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ARGUING ABOUT SANCTUARY

by

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Arguing About Sanctuary

Hiroshi Motomura[*]

TABLE OF CONTENTS

INTRODUCTION 437
I. THE DIMENSIONS OF SANCTUARY 437
A. *Enforcement and Integration* 437
B. *Some Nuances* 440
II. THE ARGUMENTS 444
A. *Structural Limits on Federal Authority* 445
B. *State and Local Prerogatives* 447
C. *Substantive Limits on Arrests and Detention* 448
D. *Fairness, Equity, and Proportionality* 450
E. *Transparency and Non-discrimination* 451
1. Some Historical Perspective 451
2. Transparency and Non-discrimination Today 455
III. THE LESSONS 457
A. *Assessing the Arguments* 457
B. *Linking Sanctuary to Other Issues* 461
IV. BACK TO THE DIMENSIONS 466
A. *Enforcement and Integration* 466
B. *Preemption* 467
V. CONCLUDING OBSERVATIONS 469

[*] Copyright © 2018 Hiroshi Motomura. Susan Westerberg Prager Distinguished Professor of Law, School of Law, University of California, Los Angeles (UCLA). This article is the author's contribution to the UC Davis Law Review's Volume 51 Symposium "Immigration Law & Resistance: Ensuring a Nation of Immigrants." For very helpful comments and suggestions, I am grateful to Jason Cade, Pratheepan Gulasekaram, Ingrid Eagly, Michael Kagan, Christopher Lasch, Juliet Stumpf, and Rose Cuison Villazor, as well as participants in symposia and workshops at the King Hall School of Law at the University of California, Davis, the University of Hamburg Faculty of Law, and the Berliner Institut für empirische Integrations- und Migrationsforschung at Humboldt University.

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INTRODUCTION

"Sanctuary" has come to mean many things. The term's elasticity helps explain why, as Professor Michael Kagan explores in this Symposium, sanctuary is the unusual term that enjoys widespread use across a polarized political spectrum.[1] Comprehensive analysis of the phenomenon is more than I can undertake here. My goals are more modest — to suggest a way of understanding the arguments for and against sanctuary, and to explore what is at stake.

I. THE DIMENSIONS OF SANCTUARY

I start by identifying some of the dimensions of sanctuary that have emerged in law, analysis, and debate over the past generation. To make this examination as comprehensive as practical, I define sanctuary broadly — laws, policies, or other actions by governments and by nongovernmental actors that have the effect of insulating immigrants from immigration law enforcement. The immigrants who might be insulated are mostly undocumented noncitizens. But many of the immigrants who benefit from sanctuary measures are lawful permanent residents who may have become deportable.[2] These measures also insulate individuals whom the federal government targets by mistake for immigration enforcement, and those close to them.

A. Enforcement and Integration

One way to assess whether the sanctuary label fits a given law, policy, or action is to ask how it engages with federal immigration law enforcement.[3] Does it do so affirmatively, by intervening directly in the enforcement process? For instance, people might form a human

[1] *See* Michael Kagan, *What We Talk About When We Talk About Sanctuary Cities*, 52 UC DAVIS L. REV. 391 (2018).

[2] *See* Immigration and Nationality Act (INA) § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2018) (establishing deportability grounds based on criminal convictions).

[3] For overviews in this dimension, see generally Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1736-52 (2018); Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. (forthcoming 2018) [hereinafter *Sanctuary Networks*]. State and local measures that limit cooperation with federal immigration enforcement have led to a pattern of enforcement that varies considerably nationwide, depending on state and local policies on cooperation with ICE. *See* RANDY CAPPS ET AL., REVVING UP THE DEPORTATION MACHINERY: ENFORCEMENT AND PUSHBACK UNDER TRUMP 24, 26-28 (Migration Policy Inst. 2018).

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shield to prevent agents of the federal Bureau of Immigration and Customs Enforcement ("ICE") from making arrests.[4] A less dramatic example of affirmative engagement is a state or local program that provides attorneys for noncitizens in removal proceedings.[5] Legal defense programs differ from human shields in important ways, but both address federal immigration enforcement through an affirmative intervention.[6]

In contrast, some laws, policies, or actions withhold state or local assistance from ICE without affirmatively engaging with federal enforcement. An example is a policy that directs state or local police and other employees not to ask about the immigration status of individuals they encounter in the course of their duties.[7] Or suppose that ICE asks local sheriffs to give ICE personnel access to local jails to identify incarcerated individuals who might be removable noncitizens, or to hold potentially removable noncitizens beyond their release dates so that ICE can take them into custody.[8] Or suppose that ICE asks local sheriffs for advance notice before they release noncitizens from local custody, so that ICE can assume custody at that moment.[9] If

[4] For precedent in a different historical setting, see JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 80-86 (1988) (describing incidents in northern states in the 1850s involving physical intervention to hinder the capture and return of African Americans to slavery).

[5] *See* Maura Ewing, *Should Taxpayers Sponsor Attorneys for Undocumented Immigrants?*, ATLANTIC (May 4, 2017), https://www.theatlantic.com/politics/archive/2017/05/should-taxpayers-sponsor-attorneys-for-undocumented-immigrants/525162/; *SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation*, VERA INST. JUST. (Nov. 9, 2017), https://www.vera.org/newsroom/press-releases/safe-cities-network-launches-11-communities-united-to-provide-public-defense-to-immigrants-facing-deportation (discussing similar programs in several local jurisdictions); CAPPS ET AL., *supra* note 3, at 60-61.

[6] Another category of affirmative intervention consists of state laws that reduce criminal sentences in ways that minimize or eliminate immigration law consequences. For an overview, see CAPPS ET AL., *supra* note 3, at 58.

[7] *See, e.g.*, CITY AND COUNTY OF S.F., CAL. ADMIN. CODE §§ 12H.2, 12I.2 (2018) (prohibiting the use of City funds or resources to gather personal information, including immigration status information, about any individual); CHI., ILL., MUN. CODE § 2-173-020 (2012) (prohibiting city agents or agencies from requesting information about the immigration or citizenship status of any individual); L.A. POLICE DEP'T, OFFICE OF THE CHIEF OF POLICE, SPECIAL ORDER NO. 40, UNDOCUMENTED ALIENS (Nov. 27, 1979) (prohibiting City police officers from initiating action to discover the immigration or citizenship status of any individual).

[8] *See* discussion *infra* Part II.C (beginning in the paragraph that starts "In a typical scenario, a noncitizen is in local custody").

[9] The current administration discontinued this practice, which the Obama administration employed from 2014 to 2016. *See* CAPPS ET AL., *supra* note 3, at 11.

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local sheriffs will not give access, will not continue to hold noncitizens, or will not notify ICE of release dates,[10] they are declining to help federal enforcement, but they are not affirmatively intervening.

I acknowledge that each of these examples of sanctuary without affirmative engagement with enforcement starts with a decision by an individual, government, or other entity to deny assistance to ICE. But as Part III explains, it is legally and politically significant to distinguish decisions to intervene affirmatively in immigration enforcement from decisions not to intervene affirmatively but instead to decline involvement.[11] Another basic point to keep in mind is that labeling an affirmative act as "interference" or instead as "assistance" is not conceptually helpful at the start of the analysis. To be sure, these labels might be justified and useful, but only after closer examination of any situation.[12]

Integration is an alternative dimension for seeing if the sanctuary label is accurate. The key question is whether the law, policy, or action serves to integrate noncitizens into a state or local community regardless of the noncitizen's immigration status. Measures that foster integration of undocumented noncitizens include state driver's license eligibility and identification cards issued by local governments.[13] Another example is eligibility for resident tuition rates and financial aid at public colleges and universities.[14] These measures integrate noncitizens, often in tangible ways. A municipal ID card may, by giving undocumented noncitizens their only valid identification document, allow them to open accounts at banks and credit unions.[15]

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[10] *See, e.g.*, Law Enforcement: Sharing Data, S.B. 54, 2017-2018 Leg., Reg. Sess. (Cal. 2017), codified at CAL. GOV'T CODE § 7284.6 (2018) (stating that California law enforcement agencies shall not be involved in immigration enforcement in various specified ways).

[11] *See* discussion *infra* Part III.A (beginning in the paragraph that starts "Arguments in the first category . . . .").

[12] *See, e.g.*, City of Chicago v. Sessions, 888 F.3d 272, 282 (7th Cir. 2018) ("[N]othing in this case involves any affirmative *interference* with federal law enforcement at all, nor is there any interference whatsoever with federal immigration authorities."); United States v. California, 314 F. Supp. 3d 1077, 1104 (E.D. Cal. 2018) ("California's decision not to assist federal immigration enforcement in its endeavors is not an 'obstacle' to that enforcement effort.").

[13] *See, e.g.*, Driver's Licenses: Eligibility: Required Documentation, A.B. 60, Chap. 524, 2013-2014 Leg., Reg. Sess. (Cal. 2013).

[14] *See, e.g.*, Public Postsecondary Education: Exemption from Nonresident Tuition, A.B. 540, 2001-2002 Leg., Reg. Sess. (Cal. 2001), codified at CAL. EDUC. CODE § 68130.5.

[15] *See, e.g.*, Michael Corkery & Jessica Silver-Greenberg, *Banks Reject New York City IDs Leaving 'Unbanked' on Sidelines*, N.Y. TIMES (Dec. 23, 2015),

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Eligibility for resident tuition rates and financial aid opens the door to higher education and professional opportunities. Other integration effects are intangible, but just as significant. These intangible effects include a feeling of local belonging, optimism about the future, and a sense of well-being.

