Printed in U.S.A.
Vol. 113, No. 3

Articles

SANCTUARIES AS EQUITABLE DELEGATION IN AN ERA OF MASS IMMIGRATION ENFORCEMENT

Jason A. Cade

ABSTRACT—Opponents of—and sometimes advocates for—sanctuary policies describe them as obstructions to the operation of federal immigration law. This premise is flawed. On the better view, the sanctuary movement comports with, rather than fights against, dominant new themes in federal immigration law. A key theme—emerging both in judicial doctrine and on-the-ground practice—focuses on maintaining legitimacy by fostering adherence to equitable norms in enforcement decision-making processes. Against this backdrop, the sanctuary efforts of cities, churches, and campuses are best seen as measures necessary to inject normative (and sometimes legal) accuracy into real-world immigration enforcement decision-making. Sanctuaries can erect front-line equitable screens, promote procedural fairness, and act as last-resort circuit breakers in the administration of federal deportation law. The dynamics are messy and contested, but these efforts in the long run help ensure the vindication of equity-based legitimacy norms in immigration enforcement.

AUTHOR—Associate Professor of Law, University of Georgia School of Law. This paper benefited from presentations at the 2018 American Association of Law Schools Annual Meeting, the 2017 People & Cultures Across Borders Conference held at Princeton University's Institute for International & Regional Studies, the 2017 Emerging Immigration Law Scholars Conference held at Texas A&M University School of Law, and the 2017 Clinical Law Writers Workshop held at NYU School of Law. Thanks especially to Jennifer Koh, Ming Hsu Chen, Kevin Lapp, Usha Rodrigues, David Rubenstein, Dan Coenen, Carrie Rosenbaum, Annie Lai, Kit Johnson, Laila Hlass, Richard Boswell, Philip Torrey, David Baluarte, and Caitlin Berry for insightful comments. Mary Honeychurch, Zack Lindsey, and "Joey" Wai Shan Fong provided invaluable research assistance. Thanks to the *Northwestern University Law Review* for editorial support. Finally, my

gratitude to Dean Peter "Bo" Rutledge and UGA Law School for the research funding that made this project possible.

INTRODUCTION

Jeanette Vizguerra, an undocumented immigrant from Mexico, has been living in the United States since 1997 and has three U.S. citizen children.[1] A traffic stop led to the issuance of a deportation order against her in 2011. She was able, however, to obtain stays of removal from Immigration and Customs Enforcement (ICE), allowing her to remain in the United States on a temporary basis. Because Vizguerra was the victim of a serious crime and helpful to law enforcement in pursuing the perpetrator, she obtained a certification from law enforcement that made her eligible for "U status," a statutory dispensation that puts certain crime victims on a pathway to lawful

[1] Donie O'Sullivan & Sara Weisfeldt, *Undocumented Mom Taking Sanctuary in Denver Church Is Among Time's 100 Most Influential People*, CNN (Apr. 20, 2017, 2:05 PM), https://www.cnn.com/2017/04/20/us/vizguerra-time-100-trnd/index.html [https://perma.cc/F3M7-GRFX].

immigration status. Nevertheless, on February 15, 2017, less than one month after President Trump's inauguration, ICE declined any further stay. It took this action notwithstanding Vizguerra's pending U application, two decades of productive residence, and the far-reaching harm her removal would have on her dependent U.S. citizen children. Vizguerra's congregation immediately offered her sanctuary, physically sheltering her from removal.[2] She lived in the church building for three months while negotiations for leniency continued on her behalf.[3] Eventually, ICE capitulated, agreeing to extend her stay of removal until March 15, 2019, thus allowing her to remain with her family while awaiting agency adjudication of her U application.[4]

Vizguerra's precarious situation is not unique. Across the United States, immigration enforcement in 2017 took a sharp turn in a less nuanced and more draconian direction. Few deportable noncitizens now can expect to benefit from favorable enforcement discretion, even if they lack a criminal record and have made positive contributions to their community, or if their removal would cause substantial suffering to themselves or their families.[5] Taxpaying breadwinners who have lived in the country for decades have suddenly found themselves detained far from family.[6] Noncitizen survivors of domestic violence seeking protective orders, as well as immigrant parents in child support or custody disputes, have been arrested by ICE just outside

---

[2] *See* Memorandum from John Morton, Dir., ICE, to Field Officer Dirs. et al., ICE, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011), https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf [https://perma.cc/8J96-TLGL] (indicating that as a policy matter ICE will not enforce immigration law in "sensitive locations" such as churches).

[3] Melissa Etehad, *Denver Mother Is Granted Temporary Deportation Relief After 3 Months of Sanctuary in a Church*, L.A. TIMES (May 13, 2017, 3:05 PM), http://www.latimes.com/local/lanow/la-na-denver-mother-relief-20170512-story.html [https://perma.cc/8J96-TLGL] (describing efforts by politicians and her congregation to obtain a reprieve from ICE).

[4] *Id.* Due to a 10,000 per year cap on U visas, there is currently a multi-year backlog in processing. 8 U.S.C. § 1184(p)(2)(A) (2012); U.S. CITIZENSHIP & IMMIGRATION SERVS., NO. OF FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009–2017 (2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2017_qtr4.pdf [https://perma.cc/M7XA-PTC4].

[5] *See generally* Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 9–13 (2014) (discussing the statutory grounds that make noncitizens deportable for a wide range of immigration violations and crimes, with little opportunity for formal discretionary relief).

[6] *See, e.g.*, Liz Robbins, *Once Routine, Immigration Check-Ins Are Now High Stakes*, N.Y. TIMES (Apr. 11, 2017), https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-in-deportation.html [https://perma.cc/67G9-69D2]; Tracy Seipel, *Deported: End of the Line for Undocumented Oakland Couple*, MERCURY NEWS (published Aug. 16, 2017, 4:39 PM; updated Mar. 29, 2018, 12:03 PM), https://www.mercurynews.com/2017/08/16/deported-end-of-the-line-for-undocumented-oakland-couple [https://perma.cc/9DAE-P7BJ] (reporting on ICE's refusal to exercise favorable discretion in the case of a Mexican couple without criminal records deported after living in the U.S. for over two decades, working in construction and nursing, paying taxes, and raising four children, now in high school and college).

the courtroom door.[7] Noncitizens arrested for minor offenses have been put in removal proceedings even before they have had an opportunity to contest the criminal charges.[8] Even immigrants with clear paths to lawful status are routinely detained.[9] In 2017, immigration arrests of noncitizens without criminal histories more than doubled, while immigration arrests generally rose by 42%.[10]

What precipitated this dire situation for noncitizens? In short, a changing of the guard. When the Trump Administration came to power early in 2017, it quickly made every potentially deportable noncitizen a removal priority.[11] In sharp contrast to the efforts of prior administrations, the new Administration abandoned the premise of equitable prosecutorial discretion.[12] The Administration trumpets this blanket, indiscriminate approach to enforcement as a "return to [the] rule of law."[13] As then-

---

[7] *See, e.g.*, Jonathan Blitzer, *The Trump Era Tests the True Power of Sanctuary Cities*, NEW YORKER (Apr. 18, 2017), https://www.newyorker.com/news/news-desk/the-trump-era-tests-the-true-power-of-sanctuary-cities [https://perma.cc/L9QA-5XUG]; Nora Caplan-Bricker, *"I Wish I'd Never Called the Police,"* SLATE (Mar. 19, 2017, 8:12 PM), http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html [https://perma.cc/QMQ5-96UU]; Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation.*, N.Y. TIMES (Apr. 30, 2017), https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html [https://perma.cc/Z9MP-AEKE].

[8] Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8,793, 8,793–94 (Jan. 30, 2017) ("It is the policy of the executive branch to . . . detain individuals apprehended on suspicion of violating Federal or State law . . . ."); Maria Sacchetti, *ICE Immigration Arrests of Noncriminals Double Under Trump*, WASH. POST (Apr. 16, 2017), https://www.washingtonpost.com/local/immigration-arrests-of-noncriminals-double-under-trump/2017/04/16/98a2f1e2-2096-11e7-be2a-3a1fb24d4671_story.html [https://perma.cc/724F-9TDS] (documenting 75% rise in number of detainer requests ICE sought for arrested noncitizens); Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al., Enforcement of the Immigrant Laws to Serve the National Interest (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/UEX8-5DDT] [hereinafter Kelly, Priorities Memo] (expanding immigration priorities to include noncitizens who have been arrested but not yet convicted).

[9] *See, e.g.*, Maria Cramer, *ICE Arrested 7 People as They Sought Permanent Status in Mass., R.I.*, BOS. GLOBE (Feb. 21, 2018), https://www.bostonglobe.com/metro/2018/02/21/january-ice-arrested-people-they-sought-permanent-status-mass-and-rhode-island/EE4jLM6HkytwrHDUjYpdqL/story.html [https://perma.cc/AD5W-23EB].

[10] ICE, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2–3, 5 (2017), https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [https://perma.cc/6QF7-QVSS].

[11] *See* Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8,793; Kelly, Priorities Memo, *supra* note 8.

[12] *See infra* Part II.

[13] Press Release No. 17-889, Dep't of Justice, Return to Rule of Law in Trump Administration Marked by Increase in Key Immigration Statistics (Aug. 8, 2017), https://www.justice.gov/opa/pr/

Secretary of Homeland Security John Kelly put it, "[i]f you're here illegally, you should leave or you should be deported, put through the system."[14] In December 2017, Acting Director of ICE Thomas Homan affirmed the Administration's continued commitment to this approach: "There's no population off the table. If you're in this country illegally, we're looking for you and we're going to look to apprehend you."[15]

In the face of this mass, indiscriminate federal enforcement, sites of resistance have risen throughout the country. Hundreds of jurisdictions have passed or strengthened so-called "sanctuary" policies, which limit local government employees' cooperation in the federal immigration enforcement process and in some cases provide services to potentially deportable noncitizens.[16] Religious organizations, too, have taken up this cause, gaining visibility as institutions willing to shelter and assist individuals caught up by harsh deportation policies.[17] Sanctuary campuses—public or private institutions of higher education with policies limiting cooperation or information-sharing with federal immigration authorities—are also on the rise.[18]

Critics charge that sanctuary policies present a threat to law and order, unlawfully obstruct enforcement, endanger the public, protect lawbreakers, and encourage further immigration violations.[19] One of President Trump's

return-rule-law-trump-administration-marked-increase-key-immigration-statistics [https://perma.cc/LM2C-PYAP].

[14] *Meet the Press* (NBC television broadcast Apr. 16, 2017), https://www.nbcnews.com/meet-the-press/meet-press-april-16-2017-n747116 [https://perma.cc/9K7U-N8Z8]. On July 31, 2017, John Kelly was appointed Chief of Staff to the Trump Administration, vacating his position as DHS Secretary, which he had held since January 20, 2017. Dan Merica, *Kelly Sworn In as Trump's Second Chief of Staff*, CNN (July 31, 2017, 10:17 PM), https://www.cnn.com/2017/07/31/politics/john-kelly-chief-of-staff/index.html [https://perma.cc/NU6N-7ZUQ].

[15] Adam K. Raymond, *Deportations Are Down Under Trump, but Arrests of Non-Criminal Immigrants Surge*, N.Y. MAG: DAILY INTELLIGENCER (Dec. 20, 2017), http://nymag.com/daily/intelligencer/2017/12/deportations-are-down-as-immigration-arrests-surge.html [https://perma.cc/6KW9-A6PS]; *see also* Kery Murakami, *Immigrant Deportations Up Sharply Under Trump*, MANKATO FREE PRESS (Aug. 19, 2017), http://www.mankatofreepress.com/news/local_news/immigrant-deportations-up-sharply-under-trump/article_a2b7b8d3-d00b-5839-9f1d-8de5d83b3696.html [https://perma.cc/G757-6R9R] (reporting ICE's statement that the agency is no longer exercising leniency with respect to undocumented residents who have not committed weighty crimes).

[16] *See infra* Section III.A.

[17] *See infra* Section III.B.

[18] *See infra* Section III.C.

[19] *See, e.g.*, Rafael Bernal, *Sessions Rips 'Culture of Lawlessness' in Chicago*, HILL (Aug. 7, 2017, 6:39 PM), http://thehill.com/latino/345668-sessions-rips-culture-of-lawlessness-in-chicago [https://perma.cc/KEV2-2ZH9] (reporting on Attorney General Jeff Sessions's statement that "the political leadership of Chicago has chosen deliberately and intentionally to adopt a policy that obstructs this country's lawful immigration system"); *see also* Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 CAP. U. L. REV. 583, 612 (2014) (making a similar argument and citing sources).

first executive orders, for instance, asserted that "sanctuary jurisdictions . . . willfully violate Federal law in an attempt to shield aliens from removal."[20] Even those who are generally sympathetic to sanctuaries sometimes describe their efforts and objectives as rooted in the obstruction of governing law—most prominently as a form of civil disobedience directed at an unduly harsh immigration system, pursued in the name of a "higher" (i.e., religious or moral) law.[21] The usual storyline is simple: immigration enforcers are trying to carry out legal commands, while sanctuary efforts are undertaken to impede the law.[22]

In this Article, I argue that this frame is too facile. The better view is that sanctuary efforts function not as legal obstructions but as engines furthering critical legal norms in the face of the Executive Branch's indiscriminate enforcement policies. To explain why, however, requires grappling with the deep complexities of immigration law. The significance of sanctuary policies in the current immigration enforcement crackdown cannot be fully appreciated without an understanding of the broader historical and statutory context of immigration law. For most of the twentieth century, immigration judges were empowered to set aside a deportable noncitizen's removal when warranted by the equities. This power was seen as necessary to avoid grave injustice in individual cases.[23] Statutory provisions enacted in the 1990s, however, dramatically expanded the kinds of criminal offenses and immigration violations that would lead to deportation, while at the same time constricting the back-end discretionary authority of adjudicators to provide relief from these increasingly onerous sanctions.[24] In this period, Congress also created a variety of mechanisms that allowed federal enforcers in the Department of Homeland Security

---

[20] Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017); *see also* Paul Bedard, *ICE Chief Lists Worst Sanctuary Cities: Chicago, NYC, San Francisco, Philadelphia*, WASH. EXAMINER (July 24, 2017, 7:27 AM), https://www.washingtonexaminer.com/ice-chief-lists-worst-sanctuary-cities-chicago-nyc-san-francisco-philadelphia [https://perma.cc/P6XK-G7YQ] (describing sanctuary cities as "un-American" because they "harbor[] criminal illegal immigrants").

[21] *See, e.g.*, Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133, 140–41 (2008) (describing the "morally-based arguments of the sanctuary movement" as in conflict with the "rule-of-law principle that the federal government sought to employ").

[22] *Cf.* Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 911 (1995) ("This rendition of Sanctuary as law-breaking protest evokes a familiar picture and, for many Americans, not a terribly troubling narrative of maintaining social order through the rule of law in the world's premier democracy.").

[23] *See infra* Part I.

[24] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546; Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40 & 42 U.S.C.); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

(DHS) to remove many categories of noncitizens from the purview of immigration court altogether, thus authorizing fast-track proceedings presided over solely by enforcement officials.[25] The cumulative result of these changes was a removal code of unprecedented harshness and rigidity, with cruel consequences that soon began to make headlines.[26]

And yet, removing equitable discretionary authority from adjudicators did not excise it from the system altogether.[27] The exercise of equitable discretion by enforcers remained a necessary component to ensure the system continued to comport with basic justice.[28] Indeed, for over sixteen years, across both Republican and Democratic administrations, federal enforcers were deeply engaged in the process of developing and refining equitable enforcement policies.[29] Across that same time period, the Supreme Court issued a variety of rulings that not only acknowledged the necessity of enforcement-based system equity, but increased the opportunities for discretionary interventions by enforcers.[30]

Political and judicial branches have engaged in this project of equitable enforcement—despite the apparent statutory rigidity of modern immigration law—because the immigration system is unique among civil enforcement fields with respect to the gravity of benefits and sanctions it administers. Indeed, deportation often threatens life-destroying consequences for noncitizens and their families. Such a system demands that the individual human beings who face such dire consequences be afforded some measure of equitable discretion—what I have described in previous articles as "immigration equity"[31]—in keeping with basic principles of fairness, equality, and proportionality. If not at the back end, these concerns must be

---

[25] *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 193–98 (2017); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6–7, 22–25 (2014).

[26] *See, e.g.*, Joseph Ditzler, *Detentions Spark Protest*, ALBUQUERQUE J., Dec. 31, 2001, at 1; Gayda Hollnagel, *Immigration Sweeps Disrupt Small Towns, Separate Families*, WIS. ST. J., Dec. 25, 1997, at 1C, https://madison.newspaperarchive.com/madison-wisconsin-state-journal/1997-12-25/page-19 [https://perma.cc/8CS3-NS4G]; Anthony Lewis, *Congress Needs to Restore Humanity to U.S. Immigration Policy*, NAPLES DAILY NEWS, Dec. 22, 1997, at D07; Eric Lipton, *Shoplifting Gets Woman Kicked out of Country*, TIMES-PICAYUNE (New Orleans), Dec. 21, 1999, at A01; Nancy Lofholm, *INS Doubles Staff for Colorado Crackdown*, DENVER POST, Dec. 30, 1999, at A01; Marianne Means, *Deportations Putting Public at Some Risk*, TIMES UNION (Albany), Dec. 22, 1997, at A7.

[27] *See infra* Section I.B.

[28] *See infra* Section I.C.

[29] *See infra* Part II.

[30] *See infra* Section I.D.

[31] *See* Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 664–65 (2015) [hereinafter Cade, *Enforcing Immigration Equity*]; Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029 (2017) [hereinafter Cade, *Judging Immigration Equity*].

realized in early stages of immigration-related decision-making.[32] Thus, the structure of deportation law mirrors criminal law, where prosecutorial discretion has long been recognized as necessary to ensure individual justice in the face of overbroad criminal codes.[33]

When federal agencies fail to adequately undertake this equitable responsibility—instead engaging in mass, indiscriminate enforcement—justice is not reliably meted out, jeopardizing the legitimacy of the deportation system. Legitimacy encompasses both legal accuracy (ensuring that deportations are not contrary to federal law) and normative accuracy (ensuring that equitable factors are weighed before deportation is rigidly applied in individual cases).[34] While there obviously cannot be a one-size-fits-all rule for the proper equitable result in all deportation cases, previous administrators worked to develop detailed standards to guide agency officials.[35] The Trump Administration's wholesale disregard of the responsibility to equitably enforce the law has led and will continue to lead to unjust and arbitrary consequences in many cases. As a result, the locus of discretion shifts further upstream, to the local police, state prosecutors, and other nonfederal institutions in local communities, including churches and campuses. Some of these actors have chosen courses of action that promote equitable norms in the operation of immigration enforcement. Sanctuaries, I argue, have helped the system incorporate some fairness into real-life immigration decision-making, achieving results that are normatively more accurate.

Depending on the type of sanctuary measure at issue, these legitimizing forces may take hold at different stages of the enforcement process. Municipalities and campuses with limited-cooperation policies, for instance, impose an "equitable screen" at the front end of the system. The federal immigration system has long relied on criminal justice actors to identify and process "undesirable" noncitizens.[36] By declining to turn noncitizens over to federal authorities, sanctuary communities operate something like normative grand juries, refusing to indict except where aggravating factors are

---

[32] *See* Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36 (2015) (arguing that Department of Homeland Security officials should defer to signals by criminal court judges that deportation would not be appropriate in particular cases).

[33] *See infra* Section I.B.

[34] *See infra* Part IV; *cf.* Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 1019–21 (2014) (explaining the difference between legal accuracy and moral accuracy).

[35] *See* Cade, *Enforcing Immigration Equity*, *supra* note 31, at 708 ("The point is that *some* balancing should take place in individual cases, even for 'criminal noncitizens,' to safeguard against injustice and arbitrary action in the removal system."); *infra* Part II.

[36] *See infra* Section IV.A.

present.[37] These screening measures bear other legitimacy-enhancing consequences, too. Of particular importance, cooperation-limiting measures bolster the ability of noncitizens and citizens alike to engage in certain protected aspects of family and civic life without illegitimate intrusion by federal or state immigration enforcers.[38]

Cities and churches that provide support and legal representation to persons in detention or removal proceedings help hold the government to its burden of proof and improve the likelihood that eligibility for lawful status or defenses to removal will be fairly considered.[39] Sanctuaries can also play the role of a last-resort circuit-breaker.[40] The physical refuge provided to Jeanette Vizguerra in Denver illustrates this dynamic. The provision of true sanctuary—in the literal, historically familiar sense—shielded her from immediate removal after formal processes had run out, allowing negotiation on her behalf that ultimately led ICE to permit her to remain in the country while her application for U status proceeds.

The various forms of sanctuary that I consider in this Article spring from a range of motivations, implicate different legal rules, and vary in effectiveness.[41] Each of them, however, has the potential to inject legitimizing dynamics into the current immigration enforcement landscape. As a result of sanctuary activities, some individual noncitizens who should not be deported will be spared. The policies will enable even more individuals to engage in constitutionally protected civic life, to the wider benefit of their families and communities. Together, these outcomes will help foster at least localized tonics against growing immigrant cynicism regarding the legitimacy of the immigration enforcement system, and by extension, its criminal system adjuncts.[42] Meanwhile, the high visibility of sanctuary efforts, along with the credibility of the particular institutions involved, will help shape opinion and influence public discourse nationally, perhaps generating broader support for more humane immigration policies in the future.[43]

By focusing on the functions that different sanctuary forms share in the context of mass immigration enforcement, I provide a unifying account of

---

[37] *See infra* Section IV.A.

[38] *See infra* Section IV.D.

[39] *See infra* Section IV.B.

[40] *See infra* Section IV.C.

[41] *See infra* Parts III, V.

[42] *See* Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1003 (2017) (exploring how the punitive, arbitrary, and inscrutable nature of the immigration detention system as experienced by noncitizens can lead to deep and widespread distrust of the legal system).

[43] *See infra* Section IV.E.

public and private defensive sanctuary efforts, which thus far have been considered for the most part in isolation.[44] More importantly, I make the case that sanctuary efforts comport with deep-rooted principles of justice, including equity-based principles vindicated repeatedly in modern Supreme Court rulings concerning immigration enforcement.

This Article develops these points in five Parts. Part I outlines the significant transition that has occurred in immigration law and enforcement in recent decades, moving away from formal equitable adjudication toward the empowerment of nonadjudicators in determining whether deportation law is administered fairly and proportionally. I explain why faithful execution of the immigration scheme requires attention to this equitable responsibility, and I show that the Supreme Court has endorsed the necessity of this new enforcement-based system of equity, issuing rulings designed to facilitate consideration of proportionality and fairness by both federal and local actors.

Part II reviews how recent administrations have dealt with the need to undertake this equitable task. As I explain, immigration agencies began to implement prosecutorial discretion policies during the George W. Bush Administration in response to the emerging deleterious consequences of Congress's new statutory regime. Immigration agencies continued to refine these discretionary approaches for a decade and a half, and that process gained significant momentum during President Obama's first term. The Trump Administration, in contrast, has sought to displace this reified system of equitable enforcement discretion with a radically new system, one characterized by a mass, indiscriminate approach to immigration enforcement.

Part III describes the three primary subfederal entities engaged in sanctuary activity: cities, churches, and campuses. For each form, I briefly touch on the most salient legal justifications for the various activities, but only to make the point that each is likely on sufficiently solid legal footing to weather challenges from the federal officials who oppose them. I turn to my larger argument in Part IV, explaining that the emergence of all these forms of sanctuary activity should be viewed as the latest development in the upstream relocation of immigration law equity. Stepping into the equitable void left by the Executive Branch, sanctuaries are generating new ways of injecting a measure of salutary equitable discretion into real-world deportation processes. Because sanctuaries, at bottom, promote fairness and justice in immigration-related decision-making, they have a strong claim to

[44] For an exception, see Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, MINN. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3038943 [https://perma.cc/RS9Y-NW2F].

legitimacy in light of immigration law's overarching and judicially recognized context. In Part V, I address some of the limitations and drawbacks of relying on sanctuary policies for equity in immigration enforcement. To be sure, the positive effects that sanctuaries offer in achieving immigration equity are limited in efficacy and reach. Even so, in both the short-term and long-term, sanctuaries can make a positive difference. This Article concludes by suggesting possibilities for the future of the sanctuary movement and the role courts might play in protecting immigration equity's last stand.

