LAPD Will not Help Deport Immigrants Under Trump, Chief Says*, *L.A. TIMES* (Nov. 7, 2016), <http://www.latimes.com/local/lanow/la-me-ln-los-angeles-police-immigration-20161114-story.html> (“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 Chief Charlie Beck); 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> (“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); Journal North Staff, *Gonzales Reiterates Santa Fe’s Pro-Immigrant Stance After Trump’s Election Win*, *ALBUQUERQUE JOURNAL* (Nov 15, 2016), <https://www.abqjournal.com/889149/mayor-reiterates-santa-fes-pro-immigrant-stance-after-trumps-election-win.html> (“[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); Gary Kane, *Philly’s Sanctuary City Status Threatened under Trump Administration, Mayor Jim Kenney Says the City Will Protect Citizens’ Fourth Amendment Rights*, *METRO – PHILADELPHIA* (Nov. 10, 2016),

rable 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 policing. 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 lacking in probable cause. More to the core, many sanctuary city laws and policies are designed to embrace a diverse and inclusive vision of community.

Our analysis reveals a key insight. The debate over sanctuary cities, while 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 that intensified in the 1980s. One cannot understand sanctuary cities without understanding this history, the particular policies at issue and the rich array of rationales that have driven local communities time and time again to adopt them.

The collaboration that produced this work was inspired by the intense nationwide interest in “sanctuary cities” springing from the 2016 election. As scholars of immigration and crimmigration law, localities, advocates, and media have called on us for insight into the consequences of federal pressure on localities to take on and expand immigration enforcement roles. We sought one another out to collaborate on this singular project, in order to offer a deeper understanding of how the intersection of immigration and criminal justice is now playing out in the tension between restrictive federal immigration policymaking and local criminal justice priorities.

This Article proceeds in four 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. Part II grounds the current sanctuary debate in the rise of a “crimmigration” enforcement regime, that is, the increasingly heavy reliance on using the criminal justice system for immigration enforcement purposes.¹⁰ Specifically, we provide history essential to understanding the current moment, including the creation of ICE “detainers” and programs such as Secure Communities that link local arrests to deportation. In Part III we discuss the six primary types of criminal justice policies that cities have adopted to disentangle their law enforcement systems from federal immigration enforcement. Finally, Part

<http://www.metro.us/philadelphia/philly-s-sanctuary-city-status-threatened-under-trump-administration/zsJpkk---5u7en8W5aEanw> (“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).

¹⁰ 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).

IV analyzes five of the most significant legal and policy rationales that localities have offered to justify their maintenance and adoption of protective policies.

I. PRESIDENT TRUMP’S PROMISE TO “END” SANCTUARY CITIES

The false characterization of “sanctuary cities” as propagating immigrant crime has been a central feature of the Trump campaign from its inception. This claim relied on two principal propositions: first, that immigrants are criminals, and second, that policies that disentangle local law enforcement from federal immigration activity promote criminal activity by immigrants.

Throughout his campaign, Trump relied on a rhetoric of immigrant criminality to support his harsh immigration enforcement proposals. At his campaign launch in June of 2015, Trump described Mexican immigrants as drug dealers and rapists: “They’re bringing drugs. They’re bringing crime. They’re rapists.”¹¹ After securing the Republican nomination, Trump gave a speech dedicated to immigration issues in Phoenix, Arizona in which he claimed there were “at least two million” so-called “criminal aliens” in the United States and pledged that his administration would have “Zero tolerance for criminal aliens. Zero. Zero.”¹²

Trump’s identification of sanctuary cities as propagating criminal aliens appeared most powerfully in his campaign statements about the killing of Kathryn Steinle by an undocumented immigrant in 2015.¹³ Trump mentioned Steinle and other citizens killed by immigrants when he accepted the Republican nomination,¹⁴ asking “where was sanctuary for Kate Steinle” and for “all the other Americans who have been so brutally murdered, and who have suf-

¹¹ *Donald Trump Transcript: ‘Our Country Needs a Truly Great Leader,’* WALL ST. J.: WASH. WIRE (June 16, 2015), <http://blogs.wsj.com/washwire/2015/06/16/donald-trump-transcript-our-country-needs-a-truly-great-leader/>.

¹² Politico Staff, *Full Text: Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016), www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614 [hereinafter Trump’s August 31 Speech].

¹³ See, e.g., Trump’s August 31 Speech, *supra* note 12.

¹⁴ 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), <http://abcnews.go.com/Politics/family-people-killed-undocumented-immigrants-speak-gop-convention/story?id=40685407>.

ferred so horribly?”¹⁵ For Trump, Kathryn Steinle’s death was “another example of why we must secure our border immediately.”¹⁶ Immigrant criminality has justified Trump’s call to deport all undocumented immigrants and to “end” sanctuary cities.¹⁷ To accomplish this goal, Trump has repeatedly threatened that “[c]ities that refuse to cooperate with federal authorities will not receive taxpayer dollars[.]”¹⁸

The Trump administration moved quickly after the inauguration to implement promises made on the campaign trail. On January 25, 2017, President Trump signed two executive orders that expanded federal priorities for immigration enforcement¹⁹ and instructed the Department of Homeland Security to immediately commence work on a “great wall.”²⁰ The executive order addressing interior enforcement 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.”²¹ According to Trump, “[t]hese jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.”²² The executive order further charged the Attorney General and the Secretary of Homeland Security with ensuring that “sanctuary jurisdictions” are “not eligible to receive Federal grants, except as deemed necessary

¹⁵ *Transcript: Donald Trump’s Speech at Republican Convention*, THE MERCURY NEWS (July 22, 2016), <http://www.mercurynews.com/2016/07/22/transcript-donald-trumps-speech-at-republican-convention/>.

¹⁶ Doug Stanglin, *Trump: San Francisco Shooting Case for Securing Border*, USA TODAY (July 4, 2015), <http://www.usatoday.com/story/news/nation/2015/07/04/donald-trump-san-francisco-killing-whipping-post/29694403/>.

¹⁷ Trump’s August 31 Speech, *supra* note 12 (“We will end the sanctuary cities that have resulted in so many needless deaths.”).

¹⁸ *Id.*; see also Amita Kelly & Barbara Sprunt, *Here Is What Donald Trump Wants to Do in His First 100 Days*, NPR (Nov. 9, 2017), <http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days> (noting Trump’s promise to “cancel all federal funding to Sanctuary Cities”).

¹⁹ Exec. Order on Interior Enforcement, *supra* note 3 (declaring priorities for enforcement to include those 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).

²⁰ Exec. Order 13767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 25, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02095.pdf> (directing DHS Secretary to “take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border”).

²¹ Exec. Order on Interior Enforcement, *supra* note 3, at § 1.

²² *Id.*

for law enforcement purposes by the Attorney General or the Secretary.”²³ White House Press Secretary Sean Spicer told the press immediately after the executive order was signed: “Federal agencies are going to unapologetically enforce that law, no ifs ands or buts. We’re going to strip federal grant money from the sanctuary states and cities that harbor illegal immigrants. The American people are no longer going to have to be forced to subsidize this disregard for our laws.”²⁴

Implementation of the executive orders by Department of Justice officials continued President Trump’s rhetoric of immigrant criminality. Department of Homeland Security Secretary John F. Kelly issued an implementing memorandum declaring that “[c]riminal aliens regularly victimize Americans and other legal residents.”²⁵ Attorney General Jeff 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.”²⁶ Invoking Kathryn Steinle’s case, and claiming that sanctuary policies “endanger the lives of every American” and “violate federal law,” Attorney General Sessions vowed to implement the executive order by cutting funding to sanctuary jurisdictions.²⁷

Statements conflating immigration and crime have become a mainstay of the Trump presidency.²⁸ For example, in July of 2017, President Trump told

²³ *Id.* at § 9(a).

²⁴ Bill Ruthhart & Hal Dardick, *As Trump Signs Immigration Order, Emanuel Vows Chicago Will Stay Sanctuary City* (Jan. 25, 2017), <http://www.chicagotribune.com/news/local/politics/ct-rahm-emanuel-donald-trump-chicago-sanctuary-cities-met-0126-20170125-story.html>

²⁵ Memorandum from John Kelly, Sec’y, Dep’t of Homeland Security, to Kevin McAlaneen, Acting Comm’r, U.S. Customs and Border Protection, *et al.* re Implementing the President’s Border Security and Immigration Enforcement Policies 4 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [hereinafter Kelly Border Security Memo].

²⁶ U.S. Dep’t of Justice, Office of Public Affairs, *Attorney General Jeff Sessions Delivers Remarks Announcing Sanctuary Jurisdictions* (March 27, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-sanctuary-jurisdictions>.

²⁷ *Id.*

²⁸ Despite these claims, research has consistently shown that immigrants are less likely than citizens to commit crimes. *See, e.g.*, RUBÉN RUMBAUT ET AL., DEBUNKING THE MYTH OF IMMIGRANT CRIMINALITY: IMPRISONMENT AMONG FIRST- AND SECOND-GENERATION YOUNG MEN (June 1, 2006), <http://www.migrationpolicy.org/article/debunking-myth-immigrant-criminality-imprisonment-among-first-and-second-generation-young> (demon-

community members in Suffolk County, New York that undocumented immigrants who commit crimes are “animals” that render cities “bloodstained killing fields.”²⁹ The President’s national campaign to “crack down” on sanctuary cities also includes a legislative component. In June of 2017, the House of Representatives passed a bill, entitled the No Sanctuary for Criminals Act, to punish resistant localities by withholding Department of Justice and Department of Homeland Security grant funds.³⁰

The Trump administration’s immigration plans have also brought into the open the racial impact of crimmigration policy. Consistent with candidate Trump’s statements connecting Mexican nationals with crime, anti-immigrant rhetoric has become a core component of a vocal white supremacy ideology which understood Trump’s deportation policies as furthering a brazenly racist agenda.³¹ Some localities confronted this bald linking of white nationalism and immigration restrictionism by justifying the policies they adopted encouraging disentanglement of policing and immigration enforcement as bolstering diversity and inclusion.³²

Within two months of Trump’s inauguration, six jurisdictions filed lawsuits challenging the executive order and its intention to starve “sanctuary” cities of federal funding.³³ On April 25, 2017 a federal judge issued a nationwide

strating that “immigrants have the lowest rates of imprisonment for criminal convictions in American society”); TOM K. WONG, THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY (Jan. 26, 2017), <https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf> (concluding that “[c]rime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties”).

²⁹ Maggie Haberman & Liz Robbins, *Trump, on Long Island, Vows an End to Gange Violence* (July 24, 2017), <http://www.nytimes.com/2017/07/28/us/politics/trump-immigration-gang-violence-long-island.html>; 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>.

³⁰ H.R. 3003 (“No Sanctuary for Criminals Act”), 115th Congress (introduced June 22, 2017). Similar proposals had been introduced in earlier years; none had ever become law. See Lai & Lasch, *supra* note 7 (cataloguing nearly a dozen federal legislative proposals to target sanctuary jurisdictions introduced over the past twelve years).

³¹ 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).

³² See Part IV.E, *infra*.

³³ See *City and Cty. of S.F. v. Donald J. Trump*, No. 3:17-cv-00485 (N.D. Cal. filed Jan. 31, 2017); *Cty. of Santa Clara v. Donald J. Trump*, No. 5:17-cv-00574 (N.D. Cal. filed Feb. 3, 2017); *City of Chelsea & City of Lawrence v. Donald J. Trump*, No. 1:17-cv-10214 (D. Mass. filed Feb. 8, 2017); *City of Richmond v. Donald J. Trump*, No. 3:17-cv-01535-SK (N.D. Cal. filed Feb. 22, 2017); *City of Seattle v. Donald J. Trump*, No. 2:17-cv-00497

preliminary injunction halting the executive order.³⁴ The injunction notwithstanding, in July of 2017, the Department of Justice announced that local jurisdictions that did not cooperate with federal immigration authorities in significant ways would be denied their Byrne Justice Assistance Grants (JAG),³⁵ a leading source of federal funding for state and local criminal justice systems.³⁶ Several jurisdictions, as well as the State of California, have filed suit challenging this latest move.³⁷

This Part has outlined the Trump administration's increasingly hostile attacks on sanctuary cities. In seeking support for this agenda, the administration has filled its campaign and public statements since taking office with racially-coded rhetoric about immigrant criminality. This rhetoric of immigrant criminality and the administration's anti-sanctuary actions on multiple fronts have

(W.D. Wash. filed March 29, 2017). For a more detailed examination of the litigation, see Lai & Lasch, *supra* note 7.

³⁴ Order Granting the Cty. of Santa Clara's and City and Cty. of San Francisco's Motions to Enjoin Section 9(a) of Executive Order 13768, *Cty. of Santa Clara*, No. 5:17-cv-00574 (Apr. 25, 2017). The federal defendants' motion to reconsider the preliminary injunction and motions to dismiss as to Santa Clara and San Francisco were denied on July 20, 2017, and the federal defendants were given twenty days to file an answer to those complaints. Order Denying the Government's Motions for Reconsideration and to Dismiss with Regards to the City and County of San Francisco and the County of Santa Clara, *Cty. of Santa Clara*, No. 5:17-cv-00574 (July 20, 2017).

³⁵ BUREAU OF JUSTICE ASSISTANCE, BJA'S EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, <https://www.bja.gov/jag/>.

³⁶ U.S. Dept. 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> (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 48 hours advanced notice of the scheduled release date and time of any inmate to facilitate transfer of custody to ICE). 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 (2016) (delving deeply into federal anti-sanctuary statutes, including 8 U.S.C. § 1373, and evaluating the anti-sanctuary approach).

³⁷ See *City of Chicago v. Jefferson Beauregard Sessions*, No. 1:17-cv-05720 (N.D. Ill. filed Aug. 7, 2017); *City and Cty of S.F. v. Jefferson B. Sessions et al.*, No. 3:17-cv-04642-MEJ (N.D. Cal. filed Aug. 11, 2017); *State of California ex rel. Xavier Becerra v. Jefferson B. Sessions et al.*, No. 3:17-cv-0471 (N.D. Cal. filed Aug. 14, 2017); *City of Philadelphia v. Sessions*, No. 2:17-cv-03894 (E.D. Pa. filed Aug. 30, 2017). In August 2017, Los Angeles sought leave to join the litigation, explaining that it was being forced into the "untenable choice of risking a key public safety grant or making the LAPD an arm of federal immigration policy." See Joel Rubin, *L.A. Looks to Join Fight Against Trump Administration over Threats to Withhold Anti-Crime Funds for 'Sanctuary' Cities*, L.A. TIMES (Aug. 22, 2017).

obstructed critical understandings of the roots of sanctuary city policies and obscured the legal obstacles to the Trump administration's plans to pressure cities to participate in his plans. In the next Part, we will discuss the origins of the debate about the role of state and local law enforcement in federal immigration enforcement.

