IMMIGRATION EQUITY'S LAST STAND: SANCTUARIES AND LEGITIMACY IN AN ERA OF MASS IMMIGRATION ENFORCEMENT

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ABSTRACT

Opponents of (and sometimes advocates for) sanctuary policies typically describe such measures as obstructions to the operation of federal immigration law. This Article posits that this premise is faulty. Rather, 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 decision-making processes. Against this backdrop, the sanctuary efforts of cities, churches, and campuses are best seen as the latest development in a significant transition occurring in immigration enforcement over the past two decades. That transition has centered on a shift forward in responsibility for equitable decision-making in deportation cases, away from adjudicators charged with handling formal proceedings and toward federal agents deciding whom to target for removal and how to process them. As federal immigration enforcement practices themselves have calcified, abandoning equitable individuation in favor of mass and indiscriminate removal, the locus of discretion has moved even further upstream, relocating key discretionary authority in local police officers, state prosecutors, and other non-federal actors in local communities. These actors inject normative and legal accuracy into real-world immigration enforcement decision-making by providing front-line equitable screens and last-resort circuit breakers in the administration of federal deportation law. The dynamics are messy and contested, and the results incomplete, but these efforts in the long run will help ensure the vindication of legally salient, equity-based legitimacy norms in immigration enforcement.

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INTRODUCTION

Jeanette Vizguerra, an undocumented immigrant from Mexico, has been living in the United States since 1997 and has three U.S. citizen children.[2] A traffic stop led to the issuance of a deportation order in 2011. She was able, however, to obtain stays of removals from Immigration and Customs Enforcement (ICE), thus allowing her to remain in the United States on a temporary basis. Because Vizguerra was the victim of serious crime and helpful to law enforcement in pursuing the perpetrator, she obtained a certification that made her eligible for "U status," a statutory dispensation that puts certain crime victims on a pathway to lawful immigration status. Nevertheless, on Feb. 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.[3] She lived within the church building for three months while negotiations for leniency continued on her behalf. Finally, 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 situation is not unique. Across the United States, immigration enforcement in 2017 has taken 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 have made positive contributions to their community, or if their removal would cause substantial suffering to themselves or their families. Tax-paying breadwinners, including those who have no criminal convictions and have lived in the country for decades, have suddenly found themselves taken into to custody and sent far away from loved ones and dependents.[5] Noncitizen victims of domestic violence seeking protective orders,

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[2] Donie O'Sullivan & Sara Weisfeldt, *Undocumented mom taking sanctuary in Denver church is among Time's 100 most influential People*, CNN (April 20, 2017).

[3] *See* Memorandum from John Morton, Dir. of U.S. Immigration and Customs Enf't to Field Officer Directors, Special Agents in Charge, and Chief Counsel of U.S. Immigration and Customs Enf't, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011) (indicating that as a policy matter ICE will not enforce immigration law in "sensitive locations" such as churches), https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf.

[4] Melissa Etehad, *Denver mother is granted temporary deportation relief after 3 months of sanctuary in a church*, L.A. TIMES (May 13, 2017). Due to a 10,000 per year cap on U visas, there is currently a several-year backlog in processing. 8 USC § 1184(p)(2)(A).

[5] Liz Robbin, *Once Routine, Immigration Check-Ins Are Now High Stakes*, NY TIMES (April 11, 2017); Tracy Seipel, *Deported: End of the line for undocumented Oakland couple*, MERCURY NEWS (Aug. 16, 2017) (reporting on ICE's refusal to exercise discretion in case of Mexican couple without criminal records deported after living in U.S. for over two decades, working in

as well as immigrant parents in child support or custody disputes, might be arrested by ICE just outside the courtroom door.[6] Noncitizens arrested for minor offenses, if undocumented, have been put in removal proceedings even before they have an opportunity to contest the criminal charges.[7] In the first two months of the Trump administration, immigration arrests of noncitizens without criminal histories more than doubled, while immigration arrests generally rose almost thirty percent.[8]

Equitable prosecutorial discretion, which federal immigration enforcement agencies had been in the process of developing and refining for almost two decades,[9] has been thrown to the wind. Today, nearly every potentially deportable noncitizen is a removal priority. The Trump administration has touted its blanket, indiscriminate approach to enforcement as a "return to the rule of law."[10] As former Secretary of Homeland Security John Kelly put it: "[T]he laws on the books are pretty straightforward. If you're here illegally, you should leave or you should be deported, put through the system."[11]

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construction and nursing, paying taxes, and raising four children, now in high school and college), http://www.mercurynews.com/2017/08/16/deported-end-of-the-line-for-undocumented-oakland-couple/.

[6] Nora Caplan-Bricker, *"I Wish I'd Never Called the Police"*, SLATE (March 2017); Jonathan Blitzer, *The Trump Era Tests the True Power of Sanctuary Cities*, NEW YORKER (April 18, 2017); Jennifer Medina, *Too Scared to Report Abuse, For Fear of Being Deported*, NY TIMES (April 30, 2017).

[7] Maria Sacchetti, *ICE immigration arrests of noncriminals double under Trump*, WASH. POST (April 16, 2017) (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., ENFORCEMENT OF THE IMMIGRANT LAWS TO SERVE THE NATIONAL INTEREST (Feb. 20, 2017) (expanding immigration priorities to include noncitizens who are arrested but not yet convicted); Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

[8] Sacchetti, *supra* note_.

[9] *See* Part II.

[10] *Return to Rule of Law in Trump Administration Marked by Increase in Key Immigration Statistics*, DEPARTMENT OF JUSTICE, https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics (last visited Aug. 25, 2017) (citing data that between Feb. 1, 2017 and July 31, 2017, total orders of removal were 49,983, up 27.8 percent from 39,113 removals over the same time period in 2016).

[11] *Meet the Press with Chuck Todd*, NBC (April 15, 2017). *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 (reporting ICE's statement that the agency is no longer exercising leniency with respect to undocumented residents who have not committed weighty crimes). As of 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 Jan. 20, 2017. Dan Merica, *Kelly sworn in as Trump's second chief of staff*, CNN (July 31, 2017), http://www.cnn.com/2017/07/31/politics/john-kelly-chief-of-staff/index.html.

In the face of mass, indiscriminate federal enforcement, sites of resistance have risen throughout the country. Hundreds of jurisdictions have passed or strengthened "sanctuary" policies, which limit government employees' cooperation in the federal immigration enforcement process and in some cases provide services to potentially deportable noncitizens.[12] Religious organizations, too, have taken up this cause, gaining visibility as institutions willing to shelter and assist individuals caught up by harsh deportation policies.[13] 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.[14] In this Article, I examine these resistance-oriented sanctuary efforts in a new way, explaining how they fit within the context of today's federal immigration enforcement system.

Sanctuary movements have an ancient and noble pedigree.[15] But controversy surrounds the sanctuaries of today.[16] 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.[17] President Trump's Executive Order 13768, for instance, asserted that "sanctuary jurisdictions . . . willfully violate Federal law in an attempt to shield aliens from removal."[18] Even those who are generally sympathetic to sanctuary efforts sometimes describe the movements' methods and objectives as rooted in the obstruction of governing law – most prominently as a form of civil disobedience directed at an unduly harsh (but legal) immigration system, pursued in the name of a "higher" (*i.e.*, religious or moral) law.[19] And to be sure, there are federal statutes that would seem to prohibit at least some forms of sanctuary

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[12] *See* Part III.A.
[13] *See* Part III.B.
[14] *See* Part III.C.
[15] Rose Cuison Villazor, *What is a "Sanctuary"?*, 61 SMU L. REV. 133, 154-56 (2008).
[16] Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 CAP. U. L. REV. 583 (2014) (asserting that, unlike ancient origins of the sanctuary tradition, modern sanctuary efforts have "only a tangential link to religious moralism").
[17] *See, e.g.*, Rafeal Bernal, *Sessions rips 'culture of lawlessness' in Chicago*, THE HILL (Aug. 7, 2017), http://thehill.com/latino/345668-sessions-rips-culture-of-lawlessness-in-chicago (reporting on Attorney General Jeff Sessions' statement that "the political leadership of Chicago has chosen deliberately and intentionally to adopt a policy that obstructs this country's lawful immigration system"); Davidson, *supra* _, at 612 (making similar argument and citing sources).
[18] Exec. Order No. 13,768, sec. 1. *See also* Paul Bedard, *ICE Chief Lists Worst Sanctuary Cities: Chicago, NYC, San Francisco, Philadelphia*, WASH. EXAM'R (Jul. 24, 2017) (describing sanctuary cities as "un-American" because they "harbor[] illegal immigrants").
[19] *See, e.g.*, Villazor, *supra* note_, at 141 (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").

activities.[20] In sum, the accepted storyline is simple: immigration enforcers are trying to carry out legal commands, while sanctuary efforts are undertaken to impede the law.[21]

That frame is too facile. The better view, I argue, is that sanctuary efforts function not as legal obstructions, but as engines furthering legal norms in the face of the executive branch's mass, indiscriminate enforcement policy and less-than-faithful execution of the full body of our immigration law. To understand why this is so requires placing current immigration enforcement policy in a broader context. For most of the twentieth century, immigration judges were empowered to set aside removal when warranted by the equities. New statutory provisions enacted in the 1990s, however, dramatically expanded the kinds of criminal offenses and immigration violations that would lead to deportation, while constricting the back-end discretionary authority of adjudicators to provide relief from these onerous sanctions.[22] Congress also created a variety of mechanisms that allowed federal enforcers to remove many categories of noncitizens from the purview of immigration court altogether, thus authorizing fast-track proceedings presided over solely by enforcement officials.[23] The cumulative result was a removal code of unprecedented harshness and rigidity, the abject cruelty of which soon began to make headlines.[24]

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[20] *See* 8 USC § 1373 (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"); 8 USC § 1324(a)(1)(A)(iii) (providing 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, such alien in any place, including any building or any means of transportation").

[21] *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.").

[22] *See* Immigration Act of 1990, 101 Pub. L. No. 649, 104 Stat. 4978; 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.).

[23] *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 193-221 (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).

[24] *See, e.g.*, Gayda Hollnagel, *Immigration Sweeps Disrupt Small Towns, Separate Families Many People in Norwalk and Sparta Fear a Repeat of the Dec. 15 Raid*, WISCONSIN STATE JOURNAL at 1C (Dec. 25, 1997); Marriane Means, *Deportations Putting Public at Some Risk*, ALBANY TIMES UNION, at A7 (Dec. 22, 1997); Anthony Lewis, *Congress Needs to Restore Humanity to U.S. Immigration Policy*, NAPLES DAILY NEWS, at D07 (Dec. 22, 1997); Nancy Lofholm, *INS Doubles Staff for Colorado Crackdown*, DENVER POST, at A01 (Dec. 30, 1999); Eric Lipton, *Shoplifting Gets Woman Kicked out of Country*, NEW ORLEANS TIMES PICAYUNE, at A01 (Dec. 21, 1999); Joseph Ditzler, *Detentions Spark Protest*, ALBUQUERQUE JOURNAL, at 1 (Dec. 31, 2001); Shannon

But removing equitable discretionary authority from adjudicators does not necessarily excise it from the system altogether. Indeed, Congress may even have anticipated that the responsibility for equitable decision-making about the appropriateness of removal in individual cases would shift forward in the process, away from adjudicators at the end of an immigration hearing, and toward federal agents charged with deciding who to target for enforcement.[25] Of course, in this matter, as in many, it is difficult to discern Congress's true intent with absolute certainty.[26] Even if we assume that legislators desired the draconian code be enforced as fully as possible, however, equitable discretion by enforcers would still be necessary to ensure basic justice.[27] The immigration system is perhaps unique among civil enforcement fields with respect to the gravity of benefits and sanctions it administers. Indeed, it 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"[28]—in keeping with basic principles of fairness, equality, and proportionality. If not at the back-end, these concerns must be realized in early stages of immigration-related decision-making.[29]

When federal agencies fail to adequately undertake this responsibility—instead engaging in mass, indiscriminate enforcement—the legitimacy of the system is in jeopardy. As a consequence, the locus of discretion shifts further upstream, to the local police, state prosecutors, and other non-federal institutions in local communities, including churches and campuses. Some of these actors have chosen (whether or not by design) courses of action that promote legitimacy norms in the operation of immigration enforcement. In particular, I argue that

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McCaffrey, *Diplomats Complain of Secrecy Surrounding Detainees from their Countries*, AP ONLINE (Dec. 31, 2001).

[25] *See* Part I.B.

[26] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003) ("[T]he legislative process is simply too complex and too opaque to permit judges to get inside Congress's mind.").

[27] *See* Part I.C.

[28] *See* Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 UC DAVIS L. REV. 1029 (2017); Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661 (2015).

[29] *See* Jason A. Cade, *Return of the JRAD*, 90 NYU L. REV. ONLINE 25 (2015) (arguing that DHS officials should defer to signals by criminal court judges that deportation would not be appropriate in a particular case).

sanctuaries help the system lurch toward legal and normative accuracy,[30] while incorporating some fairness into real-life immigration decision-making, at least where they operate.[31]

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 something of an "equitable screen" at the front-end of the system. More specifically, the federal immigration system has long relied on criminal justice actors to identify and process "undesirable" noncitizens.[32] Thus, by declining to turn noncitizens over to federal authorities, these sanctuary communities operate like normative grand juries, refusing to indict except where aggravating factors are present.[33] 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 aspects of family and civic life that enjoy protection under federal law without illegitimate intrusion by federal or state immigration enforcers.[34]

By way of contrast, 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.[35] Sanctuaries also can play the role of a last-resort circuit-breaker.[36] 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 variety of motivations and implicate different legal rules. Each of them, however, has the potential to inject legitimizing dynamics into the current immigration

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[30] 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).

[31] *See, e.g.*, Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017) (arguing that the government should be prevented from initiating removal based on information that was provided upon an assurance of non-enforcement); Simon Y. Svirnovskiy, *Finding a Right to Remain: Immigration, Deportation, and Due Process*, 12 NW. J.L. & SOC. POL'Y 32 (2017) (arguing that laches or other equitable defenses should prevent the government from removing lawful permanent residents on the basis of old criminal history).

[32] *See* Part IV.A.

[33] *Id*.

[34] *See* Part IV.B.

[35] *See* Part IV.A.

[36] *Id.*

enforcement landscape. To be sure, the positive effects that sanctuaries offer in this regard are limited in efficacy and reach. Even so, in both the short-term and long-term, sanctuaries can make a positive difference. 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.[37] 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.[38]

By focusing on the functions that different sanctuary forms share in the context of mass immigration enforcement, I provide a unifying account of public and private defensive sanctuary efforts, which thus far have been considered for the most part in isolation.[39] More importantly, I also make the case that, contrary to general understanding, many forms of 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 four Parts. Part I outlines the significant transition that has occurred in immigration law and enforcement in recent decades, thus generating a movement away from formal equitable adjudication towards the empowerment of non-adjudicators in determining whether deportation law is administered fairly and proportionally. I explain why a mass enforcement approach that ignores this responsibility runs afoul of the President's duty to faithfully execute the immigration scheme, and I show that the Supreme Court has endorsed 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, the 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

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[37] *See* Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999 (2017).
[38] *See* Part IV.C.
[39] For a notable exception, see Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks* (on file with author).

approaches for a decade and a half, and that process gained significant momentum during President Obama's first term. In the initial stage of the Trump administration, however, immigration policy has sought to displace this thus-reified system of equitable enforcement discretion with a radically new system, characterized by mass, indiscriminate enforcement.