I. OVERBROAD REMOVAL GROUNDS REQUIRE EQUITABLE ENFORCEMENT DECISION-MAKING

A. The Shift to Statutory Severity

In the late twentieth century, Congress set into motion a radical restructuring of immigration enforcement and the deportation scheme.[45] Through extensive changes to the immigration code,[46] Congress vastly increased the number of lawfully present noncitizens subject to deportation on the basis of even minor criminal history,[47] made all unauthorized presence a deportable offense, and barred most paths to lawful status for noncitizens who entered without inspection unless they first depart the country, which in turn typically triggers a ten-year prohibition on lawful return.[48] At the same time, Congress tightly constrained the authority of administrative immigration judges and criminal sentencing judges to exercise the equitable

[45] Cade, *Enforcing Immigration Equity*, *supra* note 31, at 671–83; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009).

[46] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546; Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40 & 42 U.S.C.).

[47] *See, e.g.*, Lopez-Valencia v. Lynch, 798 F.3d 863, 867 (9th Cir. 2015) (concerning the appeal of a forty-two-year-old lawful permanent resident who had lived in the country for forty years and was deported as an "aggravated felon[]" after shoplifting a $2 can of beer). *See generally* 8 U.S.C. § 1227(a)(2) (2012) (listing many categories of crimes that make lawfully present noncitizens deportable); Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758–63 (2013) (discussing the statutory provisions that make lawfully present noncitizens deportable on the basis of even minor crimes).

[48] *See* 8 U.S.C. § 1182(a)(6)(A)(i) (noncitizens who enter without inspection are inadmissible and therefore cannot adjust lawful status); *id.* § 1227(a)(1)(B) (noncitizens present without authorization are deportable); *id.* § 1182(a)(9)(B)(i) (ten-year reentry bar for noncitizens previously present in the United States without authorization for one year or more; three-year reentry bar if the period of unlawful presence was between 181 and 364 days).

discretionary powers they had employed for most of immigration law's history to avoid unjust or disproportionate removals.[49]

Today, few statutory provisions allow undocumented noncitizens to avoid deportation on humanitarian or equitable grounds. Such relief is available only to those who (1) have very long residence in the United States, no disqualifying criminal record, and immediate U.S. citizen family members who would suffer "exceptional and extremely unusual" hardship by the noncitizen's removal;[50] or (2) are victims of trafficking, abuse, or other specified serious crimes in the United States and can meet other criteria.[51] Moreover, Congress created numerous mechanisms permitting the fast-track removal of large categories of noncitizens without any formal immigration proceedings at all.[52] Finally, amendments to the immigration code in the 1990s greatly expanded the use of immigration detention, mandating or permitting immigration authorities to employ detention in a wide variety of circumstances, including many situations that have little or no bearing on the underlying assessment of risk that would typically justify the deprivation of liberty.[53]

---

[49] *See generally* Padilla v. Kentucky, 559 U.S. 356 (2010) (discussing the elimination of 212(c) and the Judicial Recommendation Against Deportation, as well as other constrictions of adjudicative relief from removal); Cade, *supra* note 32, at 40–41 (discussing the statutory measures for equitable discretion in immigration enforcement before and after Congress's statutory changes in the 1990s).

[50] *See, e.g.*, 8 U.S.C. § 1229b(a)–(b) (addressing cancellation of removal for both lawful permanent residents (LPRs) and noncitizens without lawful status). For purposes of eligibility for cancellation of removal, the required periods of continuous presence are deemed to end upon commission of criminal offenses or the inception of removal proceedings. Cade, *Enforcing Immigration Equity*, *supra* note 31, at 677–78 (explaining the limitations of cancellation of removal provisions); *see also* Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527, 540–42 (2015) (discussing how the statutory annual cap of 4000 grants of cancellation for non-LPRs created a backlog, significantly forestalling the effectiveness of such relief).

[51] *See* 8 U.S.C. § 1101(a)(15)(T) (trafficking victims); *id.* § 1101(a)(15)(U) (victims of designated serious crimes who assist law enforcement); *id.* § 1101(a)(27)(J) (juveniles dependent on family court due to parental abuse, neglect, or abandonment). Asylum is another statutory form of humanitarian relief but is exceedingly difficult to obtain, as it requires the noncitizen to apply within one year of entry to the United States and to prove a likelihood of torture or persecution by the government of his country of origin on account of race or another protected ground, among other restrictions and requirements. *See id.* § 1158.

[52] *See* DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 52–67 (2012) (identifying a "bewildering array of . . . fast-track mechanisms" for removal); Koh, *supra* note 25, at 193–221 (describing five types of removal orders that occur in "immigration court's shadows"); Wadhia, *supra* note 25, at 22–25 (describing expedited removal, reinstatement of removal, and administrative removal as instances of "speed deportation").

[53] *See, e.g.*, Immigration and Nationality Act (INA), 8 U.S.C § 1225(a), (b)(2)(A) (requiring detention of noncitizens seeking admission who are "not clearly and beyond a doubt entitled to be admitted"); *id.* § 1226(c) (providing that immigration officials "shall take into custody any alien who [is inadmissible or deportable on most criminal grounds] . . . when the alien is released"); *id.* § 1231(a)(2), (a)(6) (requiring detention for up to ninety days following a removal order and authorizing continued

Cumulatively, these changes wrought a deportation system that now subjects many millions of long-term noncitizens to the possibility of detention and removal, including lawful permanent residents who have only minor criminal histories, with limited opportunities for judges to consider whether these severe sanctions are justified in individual cases. Frequently, the collateral consequences of a deportation extend far beyond the individual, including the separation of a caregiver from a U.S. citizen spouse or children and a variety of direct and indirect economic losses.[54] In the Supreme Court's words, "deportation may result in the loss of all that makes life worth living."[55]

The legislative constriction of immigration and sentencing judges' authority to set aside removal, however, does not necessarily remove all consideration of fairness and proportionality from the system. Instead, when adjudicative discretion contracts, such considerations shift to other parts of the system.[56] Perhaps paradoxically, the Executive's duty to faithfully execute the law in the immigration context requires attention and responsiveness to individual equitable circumstances rather than rote

detention beyond that period on a discretionary basis). *See generally* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 365 (2014) (discussing the implementation of mandatory and discretionary immigration detention); Cade, *Judging Immigration Equity*, *supra* note 31, at 1029, 1082–92 (same); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449 (2015) (same).

[54] *See* RANDY CAPPS ET AL., URBAN INST. & MIGRATION POLICY INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES (2015) (explaining the psychological trauma, economic hardship, and instability experienced by the children of immigrant parents due to workplace raids and other enforcement activities); JOANNA DREBY, CTR. FOR AM. PROGRESS, HOW TODAY'S IMMIGRATION ENFORCEMENT POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES: A VIEW FROM THE GROUND 2 (2012) (addressing the consequences of deportation for those left behind, such as single mothers who struggle to provide for their families and the detrimental effect on children's health and mentality); *see also* Sibylla Brodzinsky & Ed Pilkington, *US Government Deporting Central American Migrants to Their Deaths*, GUARDIAN (Oct. 12, 2015, 8:57 AM), https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america [https://perma.cc/9AM6-SYKD] (analyzing data regarding deportees killed upon return to the violent countries they fled); Eline de Bruijn, *Deportation Was a 'Death Sentence' for Austin Father Sent Back to Mexico, Lawyer Says*, DALL. MORNING NEWS (Sept. 20, 2017), https://www.dallasnews.com/news/texas/2017/09/20/man-fled-mexico-fear-gangs-killed-deported-austin-wife-says [https://perma.cc/G4A9-59G8]; Sarah Elizabeth Richards, *How Fear of Deportation Puts Stress on Families*, ATLANTIC (Mar. 22, 2017), https://www.theatlantic.com/family/archive/2017/03/deportation-stress/520008 [https://perma.cc/X8WP-97HW] (examining the effects of deportation-related anxiety on families, especially children who can suffer stress severe enough to inhibit development, leading to mental, emotional, and cognitive disabilities).

[55] Bridges v. Wixon, 326 U.S. 135, 147 (1945) (internal quotation marks omitted).

[56] Cade, *Judging Immigration Equity*, *supra* note 31, at 1038 ("As with squeezing a balloon, the contraction of judicial authority to wield equitable discretion has expanded the role of police and prosecutorial discretion in evaluating and extending relief to noncitizens based on their individual circumstances.").

application of rigid code law. In the following Sections, I elaborate on this claim.

B. Deportation Laws Are Not Designed for Rigid Enforcement

Formal code law is only one ingredient in the complex admixture that creates a legal regime. As Dean Roscoe Pound observed over a century ago, there is always a gap between "law in books" and "law in action."[57] Enforcement priorities, resource constraints, constitutional limitations, political will, and other factors have as much to say about how a particular field is regulated as black letter statutes. Lawmakers, knowing this reality, enact many laws without the anticipation of full enforcement, allowing (and often counting on) calibration and refinement through on-the-ground implementation.[58] This tempering process is particularly evident, and necessary, in fields that administer severe penalties, where harsh legislation is politically advantageous but can wreak great injustice in particular cases.[59] Legislators have political incentives to increase the severity of criminal laws, for example, relying on police and prosecutors to exercise discretion in determining whom to arrest and prosecute.[60] Enacting broad, inflexible penal

---

[57] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 34 (1910) ("[T]he law upon the statute books will be far from representing what takes place actually . . . ."); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 521 (2001) ("Broad [criminal] codes cannot be enforced as written; thus, the definition of the law-on-the-street necessarily differs, and may differ a lot, from the law-on-the-books.").

[58] *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 87 (2d prtg. 1970) (arguing that "legislation has long been written in reliance on the expectation that law enforcement officers will correct its excesses through administration"); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1963 (1992) (arguing that legislators intend that prosecutors will "exercise their discretion *not* to pursue habitual criminal sentencing for offenders who [fall] within the statute but seem[] not to deserve such harsh treatment"); *cf.* Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 601–07 (2012) (citing evidence that legislators sometimes act based on awareness or assumptions about correlations between statutory severity, prosecutorial choices, and likelihood of conviction).

[59] Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1664–65 (2010) ("Legislators pass broad and deep criminal codes not only to appear tough on crime, but also for efficiency's sake: They seek to leave determinations of optimal enforcement to the executive. They purposefully avoid the particulars, anticipating case-specific, back-end equitable intervention." (footnote omitted)); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 102–03 (2013) (describing examples of public criticism and legislative responses when prosecutors fail to exercise the tremendous discretion delegated to them by broad penal legislation in equitably appropriate ways); Stuntz, *supra* note 57, at 569–79 ("[T]here are two keys to legislative incentives in this area—prosecutors' ability to decline to charge, and prosecutors' incentive to charge only those whom the public wishes to see charged.").

[60] *See* DAVIS, *supra* note 58, at 87; Scott & Stuntz, *supra* note 58, at 1963; William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008) [hereinafter Stuntz, *Unequal Justice*] ("[C]riminal justice policies are mostly political symbols or legal abstractions, not questions the answers to which define neighborhood life.").

statutes and mandatory sentencing guidelines thus transfers equitable power to police and prosecutors, who act as the criminal system's normative gatekeepers.[61] The acceptability and expectation of executive underenforcement of penal law for reasons of justice has roots reaching back to the early days of the Republic.[62]

In the immigration context, Congress has delegated vast enforcement authority through both formal and indirect means.[63] As an initial matter, specific statutory provisions afford wide latitude to DHS to determine enforcement priorities.[64] But even without those vague delegations, Congress effectively transferred a great deal of gatekeeping power to the deportation system's enforcers when it expanded the grounds for removal while narrowing adjudicative discretionary authority.[65] About 11 million persons are present in the United States without authorization, and many hundreds of thousands more are lawfully present but potentially deportable for civil or criminal offenses.[66] The development of this large unauthorized population can be explained, in part, by longstanding political acquiescence under both Republican and Democratic administrations, including a century of economic reliance on migrants from Mexico for cheap labor.[67] Even as laws and attitudes about undocumented workers and immigration enforcement have become more stringent, Congress's growing budgetary appropriations

---

[61] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 3–4 (2011) ("Law enforcers . . . define the laws they enforce."); *see also* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 154–57 (2007); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533 (1970); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1422 (2008).

[62] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 716–48 (2014). Professor Price provides evidence that between 1801 and 1828, federal district attorneys terminated roughly a third of federal prosecutions as an exercise of prosecutorial discretion, with judicial acquiescence, and discusses correspondence between high-ranking federal government officials directing nonprosecution in cases where mitigating factors demanded equity. *Id.*; *see also* Stith, *supra* note 61, at 1422 (arguing that Congress "has created a system of criminal laws that requires—and has always required—the exercise of discretion").

[63] *See* Cade, *supra* note 32, at 53–54 (discussing congressional delegation of authority to the Executive to determine immigration enforcement priorities).

[64] *See* 6 U.S.C. § 202(5) (2012) (charging the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities"); 8 U.S.C. § 1103(a)(1) (2012) (conferring broad power to the Secretary of Homeland Security over "the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens").

[65] Cade, *Enforcing Immigration Equity*, *supra* note 31, at 679–81; Cox & Rodríguez, *supra* note 45, at 464, 518–19.

[66] Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RES. CTR. (Sept. 21, 2016), http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade [https://perma.cc/HZ6F-29AY].

[67] HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 19–55 (2014). As Professor Motomura has explained, there has always been a large population of noncitizens living and working without authorization in the U.S. *Id.* at 24–25, 172–74.

in recent years to the immigration agencies have enabled the removal of only a small fraction of the total number of noncitizens who may be deportable on the basis of unlawful presence, criminal history, or other infractions.[68] The confluence of these factors works to delegate tremendous de facto discretionary enforcement power. Thus, although the Obama Administration actualized more than 2.5 million removals—far more than any other administration in history—many of these reflected the prioritization of border enforcement actions and the use of summary procedures for recent entrants or persons previously removed, representing but a drop in the bucket relative to the size of the pool of possible enforcement targets living within the interior United States.[69]

Because Congress enacted broad and rigid statutory provisions against the backdrop of this long history of underenforcement, without commensurate increases in funding, there are undeniable practical limits on any administration's capability to enforce the law on the books. Legislators cannot realistically have expected the new rules to be fully enforced.[70] In other words, Congress tacitly or implicitly relies on the Executive Branch to set priorities and exercise equitable discretion when determining which percentage of the total removable population to target.

Deportation laws thus present a variation of what Professor Michael Gilbert labels "insincere rules," which are statutes or regulations designed to achieve a result that is less than co-extensive with the literal letter of the law.[71] Insincere rules are everywhere, from speed limits to environmental standards to criminal laws to tax regulation.[72] The basic idea is that by overshooting with rules on the books, lawmakers hope to get something close to what they actually want with rules in action. Professor Gilbert argues that

---

[68] Furthermore, Congress's immigration enforcement appropriation acts have typically provided that DHS prioritize among noncitizens deportable on the basis of criminal history. *See, e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 251; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574, 3659.

[69] Koh, *supra* note 25, at 184 (citing statistics that over 83% of removals in recent years were through expedited procedures that bypass immigration court); Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661 [https://perma.cc/53M4-26PJ].

[70] *See supra* notes 59–64 and accompanying text; *see also* Michael D. Gilbert, *Insincere Rules*, 101 VA. L. REV. 2185 (2015) (arguing that legal rules can be intentionally insincere); Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1605 (2016) ("[O]nce widespread nonenforcement becomes practically inevitable, Congress may enact laws with the expectation that they will not be fully enforced; and by the same token, it may choose not to devote legislative effort to narrowing or repealing existing laws that would be deeply unpopular if fully enforced, precisely because those laws' nonenforcement reduces the urgency to update them.").

[71] Gilbert, *supra* note 70, at 2205.

[72] *Id.* at 2186.

as the cost of enforcement within a particular field increases, the gap between desired behavior and legislated restrictions is also likely to widen.[73] Greater sanctions will be necessary to achieve general compliance whenever enforcement is very costly, in terms of either resources or political will.[74] Given the historically sporadic enforcement of deportation rules and the practical impossibility of attempting to remove more than 11 million presumptively deportable immigrants, the severity of immigration penalties may be roughly calibrated to achieve a measure of general deterrence desired by Congress.

Indeed, when media accounts began highlighting stories about the Immigration and Naturalization Service's (INS) indiscriminate enforcement against long-time lawful permanent residents of the harsher statutory provisions enacted in 1996, many of the legislators who had voted for the revisions wrote a letter to the Attorney General urging more systematic prosecutorial discretion in order to avoid "unfair" deportations and "unjustifiable hardship."[75] The twenty-eight bipartisan cosigners of the letter could not understand "why the INS pursued removal in such cases when so many other more serious cases existed."[76] This letter is not law, but it helps substantiate this account of the insincerity of modern deportation rules.

The bottom line is that, with immigration law, as in many other areas of regulatory enforcement, there is an understood—and intended—gap between "law in books" and "law in action."[77] For the reasons I have stated, one can confidently infer that Congress counted on immigration enforcers to shape and temper the rigidity of the removal provisions.

C. Proportionality and Fairness Require Equitable Enforcement

Even if one believes that Congress desired rigid and absolute enforcement of its harsh statutory rules, this view would not justify an indiscriminate approach to deportation. The removal system imposes dire, life-altering penalties on the basis of a broad range of civil and criminal infractions, while providing few formal avenues to set aside these consequences in the balance of equities. I have argued elsewhere at length

---

[73] *Id.* at 2205.

[74] *Id.* at 2209–10, 2213 ("Precisely because enforcement capacity is limited, rule-makers have an incentive to adopt demanding, insincere rules.").

[75] Letter from Twenty-Eight Members of the U.S. House of Representatives to Janet Reno, Attorney Gen., U.S. Dep't of Justice, and to Doris M. Meissner, Comm'r, INS (Nov. 4, 1999), https://www.ice.gov/doclib/foia/prosecutorial-discretion/991104congress-letter.pdf [https://perma.cc/X6M7-RH54] [hereinafter Letter to Reno]. The INS was the predecessor agency to DHS, which was created in 2003.

[76] *Id.*

[77] Pound, *supra* note 57, at 21; Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 49 (2017).

that proportionality and basic fairness require that enforcement decisions account for equitable considerations and afford noncitizens facing removal adequate due process.[78] Here I will briefly summarize the main points.

Immigration officials have a responsibility to be "minister[s] of justice," and seek normatively correct outcomes.[79] Equitable discretion is necessary to implement the deportation scheme fairly, with attention to disproportionate consequences in individual circumstances. "[I]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done."[80] DHS agents and attorneys are not exempted from this obligation; instead, they are "duty-bound to 'cut square corners' and seek justice rather than victory."[81] Even where the foreign national lacks any current path to lawful status, basic justice sometimes demands the use of prosecutorial discretion in order to avoid overly severe sanctions.[82]

Any legal scheme that administers consequences as significant as deportation should reflect the principle of proportionality. Proportionality refers to the fit between the gravity of the underlying offenses, tempered by any mitigating factors, and the severity of the sanction.[83] To be sure, there is no universal agreement about the point at which a given penalty becomes disproportionate.[84] Nevertheless, most lawyers, scholars, and jurists accept that enforcers or enforcement systems should be sensitive to egregiousness,

---

[78] Cade, *Enforcing Immigration Equity*, *supra* note 31; Cade, *Judging Immigration Equity*, *supra* note 31; Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013) [hereinafter Cade, *Policing the Immigration Police*]; Cade, *supra* note 32.

[79] *See generally* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (AM. BAR ASS'N 2013); Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129 (2017) (making a similar argument about other law enforcers); Margaret H. Lemos, *Accountability and Independence in Public Enforcement* 25 (Duke Law Sch. Pub. Law & Legal Theory Series No. 2016-23, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748720 [https://perma.cc/86VY-KN8S] (arguing that because enforcement actions typically lack judicial oversight, "enforcers are not just advocates for one side; they have substantial responsibility for deciding what outcome is fair and just, all things considered").

[80] Matter of S-M-J-, 21 I. & N. Dec. 722, 727 (B.I.A. 1997).

[81] Kang v. Attorney Gen., 611 F.3d 157, 167 (3d Cir. 2010).

[82] DAVIS, *supra* note 58, at 25 ("Discretion is a tool, indispensable for individualization of justice.").

[83] *See* Austin Lovegrove, *Proportionality Theory, Personal Mitigation, and the People's Sense of Justice*, 69 CAMBRIDGE L.J. 321, 330 (2010) ("[T]he severity of the punishment should be proportionate to the seriousness of the offence in question; but it also should be appropriate, having regard to the offender's personal mitigation."); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416 (2012) ("Proportionality is the notion that the severity of a sanction should not be excessive in relation to the gravity of an offense.").

[84] Bowers, *supra* note 79, at 142 ("There is no obvious answer to the question of when the state has criminalized too much, too hard.").

mitigating factors, and hardship.[85] Because a commitment to proportionality recognizes that there is no "invariant, objective deserved punishment for each offensive act," as Professor Stephen Morse has written, no statute can possibly be just in all its applications.[86] Professor Lawrence Solum similarly observed that "the infinite variety and complexity of particular fact situations outruns our capacity to formulate general rules."[87] In turn, this inability to create rules precise and flexible enough to avoid normative error means that "it is justice itself, not a departure from justice, to use equity's flexible standard."[88] We need, and have always needed, equitable correction of rigid rules. At some point, the gap between the consequences of deportation for an affected individual and the nature of the underlying circumstances becomes too wide, raising proportionality problems.

Government agents charged with meting out life-altering sanctions on a large scale must be "responsive to the unique circumstances of individual transgressions."[89] Persons—citizens and noncitizens alike—who commit civil and criminal violations fall along "a vast spectrum of human character and behavior," and treating them all the same can work great injustice for those who had "made single mistakes or had shown genuine rehabilitation and remorse."[90] Moreover, in any given removal enforcement situation, the noncitizen may have established deep bonds of family, faith, employment,

---

[85] *See, e.g.*, Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1663–71 (2013); Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1449–72 (2018) (outlining possibilities for increased judicial scrutiny of deportation on various constitutional grounds); Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1445 (1995); Wishnie, *supra* note 83, at 418–24 (collecting and discussing authorities).

[86] Stephen J. Morse, *Justice, Mercy, and Craziness*, 36 STAN. L. REV. 1485, 1493 (1984) (reviewing NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982)); *see also* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 1 (1990) (arguing that legislated sanctions fall short of societal expectations because "we have tried to convert a deeply social issue into a technical task for specialist institutions").

[87] Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 206 (2003); *see also* ARISTOTLE, THE NICOMACHEAN ETHICS 133 (David Ross trans., J. L Ackrill & J. O. Urmson rev. ed., 1998) (explaining that "about some things it is not possible to make a universal statement which shall be correct" and that therefore when it is necessary for the law "to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error").

[88] Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 93–96 (1993).

[89] MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 15 (1980) ("[S]ociety seeks not only impartiality from its public agencies but also compassion for special circumstances and flexibility in dealing with them."); *see also* KANSTROOM, *supra* note 52, at 219 (arguing that because European law requires balancing of private and public interests in deportation cases, the system "preserves an important measure of respect for human rights norms and a powerful safeguard against arbitrary government actions").

[90] David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 64.

and friendship. In such cases, deportation results in extreme consequences, "both for that individual and for the family members, persons, and institutions at the other end of those connections."[91] Thus, when enforcers blindly apply overbroad and formally inflexible rules, they do "not merely fail to do justice, they may do positive injustice."[92]

Agents charged with faithfully carrying out the law—including federal enforcers—must consult not only statutory *text* but also *context*.[93] Adherence to context includes consideration of the entire legislative plan, constitutional constraints, and rule-of-law commitments such as notice, consistency, and procedural justice.[94] In Professor Margaret Lemos's words, "'good' enforcement is not the same thing as maximum enforcement."[95] These considerations have led Professor Mila Sohoni to persuasively argue that the President's constitutional obligation to faithfully execute the law[96] is violated by a "crackdown" approach to enforcement.[97] But one need not find a constitutional hook, however, to agree that all branches of the government engaged in the enforcement of any area of the law must strive to follow, and promote, ideals of fairness and justice. Rigidly enforcing any law to the fullest extent possible is likely to violate this obligation—perhaps particularly so with respect to the drastic sanction of deportation.