II. THE RISE OF CRIMMIGRATION

Over the past twenty years, state and local law enforcement have increasingly been pressed to engage in federal immigration enforcement efforts. This entanglement of local criminal law systems with immigration enforcement has been well documented by scholars as part of a growing "crimmigration" phenomenon.³⁸ As we discuss in Part II, crimmigration, or the interweaving of immigration and criminal law, has led to the creation of new interior immigration enforcement policies. Understanding the modern sanctuary city requires first tracing how the conflation of immigration and criminal law enforcement schemes has impacted immigrant communities and communities of color in the United States. Next, we trace the federal enforcement tools that pre-date the Trump administration, but that have been brandished in new ways since the election. This background provides an important context for understanding the rise of sanctuary policies, which we discuss in Parts III and IV.

A. The Traditional Immigration Roles of Federal and State Officials

In a series of seminal cases in the late nineteenth century, the Supreme Court sharply delineated between the role of civil immigration enforcement and criminal punishment.³⁹ In *Fong Yue Ting v. United States*, the Court clarified

³⁸ Stumpf, *The Crimmigration Crisis*, *supra* note 10; *see also, e.g.*, Katherine Beckett and Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 *LAW & SOC'Y REV.* 241 (2015); Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 *UCLA L. REV.* 594 (2016); Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 *HASTINGS WOMEN'S L. REV.* 79 (1998); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 *GEO. IMMIGR. L.J.* 611 (2003); Stumpf, *The Crimmigration Crisis*, *supra* note 10, at 376; Jennifer M. Chacón, *Managing Migration Through Crime*, 109 *COLUM. L. REV. SIDEBAR* 135 (2009); Ingrid V. Eagly, *Prosecuting Immigration*, 104 *NW. U. L. REV.* 1281 (2010); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 *B.Y.U. L. REV.* 1457, 1513 (2013); Mary Fan, *The Case for Crimmigration Reform*, 92 *N.C. L. REV.* 75 (2013); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 *OHIO ST. L.J.* 599 (2015).

³⁹ *See generally* 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).

that immigration proceedings, which determined “whether the conditions exist upon which congress has enacted that an alien . . . may remain within the country,” were civil in nature.⁴⁰ Later, in *Wong Wing v. United States*, the Court held that criminal proceedings meant to impose punishment required the constitutional protections afforded in criminal cases.⁴¹ Finally, in the third case in the trilogy, *Yick Wo v. Hopkins*, the Court held that the power retained by states over criminal matters could not be used to control immigration by discriminating between citizens and noncitizens.⁴²

These early cases have great significance for modern sanctuary cities. First, the Court drew a stark distinction between a civil immigration scheme within federal control and a criminal justice system that states largely governed. By defining exclusion and expulsion as non-punitive, the Court also made clear that the laws governing these two systems are separate, as are the types of protections that the systems provide to defendants. Second, by locating immigration law in the realm of foreign policy, the Court constituted immigration enforcement as a federal function. Third, the Court clarified that states that use their criminal justice power to enforce immigration law run the risk of violating the Equal Protection Clause of the Fourteenth Amendment. In sum, this trilogy of Supreme Court holdings ousted the states from any significant role in controlling the movement of noncitizens. It placed responsibility for immigration enforcement squarely in the hands of the federal government.⁴³

⁴⁰ *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“Deportation is not a punishment for crime.”).

⁴¹ *See Wong Wing v. United States*, 163 U.S. 228 (1896) (holding that the government could not punish noncitizens for violating immigration law by imprisoning them at hard labor unless it provided the criminal law protections of the Fifth and Sixth Amendments).

⁴² *See generally Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that San Francisco’s discriminatory application of a misdemeanor ordinance to Chinese residents violated the Equal Protection Clause).

⁴³ Stumpf, *States of Confusion*, *supra* note 39, 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 federal power, holding that the federal government may exercise power in the immigration arena relatively unconstrained by constitutional norms such as equal protection. *See generally* Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 18 n.88 (2013) (highlighting the various “intense scholarly criticism[s]” of the plenary power doctrine); Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 14 MICH. L. REV. FIRST IMPRESSIONS 21 (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, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (predicting that “[l]ittle by little, exceptions and qualifications will reduce the doctrine to a shadow of its former self without an express

For states and cities, divorcing immigration enforcement from criminal justice meant that principles of equality trumped delineations based on immigration status, especially in criminal law.⁴⁴ Equal protection jurisprudence applied strict scrutiny to local criminal laws that created distinctions based on alienage.⁴⁵ States and localities could not use either immigration law to divest their noncitizen residents of membership on the basis of their status as noncitizens.⁴⁶ Criminal law 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 law⁴⁷ underwent an important transformation beginning in the 1980s—when a fundamental reframing of the nature of immigration enforcement upset these long-established roles.

B. The Construction of Immigrants as Criminals

The rise of crimmigration has carved a new role for states and localities in immigration enforcement.⁴⁸ In the 1980s, the Reagan administration’s “war on

overruling of contrary precedent”); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (describing the subversion of the plenary power doctrine through statutory interpretation); Kevin R. Johnson, *Immigration and 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”).

⁴⁴ See Stumpf, *States of Confusion*, *supra* note 39, at 1558–65. See also Daniel Kanstroom, *Immigration Enforcement and State Post-Conviction Adjudications: Towards Nuanced Preemption and True Dialogical Federalism*, 70 U. MIAMI L. REV. 489 (2016) (counseling federal deference to state adjudications that protect basic rights in immigration enforcement settings); Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 295 (2016) (describing immigrant equality in criminal law as ensuring that “each person subjected to the criminal justice system is treated in a way that is equitable, regardless of his or her immigration status”).

⁴⁵ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (striking down California statute regulating immigration); *Yick Wo v. Hopkins*, 118 U.S. 356, 358–89 (1886) (striking down discriminatory city ordinance); *Graham v. Richardson*, 403 U.S. 365, 376–80 (1971) (striking down state laws conditioning welfare on U.S. citizenship and residency).

⁴⁶ See Stumpf, *States of Confusion*, *supra* note 39, at 1557–58.

⁴⁷ See, e.g., *United States v. Morrison*, 529 U.S. 598, 618 (2000) (finding “no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims”).

⁴⁸ A burgeoning scholarship has traced these developments in “crimmigration.” See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and*

drugs” propelled an unprecedented merger of immigration enforcement with the criminal justice system.⁴⁹ As part of President Reagan’s drug war, immigrants were conflated with criminality in ways that facilitated local law enforcement participation in policing immigration.⁵⁰ Immigrants were portrayed as not just a threat to American jobs, but a racialized source of criminality that propelled the need for local law enforcement to bring to bear local criminal justice resources.⁵¹ This perpetuation of a narrative of immigrants-as-criminals made it appear more natural for local law enforcement to play a role in immigration enforcement.⁵²

National Security, 39 CONN. L. REV. 1827 (2007); Eagly, *Prosecuting Immigration*, *supra* note 38; 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 (2004); Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. L. REV. 879 (2015); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); Stumpf, *The Crimmigration Crisis*, *supra* note 10.

⁴⁹ 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”). *See also* Peter Andreas, *Redrawing the Line: Borders and Security in the Twenty-First Century*, 28 INT’L SEC. 78, 87 (2003) (describing the “narcoticized” southern border); Miller, *Citizenship & Severity*, *supra* note 38, at 626 (describing the notion of the “U.S. border as a ‘crime scene’”).

⁵⁰ *See* Vázquez, *Constructing Crimmigration*, *supra* note 38 at 641-42 (describing increased use of “criminal alien” concept as spillover effect of war on drugs).

⁵¹ Leo Chavez has proposed that this immigrant “threat narrative” was constructed and replenished over the course of a century. *See generally* Leo R. Chavez, “Illegality” Across Generations: Public Discourse and the Children of Undocumented Immigrants, in CONSTRUCTING IMMIGRANT “ILLEGALITY”: CRITIQUES, EXPERIENCES, AND RESPONSES 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. De Genova, *Immigration “Reform” and the Production of Migrant “Illegality,”* in CONSTRUCTING IMMIGRANT “ILLEGALITY,” *supra* note 51, at 39-58. *See also* Gyung-Ho Jeong et al., *Cracks in the Opposition: Immigration as a Wedge Issue for the Reagan Coalition*, 55 AM. J. POL. SCI. 511 (2011) (describing evolution of immigration from an economic issue to a social issue).

⁵² *See, e.g.,* Ian F. Haney-López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1036, 1036 n.62 (2010) (noting that “fighting crime became a seemingly ‘obvious’ framework for responding to social problems,” including unauthorized immigration).

As low-level drug crime became a national obsession, criminal arrest was converted into a primary avenue to deportation. This change in criminal enforcement patterns was buttressed by changes in the immigration law, which allowed for even low-level drug offenses to result in automatic deportation. In 1986 Congress passed the Narcotics Traffickers Deportation Act, which amended the Immigration and Nationality Act to provide for the exclusion or deportation of immigrants who commit controlled substance offenses.⁵³ In introducing the legislation, the legislators relied explicitly on the alleged connection between immigration and crime:

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.⁵⁴

This blaming of immigrants for the nation's drug problem cemented the trope of immigrant criminality and also set the stage for enticing localities to use their criminal justice resources to support immigration enforcement efforts.

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.⁵⁵ The 287(g) program provides for voluntary partnerships between local law enforcement and federal immigration officials whereby local officers could be deputized to perform certain immigration enforcement functions under federal supervision.⁵⁶ At the same time, federal immigration enforcement began to increasingly rely on criminal prosecution of immigrants for immigration violations.⁵⁷ In addition, the immigration system expanded its reliance on detention and other criminal tools that make immigration enforcement much more like criminal law enforcement.⁵⁸

⁵³ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §1751 (Subtitle M), 100 Stat. 3207 (Oct. 27, 1986).

⁵⁴ 132 Cong. Rec. H6716-03, 1986 WL 790075 (Sept. 11, 1986) (statement of Rep. Smith).

⁵⁵ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 133, 110 Stat. 3009 (codified at 8 U.S.C. § 1357(g) (2000)).

⁵⁶ *Id.*

⁵⁷ See David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 166-75 (2012) (describing rise in prosecutions of immigration crimes).

⁵⁸ E.g. García Hernández, *Immigration Detention As Punishment*, *supra* note 49 at 1372-77 (describing rise of detention as example of incorporation of "penal norms" in immigration enforcement); Stumpf, *The Crimmigration Crisis*, *supra* note 10 at 386-91 (describing how "[i]mmigration enforcement has come to parallel criminal law enforcement").

The push to involve local police in federal immigration enforcement intensified after the terrorist attacks of 9/11.⁵⁹ In 2002, the Department of Justice 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.⁶⁰ This policy change precipitated a vigorous debate between critics who argued that federal immigration enforcement was not the job of state and local law enforcement officials⁶¹ and immigration restrictionists who believed that local police should act as a “force multiplier” in the federal immigration enforcement effort.⁶²

States and localities reacted in different ways. Some local jurisdictions rushed to participate in the 287(g) program. A number of states and localities also passed their own restrictionist immigration measures,⁶³ many of them premised on the association of immigrants with criminality.⁶⁴

⁵⁹ See generally Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007) (describing “blurred boundaries” between immigration, crime, and national security control after 9/11); Anil Kalhan, *Immigration Enforcement and Federalism after September 11, 2001*, in IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE (Ariane Chebel d'Appollonia & Simon Reich, eds., 2008) (describing efforts to enlist local law enforcement in federal immigration enforcement efforts after 9/11); Gallya Lahav and Marie Courtemanche, *The Ideological Effects of Framing Threat on Immigration and Civil Liberties*, 34 POL. BEHAV. 477, 478 (2012) (describing a “‘securitization of migration’ discourse” after 9/11); Miller, *Blurring the Boundaries*, *supra* note 48, at 87–88 (describing post-9/11 allocation of crime-control resources to immigration control).

⁶⁰ Jay S. Bybee, Asst. Att’y Gen’l, Memorandum for the Attorney General (April 3, 2002), <https://www.aclu.org/legal-document/olc-memo-state-and-local-law-enforcement-immigration-laws> [hereinafter 2002 OLC Memo].

⁶¹ See, e.g., Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004); 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 (2004).

⁶² See, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 17 (2005).

⁶³ As R. 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).

⁶⁴ 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) (describing 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

Other jurisdictions resisted the push to entangle their local criminal justice systems with federal immigration enforcement.⁶⁵ In 2006, for example, New Haven, Connecticut, distanced its police department from immigration enforcement by directing officers not to gather immigration status information.⁶⁶ And New Haven and other cities also began issuing municipal identification cards (or accepting forms of identification including foreign documents) as a means of integrating noncitizen residents and ensuring the equal provision of city services to all, irrespective of citizenship or immigration status.⁶⁷ These disentanglement and integrationist policies are early examples of local responses to federal pressure that are now labeled sanctuary policies.

C. The Harnessing of State and Local Criminal Systems for Immigration Enforcement

President Trump's embrace of the immigrant-as-criminal-threat vision drives his push for entanglement of local criminal processes with federal immigration enforcement: The administration's plans for mass deportations depend upon its ability to harness the power of local law enforcement. Since the 1980s, a growing number of federal programs sought to put state and municipal law enforcement resources in the service of federal immigration enforcement. Each of these programs has generated controversy and raised important legal questions. Nevertheless, they have been given new life under the current administration.

This section introduces the principal federal enforcement programs that play starring roles in the Trump administration's crimmigration initiatives: the Criminal Alien Program, 287(g) agreements, the Secure Communities Program, and joint operations with local law enforcement. Understanding how these pro-

immigrant policing law and limited the nonfederal role in immigration enforcement to what was permitted by Congress. *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").

⁶⁵ Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 600-05 (2008) (describing sanctuary policies and noting that many "served 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").

⁶⁶ Stephanie M. Gomes, *Building Trust in our Communities: States Encourage Their Residents to Speak Up in the Wake of the Federal Government's Silence*, 33 QUINNIPIAC L. REV. 715, 733 (2015). The New Haven policy is discussed in more depth below. *See* notes 210-215, *infra*, and accompanying text.

⁶⁷ *Id.* at 735-38; Su, *supra* note 4 at 303-05.

grams function and their resurgence under the current administration is critical to later understanding the sanctuary policies that we introduce in Part III.