Part III describes the three primary sub-federal entities engaged in sanctuary activity: cities, churches, and campuses. For each form, I briefly touch on the most salient legal threats to and justifications for the various activities, but only to make the point that each is likely on solid enough legal footing to weather challenges from the federal and state 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 legitimacy in light of immigration law's overarching and judicially-recognized aims. In a conclusion section, this Article suggests possibilities for the future of the sanctuary movement and the role courts might play in protecting immigration equity's last stand.

I. STATUTORY SEVERITY AND EQUITABLE DELEGATION

A. HARD LAW

In the late twentieth century, Congress set into motion a radical restructuring of immigration enforcement and the deportation scheme.[40] Through extensive changes to the immigration code,[41] Congress vastly increased the number of noncitizens subject to deportation on the basis of even minor criminal history,[42] 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.[43] At the same time, Congress tightly constrained the authority of

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[40] Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009); *Enforcing Immigration Equity*, *supra* note_, at 671-83.

[41] *See* IIRIRA, *supra* note_; AEDPA, *supra* note_.

[42] 8 U.S.C. § 1227(a)(2) (listing many categories of crimes that make lawfully present noncitizens deportable). *See, e.g.*, Lopez-Valencia v. Lynch, 798 F.3d 863, 869 (9th Cir. 2015) (concerning the appeal of 42-year-old LPR in the country for 40 years who was deported as an "aggravated felon" after shoplifting $2 can of beer).

[43] *See* 8 U.S.C. § 1182(a)(6)(A)(i) (noncitizens who enter without inspection are inadmissible and therefore cannot adjust lawful status); 8 U.S.C. § 1227(a)(1)(B) (noncitizens present without

administrative immigration judges and criminal sentencing judges to exercise equitable discretionary powers that they had employed for most of immigration law's history to avoid unjust or disproportionate removals.[44] Today, few statutory provisions allow undocumented noncitizens to avoid deportation on humanitarian or equitable grounds. Such relief is available only to noncitizens who (1) have very long residence in the United States, no disqualifying criminal record, and immediate U.S. citizen family members who would be caused "exceptional and extremely unusual" hardship by the noncitizen's removal;[45] or (2) are victims of trafficking, abuse or other specified serious crime in the United States and can meet other criteria.[46] Moreover, Congress created numerous mechanisms permitting the fast-track removal of large categories of noncitizens without any formal immigration proceedings at all.[47] 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

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authorization are deportable); 8 USC 1182(a)(9)(B)(i) (10-year reentry bar for noncitizens previously present in the United States without authorization for one year or more; 3-year reentry bar if the period of unlawful presence was between 181 and 364 days).

[44] *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); *Return of the JRAD*, *supra* _, at 40-41 (discussing the statutory measures for equitable discretion in immigration enforcement before and after Congress's statutory changes in the 1990s).

[45] *See, e.g.*, 8 U.S.C. § 1229b(a)–(b) (2012) (cancellation of removal for LPRs and non-LPRs). For both LPR and non-LPR cancellation, the required periods of continuous presence are deemed to end upon commission of criminal offenses or the inception of removal proceedings. *Enforcing Immigration Equity*, *supra*_, at 677-78 (explaining the limitations of cancellation of removal provisions). *See also* Margaret 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 statutory cap of 4,000 grants of cancellation for non-LPRs per year created a backlog significantly forestalling the effectiveness of such relief).

[46] *See id.* § 1101(a)(15)(T) (trafficking victims); § 1101(a)(15)(U) (victims of designated serious crime who provide law enforcement assistance); and § 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* 8 U.S.C. § 1158 (2012) (requirements for asylum).

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

underlying assessment of risk that would typically justify the deprivation of liberty.[48]

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 history, with only limited statutory opportunities for judges to consider whether these severe sanctions are justified in individual cases. 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. Frequently, and unsurprisingly, the collateral consequences of a deportation extend far beyond the individual, including the separation of caregivers from a U.S. citizen spouse or children and a variety of direct and indirect economic losses.[49] In the Supreme Court's words, "deportation may result in the loss of all that makes life worth living."[50]

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

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[48] *See, e.g.*, Immigration and Nationality Act (INA), 8 U.S.C §§ 1225(a), (b)(2)(A) (2012) (requiring detention of noncitizens seeking admission who are "not clearly and beyond a doubt entitled to be admitted"); *id.* § 1231(a)(2), (a)(6) (requiring detention for up to 90 days following a removal order and authorizing continued detention beyond that period on a discretionary basis); *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"). *See generally* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 365 (2014); *Judging Immigration Equity*, *supra*, at 1037, 1082-92; César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449 (2015).

[49] *See* CENTER FOR AMERICAN PROGRESS, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities* (Aug. 2012), https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamilies.pdf; URBAN INSTITUTE AND MIGRATION POLICY INSTITUTE, *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families* (Sept. 2015), http://www.migrationpolicy.org/research/implications-immigration-enforcement-activities-well-being-children-immigrant-families; *see also* Sarah Elizabeth Richards, *How Fear of Deportation Puts Stress on Families*, THE ATLANTIC (March 22, 2017), https://www.theatlantic.com/health/archive/2017/03/deportation-stress/520008/; Eline de Bruijn, *Deportation was a 'Death Sentence' for Austin Father Sent Back to Mexico, Lawyer Says*, THE DALLAS MORNING NEWS (Sept. 20, 2017), https://www.dallasnews.com/news/texas/2017/09/20/man-fled-mexico-fear-gangs-killed-deported-austin-wife-says; Sibylla Brodzinsky and Ed Pilkington, *US Government Deporting Central American Migrants to Their Deaths*, THE GUARDIAN (Oct. 12, 2015) https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america.

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

system.[51] 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 application of rigid code law. In the following subsections, I elaborate on this claim.

B. INSINCERE RULES

Formal code law is only one ingredient in the complex admixture that creates a legal regime. As Roscoe Pound observed over a century ago, there is always a gap between "law on the books" and "law in action."[52] 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 perhaps even counting on) calibration and refinement through on the ground implementation. This tempering process is particularly evident, and necessary, in fields that administer severe penalties, where harsh legislation is politically advantageous but can wreck great injustice in particular cases.[53] Legislators have political incentives to increase the severity of criminal laws, for example, relying on police and prosecutors to exercise discretion in determining who to arrest and prosecute.[54] Enacting broad, inflexible penal statutes and mandatory sentencing guidelines thus transfers equitable power to police and prosecutors, who act as the criminal system's

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[51] *Judging Immigration Equity*, *supra* note_, 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.").

[52] 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 COLLAPSE OF AMERICAN CRIMINAL JUSTICE 509, 521 (2011) ("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.").

[53] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is A Crime*, 113 COLUM. L. REV. ONLINE 120 (2013).

[54] *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 87 (1969) (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 seemed not to deserve such harsh treatment"); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008) ("[C]riminal justice policies are mostly political symbols or legal abstractions, not questions the answers to which define neighborhood life.").

normative gatekeepers.[55] 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.[56]

In the immigration context, Congress has delegated vast enforcement authority.[57] As an initial matter, specific statutory provisions afford wide latitude to DHS to determine enforcement priorities.[58] But even without those admittedly vague delegations, when Congress expanded the grounds for removal while narrowing adjudicative discretionary authority, it effectively transferred a great deal of gate-keeping power to the deportation system's enforcers.[59] Something on the order of 11 million 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.[60] 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.[61] Even as laws and attitudes about undocumented workers and immigration enforcement have become more stringent, Congress's growing budgetary appropriations in recent years to the Executive's immigration agencies have enabled the removal of only a small fraction of the total number of noncitizens who may be deportable on the

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[55] STUNTZ, *supra* note_, at 3-4 ("Law enforcers . . . define the laws they enforce."); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 154-57 (2007); Wayne 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 (2008).

[56] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 716-48 (2014). 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 non-prosecution in cases where mitigating factors demanded equity. *Id.*; *see also* Stith, *supra* note_, at 1422 (arguing that Congress "has created a system of criminal laws that requires – and has always required – the exercise of discretion").

[57] *See Return of the JRAD*, *supra* note _, at 53-54 (discussing Congressional delegation of authority to Executive to determine immigration enforcement priorities).

[58] *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) (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").

[59] *Enforcing Immigration Equity*, *supra* at 679-81; Cox & Rodriguez, *The President and Immigration Law*, *supra* note_, at 464, 518-19.

[60] 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/unauthorizedimmigrant-population-stable-for-half-adecade.

[61] 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.

basis of unlawful presence, criminal history or other infractions.[62] 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, representing but a drop in the bucket relative to the size of the pool of possible enforcement targets within the interior United States.[63]

In sum, when Congress enacted broad and rigid statutory provisions against the backdrop of a long history of underenforcement, without sufficiently commensurate increases in funding, it is plausible that the new rules were not expected to be fully enforced.[64] As in criminal law, Congress relies on the Executive to set priorities and exercise equitable discretion when determining which percentage of the total removable population to target.

Deportation laws thus present an example of what Michael Gilbert labels "insincere rules," which are designed to achieve in effect some result that is less than co-extensive with the literal letter of the law.[65] Professor Gilbert argues that as the cost of enforcement within a particular regulated field increases, the gap between desired behavior and legislated restrictions is likely to widen.[66] This logically follows because greater sanctions will be necessary to achieve general compliance whenever enforcement is very costly, in terms of either resources or political will.[67] Given the sporadic historical track record regarding enforcement of deportation rules, and the practical impossibility of attempting to remove more than 11 million presumptively deportable immigrants, it is conceivable that the severity of immigration penalties are roughly calibrated to achieve a measure of general deterrence.

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[62] 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 (2014); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574, 3659 (2009).

[63] Serena Marshall, *Obama Has Deported More People than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661; Koh, *Removal in the Shadows*, *supra* note_, at 184 (citing statistics that over 83% of removals in recent years were through expedited procedures that bypass immigration court).

[64] *See* discussion *supra* TAN_; *see also* Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1605 (2016); Michael Gilbert, *Insincere Rules*, 101 VA. L. REV. 2185 (2015) (arguing that legal rules can be intentionally insincere).

[65] Gilbert, *Insincere Rules*, *supra* note_, at 2205.

[66] *Id.*

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

Indeed, when media accounts began highlighting stories of the immigration agency's indiscriminate enforcement against long-time lawful permanent residents of the harsher statutory provisions enacted in 1996, many of the same 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."[68] The twenty-eight bipartisan co-signers of the letter could not understand "why the INS pursued removal in such [sympathetic] cases when so many other more serious cases existed."[69] This letter is not law, but it helps substantiate this account of the likely 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 on the books" and "law in action."[70] Plausibly, Congress counted on immigration enforcers to shape and temper the rigidity of the statutes.

C. JUSTICE AND PROPORTIONALITY

Even if one holds the unrealistic perspective that Congress wishes absolute enforcement of all immigration law, this view would not justify an indiscriminate, mass approach to enforcement. As an initial matter, immigration law does not consist only of enforcement provisions. Although narrow and restrictive, Congress has left intact pathways to lawful status for some categories of persons inside the country, primarily through certain family or employment relationships.[71] Additionally, the statute implements international obligations to refugees fleeing persecution,[72] contains measures calling for protection of victims and witnesses,[73] and allows for humanitarian parole and deferred action.[74] Statutory provisions, regulations, and case law also require various procedural

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[68] Letter from 28 members of the U.S. House of Representatives to Janet Reno, Att'y Gen., U.S. Dep't of Justice, and to Doris M. Meissner, Comm'r, U.S. Immigration and Naturalization Servs. (Nov. 4, 1999).
[69] *Id.*
[70] Pound, *Law in Action*, *supra* note _; Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 49 (2017).
[71] *See* INA § 245 [8 USC § 1255] (adjustment of status categories and procedures)
[72] *See* INA §§ 207 (refugees), 208 (asylees).
[73] *See* INA §§ 101(a)(15)(T), 214(o) (visas for victims of trafficking); INA §§ 101(a)(15)(U), 214(p) (visas for certain crime victims); INA §§ 101(a)(15)(S), 214(k) (visas for certain criminal informants).
[74] INA § 212(d)(5)(A) (humanitarian parole guidelines); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified as amended at 49 USC § 30301) (2005) (acknowledging deferred action as an appropriate basis for employment authorization).

protections for persons facing removal proceedings.[75] Furthermore, the legislative design reveals cross-cutting themes such as non-discrimination[76] and promotion of family integrity.[77]

Precisely because the paths and procedures for obtaining or preserving paths to status are so narrow, when applicable they should be carefully adhered to by immigration officials (even where the same individual might be subject to removal). 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,[78] in stark contrast to the collateral consequences that forever follow a criminal conviction.[79] 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.[80] Except where the statute sets out specific bars on the basis of criminal history or immigration violations, Congress did not intend infractions to be held against individuals who are nevertheless eligible for status or relief. Any relevance of past transgressions is thus baked into the statute.

The fact that immigration officials are not afforded the convenience of merely seeking to remove every noncitizen that comes before them, without consideration of their eligibility for statutory-based lawful status, has long been recognized by administrative and federal courts. Where a noncitizen is entitled to relief under asylum law, for example, agents have a duty to help facilitate the claim. As the Board of Immigration Appeals has stated, 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

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[75] *See, e.g.*, Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TULANE L. REV. 1, 22-23 and n.105 (2014); Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569 (2014).

[76] *See, e.g.*, 8 U.S.C. § 1152(a)(1)(A) (prohibiting discrimination in the issuance of immigrant visas); *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980) (stating that "under 8 U.S.C. § 1152(a), INS has no authority to discriminate on the basis of national origin").

[77] *See, e.g.*, 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); 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 aliens who became U.S. legal permanent residents entered the U.S. based on family ties).

[78] *See* Kari Hong, *The Ten Parts of "Illegal" in "Illegal Immigration" That I Do Not Understand*, 50 UC DAVIS L. REV. ONLINE 43, 50 (2017) ("Immigration law's design is to forgive and forget any violation when remedies are available.").

[79] Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753 (2011).

[80] *See, e.g.*, 8 USC § 1255(c).

claim."[81] Indeed, it is exceedingly difficult to articulate a legitimate basis for deporting noncitizens entitled by statute to lawful presence, or denying discretionary relief to those who are statutorily eligible.[82]

Similarly, immigration officials must adhere at least to the minimal measures for procedural fairness set forth by statute and regulation. "Immigration 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."[83] 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."[84] The procedural obligations at issue can vary depending upon the location and status of the particular noncitizen, and, as noted, in certain circumstances Congress allowed for expedited mechanisms that afford little meaningful process. But even these truncated procedures are rarely mandatory, and the larger takeaway is that enforcers must at least offer the full panoply of procedural protections that each noncitizen is entitled to, rather than seeking to circumvent such measures.

These dual factors—the pursuit of legitimate objectives and adherence to procedural protections—together constitute the Executive's duty to achieve legally accurate results in the removal system. Faithful execution of the law requires that the immigration agencies' discretionary enforcement choices be made in the service of outcomes that give life to the full range of the immigration code, not just its enforcement provisions.

But the faithful execution of the law requires more than seeking to ensure legally correct results. Administrators must also strive to be "ministers of justice," and seek normatively correct outcomes.[85] Equitable discretion is necessary to implement the deportation scheme fairly, with attention to disproportionate consequences in individual circumstances. Even where there is no current path to

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[81] Matter of S-M-J-, 21 I. & N. Dec. 722, 723, 727 (B.I.A. 1997).