D. The Supreme Court's Embrace of Upstream Equity

The previous Sections explained that, in the immigration context, Congress's expansion of deportability grounds and contraction of back-end adjudicative equity provisions shifted power and responsibility to federal enforcers and subfederal actors to evaluate and implement proportionality

---

[91] Cade, *Enforcing Immigration Equity*, *supra* note 31, at 709; *see also* Banks, *supra* note 85, at 1293–96 (discussing social science literature documenting the collateral consequences of deportation for family members left behind).

[92] Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 928 (1960); *see also* DAVIS, *supra* note 58, at 25 ("Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice.").

[93] Sohoni, *supra* note 77, at 83.

[94] *Id.* ("Whether she be judge or mayor, a faithful interpretive agent properly consults not only text, but also context, 'the legislative plan,' the public interest, constitutional rules, and commitments to rule-of-law values such as fair notice and procedural justice." (footnote omitted)). *But cf.* David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 205 (2018) (arguing that the relevant context for rule-of-law evaluations depends on which frames and facts are selected).

[95] Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 705 (2011); *see also* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 62 (2001) ("Optimal enforcement is nearly always less than complete enforcement.").

[96] U.S. CONST. art. II, § 3, cl. 5 (the President "shall take Care that the Laws be faithfully executed").

[97] Sohoni, *supra* note 77, at 48–49.

concerns at the front-end stages of the process.[98] In recent years, the Supreme Court has come to grips with the new reality of enforcement-based equity in the deportation system. In fact, concerns about the system's potential for disproportionality appear to have influenced much of the Court's recent jurisprudence in this area.[99] In *Arizona v. United States*, for example, the Court directly acknowledged that equity in the deportation scheme today depends almost entirely on the exercise of prosecutorial discretion. Justice Kennedy's opinion for the majority explained that a "principle feature of the removal system is the broad discretion exercised by immigration officials."[100] It is worthwhile to appreciate the clarity of the Court's understanding—and endorsement—of the connection between federal agencies' exercise of prosecutorial discretion and the implementation of equity in the deportation system:

> Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. . . . Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. . . . Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission.[101]

The Court in *Arizona* thus acknowledged that not all noncitizens made deportable by Congress are similarly situated, and that, as a result, executive enforcement officials should weigh "immediate human concerns" in determining the appropriateness of removal in particular cases, even where code law would seem to mandate removal.[102] The Court found most of Arizona's state-level immigration enforcement laws preempted, despite their mirroring of federal law provisions.[103] I have previously argued that the

---

[98] Cox & Rodríguez, *supra* note 45, at 518–19 ("Prosecutorial discretion has . . . overtaken the exercise of discretion by immigration judges when it comes to questions of relief.").

[99] Cade, *Judging Immigration Equity*, *supra* note 31, at 1041–82 (demonstrating that the Court's immigration enforcement jurisprudence since 2001, across a range of substantive and procedural challenges, increases or preserves structural opportunities for equitable balancing at multiple levels in the deportation process).

[100] 567 U.S. 387, 396 (2012).

[101] *Id.*

[102] *See generally* Cade, *Judging Immigration Equity*, *supra* note 31, at 1042–49 (explaining that the Court's conception of noncitizen membership in the U.S. community is broader than current code law).

[103] *See* Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 34–41 (explaining that state laws mirrored on federal laws are typically constitutional).

Court's concerns about proportionality in the removal system help explain its departure from typical preemption analysis in *Arizona*.[104] In so ruling, the Court thereby protected federal discretionary authority to forebear removal—whether through individual discretionary decisions or as a result of macro enforcement policies—from unwanted state interference.

Building on this upstream-equity doctrine, the Court has also issued a series of decisions that enable subfederal actors to take actions likely to minimize the chance of negative immigration outcomes.[105] In *Padilla v. Kentucky*, for example, the Supreme Court endorsed the idea that front-line actors in the criminal justice system should take into account the harshness and inflexibility of immigration law and make adjustments when charging, plea bargaining, and sentencing.[106] The Court's watershed holding in that case—that the Sixth Amendment requires criminal defense counsel to render effective advice about the potential immigration consequences of a conviction—was firmly rooted in the new realities of federal immigration law, including the evisceration of opportunities for leniency in the face of criminal convictions.[107] Justice Stevens's majority opinion noted that the grounds of criminal removal were narrow for much of the 20th century, and he zeroed in on the fact that "immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation."[108] Justice Stevens emphasized the recent loss of mitigating mechanisms at both federal and state levels, which he described as "critically important . . . to minimize the risk of *unjust* deportation."[109] As a result, "the drastic measure of deportation . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."[110] It would be constitutionally unfair, the Court reasoned, to allow persons to plead guilty without being aware that the

---

[104] *See* Cade, *Judging Immigration Equity*, *supra* note 31, at 1046 (arguing that the *Arizona* Court's "newfound acknowledgment of the role of enforcement-driven proportionality in the deportation system helps explain its preemption rulings"); *cf.* Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 4 (2013) ("Courts should revitalize the equality norm in deciding whether a particular state immigration provision impedes federal interests or hinders federal goals.").

[105] *See* Cade, *Judging Immigration Equity*, *supra* note 31, at 1049–93 (analyzing approximately fifteen years of the Supreme Court's recent deportation jurisprudence to argue that "[a]cross a diverse set of legal issues, the cases evince a deep concern with the sweep of the statute, especially with respect to minor offenses leading to removal, detention, or to the inability to access discretionary relief").

[106] 559 U.S. 356, 373 (2010).

[107] Relying on erroneous advice from his attorney, Jose Padilla (a long-time lawful permanent resident) pled guilty to a criminal charge that all but guaranteed his deportation. *Id.* at 359; *id.* at 387–88 (Alito, J., concurring).

[108] *Id.* at 360 (majority opinion).

[109] *Id.* at 361, 368 (emphasis added).

[110] *Id.* at 360 (internal quotation marks omitted).

penalty of deportation or other serious immigration consequences would follow.[111]

Most important for present purposes was the Court's explicit recognition that equitable discretion in the removal system has shifted to earlier enforcement stages and encouragement of defense attorneys and prosecutors to take immigration consequences into account by "plea bargaining creatively" to avoid disproportionate results.[112] *Padilla* thus established and endorsed a structure for state and local actors to negotiate plea deals that help noncitizen defendants avoid unjust removals, or that at least preserve narrow possibilities for consideration of equitable discretionary relief in later deportation proceedings.[113]

In another recent series of cases, the Court has required and refined a "categorical approach" to determining the immigration consequences of convictions.[114] In general, these cases have rejected the federal government's efforts to expansively interpret the categories of crimes that lead to deportation in the Immigration and Nationality Act (INA), instead requiring a strict categorical match between the elements of the penal offense that the noncitizen was convicted of and the relevant immigration statutory

---

[111] Convictions can also result in immigrant detention, inadmissibility, and lengthy bars to lawful reentry to the United States. Cade, *Plea Bargain Crisis*, *supra* note 47, at 1758–63, 1809–11.

[112] *Padilla*, 559 U.S. at 373. While *Padilla* by itself did not constitutionally mandate that the parties negotiate around unjust removals, the Court's subsequent decisions in two other plea bargain cases, *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012), at least suggest the possibility that defendants are constitutionally entitled to the going rate for plea deals in their jurisdiction. *See* Josh Bowers, *Plea Bargaining's Baselines*, 57 WM. & MARY L. REV. 1083, 1105 (2016); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2660–65 (2013). Thus, at least in localities where immigration-specific plea bargaining becomes standard practice, defense attorneys who fail to competently engage in such bargaining may run afoul of the Sixth Amendment. Andrés Dae Keun Kwon, *Defending Criminal(ized) "Aliens" After* Padilla*: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1062–65 (2016) (arguing that after *Padilla*, *Lafler*, and *Frye*, "defenders arguably have an affirmative duty to seek an immigration-safe plea and avoid or mitigate negative immigration consequences"); Roberts, *supra*, at 2668.

[113] *See* Heidi Altman, *Prosecuting Post*-Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 7 (2012) (arguing that *Padilla* also encourages prosecutors to agree to immigration-safe consequences in appropriate cases); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1151 (2013) (discussing various prosecutorial policies that benefit noncitizen defendants); Robert M. A. Johnson, *A Prosecutor's Expanded Responsibilities Under* Padilla, 31 ST. LOUIS U. PUB. L. REV. 129, 130 (2011) (same); Kwon, *supra* note 112, at 1100–01 (same); *see also* Vartelas v. Holder, 566 U.S. 257, 269 (2012) (noting that defense attorneys might help noncitizens who travel abroad avoid inadmissibility problems upon return by plea bargaining to immigration-safe convictions).

[114] *See, e.g.*, Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015); Moncrieffe v. Holder, 569 U.S. 184, 190 (2013); Carachuri-Rosendo v. Holder, 560 U.S. 563, 577 n.11 (2010); Lopez v. Gonzales, 549 U.S. 47, 59–60 (2006).

provision.[115] The categorical approach cases, the Court has explicitly acknowledged, allow noncitizens "to enter 'safe harbor guilty pleas'" that preserve narrow possibilities for equitable relief in immigration court or sometimes avoid immigration sanctions altogether.[116] This line of jurisprudence works hand-in-glove with *Padilla*, reinforcing the ability of subfederal actors to consider downstream consequences and constrain the application of a harsh and rigid immigration code.

Considered together, the Court's immigration enforcement jurisprudence over the last fifteen years "recognizes, and attempts to structure, the critical role that enforcement discretion plays in the modern deportation system."[117] The Court's recent rulings in this area—the vast majority of which aim to protect the liberty interests of noncitizens within the United States—evince concern with the severity and inflexibility of the immigration code, particularly with respect to minor offenses leading to deportation.[118] This jurisprudence reflects the notion that resident noncitizens' claims to membership in the United States community can be broader than allowed by current code law, and accordingly, affiliation circumstances such as family ties and community contributions are appropriately considered by both federal and state actors in order to avoid unjust removals.[119] Of particular importance to sanctuary activities, these rulings also envision an increasing role for subfederal actors in maintaining the fairness and legitimacy of the overall removal system, even with respect to noncitizens deportable for civil or criminal violations.

II. THE RISE AND RETREAT OF EQUITABLE ENFORCEMENT EFFORTS

Part I made the case that a mass, indiscriminate approach to enforcement is out of step with the context and history of the deportation system, which the Supreme Court has endeavored to structure in ways that continue to promote equitable considerations. This Part outlines the ways

---

[115] Cade, *Judging Immigration Equity*, *supra* note 31, at 1060–69; Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1700–01 (2011); Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 261–62 (2012); Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 996 (2008).

[116] *Mellouli*, 135 S. Ct. at 1987 (quoting *Koh*, *supra* note 115, at 307).

[117] Cade, *Judging Immigration Equity*, *supra* note 31, at 1093.

[118] *Id.* at 1093–1100.

[119] *See* MOTOMURA, *supra* note 67, at 110–11 (outlining a theory of immigrant inclusion called "immigration as affiliation"); Cade, *supra* note 31, at 1095–1100 (explaining how the Court's understanding of immigration law incorporates the view that removal decisions should account for affiliation circumstances, despite the fact that current statutory law provides insufficient mechanisms for adjudicative consideration of such factors).

that the Administrations of George W. Bush and, particularly, Barack Obama undertook the responsibility to implement enforcement-based equity in the removal system. While various features of those efforts were susceptible to criticism, the key point is that for over sixteen years they reified the necessity—and legality—of using discretion to inject a measure of justice and proportionality into deportation decisions. This recent historical context helps lay bare the aberrational significance of the blind crackdown currently being implemented by the Trump Administration, which I turn to in Section II.C.

A. The Bush Administration's Solid Beginnings

Although immigration agencies have utilized discretionary policies in some form since at least the late 1970s, it was not until the turn of the century that they began to more systematically implement equitable enforcement guidelines.[120] The aforementioned congressional letter to INS in 1999, which urged more refined judgment in enforcement decisions, appears to have been the catalyst for action.[121] In 2000, INS Commissioner Doris Meissner distributed an agency memo that became a lasting blueprint for the use of prosecutorial discretion in immigration enforcement.[122] The Meissner Memo instructed agency managers to "plan and design operations to maximize the likelihood that serious offenders will be identified,"[123] emphasized an expectation of fair and consistent discretionary judgments at every stage of the enforcement process,[124] and detailed a nonexhaustive list of humanitarian factors that immigration officers should consider when evaluating whether to exercise favorable discretion.[125]

The development of prosecutorial discretion standards continued after the INS was dissolved in 2003 to create the Department of Homeland Security and its subagencies. Agency memos issued that year instructed officers to adhere to the Meissner Memo and, in particular, to consider forgoing removal actions against certain noncitizens who have a path to

---

[120] *See generally* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 14–32 (2015) (chronicling the history of immigration prosecutorial discretion from 1975 to 2007).

[121] Letter to Reno, *supra* note 75 (noting "widespread agreement" that rigid adherence to the 1996 immigration laws had "resulted in unjustifiable hardship" in sympathetic cases).

[122] *See* WADHIA, *supra* note 120, at 24 (describing the Meissner memo as "the gold standard").

[123] Memorandum from Doris Meissner, Comm'r, INS, to Reg'l Dirs. et al., INS, Exercising Prosecutorial Discretion 4–5 (Nov. 17, 2000), http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf [https://perma.cc/G336-F63W].

[124] *Id.* at 1.

[125] *Id.* at 7–8 (listing immigration history, length of residence, criminal history, humanitarian concerns, military service, eligibility for a path to status, effect on future inadmissibility, community attention, available enforcement resources, and other discretionary factors).

lawful status.[126] In 2005, the Office of the Principal Legal Advisor for ICE issued guidance to the chief counsel for each ICE regional office, further refining scenarios for the "favorable" use of discretion, and emphasizing that "[p]rosecutorial discretion is a very significant tool . . . to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship."[127] Moderate expansion of immigration prosecutorial discretion guidance continued throughout the remaining years of the George W. Bush Administration.[128]

B. The Obama Administration's Expansion and Refinement

President Obama's Administration even more explicitly acknowledged the necessity of enforcement-based equity in a system marked by extreme statutory rigidity.[129] Indeed, when it became clear a few years into President Obama's first term that Congress would be unable to enact immigration reform,[130] DHS undertook significant efforts to systematize the use of prosecutorial discretion. In 2011, ICE began to roll out a series of agency

---

[126] Memorandum from Johnny N. Williams, Exec. Assoc. Comm'r of the Office of Field Operations, INS, to Reg'l Dirs. et al., INS, Unlawful Presence (June 12, 2002), http://www.asistahelp.org/documents/resources/CIS_DA_is_not_UP_8A0BF46109B93.pdf [https://perma.cc/VB32-VZJK] (requiring attention to humanitarian factors when determining whether to undertake enforcement against unlawfully present noncitizens who are also eligible for immigration benefits); Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizen & Immigration Servs., to Reg'l Dirs. & Serv. Ctr. Dirs., U.S. Citizen & Immigration Servs., Service Center Issuance of Notice to Appear (Form I-862) (Sept. 12, 2013) (on file with *Northwestern University Law Review*) (requiring continued adherence to the Meissner Memo).

[127] Memorandum from William J. Howard, Principal Legal Advisor, ICE, to All Chief Counsel, Office of the Principal Legal Advisor, ICE, Prosecutorial Discretion 2–6, 8 (Oct. 24, 2005), https://www.aila.org/File/DownloadEmbeddedFile/47955 [https://perma.cc/FL4P-2PLG].

[128] *See* Memorandum from Julie L. Myers, Assistant Sec'y, ICE, to All Field Office Dirs. & Special Agents in Charge, ICE, Prosecutorial and Custody Discretion (Nov. 7, 2007), https://www.ice.gov/doclib/foia/prosecutorial-discretion/custody-pd.pdf [https://perma.cc/DH32-PSAV] (reaffirming the Meissner Memo and instructing agents to release nursing mothers from detention on discretionary grounds except in circumstances implicating public safety); Memorandum from John P. Torres, Dir., ICE, to Assistant Dirs. et al., ICE, Discretion in Cases of Extreme or Severe Medical Concern (Dec. 11, 2006), https://www.ice.gov/doclib/foia/dro_policy_memos/discretionincasesofextremeorseveremedicalconcerndec112006.pdf [https://perma.cc/F66N-EVK6] (instructing ICE officers to consider favorable discretion when deciding whether to detain noncitizens with serious medical conditions).

[129] *See* Cade, *Enforcing Immigration Equity*, *supra* note 31, at 683–86 (describing the Obama Administration's acknowledgment, in litigation and public statements, of its responsibility to ensure that deportation operates in a fair and proportionate manner).

[130] *See, e.g.*, David Jackson, *Obama Talks Immigration With Officials -- But No Members of Congress*, USA TODAY (Apr. 19, 2011, 4:44 PM), http://content.usatoday.com/communities/theoval/post/2011/04/obama-talks-immigration-with-officials----but-no-members-of-congress/1#.WzTN8hJKjVo [https://perma.cc/UFG2-5REN]; Julie Mason, *Obama Pushes Immigration Overhaul*, POLITICO (published May 10, 2011, 4:53 PM; updated May 10, 2011, 6:57 PM), https://www.politico.com/story/2011/05/obama-pushes-immigration-overhaul-054696 [https://perma.cc/K75G-RA7C].

initiatives geared toward more consistent use of equitable discretion.[131] These efforts included trainings, numerous guidance documents, and public dissemination of transparent enforcement priorities.[132] During President Obama's two terms, the focus remained on encouraging front-line operatives to consistently use the agency's limited resources to target noncitizens with a criminal history or significant immigration violations and to forbear enforcement in cases with compelling humanitarian factors.[133]

Deferred Action for Childhood Arrivals (DACA), announced in 2012, represented the agency's attempt to shift toward systematic and categorical implementation of enforcement discretion.[134] DACA focused on one of the most sympathetic groups of undocumented noncitizens—longtime residents

---

[131] *See, e.g.*, Memorandum from John Morton, Dir., ICE, to All Emps., ICE, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [https://perma.cc/J7QA-7KHF]; Memorandum from John Morton, Dir., ICE, to All Field Office Dirs. et al., ICE, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens 4–5 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/3FVQ-MPKE] [hereinafter Memorandum from John Morton, Exercising Prosecutorial Discretion].

[132] *See, e.g.*, *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*, ICE, http://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf [https://perma.cc/V3U2-NAHW]; *Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities*, ICE, https://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf [https://perma.cc/QG6L-Y9QT]; Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., ICE, et al., Secure Communities (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [https://perma.cc/UQ5F-NQHV]; Memorandum from Gary Mead, Exec. Assoc. Dir., ICE, et al., to All Field Office Dirs. et al., ICE, Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships (Oct. 5, 2012), http://www.immigrationequality.org/wp-content/uploads/2012/11/PD-memo-10-5-2012-2.pdf [https://perma.cc/E3NY-NGZZ]; Memorandum from John Morton, Exercising Prosecutorial Discretion, *supra* note 131; Memorandum from John Morton, Dir., ICE, to All Field Office Dirs. et al., ICE, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf [https://perma.cc/5EHP-MMJS]; Memorandum from Peter S. Vincent, Principal Legal Advisor, ICE, to All Chief Counsel, Office of the Principal Legal Advisor, ICE, Case-by-Case Review of Incoming and Certain Pending Cases (Nov. 17, 2011), http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf [https://perma.cc/ZP6E-T8GD]; Policy Memorandum, U.S. Citizenship & Immigration Servs., Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (Nov. 7, 2011), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf [https://perma.cc/3TTC-7T5D].

[133] *See generally* WADHIA, *supra* note 120, at 88–104 (describing the Obama Administration's prosecutorial discretion policies with respect to immigration enforcement).

[134] *See* Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), https://nyti.ms/OQZY77 [https://perma.cc/N3V3-ZT7D].

who were brought to the United States at a young age, demonstrated a strong potential for economic productivity, and lacked indicia of dangerousness or wrongdoing.[135] Such individuals had been deeply acculturated as Americans and were largely considered to bear little or no personal culpability in their past violations of immigration laws.[136] The DACA program allowed those who met the specified criteria to affirmatively present themselves to a unit within USCIS for "targeted consideration of their eligibility for equitable balancing," with favorable action resulting in deferred action and, possibly, employment authorization.[137] For many observers, the lack of any path to lawful status for these hard-working, law-abiding youth, who know only this country, brought the current system's unforgiving harshness into sharp relief.[138] Although controversial for its programmatic nature,[139] DACA brought a large dose of transparency and consistency to the implementation

---

[135] *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGR. SERVS., http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca [https://perma.cc/R8VR-8RV7] [hereinafter *Deferred Action for Childhood Arrivals*]; Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [http://perma.cc/9QDW-3GTC].

[136] *See* Ronald Brownstein, *Poll: Public Prefers Citizenship for Dreamers*, ATLANTIC (May 9, 2012), https://www.theatlantic.com/politics/archive/2012/05/poll-public-prefers-citizenship-for-dreamers/427329 [https://perma.cc/VY3Y-RZC5]; Jennifer De Pinto et al., *Most Americans Support DACA, but Oppose Border Wall - CBS News Poll*, CBS NEWS (published Jan. 18, 2018, 7:00 AM; updated Jan. 20, 2018, 12:37 PM), https://www.cbsnews.com/news/most-americans-support-daca-but-oppose-border-wall-cbs-news-poll [https://perma.cc/8ZZK-EZV5].

[137] Cade, *Enforcing Immigration Equity*, *supra* note 31, at 694–95. Deferred action is "a revocable assurance that they are not going to be a priority for deportation." *Id.* at 694.

[138] *See generally id.* at 696–97 (arguing and citing sources for the point that DACA recipients' "personal mitigating factors point toward lack of (or significantly diminished) culpability, full acculturation as Americans, strong community ties, [and] high potential for economic productivity," and that therefore "concerns about equity loom especially large"); MOTOMURA, *supra* note 67, at 176 (same); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 92 (2015) (arguing that "individuals eligible for DACA, as individuals who 'were brought to this country as children' without any 'intent to violate the law,' arguably might be more likely to have stronger positive equities simply by definition").

[139] *See, e.g.*, Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 119 (2014) ("While prosecutorial discretion is a touchstone of immigration law, it cannot bear DACA's weight. Prosecutorial discretion to grant deferred removal has typically functioned as a palliative measure after a noncitizen has been apprehended and placed in immigration proceedings. DACA, in contrast, establishes an affirmative immigration benefit that noncitizens can apply for just as they can seek asylum or other relief." (footnote omitted)); Price, *supra* note 62, at 761 ("Yet declining to prioritize certain cases, as the executive branch might properly have done, may have very different effects from an announced, categorical policy like DACA. While the former preserves the deterrent effect of federal statutes by leaving all individuals covered by the statute in some jeopardy, the latter removes the risk of enforcement altogether.").

of immigration enforcement discretion, at least with respect to one category of highly sympathetic noncitizens.[140]

During this time, DHS also prioritized enforcement against two particular groups of noncitizens: recent border crossers and those who encounter criminal justice systems. Although not all deportations of persons within these categories satisfy proportionality concerns, prioritizing limited resources in this way lessened the likelihood of enforcement against nontargeted groups, for whom significant equitable claims are often present. Specifically, noncitizens who have already been living in the United States for some time, and who have avoided a criminal record, are more likely to have developed ties and relationships militating against removal.[141] As a result of this strategy, border removals under the Obama Administration dramatically increased as a percentage of overall removals—constituting about 66% between 2012 and 2015.[142] Similarly, nearly half of deportees in that era had at least some kind of criminal history.[143]

While these measures represented substantial efforts to implement equitable discretion, many scholars, advocates, and courts viewed DHS's enforcement approach during this time to be overly coarse, particularly with respect to noncitizens with a criminal history. President Obama, like the administrations that preceded him, largely ignored equitable considerations for persons with convictions and instead "used criminal history of almost any

---

[140] MOTOMURA, *supra* note 67, at 176; Cade, *Enforcing Immigration Equity*, *supra* note 31, at 694–98; Kalhan, *supra* note 138, at 66; Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 22 (2015–2016); *see also* Letter from 136 Law Professors and Scholars to the President, Executive Authority to Protect Individuals or Groups from Deportation (Sept. 3, 2014), https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf [https://perma.cc/R5QX-KDG8] (outlining the Executive's authority to use discretion to protect individuals or groups from deportation).