1. The Criminal Alien Program

The stated purpose of the Criminal Alien Program, or “CAP,” is to identify, arrest, and deport “priority” noncitizens encountered in federal, state, and local prisons and jails.⁶⁸ The program places ICE agents in participating local jails to identify individuals for deportation.⁶⁹ In conducting their work within the local jail, ICE agents may search biometric and biographic data, as well as interview arrestees and inmates.⁷⁰ In the ten year period between 2005 and 2015, CAP was associated with over 1,435,000 immigration arrests.⁷¹

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 profiling of Latinos.⁷² Second, although CAP was purportedly designed to go after serious criminals, research suggests that individuals without criminal records, or only minor convictions, were deported. The authors of the Texas study concluded that officers were incentivized make arrests for petty offenses, which resulted in deportation.⁷³ Indeed, documents obtained from ICE in response to a Freedom of Information Act request revealed that

⁶⁸ See U.S. IMMIGR. & CUSTOMS ENFORCEMENT, IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAM, <https://www.ice.gov/criminal-alien-program> (last visited Dec. 7, 2016). CAP also pursues noncitizens who are not currently incarcerated but may meet the criminal removal grounds. *Id.*

⁶⁹ *Id.*

⁷⁰ See WILLIAM A. KANDEL, CONG. RESEARCH SERV., INTERIOR IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAMS 10 (Sept. 8, 2016), <https://fas.org/sgp/crs/homesecc/R44627.pdf>.

⁷¹ *Id.* at 15, tbl. 2.

⁷² TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INSTITUTE 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 (documenting a correlation between immigration enforcement in a local jail and the profiling of Latinos in Irving, Texas). 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).

⁷³ GARDNER & KOHLI, *supra* note 72, at 4.

79% of immigrants targeted by CAP had either no criminal record at all, or convictions for only traffic or minor offenses.⁷⁴

The Trump administration has made clear that it plans to rely heavily on CAP to deport noncitizens.⁷⁵ According to the agency's current website, it will make immigrants identified through the program a priority for deportation action.⁷⁶ In addition, the agency pledges to work with U.S. Attorneys' Offices to "aggressive[ly] prosecut[e]" immigrants identified through the CAP program who are discovered to have violated criminal immigration laws.⁷⁷

2. The 287(g) Program

Section 287(g) of the INA grants DHS the ability to enter into optional written agreements with states and localities to train nonfederal officers, at local expense, to carry out certain immigration enforcement functions to the extent consistent with state and local law.⁷⁸ The 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.⁷⁹ The 287(g) program has a "task force model," applying to street-level policing, and a "jail model," which is mostly concerned with identifying and transferring inmates from local to immigration custody.⁸⁰

⁷⁴ 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 (April 2011), <https://ccrjustice.org/sites/default/files/assets/files/Secure%20Communities%20Fact%20Sheet%20Briefing%20guide%208-2-2010%20Production.pdf> [hereinafter NDLOM Briefing Guide]; see also NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC ET AL., INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRATION DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 10 (2012) (finding that 37 percent of noncitizens taken into custody through CAP had no criminal history).

⁷⁵ See Kelly Border Security Memo, *supra* note 25, at 3.

⁷⁶ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAM, <https://www.ice.gov/criminal-alien-program> (last visited Aug. 16, 2017) (describing the program and its goal of identifying both "criminal and other priority aliens").

⁷⁷ *Id.*

⁷⁸ 8 U.S.C. § 1357(g)(1), (3).

⁷⁹ *Id.* § 1357(g)(2).

⁸⁰ AM. IMMIGR. COUNCIL, THE 287(G) PROGRAM: AN OVERVIEW (March 15, 2017), <https://www.americanimmigrationcouncil.org/research/287g-program-immigration>. A third "hybrid" model has not been used often to date.

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.⁸¹ In 2011, a Department of Justice 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 “significantly compromised” community safety.⁸² 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.”⁸³

In the wake of this controversy, the Obama administration announced in 2012 that it would stop renewing any 287(g) task force agreements.⁸⁴ The number of agreements under the program dropped by half,⁸⁵ leaving in place only 34

⁸¹ DEP’T OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL, THE PERFORMANCE OF 287(G) AGREEMENTS: FY 2010 (Mar. 2010), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf. See also RICHARD M. STANNA, GAO, 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>.

⁸² U.S. DEP’T OF JUSTICE, REPORT RE: UNITED STATES’ INVESTIGATION OF THE MARICOPA COUNTY SHERIFF’S OFFICE 2 (Dec. 15, 2011), http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

⁸³ *Id.* at 2-3. An investigation into the 287(g) program of Alamance County, North Carolina, revealed similarly disturbing evidence of racial profiling. U.S. DEP’T OF JUSTICE, REPORT RE: UNITED STATES’ INVESTIGATION OF THE ALAMANCE COUNTY SHERIFF’S OFFICE 5 (Sept. 18, 2012), <http://www.justice.gov/iso/opa/resources/171201291812462488198.pdf> (describing discriminatory traffic enforcement and checkpoint practices).

⁸⁴ See JOHN MORTON, STATEMENT REGARDING A HEARING ON U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2013 BUDGET REQUEST (Mar. 8, 2012), <http://www.aila.org/content/fileviewer.aspx?docid=38896&linkid=244574> (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”).

⁸⁵ Press Release, U.S. Immigration and Customs Enforcement, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidelines to Further Focus Resources (December 21, 2012), <http://www.ice.gov/news/releases/1212/121221washingtondc2.htm> (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”).

section 287(g) agreements at the end of the administration.⁸⁶ All were limited to deputized officers providing jail support, rather than authorizing the kind of “task force” immigration policing in community settings that the Arizona abuses typified.⁸⁷

The 287(g) program has been linked to racial profiling and distrust in local law enforcement. A study by Professor Amada Armenta 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 on the street undermined the Latino community’s trust in the police.⁸⁸ The program also empowered some officers to be “unnecessarily punitive” and seek out and arrest Latino immigrants, a decision that could result in their deportation.⁸⁹

President Trump campaigned on a promise to revive the 287(g) program.⁹⁰ 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.”⁹¹ Since the time he took office, the number of 287(g) agreements has nearly doubled.⁹² Eighteen of these additional agreements are in Texas.⁹³

⁸⁶ IMMIGRATION AND CUSTOMS ENFORCEMENT [ICE] FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, <https://www.ice.gov/factsheets/287g> [hereinafter 287(g) Fact Sheet].

⁸⁷ DEP’T OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL, THE PERFORMANCE OF 287(G) AGREEMENTS: FY 2011 UPDATE 9 (Sept. 2011), http://www.oig.dhs.gov/assets/Mgmt/OIG_11-119_Sep11.pdf (warning that ICE lacked assurance that the 287(g) program was meeting its intended purpose, which was to target “aliens who pose the greatest risk to public safety and the community”).

⁸⁸ Amada Armenta, *Between Public Service and Social Control: Policing Dilemmas in the Era of Immigration Enforcement*, 63 SOC. PROBS. 111 (2016) (studying the implementation of 287(g) in Nashville, Tennessee). See also AMADA ARMENTA, PROTECT, SERVE, AND DEPORT (2017).

⁸⁹ Armenta, *Between Public Service and Social Control*, *supra* note 88, at 121.

⁹⁰ See Trump’s August 31 Speech, *supra* note 12 (“We will expand and revitalize the popular 287(g) partnerships, which will help to identify hundreds of thousands of deportable aliens in local jails that we don’t even know about.”).

⁹¹ Exec. Order on Interior Enforcement, *supra* note 3, at § 8 (calling on DHS to enter into 287(g) agreements with local governments).

⁹² 287(g) Fact Sheet, *supra* note 86 (noting sixty-one 287(g) agreements as of August 27, 2017). All are “jail enforcement” agreements. *Id.*

⁹³ U.S. Immigration and Customs Enforcement News Release, *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>.

3. The Secure Communities Program

In 2008, the federal government undertook its most far-reaching effort to harness state and local criminal justice systems for federal immigration enforcement. The “Secure Communities Program” 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.⁹⁴

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,” or “ICE holds”—which took the form of a piece of paper faxed or emailed from federal immigration officials to local officials. The detainer form used when the program began contained language suggesting compliance was mandatory, stating that federal regulations “*require* that you detain the alien for a period not to exceed 48 hours . . . to provide adequate time for DHS to assume custody of the alien.”⁹⁵

The confusion about whether detainers were requests or commands to local officials was perpetuated by DHS through various iterations of the detainer form as it ramped up enforcement.⁹⁶ DHS was less than forthright with local jurisdictions about whether they could “opt out” of Secure Communities. Initially, DHS suggested that jurisdictions could stop fingerprints submitted for FBI checks from being transmitted to DHS. However, when local communities tried to prevent the transmittal of fingerprints, they were told that participation in the program was mandatory.⁹⁷

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

⁹⁴ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: FREQUENTLY ASKED QUESTIONS, <https://www.ice.gov/secure-communities> (last visited Aug. 1, 2017) (explaining that “[u]nder Secure Communities, DHS receives these fingerprints from the FBI, so that ICE can determine if that person is also subject to removal (deportation)”).

⁹⁵ See U.S. IMMIGR. & NATURALIZATION SERV., FORM I-247 (April 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) (emphasis added) (citing 8 C.F.R. § 287.7).

⁹⁶ See generally Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 205-09 (2013).

⁹⁷ ICE, *Secure Communities: Get the Facts*, <https://www.ice.gov/secure-communities> (last visited July 28, 2017).

police officer became a *de facto* brush with immigration enforcement.⁹⁸ Second, Secure Communities relied on police and sheriffs to hold noncitizens beyond their normal release. And because detainers were issued upon *booking*—and not keyed to a conviction—Secure Communities regularly failed to meet its stated priorities, often ensnaring noncitizens with no criminal conviction at all.⁹⁹

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.¹⁰⁰ In addition, Secure Communities was problematic because it encouraged race-based policing.¹⁰¹ Finally, despite federal claims that Secure Communities made communities safer, a study of its implementation found that it had no impact on crime rates.¹⁰²

A series of judicial decisions also questioned the legality of the detainer-based enforcement program.¹⁰³ 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 who was held by the County pursuant to an immigration detainer.¹⁰⁴

⁹⁸ See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011).

⁹⁹ See, e.g., NDLOM Briefing Guide, *supra* note 74; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, FEW ICE DETAINERS TARGET SERIOUS CRIMINALS (Sept. 17, 2013), <http://trac.syr.edu/immigration/reports/330> (reporting that 47.7% of those subject to immigration detainers over a 16-month period had no criminal conviction at all).

¹⁰⁰ See NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (2013), https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf (reporting on the impact of police involvement in immigration enforcement on Latinos' perceptions of public safety and their willingness to contact the police).

¹⁰¹ 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); Vásquez, *supra* note 38.

¹⁰² See Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from "Secure Communities,"* 57 J. OF L. & ECON. 937-1085 (2014).

¹⁰³ See Juliet Stumpf, *D(E)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1279-81 (2015).

¹⁰⁴ *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014).

Subsequent decisions echoed *Galarza*'s conclusion that localities could not be commanded to hold individuals on behalf of the federal government¹⁰⁵ and provided firm legal footing for policies that limited detainer-based detention.¹⁰⁶

These decisions made clear that despite the language of the detainer form used by ICE, compliance with requests for detention was voluntary and could not be mandated by ICE.¹⁰⁷ More importantly, the courts made clear that the detention of individuals past the time they were otherwise entitled to release raised Fourth Amendment concerns. Local law enforcement agencies were found liable for violating the Fourth Amendment when they detained individuals for ICE without a judicial warrant or probable cause.¹⁰⁸ These and other concerns inspired localities to decline to participate in the program and to enact local policies limiting their compliance with immigration detainers.¹⁰⁹

On November 20, 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.”¹¹⁰ The program was immediately replaced with a different program,

¹⁰⁵ See *Mercado v. Dallas County, Texas*, 2017 WL 169102 at *9 (2017) (collecting cases, and rejecting Dallas County's argument that holding individuals based on immigration detainers was required by federal law).

¹⁰⁶ 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. See Alan Gomez, *Judge Bashes Miami-Dade for Helping Federal Immigration Agents*, USA TODAY (March 3, 2017).

¹⁰⁷ *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. 2014).

¹⁰⁸ Memorandum from Jeh Charles Johnson, Sec'y, DHS, *Secure Communities* 1 n.1 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [hereinafter *Secure Communities Memo*] (citing federal court decisions); see also *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 v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (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).

¹⁰⁹ *Secure Communities Memo*, *supra* note 108, at 1 (“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*.”).

¹¹⁰ *Id.* at 1.

the Priority Enforcement Program (“PEP”).¹¹¹ 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 them past their release date as had been previously requested in the typical detainer.¹¹²

The Trump administration has reversed course by terminating PEP.¹¹³ In its place, President Trump has revived the defunct Secure Communities program, which he characterizes as a “good program.”¹¹⁴ As part of this transition back to Secure Communities, the administration will place detainers on all immigrants who are arrested, regardless of the reason for arrest or the seriousness of any suspected conduct.¹¹⁵

4. Other Joint Operations

In addition to the programs just described, the Trump administration plans to rely on a range of additional “joint operations” with local law enforcement to accomplish mass deportation. As Trump told the crowd in his Phoenix immigration speech: “Two 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,

¹¹¹ *Id.* (announcing the establishment of PEP). *See generally* Stumpf, *D(E)volving Discretion*, *supra* note 103 (discussing the transition from Secure Communities to PEP).

¹¹² Secure Communities Memo, *supra* note 108, at 2; *see also* DEP’T OF HOMELAND SEC., FORM I-247N, <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247N.PDF>. While 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, *Tracking Immigration and Customs Enforcement Detainers: ICE Data Through November 2015* (2015), <http://trac.syr.edu/phptools/immigration/detain/> (last visited July 27, 2017).

¹¹³ Kelly Border Security Memo, *supra* note 25, at 3 (“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[.]”).

¹¹⁴ Trump’s August 31 Speech, *supra* note 12 (“We will restore the highly successful Secure Communities Program. Good program.”); *see also* Exec. Order on Interior Enforcement, *supra* note 3, at § 10(a) (calling for reinstatement of Secure Communities Program).

¹¹⁵ Trump’s August 31 Speech, *supra* note 12 (“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.”).

state and federal law enforcement.”¹¹⁶ Similarly, Secretary Kelly has ordered that “task forces” that the federal government uses to enforce immigration law and enhance border security should “include partnerships from other federal, state, and local agencies.”¹¹⁷

One type of joint operation is the 287(g) agreements already discussed, but there are many other similar programs that rely local law enforcement to accomplish federal enforcement goals.¹¹⁸ 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.¹¹⁹ This joint operation initiative has been expanded under the Trump administration and renamed the “National Gang Unit.”¹²⁰ Similarly, since 2003 ICE has run a National Fugitive Operations Team that works with local, state, and federal law enforcement to locate noncitizens with final orders of deportation.¹²¹

¹¹⁶ *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. TRUMP’S CONTRACT WITH THE AMERICAN VOTER, *supra* note 2.

¹¹⁷ See Kelly Border Security Memo, *supra* note 25, at 11 (“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.”).

¹¹⁸ See generally THE PEW CHARITABLE TRUSTS, IMMIGRATION ENFORCEMENT WITHIN THE NATION’S BORDERS (2014), <http://www.pewtrusts.org/~media/assets/2014/07/immigrationenforcementbriefjuly2014.pdf> (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 (2010) (same).