[82] Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 191-92 (2010). *See also Seeing Justice Done*, *supra* note_, at 22-23 and n.105.

[83] S-M-J-, 21 I&N at 727.

[84] Kang v. AG, 611 F.3d 157, 167 (3d Cir. 2010); *see also* 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").

[85] *See generally* MRPC R.3.8 cmt.1 (2013); Josh Bowers, *Annoy No Cop*, 166 PA. L. REV. __ (forthcoming 2018); Margaret H. Lemos, *Accountability and Independence in Public Enforcement*, manuscript at 25 (on file with author) (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").

lawful status, basic justice sometimes demands the use of prosecutorial discretion in order to avoid disproportional sanctions.[86]

A legal system that administers significant sanctions should reflect the principle of proportionality. Proportionality refers to the fit between the gravity of the underlying offenses, tempered by any mitigating or exacerbating factors, and the severity of the sanction.[87] To be sure, there is no universal agreement about the point at which a given penalty becomes disproportionate.[88] Nevertheless, most lawyers, scholars and jurists accept that enforcers or enforcement systems should be sensitive to egregiousness, mitigating factors, and hardship, and that 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.[89] Indeed, it is precisely because proportionality provides no "invariant, objective deserved punishment for each offensive act" that no statute can be just in all its applications.[90] In Lawrence Solum's words, "the infinite variety and complexity of particular fact situations outruns our capacity to formulate general rules."[91] 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."[92] We need, and have always needed, equitable correction of rigid rules.

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[86] DAVIS, DISCRETIONARY JUSTICE, *supra* note _, at 25 ("Discretion is a tool, indispensable for individualization of justice.").

[87] *See generally* Austin Lovegrove, *Proportionality Theory, Personal Mitigation, and the People's Sense of Justice*, 69 CAMBRIDGE L.J. 321, 330 (2010) ("[The 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.")

[88] *Annoy No Cop*, *supra* note_ at 12 ("There is no obvious answer to the question of when the state has criminalized too much, too hard.").

[89] *See, e.g.*, Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1445 (1995); Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1663-71 (2013); Wishnie, *supra* note_, at 418-24 (collecting and discussing authorities).

[90] Stephen J. Morse, *Justice, Mercy, and Craziness*, 36 STAN. L. REV. 1485, 1493 (1984). *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.").

[91] Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 206 (2003). *See also* ARISTOTLE, THE NICOMACHEAN ETHICS 133 (1988) (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").

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

Government agents charged with meting out life-altering sanctions on a large scale must be "responsive to the unique circumstances of individual transgressions."[93] 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."[94] Moreover, in any given removal enforcement situation the subject may have established deep community bonds of family, faith, employment, and friendship. In such cases, deportation may result in extreme consequences both for that individual and for the family members, persons, and institutions at the other end of those connections.[95] Thus, when enforcers blindly apply overly broad and formally inflexible rules, they do "not merely fail to do justice, they may do positive injustice."[96]

In sum, agents charged with faithful interpretation of the law – including federal enforcers – must consult not only statutory *text* but also *context*. [97] Adherence to context includes consideration of the entire legislative plan, constitutional constraints, and rule-of-law commitments such as notice, consistency, and procedural justice.[98] In Margaret Lemos' words, "'good' enforcement is not the same thing as maximum enforcement."[99] All branches of

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[93] MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 15 (2010) ("[S]ociety seeks not only impartiality from its public agencies but also compassion for special circumstances and flexibility in dealing with them."); *see also* DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 219 (2012) (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").

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

[95] *Enforcing Immigration Equity*, *supra* note _, at 709. *See also* Banks, *supra* note_, a 1293–96 (discussing social science literature documenting the collateral consequences of deportation for family members left behind).

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

[97] Sohoni, *supra* note_, at 83 ("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.").

[98] *Id.*

[99] Margaret H. Lemos, *State Enforcement of Federal Law*, 86 NYU 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.").

the government engaged in the enforcement of any area of the law must follow, and promote, ideals of fairness and justice. Immigration law is no exception.

D. THE SUPREME COURT'S EMBRACE OF UPSTREAM EQUITY

In recent years, the Supreme Court has come to grips with this 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.[100] 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 first explained that a "principle feature of the removal system is the broad discretion exercised by immigration officials."[101] 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 fails to meet the criteria for admission*.[102]

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

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[100] *Judging Immigration Equity*, *supra* note_, 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).
[101] 132 S. Ct. 2492, 2499 (2012).
[102] *Id.* (emphasis added).

to mandate removal.[103] The Court found most of Arizona's state-level immigration enforcement laws preempted, despite their mirroring of federal law provisions, thereby protecting federal discretionary authority to forebear removal through individual discretionary decisions or macro enforcement policies from unwanted state interference.[104]

Building on this upstream-equity doctrine, the Court has also issued a series of decisions that enable sub-federal actors to take actions decreasing the likelihood of negative immigration outcomes in individual cases. In *Padilla v. Kentucky*, for example, the Supreme Court endorsed the idea that front-line actors in the criminal justice system should take the harshness and inflexibility of immigration law into account and make adjustments accordingly in charging, plea-bargaining, and sentencing.[105] 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.[106] The Court noted that for much of the 20th century the grounds of criminal removal were narrow, and 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."[107] Justice Stevens' majority opinion emphasized the more recent loss of mitigating mechanisms at both federal and state levels, which he described as "critically important . . . to minimize the risk of *unjust* deportation."[108] As a result, "the drastic measure of deportation . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."[109]

It would be constitutionally unfair, the Court reasoned, to allow persons to plead guilty without being aware that the penalty of deportation or other serious immigration consequences would follow. Rooted in the Sixth Amendment's command that criminal defendants be afforded the adequate assistance of counsel,

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[103] *See generally Judging Immigration Equity*, *supra* note_, at 1042-49 (explaining that the Court's conception of noncitizen membership is broader than current code law).

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

[105] 559 U.S. 356 (2010).

[106] 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.*

[107] 559 U.S. at 360.

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

[109] *Id.* at 360.

the decision constitutionally obligates only criminal defense attorneys.[110] As a practical matter, however, the ruling has also pressured prosecutors and judges to ensure that defense attorneys have adequately advised their clients, to minimize the possibility that convictions will later be undone on ineffective assistance grounds.

Most importantly for present purposes, Justice Stevens explicitly recognized that equitable discretion in the removal system has shifted to earlier, enforcement stages, and he expressed the hope that the Court's ruling would encourage defense attorneys and prosecutors to take immigration consequences into account, engaging in "creative plea bargaining" to avoid disproportionate results.[111] 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*[112] and *Missouri v. Frye*,[113] at least suggest the possibility that defendants are constitutionally entitled to the going-rate for plea deals in their jurisdiction.[114] Thus, at least in localities where immigration-specific plea-bargaining becomes standard practice, defense attorneys who fail to competently engage in such bargaining in fact may run afoul of the Sixth Amendment.[115] In any event, *Padilla* established and endorsed a structure for state and local actors to negotiate and agree upon plea deals that help noncitizen defendants avoid removal deemed unjust, or that preserve narrow possibilities for consideration of equitable discretionary relief in later deportation proceedings.[116]

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[110] The rarity of a constitutional holding in this area is underscored by the fact that even the Court's substantive criminal law decisions are usually decided through subconstitional means. *See* Kate Stith Cabranes, *Criminal Law and the Supreme Court: An Essay on the Jurisprudence of Byron White*, 74 U. COLO. L. REV. 1523, 1548 (2003).

[111] 559 U.S. at 373.

[112] 132 S. Ct. 1376 (2012).

[113] 132 S. Ct. 1399 (2012).

[114] Josh Bowers, *Plea Bargaining's Baselines*, 57 WM. & MARY L. REV. 1083, 1105 (2016); Jenny Roberts; *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2560, 2660-65 (2013).

[115] Andrés Dae Keun Kwon, *Defending Crimal(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"); Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1153-54, 1159-60 (2013); Roberts, *supra*, at 2668.

[116] *See* Kwon, *supra* note_, at 1100-01 (arguing that *Padilla* also encourages prosecutors to agree to immigration-safe consequences in appropriate cases); Heidi Altman, *Prosecuting Post*-Padilla*: State Interests and the Pursuit of Justice for Non-Citizen Defendants*, 101 GEO. L.J. 1 (2012) (same); Robert M.A. Johnson, *A Prosecutor's Expanded Responsibilities Under* Padilla, 31 ST. LOUIS PUB. L. REV. 129, 130 (2011) (same); Eagly, *Criminal Justice for Noncitizens*, *supra* note_ (discussing various prosecutorial policies that benefit noncitizen defendants). *See also* Vartelas v. Holder, 566 U.S. at ___ (noting how defense attorneys might help noncitizens who travel abroad avoid inadmissibility problems on return by plea bargaining to immigration-safe convictions)

In another recent series of cases, the Court has required and refined a "categorical approach" to determining the immigration consequences of convictions.[117] In general, these cases have rejected the federal government's efforts to expansively interpret the criminal deportation categories in the Immigration and Nationality Act, by requiring a strict categorical match between the elements of the penal offense the noncitizen was convicted of and the relevant immigration statutory provision.[118] The categorical approach cases, the Court has noted, allow noncitizens "to enter 'safe harbor' guilty pleas" that preserve narrow possibilities for equitable relief in immigration court or sometimes avoid immigration sanctions altogether.[119] This line of jurisprudence thus works hand in glove with *Padilla*, reinforcing the ability of subfederal actors to consider downstream proportionality and constrain the application of an overly harsh and rigid immigration code.

Considered together, in my view 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."[120] The Court's recent rulings in this area – the vast majority of which work towards the protection of noncitizens' liberty interests – evince concern with the severity and inflexibility of the immigration code, particularly with respect to minor offenses leading to deportation.[121] 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.

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In sum, the President's "faithful" execution of the law[122] does not simply mean enforcing every (or any) law to the fullest extent possible.[123] Instead, Congress's expansion of deportability grounds and contraction of backend adjudicative equity provisions shifted power and responsibility, to federal

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[117] *See, e.g.*, Carachuri-Rosendo v. Holder, 560 US 563 (2010); Lopez v. Gonzalez, 549 US 47 (2006); Moncrieffe v. Holder, 133 S. Ct. 1678 (2013); Mellouli v. Lynch, 135 S. Ct. 1980 (2015).

[118] *Judging Immigration Equity*, *supra* note_, at 1060-69; Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 NYU L. REV. 1669 (2011); Jennifer Lee Koh, *The Whole is Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257 (2012); Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979 (2008).

[119] Mellouli, 135 S. Ct. at 1987.

[120] *Judging Immigration Equity*, *supra* note_ at 1093.

[121] *Id.* at 1093-1100.

[122] US Const. art. II, sec. 3, cl. 5 (the President "shall take Care that the Laws be faithfully executed . . . .").

[123] Sohoni, *supra* note_, at 48-49.

enforcers and subfederal actors to evaluate and implement proportionality concerns at the front-end stages of the process. "Prosecutorial discretion has . . . overtaken the exercise of discretion by immigration judges when it comes to questions of relief."[124]

Much of the Supreme Court's immigration jurisprudence in recent years reflects the notion that immigrant membership rights 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.[125] Faithful interpretive agents engaged in administering immigration law must take account of the Court's holdings and signals in this area, as well as the general context of the current immigration scheme.

II. THE RISE AND RETREAT OF EQUITABLE ENFORCEMENT EFFORTS

This Part outlines the ways that the administrations of George W. Bush and Barack Obama undertook the implementation of enforcement-based equity in the removal system. It then turns to the Trump administration, where the approach thus far is characterized by mass, indiscriminate enforcement and a sharp departure from discretionary leniency.

A. THE BUSH ADMINISTRATION

Although immigration agency discretionary policies have existed since at least the late 1970s, it was not until the turn of the century that agency heads began to more systematically implement equitable enforcement guidelines.[126] The aforementioned Congressional letter to INS in 1999 urging more refined judgment in enforcement decisions appears to have been the catalyst for action.[127] In 2000, INS commissioner Doris Meissner distributed an agency memo that became "the gold standard" for the use of prosecutorial discretion in immigration

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[124] Cox & Rodriguez, *supra* note_, at 518-19.

[125] *See Judging Immigration Equity*, *supra* note_, 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); MOTOMURA, *supra* note_ at 110-11 (outlining a theory of immigrant inclusion called "immigration as affiliation").

[126] *See generally* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION 14-32 (2015) (chronicling the history of immigration prosecutorial discretion from 1975 to 2007).

[127] Letter from 28 members of the U.S. House of Representatives, *supra* note_ (noting "widespread agreement" that rigid adherence to the 1996 immigration laws had "resulted in unjustifiable hardship" in sympathetic cases).

enforcement.[128] The Meissner Memo instructed agency managers to "plan and design operations to maximize the likelihood that serious offenders will be identified,"[129] emphasized an expectation of fair and consistent discretionary judgments at every stage of the enforcement process,[130] and detailed a nonexhaustive list of humanitarian factors that immigration officers should consider when evaluating whether to exercise favorable discretion.[131]

The development of prosecutorial discretion standards continued following the 2003 dissolution of the INS and the creation of the Department of Homeland Security and its sub-agencies. 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 lawful status.[132] 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."[133] Moderate expansion of immigration prosecutorial discretion guidance continued throughout the remaining years of the George W. Bush Administration.[134]

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[128] WADHIA, *supra* note _, at 24.

[129] Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, on Exercising Prosecutorial Discretion 4-5 (Nov. 17, 2000).

[130] *Id.* at 1.

[131] *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).

[132] Memorandum from William R. Yates, Assoc. Dir. for Operations, USCIS, on Service Center Issuance of Notice to Appear (Form I-862) (Sept. 12, 2013) (requiring continued adherance to the Meissner Memo); Memorandum from Johnny N. Williams, Ex. Assoc. Comm'r. of the Office of Field Operations, U.S. INS, on Family Unity Benefits and Unlawful Presence (Jan. 27, 2003) (requiring attention to humanitarian factors when determining whether to undertake enforcement against unlawfully present noncitizens who are also eligible for immigration benefits).

[133] Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, on Prosecutorial Discretion 2-6, 8 (Oct. 24, 2005).

[134] *See* Memorandum from John P. Torres, Dir., U.S. Immigration and Customs Enforcement, on Discretion in Cases of Extreme or Severe Medical Concern (2006) (instructing ICE officers to consider favorable discretion when deciding whether to detain noncitizens with significant medical conditions); Memorandum from Julie Myers, Ass. Sec., U.S. Immigration and Customs Enforcement, on Prosecutorial and Custody Discretion (2007) (reaffirming the Meissner Memo and instructing agents to release nursing mothers from detention on discretionary grounds except in circumstances implicating public safety).

B. THE OBAMA ADMINISTRATION

President Obama's administration acknowledged even more explicitly the necessity of enforcement-based equity in a system marked by extreme statutory rigidity.[135] Indeed, when it became clear a few years into President Obama's first term that Congress would not be able to enact immigration reform,[136] DHS undertook significant efforts to systematize the use of prosecutorial discretion. In 2011, ICE began to roll-out a series of agency initiatives geared towards more consistent use of equitable discretion.[137] These efforts included guidance documents, trainings, and publication of more transparent enforcement priorities.[138] Over Obama's two terms, the focus remained on encouraging front-

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

[136] *See, e.g.*, Julie Mason, *President Obama Pushes Immigration Overhaul*, POLITICO (May 10, 2011); David Jackson, *Obama Talks Immigration With Officials – But No Members of Congress*, USA TODAY (April 19, 2011); Elise Foley, *Dream Act Vote Fails in Senate*, HUFFPOST POLITICS (Dec. 19, 2010).

