



Spring 2-17-2022

The New "Sanctuary State": United States v. California and Lessons for Comprehensive Immigration Reform

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Rebecca Brown, *The New "Sanctuary State": United States v. California and Lessons for Comprehensive Immigration Reform*, 55 Loy. L.A. L. Rev. 185 (2022).

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THE NEW “SANCTUARY STATE”: *UNITED STATES V. CALIFORNIA* AND LESSONS FOR COMPREHENSIVE IMMIGRATION REFORM

Rebecca Brown*

The Trump Administration waged war on so-called “sanctuary” policies. The Administration targeted localities and states that refused to subscribe to the Administration’s enforcement goals. The battle was most potent in the fight with California, culminating in the federal case United States v. California over California’s recently enacted “sanctuary laws.” The fight brought questions of federalism, separation of powers and national identity to the forefront of legal and political debate. This Note examines the historical underpinnings of sanctuary policies, California’s transition from sanctuary cities to sanctuary state, and recommendations for immigration reform.

* J.D. Candidate, May 2022, Loyola Law School, Los Angeles; B.A. International Relations, Franklin University Switzerland, May 2011. This Note is dedicated to Anne Pilsbury, the *heroes sin capis* at Central American Legal Assistance, and the brave immigrants who inspired it. Thanks to the editors and staff of the *Loyola of Los Angeles Law Review* for their help in editing this Note. Thanks, also, to Dean Kathleen Kim for her unwavering guidance and support. Lastly, thanks to Cecile, Paul, and Susan Glasner for their sacrifices and immigrant stories that first sparked this journey.

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I. INTRODUCTION

In December 2018, two versions of the American immigrant story splashed across the front page of national newspapers. First Lady Melania Trump, a Slovenian immigrant granted a rare visa, celebrated the holiday season in the White House among red Christmas trees.¹ Meanwhile, news of the death of seven-year-old Guatemalan Jakelin Caal Maquin shocked the national conscious. Jakelin crossed the U.S.-Mexico border just two days prior, and while in U.S. custody died from dehydration and shock.² The immigrant experience can end as an American dream or an American nightmare.

Like the dichotomous experiences of Jakelin and Melania, different states' policies towards immigrants have polar effects. The United States is divided into a checkerboard of immigration policies: in one state a traffic stop leads to deportation, while across the state border the encounter ends with a ticket.³ The deepening divide over immigration policies has led to questions over America's identity, the power of the executive branch, and federalism.

Over the last fifteen years, Congress has been unable to enact comprehensive immigration reform, "even though it regularly picks at it with a reform here and a reform there."⁴ Efforts over the years have focused on immigration enforcement or certain groups of immigrants, rather than broad reform.⁵ The Trump Administration's various executive actions—including the "Muslim ban," "zero tolerance policy," and "Buy American Hire American," shone a bright light on the malleability of immigration law and the President's broad power over it. While what Trump accomplished in his immigration platform can

1. Ashley Hoffman, *Melania Trump's Christmas Decorations Gave the Internet the Most Wonderful Memes of the Year*, TIME (Nov. 28, 2017, 2:36 PM), <https://time.com/5039367/melania-trump-white-house-christmas-decorations-meme/> [<https://perma.cc/J6TT-JGCF>].

2. Nick Miroff & Robert Moore, *7-Year-Old Migrant Girl Taken into Border Patrol Custody Dies of Dehydration, Exhaustion*, WASH. POST (Dec. 13, 2018), https://www.washingtonpost.com/world/national-security/7-year-old-migrant-girl-taken-into-border-patrol-custody-dies-of-dehydration-exhaustion/2018/12/13/8909e356-ff03-11e8-862a-b6af3ce8199_story.html [<https://perma.cc/F4FS-H73M>]; Amira Vera, *Autopsy Determines 7-Year-Old Guatemalan Girl Died From Sepsis While in US Custody*, CNN (Mar. 30, 2019, 12:12 AM), <https://www.cnn.com/2019/03/29/us/guatemala-jakelin-caal-maquin-autopsy/index.html> [<https://perma.cc/LM4B-C6RB>].

3. See Tanvi Misra, *Another Consequence of Traffic Stops: Deportation*, BLOOMBERG (June 9, 2021, 4:27 AM), <https://www.bloomberg.com/news/articles/2021-06-09/another-consequence-of-traffic-stops-deportation> [<https://perma.cc/ZD86-BPC5>].

4. Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1602 (2009).

5. *Id.*

largely be undone with the stroke of a pen,⁶ thousands of immigrants are boomeranged in and out of quasi-legal status.

One particularly potent fight over federalism and immigration law is over “sanctuary” policies.⁷ The Trump administration repeatedly sued the states over sanctuary policies.⁸ California has been at the center of this tension between the federal government and the states, most recently in *United States v. California*.⁹

California recently enacted three sanctuary laws to protect immigrants from federal immigration authorities: Assembly Bill (AB) 450, AB 103 and Senate Bill (SB) 54. AB 450 prohibits private employers from providing consent to immigration agents to enter private areas of employment.¹⁰ AB 103 provided for inspection of detention facilities.¹¹ SB 54 prohibits California law enforcement agencies from inquiring about an arrestee’s immigration status and bars them from acting as an arm of immigration enforcement.¹² The United States sought a preliminary injunction to stop the state from enacting certain provisions of the three sanctuary laws, claiming they violated the Supremacy Clause.¹³ The District Court found that the United States was unlikely to succeed on the merits of many of its claims and denied its motion for a preliminary injunction.¹⁴ The government appealed, and the Ninth Circuit affirmed in part, reversed in part, remanded, and

6. Biden undid many of Trump’s executive actions only ten days into the presidency. Paul Leblanc, *Biden Has Signed 42 Executive Actions Since Taking Office. Here’s What Each Does*, CNN POLITICS (Jan. 29, 2021, 6:07 PM), <https://www.cnn.com/2021/01/29/politics/biden-executive-orders-climate-health-care-coronavirus-immigration/index.html> [https://perma.cc/W2EQ-24RV].

7. For the purposes of this Note, “sanctuary” policies are those that limit state and local cooperation with federal immigration authorities. The most common “sanctuary” policy is one that does not assist federal immigration enforcement by holding people beyond their criminal charge release date to allow for immigration authorities to pick the person up based on immigration detainers.

8. Stef W. Kight, *Trump Has Declared War on Sanctuary Cities*, AXIOS (Feb. 19, 2020), <https://www.axios.com/trump-immigration-lawsuit-subpoena-sanctuary-cities-697da83f-a8d8-4377-b42c-16840e8b6aa6.html> [https://perma.cc/62W4-UKDS].

9. 921 F.3d 865 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020).

10. Assemb. B. 450, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017); CAL. GOV’T CODE § 7285.1(a) (West 2019).

11. Assemb. B. 103, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017); CAL. GOV’T CODE § 12532(a).

12. S.B. 54, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017); CAL. GOV’T CODE § 7284.6 (West 2019).

13. *United States v. California*, 314 F. Supp. 3d 1077, 1085 (E.D. Cal. 2018), *aff’d in part, rev’d in part*, 921 F.3d 865 (9th Cir. 2019).

14. *Id.* at 1111.

dismissed in part.¹⁵ The Supreme Court denied certiorari last summer.¹⁶ With that decision, California became the nation's first "sanctuary state."¹⁷

The power to regulate immigration is exclusively federal.¹⁸ However, state and local governments play important roles in enforcing the nation's immigration laws. The degree that state and local governments play is one of constant debate. Sanctuary policies seek to limit that federal role through local laws, ordinances, regulations, resolutions, or other practices "either by refusing to or prohibiting agencies from complying with ICE detainers,¹⁹ imposing unreasonable conditions on detainer acceptance, denying ICE access to interview incarcerated aliens,²⁰ or otherwise impeding communication or information exchanges between their personnel and federal immigration officers."²¹

This Note will outline California's transition from host to individual sanctuary cities to "sanctuary state" by examining *United States v. California* and will argue that sanctuary policies should inform comprehensive immigration reform. Comprehensive immigration reform would "marry increased border enforcement with legalization for [undocumented] immigrants and the ability to bring in future workers needed by the U.S. labor market. . . . [It] would touch virtually every

15. *United States v. California*, 921 F.3d at 894–95, 878 n.5.

16. Amy Howe, *Court Turns Down Government's "Sanctuary State" Petition*, SCOTUSBLOG (June 15, 2020, 3:32 PM), <https://www.scotusblog.com/2020/06/court-turns-down-governments-sanctuary-state-petition/> [<https://perma.cc/M9DE-YXYX>].

17. Jazmine Ulloa, *California Becomes 'Sanctuary State' in Rebuke of Trump Immigration Policy*, L.A. TIMES (Oct. 5, 2017, 11:01 AM), <https://www.latimes.com/politics/la-pol-ca-brown-california-sanctuary-state-bill-20171005-story.html> [<https://perma.cc/H8Z9-S9SP>].

18. U.S. CONST. art. I, § 8, cl. 4; Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381 (2006) (also suggesting the power could derive from the Foreign Affairs Clauses, the Commerce Clause, and the nation's inherent power as a sovereign). See also THE FEDERALIST NO. 3 (John Jay) (observing that federal power would be necessary in part because "bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury" might take action that would undermine foreign relations).

19. A detainer is a notice from ICE to another law enforcement agency that "ICE intends to assume custody of an alien and includes information on the alien's previous criminal history, immigration violations, and potential threat to public safety or security." Jessica M. Vaughan & Bryan Griffith, *Map: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGR. STUD., <https://cis.org/Map-Sanctuary-Cities-Counties-and-States> [<https://perma.cc/TV5D-AXNK>] (last updated Mar. 22, 2021).

20. The word "alien" is a legal term of art in the Immigration and Nationality Act. Where "alien" is used, it is a direct reference to the legal use of alien. Otherwise, throughout the article the term "non-citizens" is used to refer to immigrants who have not naturalized and "undocumented immigrants" to refer to those without lawful immigration status.

21. Vaughan & Griffith, *supra* note 19.

facet of the U.S. immigration system.”²² Comprehensive immigration reform should consider balancing humanitarian and regulatory norms and state and federal interests, therefore mindful of sanctuary policy goals. Part II will discuss the national political and legal immigration background that influenced California’s policy change. Part III will analyze California’s transition from sanctuary cities to sanctuary state. Part IV will discuss the arguments for and against sanctuary policies, and the validity of each. Part V argues that the sanctuary policies California has enacted should inform comprehensive immigration reform. Lastly, this Note offers specific recommendations for comprehensive immigration reform that reflect sanctuary policies including repealing sections of the current law, increasing access to counsel for undocumented immigrants, and decreasing barriers to asylum.

II. BACKGROUND

A. Sanctuary Is a Closely Held Normative Value, Rising from Ancient Tradition and Influencing the Nation’s Laws

In examining sanctuary policies in particular and immigration laws in general, the famous Justice Holmes quote “a page of history is worth a volume of logic” proves true.²³ The nation’s immigration laws are the hodgepodge product of historical, political, economic, and normative forces. The term “sanctuary cities” derives its name from the Sanctuary Movement that occurred thirty years ago.²⁴ The Sanctuary Movement was a grassroots effort that sheltered Central American refugees from federal immigration authorities in churches and other houses of worship in the 1980s.²⁵ The Movement provided legal services, left water in the desert for travelers, social services, and evasion from the long arm of the federal government.²⁶

22. *Comprehensive Immigration Reform*, MIGRATION POL’Y INST., <https://www.migration-policy.org/topics/comprehensive-immigration-reform> [<https://perma.cc/AEQ9-9KGG>] (last visited Dec. 14, 2021).

23. *New York Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921).

24. Loren Collingwood & Benjamin Gonzalez O’Brien, *A History of Sanctuary Cities in the United States*, TEEN VOGUE (Nov. 27, 2019), <https://www.teenvogue.com/story/sanctuary-cities-history-united-states> [<https://perma.cc/DZ2B-BC5P>].

25. IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES 10–12 (1985).

26. *Id.* at 12–13.

Yet, the concept of sanctuary has deep moral origins stretching back millennia.²⁷ Pre-seventeenth century England, ancient Greece and Rome, pre-colonized Polynesia, and Hanseatic Germany all employed versions of sanctuary policies.²⁸ There are numerous references to sanctuary in the Judeo-Christian Bible. For example, the Bible mentions at least six Levitical “Cities of Refuge” and that Moses established three sanctuary cities for unintentional killers.²⁹

Likewise, the normative value of being hospitable to strangers runs deep through human history. The Greeks held sacred the moral notion of *xenia* (hospitality).³⁰ For example, the myth of Baucis and Philemon tells of an elderly couple rewarded in death for providing hospitality to a deity that came to their door as a stranger, while the rest of the town that denied the stranger hospitality was burned to the ground.³¹ The Judeo-Christian Bible contains numerous parables and commands relating to the treatment of “ger” or “gur,” which translates to “stranger,” “newcomer,” or “alien.”³² For instance, the Book of Deuteronomy contains provisions for treating “strangers” with active support.³³ And, of course, the Israelites were strangers in Egypt, and in the New Testament, Jesus is the stranger.³⁴

In the United States, sanctuary has long been a part of the country’s moral and political fiber. For one, the Pilgrims came to the colonies seeking refuge from religious and political persecution,³⁵ and the myth that they were welcomed and provided for in a strange new land is celebrated each year with the Thanksgiving holiday.³⁶ In the 19th century, runaway slaves were given sanctuary along the Underground Railroad, at risk of arrest and a return to bondage. However, in contrast

27. *Exodus* 21:12–15; Sophie H. Pirie, *The Origins of a Political Trial: The Sanctuary Movement and Political Justice*, 2 YALE J.L. & HUMS. 381, 388 (1990).

28. Pirie, *supra* note 27, at 388.

29. *Deuteronomy* 4:41–43.

30. John Panteleimon Manoussakis, *The Stranger in the Polis: Hospitality in Greek Myth*, in PHENOMENOLOGIES OF THE STRANGER: BETWEEN HOSTILITY AND HOSPITALITY 274, 283 (Richard Kearney & Kascha Semonovitch eds., 2011).

31. OVID, *METAMORPHOSES: A NEW VERSE TRANSLATION* 323–28 (David Raeburn trans., 2004).

32. *Ger*, BIBLE STUDY TOOLS, <https://www.biblestudytools.com/lexicons/hebrew/nas/ger.html> [<https://perma.cc/MRS5-TPUX>].

33. *Deuteronomy* 10:19; *see Deuteronomy* 24:14–22.

34. *Matthew* 25:31–40.

35. *History of the Pilgrims*, GEN. SOC’Y OF MAYFLOWER DESCENDANTS, <https://themayflowersociety.org/history/> [<https://perma.cc/3G3U-BDRX>].