[141] *See, e.g.*, HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 96–114 (2006) (outlining the history in immigration law of "affiliation-based safe harbors" that accrue through extended presence inside the United States and the development of due process norms aimed at protecting noncitizens who have developed ties from executive overreach); MOTOMURA, *supra* note 67, at 111 ("[A]ffiliation arguments grow in strength as unauthorized migrants develop ties and make contributions to American society over time."); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705 (2011) (explaining how noncitizens develop equities over time).

[142] *See FY 2015 ICE Immigration Removals*, ICE, https://www.ice.gov/removal-statistics/2015 [https://perma.cc/N34T-M4M3] (showing that border deportations constituted at least two thirds of all removal orders from 2012 to 2015).

[143] *Id.* (showing that over half of deported persons in each year from 2010 to 2015 had some kind of criminal conviction). By way of comparison, according to government statistics, DHS removed a total of 2,011,630 immigrants under the George W. Bush Administration, of which only 710,242, or 35%, had some kind of criminal history. *See* U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 96–104 (2009), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2008.pdf [https://perma.cc/APZ2-MR7G] (presenting data on removals from years 2001–2008).

type as an irrevocable marker of undesirability."[144] Indeed, the majority of those whom the Obama-era DHS labeled "criminal aliens" had been convicted only of traffic offenses, low-level drug possession, crimes of migration (illegal entry or re-entry), or other minor offenses.[145] ICE officers and attorneys denied leniency in most cases involving noncitizens with any criminal history and consistently sought the broadest and most severe interpretations of criminal removal statutes possible, even in the face of repeated reversals by the Supreme Court.[146] Additionally, under President Obama, the immigration agencies vastly increased the use of fast-track removal mechanisms such as expedited removal,[147] reinstatement of removal,[148] and administrative removal,[149] all of which bypass immigration court adjudication. In fact, these measures accounted for more than 83% of total removals in 2013 and 2014.[150] As Professor Jennifer Koh has argued, the fact that these kinds of procedures lack even the limited procedural

[144] Cade, *Enforcing Immigration Equity*, *supra* note 31, at 700; *see also* Cade, *supra* note 32, at 42–44; Eagly, *supra* note 113, at 1126, 1145–46.

[145] MARC R. ROSENBLUM & KRISTEN MCCABE, MIGRATION POLICY INST., DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE 19–20, tbl.B-3, app. C (2014), https://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change [https://perma.cc/3ANP-HQAA] (indicating that 61% of interior removals in FY 2013 consisted of persons with no criminal record whatsoever or whose most serious offense was immigration offenses, traffic offenses, simple drug possession, or other nonviolent, nonserious crimes); MARC R. ROSENBLUM & DORIS MEISSNER, MIGRATION POLICY INST., THE DEPORTATION DILEMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT 6 (2014), https://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement [https://perma.cc/22RU-8HAT] ("At the same time, most of the recent shift from noncriminal to criminal removals has been driven by increased removals of people convicted exclusively of immigration-related crimes."); Cade, *Enforcing Immigration Equity*, *supra* note 31, at 705 ("More than a quarter of all noncitizens deported after local criminal arrest have never been convicted of *any* crime at all."); Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 645 (2016) ("The creation and consolidation of the significant misdemeanor category creates wider nets by expanding the pool of people who are properly labeled criminal aliens."); Eagly, *supra* note 113, at 1140–46 (explaining that "the criminal alien category includes all noncitizens convicted of crimes—from misdemeanors to serious felonies" and graphically illustrating recent immigration enforcement in practice).

[146] *See, e.g.*, Moncrieffe v. Holder, 569 U.S. 184, 206 (2013) ("This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as 'illicit trafficking in a controlled substance,' and thus an 'aggravated felony.' Once again we hold that the Government's approach defies 'the commonsense conception' of these terms." (quoting Carachuri-Rosendo v. Holder, 560 U.S. 563, 573 (2010))). *See generally* Cade, *Judging Immigration Equity*, *supra* note 31, at 1060–69 (discussing the Court's recent categorical approach cases in the immigration context).

[147] 8 U.S.C. § 1225(b)(1)(A)(i) (2012) (allowing immigration officials at the border to issue removal orders).

[148] *Id.* § 1231(a)(5) (allowing immigration officials to re-execute a prior removal order where the noncitizen unlawfully reenters the United States).

[149] *Id.* § 1228(b)(2)(B) (allowing immigration officials to process noncitizens who lack lawful permanent resident status in fast-track proceedings with weaker procedural and substantive protections and no oversight by a neutral immigration judge).

[150] Koh, *supra* note 25, at 184 (citing statistics from the Department of Homeland Security).

protections available in immigration court casts doubt on their ability to reach accurate and consistent outcomes.[151]

In sum, immigration enforcement during the Obama Administration was a mixed bag. At the same time that this period saw significant expansion and refinement of discretionary measures intended to bring more fairness and proportionality into the removal system, the agency's approach toward noncitizens with criminal histories lacked sufficient nuance and the Administration effectuated more formal deportations than any previous administration.

C. The Trump Administration's Retreat

It is some indication of the highly sympathetic circumstances of DACA-eligible youth that President Trump waited seven months to announce the end of the discretionary program.[152] But even these 800,000 exceptional young people—now working jobs, paying taxes, serving in the military, and studying in colleges and universities across the country—could not inspire the current Administration to take a humanitarian approach with respect to their continued presence in the United States.[153] As of this writing, two federal district courts have found error in the manner in which DHS ended the DACA program, leading to its temporary reinstatement.[154]

---

[151] *Id.* at 222–31.

[152] *See* Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html [https://perma.cc/V4SV-FL6Q].

[153] *See, e.g.*, Ike Brannon & Logan Albright, *The Economic and Fiscal Impact of Repealing DACA*, CATO AT LIBERTY (Jan. 18, 2017, 3:00 PM), https://www.cato.org/blog/economic-fiscal-impact-repealing-daca [https://perma.cc/2QCF-MVRV] (reporting that the fiscal cost of deporting every DACA recipient would be "a $280 billion reduction in economic growth over the next decade"); Tom K. Wong et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, CTR. FOR AM. PROGRESS (Aug. 28, 2017, 9:01 AM), https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow [https://perma.cc/594A-JWCE] ("The survey's results also show that at least 72 percent of the top 25 Fortune 500 companies employ DACA recipients. Moreover, 97 percent of respondents are currently employed or enrolled in school.").

[154] *See* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1037, 1046 (N.D. Cal. 2018) ("Plaintiffs have shown a likelihood of success on their claim that the rescission was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."), *aff'd*, 2018 WL 5833232 (9th Cir. Nov. 8, 2018); Alan Feuer, *Second Federal Judge Issues Injunction to Keep DACA in Place*, N.Y. TIMES (Feb. 13, 2018), https://www.nytimes.com/2018/02/13/nyregion/daca-dreamers-injunction-trump.html [https://perma.cc/V3LS-MHS4] ("In his ruling, Judge Garaufis agreed with the lawyers that the rollback was arbitrary and capricious . . . ."). Appeals of these and related decisions are pending, but as of this writing the district courts' orders to process DACA renewals remain in effect. For updates on pending DACA litigation, see *Status of Current DACA Litigation*, NAT'L IMMIGRATION LAW CTR. (Sept. 6, 2018), https://www.nilc.org/issues/daca/status-current-daca-litigation [https://perma.cc/9KM5-WC9M].

Ultimately, however, the fate of these young people will rest in the hands of the political branches.

The new Administration rapidly began changing the federal government's enforcement approach in other respects. Then-DHS Secretary Kelly issued memoranda at the outset of his appointment that wholly abandoned the Obama-era prosecutorial discretion guidelines as agency-wide policy.[155] The Administration immediately began to ramp up enforcement measures and rhetoric against all deportable noncitizens, regardless of their equities or any mitigating circumstances.[156] In a February 2017 memo, for example, ICE Associate Director Matthew Albence instructed his 5700 deportation officers to "take enforcement action against all removable aliens encountered in the course of their duties."[157] Likewise, ICE trial attorneys have been told not to exercise discretion in removal proceedings even for persons with time-delayed paths to lawful status, such as those with pending U status applications or beneficiaries of family-based petitions awaiting U.S. Citizenship and Immigration Services (USCIS) adjudication of provisional hardship waivers.[158] Further, DHS has broadened its conception of "criminal aliens" for purposes of establishing removal priorities, sweeping in noncitizens merely arrested but not yet convicted of any crime.[159]

This hard tack was no mere rhetoric. From February to December of 2017, ICE made 143,000 arrests for civil immigration violations, a 42%

---

[155] Kelly, Priorities Memo, *supra* note 8.

[156] *See supra* notes 14–15 and accompanying text.

[157] Memorandum from Matthew T. Albence, Exec. Assoc. Dir., ICE, to All ERO Employees, ICE, Implementing the President's Border Security and Interior Immigration Enforcement Policies (Feb. 21, 2017), https://www.documentcloud.org/documents/3889695-doc00801320170630123624.html [https://perma.cc/8588-UVXA]; *see also* Raymond, *supra* note 15 (quoting ICE Acting Director Thomas Homan as making clear the agency's position that "[t]here's no population off the table. If you're in this country illegally, we're looking for you and we're going to look to apprehend you").

[158] *See* Minutes for AILA/ICE Liaison Meeting on October 26, 2017, AILA Doc. No. 18011132, at 2–4 (Jan. 11, 2018) (containing an official statement from the agency that ICE Trial Attorneys "should not administratively close cases where applications are pending with other agencies," including Special Immigrant Juvenile (SIJ) filings, U visas, and unaccompanied child asylum applications) (on file with *Northwestern University Law Review*). Hardship waivers can help relatives of U.S. citizens or LPRs overcome a ten-year bar on lawful admission due to prior unauthorized presence in the United States. *Id.* at 11.

[159] *See* Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,800 (Jan. 30, 2017); Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Security, to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al., Implementing the President's Border Security and Immigration Enforcement Policies (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [https://perma.cc/FS5Q-7ESL] [hereinafter Kelly, Implementation Memo].

increase from 2016.[160] During that period ICE increased its detention of noncitizens without any criminal history by 250%.[161] ICE agents have conducted extensive home raids around the country,[162] entered courthouses and hospitals to apprehend victims and witnesses believed to be deportable,[163] and targeted caregivers of U.S. citizens.[164] The agency has also

[160] Raymond, *supra* note 15.

[161] *Id.*; *see also* Marcelo Rochabrun, *ICE Officers Told to Take Action Against All Undocumented Immigrants Encountered While on Duty*, PROPUBLICA (July 7, 2017, 8:00 AM), https://www.propublica.org/article/ice-officers-told-to-take-action-against-all-undocumented-immigrants-encountered-while-on-duty [https://perma.cc/PM7Z-XLF7] ("Between February and May, the Trump Administration arrested, on average, 108 undocumented immigrants a day with no criminal record, an uptick of some 150 percent from the same time period a year ago." (citation omitted)); Maria Sacchetti & Ed O'Keefe, *ICE Data Shows Half of Immigrants Arrested in Raids had Traffic Convictions or No Record*, WASH. POST (Apr. 28, 2017), https://www.washingtonpost.com/local/social-issues/ice-data-shows-half-of-immigrants-arrested-in-raids-had-traffic-convictions-or-no-record/2017/04/28/81ff7284-2c59-11e7-b605-33413c691853_story.html [https://perma.cc/PM7Z-XLF7] ("About half of the 675 immigrants picked up in roundups across the United States in the days after President Trump took office either had no criminal convictions or had committed traffic offenses, mostly drunken driving, as their most serious crimes.").

[162] Lisa Rein et al., *Federal Agents Conduct Immigration Enforcement Raids in at Least Six States*, WASH. POST (Feb. 11, 2017), https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html [https://perma.cc/8RX8-BVHQ] (reporting on ICE raids in Los Angeles, Chicago, Atlanta, North Carolina, South Carolina, and New York).

[163] *See, e.g.*, Barbara Demick, *Federal Agents in Texas Move Hospitalized Salvadoran Woman Awaiting Emergency Surgery to a Detention Facility*, L.A. TIMES (Feb. 23, 2017), http://www.latimes.com/nation/la-na-hospital-seizure-20170223-story.html [https://perma.cc/8RX8-BVHQ]; Azi Paybarah, *Law Enforcement, Court Officials Differ on Impact of ICE Courthouse Arrests*, POLITICO (Aug. 3, 2017, 5:39 PM), https://www.politico.com/states/new-york/albany/story/2017/08/03/law-enforcement-court-officials-differ-on-impact-of-ice-courthouse-arrests-113781 [https://perma.cc/79M2-L2DF] ("Federal immigration officials are hampering the business of courts by targeting witnesses and victims of crimes for deportation, the New York State Attorney General and acting Brooklyn District Attorney said Thursday."); Letter From Tani G. Cantil-Sakauye, Chief Justice, Cal. Supreme Court, to Attorney Gen. Jeff Sessions & John Kelly, Sec'y, U.S. Dept. of Homeland Sec. (Mar. 16, 2017), https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses [https://perma.cc/9N6V-R6U7] ("Courthouses should not be used as bait in the necessary enforcement of our country's immigration laws."); *see also* ICE, DIRECTIVE NO. 11072.1, CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES (2018), https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf [https://perma.cc/6XND-VVAK] (defending and providing guidance for continued immigration enforcement efforts at courthouses).

[164] Caitlin Dickerson, *Trump Administration Targets Parents in New Immigration Crackdown*, N.Y. TIMES (July 1, 2017), https://www.nytimes.com/2017/07/01/us/trump-arrest-undocumented-immigrants.html [https://perma.cc/X9U2-GQEZ]; Katie Honan, *2 Queens Teens Beg ICE Not to Deport Father Who Sought Political Asylum*, DNA INFO (Oct. 10, 2017, 4:44 PM), https://www.dnainfo.com/new-york/20171010/jackson-heights/bablu-sharif-ice-queens-detention-deportation-president-trump [https://perma.cc/QNA4-RGXV]; Michael Sangiacomo, *Caregiver to Severely Handicapped Stepson to be Deported Again (Photos)*, PLAIN DEALER (published Sept. 25, 2017; updated Sept. 26, 2017), https://www.cleveland.com/metro/index.ssf/2017/09/caregiver_to_severely_handicap.html [https://perma.cc/S43X-N76Q] (describing the Trump Administration's decision

significantly ramped up its use of immigration detainer requests for arrestees[165] as well as the detention of individuals with prior stays of removal who have stayed out of trouble, supported their families, and faithfully shown up to annual immigration check-ins for years.[166] Even noncitizens seeking to take advantage of clear paths to lawful status may not be spared from adverse discretion and detention.[167] There are indications that DHS is positioning itself to dramatically increase the use of both discretionary detention[168] and rapid removal mechanisms.[169]

To help effectuate this clampdown, the Trump Administration has renewed federal reliance on the assistance of state and local law enforcement agencies, including through the reanimation of programs such as 287(g)

to deport a man who has provided critical care for fourteen years to his son with cerebral palsy and mental disabilities, despite a stay granted in 2015 by the Obama Administration).

[165] Sacchetti, *supra* note 8 (documenting a 75% rise in number of detainer requests ICE sought for arrested noncitizens); *Use of ICE Detainers: Obama vs. Trump*, TRAC IMMIGRATION, (Aug. 30, 2017), http://trac.syr.edu/immigration/reports/479 [https://perma.cc/45AK-VSXK]. Whenever individuals are arrested, local authorities submit their fingerprints to the FBI to check for warrants. Pursuant to an interagency protocol, the prints are then automatically forwarded to DHS. If DHS databases indicate that the arrestee may be present in the United States without authorization (which is merely a civil violation), or removable for other civil or criminal violations, then DHS agents—or local officers deputized pursuant to 287(g) agreements—issue a detainer, asking the local law enforcement agency to hold the noncitizen for an additional forty-eight hours, facilitating federal agents' ability to pick him or her up. Cade, *supra* note 47, at 1763–65. *See generally* 8 U.S.C. § 1357(g) (2012) (authorizing the Attorney General to enter into agreements with states and their subdivisions to carry out the functions of immigration officers, known as 287(g) agreements).

[166] For an extensive roundup of media reports concerning recent enforcement actions that challenge notions of proportionality or fairness, see Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 299–307 (2018); *see also supra* notes 2–11 and accompanying text.

[167] *See, e.g.*, Cramer, *supra* note 9.

[168] Clark Mindock, *Trump Plans Massive Private Prison Expansion to Jail Undocumented Immigrants*, INDEPENDENT (Oct. 18, 2017, 10:58 PM), https://www.independent.co.uk/news/world/americas/us-politics/trump-prison-immigrants-expansion-undocumented-private-plans-ice-a8007876.html [https://perma.cc/D2N7-ZW8R].

[169] *See, e.g.*, Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8,793, 8,796 (Jan. 30, 2017) (announcing expansion of the use of expedited removal proceedings); Kelly, Implementation Memo, *supra* note 159, at 6–7 (same); Memorandum from Attorney Gen. Jefferson B. Sessions to All Federal Prosecutors, Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017) (instructing federal prosecutors to ramp up prosecutions for migration crimes and the corresponding tool of stipulated removals). *See generally* Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 263–64 (2017) (anticipating increased use of fast-track removal procedures, such as stipulated orders of removal, under the Trump Administration); Jennifer Lee Koh, *Anticipating Expansion, Committing to Resistance: Removal in the Shadows of Immigration Court Under Trump*, 43 OHIO N.U. L. REV. 459, 459–60 (2017) (same).

cooperative enforcement agreements,[170] Secure Communities,[171] and the Criminal Alien Program.[172] The programs differ, but each heavily relies on immigration detainers to allow federal authorities to take custody of noncitizens arrested by local police. The legality of continuing to confine persons based on detainer requests is hotly contested.[173] Nevertheless, many jurisdictions readily comply and, in other respects, embrace a cooperative role in federal immigration enforcement.[174]

In short, the Trump Administration has taken a vigorous and indiscriminate approach to immigration enforcement, an approach that it believes states and cities must aid. Secretary Kelly explicitly declined any responsibility to impose considerations of equity on the statutorily rigid system: "If lawmakers do not like the laws they've passed and we are charged to enforce, then they should have the courage and skill to change the laws."[175] Judge Reinhardt of the Ninth Circuit Court of Appeals summed up the new reality of immigration enforcement like this: "President Trump has claimed that his immigration policies would target the 'bad hombres.' The government's decision to remove [a noncitizen petitioner with unusually compelling equities] shows that even the 'good hombres' are not safe."[176]

As I have argued, this mass enforcement approach is out of step with a contextual understanding of the deportation scheme. The rigidity and severity of the current statute require some measure of equitable enforcement discretion to maintain accuracy and fairness. Where local jurisdictions act to

---

[170] *See* Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,800 (Jan. 30, 2017) (announcing that federal agencies will seek to enact 287(g) cooperative enforcement agreements with local authorities).

[171] *See id.* at 8,801 (announcing that federal agencies will reinstate the Secure Communities program).

[172] *See* Kelly, Priorities Memo, *supra* note 8, at 3 ("ICE should devote available resources to expanding the use of the Criminal Alien Program in any willing jurisdiction in the United States.").

[173] Courts have held that confinement solely on the basis of an immigration detainer violates the Fourth Amendment because detainer requests do not supply sufficient probable cause that a crime has been committed. *See infra* notes 194–98 and accompanying text.

[174] *See, e.g.*, Cade, *supra* note 47, at 1763–66; Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109; Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. REV. 1819 (2011).

[175] Devlin Barrett, *DHS Secretary Kelly Says Congressional Critics Should 'Shut Up' or Change Laws*, WASH. POST (Apr. 18, 2017), https://www.washingtonpost.com/world/national-security/dhs-secretary-kelly-says-congressional-critics-should-shut-up-or-change-laws/2017/04/18/8a2a92b6-2454-11e7-b503-9d616bd5a305_story.html [https://perma.cc/95HY-URN4].

[176] Ortiz v. Sessions, 857 F.3d 966, 968 (9th Cir. 2017) (decrying ICE's "inhumane" decision to remove a noncitizen who became a "pillar of his community" over three decades in the United States but finding no legal basis to halt the agency's decision). I discuss this and other recent cases evaluating Trump Administration removal decisions elsewhere. *See* Cade, *supra* note 85.

strengthen the federal government's enforcement hand as cooperative force multipliers, these legitimacy norms are at even more risk.[177] This context helps us grasp the role that sanctuary efforts now play in the deportation system, which the remainder of this Article will elaborate upon.

III. THE EMERGENCE OF SANCTUARIES

A variety of subfederal governments and institutions have implemented policies or undertaken actions that could be described as "sanctuary." Sanctuary actors include both public entities (police departments, civil agencies, and public colleges), and private institutions (churches, synagogues, mosques, and universities).[178] In broad terms, sanctuary efforts consist of state or local policies that increase the ability of deportable noncitizens to engage with government or community institutions without detection or apprehension by federal immigration authorities. Sanctuary efforts can also include the actions of public or private entities that provide noncitizens with community aid, legal resources, or other assistance intended to help them access statutory or discretionary relief from removal, or at least to forestall deportation temporarily. My primary focus here is on the defensive measures taken by sanctuaries that either limit the access or information provided to federal immigration enforcers or that increase noncitizens' removal defense resources.[179] These kinds of activities most directly inject equity-influencing dynamics into the current Administration's mass deportation efforts.

In this Part, I will briefly introduce each form of sanctuary and touch on the relevant legal and policy justifications for its activities. Although the legality disputes are not the focus of my analysis, the fact that each sanctuary action likely stands on legally sound footing contributes to its clout. Just as importantly, if sanctuaries are likely to weather challenges from the Executive Branch, they are better positioned to make a more lasting impact in the removal system. In Part IV, I will explain how sanctuaries work to foster legal and equitable norms in immigration decision-making processes.

---

[177] *Cf.* Villazor & Gulasekaram, *supra* note 44, at 7 ("Moreover, even in a 'dissenting' role, where a private or local sanctuary is located in a decidedly anti-sanctuary state, these local and hyper-local expressions remain critical sites of resistance and norm-creation.").

[178] Villazor, *supra* note 21, at 137.

[179] *See* Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 25–35 (2016) (describing a range of motivations behind state and local resistance to federal immigration enforcement policies).

A. Sanctuary Cities

A large and growing number of municipalities have enacted various forms of sanctuary policies.[180] Much of the activity in this area has been concerned with federal data-sharing enforcement programs, through which federal officials identify potentially deportable noncitizens when they are booked into local jails and then issue detainers requesting that local authorities continue to detain such persons when they would otherwise be entitled to release.[181] These sanctuary measures limit the circumstances in which local authorities will either (1) obtain and/or share information about the immigration status of noncitizens with federal immigration agencies, (2) detain noncitizens explicitly (and solely) for the purpose of facilitating federal enforcers to take them into federal custody, or (3) notify federal agents when such persons are being released from local detention.[182] Many of the policies, it should be noted, contain explicit or de facto exceptions for persons with serious criminal histories, outstanding warrants, or other significant red flags.[183]

Some of these municipal sanctuaries date back to the 1980s, arising in the context of the federal government's dismal record of asylum adjudication for Central American refugees.[184] More proliferated between the late 1990s and 2015 as some counties and cities began to resist DHS's increasing prioritization of enforcement against noncitizens who encounter the criminal justice system and the agency's attempts to co-opt local law enforcement

---

[180] *See* Villazor & Gulasekaram, *supra* note 44, at 42.

[181] Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. CRIM. & CIV. CONFINEMENT 159, 161 (2016) ("The anti-detainer movement arose out of state and local resistance to the federal 'Secure Communities' program, which linked federal crime databases with federal immigration databases, allowing federal immigration officials to identify suspected immigration violators soon after their booking into a local jail. Secure Communities resulted in a ten-fold increase in the number of detainers placed, and advocates soon realized the battle against Secure Communities could be successfully waged by fighting the use of detainers." (footnote omitted)); *see supra* note 170 and accompanying text.

[182] *See* Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1736–48 (2018) (discussing various sanctuary city policies).

[183] *Id.*; *see also, e.g.*, S.B. 54, 2017–2018 Reg. Sess. (Cal. 2017) (providing a range of exceptions based on criminal history to the state's general prohibition on cooperation with immigration enforcement authorities); Julianne Hing, *Despite 'Sanctuary City' Status, Chicago Police Feed Trump's Deportation Machine*, NATION (Oct. 12, 2017), https://www.thenation.com/article/despite-sanctuary-city-status-chicago-police-feed-trumps-deportation-machine [https://perma.cc/M6YC-XSJ7] ("Currently, the city permits its police officers to cooperate with federal immigration authorities' requests to detain a person on their behalf if someone falls into one of four categories: if a person is in the city's gang database, has an outstanding criminal warrant, is convicted of a felony, or has an open felony case.").