[137] *See, e.g.*, Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't, to All ICE Emps., 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; Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't, to Field Office Dirs., Special Agents in Charge & Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention & Removal of Aliens 4–5 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[138] *See, e.g.*, John Morton, Dir., U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011); John Morton, Dir., U.S. Immigration and Customs Enforcement, on Prosecutorial Discretion: Certain Crime Victims, Witnesses and Plaintiffs (June 17, 2011) ; Policy Memorandum from U.S. Citizenship and Immigration Services on Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (Nov. 7, 2011); Memorandum from Gary Mead, Exec. Assoc. Dir., USCIS, on Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships (Oct. 5, 2012); Memorandum from Peter S. Vincent, Principal Legal Advisor, ICE, to All Chief Counsel, Office of the Principal Legal Advisor, ICE, ICE (Nov. 17, 2011), http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf; *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; *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; Memorandum from Jeh Johnson, U.S. Sec'y of Homeland Sec., Secure Communities (Nov. 20, 2014).

line operatives to more consistently use the agency's limited resources to target noncitizens with a criminal history or significant immigration violations, and to weigh forbearance in cases with compelling humanitarian factors.[139]

Deferred Action for Childhood Arrivals (DACA), announced in 2012, represented the agency's attempt to shift toward more systematic and categorical implementation of enforcement discretion.[140] DACA focused on one of the most sympathetic groups of undocumented noncitizens—longtime residents who were brought to the United States at a young age, demonstrated a strong potential for economic productivity, and lacked indicia of dangerousness or wrong-doing.[141] Such individuals had been acculturated as Americans and were considered to bear little or no personal culpability in their past violations of immigration laws. 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.[142] Although controversial for its programmatic nature, DACA brought a large dose of transparency and consistency to the implementation of immigration enforcement discretion, at least with respect to one category of highly sympathetic noncitizens.[143]

During this time, DHS also prioritized enforcement against recent border-crossers and noncitizens who encounter criminal justice systems. Although not all deportations of persons within these categories will be proportional, prioritizing limited resources in this way does lessen the likelihood of enforcement against non-targeted groups, whom the government may have believed are likely to present more significant equitable claims. Specifically, noncitizens who have already been living in the United States for some time, and who have avoided a

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[139] *See generally* WAHDIA, *supra* note_, at 88-104.

[140] *See* Julia Preston & John Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1.

[141] *See* Memorandum from Janet Napolitano, U.S. Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, U.S. Citizenship and Immigration Servs. Dir. & John Morton, U.S. Immigration and Customs Enf't Dir. 1 (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf; *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS. [hereinafter *Deferred Action for Childhood Arrivals*], http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

[142] *See generally Enforcing Immigration Equity*, *supra* note_, at 696; MOTOMURA, *supra* note _, at 176; Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015).

[143] *Enforcing Immigration Equity*, *supra* note_, at 694-98; Kalhan, *supra* note_; Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1 (2015-2016) ; MOTOMURA, *supra* note _, at 176; Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); *see also* Letter from 136 Law Professors and Scholars to President (Sept. 3, 2014) (outlining the executive's authority to use discretion to protect individuals or groups from deportation).

criminal record, are more likely to have developed ties and relationships militating against removal. As a result of this strategy, border removals under the Obama Administration dramatically increased as a percentage of overall removals—something on the order of 66 percent in recent years.[144] Similarly, nearly half of deportees had at least some kind of criminal history.[145]

While those measures represented substantial efforts to implement prosecutorial discretion, many scholars, advocates, and courts viewed the enforcement approach with respect to noncitizens with a criminal history to be overly coarse. President Obama, like several presidents preceding him, mostly abandoned equitable considerations for persons with convictions and instead "used criminal history of almost any type as an irrevocable marker of undesirability."[146] Indeed, by and large, the vast majority of those whom DHS labeled "criminal aliens" had been convicted only of traffic offenses, low-level drug possession, or crimes of migration (illegal entry or re-entry).[147] ICE officers and attorneys denied leniency in most cases involving persons with any convictions, 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.[148] Additionally, under President Obama, the immigration agencies vastly increased the use of fast-track removal mechanisms such as expedited removal,[149] reinstatement of removal,[150] and administrative removal,[151]

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[144] *See* FY 2015 ICE Immigration Removals, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, https://www.ice.gov/ removal-statistics/2015 (last visited Mar. 10, 2017) (showing that border deportations constituted at least two thirds of all removal orders from 2012 to 2015).

[145] *Id.* (showing that over half of deported persons in each year from 2010 to 2015 had some kind of criminal conviction).

[146] *Enforcing Immigration Equity*, *supra* note_, at 700. *See also Return of the JRAD*, *supra* note_, at 42-44; Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Law Enforcement*, 88 NYU L. REV. 1126, 1139, 1145-46 (2013).

[147] *Enforcing Immigration Equity*, *supra* note_, at 704-05; Angelica Chazaro, Challenging the "Criminal Alien" Paradigm, 63 UCLA L Rev. 594, 664 (2016); Eagly, *Criminal Justice for Noncitizens*, *supra* note_, at 1145-46; MARC R. ROSENBLAUM & DORIS MEISSNER, MIGRATION POLICY INST., THE DEPORTATION DELIMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT 189 (2014); MARC R. ROSENBLAUM & KRISTEN MCCABE, MIGRATION POLICY INST., DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE 20 (2014).

[148] *Enforcing Immigration Equity*, *supra* note_, at 700-03; *Judging Immigration Equity*, *supra* note _, at 1060-69. *See e.g.*, Moncrieffe v. Holder, 133 S. Ct. 1678, 1693 (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.")

[149] 8 USC § 1225(b)(1)(A)(i) (allowing immigration officials at the border to issue removal orders).

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

all of which bypass immigration court adjudication. In fact, these measures accounted for more than 83% of total removals in 2013 and 2014.[152] As Jennifer Koh has argued, the fact that these kinds of procedures lack even the limited procedural protections available in immigration court casts doubt on their ability to reach accurate and consistent outcomes.[153]

C. THE TRUMP ADMINISTRATION

Perhaps 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.[154] 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 – ultimately could not inspire the current administration to continue a humanitarian approach with respect to their presence in the United States.[155]

In other respects, the new administration began changing the federal government's enforcement approach even more rapidly. Secretary Kelly issued new memoranda at the outset of his appointment that abandoned the Obama-era prosecutorial discretion guidelines as agency-wide policy.[156] The Trump administration immediately began to ramp up enforcement measures, and rhetoric, against any and all deportable noncitizens, regardless of equities or mitigating circumstances.[157] In a February 2017 memo, for example, ICE

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[151] *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).

[152] Koh, *Removal in the Shadows*, *supra* note_, at 184 (citing statistics from the Department of Homeland Security).

[153] *Id.* at 222-31.

[154] *See* Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, NY TIMES (Sept. 5, 2017).

[155] *See, e.g.*, Ike Brannon & Logan Albright, *The Economic and Fiscal Impact of Repealing DACA,* CATO INSTITUTE (Jan. 18, 2017) https://www.cato.org/blog/economic-fiscal-impact-repealing-daca (the fiscal cost of departing 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,* CENTER FOR AMERICAN PROGRESS (Aug. 28, 2017) https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/ ("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.").

[156] Memorandum from Dep. Of Homeland Security Sec. John Kelly to U.S. Customs and Border Protection Acting Comm'r Kevin McAleenan ET AL (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.

[157] *See supra* TAN_

Associate Director Matthew Albence instructed his 5,700 deportation officers to "take enforcement action against all removable aliens encountered in the course of their duties."[158] Likewise, ICE trial attorneys have been told not to exercise discretion in removal proceedings even for persons with time-delayed paths to lawful status, for example those who have pending U status applications, or beneficiaries of family-based petitions awaiting USCIS adjudication of provisional hardship waivers.[159] Further, DHS has broadened its conception of "criminal aliens" for purposes of establishing removal priorities, now including noncitizens arrested but not yet convicted of any crime.[160]

From February to May of this year, ICE detained an average of 108 noncitizens without any criminal history every day – an increase of 150% since the same period last year.[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]

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[158] Memo from Matthew Albence, Exec. Assoc. Dir., ICE, to All ERO Employees (Feb. 21, 2017), https://www.documentcloud.org/documents/3889695-doc00801320170630123624.html.

[159] *See* OPLA, Memorandum (2017).

[160] *See* Exec. Order No. 13768, *supra* note_; Kelly Implementation Memo, *supra* note_.

[161] Maria Sacchetti & Ed O'Keefe, *ICE data shows half of immigrants arrested in raids had traffic convictions or no record*, WASH. POST (April 28, 2017) ("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, according to data obtained by The Washington Post."); Marcelo Rochabrun, *ICE Officers Told to Take Action Against All Undocumented Immigrants Encountered While on Duty*, PRO PUBLICA (July 7, 2017), https://www.propublica.org/article/ice-officers-told-to-take-action-against-all-undocumented-immigrants. Data from DHS obtained by César Cuauhtémoc García Hernández through a FOIA request indicates that of nearly 60,000 noncitizens arrested by the agency from January 20, 2017 to June 7, 2017, 25,385 (43%) had either no criminal history or a traffic conviction as the most serious offense. Another 3,325 had only immigration violation convictions. While 7,899 had a drug-related conviction, the data released do not indicate what percentage of these were possession offenses only. The remainder of the arrests of persons with criminal history included: 6,223 assault; 1,629 larceny, 1,315 burglary, 1,518 weapons, 1,243 fraud, 1,159 general crimes, 1,088 sexual assault, and another 8,170 in 28 various miscellaneous categories. The data do not indicate the date of conviction. *See* César Cuauhtémoc García Hernández, *ICE Arrests 60,000 in Trump's First Five Months*, CRIMMIGRATION: THE INTERSECTION OF CRIMINAL LAW AND IMMIGRATION LAW (Aug. 22, 2017), http://crimmigration.com/2017/08/22/ice-arrests-60000-in-trumps-first-five-months/.

[162] Lisa Rein, Abigail Hauslohner & Sandhya Somashekhar, *Federal agents conduct immigration enforcement raids in at least six states*, WASH. POST (Feb. 11, 2017) (reporting on ICE raids in Los Angeles, Chicago, Atlanta, San Antonio and New York).

[163] *See, e.g.*, Azi Paybarah, *Law enforcement, court officials differ on impact of ICE courthouse arrests,* POLITICO (Aug. 3, 2017), http://www.politico.com/states/new-york/city-hall/story/2017/08/03/law-enforcement-court-officials-differ-on-impact-of-ice-courthouse-arrests-113781 ("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, Cal. S. Ct.

The agency has also significantly ramped up its use of immigration detainer requests for arrestees, as well as the detention of individuals with prior stays of removal who have stayed out of trouble, supported families, and faithfully shown up to annual immigration check-ins for years.[165] There are indications that DHS is positioning itself to dramatically increase the use of both discretionary detention[166] and the rapid removal measures.[167]

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

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Chief Justice, to Jeff Session, U.S. Attorney Gen., and John Kelly, Dept. of Homeland Security Sec. (Mar. 16, 2017), https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses ("Courthouses should not be used as bait in the necessary enforcement of our country's immigration laws."); 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. [see also statement from ICE in Oct. 2017 that will continue to make arrests 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; Michael Sangiacomo, *Caregiver to severely handicapped stepson to be deported again*, CLEVELAND.COM (Sept. 25, 2017) (describing Trump administration decision to deport man who has provided critical care for 14 years to son with cerebral palsy and mental disabilities, despite stay granted in 2015 by Obama administration), http://www.cleveland.com/metro/index.ssf/2017/09/caregiver_to_severely_handicap.html; Katie Honan, *2 Queens Teens Beg ICE Not to Deport Father Who Sought Political Asylum*, DNA INFO (Oct. 10, 2017), https://www.dnainfo.com/new-york/20171010/jackson-heights/bablu-sharif-ice-queens-detention-deportation-president-trump.

[165] 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. __ (manuscript at 44-52) (forthcoming, 2017). *See also supra* TAN_ [2-4].

[166] Clark Mindock, *Trump plans massive private prison expansion to jail undocumented immigrants*, INDEPENDENT (Oct. 19, 2017), http://www.independent.co.uk/news/world/americas/us-politics/trump-prison-immigrants-expansion-undocumented-private-plans-ice-a8007876.html.

[167] *See, e.g.*, Exec. Order No. 13767, 82 Fed. Reg. 8793, at § 11(c) (Jan. 25, 2017) (announcing expansion of the use of expedited removal proceedings); KELLY, IMPLEMENTING THE PRESIDENT'S INITIATIVES, *supra* note_, at 6-7 (same); MEMORANDUM FROM ATTORNEY GEN. JEFFERSON B. SESSIONS, RENEWED COMMITMENT TO CRIMINAL IMMIGRATION ENFORCEMENT 40 (Apr. 11, 2017) (instructing federal prosecutors to ramp up prosecutions for migration crimes and the corresponding tool of stipulated removals). *See generally* Jennifer M. Chacon, *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 (2017) (discussing increased use of fast-track removal mechanisms under the Trump administration).

agreements,[168] Secure Communities,[169] and the Criminal Alien Program.[170] Each of these programs employes immigration detainers to allow federal authorities to take custody of noncitizens arrested by local police.[171] When individuals are arrested, their fingerprints are submitted to the FBI to check for warrants. Pursuant to an interagency protocol, the prints are then automatically forwarded to DHS. If this triggers any suspicion that the arrestee is present in the United States without authorization or removable for civil or criminal violations, then DHS agents – or local officers deputized pursuant to 287(g) agreements –issue a detainer, asking the law enforcement agency to hold the noncitizen for an additional 48 hours, facilitating federal agents' ability to pick him or her up.[172] Many jurisdictions readily comply with such detainer requests, and, in other respects, embrace a cooperative role in federal immigration enforcement.[173]

In short, the Trump administration has taken a vigorous and indiscriminate approach to immigration enforcement, which it believes that states and cities should 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."[174] 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 Magana Ortiz shows that even the 'good hombres' are not safe."[175]

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[168] *See* Exec. Order on Interior Enforcement, *supra* note_, at sec. 8 (announcing that federal agencies will seek to enact 287(g) cooperative enforcement agreements with local authorities).

[169] *See* Exec. Order on Interior Enforcement, *supra* note_, at sec. 10 (announcing that federal agencies will reinstate the Secure Communities program).

[170] *See* Memorandum from John Kelly, Sec'y, Dep't of Homeland Security, *Implementing the President's Border Security and Immigration Enforcement Policies* 3 (Feb. 20, 2017).

[171] Sacchetti, *supra* note _(documenting 75% rise in number of detainer requests ICE sought for arrested noncitizens); TRAC data (Aug. 2017).

[172] 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 __ and accompanying text.

[173] *See, e.g.*, Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1763-66 (2013); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011); 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 (2008).

[174] Devlin Barett, *DHS Secretary Kelly says congressional critics should shut up or change laws*, WASH. POST (April 18, 2017).

[175] Andres Magana Ortiz v. Jefferson B. Sessions III, No. 17-16014, at 7 (9th Cir. May 30, 2017) (decrying ICE's "inhumane" decision to remove a noncitizen who became "pillar of the

As argued above, this mass enforcement approach represents an abdication of the executive's duty to faithfully implement the scheme created by Congress. The rigidity and severity of the current statute require equitable enforcement discretion to maintain accuracy and fairness. Where local jurisdictions act to strengthen the federal government's enforcement hand even further, as cooperative force multipliers, these legitimacy norms are at even more risk.[176] This context helps us properly understand the role that sanctuary efforts now play in the deportation system.