¹¹⁹ IMMIGR. & CUSTOMS ENFORCEMENT, IMMIGRATION ENFORCEMENT, NATIONAL GANG UNIT: OPERATION COMMUNITY SHIELD, <https://www.ice.gov/national-gang-unit> (last visited Aug. 13, 2017). See also Jennifer M. Chacón, *Whose Community Shield? Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317 (2007) (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).

¹²⁰ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, IMMIGRATION ENFORCEMENT, NATIONAL GANG UNIT: OVERVIEW, <https://www.ice.gov/national-gang-unit> (last visited Aug. 13, 2017).

¹²¹ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, IMMIGRATION ENFORCEMENT, FUGITIVE OPERATIONS: OVERVIEW, <https://www.ice.gov/fugitive-operations> (last visited Aug. 13, 2017); U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *Fact Sheet: ICE Fugitive Operations Program*,

By facilitating local-federal cooperation, joint operations risk entangling jurisdictions in immigration enforcement. The Santa Cruz Police Department recently learned this the hard way when it participated in ICE's gang initiative. Although ICE told Santa Cruz that the operation would target dangerous gang members, noncitizens with no gang affiliation were arrested and deported by ICE.¹²² These kinds of "collateral" arrests involve local law enforcement involuntarily in the routine policing of immigration law. In Los Angeles, advocacy groups have similarly raised concerns about the LAPD's involvement in joint operations with the Homeland Security Investigations and Enforcement and Removal Operations division of ICE.¹²³ Although purportedly targeting gang and drug activity, such joint operations have resulted in the "collateral arrest" of noncitizen residents for immigration purposes. Such a result conflicts directly with local sanctuary policies in place in Los Angeles.¹²⁴

Part II has described the rise of crimmigration and introduced four of the major components in Trump's deportation apparatus—CAP, 287(g), Secure Communities, and other joint operations. Collectively, these programs place significant pressure on localities to make their law enforcement resources available for federal immigration enforcement. In Part III, we discuss how the policies and laws that so-called "sanctuary" jurisdictions have adopted protect community members from heightened enforcement during the Trump era.

III. "SANCTUARY" POLICIES IN AN ERA OF MASS DEPORTATION

The current political moment has required localities to clarify the proper role of local government, including law enforcement. Localities must consider how to respond to local police activity that may result in deportation, whether

<https://www.ice.gov/doclib/news/library/factsheets/pdf/fugops.pdf> (last visited Aug. 13, 2017). See generally Margot Mendelson, Shayna Strom, & Michael Wishnie, *Collateral Damage: An Examination of ICE's Fugitive Operations Program*, MIGRATION POLICY INSTITUTE 1, 5-7 (Feb. 2009), <http://www.migrationpolicy.org/research/ice-fugitive-operations-program> (last visited Aug. 26, 2017).

¹²² 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), <http://www.latimes.com/local/lanow/la-me-ln-santa-cruz-ice-raid-20170223-story.html>.

¹²³ See Letter from ICE Out of LA Coalition and 17 Other Advocacy Groups to Charlie Beck, Chief of Police, Los Angeles Police Dep't (April 26, 2016), <https://www.documentcloud.org/documents/3223904-2016-04-26-Letter-to-Chief-Beck.html>.

¹²⁴ *Id.*

to participate in enforcement programs like 287(g), whether to honor immigration detainers, and how to address the racial tenor of the Trump administration’s immigration policy pronouncements with community members.

Part III identifies five different types of legal and policy initiatives adopted by jurisdictions that chose to limit, either in whole or in part, their participation in federal immigration enforcement. We introduce each category of policy, drawing on examples of state laws, municipal ordinances, and internal sheriff and police regulations. While some of these policies are the result of new laws or policies adopted since Trump’s election, others have existed for decades.¹²⁵ In order to enhance understanding about these policies and facilitate further research, we have made full text versions of all policies cited here (and many more that we considered in our study) publicly available in an online library.¹²⁶

Before proceeding, it is important to acknowledge that how sanctuary cities protect immigrants is an increasingly important topic in this current political moment. President Trump has threatened to “end” sanctuary cities by denying federal funds to jurisdictions that refuse to comply with 8 U.S.C. § 1373,¹²⁷ a provision of the federal code that mandates that localities not prevent their officers from sharing immigration status information with federal officials.¹²⁸ Yet, as this Part will highlight, many disentanglement policies do not restrict the

¹²⁵ According to a study conducted by the Immigrant Legal Resource Center, over six hundred counties across the country currently have in place some rules or regulations limiting local law enforcement participation in federal immigration enforcement. IMMIGRANT LEGAL RESOURCE CENTER, SEARCHING FOR SANCTUARY 11 (Dec. 2016), https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf; *see also* IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL MAP OF LOCAL ENTANGLEMENT WITH ICE (Dec. 2016), <https://www.ilrc.org/local-enforcement-map> (providing 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”).

¹²⁶ *See* ONLINE APPENDIX FOR “UNDERSTANDING ‘SANCTUARY CITIES’” <http://libguides.law.du.edu/c.php?g=705342>.

¹²⁷ Exec. Order on Interior Enforcement, *supra* note 3, at 8801.

¹²⁸ 8 U.S.C. § 1373 (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. The City and County of San Francisco, in its lawsuit challenging President Trump’s executive order threatening to defund sanctuary jurisdiction, has argued that Section 1373 is facially unconstitutional. *City and Cty. of S.F. v. Donald J. Trump*, No. 3:17-cv-00485 (N.D. Cal. filed Jan. 31, 2017), Document 21 at 16-18 (filed March 8, 2017) [hereinafter *San Francisco PI Motion*] (motion for preliminary injunction and supporting memorandum).

sharing of immigration-status-related information and therefore do not run afoul of Section 1373.¹²⁹ The policies described in this Part include not allowing ICE into local jails, not collecting immigration status information, and not participating in joint task forces. Importantly, as our description of those policy decisions makes clear, in taking such actions these jurisdictions are not preventing officers who do have immigration status information from sharing it with federal law enforcement should they so desire.¹³⁰

A. Barring Investigation of Civil and Criminal Immigration Violations by Local Law Enforcement

Perhaps the most common type of sanctuary policy is a requirement that police not investigate civil or criminal immigration violations.¹³¹ These types of internal police regulations are important given that local law enforcement serve as immigration “gatekeepers” when a local arrest can result in deportation.¹³² These rules, which have been called “don’t police” policies, generally prevent law enforcement from asking questions about immigration status or otherwise enforcing civil immigration law violations.¹³³ Some “don’t police” policies go further and prevent police from investigating criminal immigration law violations.¹³⁴

An early example of a “don’t police” policy is the Los Angeles Police Department’s “Special Order 40,” issued by Chief Daryl Gates in 1979.¹³⁵ Special

¹²⁹ As noted above, *see* note 36, *supra*, Attorney General Sessions has gone beyond the President’s Executive Order, attaching additional conditions meant to ensure local participation in immigration enforcement to the JAG grant program.

¹³⁰ For example, a federal court in a suit involving Kathryn Steinle’s death recently affirmed that San Francisco’s decision to not to share information about an inmate’s release date with ICE they do not violate Section 1373 because a release date is not “citizenship or immigration status” information. *Steinle v. City and Cty. of S.F.*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017). A discussion of policies that do seek to limit communication of immigration-status information is included in Section III.D, *infra*.

¹³¹ *See generally*, Eagly, *Immigrant Protective Policies*, *supra* note 44, at 254-64 (discussing such policies).

¹³² Motomura, *The Discretion That Matters*, *supra* note 98, at 1856 (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).

¹³³ Eagly, *Immigrant Protective Policies*, *supra* note 44, at 254-64.

¹³⁴ *Id.* at 261-64.

¹³⁵ Los Angeles Police Dep’t, Office of the Chief of Police, Special Order No. 40, Undocumented Aliens (Nov. 27, 1979), http://libguides.law.du.edu/ld.php?content_id=34432079 [hereinafter LAPD Special Order 40].

Order 40 prohibits officers from “initiat[ing] police action with the objective of discovering the alien status of a person.” In addition, it prevents officers from arresting or booking persons for illegal entry into the United States under 8 U.S.C. § 1325.¹³⁶ Similarly, in 1989, San Francisco adopted a “City and County of Refuge” ordinance, which provides that state and local officials “‘have no duty’ ... to enforce the civil aspects of the federal immigration laws.”¹³⁷

Some states have restricted all police in the state from enforcing civil immigration law. In 2014, the state of Vermont required the creation of a “model fair and impartial policing policy” and its adoption by July 2016 by all local law enforcement agencies.¹³⁸ The model policy prohibits local law enforcement from policing civil immigration law. Specifically, local law enforcement may not: (1) “inquire about a person’s civil immigration status unless civil immigration status is necessary to the ongoing investigation of a criminal offense”; (2) use “suspicion about any person’s civil immigration status ... to initiate contact, detain, or arrest that person”; or (3) “dedicate ... time or resources to the enforcement of federal immigration law where the only violation of law is presence in the United States without authorization or documentation.”¹³⁹

B. Limiting Compliance with Immigration Detainers and Administrative Immigration Warrants

Pressure on localities from the federal government to participate in immigration enforcement has given rise to a second type of disentanglement policy: limiting compliance with immigration detainers and administrative immigration

¹³⁶ *Id.*

¹³⁷ San Francisco, Cal., Ordinance No. 375-89 (Oct. 24, 1989), http://libguides.law.du.edu/ld.php?content_id=34432127 [hereinafter San Francisco Ordinance]. New York City made similar observations about federal responsibility for immigration enforcement in enacting Executive Order 124. *See* Exec. Order No. 124, § 2, City of N.Y., Office of the Mayor (Aug. 7, 1989), http://libguides.law.du.edu/ld.php?content_id=34436598 [hereinafter 1989 NYC Exec. Order] (“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.”).

¹³⁸ VT. STAT. ANN. tit. 20, § 2366(a) (2017), http://libguides.law.du.edu/ld.php?content_id=35254251 (creating § 2366) and http://libguides.law.du.edu/ld.php?content_id=35254870 (amending § 2366).

¹³⁹ Vermont Criminal Justice Training Council, Fair And Impartial Policing Policy (2016), http://libguides.law.du.edu/ld.php?content_id=34437002 [hereinafter 2016 Vermont Fair and Impartial Policing Policy].

warrants. Given the Secure Communities Program's reliance on immigration detainers, declining requests for detention has achieved central prominence as a method of local resistance.

Practices limiting detainer compliance are found in a range of local ordinances, state laws, and internal policing directives. Early examples of such resistance typically stopped short of denying all requests for detention. For example, the California and Connecticut TRUST Acts mandated that localities only honor detainers if issued against persons with serious convictions.¹⁴⁰ Similarly, local policies in Cook County, Illinois and New York City included numerous crime-based exceptions to the general rule of not enforcing immigration detainers.¹⁴¹

The weight of judicial decisions now firmly establishes that the federal government cannot require jurisdictions to comply with detainers. In addition, courts have made clear that holding someone on a detainer amounts to a new arrest that must be constitutionally justified.¹⁴² Consistent with this judicial authority, many jurisdictions now impose a blanket ban on detainer compliance. Under this approach, jurisdictions will not honor a detainer unless it is accompanied by a judicial warrant or other documentation establishing probable cause of a crime.¹⁴³

¹⁴⁰ CAL. GOV. CODE § 7282, http://libguides.law.du.edu/ld.php?content_id=34433552; CONN. GEN. STAT. § 54-192h, http://libguides.law.du.edu/ld.php?content_id=34434308.

¹⁴¹ See Cook County, Ill. Ord. 11-O-73 (2011), http://libguides.law.du.edu/ld.php?content_id=34434520 [hereinafter "2011 Cook County Ordinance"] (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 62 (Nov. 22, 2011), http://libguides.law.du.edu/ld.php?content_id=34436609 (including numerous crime-based exceptions to non-compliance with detainers).

¹⁴² See Secure Communities Memo, *supra* note 108, at 1 n.1 (and cases cited therein).

¹⁴³ See, e.g., Walla Walla County Sheriff's Office, Special Order 2014-002 (Apr. 29, 2014), http://libguides.law.du.edu/ld.php?content_id=34437104 (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"); Memorandum from the Alameda County Sheriff's Office, Station Order-Immigration Detainers (May 21, 2014), http://libguides.law.du.edu/ld.php?content_id=34432481 (declaring that the Sheriff's Office would henceforth decline immigration detainers from ICE, and distinguishing between "an arrest warrant signed by a judge, and immigration detainer signed by an ICE Agent"); Chesterfield County Sheriff's Office, *A Special Message from Sheriff Karl Leonard* (Oct.

In March 2017, DHS issued guidance requiring ICE officials to obtain an administrative warrant before issuing a detainer.¹⁴⁴ An administrative immigration arrest warrant is a document issued by an ICE officer stating that the officer has determined there is probable cause to believe that an individual is subject to removal.¹⁴⁵ Many jurisdictions have implemented policies against detaining people not only when detention is based on immigration detainers but also when it is based on an administrative immigration arrest warrant.¹⁴⁶ The language of the warrant itself raises questions about whether it authorizes local

12, 2015), http://libguides.law.du.edu/ld.php?content_id=34436987 (last visited March 31, 2017) (explain 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”); COUNTY SHERIFFS OF COLORADO, WHAT AUTHORITY DO SHERIFFS HAVE RELATING TO IMMIGRATION LAW? (Dec. 2016), http://libguides.law.du.edu/ld.php?content_id=34434218 (“Outside of 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.”); 2011 Cook County Ordinance, *supra* note 141 (allowing no compliance with detainers whatsoever, absent written agreement for reimbursement of costs).

¹⁴⁴ U.S. Immigr. and Customs Enforcement, Policy 10074.2 ¶ 2.4 (Mar. 24, 2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf>.

¹⁴⁵ U.S. DEP’T. OF HOMELAND SEC., FORM I-200, WARRANT FOR ARREST OF ALIEN (SAMPLE) (REV. 09/16), https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF (accessed Aug. 10, 2017).