36. Claire Bugos, *The Myths of the Thanksgiving Story and the Lasting Damage They Imbue*, SMITHSONIAN MAG. (Nov. 26, 2019), <https://www.smithsonianmag.com/history/thanksgiving-myth-and-what-we-should-be-teaching-kids-180973655/> [<https://perma.cc/6RF5-GYDX>].

with that history and ethos, it remains a federal felony today to hide, harbor, or shield any alien “not lawfully entitled to reside within the United States.”³⁷

B. The Undocumented Immigrant Is a Relatively New Concept

Article I, Section 8, Clause 4 of the U.S. Constitution gives the federal government power over immigration and naturalization.³⁸ The first immigration statute was passed in 1790 and made naturalization an option only for “free white persons.”³⁹ The Fourteenth Amendment in 1866 granted citizenship to former slaves and states that “[a]ll persons born or naturalized in the United States . . . are citizens of the United States.”⁴⁰ Yet, the question of who was a U.S. citizen remained racially motivated and perpetuated a caste system based on race. In the Supreme Court’s landmark 1898 decision *United States v. Wong Kim Ark*,⁴¹ the question before the Court was whether a child born on U.S. soil to Chinese immigrant parents was in fact a U.S. citizen.⁴² The Court ultimately interpreted the Citizenship Clause of the Fourteenth Amendment to grant citizenship to children born on U.S. soil to parents of foreign nationality.⁴³

Beginning in the 1920s, restrictions on immigration created the category of the “illegal alien”⁴⁴: “someone whose inclusion in the nation was ‘simultaneously a social reality and a legal impossibility.’”⁴⁵ Despite a significant influx of East Asian immigration in the 19th and early 20th centuries, the naturalization laws had not yet been amended to include Asians.⁴⁶ In fact, naturalization laws at the time focused on allowing only white immigrants to become citizens.⁴⁷

37. BAU, *supra* note 25, at 3; 8 U.S.C. § 1324 (2018).

38. *Ping v. United States*, 130 U.S. 581, 603–04 (1889).

39. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 34 (2014).

40. U.S. CONST. amend. XIV, § 1.

41. 169 U.S. 649 (1898).

42. *Id.* at 653.

43. *Id.* at 705; see Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 159, 169 (1996); see also JACK CHEN, *THE CHINESE OF AMERICA* (1981) (providing an in-depth history of Chinese migration to the United States). See generally MOTOMURA, *supra* note 39, at 34–37 (providing historical overview of the unauthorized population of the United States).

44. The term “illegal alien” is misleading and reflects the false blending of criminality and immigration in public discourse.

45. Kerry Abrams, 25 L. & HIST. REV. 428, 428 (2007) (reviewing MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004)).

46. MOTOMURA, *supra* note 39, at 34–37.

47. *Immigration and the History of “White People Only” Laws*, BOUNDLESS (Sept. 7, 2017), <https://www.boundless.com/blog/immigration-whites-only/> [https://perma.cc/53C2-Z2YA].

Who qualified as “white” was a Kafkaesque legal question. In 1922, the U.S. Supreme Court heard the case of Takao Ozawa.⁴⁸ Mr. Ozawa was a Japanese national who had lived in the United States for more than 20 years and sought to nationalize under the Nationalization Act of 1906.⁴⁹ The Act only allowed “free white persons” and “aliens of African nativity and . . . persons of African descent” to naturalize.⁵⁰ Mr. Ozawa argued that he was white and therefore eligible to naturalize.⁵¹ The Court disagreed.⁵² The Court unanimously held that “white” did not mean skin color, but “Caucasian,” and concluded the Japanese were not Caucasian.⁵³ “No matter which route a borderline applicant took to gain acceptance, the caste system shape-shifted to keep the upper caste pure by its own terms.”⁵⁴ Two years later, the legislature continued the emphasis on white immigrants. The 1924 Johnson-Reed Act first enacted national quotas aimed at keeping the United States predominately white, with an emphasis on immigrants from northern and western European stock.⁵⁵

In response to anti-Mexican sentiment and job scarcity caused by the Great Depression, Mexican nationals living in the U.S. and U.S. citizens of Mexican descent were “repatriated” in the 1930s, causing further labor shortage.⁵⁶ The 1940s saw the advent of the *bracero* program, an agricultural guest worker program designed to reverse the 1930s Mexican repatriation and solve anticipated labor shortages caused by World War II.⁵⁷ The *bracero* program arguably filled the

48. *Ozawa v. United States*, 260 U.S. 178 (1922).

49. *Id.* at 189–90.

50. *Id.* at 190.

51. *Id.* at 182.

52. *Id.* at 198.

53. *Id.*

54. Isabel Wilkerson, *America’s Enduring Caste System*, N.Y. TIMES MAG. (Jan. 21, 2021), <https://www.nytimes.com/2020/07/01/magazine/isabel-wilkerson-caste.html> [<https://perma.cc/FKY2-PQKW>].

55. Anna Diamond, *The 1924 Law that Slammed the Door on Immigrants and the Politicians Who Pushed It Back Open*, SMITHSONIAN MAG. (May 19, 2020), <https://www.smithsonianmag.com/history/1924-law-slammed-door-immigrants-and-politicians-who-pushed-it-back-open-180974910/> [<https://perma.cc/9YDP-HPZB>]; see also Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT’L L.J. 207, 241–42 (2007) (analyzing immigration patterns that maintain a racial hierarchy).

56. An estimated 60 percent of the over one million people forcibly removed to Mexico were U.S. citizens. Terry Gross, *America’s Forgotten History of Mexican-American ‘Repatriation,’* NPR (Sept. 10, 2015, 1:11 PM), <https://www.npr.org/2015/09/10/439114563/americas-forgotten-history-of-mexican-american-repatriation> [<https://perma.cc/8MBH-WM2S>]; Kevin R. Johnson, *Trump’s Latinx Repatriation*, 66 UCLA L. REV. 1444, 1456–60 (2019).

57. The 1965 Hart-Cellar Act abolished the quota system. Abrams, *supra* note 45, at 429.

same economic need that slaves, coolies, and convicts served in decades past.⁵⁸ However, *braceros* were “theoretically ‘free’.”⁵⁹ The *bracero* program also included safeguards for workers, but in reality ended with exploitation and eventually wage deprivation for farm workers in the coming decades.⁶⁰ When the *braceros* quit working under the program, they then became “illegal aliens.”⁶¹

C. The 1980s Sanctuary Movement: Moral and Legal Responsibilities⁶²

While for many present-day Americans the ancient values of sanctuary and hospitality still ring true, the debate over sanctuary policies has been divided along the lines of legalism and liberalism. This battle first came to the political forefront in the United States over the civil strife in Central America in the 1980s. During the 1970s and 1980s, the small nations of Central America were engulfed in civil wars. Death squads raged across El Salvador and Guatemala, killing thousands, disappearing hundreds, and displacing millions.⁶³ Meanwhile, in another hemisphere, Vietnamese people flooded onto Southeast Asian shores in search of refuge from oppression.⁶⁴ In response to public sympathy,⁶⁵ President Jimmy Carter signed the Refugee Act

58. *Id.*

59. *Id.*

60. *About, BRACERO HIST. ARCHIVE*, <http://braceroarchive.org/about> [<https://perma.cc/68U5-V4T7>].

61. Abrams, *supra* note 45, at 429. See generally KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (Quid Pro Books 2010) (providing a historical analysis of the *bracero* program). Ultimately, the successful push in 1964 by the farmworker movement ended the *bracero* program and “its perceived abuse and exploitation of workers.” MOTOMURA, *supra* note 39, at 221.

62. In 1982, the Reverend John Fife wrote to Attorney General William French Smith to inform him that his church would violate the law against harboring aliens to counter the “immoral, as well as illegal” administration of immigration laws. *Pirie*, *supra* note 27 at 399. Reverend Fife’s language is reminiscent of Martin Luther King, Jr.’s quote, “One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws.” Martin Luther King, Jr., *Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 835, 840 (1993).

63. Cecilia Menjivar & Andrea Gómez Cervantes, *El Salvador: Civil War, Natural Disasters, and Gang Violence Drive Migration*, MIGRATION POL’Y INST. (Aug. 29, 2018), <https://www.migrationpolicy.org/article/el-salvador-civil-war-natural-disasters-and-gang-violence-drive-migration> [<https://perma.cc/69Q5-XT55>]; *Timeline: Guatemala’s Brutal Civil War*, PBS NEWSHOUR (Mar. 7, 2011, 12:00 AM), https://www.pbs.org/newshour/health/latin_america-jan-june11-time_line_03-07 [<https://perma.cc/CS6S-KQ3M>].

64. *500 Refugees from Vietnam Land at 2 Asian Ports*, N.Y. TIMES, June 11, 1980, at A14.

65. Kenton Clymer, *Jimmy Carter, Human Rights, and Cambodia*, 27 DIPLOMATIC HIST. 245, 264 (2003).

of 1980.⁶⁶ The Refugee Act raised the annual ceiling for the number of refugees and changed the definition of “refugee” to a person with a “well-founded fear of persecution” in accordance with United Nations protocols.⁶⁷ Over the course of the summer of that same year, thirteen migrants died of dehydration attempting to cross the U.S.-Mexico border.⁶⁸ Then, in December 1980, four American churchwomen were unearthed from shallow graves in El Salvador.⁶⁹ Their deaths brought national attention to the plight of war-torn Central America and ignited religious institutions to act.

1. The War on Communism: Reagan’s Involvement in Central America Caused the Political and Humanitarian Immigration Issues Faced Today

Amidst the front-page headlines of the murder of the four churchwomen, the new Reagan Administration insisted that the thousands crossing the southern border were “economic migrants” fleeing poverty, not refugees fleeing oppression or political persecution.⁷⁰ It was later revealed that the Reagan Administration was aware of the human rights abuses in Central America and acted contrary to international and domestic law.⁷¹ The Reagan Administration justified its

66. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.); see also Rachel E. Rosenbloom, *Beyond Severity: A New View of Crimmigration*, 22 LEWIS & CLARK L. REV. 663, 681–82 (2018) (providing a historical overview of the period leading up to the Refugee Act).

67. See, e.g., H.R. REP. NO. 96-608, at 18 (1979) (reaffirming Congress’s intent to “conform the language of [section 243, the deportation withholding section of the INA,] to the Convention [on the status of Refugees], . . . so that U.S. statutory law clearly reflects our legal obligations under international agreements”).

68. Al Senia, *13 Smuggled Salvadorans Found Dead in U.S. Desert*, WASH. POST (July 7, 1980), <https://www.washingtonpost.com/archive/politics/1980/07/07/13-smuggled-salvadorans-found-dead-in-us-desert/06e736ff-07bd-4cc2-8695-374f839278ea/> [<https://perma.cc/7VGP-SJ2P>].

69. Raymond Bonner, *The Diplomat and the Killer*, THE ATLANTIC (Feb. 11, 2016), <https://www.theatlantic.com/international/archive/2016/02/el-salvador-churchwomen-murders/460320/> [<https://perma.cc/H98A-QUTV>]; Belisario Betancur (Chairman of the Comm’n on the Truth for El Salvador), *From Madness to Hope: The 12-Year War in El Salvador*, U.N. DOC. S/25500, at 29 (Apr. 1, 1993).

70. However, Nicaraguans, fleeing a communist government, were immigrants worthy of refugee status. Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL’Y INST. (Apr. 1, 2006), <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era> [<https://perma.cc/L79M-4P93>].

71. John M. Goshko, *Reagan Administration Accused of Lies on El Salvador*, WASH. POST (Mar. 17, 1993), <https://www.washingtonpost.com/archive/politics/1993/03/17/reagan-administration-accused-of-lies-on-el-salvador/857e23c3-c709-4fc7-868b-08ff210ccad0/> [<https://perma.cc/3A6T-JMW7>]; Michael Ross, *Democrats Seek Probe of U.S.-Salvador Ties: Congress: The U.N.’s Report Has Reignited Lawmakers’ Debate About Washington’s Support of Salvadoran*

involvement to push back on encroaching communism in Central America because of its geographic proximity.⁷² At the time, Reagan told Congress that “El Salvador is nearer to Texas than Texas is to Massachusetts,”⁷³ as justification for ignoring the humanitarian crisis on America’s doorstep.

Out of the human rights abuses in Central America, and the American government’s funneling of funds to the leaders that caused those abuses,⁷⁴ the Sanctuary Movement was born. Between 1981 and 1990, an estimated one million Salvadorans and Guatemalans fled their homelands and clandestinely entered the United States.⁷⁵ The vast majority of asylum claims by these refugees were denied.⁷⁶ The asylum approval rate for Salvadoran and Guatemalan asylum cases in 1984 was under 3 percent.⁷⁷ That same year, the approval rate for Iranians was 60 percent.⁷⁸ “Lawyers representing refugees [were] co-opted into spending vast amounts of effort debating technicalities rather than fighting for an expanded definition of political refugee or for a determination process that would give the promise of political asylum more substantive reality.”⁷⁹

In response to and in defiance of the federal government’s immigration policies, houses of religious worship offered housing to Central American refugees, and even assisted migrants to cross the

Government, L.A. TIMES (Mar. 19, 1993, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1993-03-19-mn-12863-story.html> [<https://perma.cc/T8EC-X6YF>].

72. *President Reagan’s Address on Central America to Joint Session of Congress*, N.Y. TIMES (Apr. 28, 1983), <https://www.nytimes.com/1983/04/28/world/president-reagan-s-address-on-central-america-to-joint-session-of-congress.html> [<https://perma.cc/EY2T-J5CF>].

73. *Id.*

74. See, e.g., *Iran-Contra Affair*, BRITANNICA, <https://www.britannica.com/event/Iran-Contra-Affair> [<https://perma.cc/HH82-WR2W>] (“In the early 1980s the U.S. government provided military aid and financial support for the warring Nicaraguan opponents of the Sandinista regime, the contras, whom Reagan referred to as ‘the moral equal’ of the Founding Fathers of the United States.”); Ross, *supra* note 71 (reporting that Congress sent \$6 billion to the Salvadoran government during the country’s bloody civil war).

75. Gzesh, *supra* note 70.

76. *Id.* The harsh denial rate led to the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991), and to Temporary Protected Status in 1991 and the 1997 Nicaraguan and Central American Relief Act. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5030–36 (codified as amended in 8 U.S.C. § 1245a); Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193 (1997) (codified as amended in 8 U.S.C. §§ 1101, 1255).