III. THE EMERGENCE OF SANCTUARIES

A diverse variety of subfederal governments and institutions have implemented policies or undertaken actions that could be called "sanctuary." Sanctuary actors include both public entities (police departments, civil agencies, and public colletes), and private institutions (churches, synagogues, mosques, and universities).[177] In broad terms, sanctuary efforts could be described as 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, as well as 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 limit the provision of access or information to federal immigration enforcers, or that increase removal defense resources.[178] These activities most directly conflict with the current executive goals of mass deportation, igniting a legitimacy contest. For each form of sanctuary, I briefly touch on the relevant legal challenges to and justifications for its activities. Although these disputes are not the focus of my analysis, the fact that each sanctuary action likely stands of legally sound footing helps contribute to its clout, and suggests that they are likely to weather challenges from the executive branch. In Part IV, I will explain how sanctuaries collectively work to foster legal and equitable norms in immigration decision-making processes.

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community" over three decades in the United States), http://cdn.ca9.uscourts.gov/datastore/opinions/2017/05/30/17-16014.pdf.

[176] *Sanctuary Networks*, *supra* note_ at 7 (arguing that "in states and jurisdictions that have taken 'anti-sanctuary' stances, complementing and multiplying the federal executive's enforcement capabilities[,] . . . public and private forms of sanctuary provide the only protection an immigrant is likely to receive").

[177] Villazor, *supra* note_, at 137.

[178] *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 sanctuary policies.[179] 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 for release.[180] In the main, these 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.[181] Most of the policies, however, contain explicit or de facto exceptions for persons with serious criminal history, outstanding warrants, or other significant red flags.[182]

While some of these municipal policies date back to the 1980s, arising in the context of the federal government's dismal record of asylum adjudication for Central American refugees,[183] 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 into the identification and detention of potentially deportable noncitizens.[184] As of December, 2016, something like 300 jurisdictions had adopted policies that in some way restrict the extent to which they comply with immigration detainers or share information with

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[179] *Sanctuary Networks*, *supra* note_.

[180] *See supra* TAN_; Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 J. CRIM. & CIVIL CONFINEMENT 159, 161 (2016).

[181] *See* Christopher N. Lasch, et al., *Understanding "Sanctuary Cities"*, 58 B.C. L. REV. _, manuscript at 28-39 (forthcoming 2018) (discussing various sanctuary city policies).

[182] *Id*.; *see also* [article re Chicago city policies; and Cal Values Act]

[183] Lasch, *supra* note_, at 159-62 (briefly describing the history of the "Sanctuary City" from the 1980s to 2015); 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 (2011) (describing information-limiting policies adopted in San Francisco and New York City in the 1980s).

[184] Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 839 (2017) ("In 2008, approximately 70 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_, at 159- 61; Christina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 601 (2008); Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007). [need more on-point cites here]

immigration authorities.[185] Similar state and local measures have continued to rapidly proliferate in the first year of the Trump administration.[186]

Policy-makers have typically 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.[187] Chiefly, policy-makers emphasize that such policies are critical to community policing and public safety.[188] Assurances that police 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.[189] Indeed, studies have suggested that sanctuary jurisdictions are safer than places without sanctuary measures, as measured by crime rates.[190] Additionally, policing distortions can creep in when law enforcement officers

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

[186] Burch Elias, *Immigrant Covering*, *supra* note_, at 816; Lasch et al., *supra* note_ (Appendix). *See, e.g.*, Denver Rev. Mun. Code ch. 28, art. VIII (Aug. 28, 2017); Atlanta City Council Res., File # 17-R-4256 (Sept. 5, 2017), http://atlantacityga.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=SplitView&MeetingID=2040&MediaPosition=&ID=13260&CssClass=.

[187] Armacost, *supra* note_, 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"); Chen, *supra* note _ (describing a range of motivations for sanctuary policies and resistance to federal immigration enforcement); Kristina M. Campbell, *Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and The Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 112-13 (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); Lasch, et al., *supra* note_, at 42-60 (discussing a range of legal and policy rationales behind sanctuary city measures).

[188] Armacost, *supra* note_; Burch Elias, *Immigrant Covering*, *supra* note_, at 815; Hing, *supra* note _, at 310-11; DORIS MARIE PROVINE, ET AL., POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES (2016). *See, e.g.*, Kevin de León, California Senate President pro Tempore, *Senate Leader de León's California Values Act Clears Legislature* (Sept. 16, 2017) (articulating both public safety and resistance to Trump's indiscriminate enforcement approach as reasons supporting California sanctuary bill), http://sd24.senate.ca.gov/news/2017-09-16-senate-leader-de-leons-california-values-act-clears-legislature.

[189] *See, e.g.*, NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (2013); *Marjorie S. Zatz & Hilary Smith, Immigration, Crime, and Victimization: Rhetoric and Reality*, 8 ANN. REV. L. & SOC. SCI. 141, 150 (2012).

[190] *See, e.g.*, TOM K. WONG, THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY (Jan. 26, 2017), https://www.nilc.org/wp-content/uploads/2017/02/EffectsSanctuary-Policies-Crime-and-Economy-2017-01-26.pdf ("Crime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties"); 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).

know that immigration enforcement is likely to follow an arrest regardless of whether a criminal prosecution will occur.[191]

A second defense of law-enforcement sanctuary measures rests on constitutional constraints and legal liability for violations.[192] Many courts have held that extending a noncitizen's custody solely on the basis of an immigration detainer violates the Fourth Amendment.[193] Recently, a district court in Texas enjoined a state law requiring local authorities to comply with detainer requests, in part due to the "inevitability" of the resulting Fourth Amendment violations.[194] 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.[195] Relatedly, courts have held that immigration detainers are not mandatory (thus avoiding the Tenth Amendment's anti-commandeering rule),

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[191] *See, e.g.*, Int'l Assoc. of Chiefs of Police, *Addressing Racial Profiling: Creating a Comprehensive Commitment to Bias-Free Policing*, in PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL AND TRIBAL LAW ENFORCEMENT (Sept. 2006), http://www.theiacp.org/portals/0/pdfs/PCR_LdrshpGde_Part3.pdf. For analysis of how the integration of immigration and criminal enforcement can lead to racial profiling and other policing distortions, see Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion & the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013) (discussing connections between unconstitutional racial profiling and local enforcement agencies that prioritize the apprehension of immigrants); *Plea Bargain Crisis*, *supra* note_ (arguing that the immigration agency'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); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE WESTERN L. REV. 993 (2016); Armacost, *supra* note_, at 1223-31; Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015); Eagly, *Criminal Justice for Noncitizens*, *supra* note_; Carrie Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 29 ST. THOMAS L.J. _ (2017).

[192] Lasch, *supra* note_; *Sanctuary Networks*, *supra*_, at 26.

[193] *See, e.g.*, Lunn v. Commonwealth, 477 Mass. 517 (2017) (holding that local law enforcement lack authority to continue detention of noncitizen solely for purposes of immigration enforcement); Morales v. Chadbourne, 996 F. Supp. 2d 19, 29-34 (D.R.I. 2014), *aff'd*, 793 F.3d 208 (1st Cir. 2015); Villars v. Kubiatowski, 45 F. Supp. 3d 791, 807-08 (N.D. Ill. 2014); Galarza v. Sxalczyk, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), *rev'd on other grounds*, 745 F.3d 634, 642 (3d Cir. 2014); Miranda-Olivares v. Clackamas Cty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *5 (D. Or. Apr. 11, 2014).

[194] Cenizo v. Texas, CIVIL NO. SA-17-CV-404-OLG, at pp. 65-75 (W.D. TX, Aug. 30, 2017) ([T]he Court has found that enforcement of the mandatory detainer provisions will inevitably lead to Fourth Amendment violations."), http://crimmigration.com/wp-content/uploads/2017/08/Cenizo-v-TX-Order-Aug-30-2017.pdf.

[195] *See, e.g.*, Cty. of Santa Clara v. Trump, No.3:17-CV-574-WHO, 2017WL1459081, at*4 (N.D. Cal. Apr. 25, 2017) ("[C]ivil detainer requests are not often supported by an individualized probable cause that a crime has been committed."); Jimenez Moreno v. Napolitano, No. 11 C 5452, 2016 WL 5720465, at *4 (N.D. Ill. Sept. 30, 2016) (holding that ICE lacked statutory authority to detain without warrant in circumstances of that case, absent finding of flight risk before warrant can be obtained).

and, as a result, it is the local agency that bears liability for any constitutional violations, rather than federal authorities.[196]

A third set of reasons for these policies are fiscal. In particular, the locality bears the cost of extended detention and is typically not fully reimbursed or compensated by the federal government.[197] Moreover, time spent managing detainer requests is time away from other law-enforcement tasks. Thus, non-cooperation or limited-cooperation measures "preserve economic resources by limiting police expenditures to non-immigration-related crimes and by ensuring that police personnel time is not expended on making immigration-related inquiries."[198]

In the face of threats by the Trump administration to withhold federal funding because of these kinds of policies,[199] some jurisdictions obtained a preliminary nationwide injunction prohibiting the federal government from coercing cities and counties into assisting immigration authorities.[200] The basis of the argument is that the federal government cannot unconstitutionally coerce states, municipalities, campuses, or private institutions into assistance with matters that are squarely the federal government's domain.[201] Conversely, law enforcement is a core police power, reserved to the states in our federal system.[202]

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[196] *See, e.g.*, Galarza v. Sxalczyk, 745 F.3d 634, 640-41 (3d Cir. 2014) (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 v. Kubiatowski, 45 F. Supp. 3d 791, 802 (N.D. Ill. 2014); Miranda-Olivares v. Clackamas Cty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *5 (D. Or. Apr. 11, 2014).

[197] *See, e.g.*, Hing, *supra* note_, at 310-11.

[198] Burch Elias, *Immigrant Covering*, *supra* note_, at 815.

[199] Ex. Order, Jan. 25 2017; Julie Hirschfeld Davis & Charlie Savage, *White House to States: Shield the Undocumented and Lose Police Funding*, NY TIMES (March 27, 2017); Forrest G. Read, *Trump Administration Stops Law Enforcement Funds to Chicago, Sanctuary City, and Gets Sued*, THE NATIONAL LAW REVIEW (Aug. 22, 2017), https://www.natlawreview.com/article/trump-administration-stops-law-enforcement-funds-to-chicago-sanctuary-city-and-gets (reporting on Chicago's lawsuit seeking preliminary injunction challenging Trump Administration's decision to condition JAG grants to law enforcement on local cooperation with immigration officials).

[200] Vivian Lee, *Judge Blocks Trump Effort to Withhold Money From Sanctuary Cities*, NY TIMES (April 25, 2017); Joel Rubin, *L.A. looks to join fight against Trump administration over threats to withhold anti-crime funds for 'sanctuary' cities,* LA TIMES (Aug. 22, 2017), http://www.latimes.com/local/lanow/la-me-ln-sanctuary-city-lawsuit-20170822-story.html.

[201] *See, e.g.*, Erwin Chemerinsky, *The Constitutionality of Withholding Federal Funds from Sanctuary Cities*, 40 L.A. LAWYER 60 (2017).

[202] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1451 (1987); Hing, *supra* _, 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 UC DAVIS L. REV. 355 (2012) (arguing that federalism principles require an unequivocally clear statement from Congress that federal

In a few locations, cities have also taken steps to ensure that noncitizen residents facing deportation have the assistance of legal counsel.[203] 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.[204] Measures like this can have a significant effect on immigration outcomes, as the assistance of counsel is crucial in ensuring that noncitizens are able to defend against removal.[205] Some states and cities have also implemented integrative sanctuary measures, such as the provision of drivers' licenses or identity cards. While not my primary focus here, I briefly touch on these kinds of immigrant-welcoming activities in Part IV.B.

B. SANCTUARY CHURCHES

Today's religious sanctuaries are only the most recent iteration of a deep lineage dating back at least to Biblical times.[206] The most recent and 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.[207] At

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immigration officials can deport someone on the basis of conviction that has been pardoned or expunged under state law.

[203] Maura Ewing, *Should Taxpayers Sponsor Attorneys for Undocumented Immigrants?* THE ATLANTIC (May 4, 2017) https://www.theatlantic.com/politics/archive/2017/05/should-taxpayers-sponsor-attorneys-for-undocumented-immigrants/525162/ (discussing right-to-counsel measures in Los Angeles, San Francisco, Chicago, Washington, D.C., New York City, and Austin, as well as state-wide 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 INSTITUTE (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.

[204] Liz Robbins & J. David Goodman, *De Blasio and Council Agree, and Disagree, on Immigrants*, N.Y. TIMES (Jun. 6, 2017), https://www.nytimes.com/2017/06/06/nyregion/de-blasio-and-council-agree-and-disagree-on-immigrants.html?mcubz=0.

[205] *See infra* TAN_; *cf. Sanctuary Networks*, *supra* note_, at 26 ("The provision of legal services may perhaps be a quintessential form of safe haven.").

[206] For accounts of earlier sanctuary movements, see, for example, Bezdek, *supra* note_, 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*, __ U. ST. THOMAS L.J. __ (forthcoming 2017).

[207] *See generally* Villazor, *supra* note_, at 138-42 (outlining the historical background of sanctuaries, and highlighting in particular 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); Gabreille Emanuel, *Religious Communities Continue in the Long Tradition of Offering Sanctuary*, NPR (March 14, 2017). 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* Kristina M. Campbell,

its peak, the Movement consisted of over 100 churches and synagogues, with at least 20,000 individual participants or supporters engaged in the effort.[208] Members of these congregations believed that the refugees faced fatal danger if returned to their home countries, and felt they had to help the federal government fulfill its obligations under domestic and international asylum law.[209]

Barbara Bezdek described the 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 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."[210] The federal government viewed these activities differently, however, ultimately prosecuting participants in the movement for "bringing in and harboring of aliens," in violation of section 274 of the Immigration and Nationality Act.[211] In 1989, some members, including founder John Fife, were found guilty of violating this provision.[212] None served jail time, however, and the Movement continued.[213] Eventually, in separate but related litigation, the government conceded that its handling of the Central American asylum claims had been improper.[214]

Now, in the face of the Trump administration's enforcement approach, more than 800 churches, synagogues, and mosques throughout the country have loosely organized as the New Sanctuary Movement.[215] The New Sanctuary

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Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and The Provision of Sanctuary, 63 SYRACUSE L. REV. 71, 101 (2012);

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

[209] *See generally* Bezdek, *supra* note_, at 935-39; Campbell, *Operation Sojourner*, *supra* note_; Villarruel, *supra* note_, at 1433.

[210] Bezdek, *supra* note_, at 911.

[211] *See* 8 USC § 1324(a)(1).

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

[213] *See* Clyde Haberman, *Trump and The Battle Over Sanctuary in America*, N.Y. TIMES, at A16 (Mar. 5, 2017), https://www.nytimes.com/2017/03/05/us/sanctuary-cities-movement-1980s-political-asylum.html?mcubz=0.

[214] *See* American Baptist Churches v. Richard Thornburgh, 760 F. Supp. 796 (N.D. Cal. Jan. 31, 1991) (discussing settlement of litigation regarding government's improper handling of Central American Asylum claims). *See also* Orantes-Hernandez v. Thornbugh, 919 F.2d 549 (9th Cir. 1990) (affirming findings by district court that the Immigration and Naturalization Service violated the rights of asylum applications by El Salvadorans and Guatemalans).