¹⁴⁶ *See, e.g.*, Hartford, Conn., Municipal Code § 2-928(d) (2008), http://libguides.law.du.edu/ld.php?content_id=34434291 (“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.”); New Orleans Police Department, Operations Manual, Chapter 41.6.1 (Sept. 25, 2016), http://libguides.law.du.edu/ld.php?content_id=34434807 [hereinafter 2016 NOPD policy] at ¶¶ 15-16 (providing that “members shall take no action against an individual in response to an ICE administrative warrant” but allowing for execution of *criminal* warrants); Princeton (NJ) Police Department, General Order, “Enforcement of Immigration Laws” (Nov. 11, 2013) [hereinafter Princeton PD General Order] (“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.”); Grand Isle County Sheriff’s Dep’t, Fair and Impartial Policing Policy (2016), http://libguides.law.du.edu/ld.php?content_id=34437064 (accessed 7/31/17). (“‘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.”).

police to make an arrest,¹⁴⁷ and the informal nature of its issuance has led some courts to question its constitutional sufficiency.¹⁴⁸ Unlike a criminal arrest warrant, an administrative immigration warrant is not issued by a judge nor based on sworn testimony, and the statute and regulation that mentions these warrants provide no standard of proof for their issuance.¹⁴⁹

C. Refusing ICE Access to Local Jails

Another way in which local jurisdictions have protected immigrants is by refusing to let ICE agents enter their local jails. Indeed, the CAP program discussed in Part II harnessed local criminal justice systems for immigration enforcement in part by obtaining access to jail booking records and following up on that information by conducting in-person or telephonic interviews of inmates held in local custody.¹⁵⁰ Physical access to inmates also supplements the data obtained through the Secure Communities program and has become an important component of the pipeline connecting local law enforcement to federal immigration enforcement.

Discontinuing federal access to inmates arrested under state law 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

¹⁴⁷ 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." 567 U.S. at 408 (citing 8 CFR §§ 241.2(b), 287.5(e)(3)).

¹⁴⁸ See *El Badrawi v. DHS*, 579 F. Supp. 2d 249, 276 (D. Conn. 2008); see also *United States v. Toledo*, 615 F. Supp. 2d 453, 455, 457 n.2 (S.D. W. Va. 2009) (treating ICE warrant as an invalid warrant because it could not be executed by local law enforcement officials).

¹⁴⁹ See 8 U.S.C. § 1226(a); 8 CFR § 287.5(e)(3).

¹⁵⁰ See, e.g., Vanessa Rancano, *Fresno Sheriff's ICE Partnership May Give a Glimpse of Trump-Era Deportations*, KQED (March 3, 2017), <https://ww2.kqed.org/news/2017/03/03/fresno-sheriffs-ice-partnership-may-give-a-glimpse-of-trump-era-deportations/> (describing partnership between Fresno Sheriff and ICE which allows for interviews of immigrants in the jail); Letter, Jim McDonnell, L.A. County Sheriff, to L.A. Board of Supervisors (Sept. 22, 2015), <http://documents.latimes.com/sheriff-jim-mcdonnells-letter-board-supervisors/> (describing policy under which ICE would be permitted to interview certain jail inmates and "allowed access to all inmates" during the release process).

land over which the [Department of Corrections] exercises jurisdiction, for the purpose of investigating possible violations of civil immigration law.”¹⁵¹

Similar measures have been put 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 immigration enforcement.¹⁵² 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.”¹⁵³ Santa Clara will not allow ICE agents to enter their county jails for “investigative interviews or other purposes.”¹⁵⁴ And, while 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 is able to interview inmates.¹⁵⁵

¹⁵¹ N.Y.C., N.Y., Local Law No. 58 (2014), http://libguides.law.du.edu/ld.php?content_id=35216927; see also OFFICE OF THE MAYOR OF NEW YORK CITY, MAYOR BILL DE BLASIO SIGNS INTO LAW BILLS TO DRAMATICALLY REDUCE NEW YORK CITY’S COOPERATION WITH U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT DEPORTATIONS (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>.

¹⁵² 2011 Cook County Ordinance, *supra* note 141 (establishing Code § 46-37(b), providing: “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: Policy 428.2.4 (Aug. 2013), http://libguides.law.du.edu/ld.php?content_id=34433110 (prohibiting ICE from accessing holding facility 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), http://libguides.law.du.edu/ld.php?content_id=34434891 [hereinafter Orleans Parish Policy] (“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.”).

¹⁵³ D.C. Act 19-379 (June 15, 2012), http://libguides.law.du.edu/ld.php?content_id=34434376.

¹⁵⁴ Santa Clara County, Cal., Policy Resolution No. 2011-504, Exhibit A: § 3.54 Civil Immigration Detainer Requests (Oct. 18, 2011), http://libguides.law.du.edu/ld.php?content_id=34432167 [hereinafter Santa Clara Detainer Policy], at § 3.54(C) (mandating that ICE agents “shall not be given access to individuals or be allowed to use County facilities for investigative interviews or other purposes”).

¹⁵⁵ California TRUTH Act, A.B. 2792 (Sept. 28, 2016), http://libguides.law.du.edu/ld.php?content_id=34433572 (providing that “[i]n advance of any interview between ICE and an individual in local law enforcement custody regarding civil immigration violations, the local law enforcement entity shall provide the individual

D. Limiting Local Law Enforcement's Disclosure of Sensitive Information

Many so-called sanctuary jurisdictions have sought to impose limits on the unnecessary sharing of sensitive information about their residents. These policies have been prompted in part by the concern that noncitizens—or citizens living in mixed-status families—will be chilled from interacting with local law enforcement officials or accessing local services due to concerns about information sharing with immigration officials.

Two types of limitations have predominated. First, many jurisdictions have agreed to limit the sharing of confidential information about residents by city or county officials, including police and sheriffs. These limitations can encompass information about immigration status, but often also include other personal or sensitive information.¹⁵⁶

Second, jurisdictions have established policies of declining requests for notification of the release dates of inmates held in local jails.¹⁵⁷ By not telling immigration authorities about the time and place of a release from custody, the-

with a written consent form that explains the purpose of the interview, that the interview is voluntary, and that he or she may decline to be interviewed or may choose to be interviewed only with his or her attorney present"); Inmate Consent Form—ICE Interview, Philadelphia Department of Prisons (on file with authors); Orleans Parish Policy, *supra* note 152 (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 present during the interview, and certify to OPSO that this notice and opportunity has occurred”); Office of the Mayor, D.C., Mayor’s Order 2011-174 (Oct. 19, 2011), http://libguides.law.du.edu/ld.php?content_id=34434367 (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”); D.C. Act 19-379 (June 15, 2012), http://libguides.law.du.edu/ld.php?content_id=34434376 (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”).

¹⁵⁶ See, e.g., Exec. Order 13FY04/05 § 2(b), Office of Maine Governor Paul LePage (April 9, 2004), http://libguides.law.du.edu/ld.php?content_id=34435696 (limiting disclosure of confidential information relating to immigration status); Hartford, Conn., Municipal Code § 2-926 (2008), http://libguides.law.du.edu/ld.php?content_id=34434291 (defining “confidential information” to include immigration status; *id.* at § 2-929 (limiting disclosure of “confidential information”); Los Angeles, Cal., Exec. Directive No. 20, Mayor Eric Garcetti (Mar. 21, 2017), http://libguides.law.du.edu/ld.php?content_id=35642839; Seattle, Wash., Res. 31730, at § 1(M) (Jan. 30, 2017), http://libguides.law.du.edu/ld.php?content_id=34437121 [hereinafter 2017 Seattle Resolution].

¹⁵⁷ 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 Part III.B, *supra*.

se local jurisdictions are refusing to participate in federal immigration enforcement efforts. The 2011 ordinance passed in Cook County, Illinois, for example, 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.”¹⁵⁸

One recent example of a jurisdiction that adopted broad confidentiality protections is Santa Ana, California. In 2017, the Santa Ana City Council decreed that “sensitive information” would not be disclosed unless required by law.¹⁵⁹ 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.”¹⁶⁰ The limitation applies to all city agencies and employees, including law enforcement.¹⁶¹

Local sanctuary policies such as Santa Ana’s that encourage local residents to feel safe interacting with local officials have been particularly important during the Trump administration. For example, the Trump administration has abandoned practices in place under the Obama administration that protected certain immigrants from deportation, including victims and witnesses, as well as those who had experienced violations of their civil rights, employment, or housing rights.¹⁶² These and other individuals who have important reasons to need to interact with local officials will no longer be able to avoid deportation if they are arrested by ICE.

¹⁵⁸ 2011 Cook County Ordinance, *supra* note 141; *see also* Santa Clara Detainer Policy, *supra* note 154 (“County personnel shall not expend County time or resources responding to ICE inquiries or communicating with ICE regarding individuals’ incarceration status or release dates”); N.Y.C., N.Y., Local Law 62 § 9-131(b)(1)(iii) (Nov. 22, 2011), http://libguides.law.du.edu/ld.php?content_id=34436609 (prohibiting notification in certain circumstances); Orleans Parish Policy, *supra* note 152 (prohibiting sheriffs from notifying ICE of release dates).

¹⁵⁹ Santa Ana, Cal., Ordinance No. NS-2908 (Jan. 17, 2017), http://libguides.law.du.edu/ld.php?content_id=34432113.

¹⁶⁰ *Id.* §§ 3-4, 9.

¹⁶¹ *Id.* §§ 3-4.

¹⁶² *See* John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs* (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

The Trump administration has threatened to defund jurisdictions who have adopted information sharing protections. Specifically, officials claim that such policies violate federal law, pointing to Congress's attempt in 8 U.S.C. § 1373 to ban limitations on the exchange of information about citizenship and immigration status information with federal immigration officials.¹⁶³ But many of the policies that limit the sharing of sensitive information do not apply to citizenship and immigration status information. This is particularly true with the second type of information-sharing limitation, which applies only to custody release dates. Such policies do not address citizenship or immigration status information, and thus, on their terms are beyond the reach of Section 1373.¹⁶⁴

In addition, Section 1373 arguably amounts to an unconstitutional intrusion on state sovereignty.¹⁶⁵ At a minimum, it must be construed narrowly to

¹⁶³ 8 U.S.C. § 1373; Exec. Order on Interior Enforcement, *supra* note 3 (targeting for federal funding cuts those jurisdictions that “willfully refuse to comply with 8 U.S.C. 1373”); U.S. Dep’t of Justice, *supra* note 26 (pointing to Section 1373 in support of the claim that sanctuary jurisdictions “violate federal law”).

¹⁶⁴ *Steinle*, 230 F. Supp. 3d at 1015. The court in *Steinle* explained that the restrictions of Section 1373 are plain, and that there is “no plausible reading of [Section 1373’s] ‘information regarding . . . citizenship or immigration status’ [language that] 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 Section 1373’s narrow mandate because they do not address “‘information regarding . . . citizenship or immigration status.’” *Id.* For example, policies that prohibit police from investigating the civil immigration status of local residents, *see* Part III.A, *supra*, do not violate Section 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* Part III.B, *infra*, do not implicate Section 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 (Cal. App. 2009) (holding that LAPD Special Order 40 “addresses only the initiation of police action and arrests for illegal entry,” and Section 1373 “does not address the initiation of police action or arrests for illegal entry; it addresses only communications with ICE”).

¹⁶⁵ *See* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 159-64 (2012) (arguing that information-sharing requirements such as Section 1373 violate Tenth Amendment’s anti-commandeering principle); *see also, e.g.*, Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities is Unconstitutional*, WASH. POST (Jan. 26, 2017) (arguing that Section 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 Section 1373 is facially unconstitutional. San Francisco PI Motion, *supra* note 128 at 16-18.

avoid unduly infringing on state sovereignty.¹⁶⁶ In *City of New York v. United States*, the only federal court decision to address Section 1373’s constitutionality, the Second Circuit rejected New York City’s facial challenge to Section 1373 but acknowledged that applying Section 1373 to bar “generalized confidentiality policies” that might be “necessary to the performance of legitimate municipal functions” could run afoul of the Tenth Amendment.¹⁶⁷ Following the decision, New York’s mayor created precisely the kind of “generalized confidentiality policy” the court suggested would be permissible,¹⁶⁸ and other jurisdictions also followed suit.¹⁶⁹

E. Precluding Local Participation in Joint Operations with Federal Immigration Enforcement

A fifth prominent type of sanctuary policy is the preclusion of local participation in joint operations with federal immigration officials. As we discussed in Part II, the most common type of joint operation is the 287(g) agreement, which can allow local officers to enforce immigration law in jails and during

¹⁶⁶ Letter from Christopher N. Lasch (joined by other law professors) to Bob Goodlatte, Chairman, Committee on the Judiciary and Zoe Lofgren, Ranking Member, Subcommittee on Immigration and Border Security at 6-10 (Sept. 26, 2016), <http://docs.house.gov/meetings/JU/JU01/20160927/105392/HHRG-114-JU01-20160927-SD003.pdf> (arguing Section 1373 must be “construed narrowly” to avoid “serious constitutional concerns”).

¹⁶⁷ *City of New York v. United States*, 179 F.3d 29, 36-37 (2d Cir. 1999). The court noted that New York’s policy, far from being a generalized confidentiality provision, “singled 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.*

¹⁶⁸ Exec. Order No. 41, City of N.Y., Office of the Mayor (Sept. 17, 2003), http://libguides.law.du.edu/ld.php?content_id=34436585; Elizabeth M. McCormick, *Federal Anti-Sanctuary Law*, *supra* note 36 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> (noting that executive order’s “‘don’t tell’ provisions specifically do not apply to people suspected of criminal or terrorist activities.”).

¹⁶⁹ *See supra*, note 156 (collecting policies); *see also* New Haven Dep’t of Police Service, Gen’l Order 06-2, Re: Disclosure of Status Information: Policies and Procedures (2006), http://libguides.law.du.edu/ld.php?content_id=34434251 [hereinafter New Haven PD Order] ¶ 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”); *see also* San Francisco PI Motion, *supra* note 128 at 18-19 (arguing Section 1373 cannot be constitutionally applied to prohibit “confidentiality requirements in [San Francisco’s] Sanctuary City law and elsewhere [adopted] in order to further legitimate—and compelling—municipal interests”).

routine policing. There are other types of joint operations as well, such as the Trump administration's "National Gang Unit" and the "National Fugitive Operations Team.

Under the Trump administration, local law enforcement is under renewed pressure to designate local officers as federal immigration officers under ICE supervision through 287(g) agreements.¹⁷⁰ Sanctuary jurisdictions have responded by prohibiting participation in this program.¹⁷¹ 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."¹⁷² In 2012 the town of Amherst, Massachusetts adopted a similar policy that explicitly prohibits 287(g) agreements.¹⁷³ Similarly, the New York State Attorney General's office distributed a "model sanctuary" policy that, among other provisions, orders that local law enforcement "shall not perform the functions of a federal immigration officer or otherwise engage in the enforcement of federal immigration law—

¹⁷⁰ See DORIS MEISSNER ET AL., MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 112-13 (Jan. 2013) (describing DHS partnerships with local law enforcement).

¹⁷¹ 287(g) agreements cannot be entered without local consent. See 8 U.S.C. § 1357(g)(9) ("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.").

¹⁷² 2017 Seattle Resolution, *supra* note 156, at § 1(B). Moreover, the resolution requires the 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.* at § 1(C).