B. Some Nuances

Enforcement and integration are the two dimensions of sanctuary that are most helpful analytically, but several nuances deserve mention. First, it is important to understand how the enforcement dimension and the integration dimension are related to each other. It may seem natural to think of a measure that fosters the integration of undocumented noncitizens as the absence of enforcement — that is, integration as *non*-enforcement — or even as an *anti*-enforcement measure. It may also seem natural to think of enforcement measures as declining to foster the integration of undocumented noncitizens — that is, enforcement as *non*-integration — or even as an *anti*-integration measure.

This reciprocity often exists. For example, a state law making the undocumented eligible for driver's licenses is a matter of not only integration but also non-enforcement.[16] This is true in that a valid driver's license — by allowing practical access to more jobs — enhances employment opportunities, and thus integrates the undocumented. A driver's license also greatly reduces the likelihood that a routine traffic stop will trigger an immigration status check and possible arrest, detention, and removal — thus a license represents non-enforcement.[17] Similarly, a policy that government employees do

https://www.nytimes.com/2015/12/24/business/dealbook/banks-reject-new-york-city-ids-leaving-unbanked-on-sidelines.html (explaining that several major banks do not accept New York City ID cards as primary identification, but that some banks do); *SF City ID Card — Using Your Card*, CITY & COUNTY OF S.F. OFF. OF THE COUNTY CLERK, https://sfgov.org/countyclerk/sf-city-id-card-using-your-card (listing banks and credit unions that accept San Francisco municipal ID cards as primary identification to open bank accounts).

[16] *See, e.g.*, Cal. A.B. 60, Chap. 524. Under the federal REAL ID Act of 2005, Pub. L. No. 109-13, §§ 201-202, 119 Stat. 231, 311-12 (codified as amended in scattered sections of 8 U.S.C. ch. 12), driver's licenses issued regardless of immigration status are not valid for some purposes governed by federal law, including commercial air travel.

[17] *See* CAPPS ET AL., *supra* note 3, at 57-58 (reporting that driver's licenses and local police acceptance of alternative identification documents have reduced the likelihood that traffic stops will lead to immigration enforcement); *see also* Liz Robbins, *Driving While Undocumented, and Facing the Risks*, N.Y. TIMES (July 18, 2017),

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not ask about immigration status opens up access to government services and benefits and thus integrates, while minimizing arrests based on immigration status and thus reduces enforcement. In these ways, a policy to not ask about immigration status is a policy that both integrates and reflects non-enforcement or even anti-enforcement.

The same reciprocity between enforcement and integration can also exist for government measures that seek to *support* federal immigration enforcement and *oppose* integration of undocumented noncitizens. Measures to inhibit the integration of undocumented noncitizens can be a form of enforcement, if enforcement is understood functionally to include making life hard enough for the undocumented that they will leave. This is sometimes called a policy to promote "self-deportation."[18] Some states and localities have explicitly adopted a version of this rationale in denying undocumented noncitizens access to education, public benefits, housing, and jobs.[19]

This example of reciprocity between integration and enforcement illustrates a more general point. Just as enforcement and integration dimensions can be useful in comparing sanctuary measures with each other, the same dimensions can highlight differences among measures on the opposite end of the political spectrum from sanctuary. There, in the enforcement dimension, a state might authorize or even require state and local police to be actively involved in detaining and questioning noncitizens who are believed to be undocumented, then handing them over to ICE.[20] In the integration dimension, state laws

https://www.nytimes.com/2017/07/18/nyregion/driving-illegal-immigration-trump-administration.html (explaining how traffic stops of drivers with driver's licenses can lead to immigration law enforcement).

[18] For a fuller discussion of self-deportation, including measures to keep undocumented noncitizens from integrating into communities by blocking their access to housing and jobs, see HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 71, 74-75 (2014) [hereinafter IMMIGRATION OUTSIDE THE LAW].

[19] *See, e.g.*, S.B. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010) ("The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local governments agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."); *see also* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 71 (quoting former California Governor Pete Wilson's use of the term).

[20] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 11-1051(B), 13-1509(B), 13-2928(E), 13-2929(D), 13-3883(A)(5) (2010) (implementing various measures that allow and sometimes require state and local law enforcement officers to inquire into an individual's immigration status); TEX. GOV'T CODE § 752.053(a)–(b) (2017); Ariz. S.B. 1070, at §§ 2, 3, 5, 6 (same); S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (requiring local entities and campus police departments to cooperate in enumerated ways with federal immigration law enforcement). Litigation challenges to Arizona S.B. 1070 and similar

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might decline to make undocumented noncitizens eligible for driver's licenses.

The next nuance concerns the effects of sanctuary measures. I do not mean to suggest that measures insulating noncitizens from immigration enforcement do so completely.[21] In fact, the term sanctuary can be very misleading if it is understood to suggest complete insulation from federal immigration enforcement. But it is significant that state and local sanctuary measures will, even if they are just modestly effective, reduce the chances that federal immigration enforcement will lead to an individual's removal from the United States. In this sense, protection is real, even if it is incomplete.

In assessing the insulation that sanctuary measures offer, the overlap between the enforcement and integration dimensions shows that conceptual accuracy and completeness require applying both dimensions.[22] Integration measures intentionally function like many sanctuary measures that address enforcement directly.[23] But the broad range of sanctuary measures also shows that the relationship between enforcement and integration goes beyond simple reciprocity. Enforcement is not just anti-integration or non-integration, and integration is not just anti-enforcement or non-enforcement. In fact, states and localities might have policies that neither enforce nor

laws in other states led to court decisions, most prominently Arizona v. United States, 567 U.S. 387 (2012), that invalidated key provisions and led to out-of-court settlements that rescinded implementation of other provisions of these laws. For an overview, see T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1246-49 (8th ed. 2016). More recently, however, the Fifth Circuit Court of Appeals rejected challenges to Texas S.B. 4. *See* City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018).

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

[22] I am grateful to Deep Gulasekaram for pointing out that expanding the inquiry into sanctuary beyond enforcement dimension to also consider integration may render the concept of sanctuary so capacious that it is indistinguishable from the category of "pro-immigrant" measures. I acknowledge this effect but believe that it underscores the analytical futility of trying to apply the sanctuary label to a smaller set of measures.

[23] This link reflects the functional overlap between immigration law and alienage law. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 113-14 (2006) [hereinafter AMERICANS IN WAITING]; Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1056-57 (1994); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202-03 (1994) [hereinafter *Immigration and Alienage*].

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integrate. A state might, for example, decline to assist ICE or provide attorneys for noncitizens facing removal, while also doing nothing to integrate the undocumented. Or a state might make undocumented students eligible for resident tuition and at the same time have police actively assisting ICE.

These combinations highlight other nuances. One is that immigration enforcement can distinguish between different groups of noncitizens. For example, a state may try to integrate some of its undocumented through access to higher education, while actively helping ICE apprehend undocumented residents who lack formal education or other conventional signs of professional promise. At other times, enforcement priorities can distinguish the undocumented from lawful permanent residents who may be deportable because of a criminal conviction, for example.[24] Or some noncitizens with criminal convictions may be excluded from protection offered by programs to provide attorneys or by rules that limit cooperation with federal immigration agencies.[25] Another nuance is that states, localities, and nongovernmental actors vary widely in their baseline levels of overall activity. A state legislature that meets only in short sessions in a political culture of limited government may do less on *any* topic. Likewise, some businesses, churches, and universities may be more inclined or less inclined to address any public issue than others would.[26]

[24] *See* Immigration and Nationality Act (INA) § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2018) (establishing deportability grounds based on criminal convictions).

[25] *See, e.g.*, CAL. GOV'T CODE § 7282.5(a) (2018); Law Enforcement: Sharing Data, S.B. 54 § 2, 2017-2018 Leg., Reg. Sess. (Cal. 2017) (allowing detainers for noncitizens with convictions for certain enumerated crimes); Liz Robbins, *Mayor and City Council Make Deal on Lawyers for Immigrants*, N.Y. TIMES (July 31, 2017), https://www.nytimes.com/2017/07/31/nyregion/mayor-and-city-council-make-deal-on-lawyers-for-immigrants.html (explaining that New York City funds will not be used to provide lawyers for noncitizens in removal proceedings with convictions for certain enumerated crimes).

[26] On nongovernmental actors, see generally Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 UC DAVIS L. REV. 549 (2018); CAPPS ET AL., *supra* note 3; *see also* Todd Haselton, *Microsoft to Trump: You're Going to Have to Go Through Us to Deport Dreamers Who Work Here*, CNBC (Sept. 5, 2017), https://finance.yahoo.com/news/microsoft-trump-apos-going-us-183418540.html; Joshua Sabatini, *San Francisco Restaurant Owners Offer Employees Sanctuary Workplace*, S.F. EXAMINER (Mar. 10, 2017), http://www.sfexaminer.com/san-francisco-restaurant-owners-offer-employees-sanctuary-workplace; *cf.* Employment Regulation: Immigration Worksite Enforcement Actions, A.B. 450, 2017-2018 Leg., Reg. Sess. (Cal. 2017) (prohibiting California employers from some forms of cooperation with ICE without a judicial warrant). College and university measures can take on governmental and private characteristics.

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In offering this taxonomy of sanctuary, I recognize that enforcement and integration are not the only possible dimensions for understanding state and local efforts to insulate noncitizens from immigration enforcement. For example, it may be useful to refine the enforcement dimension to ask more specifically about a state or local government's use of coercive power. Does a state or locality use its own criminal sanctions or other coercive power against immigration violators? Or does it instead confine its efforts to restricting work or housing, while leaving the use of physical force to the federal government? The Immigrant Climate Index developed by Professors Huyen Pham and Pham Hoang Van offers a more detailed taxonomy.[27] But even recognizing that further nuance and detail are possible, the enforcement and integration dimensions seem able — especially by adopting two very different angles — to organize the many examples of protection that have emerged.