[215] *See* Sarah Quezada, *How Churches Can Give Sanctuary and Still Support the Law*, CHRISTIANITY TODAY (March 17, 2017); 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://www.realchangenews.org/2017/06/21/mosques-churches-synagogues-and-temples-rekindle-sanctuary-movement-protect-refugees-and. *See also* SANCTUARY MOVEMENT, *supra* note_ (stating that over 1,000 congregations have now joined the New Sanctuary Movement). This is a dramatic increase from 2013, when just over a dozen

Movement has spread even to locations where historically there was little or no involvement with sanctuary efforts or immigrant advocacy, such as Grand Rapids, MI and Twin Cities, IA.[216] Congregation members in this movement share a commitment to keeping the families of deportable noncitizens intact, particularly those with U.S. citizen children. The forms of support vary. A number of churches will provide physical refuge to persons facing removal despite having minor U.S. citizen children and other significant equities. In some cases, these actions have influenced federal enforcers to reverse prior decisions to deny requests for a stay of removal.[217] Other assistance includes "know-your-rights" trainings and legal screenings or representation.[218]

Today's religious sanctuary actors seek to avoid the legal liability that befell the earlier movement's participants by providing sanctuary openly, with the knowledge of immigration enforcers. In this way, they can argue that they are not actually concealing potentially deportable noncitizens.[219] Moreover, the congregations acknowledge that ICE officials may carry out enforcement on church property so long as they have a valid warrant to do so.[220] Indeed, congregations and participants in the New Sanctuary Movement have become

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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), http://religionnews.com/2016/11/18/sanctuary-churches-vow-to-shield-immigrants-from- trump-crackdown/.

[216] Andrea Castillo, *Churches answer call to offer immigrants sanctuary in an uneasy mix of politics and compassion*, LA TIMES (March 24, 2017).

[217] *See, e.g.*, Melissa Etehad, *Denver Mother is Granted Temporary Deportation Relief After 3 Months of Sanctuary in a Church*, L.A. TIMES (May 13, 2017), http://www.latimes.com/local/lanow/la-na- denver-mother-relief-20170512-story.html; Kyung Lah, Alberto Moya & Mallory Simon, *Underground Network Readies Homes to Hide Undocumented Immigrants*, CNN (Feb. 26, 2017), http://www.cnn.com/2017/02/23/us/california-immigrant-safe-houses/index.html. *See also infra* TAN_ (citing reports of sanctuary activities leading to favorable exercises of discretion).

[218] *See, e.g.*, Emily Fontenot*, Why are churches choosing to provide legal services to immigrants?,* THE IMMIGRATION ALLIANCE, http://theimmigrationalliance.org/churches-choosing-provide-legal-services-immigrants/; Christopher Smart, *Leaked document offers peek at how church helps undocumented immigrant Mormons,* THE SALT LAKE TRIBUNE (Mar. 10, 2017), http://archive.sltrib.com/article.php?id=5006677&itype=CMSID ("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.").

[219] Sarah Quezada, *How Churches Can Give Sanctuary and Still Support the Law*, CHRISTIANITY TODAY (Mar. 17, 2017), http://www.christianitytoday.com/women/2017/march/how- churches-can-give-sanctuary-to-immigrants-and-still-sup.html.

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

savvy about the Fourth Amendment and related constitutional protections for private property.[221] Thus far, ICE has adhered to longstanding agency policy not to conduct enforcement actions in churches and other "sensitive locations,"[222] and no members of the New Sanctuary Movement have yet been prosecuted under section 274 of the INA.

C. SANCTUARY CAMPUSES

Sanctuary campuses are public or private institutions of higher learning that admit undocumented students[223] and resist efforts by federal agents to obtain information about these students or conduct enforcement activities on campus.[224] Thus far, something like seventy-seven campuses have adopted non-cooperation policies.[225] Around a dozen have officially declared themselves to be "sanctuary campuses."[226] More common are universities that have implemented sanctuary-like measures, particularly policies that limit information-sharing without a court

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[221] *See Sanctuary Networks*, *supra* note_, at 20-21 (discussing a variety of legal strategies that churches have taken to maximize protection of noncitizens seeking sanctuary in their buildings).

[222] *See* Memorandum from John Morton, Dir. of U.S. Immigration and Customs Enf't to Field Officer Directors, Special Agents in Charge, and Chief Counsel of U.S. Immigration and Customs Enf't, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011) (indicating that as a policy matter ICE will not enforce immigration law in "sensitive locations" such as churches), https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf.

[223] 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; Fla. H.B. 851 (2014); 110 ILCS 305/7e-5; Kansas H.B. 2145 (2004); Nebraska L.B. 239, 99th Legis., 2d Sess. (2006); New Mex. H.B. 582 (2005); N.Y. S.B. 7784 (2002); Texas H.B. 1403, 77th Reg. Sess. (2001); Utah H.B. 144 (2002); Wash. H.B. 1079, 58th Legis (2003). A few states even allow unauthorized resident students to qualify for state scholarships to public universities. *See, e.g.*, Cal. A.B. 130, 2011-2012 Reg. Sess.; Wash. S.B. 6523, 2014 Reg. Sess.

[224] *See generally* Julia Preston, *Campuses Wary of Offering 'Sanctuary' to Undocumented Students*, N.Y. TIMES (Jan. 26, 2017).

[225] *See* SANCTUARY CAMPUSES, https://www.google.com/maps/d/viewer?mid=1LcIME474-lYWbTf_xQChIhSSN30&hl=en&ll=36.2039797443434%2C-113.89148150000005&z=3.

[226] *Id.*; *see, e.g.*, Kathleen Megan, *Wesleyan Declares Itself a Sanctuary Campus for Undocumented Immigrants*, HARTFORD COURANT (Nov. 23, 2016), http://www.courant.com/education/hc- college--trump-sanctuary-1123-20161122-story.html; City Coll. of S.F., CCSF Bd. of Tr. Res. 161215-IX-346 (Dec. 15, 2016) ("City College of San Francisco joins the City and County of San Francisco in affirming its sanctuary status for all people of San Francisco"), http://www.ccsf.edu/BOT/2016/December/346r.pdf; Pres. John R. Kroger, REED COLLEGE (Nov. 18, 2016), http://www.reed.edu/reed_magazine/sallyportal/posts/2016/sanctuary-college.html (declaring Reed College to be a sanctuary college); Pres. Wim Wiewel, PORTLAND STATE UNIV. (Nov. 18, 2016), https://www.pdx.edu/insidepsu/portland-state-is-a-sanctuary-university (declaring Portland State University to be a sanctuary campus).

order or that deny federal enforcers campus access without a warrant.[227] Although less common, public schools are another emerging sanctuary site.[228]

As with other sanctuary entities, such measures have not gone without controversy and challenge. Law-makers have introduced bills, for instance, that would deprive sanctuary campuses of various sources of funding.[229] Moreover, public universities and colleges are administered by employees of the state, and, accordingly, it is possible that 8 U.S.C. § 1373 restricts their ability to limit information-sharing with federal enforcers by university staff. Yet, as Professors Villazor and 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.[230] The Federal Education Rights and Privacy Act prohibits the disclosure of confidential student information to any third-party, and there is no reason to view information about immigration status as exempt from this restriction.[231]

Additionally, because sanctuary campuses (both public and private) sometimes provide housing to undocumented students, the question is raised whether they face liability for "harboring" in violation of INA section 274.[232] This seems unlikely. First, although Congress has restricted the access of noncitizens to federal educational loans, along with various other governmental benefits, the statute expressly allows that states "may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for

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[227] SANCTUARY CAMPUSES, supra note_; *see, e.g.*, Aaron Holmes, *University to Provide Sanctuary, Financial Support for Undocumented Students*, COLUMBIA SPECTATOR, (Nov. 21, 2016), http://columbiaspectator.com/news/2016/11/21/university-provide-sanctuary-financial-support-undocumented-students.

[228] In May 2017, for example, an ICE agent attempted to apprehend a fourth-grader at a public school in Queens, NY, but was turned away by school officials. *See, e.g.*, Alex Erikson, *ICE Agent Tried to Apprehend a 4th-Grader but Was Turned Away by the School*, YAHOO NEWS (May 14, 2017). 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), https://splinternews.com/new-york-city-to-ice-stay-out-of-our-schools-1793859239 ("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.").

[229] *See, e.g.*, No Funding for Sanctuary Campuses Act of 2017, H.R. 483, 115th Cong. (2017); Bryan Lyman, *Alabama House Approves 'Sanctuary Campus' Bill,* MONT. ADVERTISER (Feb. 14, 2017) (reporting on passage of a bill that would authorize the state to withhold funds from sanctuary campuses); Ga. H.B. 37 (2017) (passed); Ark. H.B. 1042, 91st Gen. Assemb., (2017) (died in commission); Ind. S.B. 423 (2017) (passed); Iowa H.F. 265, 87th Gen. Assemb. (2017) (introduced); Tex. S.B. 4, 85th Leg. (2017) (passed).

[230] *Sanctuary Networks*, *supra* note_, at 28.

[231] 20 U.S.C. § 1232g (2013).

[232] *Sanctuary Networks*, *supra* note_, at 27.

which such alien would otherwise be ineligible . . . through the enactment of a State law. . . ."[233] It would be exceedingly odd to allow campuses to permit universities to openly enroll undocumented noncitizens pursuant to a validly enacted state law, but then hold state officials criminally liable for providing housing to those same students. On a related score, the Fifth Circuit Court of Appeals recently observed that "there is no reasonable interpretation by which merely renting housing or providing social services to an illegal alien constitutes 'harboring . . . that person from detection.'"[234] Thus, it is not likely that the anti-harboring provision would extend to this educational context, although it remains to be seen whether the government might seek to prosecute campuses on this basis.[235]

IV. SANCTUARIES AND LEGITIMACY IN IMMIGRATION ENFORCEMENT

The previous Part showed that each form of sanctuary has its own set of independent legal and policy justifications. In this Part, I advance an argument that defends these resistance measures on more systemic grounds. The crux of the argument is 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 discretion shifts yet further upstream, to the police, prosecutors, public defenders, churches, and other local institutions that encounter noncitizens before the federal government gets to them. Thus, rather than subvert law,[236] non-cooperative sanctuary policies – public and private alike – can promote legitimacy values in the removal system.

The administration of immigration law requires more than full-bore enforcement.[237] Statutory pathways to status or relief to removal are now quite narrow for undocumented persons inside the United States, 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. Just as importantly, enforcement actions and policies should be just and fair, especially in a system that now eschews formal back-end proportionality measures. Seen in this light,

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

[234] *See, e.g.*, Cruz v. Abbott, No. 16-50519, at 10 (5th Cir. Feb. 23, 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.'").

[235] *See infra* TAN_ (arguing that courts should endeavor to issue rulings that protect legitimacy-enhancing functions of sanctuaries).

[236] Villazor, supra, at 141 (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").

[237] *See supra* Part I.C.

the Trump administration's mass, equity-blind enforcement approach is an abdication of the executive's proper role.[238] It is an approach that makes the current immigration scheme less, not more, legitimate.[239]

The dynamics between sanctuaries and the federal government are messy, and I hold no delusion that sanctuaries will precipitate complete and 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.

A. LEGAL AND NORMATIVE ACCURACY

The current executors of the removal system see enforcement targets as interchangeable numbers or chits. They are nameless, faceless bodies, others, 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. "After the rules, there [must be] understanding."[240] Especially in a system that administers liberty-depriving sanctions like detention and deportation, individuals who have built lives of family, faith, and community in this country should be able to expect particular, if not categorical, evaluation on equity grounds. High stakes demand commensurate scrutiny and process.[241] As in criminal law, immigration enforcement's "currency is ultimately life and death, prosperity and ruin, freedom and imprisonment."[242] 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. This is what comprises truly equitable discretion and "complete justice."[243]

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[238] *See* Sohoni, *supra* note_ (arguing that enforcement "crackdowns" can resemble "law-making" more than law-enforcing).
[239] *See* LIPSKY, *supra* note_, at 12 (arguing that "society seeks not only impartiality from its public agencies but also compassion for special circumstances and flexibility in dealing with them").
[240] *Annoy No Cop*, *supra*_, at 74 ("[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.").
[241] Mathews v. Eldrige, 424 U.S. 319 (1976) (holding that as the stakes of the private interest affected rise in importance, so must the procedures to guard against erroneous deprivations).
[242] Waldron, *supra* note_, at 217.
[243] Josh Bowers, *Upside Down Juries*, 112 NW. U. L. REV. _, at 19 (forthcoming 2017).

To be legitimate, enforcement determinations must achieve both legal and normative accuracy.[244] As Josh Bowers has explained, legal accuracy "attends to the rules," while normative accuracy "attends to the particulars."[245] Both are essential to the achievement of complete justice.[246] Moreover, when they are in conflict, normative concerns should usually prevail.[247] Operating in the context of the Trump administration's indiscriminate, mass approach to immigration enforcement, sanctuaries are particularly important to the achievement of normatively correct results, though they also contribute to legal accuracy and procedural fairness in some cases.[248] The nature of the legitimacy-enhancing force varies with the type of sanctuary measure at issue.

First, 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.[249] As noted, immigration judges and criminal court sentencing judges no longer have the authority to adjust the application of the law even in extremely compelling circumstances. Moreover, at immigration officials' prerogative, many categories of noncitizens can be denied access to immigration judges altogether.[250] In the new regime, the gears are fixed, and executive officials control the equitable levers. Equity belongs to the enforcers. When the eyes of the enforcers are closed to humanity and hardship, and thereby unfaithful to the contextual operation of immigration law, it falls to local and state governments, public defenders, police and prosecutors, sentencing judges, and even private institutions like campuses and churches, to help ensure legal accuracy and to inject proportionality and equity-enhancing principles into the system.

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[244] *Pointless Indignity*, supra note_, at 1019-21.
[245] *Upside Down Juries*, *supra* note_, at 19.
[246] Nussbaum, *supra* note_, at 93-96 ("Equity may be regarded as a 'correcting' and 'completing' of legal justice."); Waldron, *How Law Protects Dignity*, supra_ at 212 (making the case that to focus solely on "the clarity and determinacy of rules . . . is to slice in half, to truncate, what law and legality rest upon").
[247] Nussbaum, *supra* note_, at 93 (observing that in Aristotelian accounts of justice, equity is superior to "strict legal justice."); Solum, *supra* note_, at 88, 197 (arguing that "the virtue of justice" is superior to "strict legal justice").
[248] *Cf.* William N. Eskridge, *No Frills Textualism*, 119 HARV. L. REV. 2041, 2043 (2006) (recounting 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").
[249] *Cf.* Nussbaum, *supra* note_, at 92 (explaining why criminal justice systems should "refuse[] to demand retribution without understanding the whole story").
[250] Koh, *Removal in the Shadows*, *supra* note _; Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 635 (2009).

President Trump has described sanctuary city activities as the "unlawful nullification of federal law."[251] But that 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.[252] To be sure, sanctuary actions sometimes occur after deportability has already been determined—albeit through processes much more deficient than in criminal law and upon a significantly weaker burden of proof.[253] Most often, however, the impact of sanctuaries will be further upstream in the process, influencing which noncitizens come into contact with federal enforcers in the first place.