[184] Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 252–59 (2012) (describing information-limiting policies adopted in San Francisco and New York City in the 1980s); Lasch, *supra* note 181, at 159–62 (briefly describing the history of the "Sanctuary City" from the 1980s to 2015).

into the identification and detention of potentially deportable noncitizens.[185] As of December 2016, about 300 jurisdictions had adopted policies that in some way restrict the extent to which these cities and municipalities comply with immigration detainers or share information with immigration authorities.[186] Similar state and local measures have continued to rapidly proliferate in the first year of the Trump Administration.[187] Professor Chris Lasch and others have established an online library that tracks such policies.[188]

Policymakers have raised a number of justifications for law enforcement sanctuary measures, which tend to focus on resource constraints, legal liability, and unintended secondary consequences for policing. In some jurisdictions, the articulated rationales also include fairness concerns.[189] Chiefly, policymakers emphasize that such endeavors are critical to community policing and public safety.[190] Assurances that police

---

[185] Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1843 (2007); Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 839 (2017) ("In 2008, approximately seventy local jurisdictions had prevented their law enforcement officials from inquiring into an individual's immigration status or discriminating against persons on the basis of that status."); Lasch, *supra* note 181, at 159–61; Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 601 (2008).

[186] Barbara E. Armacost, *"Sanctuary" Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1220 (citing reports about sanctuary jurisdictions).

[187] Elias, *supra* note 185, at 816; *Understanding "Sanctuary Cities"—Online Appendix: Policies Sorted by State*, WESTMINSTER L. LIBR. (last updated Jun. 6, 2018, 11:55 AM), http://libguides.law.du.edu/c.php?g=705342&p=5008843 [https://perma.cc/329T-79T7]; *see, e.g.*, DENVER, COLO., CODE OF ORDINANCES § 25-250 (2018); Atlanta, Ga., Res. 17-R-4256 (Sept. 5, 2017), http://atlantacityga.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=SplitView&MeetingID=2040&MediaPosition=&ID=13260&CssClass= [https://perma.cc/3RYC-DNFK].

[188] *Understanding "Sanctuary Cities"—Online Appendix: Policies Sorted by State*, *supra* note 187.

[189] Armacost, *supra* note 186, at 1199 (arguing that sanctuary policies are often designed "to address certain pathologies of a system in which local policing and immigration enforcement has become destructively intertwined"); Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 111–13 (2012) (arguing that most sanctuary city policies have little to do with providing protection to deportable immigrants but instead are focused on general public safety); Chen, *supra* note 179, at 53–54 (describing a range of motivations for sanctuary policies and resistance to federal immigration enforcement); Lasch et al., *supra* note 182, at 1752–73 (discussing a range of legal and policy rationales behind sanctuary city measures).

[190] DORIS MARIE PROVINE ET AL., POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES 4 (2016) ("Helping to maintain a variety of approaches, however, is the tension between enforcement of immigration laws against law-abiding, but undocumented, residents and the principle of community policing based on trusting relationships with all residents in a community."); Armacost, *supra* note 186, at 1250 ("Many state and local police departments complain that associating ordinary policing so closely with immigration enforcement—especially when it involves racial profiling and targets minor offenders—undermines trust between the police and immigrant communities."); Elias, *supra* note 185, at 815 (explaining that sanctuary protocols are primarily motivated by public safety and economic concerns); Hing, *supra* note 184, at 297–308 (same); *see, e.g.*, *Senate Leader de León's California Values Act Clears Legislature*, SENATOR KEVIN DE LEÓN (Sept. 16, 2017), http://sd24.senate.ca.gov/news/2017-

and other authorities will not provide immigration-related information to federal enforcers encourage victims and witnesses to come forward and report crimes, furthering safety goals for the entire community.[191] Indeed, studies have suggested that sanctuary jurisdictions are safer than places without sanctuary measures, as measured by crime rates.[192] Additionally, policing distortions, such as racial profiling, can creep in when law enforcement officers know that immigration enforcement is likely to follow an arrest regardless of whether a criminal prosecution will occur.[193]

A second defense of law enforcement sanctuary measures rests on constitutional constraints and legal liability for violations.[194] Many courts have held that extending a noncitizen's custody solely on the basis of an immigration detainer violates the Fourth Amendment.[195] Recently, a district

09-16-senate-leader-de-leons-california-values-act-clears-legislature [https://perma.cc/3894-WUQS] (articulating both public safety and resistance to President Trump's indiscriminate enforcement approach as reasons for supporting California sanctuary bill).

[191] *See, e.g.*, NIK THEODORE, DEP'T OF URBAN PLANNING & POLICY, UNIV. OF ILL. AT CHI., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT 3 (2013); Jason A. Cade & Meghan L. Flanagan, *Five Steps to a Better U: Improving the Crime-Fighting Visa*, 21 RICH. PUB. INT. L. REV. 85, 102–06, 109–11 (2018); Marjorie S. Zatz & Hilary Smith, *Immigration, Crime, and Victimization: Rhetoric and Reality*, 8 ANN. REV. L. & SOC. SCI. 141, 150 (2012).

[192] *See, e.g.*, ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 251–60 (2012) (describing evidence that places with high concentrations of immigrants have lower crime rates); Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017, 1:00 AM), https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy [https://perma.cc/2JCE-8QR6] ("Crime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties.").

[193] *See, e.g.*, INT'L ASSOC. OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL AND TRIBAL LAW ENFORCEMENT 153–91 (2006), http://www.theiacp.org/portals/0/pdfs/PCR_LdrshpGde_Part3.pdf [https://perma.cc/ZG4B-V687]. For an analysis of how the integration of immigration and criminal enforcement can lead to racial profiling and other policing distortions, see Armacost, *supra* note 186, at 1223–31; Cade, *Policing the Immigration Police*, *supra* note 78, at 184 (discussing connections between unconstitutional racial profiling and local enforcement agencies that prioritize the apprehension of immigrants); Cade, *supra* note 47, at 1757 (arguing that ICE's integration with the criminal justice system, and in particular the misdemeanor system, can create corrosive feedback loops that undermine the reliability and integrity of both systems); Eagly, *supra* note 113, at 1150; Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 844 (2015); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1026 (2016); and Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. ST. THOMAS L.J. 532, 545 (2017).

[194] Lasch, *supra* note 181; Villazor & Gulasekaram, *supra* note 44, at 26.

[195] *See, e.g.*, Villars v. Kubiatowski, 45 F. Supp. 3d 791, 807–08 (N.D. Ill. 2014); Miranda-Olivares v. Clackamas County, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *5 (D. Or. Apr. 11, 2014); Morales v. Chadbourne, 996 F. Supp. 2d 19, 29–34 (D.R.I. 2014), *aff'd*, 793 F.3d 208 (1st Cir. 2015); Galarza v. Szalczyk, No. 10-cv-06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), *rev'd on other grounds*, 745 F.3d 634, 642 (3d Cir. 2014); Lunn v. Commonwealth, 78 N.E.3d 1143, 1156–60 (Mass. 2017)

court in Texas enjoined a state law requiring local authorities to comply with detainer requests, in part due to the likelihood that Fourth Amendment violations will result.[196] Authority to arrest or detain requires probable cause or a judicially sanctioned warrant, and an immigration agent's decision to issue a detainer provides neither.[197] Relatedly, courts have held that immigration detainers are not mandatory (thus avoiding the Tenth Amendment's anti-commandeering rule), and as a result, it is the local agency that bears liability for any constitutional violations, rather than federal authorities.[198]

A third set of reasons for sanctuary policies is fiscal. Localities complying with immigration detainer requests bear the cost of extended detention and are typically not fully reimbursed or compensated by the federal government.[199] Moreover, time spent managing detainer requests is time away from other law enforcement tasks. Noncooperation or limited-cooperation measures thus "preserve economic resources by limiting police expenditures to nonimmigration-related crimes and by ensuring that police personnel time is not expended on making immigration-related inquiries."[200]

In the face of threats by the Trump Administration to withhold federal funding from sanctuary jurisdictions,[201] some jurisdictions obtained a

(holding that local law enforcement lacks authority to continue detention of noncitizen solely for purposes of immigration enforcement).

[196] City of El Cenizo v. Texas, 264 F. Supp. 3d 744, 809 (W.D. Tex. 2017) ("[T]he Court has found that enforcement of the mandatory detainer provisions will inevitably lead to Fourth Amendment violations."), *aff'd in part and vacated in part*, 890 F.3d 164 (5th Cir. 2018). On appeal, the Fifth Circuit panel held that plaintiffs could only challenge Fourth Amendment violations resulting from detainers on a case-by-case basis. 890 F.3d at 185–90.

[197] *See, e.g.*, County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 510 (N.D. Cal. 2017) ("[C]ivil detainer requests are often not supported by an individualized determination of probable cause that a crime has been committed."); Moreno v. Napolitano, 213 F. Supp. 3d 999, 1003 (N.D. Ill. 2016) (holding that ICE lacked statutory authority to detain without warrant in circumstances of that case absent a finding of flight risk before a warrant can be obtained).

[198] *See, e.g.*, *Galarza*, 745 F.3d at 640–41 (holding, along with the First, Second, Fifth, and Sixth Circuits, that construing detainers as mandatory would violate the anti-commandeering rule of the Tenth Amendment); *Villars*, 45 F. Supp. 3d at 802; *Miranda-Olivares*, 2014 WL 1414305, at *5.

[199] *See, e.g.*, Hing, *supra* note 184, at 310–11.

[200] Elias, *supra* note 185, at 815.

[201] Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 30, 2017); Julie Hirschfeld Davis & Charlie Savage, *White House to States: Shield the Undocumented and Lose Police Funding*, N.Y. TIMES (Mar. 27, 2017), https://www.nytimes.com/2017/03/27/us/politics/sanctuary-cities-jeff-sessions.html [https://perma.cc/XH2R-BRQV]; Forrest G. Read IV, *Trump Administration Stops Law Enforcement Funds to Chicago, Sanctuary City, and Gets Sued*, NAT'L L. REV. (Aug. 22, 2017), https://www.natlawreview.com/article/trump-administration-stops-law-enforcement-funds-to-chicago-sanctuary-city-and-gets [https://perma.cc/79G5-JP6B] (reporting on Chicago's lawsuit challenging the Trump Administration's decision to condition JAG grants to law enforcement on local cooperation with immigration officials).

preliminary nationwide injunction prohibiting the federal government from coercing cities and counties into assisting immigration authorities.[202] There are two main components to the argument. First, the Executive Branch is limited in its ability to attach new conditions on congressionally authorized funding streams.[203] Second, the federal government cannot unconstitutionally coerce states, municipalities, campuses, or private institutions into assistance with matters that are squarely within the federal government's domain.[204] Conversely, law enforcement is a core police power, reserved to the states in our federal system.[205]

A few cities have taken steps to ensure that noncitizen residents facing deportation have the assistance of legal counsel.[206] In New York City, for example, all noncitizens who cannot afford an attorney are provided with representation through a combination of private and public funding sources.[207] Measures like this can have a significant effect on immigration outcomes, as the assistance of counsel has been shown to be crucial in

---

[202] Vivian Yee, *Judge Blocks Trump Effort to Withhold Money from Sanctuary Cities*, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/us/judge-blocks-trump-sanctuary-cities.html [https://perma.cc/K5ST-K7MT]; 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, 4:20 PM), http://www.latimes.com/local/lanow/la-me-ln-sanctuary-city-lawsuit-20170822-story.html [https://perma.cc/67RB-65YE].

[203] *See, e.g.*, City of Chicago v. Sessions, 888 F.3d 272, 296 (7th Cir. 2018) (upholding lower court injunction against Trump Administration's withholding of funds pursuant to access and notice conditions); Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 573–80 (delineating the constitutional requirement that funding conditions be germane to Congress's purpose and applying these principles to the Trump Administration's efforts to curb sanctuary policies through funding restrictions).

[204] *See, e.g.*, Erwin Chemerinsky, *The Constitutionality of Withholding Federal Funds from Sanctuary Cities*, L.A. LAW., Apr. 2017, at 60, 60.

[205] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1451 (1987); Hing, *supra* note 184, at 273–80 (arguing that the Tenth Amendment and principles of federalism protect state and local law enforcement decisions not to cooperate with federal immigration enforcement); *cf.* Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 402–04 (2012) (arguing that federalism principles require an unequivocally clear statement from Congress that federal immigration officials can deport someone on the basis of a conviction that has been pardoned or expunged under state law).

[206] Maura Ewing, *Should Taxpayers Sponsor Attorneys for Undocumented Immigrants?*, ATLANTIC (May 4, 2017), https://www.theatlantic.com/politics/archive/2017/05/should-taxpayers-sponsor-attorneys-for-undocumented-immigrants/525162 [https://perma.cc/GQ7M-TDSY] (discussing right-to-counsel measures in Los Angeles, San Francisco, Chicago, Washington, D.C., New York City, and Austin, as well as statewide initiatives on the table in New York and California); *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, VERA INST. (Apr. 7, 2017), https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation [https://perma.cc/H5B2-P964].

[207] Liz Robbins & J. David Goodman, *De Blasio and Council Agree, and Disagree, on Immigrants*, N.Y. TIMES (June 6, 2017), https://www.nytimes.com/2017/06/06/nyregion/de-blasio-and-council-agree-and-disagree-on-immigrants.html [https://perma.cc/8LK8-UFH5].

ensuring that noncitizens are able to defend against removal.[208] Some states and cities have also implemented integrative sanctuary measures, such as the provision of drivers' licenses or identity cards.[209] While not my primary focus here, I briefly touch on the consequences of these kinds of immigrant-welcoming activities in Section IV.D.

B. Sanctuary Churches

Today's religious sanctuaries are only the most recent iteration of a deep lineage dating back at least to biblical times.[210] The most direct precedent is the Sanctuary Movement of the 1980s, which provided legal screening, shelter, and other assistance to refugees from El Salvador and Guatemala who were widely perceived to have been unfairly denied asylum.[211] At its peak, the Movement consisted of over 100 churches and synagogues, with at least 20,000 individual participants or supporters engaged in the effort.[212] Members of these congregations believed that the refugees faced fatal danger if returned to their home countries and felt compelled to help the federal government fulfill its obligations under domestic and international asylum law.[213]

Professor Barbara Bezdek described that Sanctuary Movement as "civil initiative," which she defined as the "conscientious practice of people joined by a faith-based understanding of the importance and possibility of

---

[208] *See infra* notes 280–81 and accompanying text; *cf.* Villazor & Gulasekaram, *supra* note 44, at 28–29 ("The provision of legal services may perhaps be a quintessential form of safe haven.").

[209] *See, e.g.*, CAL. VEH. CODE § 12801.9 (West 2016) (allowing undocumented noncitizens to obtain driver's licenses with proof of identity and state residence); 625 ILL. COMP. STAT. ANN. 5/6-105.1 (West 2013) (allowing undocumented noncitizens to obtain driver's licenses with proof of residency for at least one year); N.Y.C., N.Y. ADMIN. CODE § 3-115(d)(1)(vi) (2018) (allowing undocumented noncitizens to obtain city identification cards with proof of identity).

[210] For accounts of earlier sanctuary movements, see, for example, Bezdek, *supra* note 22, at 928–31; Kristina M. Campbell, *Operation Sojourner: The Government Infiltration of the Sanctuary Movement in the 1980s and Its Legacy on the Modern Central American Refugee Crisis*, 13 U. ST. THOMAS L.J. 474 (2017).

[211] *See generally* Villazor, *supra* note 21, at 138–42 (outlining the historical background of sanctuaries and highlighting the efforts of churches and individuals in the 1980s to offer assistance to Central American migrants believed to have been wrongly denied asylum by the United States); Gabrielle Emanuel, *Religious Communities Continue the Long Tradition of Offering Sanctuary*, NPR (Mar. 14, 2017, 4:28 PM), https://www.npr.org/2017/03/14/519307698/religious-communities-continue-the-long-tradition-of-offering-sanctuary [https://perma.cc/SY4N-LVMZ]. As part of a legal settlement, the federal government later admitted it had not properly adjudicated the asylees' claims. *See* Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991). *See generally* Campbell, *supra* note 189, at 101 (describing this history).

[212] Kathleen L. Villarruel, Note, *The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values*, 60 S. CAL. L. REV. 1429, 1433 (1987).

[213] *See generally* Bezdek, *supra* note 22, at 935–39 (describing the motivations behind this sanctuary movement); Campbell, *supra* note 210 (same); Villarruel, *supra* note 212, at 1433–34 (same).

responding to the sufferings of strangers, by enacting a way for society to comply with human rights laws although the Government persisted in violating them."[214] The federal government viewed these activities differently, however, ultimately prosecuting participants in the Movement for "harboring or transporting . . . aliens" in violation of Section 274 of the Immigration and Nationality Act (INA).[215] In 1989, some Sanctuary Movement members, including founder John Fife, were found guilty of violating this provision.[216] None served jail time, however, and the Movement continued.[217] Eventually, in separate but related litigation, the government conceded that its handling of the Central American asylum claims had been improper.[218]

Now, in the face of the Trump Administration's mass enforcement approach, more than 1000 churches, synagogues, and mosques throughout the country have loosely organized as the New Sanctuary Movement.[219] The New Sanctuary Movement has spread even to locations that historically had little or no involvement with sanctuary efforts or immigrant advocacy, such

---

[214] Bezdek, *supra* note 22, at 911.

[215] *Id.* at 902. The current harboring provision of the INA provides for criminal penalties for "[a]ny person who . . . knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation." *See* 8 U.S.C. § 1324(a)(1)(A) (2012).

[216] *See* United States v. Aguilar, 883 F.2d 662, 671 (9th Cir. 1989).

[217] *See* Clyde Haberman, *Trump and the Battle over Sanctuary in America*, N.Y. TIMES (Mar. 5, 2017), https://www.nytimes.com/2017/03/05/us/sanctuary-cities-movement-1980s-political-asylum.html [https://perma.cc/3AJE-M45B].

[218] *See* Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796, 797 (N.D. Cal. 1991) (discussing settlement of litigation regarding the government's improper handling of Central American asylum claims); *see also* Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 565–68 (9th Cir. 1990) (affirming findings by the district court that INS violated the rights of Salvadoran and Guatemalan asylum applicants).

[219] *See* MYRNA OROZCO & NOEL ANDERSEN, SANCTUARY IN THE AGE OF TRUMP: THE RISE OF THE MOVEMENT A YEAR INTO THE TRUMP ADMINISTRATION 6 (2018), https://www.sanctuarynotdeportation.org/uploads/7/6/9/1/76912017/sanctuary_in_the_age_of_trump_january_2018.pdf [https://perma.cc/WH8J-PB9L] ("As of January 2018, there are more than 1,110 congregations in the Sanctuary Movement, showing the faith resistance continues to grow against harsh and inhumane immigration policies." (emphasis omitted)); Ashley Archibald, *Mosques, Churches, Synagogues, and Temples Rekindle the Sanctuary Movement to Protect Refugees and Immigrants from Deportation*, REAL CHANGE NEWS (June 21, 2017), http://realchangenews.org/2017/06/21/mosques-churches-synagogues-and-temples-rekindle-sanctuary-movement-protect-refugees-and [https://perma.cc/4NGM-VGHW]; Sarah Quezada, *How Churches Can Give Sanctuary and Still Support the Law*, CHRISTIANITY TODAY (Mar. 17, 2017), https://www.christianitytoday.com/women/2017/march/how-churches-can-give-sanctuary-to-immigrants-and-still-sup.html [https://perma.cc/KS8E-297N]. This is a dramatic increase from 2013, when just over a dozen churches were known to provide sanctuary to undocumented families. Elizabeth Evans & Yonat Shimron, *'Sanctuary Churches' Vow to Shield Immigrants from Trump Crackdown*, RELIGION NEWS SERV. (Nov. 18, 2016), https://religionnews.com/2016/11/18/sanctuary-churches-vow-to-shield-immigrants-from-trump-crackdown [https://perma.cc/YZG3-NSTL].

as Grand Rapids, Michigan, and Twin Cities, Iowa.[220] Congregations partaking in this Movement share a commitment to keeping the families of deportable noncitizens intact, particularly those that include U.S. citizen children. The forms of support vary. Most significantly, a number of churches have provided physical refuge to persons facing removal despite highly sympathetic circumstances. In some cases, these actions have influenced federal enforcers to exercise discretion to the benefit of the noncitizen.[221] Other less extreme but nevertheless important assistance regularly provided by church sanctuaries includes "know-your-rights" trainings, legal consultations, or attorney representation.[222]

Today's religious sanctuary actors seek to avoid the legal liability that befell the earlier movement's participants in part by providing sanctuary openly. In this way, they can argue that they are not actually concealing potentially deportable noncitizens.[223] Moreover, the congregations acknowledge that ICE officials are lawfully entitled to carry out enforcement on church property so long as they have a valid warrant to do so.[224] Indeed, congregations and participants in the New Sanctuary Movement have become savvy about the Fourth Amendment and related constitutional protections for private property.[225] Thus far, ICE has adhered to longstanding agency policy not to conduct enforcement actions in churches and other

---

[220] Andrea Castillo, *Churches Answer Call to Offer Immigrants Sanctuary in an Uneasy Mix of Politics and Compassion*, L.A. TIMES (Mar. 24, 2017), http://www.latimes.com/local/lanow/la-me-sanctuary-churches-20170301-story.html [https://perma.cc/A88C-TWQ7].

[221] *See, e.g.*, Etehad, *supra* note 3; Kyung Lah et al., *Underground Network Readies Homes to Hide Undocumented Immigrants*, CNN (Feb. 26, 2017, 8:46 PM), https://www.cnn.com/2017/02/23/us/california-immigrant-safe-houses/index.html [https://perma.cc/AG9N-MQVM]; *see also infra* note 283 (citing reports of sanctuary activities leading to favorable exercises of discretion).

[222] *See, e.g.*, Emily Fontenot, *Why Are Churches Choosing to Provide Legal Services to Immigrants?*, IMMIGR. ALLIANCE, http://theimmigrationalliance.org/churches-choosing-provide-legal-services-immigrants [https://perma.cc/34AM-3ACV]; Christopher Smart, *Leaked Document Offers Peek at How Church Helps Undocumented Immigrant Mormons*, SALT LAKE TRIB. (Mar. 10, 2017, 12:20 AM), http://archive.sltrib.com/article.php?id=5006677&itype=CMSID [https://perma.cc/Q6HP-249H] ("Congregational leaders in the LDS Church should provide welfare assistance to undocumented Mormon immigrants as they would to any other church member, according to a purported policy paper from the Utah-based faith.").

[223] *See* Quezada, *supra* note 219.

[224] *See, e.g.*, Manya Brachear Pashman, *Cupich to Priests: No Entry for Immigration Agents Without Warrants*, CHI. TRIB. (Mar. 1, 2017, 5:30 PM), http://www.chicagotribune.com/news/local/breaking/ct-cardinal-cupich-immigration-directive-20170301-story.html [https://perma.cc/5587-VV5Z].

[225] *See* Villazor & Gulasekaram, *supra* note 20, at 20–21 (discussing a variety of legal strategies that churches have taken to maximize protection of noncitizens seeking sanctuary in their buildings).

"sensitive locations,"[226] and no members of the New Sanctuary Movement have been prosecuted under the harboring provision of the INA.[227]

C. Sanctuary Campuses

Sanctuary campuses are public or private institutions of higher learning that admit undocumented students[228] and resist efforts by federal agents to obtain information about these students or to conduct enforcement activities on campus.[229] As of this writing, about eighty campuses have adopted noncooperation policies.[230] Around sixteen have officially declared themselves to be "sanctuary campuses."[231] More commonly, universities

---

[226] *See* Memorandum from John Morton, *supra* note 2, at 1 (indicating that as a policy matter ICE will not enforce immigration law in "sensitive locations" such as churches).