II. THE ARGUMENTS

My map of sanctuary suggests the complexity of the phenomenon and lays a foundation for discussing what is at stake. I start with my general agreement with Michael Kagan's main points in this Symposium, especially that opponents of sanctuary-type measures have adopted two effective, intertwined strategies.[28] One strategy casts sanctuary as pure resistance to federal immigration enforcement without a principled basis beyond resistance itself. The other, closely related strategy contrasts sanctuary with the rule of law, arguing that sanctuary undermines the rule of law. These intertwined strategies try, with some success, to convince some substantial part of the American public to dismiss sanctuary as lawless, unprincipled opposition to immigration enforcement that, among other things, promotes criminality.[29]

Sanctuary in the United States has modern roots in church activities in the 1980s to stymie federal efforts to deport Central American asylum seekers. *See* Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 UC IRVINE L. REV. 247, 252-53 (2011); Rose Cuison Villazor, *What Is a Sanctuary?*, 61 SMU L. REV. 133, 134-35 (2008). *See generally* CAPPS ET AL., *supra* note 3, at 1709-10 (discussing the history of the term sanctuary in U.S. immigration law).

[27] *See* Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 93 N.Y.U. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171663.

[28] *See* Kagan, *supra* note 1, at 14-18.

[29] *See, e.g.*, Exec. Order No. 13,768, 82 Fed. Reg. 8,799 § 1 (Jan. 25, 2017)

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For sanctuary advocates, the challenge is to be fully informed and intentional in advancing persuasive narratives and arguments for sanctuary measures, especially to offset the view that sanctuary is just lawless political opposition. To analyze this challenge, I start by surveying five loose categories of pro-sanctuary arguments.[30] The first three — based on structural limits on federal authority, state and local prerogatives, and substantive limits on arrests and detention — appear consistently in litigation and public debate. The last two — based on fairness, equity, and proportionality, and on transparency and non-discrimination — are much less evident in law and policy.

Some cogent analyses that offer reasons for sanctuary measures rely on a combination of arguments from most of these categories. For example, Professors Annie Lai and Christopher Lasch have presented a sophisticated analysis of sanctuary measures as countering a corrosive, factually flawed, and morally corrupt narrative that links immigrants with criminality.[31] My goal is not directly to contrast my analysis with theirs, but rather to unpack how their analysis and analyses by others actually rely on arguments from one or more categories. I will not suggest that any one category of argument or any combination is consistently more persuasive for all settings or audiences. But I explain in Parts III and IV that some arguments have facets and implications that are underappreciated or even overlooked.

A. Structural Limits on Federal Authority

The first category consists of structural arguments to insulate states and localities from federal pressure for more active involvement in federal immigration enforcement. Starting in early 2017, the new presidential administration made clear its intent to increase such pressure, especially on what it called "sanctuary jurisdictions."[32] Since

("Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States."); *id.* ("Many of these aliens are criminals who have served time in our Federal, State, and local jails."). For further discussion, see Christopher Lasch, *The Political Attorney General*, JURIST (Apr. 15, 2017), https://www.jurist.org/commentary/2017/04/the-political-attorney-general/.

[30] *Cf.* CAPPS ET AL., *supra* note 3, at 1708 (providing a different taxonomy of rationales for sanctuary measures).

[31] *See* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 584-608 (2017).

[32] *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799, at 8,801 (not formally defining sanctuary or "sanctuary jurisdiction," but implying a definition by criticizing sanctuary jurisdictions as ones that attempt "to shield aliens from removal" and including in sanctuary those "jurisdictions that willfully refuse to comply with 8 U.S.C 1373"). A definition of sanctuary jurisdictions as those that do not comply with ICE

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then, the administration has taken steps toward cutting off federal funds to states and localities that withhold certain forms of assistance to ICE.[33]

A major argument in litigation challenging such federal pressure is that the administration is violating restrictions set out in federal law. Some restrictions are rooted in the U.S. Constitution. These include the anti-commandeering doctrine based on the Tenth Amendment — that the federal government may not directly compel a state to enact a regulation or enforce a federal regulatory program, conscript state officers for that purpose, or prohibit a state from enacting laws.[34] A closely related constitutional limitation, derived from the Spending Clause, is that the federal government may not use its control over the authorization and disbursement of funds to "coerce" states in their decision-making.[35] Other challenges assert that federal statutes limit federal executive authority to impose conditions on the state and local receipt of federal funds. This means the executive branch can impose conditions only if authorized to do by the congressional legislation that authorized or appropriated the funds.[36] In short, this first category

requests to hold noncitizens emerged as the federal government's position in County of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1201 (N.D. Cal. 2017), *aff'd in part, vacated in part sub nom*; *see also* City & County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018); *accord* City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 591 (E.D. Pa. 2017); *cf.* City of Chicago v. Sessions, 888 F.3d 272, 281 (7th Cir. 2018) (observing that the dictionary definition of sanctuary as a place of protection does not apply when states or localities decline to assist with federal immigration enforcement).

[33] *See* Press Release, U.S. Dep't of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

[34] *See* Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018); Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 157 (1992).

[35] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012); South Dakota v. Dole, 483 U.S. 203, 211-12 (1987).

[36] Courts have so far uniformly held that the federal executive branch may not do so, because the conditions were not authorized by federal legislation. *See, e.g.*, *City of Chicago*, 888 F.3d at 282-87 (holding that the district court did not err in finding that the City was likely to succeed on the merits of its contention that the Attorney General lacked the authority to impose certain conditions on the receipt of federal grant funds); *City & County of San Francisco*, 897 F.3d at 1231-35 (holding that the conditions imposed by the Attorney General on the receipt of federal grant funds exceeded his statutory authority and therefore violated constitutional separation of powers); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 321-31 (E.D. Pa. 2018) (holding that the Attorney General's imposition of certain conditions exceeded his statutory authority and violated the Administrative Procedure Act, the Spending Clause, and the Tenth Amendment to the U.S. Constitution). One federal district court found that section 9(a) of the Executive Order also violates the Fifth

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of arguments contests the lawfulness of federal measures that impose penalties on sanctuary measures.[37]

B. State and Local Prerogatives

A second category of arguments, closely related to the first, is that states and localities have inherent decision-making authority to choose among goals and tasks that compete for priority. In turn, the argument continues, states and localities may decide how to allocate tangible and intangible resources. For example, sanctuary advocates often press for non-involvement in federal immigration enforcement by arguing that state and local links to ICE would impair community trust in police. One consequence, those advocates maintain, is to weaken law enforcement if, for example, crime reporting or witness cooperation declines.[38]

This is one reason for concern among some local police departments when ICE agents conduct raids wearing jackets with the word

Amendment's procedural due process requirement and is void for vagueness. *See City & County of San Francisco*, 897 F.3d at 1231; *County of Santa Clara*, 275 F. Supp. 3d at 1217-18, *aff'd on other grounds sub nom*. For a survey of litigation challenging federal defunding, see Lai & Lasch, *supra* note 31, at 557-63. For a further update, see Kevin Penton, *Trump's 'Sanctuary' Rules Challenged by N.Y., N.J., Others*, LAW360 (July 18, 2018), https://www.law360.com/articles/1064575/trump-s-sanctuary-rules-challenged-by-ny-nj-others.

[37] Analogous issues — beyond the scope of my analysis here — arise when states try to limit sanctuary measures by local governments or other sub-state public entities. *See* S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017); *see also* City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018) (rejecting most challenges to Texas SB 4). For a summary of laws in Texas, Mississippi, and Iowa that require and strengthen cooperation with ICE, see CAPPS ET AL., *supra* note 3, at 20-21.

[38] *See* CAL. GOV'T CODE § 7284.2 (2017):

> The Legislature finds and declares the following: . . . .
>
> (b) A relationship of trust between California's immigrant community and state and local agencies is central to the public safety of the people of California.
>
> (c) This trust is threatened when state and local agencies are entangled with federal immigration enforcement, with the result that immigrant community members fear approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school, to the detriment of public safety and the well-being of all Californians.

cf. CAPPS ET AL., *supra* note 3, at 41 (reporting that court officials in several cities and states have criticized ICE arrests at courthouses because they can deter victims and witnesses from coming forward); *id.* at 68-69 (reporting decline in crime and reports of domestic violence).

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"POLICE" emblazoned in large lettering.[39] This practice may lead many residents to believe that local law enforcement routinely makes immigration arrests. In basic terms, arguments in this second category reflect concern that the federal pressure to prioritize immigration enforcement over other aspects of law enforcement has two negative consequences. One is to impose federal priorities, and the other is to disregard state or local prerogatives as protected by the U.S. Constitution and federal statutes.[40]

In more general doctrinal terms, this concern with preserving state and local prerogatives often appears as a matter of federal preemption. Though immigration law is traditionally an area of exclusive federal authority, the U.S. Supreme Court has consistently been careful to preserve state and local prerogatives if they touch on immigration issues but operate in areas traditionally left to the states, and by extension to local governments.[41]

C. Substantive Limits on Arrests and Detention

Pro-sanctuary arguments in a third category are less structural and more substantive. They amount to insistence by states and localities that federal agencies adhere to legal requirements when those agencies enforce immigration law. The most prominent example is the argument that states and localities typically make when they justify noncompliance with ICE requests to detain noncitizens until ICE can take them into custody.