Seen in this light, a more apt analogy from criminal law would be that of the grand jury. In the case of criminal grand juries, "equitable charging discretion is not only institutionally acceptable but welcome and anticipated."[254] 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.[255] For the most part, 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.[256] Thus, local law enforcement is already deeply enmeshed in the immigration enforcement scheme.[257]

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[251] Elise Foley & Marina Fang, *White House, Trump Attack Judicial Branch Again By Misconstruing "Sanctuary City" Ruling*, HUFFINGTON POST (Apr. 36, 2017) (reporting that President Trump characterized sanctuary city policies as "engaged in the dangerous and unlawful nullification of Federal law").

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

[253] *See Justice in Removal*, *supra* note_, at 14-17 (explaining burdens of proof in immigration court).

[254] *Upside-Down Juries*, *supra*_, at 22-23; *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?*, 83 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.").

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

[256] *Return of the JRAD*, *supra* note_, at 57. *See also Deporting the Pardoned*, *supra* note _, at 365 ("Although either federal or state convictions can fall within the INA's categories of deportable

When federal enforcers come into the picture now, removal measures are likely to follow without due 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 who to present and who to shield from federal authorities. In effect, they operate as an equitable grand jury, deciding whether immigration enforcement is justified on moral or prudential grounds.[258] 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 further acknowledge the appropriateness of a corresponding role to provide an equitable screen in that context.

Importantly, this is the sort of determination that local authorities and laypersons are in a decent position to make, at least in theory. Proportionality considerations are less about technical culpability than the evaluation of normative principles such as blameworthiness, social responsibility, fairness, hardship, and equality.[259] To put it more precisely, the determination of moral culpability and mitigation "arises out of the exercise of human intuition and practical reason, applied concretely to a particular offender and his act."[260] In short, whether the removal of a particular noncitizen represents is socially positive – for the immigrant, his family, and the broader community – is a highly contextual consideration.

Local actors have a strong claim to competency when it comes to the measurement of individual equities and blameworthiness within the community context. Local institutions and entities are more likely to understand local values and act accordingly.[261] In this respect, police are not solely law enforcers; they are also considered caretakers of their communities. To be sure, police decision-

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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.").

[257] *Sanctuary Networks*, *supra* note_, at 33-34.

[258] *Upside-Down Juries*, *supra*_, at 22.

[259] *Id.* at 15 ("Laypeople are uniquely well suited to evaluate normative principles, like fairness, dignity, autonomy, mercy, forgiveness, coercion, and even equality.").

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

[261] *Cf.* Lemos, *supra* note_, at 750 ("[S]tate enforcement authority can help match enforcement policy to the preferences of local citizens."); 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, *Forward: 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").

making will always reflect some institutional biases and constraints.[262] 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 and emotional detachment.[263] While local policy-makers, police, and prosecutors will not likely let criminal activity by noncitizens go unpunished, in sanctuary jurisdictions they may nonetheless conclude in many cases that tacking banishment onto the penal sanction already meted out by the criminal system is a disproportional response. The call is even easier for the immigrant with no criminal record whatsoever.

To be sure, local police and local laws can also be decidedly anti-immigrant.[264] Empirical data suggest that anti-immigrant laws are largely a function of politics, however, rather than levels of immigration or crime rates.[265] In any event, 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 enforcement apparatus, sanctuary campuses and churches take action that reflects the conscience and ideals of at least a sub-section of the local community as applied to the question of whether particular noncitizens in that community warrant removal. There are positives and negatives when these entities undertake that role. As organizations with community-based service missions, religious organizations and universities are less constrained by the institutional incentives and biases that can sometimes

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[262] For example, local law enforcement agencies rely on state and federal funding sources, whose preferences regarding immigration enforcement must be placated or negotiated. [cite]. *See also Upside-Down Juries*, *supra*_, at 5 (discussing law-enforcement biases and institutional constraints that hamper the application of equitable principles).

[263] This understanding underscores why the loss of the sentencing court remedy of the JRAD was so significant, especially at the moment that immigration law intensified broadened the deportation net for noncitizens with a criminal history. The JRAD did not require 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*, 14–02 IMMIGR. BRIEFINGS 4 (Feb. 2014).

[264] *See generally* Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. STATE L.J. 1431 (2013); Rodriguez, *supra* note_; Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339 (2013); *Policing the Immigration Police*, *supra* note_, (discussing police departments in North Carolina and Arizona that targeted noncitizens).

[265] 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 (1) the percentage of local voters registered as Republican and (2) the presence of an enterprising politician seeking higher office).

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 sanctuary action will either largely accord with local views or reflect a calculated decision that the removal of a particular individual is unjust enough to warrant the risk of community friction.

Other sanctuary measures further legitimacy norms at other stages of the process. Churches and cities that provide legal screening, attorneys, and other resources to help noncitizens defend against removal proceedings contribute to legally accurate and procedurally just outcomes. Indeed, study after study has shown that attorneys make a critical difference in immigration court outcomes in the modern system.[266] 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 limited forms of relief from removal that remain.[267]

Furthermore, the rising use of fast-track mechanisms that bypass immigration court altogether raises due process concerns.[268] These concerns include absence of a neutral adjudicator, determination of complex immigration issues by non-attorneys, lack of most of the limited substantive and procedural rights available in regular immigration proceedings, and inability to seek judicial

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[266] *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 five-and-a-half times more likely to obtain relief from removal); 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); Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, CARDOZO L. REV. DE NOVO (Dec. 2011), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf (reporting 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 non-detained (or released) noncitizens with counsel and 13% without counsel); Andrea Saenz, *The Power of 1000: Updates from the Nation's First Immigration Public Defender*, CRIMMIGRATION (July 14, 2015), http://crimmigration.com/2015/07/14/the-power-of-1000-updates-from-the-nations-first-immigration-public-defender/ ("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*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (July 15, 2015), http://trac.syr.edu/immigration/reports/396/.

[267] On zealous representation in immigration court, see Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L.J. 475 (2015).

[268] Koh, *Removal in the Shadows*, *supra* note_, at 183-84.

review in many cases.[269] Without judicial review, the federal system without means to correct the errors that inevitably arise with such weak procedural protections. Early indications are that the Trump administration is dramatically expanding the use of these deficient processes to effectuate its mass deportation goals.

Procedural deficiencies in removal proceedings – particularly with respect to fast-track removal – offends the rule of law because one of the "elementary features of natural justice" is the adjudicatory norm of "offering both sides an opportunity to be heard."[270] For Jeremy Waldron, the rule of law includes not just settled rules and predictability, but a true opportunity for moral deliberation and argumentation.[271] As Tom Tyler's work has shown, "People 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."[272] The Trump administrations' expansion of procedurally-stunted speed removal measures thus implicates both legal accuracy and procedural justice norms, which should be honored when something as significant as banishment is on the line. Seen in that light, when sanctuaries take lawful actions that help noncitizens subject to these 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.

Finally, religious congregations offering shelter to noncitizens facing impending removal act as a last-resort "circuitbreaker in the State's machinery of [in-]justice," to paraphrase the Supreme Court.[273] 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 temporarily disconnect the wiring of the deportation machine. In some cases, this has jolted federal authorities into doing the right thing.[274]

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

[270] Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 55-56 (2008).

[271] *Id.* at 5, 8, 58-59.

[272] Tom R. Tyler, *Procedural Justice & the Courts*, 44 COURT REV. 26, 33 (2007); *see also Annoy No Cop*, *supra*_, at 59 ("[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.").

[273] Blakely v. Washington, 542 U.S. 296, 306 (2004).

[274] Jeanette Vizguerra's removal was not legally required because she had a pending path to status. But deportation was also normatively unjustified in her case because of the tremendous equities in her favor and the hardship deportation would cause to her and her family. *See also* Mary O'Leary, *Undocumented Immigrant who Took Sanctuary in Connecticut Church Granted Stay of Deportation*, REGISTER CITIZEN (Jul. 26, 2017) (describing how church decision to offer sanctuary

To be sure, there are limitations and drawbacks 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 non-existent in many locations. Second, sanctuary measures are controversial, resulting in political pressures and possible funding restrictions, and often generating costly litigation.[275] Third, the Trump administration has demonstrated a propensity to seek revenge on some sanctuary jurisdictions, shifting enforcement resources to such areas on at least a sporadic basis, and thus potentially overriding the ability of sanctuaries to protect residents of their communities.[276]

What is more, it is not practical for most sanctuaries to make precise decisions about the normative justifiability of removability on an individual level (resource-intensive sanctuary activities by religious organizations may present an exception). Instead, police, prosecutors, and other sub-federal officials must rely on incomplete information, proxies, and guidelines as they enact policies or make decisions that will protect individuals or categories of immigrants. For example, most police departments and municipalities with non-cooperation policies have made exceptions for persons with significant criminal history. On one hand, those carve-outs help justify the view that sanctuary entities operate as an equitable grand jury since they will in fact turn an arrestee over to ICE where the equities are less obviously sympathetic. For many observers, whether local or far away,

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to woman living in the U.S. for 24 years resulted in ICE granting a stay), http://www.registercitizen.com/general-news/20170726/undocumented-immigrant-who-took-sanctuary-in-connecticut-church-granted-stay-of-deportation; *Mother from Peru granted stay from deportation*, BOSTON 25 NEWS (May 21, 2017) ("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."), http://www.fox25boston.com/news/mother-from-peru-granted-stay-from-deportation/524982794; Carolina Pichardo*, Guatemalan Immigrant Who Took Refuge at Church Granted Stay of Deportation*, DNA INFO (Aug. 22, 2017), https://www.dnainfo.com/new-york/20170822/washington-heights/amanda-morales-guerra-guatemala-refugee-deportation.

[275] *See, e.g.*, Cty. of Santa Clara v. Trump, No. 3:17-CV-574-WHO, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017); City and Cty. of S.F. v. Trump, No. 3:17-CV-485-WHO, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (expressing ire against sanctuary cities and a plan to withhold federal funds from them).

[276] *See Statement from ICE Acting Director Tom Homan on California Sanctuary Law*, ICE (Oct. 6, 2017) (stating that as consequence of CA'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"); Rafeal Bernal*, Sessions rips 'culture of lawlessness' in Chicago,* The Hill (Aug. 8, 2017), http://thehill.com/latino/345668-sessions-rips-culture-of-lawlessness-in-chicago; Rick Ritter, *ICE Arrest Hundreds During Operation 'Safe City' Immigration Crackdown; 28 Arrested in Md.*, CBS BALTIMORE (Sept. 29, 2017); Victor Fiorillo, *ICE Arrests 107 Immigrants in Philly This Week During "Operation Safe City,"* PHIL. MAG. (Sept. 29, 2017).

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 deserve a reprieve, or, conversely, aid noncitizens who some would believe do not warrant protection. Thus, the rough-shod 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 the tool of equitable discretion.

Moreover, there are at least three additional reasons why these downsides are outweighed by the positive functions of sanctuaries. The first is that, unlike the situation that arises in criminal law when a jury nullifies a verdict or a grand jury refuses to indict, sanctuary measures do not offer a final veto over federal enforcement decisions. If the federal government is determined to do so, in many cases it will eventually be able to apprehend the noncitizen and put him or her into removal proceedings.[277] 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) fear of 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.[278]

Relatedly, when the consequences of an enforcement system are as severe as those that result from deportation, the balance should tip towards risk of under-enforcement, and the heavier burden is rightly placed on the government.[279] Sanctuary entities that decline to assist federal agents in the machinery of removal

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[277] *See, e.g.*, Ed Pilkington, *U.S. Deports Mother Who Took Sanctuary*, GUARDIAN, at 20 (Aug. 20, 2007) (reporting on Elvira Arellano, an activist with a U.S. citizen son, who was eventually apprehended and deported despite taking church sanctuary in Humboldt Park, Illinois, for a year).

[278] *See, e.g.*, Jana Kasperkevic, *Deporting All of America's Illegal Immigrants Would Cost a Whopping $285 Billion*, BUS. INSIDER (Jan. 30, 2012) (citing sources establishing that deporting one noncitizen likely costs the government between $12,500 and $23,480); *The New York Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers*, CENTER FOR POPULAR DEMOCRACY 5, 10-14 (last visited Oct. 31, 2014) (estimating that if noncitizens in immigration detention in New York were provided legal representation, the state could save $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).

[279] Matt Matravers, *Unreliability, Innocence, and Preventative Detention*, in CRIMINAL LAW CONVERSATIONS 81, 82 (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.").

fit within theories of federalism that posit sub-federal actors as checks against federal tyranny and abuse.[280] Increasingly, theorists have applied federalism insights to non-governmental institutions.[281] While sanctuary policies that run counter to federal enforcement priorities may sometimes be overprotective, it is better to err on the side of liberty than oppression.[282] At the end of the day, a normatively wrong removal is nearly as troubling as one unsupported by code law.[283]

B. A SPHERE OF PROTECTED AUTONOMY

Sanctuaries also promote legitimacy in another way. Specifically, their activities 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. 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 searches and seizures, or to engage in other lawful life activities.

It is beyond the scope of this Article to explore the general 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 protected spheres of autonomy. One of the most important, but largely overlooked, takeaways from *Arizona v. United States* is Supreme Court's understanding that even deportable noncitizens should be able to engage in lawful daily life activities without fear of unlawful government intrusion in the name of immigration enforcement.[284] As the reader will recall, 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

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[280] *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.").

[281] *See, e.g.*, Rachel 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, *Forward: Federalism All the Way Down*, 124 HARV. L. REV. 4, 24-34 (2011) (applying federalism principles to argue that agencies and other public institutions can play a valuable role in dissenting against federal policies); *Sanctuary Networks*, *supra* note_, at 51-52 (extending federalism analysis to include private organizations).

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

[283] *Annoy No Cop*, *supra* note_, at 66 (arguing that moral arbitrariness generates costs to the legitimacy of the removal system on par with the costs of legal errors).

[284] 132 S. Ct. 2492 (2012); *see generally Judging Immigration Equity*, *supra* note _, at 1042-49 (discussing the *Arizona* decision).

grounds.[285] 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."[286]

Throughout its preemption rulings, the Court reiterated the principle that noncitizens who avoid removal actions through the federal government's enforcement policies should not be subjected to "unnecessary harassment" by state or local officers.[287] Most importantly for present purposes is 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.[288] The Court made clear the Fourth Amendment governs these encounters, and that they cannot be initiated or prolonged in ways that violate the constitution, regardless of the individual's immigration status.[289] 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."[290]

Similarly, in *INS v. Lopez-Mendoza*, the Court recognized noncitizens' freedom to expect to conduct one's affairs 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 widespread violations of the Fourth Amendment.[291] Subsequently, numerous lower federal courts have elaborated on this holding.[292]

The freedom of noncitizens to lawfully engage in civic and community life emanates from other precedential touchstones too. In *Plyler v. Doe*, for example, the Court protected on equal protection grounds the freedom of parents'

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[285] 132 S. Ct. at 2502-07.
[286] *Id.* at 2499, 2507.
[287] *Id.* at 2506; *see also id.* at 2503, 2505, 2507.
[288] *Id.* at 2508-09.
[289] *Id.* at 2508-09. *See also Policing the Immigration Police*, *supra* note _; Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L. J. 125 (2015).
[290] *Id.* at 2506.
[291] 468 U.S. 1032, 1050-51 (1984). *See also* Jennifer Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Protections*, 59 DUKE L. J. 1563, 1624–27 (2010); Burch Elias, *"Good Reason to Believe," supra* note_, at 1115; *Policing the Immigration Police*, *supra* note_; Kagan, *supra*_.
[292] *See, e.g.*, Yanez-Marquez v. Lynch, 789 F.3d 434, 450 (4th Cir. 2015); Oliva-Ramos v. USAG, 694 F.3d 259, 271-72 (3d Cir. 2012); Kandamar v. Gonzales, 464 F.3d 65, 71 (1st Cir. 2006); Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).

right to send their undocumented children to public school.[293] Similarly, the Court has limited the authority of states to deny, on the basis of immigration alone, access to other services for which noncitizens are otherwise eligible.[294] Finally, federal law does not directly prohibit undocumented noncitizens from working, and expressly authorizes work as an independent contractor or business owner.[295]

Thus, when immigration agents (or their sub-federal 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.[296] The problem is magnified in areas where local law enforcement and other authorities work in tandem to turn arrests and civic encounters into removal actions wherever possible.[297]

Local limited-cooperation measures 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 protected spheres of autonomy with less fear of unconstitutional and illegitimate interference. If an individual is generally law-abiding in a sanctuary jurisdiction, he or she can largely continue to engage in the life and institutions of the community. Within the realm governed by the particular sanctuary measures at hand, at least, noncitizens can operate with certain expectations regarding

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[293] Plyler v. Doe, 457 U.S. 202 (1982).