[227] *See generally* 8 U.S.C. § 1324(a)(1)(A)(iii) (2012). *But see* Ryan Devereaux, *"We're Gonna Take Everyone"—Border Patrol Targets Prominent Humanitarian Group As Criminal Organization*, INTERCEPT (Apr. 30, 2018, 3:00 PM), https://theintercept.com/2018/04/30/were-gonna-take-everyone-border-patrol-targets-prominent-humanitarian-group-as-criminal-organization [https://perma.cc/66TD-E6JW] (reporting on arrest and lodging of federal harboring charges against Scott Warren, a volunteer with the Unitarian Universalist Church of Tucson-affiliated organization No More Deaths, for providing aid to migrants near the border).

[228] For examples of states allowing undocumented noncitizens to attend universities and, in some cases, qualify for in-state tuition, see CAL. EDUC. CODE § 68130.5 (West 2018); 110 ILL. COMP. STAT. 305/7e-5 (West 2015); KAN. STAT. ANN. § 76-731a (West 2004); NEB. REV. STAT. ANN. § 85-502 (West 2016); N.M. STAT. ANN. § 21-1-4.6 (West 2015); N.Y. EDUC. LAW § 6206 (McKinney 2018); TEX. EDUC. CODE ANN. § 54.052 (West 2005); UTAH CODE ANN. § 53B-8-106 (West 2002); and WASH. REV. CODE ANN. § 28B.15.012 (West 2018). A few states even allow unauthorized resident students to qualify for state scholarships to public universities. *See, e.g.*, CAL. EDUC. CODE § 66021.7 (West 2011); WASH. REV. CODE ANN. § 28B.92.010 (West 2014).

[229] *See generally* Julia Preston, *Campuses Wary of Offering 'Sanctuary' to Undocumented Students*, N.Y. TIMES (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/education/edlife/sanctuary-for-undocumented-students.html [https://perma.cc/QJU8-4424].

[230] Map of Sanctuary Campuses on Oct. 4, 2018, GOOGLE MAPS, https://www.google.com/maps/d/viewer?mid=1LcIME474-lYWbTf_xQChIhSSN30&hl=en&ll=36.2039797443434%2C-113.89148150000005&z=3 [https://perma.cc/ZW4Q-2K7X] (mapping United States campuses with sanctuary policies and roughly coding the strength of their expressed commitment); *see, e.g.*, Kathleen Megan, *Wesleyan Declares Itself a Sanctuary Campus for Undocumented Immigrants*, HARTFORD COURANT (Nov. 23, 2016, 6:00 AM), https://www.courant.com/education/hc-college--trump-sanctuary-1123-20161122-story.html [https://perma.cc/J5K2-L944] (reporting that Wesleyan University President Michael Roth publicly stated that Wesleyan "would not cooperate with any efforts to round up people, unless . . . forced to").

[231] Map of Sanctuary Campuses on Oct. 4, 2018, *supra* note 230; *see, e.g.*, Chris Lydgate, *Kroger Declares Reed a Sanctuary College*, REED MAG. (Nov. 18, 2016, 11:14 AM), http://www.reed.edu/reed_magazine/sallyportal/posts/2016/sanctuary-college.html [https://perma.cc/5VM4-RS6P]; Megan, *supra* note 230; Wim Wiewel, *Portland State Is a Sanctuary University*, INSIDE PSU, https://www.pdx.edu/insidepsu/portland-state-is-a-sanctuary-university [https://perma.cc/QBF8-6M7T] (declaring Portland State University to be a sanctuary campus, by university president); Resolution No. 161215-IX-346, City Coll. of S.F. Bd. of Trs., City College of San Francisco Joins the City and County of San Francisco in Affirming Its Sanctuary Status for all People of San Francisco (Dec. 15, 2016), http://www.ccsf.edu/BOT/2016/December/346r.pdf [https://perma.cc/CLR9-9MYE].

have simply implemented sanctuary-like measures, particularly policies that limit information sharing without a court order or deny federal enforcers campus access without a warrant.[232] Although less frequent, public schools are another emerging sanctuary site.[233]

As with other sanctuary entities, such measures have not gone without controversy and challenge. Lawmakers have introduced bills, for instance, that would deprive sanctuary campuses of various sources of funding.[234] Moreover, public universities and colleges are administered by employees of the state, and accordingly, it is possible that federal immigration law restricts their ability to limit information sharing with federal enforcers.[235] Yet, as Professors Rose Cuison Villazor and Pratheepan Gulasekaram observe, federal privacy laws, as well as the unique role of universities as "institutions . . . tasked with educating and protecting students," provide strong arguments that sanctuary campuses are operating on safe ground.[236] The Federal Education Rights and Privacy Act prohibits the disclosure of confidential student information to any third party,[237] at the risk of significant

---

[232] Map of Sanctuary Campuses on Oct. 4, 2018, *supra* note 230; *see, e.g.*, Aaron Holmes, *University to Provide Sanctuary, Financial Support for Undocumented Students*, COLUM. SPECTATOR, (Nov. 22, 2016, 7:54 PM), https://www.columbiaspectator.com/news/2016/11/21/university-provide-sanctuary-financial-support-undocumented-students [https://perma.cc/C6V8-M3ZY] (describing Columbia University's policies not to allow immigration authorities on campus without a warrant or to share student information unless subpoenaed).

[233] In May 2017, for example, an ICE agent attempted to apprehend a fourth grader at a public school in Queens, New York, but was turned away by school officials. Alex Eriksen, *ICE Agent Tried to Apprehend a 4th-Grader but Was Turned Away by the School*, YAHOO! LIFESTYLE (May 14, 2017), https://www.yahoo.com/lifestyle/ice-agent-tried-apprehend-4th-grader-turned-away-school-224058706.html [https://perma.cc/F6E9-HYQA]. Some schools have now undertaken policies that limit ICE's access to potentially deportable students or their information. *See, e.g.*, Rafi Schwartz, *New York City to ICE: Stay Out of Our Schools*, SPLINTER NEWS (Mar. 22, 2017, 12:36 PM), https://splinternews.com/new-york-city-to-ice-stay-out-of-our-schools-1793859239 [https://perma.cc/TFG4-PXA7] ("New York City Mayor Bill de Blasio announced that city school employees have been instructed to turn away Immigration and Customs Enforcement agency officials attempting to enter school buildings unless they presented a valid, judge-ordered warrant.").

[234] *See, e.g.*, No Funding for Sanctuary Campuses Act, H.R. 483, 115th Cong. (2017); H.B. 1042, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (died in committee); H.B. 37, 154th Gen. Assemb., Reg. Sess. (Ga. 2017) (passed); S. Enrolled Act 423, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017) (passed); H. File 265, 87th Gen. Assemb. (Iowa 2017) (introduced); S.B. 4, 85th Leg. Reg. Sess. (Tex. 2017) (passed); Brian Lyman, *Alabama House Approves 'Sanctuary Campus' Bill*, MONTGOMERY ADVERTISER (Feb. 14, 2017, 9:46 PM), https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/02/14/alabama-house-approves-sanctuary-campus-bill/97929404 [https://perma.cc/T3RN-H9WR] (reporting on passage of a bill that would authorize the state to withhold funds from sanctuary campuses).

[235] *See* 8 U.S.C. § 1373(a) (2012) (providing that no law can prevent "any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual").

[236] Villazor & Gulasekaram, *supra* note 44, at 31.

[237] 20 U.S.C. § 1232g(b)(1) (2012).

loss of funding,[238] and there is no reason to view information about immigration status as exempt from this restriction.

Additionally, because sanctuary campuses (both public and private) sometimes provide housing to undocumented students, they too might face prosecution for "harboring" undocumented immigrants in violation of Section 274 of the INA.[239] But liability under this provision seems unlikely for a number of reasons. First, although Congress has restricted the access of noncitizens to federal educational loans and other governmental benefits, the statute expressly allows states to pass laws that make "an alien who is not lawfully present in the United States . . . eligible for any State or local public benefit for which such alien would otherwise be ineligible."[240] A statutory scheme that permitted universities to openly enroll undocumented noncitizens pursuant to a valid state law but then held them criminally liable for providing housing to those same students would be exceedingly inconsistent, to say the least. On a related score, the Fifth Circuit recently observed that, as a general matter, "there is no reasonable interpretation by which merely renting housing or providing social services to an illegal alien constitutes 'harboring . . . that person from detection.'"[241] For all these reasons, one can surmise that the anti-harboring provision would not extend to this educational context, although it remains to be seen whether the government might nevertheless attempt to prosecute on this basis.[242]

IV. THE EQUITY-INFLUENCING DYNAMICS OF SANCTUARIES

The previous Part described the three main forms of sanctuary that have taken hold and showed that each has its own legal and policy justifications. This Part defends these resistance measures on more systemic grounds. I argue that when federal enforcers fail to exercise equitable discretion appropriately in a system that requires prosecutorial leniency in order to achieve proportionality and fairness, the locus of this discretionary need shifts yet further upstream—to the police, prosecutors, public defenders, churches, and other local institutions that encounter noncitizens before the federal government has the opportunity to take enforcement actions against

---

[238] *Id.* § 1234c(a).

[239] Villazor & Gulasekaram, *supra* note 44, at 31.

[240] *See* 8 U.S.C. § 1621(d) (titled "State authority to provide for eligibility of illegal aliens for State and local public benefits"); *id.* §§ 1611, 1623(a), 1641 (restricting undocumented persons' eligibility for federal educational loans).

[241] *See, e.g.*, Cruz v. Abbott, 849 F.3d 594, 602 (5th Cir. 2017) (omission in original).

[242] *See also infra* notes 344–46 and accompanying text (arguing that courts should endeavor to issue rulings that protect legitimacy-enhancing functions of sanctuaries in the face of government attempts to bring harboring prosecutions).

them. Thus, rather than subvert law, noncooperative sanctuary policies—public and private alike—can promote legitimacy in the removal system.

The current executors of the removal system see enforcement targets as interchangeable numbers or chits—nameless, faceless others, to be eliminated or reduced—rather than individual human beings with unique life stories and loved ones. But this way of thinking is a mistake and untrue to our better traditions of justice in this country. In a system that administers liberty-depriving sanctions like detention and deportation, individuals who have built lives in the United States over time should be able to expect particular, if not categorical, evaluation on equity grounds.[243] High stakes demand commensurate scrutiny, process, and understanding.[244] As in criminal law, immigration enforcement's "currency is ultimately life and death, prosperity and ruin, freedom and imprisonment."[245] Noncitizens—as human beings living, working, learning, and parenting in their communities—are entitled to contextualized consideration of the circumstances underlying both the basis of their potential deportation and the resulting consequences for themselves, their families, and their communities. Seen in this light, equitable discretion is essential to "complete justice."[246]

To avoid illegitimate consequences, enforcement determinations must consider not solely legality but also normative accuracy.[247] As Professor Josh Bowers has explained regarding the administration of criminal law, legal accuracy "attends to the rules," while normative accuracy "attends to the particulars."[248] Both are essential to the achievement of complete justice.[249] But when they are in conflict, normative concerns should usually prevail.[250] Operating in the context of the Trump Administration's indiscriminate, mass approach to immigration enforcement, the efforts of sanctuaries are particularly important to the achievement of normatively correct results,

---

[243] *Cf.* Bowers, *supra* note 79, at 212 ("[M]eaningful understanding is not asymmetric. Nor may we leave it to sovereign prerogative. We are *owed* understanding. It is our rightful claim. It is the job of all branches of government to deliver it." (footnote omitted)).

[244] Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (holding that as the stakes of the private interest affected rise in importance, so too must the procedures to guard against erroneous deprivations).

[245] Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 217 (2012).

[246] Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1664 (2017).

[247] Bowers, *supra* note 34, at 1019–21.

[248] Bowers, *supra* note 246, at 1664.

[249] Nussbaum, *supra* note 88, at 93–96 ("Equity may be regarded as a correcting and completing of legal justice." (internal quotation marks omitted)); Waldron, *supra* note 245, at 212 (arguing that to focus solely on "the clarity and determinacy of rules . . . is to slice in half, to truncate, what law and legality rest upon").

[250] Nussbaum, *supra* note 88, at 93 (observing that in Aristotelian accounts of justice, equity is superior to "strict legal justice"); Solum, *supra* note 87, at 194–207 (arguing that "the virtue of justice" is superior to strict legal justice).

though they also contribute to legal accuracy and procedural fairness in some cases.[251] The nature of the legitimacy-enhancing force varies with the type of sanctuary measure at issue. The following Sections elaborate on these points.

A. Equitable First-Level Screens

Sanctuary policies that limit cooperation or access for purposes of immigration enforcement erect a first-level equitable screen in the removal system. Enforcement systems administering sanctions as severe as banishment must somewhere afford the capacity to appreciate claims of equity, hardship, and mitigation.[252] However, criminal court sentencing judges and, for the most part, immigration judges no longer have much authority to adjust the application of deportation law, even in extremely compelling circumstances. At immigration officials' prerogative, moreover, many categories of noncitizens can be denied access to immigration courts altogether.[253] In the new regime, the gears are fixed, and executive officials control the equitable levers. When the eyes of these officials are closed to humanity and hardship, they ignore the contextual demands of immigration law. In such circumstances, it falls to local and state governments, public defenders, police and prosecutors, sentencing judges, and even private institutions like campuses and churches to erect equitable screens around noncitizens for whom removal would be disproportionate.

President Trump has described sanctuary city activities as the "unlawful nullification of Federal law."[254] But this analogy is imperfect. In the criminal context, nullification refers to an ex post decision to ignore state evidence presented in a formal prosecution that establishes a defendant's guilt beyond a reasonable doubt.[255] To be sure, sanctuary actions sometimes occur after

---

[251] *Cf.* William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2043 (2006) (recounting in a book review an interpretive approach to statutes that "considers the . . . normative context for applying the statute," such that "statutes will not be applied in ways that are unreasonable").

[252] *Cf.* Nussbaum, *supra* note 88, at 87–88, 92 (explaining why criminal justice systems should "refuse[] to demand retribution without understanding the whole story").

[253] Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 611–32 (2009) (analyzing the mechanisms that allow the government to remove noncitizens without utilizing the immigration adjudication process); Koh, *supra* note 25 (same).

[254] Elise Foley & Marina Fang, *White House, Trump Attack Judicial Branch Again by Misconstruing 'Sanctuary City' Ruling*, HUFFINGTON POST (Apr. 26, 2017, 10:57 AM), https://www.huffingtonpost.com/entry/trump-attacks-court-immigration-sanctuary-cities_us_590098e7e4b0af6d718a2d99 [https://perma.cc/6SUN-T4QB] (reporting that President Trump characterized sanctuary city policies as "engaged in the dangerous and unlawful nullification of Federal law").

[255] Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 253–54 (1996).

deportability has already been determined;[256] however, these instances are uncommon. Most often the impact of sanctuaries will be further upstream in the process, influencing which noncitizens come into contact with federal enforcers in the first place.

A more apt analogy from criminal law is that of the grand jury. In the case of criminal grand juries, "equitable charging discretion is not only institutionally acceptable but welcome and anticipated."[257] Although the role of subfederal actors in the removal system might at first blush seem to be quite distinct from the grand jury's role in the criminal system, a functional closer look reveals key similarities.[258] The federal immigration system rarely makes its own determination about whether a particular noncitizen is actually dangerous or likely to transgress societal norms. Instead, the enforcement scheme directly relies on local law enforcement actors to determine which noncitizens should be priorities for removal, using the proxies of arrest and conviction.[259] Thus, local law enforcement is already deeply enmeshed in the immigration enforcement scheme.[260]

Under the Trump Administration, federal enforcers undertake removal measures with precious little consideration of the noncitizen's character, conduct, and contributions. Local police, as well as other local officials and institutions such as schools and campuses, thus function as an upstream normative screen, determining whom to present and whom to shield from federal authorities. In effect, they operate as an equitable grand jury, deciding whether immigration enforcement is justified on moral or prudential

---

[256] Note also that deportability determinations occur through much thinner processes than those afforded criminal defendants, and the government enjoys a significantly more relaxed burden of proof. *See* Cade, *supra* note 5, at 14–17 (explaining the government's "clear and convincing" burden of proof and other procedural aspects of immigration court).

[257] Bowers, *supra* note 246, at 1672; *see also* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1269 n.19 (2006) (noting that "jury nullification . . . criticisms do not readily apply to grand juries, which have the valid power to decline prosecution even on meritorious criminal charges"); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 48 (2002) ("The term 'grand jury nullification' is . . . a misnomer because it equates the grand juror's *proper* exercise of discretionary judgment with a trial juror's *improper* decision to acquit those whom have been proven guilty.").

[258] For explorations of the similarities and differences between criminal and removal systems, see Cade, *supra* note 5, at 54–58; Austin T. Fragomen, Jr., *The "Uncivil" Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule*, 45 BROOK. L. REV. 29, 34–35 (1978); and Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 481–82 (2007).

[259] Cade, *supra* note 32, at 57; *see also* Cade, *supra* note 205, at 365 ("Although either federal or state convictions can fall within the INA's categories of deportable offenses, the federal government primarily depends on states and their criminal justice systems to determine in the first instance whether . . . immigrants are criminals and therefore deportable under federal law.").

[260] Villazor & Gulasekaram, *supra* note 44, at 39.

grounds.[261] Because the federal government already uses subfederal actors to generate what could functionally be described as immigration enforcement indictments, it is not a far stretch to acknowledge the appropriateness of the subfederal actor's corresponding role to provide an equitable screen in that same context.

Local authorities and laypeople may be better positioned to make these kinds of equitable determinations than one might initially surmise. Proportionality considerations are less about the determination of technical culpability than the evaluation of normative principles such as blameworthiness, social responsibility, fairness, hardship, and equality.[262] The determination of moral culpability and mitigation "arises out of the exercise of human intuition and practical reason, applied concretely to the particular offender and his act."[263] Whether the removal of a particular noncitizen is socially positive—for the immigrant, his family, and the broader community—is a highly contextual consideration.

Local institutions and entities are more in tune with local context and values than federal actors.[264] In this respect, police are not solely law enforcers; they are also caretakers of their communities. To be sure, institutional biases and constraints will always exert influence on decision-making by police and other law enforcement agents.[265] Nevertheless, like public defenders, prosecutors, and sentencing judges, police officers likely will be more in tune with local social norms and attitudes than technocratic lawmakers and federal enforcers, who operate at considerable geographic

---

[261] *Cf.* Bowers, *supra* note 246, at 1672 (arguing that grand juries should perform an equitable function in the criminal context).

[262] *Id.* at 1666 ("Laypeople are uniquely well suited to evaluate normative principles, like fairness, dignity, autonomy, mercy, forgiveness, coercion, and even equality.").

[263] Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel*, 1 VA. J. CRIM. L. 135, 136 (2012).

[264] Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698 (2017) (offering an extended and sympathetic defense of this point); *cf.* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 18 (1994) ("Local jurors . . . know the conscience of the community and can apply the law in ways that resonate with the community's moral values and common sense."); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1168 (1998) (arguing that local communities are as well-situated as anyone to evaluate whether enforcement tactics "embody a reasonable trade-off between liberty and order"); Lemos, *supra* note 95, at 750 ("[S]tate enforcement authority can help match enforcement policy to the preferences of local citizens.").

[265] For example, local law enforcement agencies rely on state and federal funding sources, whose preferences regarding immigration enforcement must be placated or negotiated. *See* Bowers, *supra* note 246, at 1659 (discussing law enforcement biases and institutional constraints that hamper the application of equitable principles). *See generally* Lai & Lasch, *supra* note 203 (describing the dynamics at play when state and local law enforcement accept federal funding).

and emotional detachment.[266] While local policymakers, police, and prosecutors are unlikely to let criminal activity by noncitizens (or anyone else) go unpunished, in sanctuary jurisdictions they may nonetheless conclude that in many cases tacking banishment onto the criminal sanctions would be a disproportional response. The call is even easier for the immigrant with no criminal record whatsoever. Although local police and local laws can also be decidedly anti-immigrant,[267] the argument that it is appropriate for local actors to act as normative grand juries in an era of mass immigration enforcement holds even if not all jurisdictions take up that responsibility.

Similarly, by shielding their undocumented students or congregation members from detection by the immigration enforcers, sanctuary campuses and churches reflect the conscience and ideals of at least a subsection of the local community. As organizations with community-based service missions, religious organizations and universities are less constrained by the institutional incentives and biases that can sometimes hamstring the decision-making of law enforcement agencies. On the other hand, they are less directly accountable to the public. Still, neither campuses nor congregations benefit by alienating their local communities, so their actions will either largely accord with local views or reflect a calculated decision that the removal of a particular individual would be sufficiently unjust to warrant the risk of community friction.

---

[266] This understanding underscores why the loss of the sentencing court remedy of the Judicial Recommendation Against Deportation (JRAD) was so significant, especially at the moment that immigration law broadened the deportation net for noncitizens with a criminal history. The JRAD did not require a technical understanding of immigration law. Rather, sentencing judges needed only a narrative understanding of individual blameworthiness and mitigation to make a determination that deportation was not warranted. *See generally* Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, IMMIGR. BRIEFINGS, Feb. 2014, at 1, 4–6 (describing the history and function of JRADs).

[267] *See generally* Cade, *Policing the Immigration Police*, *supra* note 78, (discussing police departments in North Carolina and Arizona that targeted noncitizens); S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1437 (2012) ("States and localities are increasingly considering and passing laws that create state immigration crimes, enact state immigration enforcement schemes, regulate the renting of property to certain noncitizens, penalize businesses for hiring unauthorized workers, and discriminate in the provision of public services."); Rodríguez, *supra* note 185, at 591–600 (describing a typology of state "restrictionist" measures); Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1378–89 (2013) (same). Empirical data suggest that anti-immigrant laws are largely a function of politics rather than levels of immigration or crime rates. PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 207–08 (2015) (showing that whether a particular local jurisdiction implements anti-immigrant laws is best predicted by the percentage of local voters registered as Republican and the presence of an enterprising politician seeking higher office).

B. Promotion of Procedural Fairness and Legal Accuracy

Other sanctuary measures further legitimacy norms at different stages of the immigration enforcement process. Churches and cities that provide legal screening, attorneys, and other resources to help noncitizens defend against removal proceedings, for example, contribute to legally accurate and procedurally just outcomes.

The full administration of the immigration laws requires more than attention to its enforcement provisions. The INA also provides for immigration benefits[268] and relief from removal.[269] Statutory pathways to status and defenses to removal are now quite narrow for undocumented persons inside the United States, as I have explained, but those limitations make it all the more important that immigration officials take care that those who are in fact eligible can access the remaining opportunities.[270] Where a

---

[268] *See, e.g.*, 8 U.S.C. § 1255 (2012) (concerning adjustment of status categories and procedures). *See generally* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42866, PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW (2014) (stating that in FY2013, 65.6% of the noncitizens who became legal permanent residents did so based on family ties); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 274, 297–98 (1996) (discussing how congressional legislation in 1965 made family reunification a central goal of the INA).

[269] *See, e.g.*, 8 U.S.C. § 1229b(a)–(b) (cancellation of removal for LPRs and non-LPRs); *id.* § 1157 (refugees), *id.* § 1158 (asylees); *id.* § 1101(a)(15)(T) (visas for victims of human trafficking); *id.* § 1101(a)(15)(U) (visas for certain crime victims); *id.* § 1101(a)(15)(S) (visas for certain criminal informants); *id.* § 1182(d)(5)(A) (humanitarian parole guidelines); *id.* § 1254 (temporary protected status); REAL ID Act of 2005, Pub. L. No. 109-13, Division B, 119 Stat. 231, 302 (codified as amended at 49 U.S.C. § 30301) (acknowledging deferred action as an appropriate basis for employment authorization).