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[39] *See, e.g.*, Stephen Elliott, *ICE Accused of Impersonating Police in Immigration Stops*, NASHVILLE SCENE (June 22, 2017), https://www.nashvillescene.com/news/features/article/20865344/do-immigration-sweeps-in-the-kurdish-community-undermine-mnpds-credibility; Doug Smith, *Los Angeles Officials Urge ICE Agents to Stop Identifying Themselves as Police*, L.A. TIMES (Feb. 23, 2017, 6:00 P.M.), http://www.latimes.com/local/lanow/la-me-ln-la-officials-protest-ice-tactics-20170223-story.html.

[40] *See, e.g.*, *City of Chicago*, 888 F.3d at 282 ("The choice as to how to devote law enforcement resources — including whether or not to use such resources to aid in federal immigration efforts — would traditionally be one left to state and local authorities."). A related critique is that sanctuary policies, to the extent that they take local police out of immigration enforcement, counter the political strategy of associating immigrants with crime in order to advocate for more intense immigration enforcement. *See* Lai & Lasch, *supra* note 31, at 581-84.

[41] *See* DeCanas v. Bica, 424 U.S. 351, 355 (1976) ("[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised."); United States v. California, 314 F. Supp. 3d 1077, 1098-111 (E.D. Cal. 2018) (holding that the federal government was not likely to succeed on the merits of its claim that federal law preempts a California statute limiting cooperation with federal agencies enforcing immigration law).

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In a typical scenario, a noncitizen is in local custody. As part of their normal process for processing anyone arrested, local law enforcement agencies routinely send fingerprints to the FBI. Under the federal Secure Communities program, the FBI automatically forwards the fingerprints to the Department of Homeland Security ("DHS").[42] DHS checks for possible immigration issues, for example if someone has no lawful status or is a lawful permanent resident with a criminal conviction that could make her deportable. ICE may ask local authorities to hold that person longer than they normally would, in order to affect a transfer of custody.

The problem for local law enforcement is that complying with an ICE request to extend detention would typically violate the U.S. Constitution. In particular, the Fourth Amendment prohibits searches and seizures without a judicial warrant or probable cause to believe that a crime has occurred.[43] Moreover, state law may also limit the authority of state and local law enforcement officers.[44] Given these constraints, the decision not to help ICE arises partly out of principled obedience to constitutional commands, but also driven by a practical desire to avoid financial liability for unlawful detention.[45]

[42] *See generally* ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON & STUMPF, *supra* note 20, at 1215-21; David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 438-46 (2015) (discussing immigration techniques).

[43] *See* Brian Melley & Amy Taxin, *Court Rules Los Angeles Sheriff Violated Immigrants' Rights*, ASSOCIATED PRESS (Feb. 9, 2018), https://www.apnews.com/bef91382ea9f41f0b65fbdf43bf2b7a6. *See generally* United States v. Watson, 423 U.S. 411, 417 (1976); ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON & STUMPF, *supra* note 20, at 1136-47.

[44] *See, e.g.*, Lunn v. Commonwealth of Massachusetts, 78 N.E.3d 1143, 1158-60 (Mass. 2017) (holding that Massachusetts state law does not directly or indirectly authorize detention of individuals based solely on a federal civil immigration detainer).

[45] For court decisions finding local governments may be financially liable for unlawful detention for immigration enforcement purposes, see, e.g., Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014) (vacating order dismissing action and remanding for further proceedings); Villars v. Kubiatowski, 45 F. Supp. 3d 791, 812 (N.D. Ill. 2014) (denying motion to dismiss); Miranda-Olivares v. Clackamas Cty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (discussing *Monell* liability); Morales v. Chadbourne, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (denying motion to dismiss); *see also* CAPPS ET AL., *supra* note 3, at 35 (reporting that the number of detainers that state and local law enforcement agencies had declined to honor more than quadrupled between 2016 and 2017).

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D. Fairness, Equity, and Proportionality

A fourth category consists of arguments that sanctuary-type provisions are necessary to restore basic principles of fairness, equity, and proportionality to the immigration law system. This view, set forth by Professor Jason Cade, starts with his observation that legislation since the 1990s has eliminated many features of federal immigration statutes that allowed various government decisionmakers "to set aside a deportable noncitizen's removal when warranted by the equities."[46]

For example, Congress repealed a provision that had allowed a sentencing judge in a criminal case to make a recommendation that would effectively prevent deportation based on that conviction.[47] Also in 1996, Congress amended a statute that had allowed noncitizens facing removal to ask an immigration judge to block removal after assessing facts of the case. The pre-1996 version allowed discretionary relief based on "extreme hardship," including hardship to the noncitizen. The amended version sets a much higher standard, "exceptional and extremely unusual hardship," which now must be hardship to a U.S. citizen or lawful permanent resident spouse, parent, or child. Similar amendments to other federal immigration statutes curtailed the discretionary authority of immigration judges and other government officials to block the removal of individual noncitizens on a case-by-case basis.[48]

In Cade's view, federal statutes severely constrain grants of discretionary relief by federal immigration judges and other officials, but fair and equitable results in individual immigration cases require the exercise of discretion. Cade argues that the current administration's "wholesale disregard of the responsibility to equitably enforce the law"[49] exacerbates this inflexibility. In this setting, he

[46] Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. (forthcoming 2018) [hereinafter *Sanctuaries as Equitable Delegation*].

[47] For discussion of the "judicial recommendation against deportation," often called the "JRAD," see Padilla v. Kentucky, 559 U.S. 356, 361-64 (2010).

[48] *See* Immigration and Nationality Act § 240A, 8 U.S.C. § 1229(b) (2018) (setting out requirements for cancellation of removal); *see also* ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON & STUMPF, *supra* note 20, at 735-36; Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 677-78 (2015) [hereinafter *Enforcing Immigration Equity*]; Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527, 540-42 (2015).

[49] *Sanctuaries as Equitable Delegation*, *supra* note 46, at 8. *See* CAPPS ET AL., *supra* note 3, at 51-56 (reporting on the administration's reduction in the use of

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continues, state and local decisionmakers are a significant group of actors who are capable of exercising meaningful discretion.[50] Sanctuary measures enlarge the state and local role in ways that make it less likely that intensive federal enforcement leads to removal. This means that sanctuary measures "help the system incorporate some fairness into real-life immigration decision-making, achieving results that are normatively accurate."[51]

E. Transparency and Non-discrimination

A fifth category of arguments for sanctuary has not been explained or articulated as fully as I believe it should be, so I will do so here. My aim in this Part II-E is to explain the argument, and Parts III and IV explain in greater detail why the argument is important. It invokes a historical perspective on U.S. immigration law and policy as the foundation for constitutional concerns grounded in transparency and non-discrimination. The core of the argument is that sanctuary-type measures safeguard the rule of law in ways that serve to prevent unlawful racial and ethnic discrimination. This purpose is especially urgent in the current presidential administration, under which immigration law enforcement has become rogue by design. In this setting, the paradigmatic problem is undetected or unremedied racial and ethnic discrimination. A closely related concern is erosion of the rule of law.

1. Some Historical Perspective

The historical perspective is rooted in the origins and current operation of the U.S. immigration system.[52] Two features are key. One is the unfortunate entanglement of immigration law with race and ethnicity. The other is the core logic of the system, which features selective admissions and selective enforcement, which in turn lead to vast discretion exercised by the individuals and agencies that enforce immigration law.[53] Because of these core features, enforcement will

prosecutorial discretion after arrest and ICE's "high degree of autonomy during the current administration").

[50] *See Sanctuaries as Equitable Delegation*, *supra* note 46, at 46-63.

[51] *Id.* at 8.

[52] For much fuller discussions of this history, see IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 31-55, 96-105; AMERICANS IN WAITING, *supra* note 23, at 15-36, 47-50, 63-76, 115-35, 174-87.

[53] *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 41-52, 128-31.

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not be transparent. Lack of transparency creates a serious risk that enforcement will be discriminatory but escape detection or remedy.

The entanglement of U.S. immigration and citizenship law with race and ethnicity spans more than two centuries. For about 150 years, citizenship rules used race to define who belonged and who did not. In 1790, the first federal naturalization statute limited eligibility to "free white persons."[54] Race also separated newcomers who could become citizens from those who could not. As an incentive to immigrate and a vehicle to integrate them, federal, state, and territorial laws often treated the newest immigrants like citizens, even immediately after arrival. For example, those who declared their intent to naturalize could acquire western land under the federal Homestead Act of 1862 and vote in many new territories.[55] But these advantages were limited to white immigrants, who were the only immigrants eligible to naturalize.[56]

After the Civil War, the Fourteenth Amendment conferred birthright national citizenship on anyone born on U.S. soil and subject to U.S. jurisdiction.[57] For the first time, national law recognized African Americans as citizens by birth.[58] The U.S. Supreme Court decided in 1884 that this excluded American Indians,[59] but it decided in 1898 that the same clause conferred citizenship on anyone of Asian ancestry born on U.S. soil.[60] Citizenship by naturalization followed a parallel timeline. In 1870, Congress broadened eligibility to naturalize to include "aliens of African nativity and to persons of African descent" — but not Asian immigrants.[61] Only in 1952 were racial bars to naturalization eliminated from federal law.[62] Citizenship gradually

[54] Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (Mar. 26, 1790).

[55] *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 100-02; AMERICANS IN WAITING, *supra* note 23, at 115-19.

[56] *See* AMERICANS IN WAITING, *supra* note 23, at 115-19.

[57] *See generally* U.S. CONST. amend. XIV, § 1 (defining citizens as all persons born or naturalized in the United States).

[58] *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 96-97; AMERICANS IN WAITING, *supra* note 23, at 72-76.

[59] *See* Elk v. Wilkins, 112 U.S. 94, 109 (1884).

[60] *See* United States v. Wong Kim Ark, 169 U.S. 649, 694-96 (1898); IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 97-98; AMERICANS IN WAITING, *supra* note 23, at 72-73.