¹⁷³ Amherst, Mass., ARTICLE 29. Petition Article - Bylaw Regarding Sharing of Information with Federal Agencies (May 21, 2012), http://libguides.law.du.edu/ld.php?content_id=34434966 [hereinafter 2012 Amherst Resolution] (resolving 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. Should the Commonwealth of Massachusetts enter into an agreement or Memorandum of Agreement regarding Secure Communities, the Town of Amherst shall opt out if legally and practically permissible").

whether pursuant to Section 1357(g) of Title 8 of the United States Code or under any other law, regulation, or policy.”¹⁷⁴

Other jurisdictions have gone further and barred local participation in a broader set of joint operations. In New Mexico, Commissioners from Doña Ana County passed a resolution stating that “no County funds or resources” would be used for immigration enforcement, 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.”¹⁷⁵ The New Orleans Police Department also has a broad prohibition prohibiting its officers from “accept[ing] requests by ICE or other agencies to support or assist in immigration enforcement operations, including but not limited to requests to establish traffic perimeters related to immigration enforcement. 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.”¹⁷⁶

Part III has revealed that the sanctuary jurisdictions under attack by Trump are truly a kaleidoscope of policy actions. The most significant questions these policies address are what role, if any, immigration status should play in how police conduct themselves in their communities, how to regulate police initiatives to enforce federal immigration law, and how to limit entanglement with federal law enforcement by declining requests to participate in detention or removal activity.

Taken together, the policies form a spectrum of local entanglement with immigration enforcement that ranges from the least resistance to federal involvement to the greatest. At one end, sanctuary policies merely regulate the

¹⁷⁴ N.Y. STATE ATT’Y GEN’L ERIC T. SCHNEIDERMAN, GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS (Jan. 19, 2017 & Mar. 12, 2017 suppl.).

¹⁷⁵ Doña Ana County, Board of Commissioners, Res. No. 2014-91 (Sept. 9, 2014), http://libguides.law.du.edu/ld.php?content_id=34435968; *see also, e.g.*, City of Boulder, Colorado, Ordinance No. 8162 (Jan. 3, 2017), http://libguides.law.du.edu/ld.php?content_id=34430755 [hereinafter Boulder Ordinance] (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”); State of Washington, Office of the Governor, Exec. Order 17-01 ¶ 8 (Feb. 23, 2017), http://libguides.law.du.edu/ld.php?content_id=34437156 (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”).

¹⁷⁶ 2016 NOPD Policy, *supra* note 146, at ¶¶ 6, 7.

activity of a locality's own law enforcement officials by restricting immigration enforcement initiated independently from federal prompting. They are the type of policy over which the locality exercises the greatest control.

Declining detainers and administrative warrants occupy the next place on the spectrum, addressing immigration enforcement actions that involve less initiative by local police but more interaction with federal officials. Preventing ICE from accessing jails and restricting the provision of immigration information to ICE, policy types that occupy the next niche along the spectrum, creates a neutral space between federal enforcement and a locality's criminal justice system. They characterize federal immigration presence in local jails and the sharing of criminal justice information as unwelcome intrusions into the locality's physical space and virtual data stores. Declining to participate in joint operations like the 287(g) program and other less formal collaborations constitutes resistance to the very federal entanglement that the Trump administration has made key to its deportation policies, and also runs counter to a long tradition of cooperation between law enforcement agencies.

Enacted together, these policies form a crosshatched shield from entanglements with federal deportation policy.

IV. LEGAL AND POLICY RATIONALES FOR "SANCTUARY"

In Part III we described some of the different methods localities have adopted to put distance between local law enforcement and the federal immigration enforcement system. Part IV turns to a discussion of the five most significant¹⁷⁷ legal and policy rationales for these immigrant protective criminal justice policies:¹⁷⁸ (1) the conviction that localities and not the federal govern-

¹⁷⁷ We canvass here only commonly invoked rationales. There are other policy rationales that would support a jurisdiction's decision to disentangle local law enforcement from immigration enforcement, including social and economic arguments. *See, e.g.*, 2013 Multnomah County Resolution, *supra* note 191 ("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"); 2013 King County Ordinance, *supra* note 212, at § 1(A) (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 (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).

¹⁷⁸ *See generally* Eagly, *Immigrant Protective Policies*, *supra* note 44 (describing common policy rationales for what she terms "immigrant protective policies" in the criminal justice system).

ment control local criminal justice priorities and resources; (2) the concern that entangling policing with immigration enforcement erodes the trust required for productive interaction between residents and local police; (3) a desire to prevent unlawful arrests predicated on requests from immigration agents to police to hold arrestees beyond constitutional bounds; (4) consistency with equal protection law through avoiding policing based on racial or immigration status, including discriminatory barriers to access to police services; and (5) a connection between furthering diversity and inclusion and the adoption of disentanglement policies. While the Trump administration has attempted to paint “sanctuary” cities as undermining public safety and defying the rule of law,¹⁷⁹ this Part shows that such policies are informed by sound legal principles and considered policy judgments about how local resources should be used.

The Trump administration’s attacks on sanctuary cities have had two significant effects. First, as Part III and our online appendix make clear, they have forced localities to review and augment their sanctuary policies. The imminent threat of deportation has caused more localities to move toward implementing the entire shield of the five protective policies that we set forth in Part III. In addition, the Trump administration’s reliance on white nationalist themes and racialized rhetoric of immigrants has fostered greater awareness about the need for sanctuary policies that address discrimination and multiculturalism.

Second, as we now describe in Part IV, the administration’s attacks on sanctuary cities have required local leaders to articulate more precisely their reasons for maintaining such policies. Sheriffs, police chiefs, mayors and governors have come forward to defend their sanctuary policies not only as legally justified, but also as a necessary moral and ethical response to the administration’s policies. In addition, as compared to earlier moments in the sanctuary movement, the current controversy around sanctuary is more explicitly one grounded in concerns about the discriminatory impacts of immigration enforcement and the racialized impact of such federal policies on local values of diversity and inclusion.

The policy justifications discussed in Part IV tend either to reflect specific values of the adopting locality, or support practical considerations. Together, the justifications we identify form a constellation of values that jurisdictions may hold: the desire for local communities to exercise some level of self-determination, a concern with the integrity and inclusiveness of the locality’s membership, a commitment to locally-chosen values such as the promotion of equality or the protection of community members. Other justifications are more practical: avoidance of municipal liability through compliance with constitutional law, gains in efficiency and accuracy in the criminal justice system that results from decreasing actual or perceived bias in law enforcement and from

¹⁷⁹ See, e.g., Press Release 17-826, *supra* note 36.

lowering barriers to access to justice for victims or witnesses, or resisting deportation of embedded community members whose absence may impose economic or intangible costs on the locality.

A. Maintain Local Control Over Criminal Justice

Some types of sanctuary policies rely on the legal and policy rationale that localities are sufficiently self-determinative to decide for themselves whether they will play a role in federal immigration enforcement, and that they exercise control over the local resources that support local policing. This rationale is grounded in three historical principles and modern values: the separation of criminal and deportation law, equality principles rooted in alienage law, and freedom from federal commandeering of local resources.

As described in Part II, the Supreme Court's nineteenth century jurisprudence separating criminal punishment from civil deportation law and imposing strict scrutiny on discriminatory alienage laws effectively divided responsibility for immigration enforcement and criminal justice along federal and state lines.¹⁸⁰ This jurisprudence elevated the federal government to the role of immigration enforcer, largely excluded the states from regulating immigration through their criminal justice systems, and prevented states from discriminating between citizens and noncitizens in the enforcement of criminal laws.¹⁸¹

The Supreme Court's landmark Tenth Amendment jurisprudence of the 1990s—*New York v. United States*¹⁸² and *Printz v. United States*,¹⁸³ rounds out support for the “federal responsibility” rationale of disentanglement policies. These holdings, which established that the federal government may not compel or coerce states into participating in a federal regulatory program, translated fairly readily into a legal claim that states had the right to resist federal requests by immigration authorities to detain community members for transfer to ICE.¹⁸⁴

Most of the policy types described in Part III find solid ground in the rationale that localities may exercise control over their own criminal justice resources. Jurisdictions that have adopted “don't police” policies barring their

¹⁸⁰ See Part II.A, *supra*, (describing the development of federal immigration power and the restrictions on states and localities of alienage law).

¹⁸¹ *Id.*

¹⁸² *New York v. United States*, 505 U.S. 144 (1992).

¹⁸³ *Printz v. United States*, 521 U.S. 898 (1997).

¹⁸⁴ See *Printz*, 521 U.S. 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”).

own officers from civil immigration enforcement¹⁸⁵ have insisted, echoing the Court’s nineteenth-century jurisprudence, that “the enforcement of immigration laws is a responsibility of the federal government.”¹⁸⁶ San Francisco, for example, in adopting its “City and County of Refuge” ordinance in 1989, noted that state and local officials “‘have no duty’ ... to enforce the civil aspects of the federal immigration laws.”¹⁸⁷ 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.*”¹⁸⁸ The same rationale has bolstered the fourth type of sanctuary policy, barring disclosure to federal agencies of confidential 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” as a reason for its policy on non-disclosure of confidential information, including immigration status.¹⁸⁹

The second type of disentanglement policy, limiting compliance with detainers and administrative warrants, has been paired with the observation that the federal government made no monetary reimbursement to local law enforcement for the costs of engaging in immigration enforcement.¹⁹⁰ For juris-

¹⁸⁵ See Part III.A, *supra*.

¹⁸⁶ 2011 Cook County Ordinance, *supra* note 141; see also Santa Clara County, Cal., Advancing Public Safety and Affirming the Separation Between County Services and the Enforcement of Federal Civil Immigration Law (2010), http://libguides.law.du.edu/ld.php?content_id=34432102 [hereinafter 2010 Santa Clara Resolution] (noting that “the enforcement of federal civil immigration law is the responsibility of the federal government and not of the County”).

¹⁸⁷ San Francisco Ordinance, *supra* note 137. New York City similarly connected federal responsibility for immigration enforcement to its enactment of Executive Order 124. See 1989 NYC Exec. Order, *supra* note 137, at 3 (stating “[f]ederal 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.”).

¹⁸⁸ Pittsburgh, Pa., Bill No. 2004-0295 (Apr. 26, 2004), http://libguides.law.du.edu/ld.php?content_id=34436690 [hereinafter 2004 Pittsburgh Resolution] (emphasis in original).

¹⁸⁹ New Haven PD Order, *supra* note 169; see also 1989 NYC Exec. Order, *supra* note 137.

¹⁹⁰ See, e.g., 2011 Cook County Ordinance, *supra* note 141 (noting that “the federal government only reimburses part of the costs associated with ICE detainers”); Phila., Pa., Exec. Order 1-14 (April 16, 2014), http://libguides.law.du.edu/ld.php?content_id=34436655 (noting that “the Secure Communities program shifts the burden of federal civil immigration enforcement onto local law enforcement, including shifting costs for detention of individu-

dictions strapped for resources, the federal government's attempts to put local law enforcement in the service of immigration enforcement conflicted with their desire to reserve scarce resources for local priorities.¹⁹¹ An example 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.¹⁹²

While the anti-commandeering argument was an obvious fit for justifying policies that prevented immigration enforcement from being added to the list of responsibilities of street-level police by the federal government,¹⁹³ relatively few jurisdictions explicitly invoked it until the Secure Communities program

als in local custody who would otherwise be released"); California Assemb. B. No. 4 § 1(B), 2013–2014 Reg. Sess. (approved Oct. 5, 2013), http://libguides.law.du.edu/ld.php?content_id=34433552; ("State and local law enforcement agencies are not reimbursed by the federal government for the full cost of responding to a detainer, which can include, but is not limited to, extended detention time and the administrative costs of tracking and responding to detainees."); Memorandum from County Attorney to Board of County Commissioners of Miami-Dade County, Res. No. R-1008-13 (adopted Dec. 3, 2013), http://libguides.law.du.edu/ld.php?content_id=34434395 [hereinafter 2013 Miami-Dade Resolution] (reciting costs to Miami-Dade taxpayers of detainer compliance and reciting that "the federal government does not directly reimburse Miami-Dade County for costs" of detainer compliance).

¹⁹¹ See, e.g., 2011 Cook County Ordinance, *supra* note 141 ("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 186 (noting that "in this time of economic difficulties, the Board of Supervisors remains committed to maximizing public safety, public health and vital services..."); Multnomah County, Or., Res. No. 2013-032 (April 4, 2013), http://libguides.law.du.edu/ld.php?content_id=34436634 [hereinafter 2013 Multnomah County Resolution] (noting that the "uncompensated detention of individuals 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, *Immigrant Protective Policies*, *supra* note 44, at 291-94 (discussing policies limiting entanglement due to budgetary constraints).

¹⁹² 2011 Cook County Ordinance, *supra* note 141; see also 2010 Santa Clara Resolution, *supra* note 186 (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 188 (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).

¹⁹³ See Gardner, *supra* note 4, at 331 (describing the "slate of immigrant sanctuary policies passed after 2001" as "predicated on the Court's interpretation of the Tenth Amendment in *Printz*").

matured under the Obama administration and was resurrected under Trump.¹⁹⁴ Until then, there was little need to resort to the anti-commandeering argument because the federal government had not yet attempted to force local police into immigration enforcement. Instead, the emphasis was on authorizing local participation for those jurisdictions who wanted to be involved.¹⁹⁵

The Third Circuit’s 2014 decision in *Galarza* vindicated the claims of jurisdictions that had grounded anti-detainer policies in the Tenth Amendment.¹⁹⁶ The district court had held that U.S. citizen Galarza’s detention was unsupported by probable cause and violated the Fourth Amendment, but that the county could not be held liable because detainers “impose mandatory obligations on state or local law enforcement agencies ... including municipalities, to follow such a detainer once it is received.”¹⁹⁷ The Third Circuit reversed. Relying on *New York* and *Printz*, the court held that understanding “a federal detainer filed with a state or local LEA [as] a command to detain an individual on behalf of the federal government, would violate the anti-commandeering doctrine of the Tenth Amendment.”¹⁹⁸ Detainers, the court said, must therefore be understood as “only requests that state and local law enforcement agencies detain suspected aliens subject to removal.”¹⁹⁹ Subsequent cases followed *Galarza*’s Tenth Amendment reasoning that the federal government could not command localities to hold individuals on its behalf,²⁰⁰ providing firm ground for policies that prohibited agreeing to detainer requests .

The Trump administration, distressed by policies limiting local law enforcement participation in immigration enforcement, has not sought to persuade local jurisdictions to abandon their policies on the merits. Instead the administration has sidestepped the court decisions about state sovereignty and immi-

¹⁹⁴ Two exceptions were Lawrence, Kansas and Milwaukee, Wisconsin. See Lawrence, Kan., Res. No. 6541 (April 20, 2004), http://libguides.law.du.edu/ld.php?content_id=34434777 (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.”); see also, Milwaukee, Wis., File No. 031413 (Mar. 2, 2004), http://libguides.law.du.edu/ld.php?content_id=34437224 (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.”).