[270] *Cf.* Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 20 (2017) (suggesting that, as with many other federally regulated fields, immigration officials should proactively help eligible noncitizens come into compliance with immigration law); Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 191 (2010) ("It also bears asking whether the government has a legitimate interest in deporting those who are not deportable, or in barring from discretionary relief those who are eligible."); Jason A. Cade & Mary Honeychurch, *Restoring the Statutory Safety-Valve for Immigrant Crime Victims: Premium Processing for Interim U Visa Benefits*, 113 NW. U. L. REV. ONLINE (forthcoming 2019) (suggesting that USCIS undertake an administrative reform that would improve the U visa process for undocumented victims of serious crime who aid law enforcement). Notably, when noncitizens are able to take advantage of a statutory means of regularizing their status, past immigration transgressions or violations are erased and completely forgiven, in stark contrast to the collateral consequences that forever follow a criminal conviction. *See* Kari Hong, *The Ten Parts of "Illegal" in "Illegal Immigration" That I Do Not Understand*, 50 U.C. DAVIS L. REV. ONLINE 43, 50 (2017) ("Immigration law's design is to forgive and forget any violation when remedies are available."); *cf.* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 755 (2011) ("The status imposed by conviction has become increasingly public, the sanctions generated by it have become more severe and harder to mitigate, and the number of people trapped in that status—usually for life—has ballooned."). In other words, if a person is able to obtain lawful permanent resident status, they are not penalized for previously having overstayed a visa or worked and lived in the United States without authorization. *See, e.g.*, 8 U.S.C. § 1255(c). Except where the statute sets out

noncitizen is entitled to relief under asylum law, for example, agents should help facilitate the claim.[271] Just as importantly, enforcement actions and policies should be just and fair, especially in a system that now eschews formal back-end proportionality measures.[272] Seen in this light, the Trump Administration's equity-blind enforcement approach does not conform to the Executive's proper role.[273] It is an approach that makes the current immigration scheme less, rather than more, legitimate.[274]

Furthermore, the rising use of fast-track mechanisms that bypass immigration court altogether portends inadequate process on a large scale.[275] The concerns about these "shadow" removals include absence of a neutral adjudicator, determination of complex immigration issues by nonattorneys, failure to provide most of the already limited substantive and procedural rights available in regular immigration proceedings, and inability to seek judicial review in many cases.[276] Without judicial review, the federal system lacks the means to correct the errors that inevitably result from such weak procedural protections.

Procedural deficiencies in removal proceedings—particularly with respect to fast-track deportation—offend one of the "elementary features of natural justice," which is the adjudicatory norm of "offering both sides an

specific bars on the basis of criminal history or immigration violations, Congress did not intend past infractions to be held against individuals who are nevertheless eligible for status or relief.

[271] Matter of S-M-J-, 21 I. & N. Dec. 722, 723, 727 (B.I.A. 1997) (stating that government enforcement agents "bear the responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim"). Historically, at least, attorneys for the agency charged with prosecuting removal were trained to support adjudicatory relief where legally merited. *See* Cade, *supra* note 5, at 23 & n.11 (quoting David Martin, former general counsel to both DHS and the INS).

[272] *See generally* ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 898–943 (8th ed. 2016) (discussing due process rights, such as representation by adequate counsel (at no expense to the government), opportunities to present evidence, language-access, reasonable accommodations for disabilities, and the government's burdens of proof); Cade, *supra* note 5, at 22–23 (discussing procedural protections in immigration court); Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1575 (2014) (same).

[273] *See* Sohoni, *supra* note 77, at 49 (arguing that enforcement "crackdowns" can resemble "lawmaking" more than law enforcing).

[274] *See, e.g.*, Reid v. INS, 949 F.2d 287, 288 (9th Cir. 1991) (commending the government's immigration prosecutor for conceding error, in light of the principle that "the government has an interest only in the law being observed, not in victory or defeat in any particular litigation"); LIPSKY, *supra* note 89, at 15 (arguing that "society seeks not only impartiality from its public agencies but also compassion for special circumstances and flexibility in dealing with them").

[275] Koh, *supra* note 25, at 183–84.

[276] *Id.* at 194, 222–31. *See generally* Amanda Frost, *Learning from Our Mistakes: Using Immigration Enforcement Errors to Guide Reform*, 92 DENV. U. L. REV. 769 (2015) (arguing that errors occur in immigration removal because low-level officials are asked to administer complex and ambiguous immigration laws rapidly, without sufficient training or oversight).

opportunity to be heard."[277] For Professor Jeremy Waldron, rule of law values include not just settled rules and predictability, but also a true opportunity for moral deliberation and argumentation.[278] As Professor Tom Tyler's work has shown, "[p]eople want to have the opportunity to tell their side of the story in their own words before decisions are made about how to handle the dispute or problem."[279] The Trump Administration's expansion of procedurally stunted rapid removal measures thus implicates both legal accuracy and procedural justice norms, which are particularly important when something as significant as banishment is on the line.

Sanctuary measures ensuring that noncitizens enjoy the benefit of counsel help combat these procedural threats. Multiple studies have shown that attorneys make a critical difference in immigration court outcomes in the modern system.[280] Represented noncitizens are three to five times more likely to prevail, according to several of these studies. Attorneys can help noncitizens hold ICE to its burden of proof, contest the accuracy of charges, ensure that court appearances are not missed, secure release from detention, and help establish eligibility for the remaining forms of relief from

---

[277] Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 55–56 (2008). *See generally* ALEINIKOFF ET AL., *supra* note 272, at 946–54 (discussing fast-track removal).

[278] Waldron, *supra* note 277, at 5, 8, 58–59.

[279] Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30 (2007); *see also* Bowers, *supra* note 79, at 195 ("[T]he idea of 'voice' entails an individual's awareness not only that her reasonable concerns are going to be considered, but also that her reasonable perspective might be brought to bear to resolve any ambiguities of law and fact.").

[280] *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (analyzing 1.2 million deportation cases to demonstrate that only 14% of detained immigrants were able to secure representation and that immigrants with attorneys were 5.5 times more likely to obtain relief from removal); Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363–64 (2011) (reporting a study in which only 18% of detained noncitizens with counsel and 3% without counsel were successful in removal proceedings, in contrast to a win rate of 74% for nondetained (or released) noncitizens with counsel and 13% without counsel); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (presenting research suggesting that asylum seekers represented by counsel were about three times more likely to prevail than those who were unrepresented); Andrea Saenz, *The Power of 1000: Updates from the Nation's First Immigration Public Defender*, CRIMMIGRATION (July 14, 2015, 4:00 AM), http://crimmigration.com/2015/07/14/the-power-of-1000-updates-from-the-nations-first-immigration-public-defender [https://perma.cc/K24B-CS6P] ("The early data indicate that the presence of NYIFUP counsel increases a detained client's chance of success in their removal case ten times over, or by as much as 1000%."); *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court "Women with Children" Cases*, TRAC IMMIGRATION (July 15, 2015), http://trac.syr.edu/immigration/reports/396 [https://perma.cc/P4TN-CS9M] (finding that women and children were more than fourteen times more likely to avoid a deportation order and be permitted to remain in the country when represented in removal proceedings).

removal.[281] Similarly, when sanctuaries help noncitizens subject to summary procedures assert their claims with the help of legal representation—or avoid apprehension altogether—they help counter the consequences of fast-track mechanisms operating with a high probability of error.

C. Last-Resort Circuit-Breakers

Finally, religious congregations offering shelter to noncitizens facing impending removal can act as a last-resort "circuitbreaker in the State's machinery of" injustice, to paraphrase the Supreme Court.[282] By providing shelter and negotiation on behalf of those for whom formal processes have expired, but who nevertheless have compelling legal or equitable claims, church sanctuaries disconnect, at least temporarily, the wiring of the deportation machine.

Notably, in a number of cases covered by the media, this kind of sanctuary activity has eventually jolted federal authorities into doing the right thing.[283] Jeanette Vizguerra's case, with which I began this Article, provides an example. To be sure, Vizguerra's removal was authorized under law, although it was not legally required. She had (and continues to have) a pending path to lawful status on the basis of having been a serious crime victim who assisted law enforcement, among other factors. Although there is a lengthy backlog in the adjudication of U applications due to the annual statutory cap of 10,000, the agency is authorized to conditionally approve

---

[281] *See generally* Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475 (2015) (discussing the impact of zealous representation in immigration court and calling upon the immigration bar to establish norms of zealous advocacy).

[282] Blakely v. Washington, 542 U.S. 296, 306–07 (2004).

[283] *See also* Mary O'Leary, *Undocumented Immigrant Who Took Sanctuary in New Haven Church Granted Stay of Deportation*, NEW HAVEN REG. (July 26, 2017, 5:36 PM), https://www.nhregister.com/connecticut/article/Undocumented-immigrant-who-took-sanctuary-in-New-11729234.php [https://perma.cc/8L7D-VQY5] (describing how a church decision to offer sanctuary to a woman living in the United States for twenty-four years resulted in an immigration judge granting a stay); Carolina Pichardo, *Guatemalan Immigrant Who Took Refuge at Church Granted Stay of Deportation*, DNA INFO (Aug. 22, 2017, 6:46 PM), https://www.dnainfo.com/new-york/20170822/washington-heights/amanda-morales-guerra-guatemala-refugee-deportation [https://perma.cc/CJ43-AQGC] ("The undocumented Guatemalan immigrant with three young kids who last week took refuge at a church on West 179th Street to avoid deportation has been granted a temporary reprieve in her quest to remain in the country, officials said."); *Mother from Peru Granted Stay from Deportation*, BUS. INSIDER (May 21, 2017, 3:48 PM), http://www.businessinsider.com/ap-mother-from-peru-granted-stay-from-deportation-2017-5 [https://perma.cc/AE4W-2GGM] ("A mother of two children who sought sanctuary at a Quaker meeting house in Denver to avoid U.S. immigration authorities has been granted a temporary stay from deportation."); *Woman Who Took Sanctuary in Church Gets One-Year Reprieve*, BOS. 25 NEWS (June 11, 2018, 2:28 PM), https://www.boston25news.com/news/massachusetts/woman-who-took-church-sanctuary-granted-stay-of-deportation/767552821 [https://perma.cc/E9JC-X5RZ] ("A woman who took sanctuary in a Massachusetts church to avoid deportation to her native Peru has been granted a one-year stay of removal by federal immigration officials.").

any "bona fide" applicant and grant deferred action and work authorization in the interim.[284] Moreover, the backlog itself has resulted in part from the agency's failure to issue implementing regulations for more than seven years after Congress first created the U visa.[285] Thus, the federal government's failure to devote adequate resources to this form of relief is in large part the reason that Vizguerra and tens of thousands of other U applicants continue to be present without authorization. Accordingly, the efforts of Vizguerra's church, which eventually resulted in a stay of removal until her U visa could be adjudicated, arguably led to a more legally accurate outcome.

But deportation is also normatively unjustifiable in Vizguerra's case because of the tremendous equities in her favor and the hardship that deportation would cause to her and her family. By breaking the circuit in the deportation machinery and allowing negotiations to continue on Vizguerra's behalf, her unjust removal from the country was averted.[286]

D. Spheres of Protected Autonomy

Sanctuaries also promote other legitimizing norms worthy of consideration. One way they do so is by enabling protected autonomy. They help guard against unlawful intrusions on the daily lives and lawful activities of persons suspected to be deportable (which, of course, sometimes includes U.S. citizens[287]). It is beyond the scope of this Article to explore the constitutional rights of noncitizens in detail, but a few highlights will help illustrate the role that sanctuaries can play in protecting against illegitimate incursions on spheres of autonomy.

The fact that a person is (or might be) removable from the United States on the basis of civil immigration violations or criminal history does not extinguish the person's constitutional right to be free of unreasonable

---

[284] Immigration and Nationality Act, Pub. L. No. 110-457, § 214(p)(6), 122 Stat. 5044, 5053 (2008) (codified as amended at 8 U.S.C. § 1184(p)(6) (2012)) ("The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U)."); 8 C.F.R. § 214.14(d)(1)–(2) (2018). *See generally* Cade & Honeychurch, *supra* note 270.

[285] Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 912 (2008).

[286] *Cf.* Pichardo, *supra* note 283 ("'Amanda is not hiding. Amanda is taking sanctuary and is seeking the justice that has been denied,' Juan Carlos Ruiz, a Lutheran minister and organizer for the Sanctuary Coalition, said Monday.").

[287] Paige St. John & Joel Rubin, *ICE Held an American Man in Custody For 1,273 Days. He's Not the Only One Who Had to Prove His Citizenship*, L.A. TIMES (Apr. 27, 2018, 5:00 AM), http://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html [https://perma.cc/J64N-SY7A] ("But Immigration and Customs Enforcement agents repeatedly target U.S. citizens for deportation by mistake, making wrongful arrests based on incomplete government records, bad data and lax investigations, according to a Times review of federal lawsuits, internal ICE documents and interviews.").

searches and seizures or to engage in other lawful life activities. One of the most important, but largely overlooked, takeaways from *Arizona v. United States* is what that decision revealed about the Supreme Court's view that even deportable noncitizens should be able to engage in lawful daily life activities without fear of unlawful government intrusion in furtherance of immigration enforcement.[288] Justice Kennedy's opinion for the majority emphasized the "significant complexities" of federal immigration law and the "immediate human concerns" raised by factors such as "[u]nauthorized workers trying to support their families."[289] Throughout its opinion, the Court reiterated the principle that noncitizens who are not removal priorities under the federal government's enforcement policies should not be subjected to "unnecessary harassment" by state or local officers.[290]

Most revealing on this particular point was the Court's analysis of the single challenged state provision to survive preemption—a show-me-your-papers law allowing state officers to make a reasonable attempt to determine the immigration status of persons who have been stopped on some other legitimate basis if the officer reasonably suspects the person might be unlawfully present.[291] The Court made clear the Fourth Amendment governs these encounters and that such encounters cannot be initiated or prolonged in ways that violate the Constitution, regardless of the individual's underlying immigration status.[292] As the Court stated, "it is not a crime for a removable alien to remain present in the United States. If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent."[293]

Similarly, in *INS v. Lopez-Mendoza*, the Court recognized noncitizens' legitimate expectation to be free of Fourth Amendment violations by federal immigration agents, even going so far as to require immigration judges and federal courts to ignore evidence of an immigrant's removability where it was obtained through enforcement practices resulting in either egregious or

---

[288] 567 U.S. 387, 406–09 (2012). That case concerned an omnibus law authorizing or requiring state actors to engage in various immigration enforcement activities, which the Court largely struck down on preemption grounds. *Id.* at 393–94, 403, 407, 410. *See generally* Cade, *Judging Immigration Equity*, *supra* note 31, at 1042–49 (discussing the *Arizona* decision).

[289] *Arizona*, 567 U.S. at 396, 409.

[290] *Id.* at 408; *see also id.* at 402, 407, 410.

[291] *Id.* at 411–15.

[292] *Id.* at 411, 413–14 (citation omitted); *see also* Cade, *Policing the Immigration Police*, *supra* note 78, at 189–90 (discussing this aspect of *Arizona*); Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L. J. 125 (2015) (applying Fourth Amendment law to the immigration arrest and detainer context).

[293] *Arizona*, 567 U.S. at 407 (citation omitted).

widespread violations of the Fourth Amendment.[294] Subsequently, numerous lower federal courts have elaborated on this holding.[295]

The freedom of noncitizens—even those present in the United States without authorization—to lawfully engage in civic and community life emanates from other precedential touchstones, too. In *Plyler v. Doe*, for example, the Court found that parents have a constitutionally protected right to send their undocumented children to public school.[296] Similarly, the Court has limited the authority of states to deny, on the basis of immigration status alone, access to other services for which noncitizens are otherwise eligible.[297] Finally, federal law does not directly prohibit undocumented noncitizens from working and expressly authorizes work as an independent contractor or business owner.[298]

Thus, when immigration agents (or their subfederal deputies) conduct home raids and workplace raids that do not adhere to the constraints of the Fourth Amendment or engage in enforcement activities in hospitals, courthouses, and other places where noncitizens are engaging in or assisting with vital community services, these constitutionally protected areas of autonomy are threatened.[299] The problem is magnified in areas where local

---

[294] 468 U.S. 1032, 1050–51 (1984)*; see also* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1624–27 (2010) (same); Elias, *supra* note 174, at 1115 (discussing this aspect of *Lopez-Mendoza* and arguing that Fourth Amendment violations have now become widespread in immigration enforcement); Kagan, *supra* note 292, at 147 n.159; *see also* Cade, *Policing the Immigration Police*, *supra* note 78, at 183 (arguing that Executive Branch officials are constitutionally obligated to uphold the Fourth Amendment even where the violation is not per se egregious).

[295] *See, e.g.*, Yanez-Marquez v. Lynch, 789 F.3d 434, 450 (4th Cir. 2015); Oliva-Ramos v. Attorney Gen., 694 F.3d 259, 271–72 (3d Cir. 2012); Kandamar v. Gonzales, 464 F.3d 65, 70 (1st Cir. 2006); Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).

[296] 457 U.S. 202, 230 (1982).

[297] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that states have "no 'special public interest'" in limiting to citizens the expenditure of tax revenues to which aliens had contributed); Truax v. Raich, 239 U.S. 33, 43 (1915) (holding that Arizona could not restrict the employment of aliens); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that discrimination on the basis of immigration status in the application of criminal ordinances violates equal protection).

[298] *See* 8 U.S.C. § 1324(a)(3)(A) (2012) (prohibiting employers from *hiring* workers without federal authorization, but not prohibiting unauthorized work itself); 8 C.F.R. § 274a.1(f) (specifying that federal law does not prohibit unauthorized work if done as an independent contractor or business owner). *See generally* Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243 (2017) (providing a historical overview of unauthorized noncitizens' right to work in this country); Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617 (2018) (explaining the current legal landscape regarding unauthorized noncitizens' right to work).

[299] *See, e.g.*, Adolfo Flores & Chris Geidner, *A DREAMer Was Arrested During a Raid and Now Immigration Officials Have Been Ordered to Explain Why*, BUZZFEED NEWS (published Feb. 14, 2017, 8:43 PM; updated Feb. 15, 2017, 7:33 PM), https://www.buzzfeed.com/adolfoflores/immigrations-officials-ordered-to-defend-arrest-of-dreamer [https://perma.cc/6E82-X7UH]; Michael Matza, *After ICE Raid at Chesco Mushroom Farm, Anxiety High Among Immigrant Workers*, PHILA.

law enforcement and other authorities work in tandem to turn arrests and civic encounters into removal actions wherever possible.[300]

Measures limiting local roles in immigration policing guard against these incursions. By providing an equitable screen that limits the access and information of federal enforcers, these policies enable noncitizens and their families to operate within autonomous spaces with less fear of unconstitutional (and therefore illegitimate) interference. Within the boundaries governed by the particular sanctuary measures, at least, noncitizens can operate with certain expectations regarding enforcement such that, for the most part, they can continue to engage in the life and institutions of the community.[301] This relative predictability facilitates the human flourishing that underlies the basis for the protection of various autonomy interests.[302]

Sanctuaries ward against rights violations for U.S. citizens and lawful permanent residents (LPRs), too, especially those who do not have white European ancestry.[303] As a consequence of show-me-your-papers laws, local immigration force multipliers, and race-based immigration stops, even

---

INQUIRER (May 7, 2017, 7:00 AM), http://www.philly.com/philly/news/ice-raid-mushroom-fear-deport-chester-county.html [https://perma.cc/7HGZ-W3VR]; Lisa Rein et al., *Federal Agents Conduct Immigration Enforcement Raids in at Least Six States*, WASH. POST (Feb. 11, 2017), https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html [https://perma.cc/55HA-XF7S]; Andrew Selsky, *Activist: Immigration Officers Detain 10 Workers in Oregon*, ASSOCIATED PRESS (Mar. 1, 2017), https://apnews.com/88fd12ab02124e17968a8068bc85a3dd [https://perma.cc/T3PE-TWPF]; David Wickert, *Georgia Immigration Arrests Spark Sharp Responses*, ATLANTA J.-CONST. (Feb. 11, 2017), https://www.ajc.com/news/local/georgia-immigration-arrests-spark-sharp-responses/Vy6VksCEdGkgctSQwKB14L [https://perma.cc/MS8T-9VJ7]; *see also supra* note 163 (citing media reports of enforcement actions in courthouses and hospitals).

[300] *See supra* notes 170–74, 195–98, 291–93 and accompanying text (discussing joint federal–state enforcement efforts and correlations between an amplified local role in immigration policing and constitutional rights violations).

[301] *Cf.* Stuntz, *Unequal Justice*, *supra* note 60, at 2039 ("[W]hen prosecutors have enormous discretionary power, giving other decisionmakers discretion promotes consistency, not arbitrariness. Discretion limits discretion; institutional competition curbs excess and abuse.").

[302] Bowers, *supra* note 79, at 144 (arguing that the ability to "plan[] affairs" without state interference is "a tool for self-discovery and expression" and emphasizing that "to know what the state *may not do* is to know not only what I *may do* but also to ponder and pursue who I *am* and what I may *become*"); *see also* JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986) ("The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives."); Bezdek, *supra* note 22, at 917 n.54 (explaining that "liberation theologians hold as a central tenet the right and capacity of the common people to become active, creative agents of their own history"); Christopher Heath Wellman, *Toward a Liberal Theory of Political Obligation*, 111 ETHICS 735, 738 (2001) (arguing that liberty from state intrusion "implies that each autonomous individual has a right to decide which self-regarding benefits to pursue").

[303] *See* 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) (arguing that our treatment of noncitizens affords a window into current racial attitudes more broadly).

citizens and LPRs—if they appear Latino—are less able to make plans, engage with community institutions, or otherwise carry out their lives because of the constant specter of state intrusion on suspicion of unlawful presence. Stops based solely on race-based suspicion of unlawful presence offend bedrock principles of legality and liberty.[304] In Professor Herbert Packer's words: "It is important, especially in a society that likes to describe itself as 'free' and 'open,' that a government should be empowered to coerce people only for *what they do* and not for *what they are*."[305] Decoupling immigration from local law enforcement thus can help avoid racial profiling and other distortions that arise from the integration of the two systems.[306] In this way, sanctuaries protect not just the legitimate expectations of undocumented residents but also those with citizenship or lawful status.

The efficacy of cooperation-limiting policies in protecting against incursions on spheres of autonomy is enhanced where sanctuary jurisdictions also have implemented various integrative measures. Some jurisdictions, for example, have facilitated noncitizen residents' access to community life by making available driver's licenses and identity cards. Twelve states and the District of Columbia allow all residents who meet the requirements to obtain driver's licenses, even those who are unauthorized.[307] Because of restrictions

---

[304] HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 98 (1968) (arguing that arrests "for investigation" or "on suspicion" offend the principle of legality, even where the individual is held "only for a few minutes").

[305] *Id.* at 74 (emphasis added).

[306] *See, e.g.*, Edgar Aguilasocho et al., *Misplaced Priorities: The Failure of Secure Communities in Los Angeles County*, IMMIGRANT RTS. CLINIC, U.C. IRVINE SCH. L. 16–18 (2012), http://www.law.uci.edu/academics/real-life-learning/clinics/MisplacedPrioritiesaguilasocho-rodwin-ashar.pdf [https://perma.cc/E7QZ-2G79] (noting increased racial profiling in policing in Los Angeles County following the implementation of the Secure Communities program); Amanda Armenta, *Between Public Service and Social Control: Policing Dilemmas in the Era of Immigration Enforcement*, 63 SOC. PROBS. 111, 121 (2016) (showing with two years' worth of data that the 287(g) program implemented in Nashville, Tennessee led to significant racial profiling and public trust concerns); Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, 5 J. ON MIGRATION & HUM. SECURITY 645, 646 (2017) (finding that a 287(g) program in Frederick County, Maryland led to a "significantly higher number of arrests of Hispanics by the Sheriff's Office than would have occurred in its absence"); Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, CHIEF JUST. EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY 1 (2009), https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf [https://perma.cc/BLG9-NF3Y] ("[I]mmediately after Irving, Texas law enforcement had 24-hour access . . . to ICE in the local jail, discretionary arrests of Hispanics for petty offenses—particularly minor traffic offenses—rose dramatically."); Cade, *supra* note 47, at 1796–1811 (describing distortions in immigration law and criminal law that arise through the convergence of the two systems).