[61] *See* Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256 (July 14, 1870); IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 97-98; AMERICANS IN WAITING, *supra* note 23, at 73.

[62] The Nationality Act of 1940 opened up naturalization to "races indigenous to the Western hemisphere," a phrase referring to American Indians. Nationality Act of 1940, ch. 876, § 303, 54 Stat. 1137, 1140 (Oct. 14, 1940). Eligibility expanded to include immigrants from China in 1943, and from India and the Philippines in 1946.

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became more inclusive, but its association with racial exclusion remained woven into the nation's historical fabric.[63]

Starting in the late 1800s, immigration laws came to join citizenship laws in enforcing racial exclusion. After the 1849 Gold Rush, Chinese migrants were recruited to work in the western United States. Later, however, they were blamed for taking jobs from Americans.[64] In 1882, a federal law banned the admission of Chinese laborers for ten years.[65] This Chinese Exclusion Act was renewed several times and then extended indefinitely, to be repealed only in 1943.[66] In the late 1800s, as the U.S. economy rebounded, it turned to other labor sources, notably Japan, but other racial and ethnic restrictions on immigration followed. In 1917, a new federal law blocked immigrants from an "Asiatic barred zone" that covered most of that continent.[67] The only exceptions were the Philippines and other U.S. possessions, as well as Japan, for which no formal restriction was needed after the Japanese government agreed in 1907 to limit emigration to the U.S. mainland.[68]

In the 1920s, federal laws continued to exclude on the basis of race as part of efforts to preserve the country's ethnic mix. The benchmark for these efforts was the U.S. population in the late nineteenth century, before the arrival of many southern and eastern European immigrants who were widely considered racially inferior and unassimilable.[69] These laws were the first to limit the number of immigrants, unlike earlier bans on undesirables by category. After a temporary ethnic screening measure in 1921, the National Origins Act of 1924 made ethnic caps a core aspect of federal immigration law.[70] Until 1965, these laws limited immigration from outside the Western Hemisphere

See Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 600, 601; Act of July 2, 1946, ch. 534, § 1, 60 Stat. 416, 416; IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 98; MOTOMURA, *supra* note 23, at 75.

63 *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 100-02; AMERICANS IN WAITING, *supra* note 23, at 173-88.

64 *See* AMERICANS IN WAITING, *supra* note 23, at 15-31.

65 *See* Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58, 61.

66 *See* Act of Apr. 27, 1904, ch. 1630, § 5, 33 Stat. 392, 428, *repealed by* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600, 600.

67 *See* Act of Feb. 5, 1917, ch. 29, §§ 1-3, 39 Stat. 874.

68 *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 36-37; AMERICANS IN WAITING, *supra* note 23, at 31-32.

69 *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 99-100; AMERICANS IN WAITING, *supra* note 23, at 123-32.

70 *See* Act of May 26, 1924, ch. 190, § 4-5, 43 Stat. 153, 155; Act of May 19, 1921, ch. 8, §§ 2(a)(6), 3, 42 Stat. 5, 5-7.

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and kept it almost entirely white, and largely from western and northern Europe.[71]

As for immigration from the Western Hemisphere, the number of migrants admitted from Mexico or elsewhere in Latin America was not capped during this period. Federal law controlled their entry mainly by excluding anyone likely to "becom[e] a public charge . . . ."[72] At the behest of growers, ranchers, mining companies, railroads, and other employers, the federal government applied this restriction to Latin American and especially Mexican migrants only selectively. Racial perceptions cast Mexicans as a subordinate workforce, expected to work when needed but go home when they were not.[73] Mexican workers could be managed as migrants, some lawful and some undocumented, but they were not treated as future citizens.

With minimal enforcement resources available for the vast borderlands and the economy needing workers, the U.S. government tolerated considerable undocumented migration. Enforcement against the largely Mexican undocumented population was highly discretionary, reflecting economic conditions and politics.[74] Workers toiled for low wages in harsh conditions. Some came outside the law. Others were temporary workers in the Bracero program, which operated from 1942 until the mid-1960s and brought in nearly a half-million Mexicans in each of its peak years.[75]

Congress repealed Chinese exclusion in 1943 and the last racial bars to naturalization in 1952.[76] The next step — repeal of the National Origins Act in 1965 — was a transformational moment in U.S. history, driven by the same coalition that won the 1964 Civil Rights Act and the 1965 Voting Rights Act.[77] The new system brought many more

[71] *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 99-100; AMERICANS IN WAITING, *supra* note 23, at 132-33.

[72] *See* Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875, 876. In 1882, Congress enacted the first federal provision barring from entry "any person unable to take care of himself or herself without becoming a public charge." Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214; *see also* AMERICANS IN WAITING, *supra* note 23, at 47-51.

[73] *See* IMMIGRATION COMM'N, *Abstract of the Report on Japanese and Other Immigrant Races in the Pacific Coast and Rocky Mountain States*, *in* REPORTS OF THE IMMIGRATION COMMISSION: ABSTRACTS OF THE REPORTS OF THE IMMIGRATION COMMISSION WITH CONCLUSIONS AND RECOMMENDATIONS AND VIEWS OF THE MINORITY 690-91 (1911).

[74] *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 46-52.

[75] For a fuller version of the analysis in this paragraph, see *id.* at 31-55.

[76] *See* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600, 600 (repealing Chinese exclusion); Act of Mar. 20, 1952, Pub. L. 82-414, ch. 477, § 311, 66 Stat. 163, 239 (codified at INA § 311, 8 U.S.C. § 1422) (eliminating restrictions on naturalization based on race, sex, or marital status).

[77] *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 104; AMERICANS IN

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immigrants, changing the country's racial and ethnic makeup and transforming American culture profoundly. The foreign-born population — under five percent in 1970 — increased to about 13.5 percent in 2016, with many more from Asia and Latin America and a dramatic decline in the European share.[78]

The new system also led to a large undocumented population. Congress decided that ending unequal treatment of immigrants by nationality would mean worldwide application of the new system with its numerical caps. For the first time, federal law limited the number of immigrants from Latin America, just as it limited immigrants from other regions.[79] The system also shut out almost all workers without a college education.[80] At the same time, notorious labor abuses in the Bracero program led to its termination.[81] But patterns of migration, especially from Mexico, had become deeply engrained for migrants, their communities, and many employers.[82] Enforcement was porous enough to channel millions of undocumented into an economy that put them to work.

2. Transparency and Non-discrimination Today

In the immigration scheme that prevails today, lawful admissions are highly selective, but employer demand for workers is strong, and the government has long tolerated substantial undocumented immigration.[83] As a result, today's undocumented population reflects a

WAITING, *supra* note 23, at 132; *see generally* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (supported by liberal groups and labor groups); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973-1973bb-1) (supported by liberal groups and labor groups).

[78] *See* WILLIAM A. KANDEL, PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW 7-9 (Cong. Res. Serv. 2018); *U.S. Immigrant Population and Share over Time, 1850-Present*, MIGRATION POLICY INST. (2018), https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time.

[79] *See* Immigration and Nationality Act § 202(a)(2), 8 U.S.C. § 1152(a)(2) (2018); H.R. Rep. 94-1553, 94th Cong., 2d Sess., at 1-4 (1976); S. 89-748, 89th Cong., at 17-18 (1965); Daniel Tichenor, *The Political Dynamics of Unauthorized Immigration: Conflict, Change, and Agency in Time*, 47 POLITY 284, 293-96 (2015); IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 41. For related legislation, see generally Act of March 17, 1980, Pub. L. No. 96-212, 94 Stat. 102; Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907; Act of Oct. 20, 1976, Pub. L. 94-571, § 3, 90 Stat. 2703; Act of Oct. 3, 1965, Pub. L. No. 89-236, §§ 8, 21(e), 79 Stat. 911, 916, 921.

[80] *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 41-46.

[81] The Bracero program ended on December 31, 1964, with the expiration of the authority under the Act of Dec. 16, 1963, Pub. L. No. 88-203, § 1, 77 Stat. 363, 363.

[82] *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 46-52.

[83] For a fuller version of the analysis in this paragraph, see IMMIGRATION OUTSIDE

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wide gap between the law on the books and law in action. Enforcement is politically contentious. On the one hand, undocumented migrants keep businesses profitable, they are the close relatives of citizens, and they are embedded in the daily lives of communities in many ways. But others see them as lawbreakers. Long-term solutions such as legalization and reworking admission categories seem out of reach in the immediate future.

Political pressure has boosted enforcement, but funding is modest for the size of the undocumented population.[84] And because admissions are selective, so is enforcement.[85] In turn, vast discretion governs arrest, detention, and removal. Selective admissions, selective enforcement, and vast discretion have combined to create a vulnerable population open to exploitation. Many are immigrants of color, especially from Latin America. They are invited to work and have been broadly tolerated but kept at society's margins.

Though current immigration laws are generally drafted in neutral terms, concerns about *de facto* discrimination in enforcement prompt direct challenges that often allege racial or ethnic profiling or other types of selective enforcement. This background lays the foundation for this fifth category of arguments for sanctuary. Sanctuary-type measures limit unlawful discrimination that might be one consequence of rogue enforcement. Relatedly, sanctuary-type measures limit erosion of the rule of law. The issue is not directly one of the number of individuals subject to immigration enforcement, nor of the intensity of enforcement, or even of the use of fear as an enforcement tool.[86] These are all urgent concerns, but the more basic issue that underlies the fifth category of arguments focuses on how someone in the federal government makes enforcement decisions. The key questions are these: who is threatened with arrest, detention, and deportation, or adversely affected by those threats, and is that decision-making discriminatory?[87]

THE LAW, *supra* note 18, at 41-46.