77. Gzesh, *supra* note 70.

78. *Id.*

79. Pirie, *supra* note 27, at 392. While this quote is in the past tense, it rings true today.

border.⁸⁰ Ministers, priests, rabbis, imams, and many religious lay people built a grassroots network to support the refugees. They then enlisted attorneys to assist with the refugees' immigration claims.⁸¹ While they saw their efforts as complying with divine law, they recognized the need for advocates for man-made law. Still, the leaders of the Sanctuary Movement framed the cause as a moral, rather than political impetus.⁸² One of the founders of the Movement, Reverend John M. Fife, said at the time, "Sometimes you cannot love both God and the civil authority. Sometimes you have to make a choice."⁸³ While the Movement had spiritual and religious roots, the Movement was wholeheartedly political.⁸⁴ Public support of the Movement soon gained hold because the activists framed the issue as a humanitarian and moral cause.⁸⁵ By the mid-1980s, over 150 congregations openly defied the federal government by offering humanitarian and legal assistance to Central American refugees.⁸⁶ Another thousand congregations of all faiths endorsed the practice.⁸⁷ Colleges and universities soon followed suit.⁸⁸ Then cities did, too.⁸⁹

The Reagan Administration responded to the Sanctuary Movement by arresting and prosecuting its leaders.⁹⁰ Like the government's

80. This "underground railroad" was "anything but underground." Sanctuary workers displayed signs viewable to the public and the authorities that they were transporting and housing unauthorized immigrants. *Id.* at 398–99.

81. BAU, *supra* note 25, at 13

82. See LOREN COLLINGWOOD & BENJAMIN GONZALEZ O'BRIEN, SANCTUARY CITIES: THE POLITICS OF REFUGE 10 (2019).

83. Clyde Haberman, *Trump and the Battle Over Sanctuary in America*, N.Y. TIMES (Mar. 5, 2017), <https://www.nytimes.com/2017/03/05/us/sanctuary-cities-movement-1980s-political-asy-lum.html> [<https://perma.cc/PXN2-3V5S>].

84. See Pirie, *supra* note 27, at 395.

85. See *id.* at 413.

86. Gzesh, *supra* note 70.

87. *Id.*

88. BAU, *supra* note 25, at 12 n. 8.

89. On June 7, 1983, Madison, Wisconsin, passed the first sanctuary city proclamation in response to the Sanctuary Movement, officially commending churches in the city that were offering sanctuary to undocumented Central Americans. Benjamin Gonzalez O'Brien et al., *The Politics of Refuge: Sanctuary Cities, Crime, and Undocumented Immigration*, 55 URB. AFF. REV. 3, 4 (2019). In 1985, the Madison city council officially declared the entire city a sanctuary for Central Americans fleeing violence in El Salvador and Guatemala. *Id.* By 1987, 440 cities across the United States had declared themselves sanctuary cities. Judith McDaniel, *The Sanctuary Movement, Then and Now*, RELIGION & POLS. (Feb. 21, 2017), <https://religionandpolitics.org/2017/02/21/the-sanctuary-movement-then-and-now/> [<https://perma.cc/L6US-H8V5>]. California led the nation in the total number of sanctuary sites, with 149 sanctuary sites by 1987. COLLINGWOOD & GONZALEZ O'BRIEN, *supra* note 82, at 24.

90. Pirie, *supra* note 27, at 407.

actions during COINTELPRO⁹¹ just a few years prior, the Reagan Administration organized infiltration and surveillance of the Sanctuary Movement to build its case against it.⁹² The government authorized an undercover investigation, named “Operation Sojourner,” to bug church services and Bible services and infiltrate Sanctuary worker meetings.⁹³ The government then brought suit against leaders of the Sanctuary Movement alleging they committed conspiracy to violate immigration law.⁹⁴ Eight of the eleven defendants were found guilty in *United States v. Aguilar*.⁹⁵

Much of the government’s case against the Sanctuary leaders in *Aguilar* relied on the court’s grant of its motion in limine to exclude the defendants’ defenses or claims that they were acting morally and that their conduct was not criminal.⁹⁶ Specifically, the motion asked to

exclude defense arguments that the Refugee Act of 1980 or any international treaty confers refugee status on any of the undocumented people named in the indictment; that defendants’ conduct was justified by their religious faith; that defendants had any good motives or beliefs that negated criminal intent; and that necessity compelled defendants to act as they did.⁹⁷

The court’s grant of the motion stripped the defendants of any argument that may have justified or explained the leaders’ actions and arguably violated their constitutional rights.⁹⁸ The arrest and prosecution of the Sanctuary leaders showed the public that resistance to federal

91. “COINTELPRO” is short for the Counterintelligence Program conducted by the FBI starting in the 1950s and sanctioned by Director J. Edgar Hoover. It was a series of illegal covert actions by the FBI to infiltrate and disrupt domestic political organizations, including the anti-Vietnam War and civil rights movements. See S. REP. NO. 94-755, at 10–11 (1976).

92. Douglas L. Colbert, *The Motion in Limine: Trial Without Jury—A Government’s Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 44 (1986); Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 946–49 (1995).

93. Bezdek, *supra* note 92, at 902–03.

94. Colbert, *supra* note 92, at 6.

95. *United States v. Aguilar*, 883 F.2d 662, 709 (9th Cir. 1989). The defendants were found guilty of conspiracy to violate section 1324(a) of the Immigration Act of 1990, which provides criminal penalties for bringing in and harboring aliens. Colbert, *supra* note 92, at 6 & n.1.

96. Colbert, *supra* note 92, at 8.

97. Bezdek, *supra* note 92, at 951.

98. Colbert, *supra* note 92, at 6–7; see also Pirie, *supra* note 27, at 410 (a motion in limine is “unusual for the prosecuting side to use in the United States—except in ‘political trials’”).

immigration enforcement would not be tolerated. That stance would soon be codified.

2. IRCA Extends Federal Immigration Enforcement to Private Actors

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), making it illegal for the first time to knowingly hire undocumented immigrants and establishing civil and monetary penalties for employers who hired undocumented immigrants.⁹⁹ IRCA effectively deputized employers as immigration agents, “transferring immigration-enforcement functions to the workplace.”¹⁰⁰ As a consequence, some employers hire undocumented immigrants and then threaten to report them to immigration authorities if they demand better working conditions.¹⁰¹ Thus, undocumented workers are caught in a Catch-22: work in unacceptable conditions, or be deported. Dean Kathleen Kim explains:

[E]ven when employers do not engage in abusive conduct, IRCA’s de facto deputization of employers as immigration enforcers creates an implicit coercive choice set for undocumented workers: comply with exploitation or reject and risk deportation. In this way, undocumented workers may be structurally coerced—our immigration laws maintain a general atmosphere of coercion, causing undocumented workers to submit to unfair labor practices.¹⁰²

IRCA also granted amnesty to 2.7 million immigrants,¹⁰³ and led to an influx of legal immigration.¹⁰⁴ Additionally, against the backdrop of the War on Drugs, the Criminal Alien Program was created “to identify, arrest, and deport ‘priority’ noncitizens encountered in federal, state, and local prisons and jails.”¹⁰⁵ As a result, many of the

99. Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 471 (2011).

100. *Id.*

101. *Id.*

102. *Id.* at 472.

103. Emily Badger, *What Happened to the Millions of Immigrants Granted Legal Status Under Ronald Reagan?*, WASH. POST (Nov. 26, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/11/26/what-happened-to-the-millions-of-immigrants-granted-legal-status-under-ronald-reagan/> [<https://perma.cc/7SRY-JNHU>].

104. Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION & DEV. REV. 1, 10–11 (2012).

105. Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1724 (2018).

Salvadorans who arrived to the United States as impoverished youth seeking refuge from the violent civil war and later joined criminal gangs in the U.S.¹⁰⁶ were deported back to El Salvador.¹⁰⁷ Politically, IRCA was heralded as striking a balance between humanitarian concerns for undocumented people already within the nation's borders while meeting enforcement goals.

D. The War on Drugs Continued: Clinton Strengthens the Tie Between Criminal and Immigration Enforcement: IRAIRA and Crimmigration

The Sanctuary Movement faded considerably from the public discourse in the 1990s.¹⁰⁸ However, during that time, the Supreme Court laid the foundation for current sanctuary policies in *New York v. United States*¹⁰⁹ and *Printz v. United States*.¹¹⁰ Neither case involved immigration, but both had consequences for immigration at the state and federal level. *New York v. United States* struck down a federal mandate requiring states to take possession of low-level radioactive waste.¹¹¹ *Printz* involved the Brady Handgun Violence Protection Act, which would have required state and local law enforcement officials to conduct background checks on individuals attempting to purchase handguns.¹¹² As discussed *infra*, the two cases articulated the “anti-commandeering principle” and held that the federal government may not compel or coerce local officials to enforce, enact, or administer federal programs.¹¹³

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).¹¹⁴ IIRAIRA strengthened the

106. The Mara Salvatrucha or MS-13 and Barrio 18 (or 18th Street gang) were formed in Los Angeles in the 1970s and 1980s as a response to the already predominant LA Mexican street gangs. See Oscar Martínez et al., *Killers on a Shoestring: Inside the Gangs of El Salvador*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/world/americas/el-salvador-drugs-gang-ms-13.html> [<https://perma.cc/C8RW-EP89>].

107. Of course, this created a vicious cycle of migration as the MS-13 and Barrio 18 created a de facto civil war in the country that has caused millions to flee north. *Id.*

108. See COLLINGWOOD & GONZALEZ O'BRIEN, *supra* note 82, at 11.

109. 505 U.S. 144 (1992).

110. 521 U.S. 898 (1997).

111. *New York v. United States*, 505 U.S. at 188.

112. *Printz*, 521 U.S. at 902–03.

113. *Id.* at 935.

114. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009–546 (1996) (codified in scattered sections of 8, 18 U.S.C.).

criminal law and immigration connection (“cimmigration”).¹¹⁵ Before 1996 and the enactment of IIRAIRA, internal immigration enforcement was not very significant.¹¹⁶ IIRAIRA contained stronger immigration consequences for undocumented immigrants who commit crimes within the United States and reflected President Clinton’s law and order platform.¹¹⁷ Section 287(g) of IIRAIRA allows the Department of Homeland Security (DHS) to enter into formal written agreements with state or local law enforcement and deputize officers to perform federal immigration agent functions.¹¹⁸ IIRAIRA also included a provision that prohibits state and local governments from enacting laws or policies that limit communication with federal immigration enforcement agencies about “information regarding the immigration or citizenship status, lawful or unlawful, of any individual.”¹¹⁹ Further, in response to the Oklahoma City bombings, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which “required the mandatory detention of non-citizens convicted of a wide range of offenses, including minor drug offenses.”¹²⁰

E. The War on Terror: 9/11 Drastically Changed the Immigration System and Lessened Due Process for Immigrants

The terrorist attacks on September 11, 2001, prompted stricter enforcement of immigration laws and established the trilogy of immigration enforcement branches under the Department of Homeland Security (DHS) in force today: U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs

115. “Cimmigration” is a term that describes the fusion between criminal law and immigration law. See Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (coining the term “cimmigration”); see also César Cuahtémoc García Hernández, *Deconstructing Cimmigration*, 52 U.C. DAVIS L. REV. 197, 202 (2018) (discussing the rise of “cimmigration” and arguing for the disentanglement of criminal law and immigration law).

116. Massey & Pren, *supra* note 104, at 8.

117. Janet Hook, *Clinton Moves to Speed Deportations: Immigration: President Orders Justice Department to Cut Backlog. He Singles Out Those Who Came to U.S. Illegally and Have Been Charged With a Crime*, L.A. TIMES (May 7, 1995), <https://www.latimes.com/archives/la-xpm-1995-05-07-mn-63503-story.html> [<https://perma.cc/9EGA-QQ5T>].

118. 8 U.S.C. § 1357(g) (2018).

119. 8 U.S.C. § 1373. “[O]ver time restrictionist bills were passed at an increasingly rapid pace. In the 30 years from 1965 to 1995, for example, only six major immigration bills were enacted, whereas in the decade from 1996 to 2006, eight pieces of legislation were signed into law. . . . [Sixteen] named enforcement operations [were] launched between 1993 and 2010.” Massey & Pren, *supra* note 104, at 6.

120. *Analysis of Immigration Detention Policies*, ACLU, <https://www.aclu.org/other/analysis-immigration-detention-policies> [<https://perma.cc/ZNS9-KJRF>] (last visited Dec. 15, 2021).

and Border Patrol (CBP).¹²¹ Additionally, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act authorized deportation of noncitizens without due process and expanded the executive branch's authority over immigration.¹²² With stricter enforcement, and new immigration consequences realized by the USA PATRIOT Act, deportations rose to unprecedented numbers.¹²³ The public backlash followed Bush through most of his second term, and even followed him on his trip abroad to Guatemala.¹²⁴ While none of the perpetrators of the 9/11 terrorist attacks were Mexicans and none of the terrorists entered through Mexico, "Mexicans nonetheless bore the brunt of the deportation campaign launched in the name of the war on terrorism, comprising 72 percent of those removed in 2009."¹²⁵ At the end of President Bush's term, Congress directed ICE to develop a plan to "identify every criminal alien, at the prison, jail, or correctional institution in which they are held" and prioritize for deportation "criminal aliens convicted of violent crimes".¹²⁶ In response, ICE set forth Secure Communities ("S-Comm"), an unprecedented program coordinating local and federal governments that allows local governments on agreement to share data with ICE.¹²⁷ By the end of the Bush administration, over seventy section 287(g) agreements had been signed.¹²⁸ By that time, the Sanctuary Movement resurged with a new mission to protect undocumented immigrants present in the country from deportation.

121. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended in scattered sections of 6 U.S.C.).

122. *See How the Anti-Terrorism Bill Permits Indefinite Detention of Immigrants*, ACLU, <https://www.aclu.org/other/how-anti-terrorism-bill-permits-indefinite-detention-immigrants> [<https://perma.cc/VL6M-HDCF>] (last updated Oct. 23, 2001).

123. Massey & Pren, *supra* note 104, at 8.

124. Jim Rutenberg & Marc Lacey, *Bush Meets Anger Over Immigration Issue as He Promotes Free Trade in Guatemala*, N.Y. TIMES (Mar. 13, 2007), <https://www.nytimes.com/2007/03/13/world/americas/13prexy.html> [<https://perma.cc/RX6E-DMQB>]; Jim Rutenberg, *Bush Calls for Compromise on Immigration*, N.Y. TIMES (May 16, 2006), <https://www.nytimes.com/2006/05/16/world/americas/16iht-wb.0516bush.html> [<https://perma.cc/S77M-3W7X>].

125. Massey & Pren, *supra* note 104, at 8.

126. *Department of Homeland Security Appropriations for 2009 Hearings Before a Subcomm. of the Comm. on Appropriations H.R.*, 110th Cong. 592 (2008); Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2051 (2007).

127. Muzaffar Chishti et al., *The Obama Record on Deportations: Deportee in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not> [<https://perma.cc/8FEA-HPZQ>].