[307] Adam Hunter & Angelo Mathay, *Driver's Licenses for Unauthorized Immigrants: 2016 Highlights*, PEW CHARITABLE TR. (Nov. 22, 2016), https://www.pewtrusts.org/en/research-and-analysis/articles/2016/11/22/drivers-licenses-for-unauthorized-immigrants-2016-highlights [https://perma.cc/R6DN-AEZ7].

posed by the federal REAL ID Act of 2005,[308] the licenses that most of these states issue to undocumented noncitizens are visibly distinguishable and limited to state or local use.[309] Nevertheless, when undocumented noncitizens are able to obtain driver's licenses, it can have a "transformative effect . . . , enabling them to drive without fear of being stopped by state or local police, arrested, detained, or fined, and thereby facilitating their daily access to work, friends, and family."[310] The related provision of municipal identity cards to unauthorized noncitizens increases access to local services such as police assistance, school enrollment, libraries, parking, bank and pharmacy accounts, and other community benefits.[311] In turn, engagement with these institutions can help noncitizens develop ties, equities, and evidence that eventually may be valued by formal immigration law.[312]

E. Narratives and Norms

Finally, sanctuaries provide an important voice in the contest of narratives about noncitizens and their place in this country. In the view expressed (or at least implied) by some sanctuary entities, a mass, indiscriminate approach to immigration enforcement harms our shared humanity. Some feel that to ignore or accommodate this approach is to

[308] REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2), 109 Stat. 231, 312–13 (codified as amended at 49 U.S.C. § 30301 (2012)) (prohibiting the provision of regular driver's licenses to undocumented individuals and imposing restrictions on licenses for nonimmigrant visa holders but allowing standard licenses for recipients of deferred action).

[309] Elias, *supra* note 185, at 835–36 (describing the differences in license design in the states that allow unauthorized or conditionally present noncitizens to obtain driver's licenses).

[310] *Id.* at 837; Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 440 (2018) ("A driver's license also greatly reduces the likelihood that a routine traffic stop will trigger an immigration status check and possible arrest, detention, and removal — thus a license represents non-enforcement."); *see also* SAMEER M. ASHAR ET AL., UNIV. OF CAL. IRVINE SCH. OF LAW, LEGAL STUDIES RESEARCH PAPER SERIES NO. 2016-05, *NAVIGATING* LIMINAL LEGALITIES ALONG PATHWAYS TO CITIZENSHIP: IMMIGRANT VULNERABILITY AND THE ROLE OF MEDIATING INSTITUTIONS 34 (2015) ("All residents of Southern California must contend with urban sprawl, but the effects of geographic distance were exacerbated by the inability of many undocumented residents to obtain a driver's license. As mentioned previously, A.B. 60, enables undocumented immigrants to secure California driver's licenses, and a large number of our constituent interviewees gave unprompted and unequivocal statements about the importance of these licenses in their daily lives."); Campbell, *supra* note 189, at 114 (explaining that in some locations the lack of a driver's license also frequently leads to the impoundment of immigrants' cars).

[311] Elias, s*upra* note 185, at 840–41; Campbell, *supra* note 189, at 114–15.

[312] *See, e.g.*, MOTOMURA, *supra* note 67, at 111 ("[A]ffiliation arguments grow in strength as unauthorized migrants develop ties and make contributions to American society over time."); Stumpf, *supra* note 141, at 1712–20 (discussing various ways that time is valued in immigration law).

condone it.[313] For others, public safety concerns motivate sanctuary efforts.[314] To be sure, there may be a gap between a sanctuary entity's real and publicly expressed motivations, possibly for strategic reasons. But at the end of the day, the underlying impetus is less important than the overall effect. All sanctuaries, by visibly resisting the Trump Administration's approach in principled and transparent ways, promote competing norms of justice and empathy in the national dialogue.[315]

The legitimacy problem created by the failure to implement equitable discretion at the federal level is magnified in jurisdictions where local enforcers seek to cooperate with (or even expand on) federal immigration enforcement priorities. Lack of institutional competition expands the possibility of arbitrariness, excess, and abuse. Defensive sanctuary policies, on the other hand, constrain federal excess and capriciousness. Thus, recognizing the discretion possessed by subfederal actors in this context helps counteract immigration law's growing legitimacy problem. "Discretion limits discretion."[316] Moreover, as noted, local actors are at least as well-situated to make equitable judgments about persons in their community as are detached and geographically distant federal enforcers.[317]

Cities, churches, and campuses engaging in sanctuary activities have a particular gravitas that lends weight to their dissent.[318] Their integral roles in

---

[313] BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 50 (2006).

[314] *See supra* notes 189–93 and accompanying text (explaining the public safety rationale for sanctuary city policies and citing examples).

[315] *See* Bezdek, *supra* note 22, at 913 ("The commitment of the State to its law is indicated by the narratives it chooses, but the law of refugees, and the law of citizen conscience unfettered by the government's preferences, are also parts of the construction of legal meaning."); *see also* ROBERT COVER, *Nomos and Narrative*, *in* NARRATIVE, VIOLENCE, AND THE LAW 95, 98–99 (Martha Minow et al. eds., 1992) ("The normative universe is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments—of officials and of others—do determine what law means and what law shall be.").

[316] Stuntz, *Unequal Justice*, *supra* note 60, at 2039.

[317] *See also* Cade, *supra* note 205, at 385–405 (making similar arguments about state-level pardons for deportable noncitizens); Cade, *Return of the JRAD*, *supra* note 32, at 50 (making similar arguments about criminal court JRADs, deferred adjudication, and expungements). To be sure, this claim holds most true with respect to macro-level policy decisions by distant technocrats. But as the current Administration has tightly constrained the ability of local ICE field officers to defer enforcement on equitable grounds, it matters little how well-aligned that local officer might be with the norms of her community. *See, e.g.*, Minutes for AILA/ICE Liaison Meeting on October 26, 2017, *supra* note 158, at 2 ("On a case-by-case basis in extraordinary circumstances, the Chief Counsel may – *with the concurrence of the NTA issuing agency* (i.e. USCIS, CBP, ICE ERO or ICE HSI) – agree to administratively close or dismiss a case.").

[318] Villazor & Gulasekaram, *supra* note 44, at 49 ("These institutions have missions that are meant to serve their immediate community, but are also tied to broader responsibilities to the nation, the world, and to notions of social justice. . . . For universities, that gravitas comes from long-established reputations as research and policy centers with expertise in the field; for churches, it is the moral heft of serving vulnerable populations.").

the community, as well as the various legal protections they are afforded, allow them the independence to assert contrasting views, thereby communicating "powerful reminders to community members that anti-sanctuary views are not consensus perspectives."[319] For law enforcement agencies in particular, the fact that they have the authority to help the federal government enforce immigration law, but choose not to, endows their competing narrative with special clout.

Conceptualized this way, sanctuary efforts should be viewed not as the "demonstrative acts" of civil disobedience but rather as initiatives that both implement a more just conception of law and actively reshape norms in a longer conversation about immigration policy.[320] The resonance of sanctuary efforts emanates from a sustained alternative interpretation of federal law.[321] In Professors Villazor and Gulasekaram's words, sanctuaries are "stakeholders in the project of immigration regulation," whose policies "function as negotiations and contestations with the federal government's current enforcement regime."[322] Law consists of more than rules on paper.[323] Narratives give the law its meaning, and our shared understandings of right and wrong are contingent and dependent upon the creative activities of the stakeholders interpreting the law.[324] If sanctuaries continue to sustain alternative interpretive efforts, and if the stories of the sympathetic individuals and families they helped continue to be shared, the significance

---

[319] *Id.* ("Moreover, these institutions can couple this heft with the ability – either because of how they finance themselves or their constitutional protections – to stand apart from the majoritarian politics of their municipality or state. . . . Their reputations in the community enable them to question and undermine the legitimacy and desirability of the state's hard sanctions.").

[320] Bezdek, *supra* note 22, at 973 (making this observation about earlier sanctuary movements); Villazor & Gulasekaram, *supra* note 44, at 52 (explaining that sanctuaries can "serve the critical governance functions of norm-creation and swaying public perception").

[321] *See also* Villazor & Gulasekaram, *supra* note 44, at 56 ("What mostly links these multi-faceted sanctuaries – from states to localities and agencies to schools to churches – is not their claim to be the final decisionmaker over a jurisdiction, but rather that all of them are registering dissent against the current federal administration's immigration policy.").

[322] *Id.* at 33; *see also* Bezdek, *supra* note 22, at 971 (describing the 1980s Sanctuary "Movement as a heroic epic, challenging entrenched policies and policymakers with a contrary normative understanding, and enabling citizens to insist on changing those policies of exclusion").

[323] Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983) ("Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.").

[324] *Id.* at 4 ("We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."); *see also* Susan L. Waysdorf, *Popular Tribunals, Legal Storytelling, and the Pursuit of a Just Law*, 2 YALE J.L. & LIBERATION 67, 68 (1991) (arguing that "legal storytelling can provide the nexus between justice-seeking values and the narrative form, within the context of more traditional legal discourse").

of the movement will transcend equitable results in individual cases, ultimately shaping and refining underlying norms and policies.[325]

Finally, sanctuaries may further legitimacy norms by counteracting a growing distrust regarding the ability of the immigration enforcement system to achieve just results. As Professor Emily Ryo has shown, the experiences of long-term immigrant detainees are leading them to develop and disseminate legal cynicism about the legitimacy of the deportation system on a widespread basis.[326] Those most affected by the system perceive the "law in action" to be punitive, inscrutable, and arbitrary.[327] This cynicism is problematic for numerous reasons, not the least of which is that it leads individuals to opt out of the legal system altogether, even those with meritorious claims.[328] To the extent that sanctuary activities inject some modicum of fairness and equity into the federal removal system and its subfederal criminal law adjuncts, they work against this growing legal cynicism, at least on a local level.

* * *

When federal enforcers neglect to implement immigration law equitably, such concerns devolve further upstream in the removal process. As this Part has explained, the local officials and institutions that interact with noncitizens before they come into the hands of ICE have the opportunity to engage in measures that provide temporary or permanent relief in multifaceted ways. Some of these efforts prescreen noncitizens, albeit in roughshod fashion, relying on local norms and context to determine whom, if anyone, to subject to immigration enforcement. Others promote procedural and legal accuracy. Still others break the enforcement circuit when there appear to be no other legal options to permit necessary reconsideration. Further, sanctuary efforts help enable constitutionally protected autonomy, for noncitizens and citizens alike. And finally, these efforts help shape the narratives about immigrants and immigration law, both locally and on the

---

[325] Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749–51, 2759–60 (2014) (describing a collective action mechanism they call "demosprudence" through which "mobilized constituencies, often at the local level, challenge basic constitutive understandings of justice in our democracy").

[326] *See* Ryo, *supra* note 42.

[327] *Id.* at 1003, 1024–48.

[328] *Id.* at 1049; *see also id.* at 1050–51 (explaining that legal systems that create cynicism impart antisocial and anti-rule of law policy messages which can be diffused to wider circles than the affected individual). To be sure, this cynicism may in fact be an intentional aspect of the design of President Trump's policies; it may be hoped to be a deterrent for those contemplating illegal (and possibly legal) migration.

national stage, in ways that ultimately may result in more fairness and proportionality on a macro level.

V. SANCTUARY-BASED EQUITY'S LIMITATIONS AND DRAWBACKS

Sanctuaries are no panacea to the problems of the removal system. There are limitations to the manner in which sanctuaries can adjust the intensity of federal enforcement. First, and most obviously, sanctuaries will only be effective where they operate. Accordingly, the protections provided by sanctuary measures for individuals will be inconsistent from place to place and nonexistent in many locations. Second, these measures are controversial, resulting in political pressures and attempts to restrict federal law enforcement grants to sanctuary cities, often generating costly litigation.[329] Third, the Trump Administration has demonstrated a propensity to seek revenge on some sanctuary jurisdictions, surging enforcement resources in such areas on at least a sporadic basis, and thus potentially overriding the ability of sanctuaries to protect residents of their communities.[330]

Additionally, it must be acknowledged that in many cases, sanctuaries are unable to evaluate the normative justifiability of removability with precision. (Resource-intensive sanctuary activities by religious organizations may present an exception to this general rule, however.) Police, prosecutors, and other subfederal officials must generally rely on incomplete information, proxies, and guidelines as they make decisions or implement policies that will protect individuals or categories of immigrants. For example, many police departments and municipalities with sanctuary policies have set noncooperation as the default rule, providing for exceptions only where the noncitizen has a significant criminal history. On one hand, those carve-outs help justify the view that sanctuary entities operate as an equitable grand jury because they will in fact turn an arrestee over to ICE where the equities are

---

[329] *See, e.g.*, County of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017); Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017) (expressing ire against sanctuary cities and a plan to withhold federal funds from them).

[330] *See Statement from ICE Acting Director Tom Homan on California Sanctuary Law*, ICE (Oct. 6, 2017), https://www.ice.gov/news/releases/statement-ice-acting-director-tom-homan-california-sanctuary-law [https://perma.cc/32GA-WGZW] (stating that as a consequence of California's sanctuary policies, "ICE will have no choice but to conduct at-large arrests in local neighborhoods and at worksites, which will inevitably result in additional collateral arrests"); Bernal, *supra* note 19; Victor Fiorillo, *ICE Arrests 107 Immigrants in Philly This Week During "Operation Safe City*," PHIL. MAG. (Sept. 29, 2017, 8:00 AM), https://www.phillymag.com/news/2017/09/29/ice-arrests-107-immigrants-philly-operation-safe-city [https://perma.cc/LGS7-UPXP]; Rick Ritter, *ICE Arrest Hundreds During Operation 'Safe City' Immigration Crackdown; 28 Arrested in Md.*, CBS BALT. (Sept. 29, 2017, 6:13 PM), https://baltimore.cbslocal.com/2017/09/29/immigration-baltimore-ice-operation-safe-city-maryland [https://perma.cc/P58P-SFCG].

less obviously sympathetic. For many observers, fewer normative concerns are raised when police cooperate with federal authorities regarding the removal of noncitizens with serious criminal records. On occasion, however, these inexact law enforcement methods will expose noncitizens who some would believe continue to deserve a reprieve or, conversely, aid noncitizens who some would believe are undeserving of protection. Thus, the roughshod approach is not ideal, but such is the world we live in when formal code law is too harsh and static and federal enforcers decline to employ equitable discretion.

There are at least three additional reasons why these downsides are outweighed by the positive functions of sanctuaries. First, unlike jury nullification or grand jury refusal to indict in criminal law, sanctuary measures do not offer a final veto over federal enforcement decisions. If the federal government is determined, in many cases it will eventually be able to apprehend the noncitizen and put him or her into removal proceedings.[331] Second, sanctuary efforts largely maintain the status quo. Immigration crackdowns and equity-blind enforcement, in contrast, generate significant and costly external consequences, including (1) the cost of detention and removal proceedings; (2) destruction of family units with long-term effects on the health of children and collateral consequences for foster care and welfare systems; (3) trepidation about accessing preventative medical care, resulting in the unnecessary spread of treatable disease and burdens for hospital emergency rooms; (4) loss of workforce; and (5) failure to report crime. And for much of this, taxpayers end up footing the bill.[332]

Third, when the consequences of an enforcement system are as severe as those that result from deportation, the balance should tip toward risk of underenforcement, with the heavier burden rightly placed on the

---

[331] *See, e.g.*, Ed Pilkington, *U.S. Deports Mother Who Took Sanctuary*, GUARDIAN (Aug. 21, 2007, 3:59 AM), https://www.theguardian.com/world/2007/aug/21/usa.edpilkington [https://perma.cc/24WU-FKAY] (reporting on Elvira Arellano, an activist with a U.S. citizen son, who was eventually apprehended and deported despite taking church sanctuary in Chicago, Illinois for a year).

[332] *See, e.g.*, Jana Kasperkevic, *Deporting All of America's Illegal Immigrants Would Cost a Whopping $285 Billion*, BUS. INSIDER (Jan. 30, 2012, 10:00 AM), http://www.businessinsider.com/deporting-all-of-americas-illegal-immigrants-would-cost-a-whopping-285-billion-2012-1 [https://perma.cc/LAY2-LHL5] (citing sources establishing that deporting one noncitizen likely costs the government between $12,500 and $23,480); *The New York Immigrant Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers*, CENTER FOR POPULAR DEMOCRACY ET AL. 5, 10–14, https://populardemocracy.org/sites/default/files/immgrant_family_unity_project_print_layout.pdf [https://perma.cc/ED6S-PW3F] (estimating that if noncitizens in immigration detention in New York were provided legal representation, the state could save nearly $2 million annually through reduced spending on health insurance, foster care services, and lost tax revenue, while employers would save $4 million annually by avoiding employee turnover costs).

government.[333] Sanctuary entities that decline to assist federal agents in the machinery of removal fit within theories of federalism that posit subfederal actors as checks against federal tyranny and abuse.[334] Increasingly, theorists have applied federalism insights to nongovernmental institutions.[335] While sanctuary policies that run counter to federal enforcement priorities may sometimes be overprotective, a system that errs on the side of liberty is preferable to one that risks oppression.[336]

The dynamics between sanctuaries and the federal government are messy, and one should hold no delusion that sanctuaries will precipitate consistent justice by any means. But even beyond the short-term individual gains that sanctuaries will sometimes achieve, they also play an important role in influencing the national dialogue on immigration enforcement policy and ultimately may help shape both legislative and judicial activity in this area. In the best-case scenario, sanctuaries would help achieve laws and enforcement policies that reflect a more humane, family-protective, and inclusive vision of which noncitizens should have a right to remain in the country.

CONCLUSION

A system administering sanctions with consequences for human life as significant as banishment and the destruction of family integrity requires sufficient play in the joints to account for the particulars of individual cases. When Congress excised back-end equitable adjudicatory measures from the purview of immigration judges and created mechanisms to process certain categories of noncitizens through summary procedures lacking basic procedural protections, the responsibility for equitable sorting shifted forward to Executive Branch enforcers. To faithfully execute this scheme

---

[333] Matt Matravers, *Unreliability, Innocence, and Preventive Detention*, *in* CRIMINAL LAW CONVERSATIONS 81, 82 (Paul H. Robinson et al. eds., 2009) (arguing that "a situation in which someone is overburdened is worse from the point of view of justice than one in which someone carries a burden that is too light. It is worse, still, for someone for whom no burden is appropriate and yet a burden is applied").

[334] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

[335] *See, e.g.*, Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1146–47 (2016) (arguing that citizen oversight models can curb political pressures to overenforce); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 24–44 (2010) (applying federalism principles to argue that agencies and other public institutions can play a valuable role in dissenting against federal policies); Villazor & Gulasekaram, *supra* note 44, at 51–53 (extending federalism analysis to include private organizations).

[336] Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1018 (1980) ("[I]t is ultimately better to err in favor of nullification than against it.").

demands fidelity to an individual evaluation of humanity and not simply rote adherence to blackletter rules. At the end of the day, a normatively wrong removal is nearly as troubling as one unsupported by code law.[337]

Disregarding this responsibility, the Trump Administration instead has professed a commitment to full enforcement crackdown. In so doing, it has failed to live up to the obligation to administer immigration law equitably. Sanctuaries have stepped into the resulting equitable void. While critics have charged that sanctuary policies subvert law, this Article has argued that they present a valid and normatively defensible means of injecting legitimacy norms, furthering due process values, and, above all, helping to avert at least some disproportionate consequences.

Thus far there is anecdotal indication that religious sanctuaries sometimes nudge the federal government to exercise proper equitable discretion.[338] When it comes to sanctuary cities, however, the Trump Administration has been less accommodating, perhaps because those policies shield so many more potentially deportable noncitizens. The Administration's negative reaction is demonstrated by its efforts to withhold federal funds from these jurisdictions and occasionally to undertake large-scale enforcement activities specifically targeted at their residents.[339]

The most ideal way forward would be for Congress to roll back the severity and sweep of removal provisions and return adjudicative equitable discretion to immigration and sentencing judges. While a return to robust equitable prosecutorial discretion by federal enforcements represents a second-best solution, the truth is that professional enforcers have always been an imperfect fit as the primary site for applying law and equity to

---

[337] Bowers, *supra* note 79, at 202 (arguing that moral arbitrariness generates costs to the legitimacy of the removal system on par with the costs of legal errors).

[338] *See supra* notes 283–86 and accompanying text (discussing the Vizguerra case and citing other reports of sanctuary activities leading to favorable exercise of discretion by the federal government). In this way, the federal government seems to interpret the efforts of religious sanctuaries on behalf of deportable noncitizens as something like what I have termed "disproportionality rules of thumb." Cade, *supra* note 32, at 44–50.

[339] *See supra* notes 202–05, 330 and accompanying text (discussing litigation surrounding the withholding of funds from sanctuary cities and enforcement operations such as Operation Safe City that suggest a pattern of revenge against sanctuary jurisdictions).

determine the appropriate outcomes.[340] Enforcers are typically too busy,[341] and they are primarily tasked with conduct, not adjudication.[342]

Despite the messy and antagonistic milieu in which sanctuaries have arisen, they might help point the way to a better future of immigration adjudication. Perhaps that future would include a formalized subfederal government or community role in recommending against an individual's deportation on normative grounds or even in setting deportation policy more generally.[343] For now, however, immigration reform remains hopelessly gridlocked. Until those gears finally loosen, it falls to other actors in the system to shape enforcement in a way that maintains the system's legitimacy.

Although the Supreme Court's recent immigration enforcement cases do not involve sanctuaries, they nevertheless reveal the Court's acceptance and even endorsement of both federal and subfederal activities that inject considerations of fairness and equity into the deportation scheme. *Padilla*, for example, demonstrates the Court's approval of state and local efforts to reduce the possibility of inequitable removals. The lesson of *Padilla*, *Arizona*, and other cases is critical in the context of thinking about sanctuary efforts: equitable discretion, exercised either by enforcers or by others who can influence outcomes, is both appropriate and necessary for the legitimacy of the current removal system.[344]

---

[340] *See, e.g.*, Cade, *Enforcing Immigration Equity*, *supra* note 31, at 693 (quoting Todd Starnes, *ICE Agents: Obama Won't Let Us Arrest Illegals*, FOX NEWS RADIO, http://radio.foxnews.com/toddstarnes/top-stories/exclusive-ice-agent-faces-suspension-for-arresting-illegal-alien.html [https://perma.cc/MU3C-FX2D] (reporting the President of the National ICE Council Chris Crane's view that ICE agents should "charge (the suspect) as being in the United States illegally and let the judge sort it out. . . . That's our place in the universe. . . . We're supposed to make arrests and let the judges and the legal system sort through the details").

[341] *See* Cade, *supra* note 5, at 50–54.

[342] Bowers, *supra* note 79, at 147 ("Unlike the professional adjudicator, the professional law enforcer['s] . . . primary function is to take action—*to engage in conduct*."); Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 319 n.90 (2010) ("Speaking for two bodies—the police and lower courts—means that Court opinions must provide both decision rules to guide courts and conduct rules to guide police."); *see also* Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 210 (2014) (arguing that the pervasive culture of enforcement within ICE prevents appropriate consideration of equitable factors).

[343] *Cf.* Morales, *supra* note 264, at 760 (arguing that the only politically feasible path to more humane crime-based deportation is to make it a matter of local prerogative, because at least some localities would take a more flexible and unconditional approach to noncitizen membership, while restrictionist jurisdictions would also value more local control).

[344] *See also* Vartelas v. Holder, 566 U.S. 257, 275 n.10 (2012) (endorsing the idea that lawful permanent residents might "negotiate a plea to a nonexcludable offense," allowing them to travel outside the United States without triggering immigration problems); Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015) (explaining, with apparent approval, how the categorical approach allows defendants to enter "safe harbor" plea deals that avoid unjust removals); Judulang v. Holder, 565 U.S. 42, 55–58 (2011) (holding

These considerations might inform courts adjudicating challenges to the federal government's attempts to withhold federal funding from sanctuary cities. Courts might also limit the scope of criminal liability under the harboring statute in certain situations where sanctuaries provide shelter or other assistance to deportable noncitizens.[345] And if situations arise in which harboring convictions cannot be avoided, courts might nevertheless impose light sentences.[346] Through these and related measures, courts might protect sanctuary efforts, curb some unfairness in the removal system, and signal to the Executive that a reformulation of approach in immigration enforcement is required. Ultimately, it may take a combination of sustained resistance by subfederal entities and supportive court rulings to jolt the political branches into doing the right thing. Until then, sanctuaries represent immigration equity's last stand.

that discretionary relief policies that fail to take into account the "alien's prior offense or his other attributes and circumstances" violate the Administrative Procedures Act).

[345] *See, e.g.*, Cruz v. Abbott, 849 F.3d 594, 602 (5th Cir. 2017) ("[T]here is no reasonable interpretation by which merely renting housing or providing social services to an illegal alien constitutes harboring . . . that person from detection." (internal quotation marks omitted)).

[346] *See* Campbell, *supra* note 210, at 486 (discussing how no jail time was imposed following the Operation Sojourner convictions in the 1980s).