[84] *See* CAPPS ET AL., *supra* note 3, at 71 (observing that resource limitations are a key constraint on immigration enforcement).

[85] For a fuller version of the analysis in this paragraph, see IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 46-52.

[86] In this regard, immigration enforcement since January 2017 differs significantly from the Obama administration, which oversaw record numbers of removals in some years. *See* CAPPS ET AL., *supra* note 3, at 38-55 (comparing the two administrations' enforcement priorities and outcomes).

[87] From 2013 through 2017, Mexicans and Central Americans accounted for 85 to 87 percent of arrests. *See* CAPPS ET AL., *supra* note 3, at 29. In 2014, Mexicans and Central Americans accounted for about 64 percent of the unauthorized population of the

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III. THE LESSONS

A. Assessing the Arguments

The first three categories of arguments for sanctuary — based on structural limits on federal authority, state and local prerogatives, and substantive limits on arrests and detention — are relatively familiar. Arguments in the fourth and fifth categories — based on fairness, equity, and proportionality, and on transparency and non-discrimination — appear much less frequently. This is especially true for the fifth category.

Arguments in all five categories have some power to persuade. To varying degrees, however, they are susceptible to their opponents' narratives that sanctuary is "lawless resistance" and "undermines the rule of law."[88] I recognize that many advocates for sanctuary may intend to send a message of resistance, defiance, or dissent, in spite of what the law might say. Nor do I mean to disregard or diminish the essential role of resistance, defiance, and dissent in political debate and action. And yet, it remains important to analyze how the persuasive power of arguments for sanctuary will vary by audience and context.

None of the five categories of arguments is inherently or consistently superior. Instead, each category has strengths and weaknesses, and choosing to use one or more in a given setting should be an intentional process. That process should be informed by awareness of the dimensions of sanctuary, the various types of arguments, the persuasiveness of arguments in different settings, the varying potential of arguments to forge different political alliances, and the synergy among arguments to add up to a convincing overall view of sanctuary measures.

Arguments in the first category, consisting of non-substantive structural arguments grounded in limits on federal government authority, have achieved notable successes in litigation. Most

United States. *See* Jeffrey S. Passel & D'Vera Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009*, PEW RES. CTR. (Sept. 20, 2016), http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/.

[88] *See generally* Kagan, *supra* note 1. In this regard, the term sanctuary bears some resemblance to "Abolish ICE," which can mean many different things ranging from open borders and an end to immigration enforcement, or just a different emphasis and organization of immigration law enforcement. Discussion of the Abolish ICE movement is beyond the scope of my analysis here, but the general similarity deserves mention.

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prominently, the administration has tried to withhold federal grant funding for local law enforcement agencies that decline in certain ways to cooperate with ICE. In three cases, two federal courts of appeals and one federal district court have rejected these federal executive branch efforts by applying constraints based on the Spending Clause, the Tenth Amendment, and federal statutes.[89]

Court decisions in these three cases have also cited state and local decision-making prerogatives as part of their analyses of limits on federal government authority. In this way, these decisions have sustained arguments in the second category as well as the first.[90] Similarly important is a federal district court ruling denying the federal government's preliminary injunction motion to block several California statutes limiting cooperation with ICE. In largely rejecting arguments that federal law preempts the statutes, the federal district

[89] *See* City & County of San Francisco v. Trump, 897 F.3d 1225, 1233-35 (9th Cir. 2018); City of Chicago v. Sessions, 888 F.3d 272, 283-87 (7th Cir. 2018) (finding that the City was likely to succeed on the merits of its claim that conditions on federal funding exceeded the Attorney General's statutory authority and therefore violated separation of powers); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 321-31 (E.D. Pa. 2018) (holding that federal funding conditions exceeded the Attorney General's statutory authority and were unconstitutional as violating separation of powers, the Spending Clause, and the Tenth Amendment commandeering prohibition).

[90] *See City & County of San Francisco*, 897 F.3d at 1235 (citing "policies intended to protect immigrant communities and to encourage community policing measures"); *City of Philadelphia*, 309 F. Supp. 3d at 313-14 (finding that "the City's policies of community policing and smart policing allow the City to be more effective in reducing crime, and providing social services to Philadelphia citizens," and that "[t]hese policies are well within the City's discretion to implement"); *City of Chicago*, 888 F.3d at 281 (discussing the interests of the City of Chicago in not "forgoing the relationships with the immigrant communities that they deem necessary for efficient law enforcement").

A federal statute, 8 U.S.C. § 1373 (2018), bars restrictions on the transmission of information regarding any individual's citizenship or immigration status to the federal government. The bar does not address information on an individual's expected date of release from custody, nor does the bar require states or localities to do anything affirmative. Almost two decades ago, a federal appeals court rejected the argument that § 1373 violates the Tenth Amendment, but that decision left open the possibility that a constitutional challenge to § 1373 in a different context might succeed. *See* City of New York v. United States, 179 F.3d 29, 35-37 (2d Cir. 1999). More recently, two federal district courts have held § 1373 unconstitutional. *See* City of Chicago v. Sessions, No. 17-C-5720, 2018 WL 3608564, at *10 (N.D. Ill. July 27, 2018); *City of Philadelphia*, 309 F. Supp. 289, 329-31 (E.D. Pa. 2018); *cf.* United States v. California, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018) ("The Court finds the constitutionality of Section 1373 highly suspect.").

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court cited state prerogatives as protected in the U.S. Constitution and federal statutes.[91]

Arguments in the first and second categories are rhetorically distinct from each other, in that the first category emphasizes limits on federal authority and the second category emphasizes state and local prerogatives. Analytically, however, they are intertwined. It is difficult to explain how the U.S. Constitution limits federal authority without discussing state and local prerogatives and especially how sanctuary measures preserve some state and local decision-making authority. In this way, the first and second categories are rhetorically distinct facets of what usually appears in court decisions as a unified legal analysis of immigration federalism.

These federalism-based arguments are indispensable in litigation. Besides succeeding in multiple courts, they have been persuasive in some legislative activity and public debate. But making these arguments can carry a political cost in the public arena. Some observers, especially those already skeptical or even just undecided or agnostic about sanctuary measures, may dismiss these arguments as formal rules or even as technicalities that federal enforcement imperatives should override. So viewed, these arguments may do little to counter and may even reinforce the idea that sanctuary-type provisions express lawless resistance and undermine the rule of law.[92]

Arguments in the third category invoke constitutional and statutory limits on arrests and detention, for example, limits grounded in the Fourth Amendment to the U.S. Constitution. Because these arguments go beyond the question of who should decide, they may seem less susceptible to the characterization that they are merely formal or technical. In fact, however, they suffer from similar rhetorical and political vulnerabilities. These arguments may be no more convincing to broad swaths of the general public than rules of criminal procedure that keep some criminal prosecutions from going forward. For example, the reasons for *Miranda* warnings or for the exclusionary

[91] *See California*, 314 F. Supp. 3d at 1108 ("It is . . . entirely reasonable for the State to determine that assisting immigration enforcement in any way, even in purportedly passive ways like releasing information and transferring custody, is a detrimental use of state law enforcement resources.").

[92] *Cf.* Allen Young et al., *'There is No Secession': Sessions Blasts California for 'Sanctuary' Policies, Says He Will Use His Power to Stop Them*, WASH. POST (Mar. 7, 2018) (reporting Attorney General Sessions' remarks likening sanctuary measures to southern nullification and secession before and during the American Civil War).

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rule that keeps prosecutors from relying on illegally obtained evidence may have little persuasive power with this audience.[93]

To be sure, all of the first three categories include what sanctuary supporters might call "rule of law" arguments. This is only natural for arguments grounded in the U.S. Constitution. In public opinion, however, overreliance on these arguments, especially without explaining how they advance the rule of law — can make it harder to make a persuasive case for sanctuary.

The fourth category of arguments reflects the notion that state and local insulation from federal immigration law enforcement restores necessary discretion to the immigration system. The core idea, as Part II-D explained, is that immigration enforcement is too harsh, and that the state and local decisionmakers empowered by sanctuary measures can play a tempering role that is essential to the system's design.[94] This argument moves the discussion beyond the process focus of the first and second categories' concern with facets of immigration federalism that limit federal authority and insulate state and local prerogatives, respectively. And as compared to the third category reliance on general limits on government power to arrest and detain, arguments in this fourth category raise substantive concerns that are specific to immigration law.

But skeptics of sanctuary measures can dismiss this fourth category of arguments as merely articulating policy disagreement about immigration enforcement, especially because they lack the firm constitutional foundation of the first three categories. Such arguments might persuade some, but they will likely lead skeptics to respond that sanctuary measures amount to rear-guard resistance by electoral losers. Pro-sanctuary arguments that zealous immigration law enforcement is bad for the local economy are similar. They can prompt the reaction that the federal executive branch considers immigration enforcement to be more important than any effects on local economies. For those who see any tempering of immigration enforcement as undermining the rule of law, the fourth category's plea for fairness, equity, and proportionality is very unlikely to persuade.

The fifth category of arguments — relying on the history of U.S. immigration policy to articulate concerns about transparency, discrimination, and the rule of law — offers a distinct substantive grounding for arguments for sanctuary. In a system of selective

[93] *See, e.g.*, Richard M. Re, *The Due Process Exclusionary Rule: A New Textual Foundation for a Rule in Crisis*, 127 HARV. L. REV. 1885, 1887 (2014) (analyzing the exclusionary rule's "new period of crisis").

[94] *See Sanctuaries as Equitable Delegation*, *supra* note 46, at 46-63.

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admissions, selective enforcement, and vast discretion, immigration enforcement has an alarming potential for discrimination that will escape detection and remedy. This risk of discrimination — and the related general threat to the rule of law — is an urgent concern that is not articulated with sufficient directness by arguments based on limits on federal authority, state and local prerogatives, limits on arrests and detention, or a general sense that discretion is essential to restore equity.