¹⁹⁵ See, e.g., 2002 OLC Memo, *supra* note 60.

¹⁹⁶ *Galarza*, 745 F.3d at 638; see *supra* note 104.

¹⁹⁷ *Id.* (summarizing district court holding; citations omitted).

¹⁹⁸ *Id.* at 644.

¹⁹⁹ *Id.* at 645.

²⁰⁰ See *Mercado*, 2017 WL 169102 at *9 (and cases cited therein).

gration detainees and threatened to cancel federal funding if sanctuary jurisdictions do not cooperate.²⁰¹ The attempts to withhold federal funding from local jurisdictions have so far been unsuccessful. The President's early executive order attempting to withhold all federal funding to sanctuary jurisdictions was quickly enjoined by a federal court, which found that the section on sanctuary defunding failed to comply with constitutional limits on the federal government's power under the Spending Clause.²⁰² And experts have opined that the Department of Justice's latest move to condition receipt of Byrne JAG grants on cooperation with the federal government's immigration enforcement efforts²⁰³ will likely be met with a similar fate.²⁰⁴

B. Strengthen Community Trust

A second widely proffered reason for policies that draw a clear line separating local law enforcement from ICE in policing has been that entangling street-level policing with immigration enforcement erodes the trust necessary for community members to feel comfortable interacting with local police. The Trump administration's threats renewed fear in immigrant communities that any contact with the police would lead to deportation. Community trust is the lynchpin to effective community policing practices.²⁰⁵ Social science research has concluded 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."²⁰⁶ That fear can cause immigrants and individuals in mixed status fami-

²⁰¹ See Part I, *supra*.

²⁰² Order Granting the Cty. of Santa Clara's and City and Cty. of San Francisco's Motions to Enjoin Section 9(a) of Exec. Order 13768, *Cty. of Santa Clara v. Trump*, No. 5:17-cv-00574, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017), <https://www.clearinghouse.net/detailDocument.php?id=88375>. See also Lai & Lasch, *supra* note 7 (discussing litigation in detail).

²⁰³ See *supra* note 36 and accompanying text.

²⁰⁴ See, e.g., Ilya Somin, *Chicago Files Suit Against Justice Department Policy Targeting Sanctuary Cities*, THE WASHINGTON POST (Aug. 7, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/07/chicago-files-suit-against-justice-department-policy-targeting-sanctuary-cities/?utm_term=.d2af3043827e (describing Chicago's Tenth Amendment argument as "sound").

²⁰⁵ DORIS MARIE PROVINE, *ET AL.*, POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES (2016).

²⁰⁶ Marjorie S. Zatz & Hilary Smith, *Immigration, Crime, and Victimization: Rhetoric and Reality*, 8 ANN. REV. L. & SOC. SCI. 141, 150 (2012) (collecting and analyzing empirical research).

lies to refrain from coming forward as victims of, or witnesses to crime.²⁰⁷ In 2017, the Los Angeles Police Department reported 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."²⁰⁸

In fact, there is strong evidence that being a sanctuary jurisdiction is associated with experiencing less crime. A 2017 study comparing sanctuary and non-sanctuary counties found, after controlling for differences in population size, the foreign-born percentage of the population, and the percentage of the population that was Latino, that crime was "statistically significantly lower in sanctuary counties compared to non-sanctuary counties." The analysis showed that there were an average of 35.5 fewer crimes per 10,000 people in sanctuary counties, a highly statistically significant result.²⁰⁹

A general order issued by the New Haven, Connecticut Department of Police Service encapsulates 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.²¹⁰

The 2006 order then tied this concern with establishing community trust to the larger goal of community policing:

Their cooperation is needed to prevent and solve crimes and maintain public order, safety and security in the entire community. One of our most important goals is to enhance our relationship with the immigrant community, as well as to establish new and ongoing partnerships consistent with our community policing philosophy.²¹¹

Support from law enforcement for adopting disentanglement policies in order to further community trust is not uncommon. Among the references for the New Haven policy was a paper by the Major Cities Chiefs Association,

²⁰⁷ See THEODORE, INSECURE COMMUNITIES, *supra* note 100 (linking police involvement in immigration enforcement with Latinos' perceptions about public safety and their reluctance to contact police).

²⁰⁸ News Release, L.A. Police Dep't, Decline in Reporting of Crime Among Hispanic Population NR17083ma (Mar. 21, 2017), http://www.lapdonline.org/home/news_view/61998.

²⁰⁹ WONG, *supra* note 28, at 5-6.

²¹⁰ New Haven PD Order, *supra* note 169.

²¹¹ *Id.*

warning that entanglement of local police in immigration enforcement would “undermine the level of trust and cooperation between local police and immigrant communities,” creating a divide that would undermine public safety.²¹²

The concern that entanglement can undermine public safety has supported all varieties of policies disentangling street-level policing from immigration enforcement. New Haven’s general order, for example, limited police officers’ ability to inquire into immigration status,²¹³ prohibited them from enforcing civil immigration law,²¹⁴ and limited disclosure of information to federal immigration officials.²¹⁵

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 MCSO Deputies on patrol.”²¹⁶

²¹² MAJOR CITIES CHIEFS, M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES (adopted June 2006), https://www.majorcitieschiefs.com/pdf/MCC_Position_Statement.pdf; Connecticut Judiciary Committee, Joint Favorable Report, Bill No. HB-6659 (Connecticut TRUST Act) (Apr. 22, 2013), <https://www.cga.ct.gov/2013/jfr/h/2013HB-06659-R00JUD-JFR.htm> (visited Aug. 26, 2017). Sanctuary jurisdictions have also relied for support on the testimony of community members and community organizations about the chilling effect of deportation fears on crime reporting. *See, e.g.*, 2013 Multnomah County Resolution, *supra* note 191 (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”); King County, Wash., File No. 2013-0285 § 1(A) (Dec. 10, 2013), http://libguides.law.du.edu/ld.php?content_id=34437163 [hereinafter 2013 King County Ordinance]; 2013 Miami-Dade Resolution, *supra* note 190.

²¹³ New Haven PD Order, *supra* note 169, at ¶¶ II.C.1-2 (allowing inquiry into immigration status only when “investigating criminal activity”).

²¹⁴ *Id.* ¶¶ II.C.4-5. The general order permitted officers to investigate and enforce federal immigration crimes. *Id.* ¶ II.C.3.

²¹⁵ *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”).

²¹⁶ *See, e.g.*, Milwaukee, Wis., File No. 12-135 (2012), http://libguides.law.du.edu/ld.php?content_id=34437215 [hereinafter 2012 Milwaukee County Resolution]. *See also* 2013 Multnomah County Resolution, *supra* note 191 (noting that the “deterioration of trust in local government, as a result of ICE’s Secure Communi-

Similarly, the California TRUST Act, a 2013 state-level sanctuary law, explicitly justified its policy on the risk to community policing efforts posed by the Secure Communities program and the program’s use of immigration detainers:

The Secure Communities program and immigration detainers harm community policing efforts because immigrant residents who are victims of or witnesses to crime, including domestic violence, are less likely to report crime or cooperate with law enforcement when any contact with law enforcement could result in deportation.²¹⁷

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 policy types that fall along the middle of the policy spectrum. Declining detainers, preventing immigration enforcement from occurring in local jails, and declining to provide immigration status information to ICE inserts a wedge of neutrality between federal enforcement and a locality’s criminal justice system.

C. Prevent Unlawful Arrests

In 2014, facing the potential for liability for hundreds of unlawful arrests, a wave of counties in Oregon, Colorado, Washington, and California declared they would no longer accede to ICE detainer requests.²¹⁸ Preventing police from making unlawful arrests is always a concern for localities but it became especially salient for sanctuary cities in the crimmigration era as a result of constitutional litigation surrounding police arrests related to immigration enforcement. The Trump administration’s targeting of sanctuary cities merely raised the stakes.

ties program and I-247 Immigration Detainers, hampers the county’s ability to provide public safety ...”) (emphasis added).

²¹⁷ California TRUST Act, A.B. 4 § 1(d) (Oct. 5, 2013), http://libguides.law.du.edu/ld.php?content_id=34433552; see California Senate Committee on Public Safety, 07/01/13 - Senate Public Safety: Immigration Detainers (July 1, 2013), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB4 (noting that California localities complained that participating in Secure Communities was costly and harmed law enforcement relationships with the community). see also Bos., Mass., An Ordinance Establishing a Boston Trust Act (2014), http://libguides.law.du.edu/ld.php?content_id=34435561 (“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...”).

²¹⁸ See *supra* notes 103-109 (describing the basis for these policy changes in litigation outcomes).

Avoidance of unlawful arrests as a rationale for sanctuary policies is rooted in two lines of crimmigration history. The first is the declaration from the Supreme Court in 2012 that local officials do not have inherent authority to make civil immigration arrests. As described in Part II, after 9/11, when the federal government began to invite (and later pressure) states and localities to participate in immigration enforcement some jurisdictions eagerly embraced that role on the theory that they possessed “inherent authority” to enforce federal immigration laws and could mirror federal immigration enforcement.²¹⁹ When the Supreme Court struck down much of Arizona’s immigration enforcement law as preempted, it confined the authority of local law enforcement to make immigration arrests to the specific, limited circumstances that Congress had defined.²²⁰

The second basis for this rationale is the growing consensus of case law holding localities liable for immigration detainer practice that violates the Constitution, or finding that law enforcement had no authority under local law to make such an arrest.²²¹ As discussed in Part II, the Secure Communities pro-

²¹⁹ 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 the longstanding precedent described *supra* Part II.A).

²²⁰ 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.”); see also *id.* at 413 (observing that nonfederal law enforcement arrests of individuals “solely to verify their immigration status would raise constitutional concerns”). In casting aside the “inherent authority” argument, the Court relied, *inter alia*, on earlier authorities establishing and embracing the late nineteenth century Supreme Court cases holding that immigration enforcement is an exclusive federal power because of its connection to foreign affairs. See, e.g., *id.* at 395 (“It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”) (citing *Chy Lung*, 92 U.S. at 279–280); see also Christopher N. Lasch, *Federal Immigration Detainers after Arizona v. United States*, 46 LOY. L.A. L. REV. 629, 650–54 (2013) (discussing the Court’s reliance on foreign affairs narrative); Guttentag, *supra* note 43, at 15 (same).

²²¹ In addition to other arguments that eliminating detainer-based detention is legally required, some localities have relied on the notion that civil immigration arrests may not be authorized under *state* law. See Princeton PD General Order, *supra* note 146 (“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 ...”); Moreno, *supra* note 226 (reporting email from Boulder County Sheriff stating there is “no state statutory authority for holding people on detainers”); 2016 Vermont Fair and Impartial Policing Policy, *supra* note 139, at § 5 (noting “state law does not grant local and state agencies authority to enforce civil immigration laws”).

gram was terminated by the Obama administration largely because of “the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment.”²²² These decisions, which followed the Third Circuit’s decision in *Galarza*,²²³ established that local officials holding inmates on detainers have effected a new, warrantless arrest of the unreleased inmate.²²⁴ 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.²²⁵

Two judicial decisions have had a particularly far-reaching impact on local policies concerning immigration detainers.²²⁶ *Galarza*²²⁷ made clear that local

²²² See Secure Communities Memo, *supra* note 108, at 2 & n.1 (and cases cited therein).

²²³ See *supra* notes 103-106 (describing the line of cases concluding that police violated the Fourth Amendment by holding individuals in custody pursuant to immigration detainers).

²²⁴ *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305 at *9 (D. Or. 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 *Jimenez Moreno v. Napolitano*, 213 F. Supp. 3d 999 (N.D. Ill. Sept. 30, 2016) (noting federal government’s concession that detention pursuant to a detainer constitutes a warrantless arrest).

²²⁵ 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., *COUNTY SHERIFFS OF COLORADO*, *supra* note 143 (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), *injunction made permanent in Buquer v. City of Indianapolis*, 2013 WL 1332158 (S.D. Ind. 2013); see also *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 807 (N.D. Ill. 2014) (noting that after *Arizona v. U.S.*, 567 U.S. 387 (2012), 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)).

²²⁶ See, e.g., Ivan Moreno, *Boulder Among Colo. Counties Ending Immigrant Detainers*, DAILY CAMERA (April 29, 2014), http://www.dailycamera.com/boulder-county-news/ci_25660947/boulder-among-colo-counties-ending-immigrant-detainers (reporting that Boulder County (Colorado) Sheriff Joe Pelle called the *Miranda-Olivares* decision a “game changer” in announcing his office would no longer submit to detainers); Press Release, San Miguel County Sheriff’s Office, SMSO Changes Policy on Detaining Suspected Undocumented Immigrants (Apr. 29, 2014), http://libguides.law.du.edu/ld.php?content_id=34434148 (citing *Galarza* decision as basis

law enforcement cannot be compelled to detain persons for the federal government—and if they choose to do so, they will be liable for the results.²²⁸ It also illustrated that the federal government can be wrong in selecting its targets for detention. The fallout of ICE’s error in targeting Galarza, a US citizen, fell to the state to defend.

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.²²⁹ The prolonged custody of the plaintiff, Maria Miranda-Olivares, was not the exceptional detention of a U.S. citizen but rather the prototypical detainer target: a noncitizen detained as deportable. The court determined that detainer-based detention amounted to a new arrest and would have to be independently justified in order to pass constitutional muster.²³⁰

Concerns about unlawful arrests tend to justify two policy types: barring local initiatives to undertake immigration enforcement, and declining detainers and administrative immigration warrants. As an example, Colorado sheriffs have recognized the lack of local arrest authority that the *Arizona* decision crystallized as supporting policies against initiating enforcement.²³¹ And they have pointed to the detainer cases to support their decision not to accede to detainer

for policy change); COUNTY SHERIFFS OF COLORADO, *supra* note 143 (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”) (citing *Galarza* and *Miranda-Olivares*); Written Directive, Clark County Sheriff’s Office (Apr. 30, 2014), http://libguides.law.du.edu/ld.php?content_id=34437175 (“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”); Martin Espinoza, *Sheriff Steve Freitas Moves to Limit Immigration Detainers*, PRESS DEMOCRAT (May 11, 2014) (reporting that Sonoma County (California) Sheriff Steve Freitas advised ICE that Sonoma County, on the basis of the *Galarza* and *Miranda-Olivares* decisions, would no longer detain inmates on the basis of immigration detainers unsupported by a judicial warrant); Press Release, Office of the Sheriff, City and County of San Francisco, San Francisco Sheriff’s Department: No Immigration and Customs Enforcement Detainers (May 29, 2014), http://libguides.law.du.edu/ld.php?content_id=34432181 (announcing policy requiring “judicial determination of probable cause or with a warrant of arrest”) (citing *Galarza* and *Miranda-Olivares*).