128. *Id.*

F. Who's in Charge?: Obama Reacts to Public Outcry over Immigration Policies, Demonstrates the Unfettered Power of the Executive Branch over Immigration, and the States Respond

Soon after his inauguration, President Obama became known as “Deporter-in-Chief.”¹²⁹ The Obama Administration quickly outpaced the prior administration in removals.¹³⁰ In the Administration’s first term, over three million immigrants were returned or removed from the country.¹³¹ By 2011, President Obama expanded S-Comm to enroll 1,600 jurisdictions.¹³² By 2013, S-Comm was operational in every jail and prison across the United States.¹³³ In Obama’s second term, the Administration reformed its priorities to focus on immigrants convicted of criminal offenses, and returns and removals decreased to two million.¹³⁴

1. Arizona and SB 1070

Despite the Obama Administration’s record level of deportations (or maybe because of it, creating an impression that unauthorized immigration status and criminality were one and the same), anti-immigrant sentiment steadily grew in popularity. The advent of state immigration enforcement legislation, initiated by Arizona’s SB 1070’s “attrition through enforcement”¹³⁵ and self-deportation policy goals led to the constitutional framework and political motivation for sanctuary policies. Current sanctuary type laws are an opposite form of state police powers under the Tenth Amendment intended to protect immigrant residents.¹³⁶ SB 1070 and copycat laws were also enacted

129. *Id.*

130. *Id.*

131. *Id.*

132. Brian Bennett, *Obama Administration Reports Record Number of Deportations*, L.A. TIMES (Oct. 18, 2011, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2011-oct-18-la-pn-deportation-ice-20111018-story.html> [<https://perma.cc/NY8E-L5GV>].

133. Chishti et al., *supra* note 127.

134. *Id.*; see Michele Waslin, *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, IMMIGR. POL’Y CTR., <https://www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet> [<https://perma.cc/Z9LL-4WLH>] (last updated Nov. 29, 2011).

135. Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, CTR. FOR IMMIGR. STUD. (May 1, 2005), <https://cis.org/Report/Downsizing-Illegal-Immigration> [<https://perma.cc/3YH5-2WFT>].

136. Ilya Somin, *Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1247–48 (2019). See also Pamela Begaj, *An Analysis of Historical and Legal Sanctuary and a Cohesive Approach to the Current Movement*, 42 J. MARSHALL L. REV. 135, 145 (2008) (“The New Sanctuary Movement was born on January 29, 2007, when religious leaders and

pursuant to state police powers under the Tenth Amendment, but that constitutional defense against federal preemption has largely failed.¹³⁷

In 2012, the Supreme Court heard *Arizona v. United States*¹³⁸ regarding the controversial Arizona Support Our Law Enforcement and Safe Neighborhoods Act, SB 1070, otherwise known as the “show me your papers” law.¹³⁹ SB 1070 included a provision where Arizona police could detain any individual on reasonable suspicion of being undocumented in the United States and demand documentation from the individual to show otherwise.¹⁴⁰ The court struck down three of SB 1070’s provisions, holding that the Supremacy Clause prohibited Arizona from authorizing state and local participation in immigration enforcement beyond the “system Congress created,” thus rejecting the state’s premise that it had “inherent authority” to do so under the Tenth Amendment.¹⁴¹ But the Court upheld the “show me your papers” provision.¹⁴² The provision purportedly claimed that officers “may not consider race, color[,] or national origin . . . except to the extent permitted by the United States and Arizona Constitutions,”¹⁴³ and the Court declared the inclusion of that clause allowed the provision to escape constitutional scrutiny.¹⁴⁴ Three days after the Court issued its decision, an Illinois congressman drew attention to the obvious racial profiling aspect of the law, asking the U.S. House to “Pick Out the Immigrant” between celebrities Justin Bieber, a white Canadian, and Selena Gomez, a third generation American-Mexican.¹⁴⁵ The decision

immigrants met to discuss the current immigration policy in the U.S. and the immigration raids separating families comprised of illegal aliens and their U.S. born children.”).

137. Somin, *supra* note 136, at 1247–48, 1252; *see Arizona v. United States*, 567 U.S. 387 (2012).

138. 567 U.S. 387 (2012).

139. Alisa Reznick, ‘Show Me Your Papers’: A Decade After SB 1070, ARIZ. PUB. MEDIA NEWS (Aug. 7, 2020, 1:51 PM), <https://news.azpm.org/p/news-splash/2020/7/30/177558-show-me-your-papers-a-decade-after-sb-1070/> [<https://perma.cc/H3ZV-KDH6>].

140. ARIZ. REV. STAT. ANN. § 11-1051 (2021). In 2016, Arizona announced an end to the practice of requiring papers, citing costs, logistical problems with ICE, and low staffing. Nigel Duara, *Arizona’s Once-Feared Immigration Law, SB 1070, Loses Most of Its Power in Settlement*, L.A. TIMES (Sept. 15, 2016, 2:55 PM), <https://www.latimes.com/nation/la-na-arizona-law-20160915-snap-story.html> [<https://perma.cc/UF9A-RPAA>]; *see also* Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 72–74 (2010) (discussing whether SB 1070 created a legal duty to carry identification).

141. *Arizona v. United States*, 567 U.S. at 407–10.

142. *Id.* at 416.

143. ARIZ. REV. STAT. ANN. § 11-1051.

144. *Arizona v. United States*, 567 U.S. at 411, 415.

145. Brian Browdie, *U.S. Rep. Cites Celebrity Couple Justin Bieber and Selena Gomez in Remarks on Arizona Immigration Law*, N.Y. DAILY NEWS (June 28, 2012, 12:38 PM),

in *Arizona* was also condemned by the dissenting conservative justices at the time as an erosion of states' rights,¹⁴⁶ but the decision left an uncertain landscape for future liberal sanctuary policies.¹⁴⁷

2. How Much Power Does the Executive Have?: Obama and DACA

The same month that the Supreme Court issued its *Arizona* decision, the Obama Administration enacted the Deferred Action for Childhood Arrivals (DACA) program,¹⁴⁸ one of the most important and hotly contested executive memoranda of recent times. Obama signed the Executive Order in response to Congress's failure to enact comprehensive immigration reform. Specifically, its repeated failure to pass the Development, Relief, and Education for Alien Minors (DREAM) Act.¹⁴⁹ The DREAM Act would have given approximately three million undocumented immigrants who entered as minors a path to permanent residency, and then citizenship.¹⁵⁰ DACA ultimately granted deferred action from removal and work authorization to over 800,000 undocumented immigrants.¹⁵¹ It does not provide a path to permanent status.¹⁵² In 2014, President Obama sought to extend deferred action¹⁵³ to include undocumented parents to U.S. citizens and

<http://www.nydailynews.com/news/national/u-s-rep-cites-celebrity-couple-justin-bieber-selena-gomez-remarks-arizona-immigration-law-article-1.1103919>.

146. Each of the three partial dissents were written by conservative justices: Justice Scalia, Justice Thomas, and Justice Alito. *Arizona v. United States*, 567 U.S. at 416–59.

147. David French, *How an Obama-Administration Precedent May Doom California's Effort to Make Itself a 'Sanctuary State'*, NAT'L REV. (Mar. 7, 2018, 3:04 PM), <https://www.nationalreview.com/2018/03/how-an-obama-administration-precedent-may-doom-californias-effort-to-make-itself-a-sanctuary-state/>.

148. EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN, DEP'T OF HOMELAND SEC. 1 (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/C6B6-X6F6>].

149. Congress made three attempts to pass some version of the DREAM Act. Yamiche Alcindor & Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize 'Dreamers'*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html> [<https://perma.cc/4RP3-FRLS>].

150. *See The Dream Act: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2021), <https://www.americanimmigrationcouncil.org/research/dream-act-overview> [<https://perma.cc/MPS5-WF6D>].

151. *Deferred Action for Childhood Arrivals (DACA): An Overview*, AM. IMMIGR. COUNCIL 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/deferred_action_for_childhood_arrivals_daca_an_overview_0.pdf [<https://perma.cc/W755-RTU7>].

152. *See The Dream Act*, supra note 150.

153. Deferred Action predates DACA in the immigration system. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999) (“At each stage [of the removal process] the Executive has discretion to abandon the endeavor, and at the time [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996] was enacted the INS had been engaging in a regular practice (which had come to be known as ‘deferred action’) of exercising that discretion for

permanent residents and to expand DACA.¹⁵⁴ The Order was met with legal battles, and ultimately the 2014 expansion was halted by the Supreme Court.¹⁵⁵

G. *Trump's War on Immigrants Transforms the Immigration System*

In 2015, San Francisco woman Kathryn Stienle was murdered. An undocumented immigrant was charged with her death.¹⁵⁶ Stienle's murder became a national rallying cry for hardline immigration policies against undocumented immigrants.¹⁵⁷ In response to Steinle's death, then-candidate Trump vowed to "end the sanctuary cities."¹⁵⁸ Trump's focus on immigration enforcement greatly helped him win the election.¹⁵⁹ It was a familiar narrative: lawless predators were seeping through the porous border.¹⁶⁰ Trump and anti-sanctuary policy

humanitarian reasons or simply for its own convenience."); *see also* *Arizona v. United States*, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." (citation removed)). "Deferred Action is a discretionary determination to defer a deportation of an individual as an act of prosecutorial discretion." Privacy Records of 1974; System of Records, 84 Fed. Reg. 54,622, 54,623 n.2 (Oct. 10, 2019). Singer John Lennon of the Beatles was famously granted Deferred Action. *You May Say He's a DREAMer: John Lennon's Immigration Case*, PBS NEWSHOUR (Dec. 14, 2012, 7:25 AM), <https://www.pbs.org/newshour/politics/you-may-say-hes-a-dreamer-john-lennons-immigration-case> [<https://perma.cc/3HBB-2U3R>].

154. POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS, DEP'T OF HOMELAND SEC. 3 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/8N3A-JFHL>]; U.S. DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OR PERMANENT RESIDENTS 1–5 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf [<https://perma.cc/QRC3-B3GY>].

155. *See* *United States v. Texas*, 136 S. Ct. 2271 (2016).

156. The alleged perpetrator's conviction was later overturned, but nevertheless the myth that he was responsible continued. Dennis Romero, *California Appeals Court Overturns Conviction in Kate Steinle Death*, NBC NEWS (Aug. 30, 2019, 8:04 PM), <https://www.nbcnews.com/news/us-news/california-appeals-court-overturns-conviction-kate-steinle-death-n1048551> [<https://perma.cc/J9AX-67YR>].

157. Kristine Phillips, *An Illegal Immigrant Killed a Woman and Was Used to Justify Trump's Wall*, WASH. POST (Oct. 25, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/10/25/an-illegal-immigrant-killed-a-woman-and-was-used-to-justify-trumps-wall-now-hes-on-trial/> [<https://perma.cc/4TXQ-3HV7>].

158. Tami Luhby, *Trump Condemns Sanctuary Cities, But What Are They?*, CNN (Sept. 1, 2016, 10:08 AM), <https://www.cnn.com/2016/09/01/politics/sanctuary-cities-donald-trump/index.html> [<https://perma.cc/N38K-SS7R>].

159. Philip Klinkner, *Op-Ed: Yes, Trump's Hard-Line Immigration Stance Helped Him Win the Election—But It Could Be His Undoing*, L.A. TIMES (Apr. 17, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-klinker-immigration-election-20170417-story.html> [<https://perma.cc/T9NA-MD63>].

160. *See* John Fritze, *Trump Used Words Like 'Invasion' and 'Killer' to Discuss Immigrants at Rallies 500 Times: USA Today Analysis*, USA TODAY (Aug. 21, 2019, 10:18 AM),

sympathizers believe that sanctuary cities are fertile grounds for crime committed by undocumented immigrants.¹⁶¹ He promised to make the banishment of “bad hombres” one of his first priorities.¹⁶²

Trump selected Jeff Sessions as his Attorney General, who called for immigration changes to “end this lawlessness that threatens the public safety [and] pulls down the wages of working Americans.”¹⁶³ Within a week of being in office, President Trump signed Executive Order 13768, seeking to punish and withdraw federal funds from Sanctuary jurisdictions.¹⁶⁴ That directive also effectively made *any* undocumented immigrant an immigration enforcement priority, not just those convicted of certain crimes as previous administrations had done. Section 5 of Executive Order 13768 prioritizes the removal of aliens who:

[h]ave been convicted of *any* criminal offense; . . . [h]ave been *charged* with *any* criminal offense, where such charge has not been resolved; . . . [h]ave committed acts that constitute a chargeable criminal offense; . . . [h]ave engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental

<https://www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/> [<https://perma.cc/7V2J-JZG3>]. See generally LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* (2d ed. 2013) (providing a historical background for the rise of the false narrative that Latino immigrants are set on taking over the American education and healthcare systems).

161. *Sanctuary Cities Undermine Law Enforcement and Endanger Our Communities*, TRUMP WHITE HOUSE ARCHIVES (Mar. 20, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/sanctuary-cities-undermine-law-enforcement-endanger-communities/> [<https://perma.cc/G32J-WN9Y>].

162. Lizzy Gurdus, *Trump: ‘We Have Some Bad Hombres and We’re Going to Get Them Out,’* CNBC (Oct. 19, 2016, 11:21 PM), <https://www.cnbc.com/2016/10/19/trump-we-have-some-bad-hombres-and-were-going-to-get-them-out.html> [<https://perma.cc/Q8QU-JWMD>]; see also César Cuauhtémoc García Hernández, *supra* note 115, at 212 (“[E]arly in his presidency, President Trump instructed the Justice Department to prioritize ‘prosecutions of offenses having a nexus to the southern border.’”).

163. *Attorney General Jeff Sessions: End Migrant Lawlessness*, BBC (Feb. 9, 2017), <https://www.bbc.com/news/world-us-canada-38923511> [<https://perma.cc/49DW-JRTG>].

164. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017); Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 128–29 (2019); *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753, 756–57 (9th Cir. 2020); *FAQ on 8 USC § 1373 and Federal Funding Threats to “Sanctuary Cities,”* IMMIGR. LEGAL RES. CTR. (Apr. 2017), https://www.ilrc.org/sites/default/files/resources/8_usc_1373_and_federal_funding_threats_to_sanctuary_cities.pdf [<https://perma.cc/M4K4-CPVF>]. President Trump made hundreds of changes to the immigration system, which are beyond the scope of this Note. For a thoughtful summary of those changes and the efforts to track them see Sarah Stillman, *The Race to Dismantle Trump’s Immigration Policies*, NEW YORKER (Feb. 1, 2021), <https://www.newyorker.com/magazine/2021/02/08/the-race-to-dismantle-trumps-immigration-policies> [<https://perma.cc/4W2P-4WGT>].

agency; . . . [h]ave abused *any* program related to receipt of public benefits; . . . [a]re subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or . . . [i]n the judgment of an immigration officer, *otherwise pose a risk to public safety or national security*.¹⁶⁵

The order represented the first display of the new administration’s “zero tolerance” policy.¹⁶⁶

1. The Caravan: Framing Immigration as a Crisis

Immigration has long been framed as a crisis.¹⁶⁷ There is fear of a tidal wave of immigrants storming the gates.¹⁶⁸ Despite stricter enforcement policies at the border and higher deportation rates within the country, a 2018 migrant caravan reportedly broke the immigration system.¹⁶⁹ In a tweet, Trump declared a national emergency¹⁷⁰ and deployed troops to defend the border in response to the “monstrous caravans”¹⁷¹ of groups of Central American migrants, including women and children, traveling to the United States in hopes of refuge. The thousands of migrants arriving on foot¹⁷² played nicely into Trump’s

165. Exec. Order No. 13,768, *supra* note 164, at 8,800 (emphasis added).

166. AM. BAR ASS’N COMM’N ON IMMIGR., THE TRUMP IMMIGRATION AGENDA: TIMELINE OF EVENTS: JANUARY 2017–AUGUST 2018 1 (2018), https://www.americanbar.org/content/dam/aba/administrative/immigration/trump_immigration_agenda_timeline.pdf.

167. For example, in 1976, the INS Commissioner published an article in *Reader’s Digest* entitled “Illegal Aliens: Time to Call a Halt!” in which he told readers that “[w]hen I became commissioner [of the INS] in 1973, we were out-manned, under-budgeted, and confronted by a growing, silent invasion of illegal aliens. Despite our best efforts, the problem—critical then—now threatens to become a national disaster.” Meagan Flynn, *An ‘Invasion of Illegal Aliens’: The Oldest Immigration Fear-Mongering Metaphor in America*, WASH. POST (Nov. 2, 2018), <https://www.washingtonpost.com/nation/2018/11/02/an-invasion-illegal-aliens-oldest-immigration-fear-mongering-metaphor-america/> [<https://perma.cc/X7E3-A9Q6>].

168. See, e.g., OTTO SANTA ANA, BROWN TIDE RISING: METAPHORS OF LATINOS IN CONTEMPORARY AMERICAN PUBLIC DISCOURSE (2002).

169. Jorge Ramos, *The Migrant Caravan Isn’t Causing the Border Crisis. Trump Is*, TIME (Nov. 29, 2018, 12:13 PM), <https://time.com/5466781/migrant-caravan-trump-border-crisis/> [<https://perma.cc/XQ2Z-WR23>].

170. David Nakamura, *For Trump, A ‘National Emergency’ Is Anything He Says It Is—Including the Migrant Caravan*, WASH. POST (Oct. 31, 2018), https://www.washingtonpost.com/politics/for-trump-a-national-emergency-is-anything-he-says-it-is--including-the-migrant-caravan/2018/10/31/6954bbf4-dd1a-11e8-85df-7a6b4d25cfbb_story.html [<https://perma.cc/3SY9-99UN>].

171. William Gallo & Katherine Gypson, *Trump Declares National Emergency*, VOA NEWS (Feb. 16, 2019, 1:21 AM), <https://www.voanews.com/a/trump-to-sign-spending-bill-declare-national-emergency/4788242.html> [<https://perma.cc/7VKU-WWF9>].

172. See Caitlin Dickerson, *Border at ‘Breaking Point’ as More Than 76,000 Unauthorized Migrants Cross in a Month*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/us/border-crossing-increase.html> [<https://perma.cc/4K4L-4K3Z>].

call to build a border wall and fell within the narrative that the asylum system was so overrun with fraud that only Trump could fix it. Trump soon brokered a deal with Mexico to allow migrants to “remain in Mexico” for the duration of their immigration proceedings.¹⁷³ While border apprehensions substantially dropped due to Trump’s Migrant Protection Protocols (MPP), otherwise known as the “Remain in Mexico” program,¹⁷⁴ it was at the expense of international law commitments, humanitarian values, and immigrant lives.¹⁷⁵ Immigrants waiting across the border for a determination on their asylum application were subject to abject poverty, increased rates of crime, and ultimately increased exposure to COVID.¹⁷⁶ MPP raised serious due process concerns as there is no public funding for counsel for asylum applicants, and representation is almost impossible to find along the border.¹⁷⁷

Much of Trump’s enforcement actions were announced as a reaction to perceived increased immigration. Immigration policy,

173. The name is Orwellian. The Migrant Protection Protocols did not protect migrants at all and became a humanitarian nightmare. Stacy Caplow & Maryellen Fullerton, *Migrant ‘Protection’ Protocols: A Report from the Front Lines*, LEXISNEXIS: LEGAL NEWSROOM (Sept. 10, 2019), <https://www.lexisnexis.com/legalnewsroom/immigration/b/outsidenews/posts/migrant-protection-protocols-a-report-from-the-front-lines> [<https://perma.cc/W8P8-493C>]; Maria Sacchetti, *U.S. Asylum Officers Say Trump’s ‘Remain in Mexico’ Policy Is Threatening Migrants’ Lives, Ask Federal Court to End It*, WASH. POST (June 27, 2019), https://www.washingtonpost.com/immigration/u-s-asylum-officers-say-trumps-remain-in-mexico-policy-is-threatening-migrants-lives-ask-federal-court-to-end-it/2019/06/26/863e9e9e-9852-11e9-8d0a-5edd7e2025b1_story.html [<https://perma.cc/QH42-T3LQ>]. Immigrants organized themselves into a waiting line, but could not receive hearing notices with a date, location and time. Tent cities grew and remain today. Ashoka Mukpo, *Asylum-Seekers Stranded in Mexico Face Homelessness, Kidnapping, and Sexual Violence*, ACLU, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/asylum-seekers-stranded-mexico-face> [<https://perma.cc/Z93V-8GWX>] (last visited Dec. 17, 2021). The policy was challenged. Maria Sacchetti et al., *Federal Appeals Court Blocks President Trump’s ‘Remain in Mexico’ Policy but Stays Its Own Ruling*, WASH. POST (Feb. 28, 2020), https://www.washingtonpost.com/immigration/trump-remain-in-mexico-halted-federal-court/2020/02/28/87bbf85e-e481-11e9-b403-f738899982d2_story.html [<https://perma.cc/WL45-VKNT>]; David Agren, *Mexico Denies Deal with US on Asylum Seekers at Border*, THE GUARDIAN (Nov. 24, 2018, 8:22 PM), <https://www.theguardian.com/us-news/2018/nov/24/trump-border-policy-asylum-seekers-mexico-agrees> [<https://perma.cc/XE5B-26CF>]; *Migrant Protection Protocols*, DEP’T HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/Q56Z-8V5F>]; Biden v. Texas, 210 L.Ed.2d 1014 (U.S. 2021).

174. *The “Migrant Protection Protocols,”* AM. IMMIGR. COUNCIL (Jan. 22, 2021), <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols> [<https://perma.cc/39BG-S5U3>].

175. See Julian Resendiz, *DHS: Migrant Protection Protocol Program Was Key to Curbing Migrant Surge*, KXAN (Oct. 31, 2019, 8:11 PM), <https://www.kxan.com/news/dhs-migrant-protection-protocol-program-was-key-to-curbing-migrant-surge/> [<https://perma.cc/RV23-BBHJ>].

176. *“Like I’m Drowning”*: Children and Families Sent to Harm by the US ‘Remain in Mexico’ Program, HUM. RTS. WATCH (Jan. 6, 2021), <https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program> [<https://perma.cc/EJ8E-E8CB>].

177. *Id.*

however, often has little to do with “waves” of immigration and more to do with economic circumstances and political ideologies.¹⁷⁸ In times of relative economic certainty, the United States has opened its borders to increased immigration; while in times of economic uncertainty, the doors close.¹⁷⁹ The same is true of political ideologies—when leaders are liberal, so are immigration policies.¹⁸⁰

2. Identity Politics: Framing Immigrants as Criminals

Throughout his time in office, President Trump made undocumented immigrants the focus of his ire and frustration. In his second State of the Union address, Trump again placed the national spotlight on victims of crimes allegedly committed by undocumented immigrants, and falsely claimed that “countless Americans” were murdered by undocumented immigrants.¹⁸¹ Trump even scapegoated individual immigrants for crimes¹⁸² and glorified victims of immigrant crime.¹⁸³ Trump’s rhetoric reflected a prominent enforcement-oriented ideology among Americans.¹⁸⁴ So, like the political landscape during the original Sanctuary Movement, part of America believes that immigration reform and control rests on legalism and crime enforcement, while a majority of the country believes reform and control should take a normative and liberalist approach.

178. See generally Ashley S. Timmer & Jeffrey G. Williamson, *Immigration Policy Prior to the 1930s: Labor Markets, Policy Interactions, and Globalization Backlash*, 24 POPULATION & DEV. REV. 739, 739–71 (1998); Douglas S. Massey, *International Migration at the Dawn of the Twenty-First Century: The Role of the State*, 25 POPULATION & DEV. REV. 303, 303–18 (1999).

179. See Massey, *supra* note 178, at 307.

180. See *id.*

181. Donald Trump, President of the U.S. of Am., Remarks by President Trump in State of the Union Address (Feb. 5, 2019); Sophie Tatum et al., *Trump’s State of the Union Address*, CNN POLITICS (Mar. 5, 2019, 2:13 PM), https://www.cnn.com/politics/live-news/state-of-the-union-2019/h_224422e78661976e31fab7b43370277f [<https://perma.cc/P98W-UGFR>].

182. The accused perpetrator of Katherine Steinle, for one. More recently, a Guyanese national arrested for murder in NYC. Annie Correal, *Citing Murder, Top Trump Official Condemns N.Y. Sanctuary Policy*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/2020/01/17/nyregion/ree-az-khan-immigration-maria-fuertes.html> [<https://perma.cc/Z2VS-6NSL>]; *ICE Lodges Detainer Against Guyanese National Arrested for the Murder of a 92-Year-Old New York City Woman*, U.S. IMMIGR. & CUSTOMS ENF’T, (Jan. 13, 2020), <https://www.ice.gov/news/releases/ice-lodges-detainer-against-guyanese-national-arrested-murder-92-year-old-new-york> [<https://perma.cc/G4YC-RK9Q>].

183. Tara Golshan, *Trump Keeps Highlighting “Angel Moms” to Make the Case for His Immigration Agenda*, VOX (Feb. 15, 2019, 11:14 AM), <https://www.vox.com/2019/2/5/18213132/trump-angel-moms> [<https://perma.cc/R3XV-EQMP>].

184. See John Gramlich, *Trump Voters Want to Build the Wall, But Are More Divided on Other Immigration Questions*, PEW RSCH. CTR. (Nov. 29, 2016), <https://www.pewresearch.org/fact-tank/2016/11/29/trump-voters-want-to-build-the-wall-but-are-more-divided-on-other-immigration-questions/> [<https://perma.cc/KM5C-NBA6>].

As has been detailed in innumerable news reports and by President Trump himself, sanctuary cities were again at the forefront of public discourse as President Trump sermonized anti-immigrant rhetoric and hardnosed (or plainly inhumane) policies.¹⁸⁵ Trump painted immigration control as legalism; a matter of law and order.¹⁸⁶ This was evident during Trump’s “zero tolerance” family separation policy, which detained children in separate facilities from their parents so the parents could be criminally prosecuted for entering the United States without legal authorization.¹⁸⁷ Amid global outrage against the policy, Trump used language reminiscent of criminal justice to justify the order: “When you *prosecute* the parents for coming in *illegally*—which should happen—you have to take the children away.”¹⁸⁸ Additionally, as a subset¹⁸⁹ of the new Sanctuary Movement, a grassroots effort to abolish ICE emerged.¹⁹⁰ The effort to abolish ICE focuses on the

185. *Public Outcry, Sanctuary Policies Are Essential to Push Back Against Trump Administration’s Anti-Migrant Agenda*, WASH. OFF. ON LAT. AM. (June 27, 2019), <https://www.wola.org/2019/06/sanctuary-policies-anti-migrant-agenda/> [<https://perma.cc/VTAS-UNXF>]; John Burnett, *How the Trump Administration’s ‘Zero Tolerance’ Policy Changed the Immigration Debate*, NPR (June 20, 2019, 4:21 PM), <https://www.npr.org/2019/06/20/734496862/how-the-trump-administrations-zero-tolerance-policy-changed-the-immigration-deba> [<https://perma.cc/MKR3-QDYS>].

186. *Sanctuary Cities Undermine Law Enforcement and Endanger Our Communities*, *supra* note 161.

187. Under the settlement agreement in *Flores v. Reno*, children cannot be held in jail-like facilities. Stipulated Settlement Agreement at 12, 14, *Flores v. Reno*, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997), https://www.aclu.org/sites/default/files/pdfs/immigrants/flores_v_meese_agreement.pdf [<https://perma.cc/5ZYW-H5XZ>]. In order to criminally prosecute parents and guardians under 8 U.S.C. §§ 1324–1326 (2018), the administration physically separated families. See H.R. COMM. ON THE JUDICIARY, 116TH CONG., REP. ON THE TRUMP ADMINISTRATION’S FAMILY SEPARATION POLICY: TRAUMA, DESTRUCTION, AND CHAOS 2 (2020), https://judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf [<https://perma.cc/82GY-NZNY>]; Memorandum from Jeff Sessions, Att’y Gen., to all Federal Prosecutors (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download> [<https://perma.cc/K3J5-YNSP>]. A District Court declared 8 U.S.C. § 1326 (prescribing criminal penalties for being a deported noncitizen present in the United States) unconstitutional in *United States v. Carrillo-Lopez*, No. 20-cr-00026, 2021 WL 3667330 (D. Nev. Aug. 18, 2021).

188. *Trump Defends Separating Immigrant Families Amid Outcry*, BBC (June 19, 2018), <https://www.bbc.com/news/world-us-canada-44538110> [<https://perma.cc/9YNL-3WG8>] (emphasis added).

189. Elaine Godfrey, *What ‘Abolish ICE’ Actually Means*, THE ATLANTIC (July 11, 2018, 12:32 PM), <https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/> [<https://perma.cc/S5DH-55T5>]; Rachel Levinson-Waldman & Haley Hinkle, *The Abolish ICE Movement Explained*, BRENNAN CTR. FOR JUST. (July 30, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/abolish-ice-movement-explained> [<https://perma.cc/Q9PC-PFAQ>].