To be sure, this focus on transparency and non-discrimination will be unpersuasive to some. Skeptics may view measures to prevent, detect, and remedy discrimination as mere technicalities that stand in the way of their notion of the rule of law. But because this fifth category is so differently and deeply rooted in national history, constitutional culture, and bedrock values, it may have unique power to persuade, especially in the current political climate. Moreover, arguments based on transparency and non-discrimination highlight the links between sanctuary measures and other issues, as Part III-B explains.

B. Linking Sanctuary to Other Issues

Beyond the unique persuasive power of arguments that sanctuary measures are essential to foster transparency and non-discrimination, arguments in this fifth category have a significant related effect. They highlight several key but often overlooked links between sanctuary and other topics of intense public debate.

One such issue arises in immigration law, even if it may seem unrelated to defining the role of state and local governments. It involves the Deferred Action for Childhood Arrivals ("DACA") program.[95] Adopted in 2012, DACA offered renewable two-year temporary reprieves from immigration enforcement to many noncitizens without lawful status, if they were under the age of sixteen when they arrived in the United States.[96]

The issue of presidential authority for DACA has attracted vigorous debate. But it is at least as significant that DACA centralized discretionary decisions — within the federal executive branch — regarding the enforcement of immigration law against a category of

[95] *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).

[96] *Id.*

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noncitizens.[97] The Department of Homeland Security did this after ICE field offices and agents resisted the agency's internal guidelines for the exercise of enforcement discretion.[98] In the context of immigration law enforcement against this group of noncitizens, DACA introduced a regularity that enhanced transparency and non-discrimination to further the rule of law.[99]

Arguments in favor of sanctuary and DACA have significant overlap and potential synergy. That synergy is enhanced if advocacy for DACA links the exercise of discretion to the lack of transparency and discrimination in immigration law enforcement. But the synergy is diminished if DACA advocacy limits itself to emphasizing the breadth of presidential authority over prosecutorial discretion. The latter, more formal defense of DACA resembles the first four categories of arguments for sanctuary, which likewise do not invoke the lack of transparency and discrimination at the heart of the fifth category.

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[97] *See generally* Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 22-27 (2015) [hereinafter *The President's Dilemma*].

[98] *Id.* (discussing Memorandum from John Morton, Dir., U.S. Customs & Immigration Enf't, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, & Removal of Aliens (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf; Memorandum From John Morton, Dir., U.S. Immigration & Customs Enf't, Prosecutorial Discretion: Certain Victims, Witnesses, & Plaintiffs (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf; Memorandum from John Morton, Dir., U.S. Customs & Immigration Enf't, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, & Removal of Aliens (Mar. 2, 2011), https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf); *see also* Memorandum from John Morton, Assistant Sec'y, Dep't of Homeland Sec., Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (Aug. 20, 2010), http://www.scribd.com/doc/36524371/John-Morton-Memo; *cf.* CAPPS ET AL., *supra* note 3, at 18 (reporting that ICE officers around the country reported that enforcement priorities in the Obama administration "had severely handicapped enforcement operations and prevented them from exercising discretion").

[99] *See The President's Dilemma*, *supra* note 97, at 27-29; *cf.* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 135-42 (2015); Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 685-89 (2016); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58, 77–78 (2015); Ahilan Arulanantham, *The President's Relief Program as a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014), https://balkin.blogspot.com/2014/11/the-presidents-relief-program-as.html; *Enforcing Immigration Equity*, supra note 48, at 694-98.

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Limiting advocacy for sanctuary and DACA to arguments that do not incorporate a historical perspective on discrimination and lack of transparency in immigration law enforcement leads to two potential problems. One is that it feeds — or rebuts ineffectively — the argument that sanctuary is just lawless resistance to federal decisions to enforce immigration laws more intensively. The other problem is that it feeds the argument that DACA reflected executive intrusion by President Obama into Congress' exclusive lawmaking sphere. Even more fundamentally, omitting transparency and non-discrimination from arguments for both programs obscures a basic truth about both. By working for transparency and against discrimination, both sanctuary and DACA safeguard the rule of law in a system that relies very heavily on low-level discretionary enforcement decisions.

The urgency of the same basic concerns in these two areas of immigration law is especially evident in light of relentless rhetoric from the very top of the current executive branch. The president has disparaged immigrants from Latin America and Africa as coming from "shithole countries."[100] He has pardoned a local sheriff who was convicted for criminal contempt as part of lawsuit charging that his office regularly violated the rights of Latinos.[101] And he has railed against any due process or other legal protections for immigrants facing immigration enforcement.[102] Consistent with the increase in the number of hate crimes against racial and ethnic minorities during this presidency[103] and the president's condonation of white supremacists and embrace of their messaging,[104] this administration is at best

[100] Julie Hirschfeld Davis et al., *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html.

[101] *See* Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html.

[102] *See* Katie Rogers & Sheryl Gay Stolberg, *Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights*, N.Y. TIMES (June 24, 2018), https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html.

[103] *See* Alexis Okeowo, *Hate on the Rise After Trump's Election*, NEW YORKER (Nov. 17, 2016), https://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election; Stephen Rushin & Griffin Edwards, *The Effect of President Trump's Election on Hate Crimes*, SSRN *1-5 (Jan. 18, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652.

[104] *See* Dan Bilefsky & Stephen Castle, *British Far-Right Group Exults Over Attention From Trump*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/world/europe/britain-first-trump.html; Kimon de Greef & Palko Karasz, *Trump Cites*

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unconcerned about discrimination that may result from rogue enforcement.

More plausibly, the administration encourages — as a core feature of its immigration policy — rogue enforcement through rhetoric and its dismantling of restrictions on street-level enforcement.[105] An Executive Order very early in the administration revoked the Obama administration's prosecutorial discretion guidelines. The Order declared virtually all potentially removable noncitizens to be enforcement priorities in broad and ambiguous language that included noncitizens who "[i]n the judgment of an immigration officer, . . . pose a risk to public safety or national security."[106] With the new administration showing little interest in monitoring field offices or private actors, the Order triggered fears that targeting of individuals, families, or communities would be unconstrained.[107] These concerns emerged with urgency with other Executive Orders targeting seven, then six majority-Muslim countries with a ban on entry to the United States,[108] followed by the U.S. Supreme Court decision upholding the

False Claims of Widespread Attacks on White Farmers in South Africa, N.Y. TIMES (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/world/africa/trump-south-africa-white-farmers.html; Glenn Thrush & Maggie Haberman, *Trump Is Criticized for Not Calling Out White Supremacists*, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/12/us/trump-charlottesville-protest-nationalist-riot.html.

105 *Cf.* John Aguilar, *Rep. Jared Polis Blames Denver Sanctuary Seeker's Troubles on "Rogue" ICE Agent*, DENVER POST (Mar. 3, 2017), https://www.denverpost.com/2017/03/03/jared-polis-denver-immigration-sanctuary-rogue-ice-agent/; Linda Greenhouse, *Who Will Watch the Agents Watching Our Borders?*, N.Y. TIMES (Feb. 16, 2017) (criticizing increase in field agent discretion); Nicholas Kulish et al., *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES (Feb. 25, 2017) (describing marked increase in discretion that field agents exercise); Ron Nixon, *Is ICE's Help-Wanted Sign a Welcome Mat for Rogue Applicants, Too?*, N.Y. TIMES (Mar. 12, 2017), https://www.nytimes.com/2017/03/12/us/politics/trump-ice-agents-deportations-immigrants.html (observing that the administration's aggressive pace of hiring immigration enforcement officers runs risk of hiring agents who will abuse immigrants).

106 *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799 § 5 (Jan. 25, 2017); *see also* City of Philadelphia v. Sessions, 280 F.3d 579, 635 (E.D. Pa. 2017) (calling the quoted clause "an apparent delegation of wildly discretionary power to ICE officers to determine their own enforcement protocol"); Memorandum from John Kelly, Sec., Dept. of Homeland Sec., to Kevin McAleenan et al., Acting Comm'r, U.S. Customs and Border Prot., Implementing the President's Border Security and Interior Enforcement Policies (Feb. 20, 2017).

107 *See* Vivian Yee, *Immigrants Hide, Fearing Capture on 'Any Corner,'* N.Y. TIMES (Jan. 15, 2017), https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html.

108 *See* Proclamation 9645, 82 Fed. Reg. 8977 (Sept. 24, 2017); Executive Order 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017); Executive Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

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current version of the ban in spite of its provenance in anti-Muslim rhetoric.[109] But the larger pattern includes numerous examples of unvarnished rhetoric and actions that started well before the 2016 election.[110]

Because this enforcement behavior is the predictable and perhaps even the intended result of high-level choices, it is not truly rogue. It is more accurate to call it enforcement that is rogue by design. With DACA, the relative transparency and uniformity of a formal, centralized application process helps control low-level enforcement discretion.[111] Sanctuary measures limit the practical effects of discretionary federal enforcement decisions that in this administration carry an especially high risk of discrimination and of flouting the rule of law.

Viewing sanctuary as a vehicle for controlling enforcement discretion also highlights links between sanctuary and issues outside of immigration law. Especially important are ongoing concerns about discriminatory over-policing in minority communities. A full account of this topic is beyond the scope of my analysis here, but the parallels deserve attention. The shared concern is the risk of discrimination that results from vast discretion exercised by low-level officers. In both settings, it is tempting to insulate these discretionary decisions from public scrutiny by emphasizing that the person who encountered police or ICE was breaking the law. But whether this is true or not is beside the real point, which is to ask if enforcement is consistent with the rule of law, or instead is rogue by design in ways that risk undetected or unremedied discrimination because enforcement decision-making is not transparent.