²²⁷ *Galarza*, 745 F.3d at 645.

²²⁸ *Id.* at 640.

²²⁹ *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305 at *11 (D. Or. 2014).

²³⁰ *Id.* at *9.

²³¹ COUNTY SHERIFFS OF COLORADO, *supra* note 143.

requests and to require a judicial rather than administrative warrant for immigration-related arrests.²³²

D. Safeguard Equal Protection

Many jurisdictions have adopted disentanglement measures to address two issues related to equal protection law: bias in policing and discriminatory barriers to access to police services. The Fourteenth Amendment to the United States Constitution declares that “[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws.”²³³ 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.²³⁴ 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 to or otherwise discriminates “on the ground of race, color, or national origin.”²³⁵ Additionally, states and localities may have their own anti-discrimination laws to answer to.²³⁶ Policies that distance local policing from immigration enforcement have accordingly been enacted in some cases to ensure that these legal commands are satisfied.

Experience has shown that involving police and sheriff’s departments in immigration enforcement efforts increases the risk of racially biased policing. Law enforcement officers engage in immigration policing may be more likely to treat community members differently on the basis of citizenship or immigration status. Furthermore, officers are likely to employ perceived proxies for immigration status like race, ethnicity, and English-language ability, in deter-

²³² *Id.* See also *supra*, note 226 (listing jurisdictions and policies that relied on the same rationale).

²³³ U.S. CONST. amend. XIV, § 1.

²³⁴ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (holding discrimination against persons of Japanese ancestry to be presumptively unconstitutional); *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”).

²³⁵ 42 U.S.C. § 2000d.

²³⁶ See, e.g., 2012 Amherst Resolution, *supra* note 173 (adopting policy of declining detainers 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”).

mining who to target for further investigation.²³⁷ 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, noting that the Secure Communities program, by “involving local law enforcement in federal immigration policy,” “*explicitly* promotes discrimination on the basis of nation of origin and *implicitly* promotes discrimination on the basis of race, color, and socio-economic status.”²³⁸

Law enforcement leaders have long recognized that the elimination of bias in policing requires a proactive approach.²³⁹ Police agencies around the country are already facing a crisis of legitimacy as issues of police brutality and discrimination in criminal justice administration receive fresh attention.²⁴⁰ Conscious of these dynamics, disentanglement policies limiting inquiry about immigration status and prohibiting civil immigration enforcement (whether in street-level policing or in the jails) are often adopted as part of a broader effort to avoid bias-based policing.²⁴¹

Consider Vermont’s state law requiring that local police not engage in immigration enforcement.²⁴² Adoption of this law, which required all law enforcement to implement a “model fair and impartial policing policy,” was motivated in part by specific instances of discriminatory traffic stops of nonciti-

²³⁷ *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).

²³⁸ 2012 Amherst Resolution, *supra* note 173 (emphasis added). The fact that discrimination cannot be confined to undocumented residents and is broadly based on race and ethnicity is consistent with scholar Kevin 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).

²³⁹ See, e.g., Int’l Assoc. of Chiefs of Police, *Addressing Racial Profiling: Creating a Comprehensive Commitment to Bias-Free Policing*, in PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL AND TRIBAL LAW ENFORCEMENT (Sept 2006), http://www.theiacp.org/portals/0/pdfs/PCR_LdrshpGde_Part3.pdf.

²⁴⁰ See, e.g., Nick Bayer, *Polls Show Millennials Increasingly Worried About Police Brutality, Criminal Justice*, HUFFINGTON POST (Aug. 16, 2016) http://www.huffingtonpost.com.mx/entry/millennials-police-criminal-justice-poll_us_57b38ceee4b04ff883994fef.

²⁴¹ See, e.g., 2010 Santa Clara Resolution, *supra* note 186 (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 passing resolution “to protect the rights of all County residents to be free from discrimination”).

²⁴² See *supra* notes 138-139 and accompanying text.

zens.²⁴³ A Vermont sheriff’s department paid nearly \$30,000 to settle a case in which the state’s Human Rights Commission found the sheriff had illegally detained a Mexican national after a traffic stop chiefly because of his nationality and skin color, and held him for over an hour to contact the Border Patrol.²⁴⁴ Based on that and similar instances, the state legislature in 2016 mandated that all jurisdictions adopt fair and impartial policing practices and ordered the crafting of a model policy.²⁴⁵

Threaded throughout the model policy are anti-bias and equality rationales for its disentanglement provisions. The model’s “don’t police” provisions reason that because “[p]olicing in a fair and impartial manner is essential to building ... trust” between police and residents, police “shall not use an individual’s personal characteristics as a reason to ask about, or investigate, a person’s immigration status.” The policy later emphasized that agencies “should not use a person’s characteristics as a reason to ask about civil immigration status.” When setting policies that restricted self-initiated arrests or adherence to ICE detainers, the model linked the Fourth Amendment’s freedom from unlawful seizure to equality principles, stating:

The Constitution’s 4th Amendment Right against unreasonable search and seizure applies equally to all individuals residing in the United States. Therefore, [agency members] shall not initiate or prolong stops based on civil immigration matters, such as suspicion of undocumented status. Similarly, [agency members] shall not facilitate the detention of undocumented individuals or individuals suspected of being undocumented by federal immigration authorities for suspected civil immigration violations.²⁴⁶

Vermont is not alone. Other jurisdictions have adopted “don’t police” policies after finding that allowing officers to engage in immigration policing resulted in racial profiling and discrimination. New Orleans, Louisiana and East Haven, Connecticut adopted “don’t police” policies after litigation over bias in policing resulted in consent decrees and substantial settlements.²⁴⁷

²⁴³ Kathleen Masterson, *Vermont Sheriff Department Pays To Settle Instance Of Discrimination*, VERMONT PUBLIC RADIO (June 14, 2016), <http://digital.vpr.net/post/vermont-sheriff-department-pays-settle-instance-discrimination#stream/0> (visited Aug. 26, 2017).

²⁴⁴ *Id.*

²⁴⁵ *See supra* notes 138-139.

²⁴⁶ *Id.*

²⁴⁷ *See, e.g.*, U.S. v. City of New Orleans, No. 2:12-cv-1924, Document 2, *Consent Decree Regarding the New Orleans Police Department* (July 24, 2012) at ¶ 183 (requiring New Orleans Police Department, 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

Equal protection principles also prohibit policing practices that systematically *deprive* certain communities of police services.²⁴⁸ This concern is implicated when policing practices effectively discourage noncitizens and individuals in mixed status families from coming forward as victims of, or witnesses to crime. Many disentanglement policies can be seen as an attempt to avoid such deprivations of equal protection in access to police services.²⁴⁹

their immigration status.”); 2016 NOPD Policy, *supra* note 146, at ¶¶ 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.”); *United States v. Town of East Haven and East Haven Bd. of Police Comm’r’s*, No. 3:12-cv-01652-AWT, Docket Entry 11 (Dec. 21, 2012) (“Agreement for Effective and Constitutional Policing”); Evan Lips, *East Haven Board of Police Commissioners Approves \$450,000 Settlement*, NEW HAVEN REGISTER (June 10, 2014), <http://www.nhregister.com/general-news/20140610/east-haven-board-of-police-commissioners-approves-450000-settlement> (reporting on policy adopted in response to DOJ lawsuit alleging that EHPD 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* *Ortega Melendres v. Arpaio*, No. 2:07-cv-02514-GMS, Document 606, Supplemental Permanent Injunction/Judgment Order at ¶ 28 (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).

²⁴⁸ 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).

²⁴⁹ *See, e.g.*, LAPD Special Order 40, *supra* note 135 (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 2007-58 (2007), http://libguides.law.du.edu/ld.php?content_id=34435656 (basing disentanglement in part on equal protection); 2013 King County Ordinance, *supra* note 212, at § 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”); *see* Cook County, Ill., 07-R-240 Resolution Declaring Cook County a “Fair and Equal County for Immigrants” (June 5, 2007), http://libguides.law.du.edu/ld.php?content_id=34434649 (adopting policy limiting inquiry into immigration status by county sheriffs, relying in part on the county’s “dedicat[ion] to

The equal protection rationale has sustained disentanglement policies that go beyond the “don’t police” category to withdrawal from joint operations, a category of policy further down the entanglement spectrum. 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.”²⁵⁰ As a spokesperson for the San Francisco Police Department (SFPD) explained, “We want all persons to feel comfortable in contacting” the police and “report[ing] crimes and emergencies without concern as to their immigration status.”²⁵¹

E. Promote Diversity and Inclusivity

After the election of President Trump, the friction between federal immigration policy and local values of inclusion and diversity has increased. The federal government’s deportation agenda is now seen by many as anti-immigrant at a minimum, and even implicitly or overtly racist.²⁵² This has spurred a new wave of immigrant protective policymaking rooted in values of inclusivity.²⁵³ This rationale is related to but distinct from the more legalistic emphasis on equality and nondiscrimination that is seen in some disentanglement policies. It employs immigration-oriented policing policies to further the aims of inclusivity and respect for diverse communities, as distinguished from the backward-looking policies based on remedying equal protection failures in the criminal justice system. It also embraces a broader view of inclusiveness in

providing all of its residents with fair and equal access to the services, opportunities, and protection county government has been established to administer”).

²⁵⁰ Ellen Nakashima, *San Francisco Police Department Pulls Out of FBI Anti-Terrorism Task Force*, WASH. POST (March 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.

²⁵¹ *Id.*

²⁵² *See supra* Part I; *see also* Kevin de León & Anthony Rendon, Joint Statement from California Legislative Leaders on Result of Presidential Election (Nov. 9, 2016), <http://sd24.senate.ca.gov/news/2016-11-09-joint-statement-california-legislative-leaders-result-presidential-election> (describing Californians’ votes against Trump as “overwhelmingly reject[ing] politics fueled by resentment, bigotry, and misogyny”); *see also* 2017 Seattle Resolution, *supra* note 156, 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”).

²⁵³ *See generally* Eagly, *Immigrant Protective Policies*, *supra* note 44, at 298-99 (noting emergence of equality-based reform movements).

crafting policies, taking care to not carve out certain groups of immigrants as more deserving than others.²⁵⁴

Enactments around the country have demonstrated the vitality of this rationale for generating disentanglement policies. Santa Monica, California and Seattle, Washington²⁵⁵ provide rich examples. In response to what Santa Monica's mayor viewed as actions by the Trump administration that did not "align with our vision of diversity and inclusion,"²⁵⁶ the city passed a resolution in February 2017 that used as a touchstone for a new policing policy the city's embrace of individuals of diverse religious, racial, national or ethnic origin, gender, and sexual identity or orientation. On that basis, and acknowledging the diverse foreign-born population in the city, Santa Monica crafted a resolution that wove together most of the typology of sanctuary policies: a "don't police" provision, a broad prohibition on use of city resources for civil immigration enforcement, and a nondisclosure provision to prevent the disclosure of information about a variety of diverse communities.²⁵⁷ In announcing these policies, the mayor made clear that disentangling Santa Monica from civil immigration enforcement was part of a larger strategic plan to "maintain[] a diverse and inclusive city."²⁵⁸

The Santa Monica example illustrates that the diversity and inclusivity rationale has the capacity to undergird the full typology of common disentanglement policies. It has supported numerous detainer policies,²⁵⁹ joint operations

²⁵⁴ See generally Serin Houstin & Charlotte Morse, *The Ordinary and Extraordinary: Producing Migrant Inclusion and Exclusion in US Sanctuary Movements*, 11 STUDIES IN SOCIAL JUSTICE 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").

²⁵⁵ 2017 Seattle Resolution, *supra* note 156.

²⁵⁶ Letter from Ted Winterer, Mayor, City of Santa Monica, Cal., to Santa Monica (March 1, 2017), <https://newsroom.smgov.net/Media/Default/CMO/MayorLetterEN.pdf> [hereinafter Winterer Letter] (last visited 08/26/17).

²⁵⁷ Santa Monica, Cal., Res. No. 11028 (Feb. 28, 2017), http://libguides.law.du.edu/ld.php?content_id=35254558.

²⁵⁸ Winterer Letter, *supra* note 256, at 2.

²⁵⁹ See, e.g., 2010 Santa Clara Resolution, *supra* note 186 (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"); 2013 Multnomah County Resolution, *supra* note 191 (grounding detainer policy in similar findings); 2013 King County Ordinance, *supra* note 212 (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").

restrictions, and broadly-crafted resolutions to use funding and other local resources for local purposes rather than immigration enforcement.²⁶⁰

* * *

The array of rationales for sanctuary policies that this Part has laid out illustrates that our typology of sanctuary policies rests on a broad and nuanced theoretical framework. Our discussion of these rationales reveals that different localities may rely on different or multiple rationales for their sanctuary policies. A sanctuary jurisdiction that values self-determination may adopt a policy against detainers on the ground that it protects the value of local control over local criminal justice resources. Other cities may adopt a similar policy to protect its diverse communities.

In addition to revealing some of the fundamental values that localities hold, Part IV also illustrates the practical consequences of sanctuary policies. Anti-detainer policies, for example, may be grounded on the practical reality of avoiding liability for constitutional rights violations under circumstances in which the locality, and not the federal government, is held responsible. Similarly, retaining local control over local criminal justice resources may have financial consequences because most joint operations, including 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 this lev-

²⁶⁰ See, e.g., McMinville, Or., Res. No. 2017-03 (Jan. 10, 2017), http://libguides.law.du.edu/ld.php?content_id=34431012 (recognizing the “inherent worth and dignity of all persons,” 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 (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, which typifies the joint operations policy type, 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> (last visited 08/26/17) (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.”)

el and mode of enforcement. In the words of former White House Press Secretary Sean Spicer, the President wants to “take the shackles off” enforcement agents. This “unshackling” of immigration enforcement brought on by the administration to enforce immigration law to its fullest extent possible means that local jurisdictions have even greater incentive to refuse to participate and to affirmatively protect immigrant communities from the perils of immigration enforcement.

The goal of this Article has been to present the facts necessary for a fuller understanding of the complex problems posed by the “sanctuary city” debate. Our close examination of local resistance to mass deportation reveals that the Trump administration’s broad claim that sanctuary policies flout federal law are misplaced. The variety of actions jurisdictions have undertaken to effect disentanglement are supported by deeply-rooted rationales designed to achieve a multiplicity of local policy goals. Indeed, many jurisdictions adopted disentanglement policies specifically in order to comply with federal law—sometimes even as a remedial measure after the Department of Justice found evidence of constitutional violations. The only specific law cited by opponents of sanctuary jurisdictions—8 U.S.C. § 1373—is narrow in scope, and jurisdictions have crafted 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 cities are engaging in their established domain of local criminal justice policymaking.