190. Is “abolish ICE” a subset of mainstream liberal or progressive discourse? See Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. (forthcoming) (manuscript at 67–72) (on file with author).

restructuring or eliminating the enforcement agency and sees the agency as instrumental in family separation.¹⁹¹

The Trump Administration has been sued more times over immigration policies than any other presidential administration.¹⁹² Professor Somin, a scholar with the conservative CATO Institute, has separated the sanctuary-focused litigation against the Administration into three categories: challenges to Executive Order 13768; “challenges to then-Attorney General Jeff Sessions’s July 2017 policy of conditioning federal law enforcement grants on state and local government cooperation with federal efforts to deport undocumented immigrants”; and *United States v. California*.¹⁹³

The Trump Administration’s attacks on sanctuary jurisdictions relied primarily on its dubious interpretation of 8 USC § 1373. The Administration argued that sanctuary jurisdictions were unlawful because § 1373 *requires* local jurisdictions to comply with ICE requests.¹⁹⁴ Yet, this is (1) incorrect, and (2) runs afoul of the anticommandeering rule. In a strange twist for both sides of the political spectrum, Trump’s attacks on sanctuary jurisdictions have unwittingly strengthened federalism.¹⁹⁵

III. FEDERALISM, THE ANTICOMMANDEERING RULE AND SECTION 1373

The anticommandeering doctrine is relatively new. First announced in 1992 by the Supreme Court in *New York v. United States*,¹⁹⁶ the doctrine directs that “[t]he federal government may not directly compel state governments to enact or administer federal regulatory programs, even in areas where Congress has enumerated power to legislate.”¹⁹⁷ The rule “is not derived from the text of the

191. Godfrey, *supra* note 189.

192. Stuart Anderson, *All the President’s Immigration Lawsuits*, FORBES (Nov. 5, 2019, 12:15 AM), <https://www.forbes.com/sites/stuartanderson/2019/11/05/all-the-presidents-immigration-lawsuits/> [<https://perma.cc/D97J-57UQ>].

193. Somin, *supra* note 136, at 1248. For an example of a challenge to Sessions’s policy, please see *Oregon v. Trump*, 406 F. Supp. 3d 940 (D. Or. 2019).

194. Section 1373 contains no such requirement. There is no provision of federal law requiring states and localities to enforce the INA. See *Arizona v. United States*, 567 U.S. 387, 411–12 (2012); *City and County of San Francisco v. Barr*; *California v. Barr*, CONST. & ACCOUNTABILITY CTR., <https://www.theconstitution.org/litigation/city-and-county-of-san-francisco-v-sessions-california-v-sessions/> [<https://perma.cc/M63F-TDZV>].

195. Somin, *supra* note 136, at 1284–94.

196. 505 U.S. 144 (1992).

197. AARON H. CAPLAN, AN INTEGRATED APPROACH TO CONSTITUTIONAL LAW 437 (2d ed. 2018).

Tenth Amendment itself,”¹⁹⁸ but arose from the overall structure of the U.S. Constitution, which includes sovereign states as part of the design.¹⁹⁹ In 1997, the Court revisited the doctrine in *Printz v. United States*.²⁰⁰ While *Printz* examined the Brady Act, which mandated federal background checks on firearm purchases and had nothing to do with immigration, the Court looked to the history of Congressional action toward citizenship and naturalization, finding that “the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions . . . [W]e do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service.”²⁰¹ Further, the Court held “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 states.”²⁰²

In 2018, the Supreme Court in *Murphy v. National Collegiate Athletic Association*²⁰³ struck down a federal law banning state government “authorization” of sports gambling under their own state law, citing the anticommandeering rule. The NCAA argued that the law was not requiring the states to do something, but that it was just telling them what *not* to do.²⁰⁴ The Court rejected this distinction: “It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”²⁰⁵

Like the contested law in *Murphy*, section 1373 tells the states not to do something.²⁰⁶ Cases confronting section 1373 after *Murphy* have

198. *New York v. United States*, 505 U.S. at 156.

199. *Id.* at 156–57.

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

201. *Id.* at 907.

202. *Id.* at 922.

203. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1481 (2018); see also Christopher Bret Alexander, Comment, *A Slam Dunk for States’ Rights: The Impact on Constitutional Federalism and Federal Regulations Following the Supreme Court in Murphy v. NCAA*, 27 JEFFREY S. MOORAD SPORTS L.J. 25, 42 (2020) (examining the impact of the Professional and Amateur Sports Protection Act on State’s lawmaking power).

204. Alexander, *supra* note 203, at 30.

205. *Murphy*, 138 S. Ct. at 1478.

206. “Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” 8 U.S.C. § 1373(a) (2018).

ruled against it. So far, at least three federal courts have found section 1373 unconstitutional under the Tenth Amendment.²⁰⁷ And in *United States v. California*, the District Court found section 1373 to be “highly suspect.”²⁰⁸ These decisions have important implications for jurisdictions who wish to adopt sanctuary policies against aiding the federal government in deporting immigrants.²⁰⁹

IV. *UNITED STATES V. CALIFORNIA* CONFIRMED CALIFORNIA AS A SANCTUARY STATE

California has a long history of enacting local sanctuary measures, in part because of its large Latinx population,²¹⁰ and in part because of its left-leaning population.²¹¹ The City of Berkeley became the first sanctuary city in 1971.²¹² In 1979, the Los Angeles Police Department filed a Special Order prohibiting officers from initiating “police action with the objective of discovering the alien status of the person” and from arresting persons found to be in violation of 8 U.S.C. § 1325 (illegal entry).²¹³ Since then, local jurisdictions across California have enacted sanctuary policies.²¹⁴ More recently, as is the focus

207. See *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 344 (E.D. Pa. 2018); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018); *Oregon v. Trump*, 406 F. Supp. 3d 940, 950 (D. Or. 2019).

208. *United States v. California*, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018), *aff'd in part, rev'd in part*, 921 F.3d 865 (9th Cir. 2019). However, the court did not make a ruling on the constitutionality of section 1373 because it found that California’s laws did not conflict with the statute anyway. *Id.* at 1104; 8 U.S.C. § 1373 (2018).

209. *The Unconstitutionality of 8 U.S.C. § 1373 and Its Implications for Sanctuary Policies*, IMMIGRANT LEGAL RES. CTR. (July 2018), https://www.ilrc.org/sites/default/files/resources/uncon_8_usc_sec_1373_sanct_pol-20180808.pdf [<https://perma.cc/SX8Y-L7Q4>].

210. *Resident Population of California in 2019, by Race and Ethnicity*, STATISTA (Sept. 20, 2021), <https://www.statista.com/statistics/306026/california-population-ethnicity-race/> [<https://perma.cc/SY56-LRPD>]. California is “home to the largest number of immigrants in the nation.” Pratheepan Gulasekaram et al., *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 888–93 (2019). California also has the largest population of undocumented immigrants in the United States—2.2 million. *U.S. Unauthorized Immigrant Population Estimates by State, 2016*, PEW RSCH. CTR. (Feb. 5, 2019), <https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/> [<https://perma.cc/58XP-Y48U>].

211. Tyler Kingkade et al., *California Has a Reputation for Progressive Politics. Don’t Tell That to the State’s Progressives*, NBC NEWS (Oct. 13, 2020), <https://www.nbcnews.com/politics/2020-election/california-has-reputation-progressive-politics-don-t-tell-state-s-n1243023> [<https://perma.cc/8EHV-RPUR>].

212. *Sanctuary*, CITY OF BERKELEY, CAL., MAYOR’S OFF., https://www.cityofberkeley.info/Mayor/Home/Sanctuary_City.aspx [<https://perma.cc/Z4HB-M5CA>].

213. L.A., CAL., OFF. CHIEF POLICE, SPECIAL ORD. 40 (Nov. 27, 1979).

214. SARAH HERMAN PECK, CONG. RSCH. SERV., R44795, “SANCTUARY” JURISDICTIONS: FEDERAL, STATE, AND LOCAL POLICIES AND RELATED LITIGATION (2019), <https://sgp.fas.org/crs/homesec/R44795.pdf> [<https://perma.cc/KL59-SNNW>].

of this Note, California has shifted from local sanctuary policies to state-wide sanctuary measures. For example, in 2014, California enacted the 2014 TRUST Act (AB 4), which limits local jails from holding people for the purpose of deportation.²¹⁵ In 2018, California's newest sanctuary measures were taken to court.

United States v. California addressed three new sanctuary laws: AB 450, AB 103, and SB 54—the California Values Act.²¹⁶ The three laws sought to protect immigrants from the long arm of the federal government. The U.S. Government argued that the three laws encroached too far on the federal power over immigration.²¹⁷

AB 450 imposes penalties on employers based on their interactions with federal immigration authorities, including prohibiting “voluntary consent to [an] immigration enforcement agent to enter any nonpublic areas of a place of labor.”²¹⁸ The Ninth Circuit upheld AB 450, finding that it did “not treat the federal government worse than anyone else” nor did it regulate any federal operations.²¹⁹

AB 103 authorizes the California Attorney General to inspect detention facilities that house civil immigration detainees.²²⁰ California amici argued that federal detention facilities lack adequate access to counsel, medical care and mental health services, which leads to increased rates of suicide.²²¹ The Court upheld the inspection provision of the law, but struck down another portion of the law that requires examination of the circumstances surrounding apprehension and transfer of immigrant detainees.²²² The court found one subsection of AB 103 “discriminate[d] against and impermissibly burdened the

215. Tom Ammiano, *TRUST Act (AB 4)*, ACLU OF N. CAL., <https://www.aclunc.org/our-work/legislation/trust-act-ab-4> [<https://perma.cc/5NWK-6KE4>]; see also Daniel Costa, *California Leads the Way*, ECONOMIC POL'Y INST. (Mar. 22, 2018), <https://www.epi.org/publication/california-immigrant-labor-laws/> [<https://perma.cc/MR56-GX3H>] (providing a survey of numerous laws California has enacted to help protect labor standards for undocumented workers).

216. *United States v. California*, 921 F.3d 865 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020).

217. *Id.* at 875–76.

218. CAL. GOV'T CODE § 7285.1(a) (West 2019).

219. *United States v. California*, 921 F.3d at 881.

220. CAL. GOV'T CODE § 12532(a).

221. “[T]he suicide rate is more than triple that of the general prison population.” Brief of Amici Curiae Immigrant Legal Resource Center et al. in Support of Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction at 2, 14, *United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal 2018) (No. 18-cv-00490).

222. *United States v. California*, 921 F.3d at 873.

federal government”²²³ as a “novel requirement, apparently distinct from any other inspection requirements imposed by California law.”²²⁴

SB 54, known as the California Values Act, passed in 2017, prohibits state and local law enforcement agencies from sharing immigrants’ personal information with immigration authorities and transferring an individual to immigration authorities unless authorized by a judicial warrant or judicial probable cause determination.²²⁵ It is the most expansive law of its kind in the country—affecting 350 local institutions—police departments, state law enforcement, school and university police departments, and sheriff’s departments.²²⁶ At least fourteen Californian cities protested SB 54, with some voting to opt out of the law.²²⁷ The Ninth Circuit upheld the California Values Act, holding that:

SB 54 may well frustrate the federal government’s immigration enforcement efforts. However, whatever the wisdom of the underlying policy adopted by California, that frustration is permissible, because California has the right, pursuant to the anticommandeering rule, to refrain from assisting with federal efforts. The United States stresses that, in crafting the INA, Congress expected cooperation between states and federal immigration authorities. That is likely the case. But when questions of federalism are involved, we must distinguish between expectations and requirements. In this context, the federal government was free to *expect* as much as it wanted, but it could not *require* California’s cooperation without running afoul of the Tenth Amendment.²²⁸

223. *Id.*

224. *Id.* at 885.

225. Tanvi Misra, *Are California’s Police Departments Defying Its Sanctuary Law?*, BLOOMBERG (Mar. 29, 2019, 4:30 AM), <https://www.bloomberg.com/news/articles/2019-03-29/the-impact-of-california-s-sanctuary-law> [<https://perma.cc/MYV5-MVD9>].

226. *Id.*

227. Samantha Raphelson et al., *California Sanctuary Law Divides State in Fierce Immigration Debate*, NPR (Oct. 17, 2018, 3:11 PM), <https://www.npr.org/2018/10/17/657951176/california-sanctuary-law-divides-state-in-fierce-immigration-debate> [<https://perma.cc/3C8M-8544>]; Jerome Ma & Nicholas Pavlovic, *California Divided: The Restrictions and Vulnerabilities in Implementing SB 54*, 26 ASIAN AM. L.J. 127, 127, 144–45 (2019); see Gulasekaram et al., *supra* note 210, at 888–93 (explaining various Californian cities’ contests to SB 54).

228. *United States v. California*, 921 F.3d at 890–91

With that holding, the California Values Act made California a sanctuary state.²²⁹

In response to the court's holding, President Trump pushed forward with his agenda and attacked California by organizing a "sanctuary op."²³⁰ Circumventing cooperation with local law enforcement and directly targeting immigrant communities, ICE made 128 arrests over five days in three California "sanctuary jurisdictions" in late September and early October 2020.²³¹

V. THE NEED FOR SANCTUARY POLICIES

A. Sanctuary Policies Are Part of the National Identity and Should Be Reflected in the Law

Then-Presidential candidate Joe Biden said the 2020 election was a battle for the "soul of America."²³² The soul of America is an immigrant one. The immigrant story is deeply rooted in the American identity. The United States brandishes itself as welcomers of the tired, the hungry, the poor.²³³ American mythology and U.S. history books tout American heritage of departing from foreign shores to the New World. Even where sanctuary policies are not formally enacted, communities are engaging in sanctuary protections.²³⁴ Yet federal laws and policies do not reflect this. A society comprised of millions of quasi-legal and "illegal"²³⁵ people is not a "melting pot" or even a salad. It is a class

229. See Raphelson et al., *supra* note 227.

230. Nick Miroff, *ICE Announces 128 Immigration Arrests in California 'Sanctuary' Cities, Part of Wider Pre-Election Operation*, WASH. POST (Oct. 7, 2020, 4:18 PM), https://www.washingtonpost.com/national/ice-announces-128-immigration-arrests-in-california-sanctuary-cities-part-of-wider-pre-election-operation/2020/10/07/820cca26-08bd-11eb-991c-be6ead8c4018_story.html [<https://perma.cc/2SQ2-RUC5>]; Hans A. von Spakovsky & Lora Ries, *Trump's Counterattack on Sanctuary Cities Has Begun, and It's About Time*, THE HERITAGE FOUND. (Feb. 17, 2020), <https://www.heritage.org/immigration/commentary/trumps-counterattack-sanctuary-cities-has-be-gun-and-its-about-time> [<https://perma.cc/4Z34-Q232>].

231. Miroff, *supra* note 230.

232. Elizabeth Dias, *Biden and Trump Say They're Fighting for America's 'Soul.' What Does That Mean?*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2020/10/17/us/biden-trump-soul-nation-country.html> [<https://perma.cc/DC2N-CS2G>].

233. Emma Lazarus, *The New Colossus*, POETRY FOUND., <https://www.poetryfoundation.org/poems/46550/the-new-colossus> [<https://perma.cc/QQ93-54M7>].