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

[295] *See* 8 USC § 1324a (prohibiting employers from *hiring* workers without federal authorization, but not prohibiting unauthorized work itself); 8 CFR § 274a.1(f) (specifying that federal law does not prohibit unauthorized work if done as independent contractor or business owner). *See generally* Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CAL. L. REV. _ (forthcoming 2018); Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMM. L.J. 197 (2017).

[296] *See, e.g.*, Andrew Selsky, *Activist: Immigration Officers Detain 10 Workers in Oregon*, ASSOC. PRESS (Mar. 1, 2017); Michael Matza, *After ICE Raid at Chesco Mushroom Farm, Anxiety High Among Immigrant Workers*, THE PHILADELPHIA INQUIRER (May 7, 2017); Adolfo Flores and Chris Geidner, *A DREAMer Was Arrested During a Raid and Now Immigration Officials Have Been Ordered to Explain Why*, BUZZFEED NEWS (Feb. 14, 2017); Lisa Rein, Abigail Hauslohner, and Sandhya Somashekhar, *Federal Agents Conduct Immigration Enforcement Raids in at Least Six States*, THE WASHINGTON POST (Feb. 11, 2017); David Wickert, *Georgia Immigration Arrests Spark Sharp Responses*, ATLANTA JOURNAL CONSTITUTION (Feb. 11, 2017). *See also supra* notes __ (media reports of enforcement actions in courthouses and hospitals).

[297] *See supra* TAN_ (discussing how increased cooperation with local authorities is correlated with increased constitutional rights violations).

enforcement.[298] This relative predictability facilitates the human flourishing that underlies the basis for the protection of autonomy interests.[299]

Sanctuaries ward against rights-violations for U.S. citizens and lawful permanent residents, too, especially those who do not have white European ancestry.[300] One consequence of "show me your papers" laws, local immigration force-multipliers, and race-based immigration stops is that even citizens and LPRs – if they appear Latino – cannot make plans, engage with community institutions, or otherwise live their lives without the constant specter of state intrusion on suspicion of unlawful presence. Since there is nothing whatsoever blameworthy about being of Latino ancestry, stops based solely on race-based suspicion of unlawful presence offend bedrock principles of legality and liberty.[301] In 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."[302] Decoupling immigration enforcement from criminal proceedings to the extent possible can thus help avoid racial profiling and other distortions in the criminal law that arise through the integration of the two systems.[303]

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[298] *Cf.* Stuntz, *Unequal Justice*, *supra*_, at 2039 (arguing that "giving other decisionmakers discretion promotes consistency").

[299] *Annoy No Cop*, *supra* note_ at 14 (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* Bezdek, *supra* note_, at 917-18 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"); JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1989) ("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."); Christopher Wellman, *Toward a Liberal Theory of Political Obligation*, ETHICS 111, 738 (2001) (arguing that liberty from state intrusion "implies that each autonomous individual has a right to decide which self-regarding benefits to pursue").

[300] *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).

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

[302] PACKER, *supra* n._, at 74.

[303] *See, e.g.*, Amanda Armenta, *Between Public Service and Social Control: Policing Dilemmas in the Era of Immigration Enforcement*, 63 SOC. PROBS. 111 (2016) (showing with two years' worth of data that the 287(g) program implemented in Nashville, TN, led to significant racial profiling and public trust concerns); EDGAR AGUILASOCHO ET AL., UNIV. OF CAL., IRVINE SCH. OF LAW, MISPLACED PRIORITIES: THE FAILURE OF SECURE COMMUNITIES IN LOS ANGELES COUNTY 16–18 (2012), http://www.law.uci.edu/pdf/MisplacedPriorities_aguilasocho-rodwin-ashar.pdf (noting increased racial profiling in policing in LA County following the implementation of the Secure Communities program); Michael Coon, *Local Immigration Enforcement and Arrests of the*

The efficacy of cooperation-limiting measures in protecting against incursions on protected spheres of autonomy is enhanced where sanctuary jurisdictions also have implemented integrative measures. In particular, some jurisdictions 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 drivers' licenses, even those who are unauthorized.[304] Because of restrictions posed by the federal REAL ID Act of 2005,[305] the licenses that most of these states issue to undocumented noncitizens are visibly distinguishable and limited to state or local use.[306] 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."[307] 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.[308]

Integrative sanctuary policies frequently benefit not just undocumented parents but their United States citizen children as well.[309] In turn, access to, and

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Hispanic Population, 5 J. MIG'N & HUMAN SECURITY 3 (2017) (finding that 287(g) program in Frederick Co., Maryland led to "significantly higher number of arrests of Hispanics by the Sheriff's Office than would have occurred in its absence"); TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1 (2009), http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf ("[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.").

[304] PEW CHARITABLE TRUST, DRIVER'S LICENSES FOR UNAUTHORIZED IMMIGRANTS: 2016 HIGHLIGHTS (2016).

[305] REAL ID Act of 2005, supra note_, at sec. 202(c)(2) (119 Stat. at 312-13) (prohibiting the provision of regular driver's licenses to undocumented and imposing restrictions on licenses for nonimmigrant visa holders, but allowing standard licenses for recipients of deferred action).

[306] Burch Elias, *Immigrant Covering*, *supra* note_, at 835-36 (describing the differences in license design in the states that allow unauthorized or conditionally present noncitizens to obtain drivers' licenses).

[307] *Id.* at 837; *see also* SAMEER M. ASHAR ET AL., NAVIGATING LIMINAL LEGALITIES ALONG PATHWAYS TO CITIZENSHIP: IMMIGRANT VULNERABILITY AND THE ROLE OF MEDIATING INSTITUTIONS 34 (2015); Kristina M. Campbell, *Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and The Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 114 (2012) (explaining that in some locations the lack of a driver's license also frequently leads to the impoundment of immigrants' cars).

[308] Burch Elias, *Immigrant Covering*, *supra* note_, at 840-41; Campbell, *supra* note_ at 114-15.

[309] *See, e.g.*, Burch Elias, *Immigrant Covering*, *supra* note_, at 817 ("Instead, the covering allows immigrants who would otherwise, by virtue of their immigration status, be disqualified from access to certain rights, privileges, and government services to have access."). Plyler v. Doe, 457

engagement with, these institutions can help noncitizens develop ties, equities, and evidence that eventually may be valued by formal immigration law.[310]

C. NARRATIVES AND NORMS

Sanctuaries are no panacea to the problems of the removal system. As discussed, their efficacy is piecemeal and incomplete. But beyond their ability to accomplish short-term outcomes, sanctuaries provide an important counter-voice in the contested narrative 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 is destructive of our shared humanity. Some feel that to ignore or accommodate this approach is to condone it.[311] For others, sanctuary efforts are motivated more by public safety concerns. At the end of the day, the underlying motivation is less important than the overall effect. All sanctuaries, by visibly resisting the Trump administration's approach in principled ways, promote competing norms of justice and empathy in the national dialogue.[312]

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. Without institutional competition, little limits the possibility of arbitrariness, excess, and abuse. Defensive sanctuary policies, on the other hand, constrain excess and capriciousness. Thus, recognizing the discretion possessed by subfederal actors in this context helps counteract immigration law's legitimacy problem. Discretion limits discretion.[313] 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.[314]

U.S. 202, 230 (1982) (affirming the Fourteenth Amendment's Equal Protection Clause protecting undocumented children's rights to guaranteed K-12 education).

[310] *See, e.g.*, Juliett P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1712-20 (2011) (discussing various ways that time is valued in immigration law).

[311] BILL ONG HING, DEPORTING OUR SOULS (2006).

[312] *See* Bezdek, *supra* note_, 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.").

[313] Stuntz, *Unequal Justice*, *supra* note_, at 2039 ("Discretion limits discretion.").

[314] *See also Deporting the Pardoned*, *supra* note_, at 385-405 (making similar arguments about pardons for deportable noncitizens); *Return of the JRAD*, *supra* note_ (making similar arguments about JRADs, deferred adjudication, and expungements).

Cities, churches, and campuses engaging in sanctuary activities have a particular gravitas that lends weight to their dissent.[315] Their integral roles in 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."[316] 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 re-shape norms in a longer conversation about immigration policy.[317] The fact that the resistance sanctuary efforts described in this article are supported by various articulated legal justifications imbues each with individual heft,[318] but their true resonance emanates from a sustained alternative interpretation of federal law.[319] In Villazor's and Glasekaram'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."[320] Law consists of more than rules on paper.[321] Narratives give the law its meaning, and our shared understandings of what is right and wrong are contingent and

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[315] *Sanctuary Networks*, *supra* note_, 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.").

[316] *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.").

[317] Bezdek, *supra* note_, at 973; *Sanctuary Networks*, *supra* note_, at 52.

[318] *See supra* TAN_.

[319] *See also Sanctuary Networks*, *supra* note_, at 53 ("What mostly links these multi-faceted sanctuaries – from states to localities and agencies to schools to churches - is not legal justification, but rather the reality that all of them are registering dissent against the current federal administration's immigration policy, and more nebulously, with the harshness of federal laws that permit this type of enforcement.").

[320] *Id.* at 33. *See also* Bezdek, *supra* note_, 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").

[321] Robert M. Cover, *The Supreme Court's 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 note merely a system of rules to be observed, but a world in which we live.").

dependent upon the creative activities of the stakeholders interpreting the law.[322] If sanctuaries continue to sustain their alternative interpretive efforts, and if the stories of sympathetic individuals and families who were helped continue to be shared, the significance of the movement will transcend equitable results in individual cases, ultimately shaping and refining underlying norms and policies.[323]

Finally, sanctuaries may further legitimacy norms by counteracting a growing distrust regarding the ability of the immigration enforcement system to achieve just results. As 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 wide-spread basis.[324] Those most affected by the system perceive the "law in action" to be a punitive, inscrutable, and, ultimately, arbitrary.[325] This legal cynicism is problematic for numerous reasons, not least of which is that it leads individuals to opt-out of the legal system altogether, even those with meritorious claims.[326] 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 legal cynicism, at least on a local level.

CONCLUSION

A system administering sanctions with consequences for human life as significant as banishment and the destruction of family integrity requires enough play in the joints to account for the particulars of individual (or alike) cases. When Congress excised back-end equitable adjudicatory measures from the purview of immigration judges and created mechanisms to allow officials discretion to process certain categories of noncitizens through summary procedures lacking sufficient protections, the responsibility for equitable sorting shifted forward to executive branch enforcers. Truly faithful execution of

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[322] Cover, *Nomos and Narrative*, at 95 ("We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."). *See also* Susan Waysdorf, *Popular Tribunals, Legal Storytelling, and the Pursuit of a Just Law*, 2 YALE J.L. & LIB. 67 (1991).

[323] Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2750, 2749–58, 2760 (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.").

[324] Ryo, *supra* note_.

[325] *Id.* at 1024-47.

[326] *Id.* at 1049. *See also id.* at 1050-51 (explaining that legal systems that create cynicism impart anti-social and anti-rule-of-law policy messages which can be diffused to wider circles than the affected individual).

immigration law thus requires fidelity to individual humanity, rather than rote, arbitrary adherence to black letter rules.

Disregarding this responsibility, the Trump administration has professed its commitment to a full enforcement crackdown on any and all deportable noncitizens it can lay hands on. In so doing, it has failed to live up to the obligation to see justice done. Sanctuaries have stepped into the resulting equitable void. Despite critics' charges that sanctuary policies subvert law, they are instead a valid and normatively defensible means of injecting legitimacy norms, decoupling criminal and immigration enforcement, furthering due process and reliance values, and, above all, helping to avert at least some disproportionate consequences.

Thus far there is anecdotal indication that church sanctuaries might be effective in goading the federal government to exercise proper discretion.[327] 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."[328] 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. Instead, 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.[329]

The most ideal way out of this situation is 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 equitable prosecutorial discretion 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 determine the appropriate outcomes.[330] Enforcers are typically too busy,[331] and they primarily tasked with conduct, not adjudication.[332]

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[327] *See supra* TAN _ (discussing the Vizguerra case and citing other reports of sanctuary activities leading to favorable exercise of discretion by the federal government).

[328] *Return of the JRAD*, *supra* note_, at 44-50.

[329] *See supra* TAN_ (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).

[330] *See, e.g.*, Todd Starnes, *ICE Agents: Obama Won't Let Us Arrest Illegals*, FOX NEWS RADIO (reporting president of 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.").

[331] *See Seeing Justice Done*, *supra* note_, at 50-54.

[332] Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 319 (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."); *Annoy No Cop*, *supra*

Thus, 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 setting deportation policy more generally.[333] 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.

As already noted, several of the Supreme Court's recent enforcement cases do not involve sanctuaries, but, nevertheless, reveal the Court's acceptance and even endorsement of both federal and sub-federal activities that inject considerations of fairness and equity into the deportation scheme. Thus, while *Padilla* is not directly relevant to many sanctuary measures, it demonstrates judicial approval of state and local efforts to reduce the possibility of inequitable removals. The takeaway 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 system.[334]

These considerations should inform courts adjudicating challenges to the federal government's attempts to withhold federal funding from sanctuary entities. 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.[335] And, where harboring convictions cannot be avoided,

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note_, at 17 ("Unlike the professional adjudicator, the professional law enforcer['s] . . . primary function is to take action—to engage in conduct."); Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195 (2014) (arguing that the pervasive culture of enforcement within ICE prevents appropriate consideration of equitable factors).

[333] Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 NYU L. REV. 698 (2017) (arguing that the only political 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).

[334] *See also* Vartelas v. Holder, 132 S. Ct. 1479, 1492 n.10 (2012) (endorsing the idea that lawful permanent residents might "negotiate a plea to a nonexcludable offense," allowing them to travel outside the U.S. 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, 132 S. Ct. 476, 485-87 (2011) (holding that discretionary relief policies that fail to take into account the "alien's prior offense or his other attributes and circumstances" violate the APA).

[335] *See, e.g.*, Cruz v. Abbott, No. 16-50519, at 10 (5th Cir. Feb. 23, 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.'").

courts might impose light sentences.[336] Through these 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 sanctuary entities and supportive court rulings to jolt the political branches into doing the right thing. Until then, sanctuaries represent immigration equity's last stand.

[336] *See supra* TAN_ (discussing how following the Operation Sojourner convictions in the 1980s no jail time was imposed).