Both DACA and over-policing show that the more basic problem addressed by sanctuary goes beyond a serious risk of lawless and discriminatory law enforcement. At stake is the rule of law. By targeting a prominent arena in which the rule of law is in peril, sanctuary measures align with other efforts to safeguard the rule of law in a political setting that puts it in multiple jeopardy.[112] By

[109] *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[110] *See* David Leonhardt & Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html?mtrref=www.google.com&assetType=opinion.

[111] *See The President's Dilemma*, *supra* note 97, at 22-29.

[112] For a description of other ways that the rule of law is in peril, see Michael D. Shear & Katie Benner, *Trump's War on the Justice System Threatens to Erode Trust in the Law*, N.Y. TIMES (Aug. 25, 2018), https://www.nytimes.com/2018/08/25/us/politics/trump-justice-legal-system.html.

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highlighting how sanctuary is linked to these other issues, this perspective helps public debate over sanctuary become as fully informed and robust as the topic deserves.[113]

IV. BACK TO THE DIMENSIONS

A. Enforcement and Integration

I have explained the unique persuasive power of arguments for sanctuary that emphasize the need to make immigration enforcement transparent and free of undetected or unremedied discrimination. To return to the dimensions of sanctuary discussed in Part I, what does this perspective on arguments for sanctuary imply for the relative importance of the enforcement and integration dimensions of sanctuary? The answer is that the enforcement dimension should usually be the principal focus. Insistence on transparency and non-discrimination is most directly pertinent to state and local measures that keep federal law enforcement from operating outside public scrutiny and control.

But some integration measures have a basis in advancing transparency and non-discrimination, and thus the rule of law. Consider a state law that makes undocumented residents eligible for driver's licenses. In localities where driving is a nearly indispensable aspect of daily life and a practical necessity for many types of work, noncitizens without driver's licenses are very vulnerable to discretionary immigration enforcement in any routine traffic stop.[114]

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[113] One further issue is basic but seldom raised. Do sanctuary measures try to create sites of belonging in cities or states as alternatives to U.S. national citizenship? Or do sanctuary measures try to find other, more regional and local sites for debating what remains U.S. national citizenship? The first two categories of arguments — based on limits on federal authority, and on state and local prerogatives — could support both characterizations. In contrast, the other three categories — based on limits on arrests and detentions, on fairness, equity, and proportionality, and on transparency and non-discrimination — invoke norms of national law and culture, and thus seem to contest the meaning of national citizenship. Especially to the extent that arguments for sanctuary reflect this second view, they are closely related to other national debates including those mentioned here. On the relationship between local integration and national citizenship, see IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 165-71.

[114] *See, e.g.*, Dale Russakoff & Deborah Sontag, *For Cops Who Want to Help ICE Crack Down on Illegal Immigration, Pennsylvania Is a Free-for-All*, PROPUBLICA (Apr. 12, 2018, 4:59 AM), https://www.propublica.org/article/pennsylvania-immigration-ice-crackdown-cops-free-for-all (describing state and local police use of discretionary traffic stops to identify and arrest undocumented drivers in Pennsylvania); *see also supra* note 13, and accompanying text.

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To the extent that driver's licenses minimize this vulnerability, they represent a rule of law safeguard. In this way, driver's license eligibility can be at the core of sanctuary policy, not so much because it promotes integration, but because it limits rogue-by-design enforcement, including enforcement that is discriminatory or factually mistaken. Other integrative sanctuary measures may be much harder to defend as directly advancing transparency and anti-discrimination. An example may be a state law that makes undocumented students eligible for resident tuition rates, even if there are other good reasons for such a law.

B. Preemption

The dimensions of sanctuary are conceptually significant in another way, by illuminating the role of preemption doctrine. One lesson from Parts I, II, and III is that arguing for and against sanctuary — to the extent that these arguments draw on federal preemption — is much more complex than a line-drawing exercise to distinguish federal turf from state or local turf. Any such effort can obscure how things that are formally different can be functional equivalents. Instead, it is more analytically sound to ask if arguments in some or all the five categories of arguments for sanctuary justify any given state or local sanctuary measures. The conclusion may be articulated as a decision that a state or local measure is federally preempted or not, but that is a conclusion, not an analysis.

What does this functional analysis imply for state and local efforts to enforce immigration law indirectly by creating intolerable conditions for the undocumented in order to encourage self-deportation?[115] It turns out that the five categories of arguments for sanctuary are helpful here, too. On the surface, preemption involves *who* decides, not *what* is decided. But as I have written elsewhere, federal preemption in immigration law is best understood as having substantive content.

States and localities have tried to enforce federal immigration law directly — through arrests and detention — or indirectly — by limiting access to housing, work, or education. In these cases, preemption can serve a prophylactic function by giving expression to concerns that state and local agencies and officials — if allowed to act — would discriminate.[116] By keeping state and local officials from

[115] *See supra* note 18, and accompanying text.

[116] On this prophylactic use of preemption, see IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 135-38; *cf.* David Rubenstein, *Black-Box Immigration Federalism*, 114

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exercising discretion, preemption minimizes the risk of undetected or unremedied discrimination.[117] Challengers need not meet the sometimes unrealistic burden imposed by prevailing equal protection law, which requires plaintiffs to prove not just that government action has a discriminatory effect, but also reflects discriminatory intent.[118]

This anti-discrimination use of preemption helps explain the Obama administration's court challenge to Arizona SB 1070.[119] The underlying concern was that state and local police would exercise law enforcement authority conferred by that legislation in ways that harmed Latino residents of Arizona.[120] Similar concerns led the Obama administration to limit federal programs that delegated some immigration enforcement authority to state and local police.[121] In this way, federal preemption fosters transparency and anti-discrimination, just as sanctuary does for federal immigration enforcement, and DACA does for federal enforcement discretion in the field. More generally, a state and local government that wants to assist with federal immigration law enforcement should be allowed to do so only under meaningful constraints.

In short, a principal justification for federal preemption in immigration cases is to prevent misuse of state or local authority. This means that preemption applies less forcefully to state and local measures that integrate the undocumented.[122] There is generally no

MICH. L. REV. 983, 1008-12 (2016) (criticizing this approach to preemption).

[117] *See* Ashley Powers, *The Renegade Sheriffs: A Law-Enforcement Movement that Claims to Answer Only to the Constitution*, NEW YORKER (Apr. 30, 2018), https://www.newyorker.com/magazine/2018/04/30/the-renegade-sheriffs. On racial profiling in local immigration enforcement, see generally EDGAR AGUILASOCHO ET AL., MISPLACED PRIORITIES: THE FAILURE OF SECURE COMMUNITIES IN LOS ANGELES COUNTY 16-18 (2012) (describing issues regarding racial profiling in local immigration enforcement); TREVOR GARDNER II & AARTI KOHLI, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM (2009) (explaining how racial profiling of Hispanics increased when local policing policies changed); Amada Armenta, *Between Public Service and Social Control: Policing Dilemmas in the Era of Immigration Enforcement*, 63 SOC. PROBS. 111 (2016); Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, 5 J. MIGRATION & HUM. SECURITY 3 (2017).

[118] *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

[119] *See* S.B. 1070, 49th Leg., 2d Reg. Sess. §§ 2(B), 3, 5(A), 5(C), 6 (Ariz. 2010); *see also* ARIZ. REV. STAT. ANN. §§ 11-1051(B), 13-1509(A), 13-2928(C), 13-2929(A), 13-3883(A)(5) (2018).

[120] *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 113-38.

[121] *See* Memorandum from Jeh Charles Johnson, Sec., U.S. Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't et al. (Nov. 20, 2014).

[122] *See* IMMIGRATION OUTSIDE THE LAW, *supra* note 18, at 151-54.

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one who would suffer concrete injury and thus have standing in federal court to challenge such state or local integrative measures. For this reason, such integration measures raise fewer concerns.[123] Accordingly, state and local governments should have the authority to enact sanctuary-type measures that protect local residents against the risk of discrimination in immigration law enforcement. The fifth category of arguments for sanctuary — as fostering transparency and non-discrimination as an aspect of the rule of law — is essential to this key aspect of preemption.[124]

V. CONCLUDING OBSERVATIONS

A historically grounded argument for sanctuary that emphasizes transparency and non-discrimination as part of the rule of law will vary in its persuasiveness, depending on audience and context. But there is a special power — not just to persuade but more fundamentally to explain — in centering the issue around race and law enforcement. It is a type of rule of law argument that is especially urgent in the current administration, and it is deeply grounded in U.S. history and constitutional values.

Rebuttals may be vociferous, especially when the argument emphasizes racial discrimination more than basic concerns about erosion of the rule of law. Sanctuary arguments based on transparency, non-discrimination, and the rule of law may be unpersuasive or even provoke a backlash in some settings. But such reactions may also mean that these arguments hit home.

At bottom, it is essential to understand when and why arguments for sanctuary are strong or weak, not just as a matter of sheer logic or of legal persuasion, but also as a narrative that may speak to the undecided. To keep the history of U.S. immigration and citizenship and its entanglement with racial and ethnic discrimination out of that narrative means losing an opportunity to explain what is really at stake.

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[123] *See id.*

[124] This perspective is also useful for analyzing nongovernmental forms of sanctuary and local sanctuary in states with laws that make such local laws and policies difficult to enact or maintain. *See generally Sanctuary Networks*, *supra* note 3 (discussing different forms of sanctuary and anti-sanctuary at all levels). For an example of a state "anti-sanctuary" law, see S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017). The Fifth Circuit Court of Appeals rejected most challenges to Texas SB 4 in City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018).

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