234. Jasmine Aguilera, *When ICE Tried to Arrest an Undocumented Man in Tennessee, Neighbors and a Network of Volunteers Formed a Human Chain to Protect Him*, TIME (July 24, 2019, 9:39 AM), <https://time.com/5632098/neighbors-protect-undocumented-immigrants-network-tennessee/> [<https://perma.cc/ZJC6-N8SJ>].

235. As noted *supra*, the term "illegal" is delusive. As José Mendoza put it, "the notion of illegality plays a large role in constructing, perpetuating, and solidifying whiteness. . . . [I]llegality, like race, has historically functioned as a signifier of nonwhiteness and thereby marks entire

system with profound effects on societal relations, family affairs, and the human psyche.²³⁶ For undocumented immigrants, the experience of being undocumented has profound psychological effects.²³⁷ If a child loses a parent to deportation, the experience can result in anxiety, depression, and social isolation.²³⁸ Additionally, children who lose a parent to deportation are at risk of being put into foster care, which risks increased psychological damage.²³⁹ When the child becomes an adult, the cycle of poverty continues.²⁴⁰ Beyond reflecting normative values, sanctuary policies are good business. America needs sanctuary policies because sanctuary policies do not increase unauthorized migration, they are good for the economy, and are good for law enforcement.²⁴¹

B. Sanctuary Policies Do Not Increase Unauthorized Migration

Approximately eleven million undocumented people live in the United States.²⁴² An estimated 40 percent are visa overstays and are seldom the people in sanctuary; indeed, most are so integrated into society, their neighbors would be surprised to learn they are “illegal.”²⁴³ There is no evidence that sanctuary policies encourage unauthorized migration.²⁴⁴ Bad foreign policy does that.²⁴⁵ The United States’ involvement in foreign countries’ affairs is almost directly correlated to waves of unauthorized migration. The starkest example is

communities (e.g., Latino and Asian communities) as nonwhite.” José Jorge Mendoza, *A “Nation” of Immigrants*, 5 THE PLURALIST, Fall 2010, at 41, 47 (emphasis omitted).

236. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (examining the negative psychological effects caused by racial segregation on children).

237. AM. PSYCH. ASS’N, WORKING WITH IMMIGRANT-ORIGIN CLIENTS: AN UPDATE FOR MENTAL HEALTH PROFESSIONALS 2–4 (2013), <https://www.apa.org/topics/immigration-refugees/report-professionals.pdf> [<https://perma.cc/PQH7-8MKM>].

238. *Id.* at 3–4.

239. Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow,’* N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html> [<https://perma.cc/VTC2-HHMT>].

240. *Id.*

241. See David K. Hausman, *Sanctuary Policies Reduce Deportations Without Increasing Crime*, 117 PROC. NAT’L ACAD. SCIS. 27262, 27262 (2020).

242. Robert Siegel & Selena Simmons-Duffin, *How Did We Get to 11 Million Unauthorized Immigrants?*, NPR (March 7, 2017, 5:55 PM), <https://www.npr.org/2017/03/07/518201210/how-did-we-get-to-11-million-unauthorized-immigrants> [<https://perma.cc/Q3GS-PYL3>].

243. *Id.*

244. Gonzalez et al., *supra* note 89, at 10–11.

245. See, e.g., Lisa Garcia Bedolla, *Latino Migration and U.S. Foreign Policy*, BERKELEY REV. LATIN AM. STUD., Spring 2009, at 50, <https://clas.berkeley.edu/sites/default/files/publications/brlas-spring2009-garciabedolla.pdf> [<https://perma.cc/5W27-P7FR>]; MOTOMURA, *supra* note 39, at 220.

that of Central America during the 1980s, described above, where the United States funded the Salvadoran military to the tune of millions of dollars a day as it killed unarmed civilians.²⁴⁶

C. *Sanctuary Policies Are Good for the Economy*

Where enacted, sanctuary policies lead to higher household income, less reliance on public assistance, and create the ability to generate inter-generational wealth.²⁴⁷ Unauthorized immigrants make up 4.4 percent of the U.S. workforce.²⁴⁸ In California, the nation's largest economy, DACAs alone contribute almost 200 million in tax revenue.²⁴⁹

D. *Sanctuary Policies Are Good for Law Enforcement*

Sanctuary policies have always sought to encourage cooperation between unauthorized immigrants and local law enforcement. The Supreme Court has stated that “[t]he promotion of safety of persons and property [has been] unquestionably at the core of the [s]tate’s police power.”²⁵⁰ The rationale behind sanctuary policies is that when a city promises not to act as immigration agents, its undocumented immigrants will report crimes without fear of immigration consequences, police can then respond to crime reports, and overall crime will decline.

246. See Bedolla, *supra* note 245, at 55.

247. TOM K. WONG, CENTER FOR AMERICAN PROGRESS, NATIONAL IMMIGRATION LAW CENTER, THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY 6-8 (2017), <https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf> [<https://perma.cc/N2N7-K8C8>]; Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. AM. PROGRESS (Jan. 26, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/> [<https://perma.cc/7V5U-LETM>].

248. Nicole Prchal Svajlenka, *Protecting Undocumented Workers on the Pandemic’s Front Lines*, CTR. FOR AM. PROGRESS (Dec. 2, 2020), <https://americanprogress.org/article/protecting-undocumented-workers-pandemics-front-lines-2/> [<https://perma.cc/8GMA-G4ES>].

249. Dan Kosten, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, NAT’L IMMIGR. F. (Sept. 6, 2018), <https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/> [<https://perma.cc/MD7W-35HR>]; Britta Glennon, *Why the Trump Administration’s Anti-Immigration Policies Are the United States’ Loss and the Rest of the World’s Gain*, BROOKINGS (July 20, 2020), <https://www.brookings.edu/blog/up-front/2020/07/20/why-the-trump-administrations-anti-immigration-policies-are-the-united-states-loss-and-the-rest-of-the-worlds-gain/> [<https://perma.cc/PQJ9-VYNZ>].

250. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

Numerous studies have proved this hypothesis true.²⁵¹ Yet, in California, there are already violations of SB 54.²⁵² Local law enforcement say that they are not actively trying to defy SB 54, it is just too complicated for them to enforce.²⁵³ For example, Edgar Torres Gutierrez was arrested by Laguna Beach police on suspicion of a DUI.²⁵⁴ Mr. Gutierrez had no criminal record but was held for 15 hours at the request of ICE.²⁵⁵ Under SB 54, the police should not have entertained the request to hold Mr. Gutierrez. It was later discovered by immigration officials that Mr. Gutierrez held DACA, and was released. Laguna Beach entered into a settlement with Mr. Gutierrez and are now required to train officers on SB 54 for the next two years.²⁵⁶

Further, the global protest movement in response to the murder of George Floyd and others shows that community policing is in desperate need of reform. Amidst a global pandemic, a global outcry for police reform reached a fever pitch. The Black Lives Matter movement includes calls for abolishing the police and for stripping police funding. As the immigration system and law enforcement are codependent,²⁵⁷ any comprehensive immigration reform must address this.

E. There Is a Constitutional Duty to Broaden Sanctuary Policies on the National Level: Race and the Thirteenth Amendment

Some commentators argue that the Constitution does not provide support for sanctuary policies, as immigration and naturalization are within the exclusive authority of the federal government. Yet, the

251. WONG, *supra* note 247, at 6; Charis E. Kubrin & Bradley J. Bartos, *Sanctuary Status and Crime in California: What's the Connection?*, 3 JUST. EVALUATION. J. 115, 119 (2020); Nick Miroff, *Study Finds No Crime Increase in Cities that Adopted 'Sanctuary' Policies, Despite Trump Claims*, WASH. POST (Oct. 21, 2020, 9:56 AM), https://www.washingtonpost.com/national/sanctuary-city-study-immigration-crime/2020/10/21/5810d13a-12fa-11eb-82af-864652063d61_story.html [<https://perma.cc/4HX3-8W9E>].

252. Farida Jhabvala Romero, *California Is a Sanctuary State, But Some Police Aren't Following the Law, Attorneys Say*, KQED (Mar. 6, 2020), <https://www.kqed.org/news/11805331/california-is-a-sanctuary-state-but-some-police-arent-following-the-law-attorneys-say> [<https://perma.cc/A3YP-D6WC>].

253. *Id.*

254. Lilly Nguyen, *Laguna Beach Agrees to \$18,750 Settlement with DACA Recipient Detained by City Police*, L.A. TIMES (Jan. 22, 2020, 5:55 PM), <https://www.latimes.com/socal/daily-pilot/news/story/2020-01-22/laguna-beach-agrees-to-18-750-settlement-with-daca-recipient-detained-by-city-police> [<https://perma.cc/3GUA-BG2Q>].

255. *City of Laguna Beach to Pay DACA Recipient in Settlement Deal*, U.C. IRVINE SCH. OF L. (Jan. 22, 2020), <https://www.law.uci.edu/news/press-releases/2020/irc-daca-settlement.html> [<https://perma.cc/CJ22-8WVS>].

256. *Id.*

257. *See supra* note 115 and accompanying text.

policy importance of immigration reform is even more compelling if one reads the Thirteenth Amendment. Passed in 1865 as part of the Reconstruction Amendments, the Thirteenth Amendment states that no person shall be subject to slavery or involuntary servitude, *except for punishment of a crime*.²⁵⁸ Immigrants held in detention facilities are subject to the below-cost labor. The Supreme Court has repeatedly stated that being detained for immigration violations is not criminal punishment.²⁵⁹ That low-cost labor therefore violates the Thirteenth Amendment.²⁶⁰

The Thirteenth Amendment “represented the Union’s deep seated commitment to end the ‘badges and incidents of servitude,’ [and] was an unadulterated call to abandon injustices that had made blacks outsiders in the country they helped build and whose economy they helped sustain.”²⁶¹ Section Two of the Thirteenth Amendment empowers Congress to enforce the abolition of slavery. In *Jones v. Alfred H. Mayer Co.*,²⁶² the Supreme Court construed the Amendment as not only abolishing African chattel slavery, but also empowering Congress to “pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”²⁶³ William M. Carter, Jr. argues that the Thirteenth “Amendment’s framers intended to dismantle the lingering vestiges of the slave system and that those vestiges extend beyond African-Americans.”²⁶⁴ The immigration detention complex is arguably a vestige of that system.²⁶⁵ AB 103 sought inspection of detention facilities, and another law, AB 32, went into

258. U.S. CONST. amend XIII.

259. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1351 (2014).

260. Anita Sinha, *Slavery by Another Name: “Voluntary” Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J.C.R. & C.L. 1, 38 (2015); see César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 286 (2017).

261. *Jamison v. McClendon*, 476 F. Supp. 3d 386, 397 (S.D. Miss. 2020) (alteration in original) (quoting Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 542 (2002)).

262. 392 U.S. 409 (1968).

263. *Id.* at 439 (emphasis omitted) (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)).

264. William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 22 (2011). Lawrence Sager attaches significance to the fact that *Jones*, unlike the Civil Rights Cases, includes within Congress’s remedial power the authority to target not just the “badges and incidents” but also the “relics” of slavery. See Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150, 151–56 (2000) (contending the Thirteenth Amendment’s empowerment of Congress to target “relics” of slavery provides ground for federal criminalization of violence against women).

265. See Rhonda V. Magee, *Slavery As Immigration?*, 44 U.S.F. L. REV. 273, 275 (2009).

effect on January 1, 2020.²⁶⁶ AB 32 prohibits the operation of private detention facilities within California.²⁶⁷

“Successful creative uses of the Thirteenth Amendment in support of progressive arguments demonstrate not that the Amendment’s definition of slavery is limitlessly malleable, but rather that its broad empowerment of Congress lends constitutional support to political imagination.”²⁶⁸ The United States is confronted today, perhaps more than in any other era, with the structural racism that befalls this country.²⁶⁹ Congress must consider the role of race in making new immigration policy.²⁷⁰ At the risk of being overly optimistic about Thirteenth Amendment expansion, there may be hope for Thirteenth Amendment protection in the immigration context.

266. Lisa Pickoff-White & Julie Small, *Report: Immigration Detainees Get Inadequate Medical Care in California Facilities*, KQED (Feb. 26, 2019), <https://www.kqed.org/news/11728992/attorney-general-releases-first-report-on-immigration-detention-facilities-in-california> [https://perma.cc/3ELK-HGKZ]; Bianca Bruno, *Feds, For-Profit Prison Group Ask Ninth Circuit to Block California Private Prison Ban*, COURTHOUSE NEWS SERV. (June 7, 2021), <https://www.courthousenews.com/feds-for-profit-prison-group-ask-ninth-circuit-to-block-california-private-prison-ban/> [https://perma.cc/7C98-3U7Y].

267. Bruno, *supra* note 266. While a step in the right direction, the law may have adverse consequences for immigrant detainees. Farida Jhabvala Romero, *Will California’s Ban on For-Profit Immigration Detention and Prisons Survive Biden Opposition?*, KQED (July 9, 2021), <https://www.kqed.org/news/11880745/will-californias-ban-on-for-profit-immigration-detention-and-prisons-survive-biden-legal-challenge> [https://perma.cc/FRN4-GA6S]. Immigration and Customs Enforcement is at risk of losing several privately-run detention facilities in California. If ICE loses the facilities, they may simply move the detainees to other states, forcing families to travel and limiting access to representation. See Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113, 115 (2009). See generally *Doe v. United States*, 831 F.3d 309, 321–22 (5th Cir. 2016) (holding female immigrant detainees assaulted by a private prison officer were unable to assert section 1983 claims against the privately run prison even though prison had contracted to provide services for ICE); Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213 (2009) (discussing the development of the private prison industry and some of the negative effects it has had on detainees); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004) (discussing the trend towards privatization of prisons); *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125 (D. Colo. 2015) (detainee challenge to below minimum wage compensation at private prison).

268. Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1737 (2012).

269. See Elliott C. McLaughlin, *How George Floyd’s Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [https://perma.cc/DD8T-M49K]; Justin Worland, *America’s Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/>.

270. Magee, *supra* note 265, at 274. For specific proposals in line with a Thirteenth Amendment approach worth considering, see *Free Our Future: An Immigration Policy Platform for Beyond the Trump Era*, MIJENTE 10 (June 2018), https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf [https://perma.cc/8M8Y-FUVK].

VI. SANCTUARY POLICIES MUST INFORM COMPREHENSIVE IMMIGRATION REFORM

Since the original Sanctuary Movement, Congress has attempted to stem the tide of “illegal” migration and expel “dangerous criminal aliens,” while trying to solve the million-dollar question of what to do with the undocumented already within the country’s borders.²⁷¹ The punitive and piecemeal executive and legislative immigration policies have not effectively ceased or even curbed illegal immigration. When Congress passed IRCA in 1986, there were five million unauthorized immigrants living in the United States.²⁷² Of those five million, 2.7 million were ultimately granted legal status under IRCA.²⁷³ Today the United States is home to over eleven million undocumented immigrants.²⁷⁴ This is not just because more people have come undocumented; it is also due to the fact that Congress’s changes in IIRAIRA made it almost impossible for lower income immigrants to become legal even if, for example, they married a U.S. citizen.²⁷⁵ Over 300 local jurisdictions in eleven states across the nation²⁷⁶ have sanctuary laws in place today.²⁷⁷ Shifting enforcement priorities every few years depending on whoever is in the White House is like punishing the marionettes and letting the organ grinder go on his way.²⁷⁸ While the judiciary has so far partially answered the question regarding the legality of sanctuary policies, comprehensive immigration reform must answer the political question of the nation’s identity.²⁷⁹

271. Brad Plumer, *Congress Tried to Fix Immigration Back in 1986. Why Did It Fail?*, WASH. POST (Jan. 30, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/01/30/in-1986-congress-tried-to-solve-immigration-why-didnt-it-work/> [https://perma.cc/NB7B-E8WL].

272. *Id.*

273. Badger, *supra* note 103.

274. Plumer, *supra* note 271. This figure does not include the over one million immigrants living in the United States with quasi-immigrant status under Temporary Protected Status and Deferred Action for Childhood Arrivals.

275. *The Three- and Ten-Year Bars: How New Rules Expand Eligibility for Waivers*, AM. IMMIGR. COUNCIL 1 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/three_and_ten_year_bars.pdf [https://perma.cc/35K5-QDE6].

276. See Vaughan & Griffith, *supra* note 19.

277. Barbara E. Armacost, “Sanctuary” Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1198–99; Megan McCauley, Note, *Reversing the Ice Age: Immigration Reform in California*, 49 U. PAC. L. REV. 481, 484–85 (2018).

278. In fact, by concentrating on the border, we have increased the number of undocumented immigrants here. “The massive increase in border enforcement . . . had the unintended and unexpected result not of deterring departures from Mexico but of reducing returns.” Massey & Pren, *supra* note 104, at 13.

279. See Kathleen Kim, *Introduction: Perspectives on Immigration Reform*, 44 LOY. L.A. L. REV. 1323, 1328 (2011) (introducing five student authors’ articles on addressing the “perplexing legal and normative dilemmas that key aspects of immigration reform present”).

Without substantive reform, undocumented immigrants face a cycle of poverty, irreversible psychological effects, and denial of free labor rights.²⁸⁰ The Supreme Court vested that plenary power in the political branches.²⁸¹ Yet, “[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States.”²⁸² Congressional inaction to reform immigration has left the states in murky waters, having to answer to constituents hungry for reform by imposing laws that chip away at Congress’s federal power over reform.²⁸³ Ultimately, having a checkerboard system of states that impose their own immigration consequences will lead to incongruous results. Immigrants will concentrate in one part of the country²⁸⁴ at the economic and social peril of the other. This furthers the divide in Congress and impedes comprehensive immigration reform, leaving Congress to chase its own tail every political cycle.²⁸⁵

To end the cycle, Congress should enact comprehensive immigration reform that reflects a majority of the nation’s values encompassed in sanctuary policies. This paper is limited to sharing insights gleaned from the Sanctuary Movement and California’s transition to sanctuary state. Of course, there are many more recommendations outside the scope of this paper. The following recommendations are compelled by the Sanctuary Movement values examined.

Congress must: (1) enact a pathway to citizenship for DACA and TPS holders;²⁸⁶ (2) repeal section 287(g) and section 1373; (3) provide

280. See NEHA DESAI & MELISSA ADAMSON, CHILD WELFARE AND IMMIGRATION: IMPLICATIONS FOR FUNDERS, YOUTH TRANSITION FUNDERS GROUP: FOSTER CARE WORK GROUP 8–9 (June 2018), http://www.ytfg.org/wp-content/uploads/2018/06/YTFG_FC_ChildWelfareAndImmigration_V1R5.pdf [<https://perma.cc/P2W2-FKSC>]; Clifford & Silver-Greenberg, *supra* note 239.

281. See *Ping v. United States*, 130 U.S. 581, 603 (1889). Naturalization, not immigration, is in the Constitution. U.S. CONST. art. I, § 8, cls. 1, 4, 18 (“The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . [and] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .”).

282. *Arizona v. United States*, 567 U.S. 387, 397 (2012).

283. TOM JAWETZ, RESTORING THE RULE OF LAW THROUGH A FAIR, HUMANE, AND WORKABLE IMMIGRATION SYSTEM 9–10 (2019), <https://cf.americanprogress.org/wp-content/uploads/2019/07/RuleOfLaw-report.pdf> [<https://perma.cc/7URQ-2CQJ>].

284. See Michael B. Sauter & Evan Comen, *10 Best States for Immigrants*, 24/7 WALL ST. (Jan. 12, 2020, 12:27 PM), <https://247wallst.com/special-report/2017/05/02/10-best-states-for-immigrants/> [<https://perma.cc/8XAV-MHYC>].

285. David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 128–29 (2018).

286. The Biden Administration renewed the call to provide DACA and TPS recipients with permanent status. Press Release, The White House, Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our->

free access to optional counsel at immigration proceedings;²⁸⁷ (4) enumerate enforcement priorities;²⁸⁸ and (5) decrease barriers to applying for asylum.²⁸⁹

First and foremost, there are nearly 700,000 DACA recipients in the United States.²⁹⁰ There are 300,000 TPS holders.²⁹¹ These individuals have lived in the U.S. for many years and have undergone strenuous background checks multiple times. Any comprehensive immigration reform must provide a pathway to citizenship for them. Allowing these individuals to fully participate in society and live without fear of deportation will strengthen the economy and social relations. A majority of the country supports this proposal and any reform without it would be incomplete.

Recent years have demonstrated the danger of 287(g) and section 1373. As explained above, 287(g)²⁹² has been the focus of local sanctuary policies. 287(g) allows DHS to deputize state and local law enforcement officers to enforce federal immigration law. 287(g) leads to workplace and civil rights violations and racial profiling, as seen in Arizona's "show me your papers" law.²⁹³ Likewise, section 1373's

immigration-system/ [https://perma.cc/29L4-VU6D]. The need to enact a pathway to citizenship for DACA recipients is ever more urgent. On July 16, 2021, the U.S. District Court for the Southern District of Texas held that the DACA policy is "illegal." *Texas v. United States*, No. 18-CV-00068, 2021 WL 3022434, at *2 (S.D. Tex. July 16, 2021). The program is again on pause, with thousands of lives again in limbo. Likewise, the future of TPS for El Salvador, Haiti, Nicaragua, and Sudan remains uncertain. *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020); *Update on Ramos v. Nielsen*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/update-on-ramos-v-nielsen> [https://perma.cc/956P-RNVP] (last updated Sept. 9, 2021).

287. While proponents of universal access to representation raise valid Sixth Amendment and humanitarian reasons for mandatory universal representation, it should remain optional given strategic advantages within the current asylum framework.

288. The author acknowledges that enforcement policies must change given national security concerns but argues Congress could provide a default baseline.

289. Stephen Meili, *Asylum Under Attack: Is It Time for a Constitutional Right?*, 26 *BUFF. HUM. RTS. L. REV.* 147 (2019). We repeatedly violate constitutional rights of minorities in times of crisis. There must be greater protection for the most vulnerable seeking safe haven. *See* Kam C. Wong, *The USA Patriot Act: A Policy of Alienation*, 12 *MICH. J. RACE & L.* 161, 188–89 (2006).

290. *Deferred Action for Childhood Arrivals (DACA)*, *supra* note 151, at 2.

291. Nicole Prchal Svajlenka et al., *TPS Holders Are Integral Members of the U.S. Economy and Society*, *CTR. FOR AM. PROGRESS* (Oct. 20, 2017, 9:01 AM), <https://www.americanprogress.org/issues/immigration/news/2017/10/20/440400/tps-holders-are-integral-members-of-the-u-s-economy-and-society/> [https://perma.cc/QP76-J3FJ].

292. 8 U.S.C. § 1357(g) (2018).

293. Duara, *supra* note 140. Section 287(g) agreements also place an enormous burden on state and city budgets. *See* Wesley Tharpe, *Voluntary Immigration Enforcement a Costly Choice for Georgia Communities*, *GA. BUDGET & POL'Y INST.* 4 (July 2018), <https://gbpi.org/wp-content/uploads/2020/05/Voluntary-Immigration-Enforcement-a-Costly-Choice-for-Georgia-Communities.pdf> [https://perma.cc/5K82-MXHU].

constitutional validity is questionable, at a minimum, and runs contrary to federalism and sanctuary principles.²⁹⁴

Without recognizing that the Sixth Amendment extends to immigration deportation proceedings,²⁹⁵ Congress can provide free access to optional counsel at immigration proceedings for indigent immigrants by removing the Legal Services Corporation Act (LSC) restriction on non-citizens.²⁹⁶ LSC currently excludes funding for organizations representing undocumented immigrants. Removing the restriction would increase access to counsel for indigent immigrants and identify applicants eligible for a path to citizenship. Increased access to funding would also serve as a barrier to future due process violations in the immigration context.²⁹⁷

The executive branch currently identifies enforcement priorities, but there is no law prohibiting Congress from enacting its own. While it may be so that enforcement priorities must be flexible to adapt to changing need, a congressional list would serve as a guiding hand to the Executive's power over immigration and limit the President's almost unfettered authority to enact enforcement priorities inconsistent with those of Congress and the people it represents.

294. See Section III, *supra*.

295. Since “[r]emoval is a civil, not criminal matter,” it is largely outside the purview of the Sixth Amendment’s right to counsel. *Arizona v. United States*, 567 U.S. 387, 396 (2012). Courts have repeatedly declined to find that indigent individuals in removal proceedings have a Sixth Amendment right to counsel at the government’s expense in removal proceedings. See, e.g., *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *United States v. Ramos*, 623 F.3d 672, 682 (9th Cir. 2010); *Romero v. U.S. Immigr. & Naturalization Serv.*, 399 F.3d 109, 112 (2d Cir. 2005); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001); *Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001); *Stroe v. Immigr. & Naturalization Serv.*, 256 F.3d 498, 500–01 (7th Cir. 2001); *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir. 2001); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999); *Mustata v. U.S. Dep’t of Justice*, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999); *Gandarillas-Zambrana v. Bd. of Immigr. Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995); *Mantell v. U.S. Dep’t of Just., Immigr. & Naturalization Serv.*, 798 F.2d 124, 127 (5th Cir. 1986); see also *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (In the context of deportation proceedings triggered by criminal conduct, “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.”); *United States v. Garcia-Villa*, No. 14CR1481WQH, 2014 WL 4955703, at *4 (S.D. Cal. Sept. 30, 2014) (“No statutory or regulatory provision of the expedited removal proceedings [under Section 235 of the INA] provides a right to consult with counsel.”).

296. 45 C.F.R. § 1626 (2011). There is also growing support for the argument to make the immigration courts independent, Article I courts. *Immigration Courts Aren’t Real Courts. Time to Change That*, N.Y. TIMES (May 8, 2021), <https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html> [<https://perma.cc/7NHQ-27LG>].

297. The Sixth Amendment requires the existence of public-defender systems, but civil legal-aid programs have no such constitutional mandate.

Thirty-five percent of the world's countries acknowledge the right to asylum within their domestic laws or constitutions.²⁹⁸ Several Circuit Courts have acknowledged that the right to asylum resides within the due process rights of non-citizens.²⁹⁹ It is unlikely the Supreme Court will recognize such a right anytime soon.³⁰⁰ Section 208 of the INA governs asylum.³⁰¹ Currently, an individual is barred from applying for asylum if they fail to do so within the first year of entry.³⁰² Congress must eliminate the one year filing deadline.³⁰³ There are potentially thousands of immigrants that face cognizable persecution if returned to their country of origin but are prohibited from stating that claim because of the one year filing deadline. While lesser relief is still available under the Convention Against Torture to those who miss the one-year filing deadline, in a strange result, the lesser relief has a higher standard of proof.³⁰⁴ Additionally, relief under the Convention Against Torture does not lead to permanent residence or citizenship. Moreover, currently if an individual is denied asylum based on a safe third country option, has exceeded the one-year deadline, was previously denied asylum, or fails to demonstrate changed circumstances, there is no judicial review of the decision. Congress must also eliminate the prohibition on judicial review.³⁰⁵

VII. CONCLUSION

Academics, practitioners, politicians on both sides of the aisle,³⁰⁶ the public, and immigrants caught in the wheels of the immigration machine all acknowledge that the immigration system is broken.³⁰⁷

298. Meili, *supra* note 289, at 148.

299. *Id.* at 149.

300. *Id.*

301. 8 U.S.C. § 1158(a)(1) (2018).

302. *Id.* § 1158(a)(2)(B) (an alien must “demonstrate[] by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States”). Exceptions to the rule are provided in 8 U.S.C. § 1158(a)(2) and 8 C.F.R. § 208.4(a) (2011).

303. Admirably, President Biden’s proposed bill includes this. Press Release, *supra* note 286.

304. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984); Act of Oct. 21, 1998, Pub. L. No. 105-277, 112 Stat. 2681-822 (1998) (codified as note to 8 U.S.C. § 1231); 8 C.F.R. § 208.16-18 (2011).

305. *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 2008 (2020) (Sotomayor, J., dissenting).

306. See LOU DOBBS, WAR ON THE MIDDLE CLASS: HOW THE GOVERNMENT, BIG BUSINESS, AND SPECIAL INTEREST GROUPS ARE WAGING WAR ON THE AMERICAN DREAM AND HOW TO FIGHT BACK 131 (2007).

307. “To say that US immigration policies have failed is an understatement. From 1970 to 2010 the population born in Latin America increased more than 11 times. . . . If the goal of such actions was to limit immigration from Latin America and prevent the demographic transformation of the

However, if there is ever to be an honest effort at comprehensive immigration reform, we must look to the grassroots movement that brought us here. Like the Sanctuary Movement of the 1980s, today's sanctuary policies test the limits of federalism, presidential supremacy over the realm of immigration, and the nation's moral compass. *United States v. California* provides an illustration of the current state of the battle over federal immigration law and invites Congress to enact comprehensive reform—a matter well within its purview. This Note proposes answering that call by reforming immigration law to conform to sanctuary policies, for the sake of the nation's unity, its identity, and its interests.

United States, they achieved the opposite. . . . The crux of the problem is that Congress routinely makes consequential policy decisions with scant consideration of the underlying dynamics of the social processes involved.” Massey & Pren, *supra* note 104, at 14; Rubenstein, *supra* note 285, at 128–29 (explaining the cycle of blame that leads to inaction).

