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Are Carve-Outs Killing the Spirit of Sanctuary Cities? A Comparative Analysis of Chicago and Oak Park's Sanctuary Policies, 52 UIC J. Marshall L. Rev. 395 (2019)

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ARE CARVE-OUTS KILLING THE SPIRIT OF SANCTUARY CITIES? A COMPARATIVE ANALYSIS OF CHICAGO AND OAK PARK'S SANCTUARY POLICIES

ANA TORRES

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Abstract

In the United States, undocumented immigrants often shy away from accessing public services due to fear of deportation. Chicago and Oak Park have passed ordinances commonly known as “sanctuary policies,” which seek to promote trust between immigrant communities and local law enforcement in order to lower crime rates and increase public safety. The rationale is that undocumented immigrants will feel more confident to report crimes and utilize public and social services without fear of repercussions. Sanctuary policies strive to create basic protections for undocumented immigrants at a local level by limiting cooperation with the federal government. However, many sanctuary policies are inadequate because they contain carve-outs that leave many undocumented populations unprotected. This comment analyzes

Chicago and Oak Park's sanctuary policies. It proposes amendments to Chicago's Welcoming City ordinance and utilizes Oak Park's Welcoming Village ordinance as a model for such changes.

I. INTRODUCTION

President Trump's stance on immigration is overtly more aggressive in tone than his predecessor, Barack Obama.¹ Trump's negative sentiments against undocumented immigrants are translating into tangible policies that directly threaten their future in the United States.² While some local governments welcome the Trump administration's policies, others have pushed back by enacting legislation that attempts to protect immigrant communities.³

There are many neighborhoods in the U.S. that are known to have large concentrations of immigrants.⁴ The families living in these communities are sometimes composed of undocumented immigrants.⁵ Immigrant communities, similar to any other

1. See Adam Goodman, *The Core of Donald Trump's Immigration Policy? Fear.*, WASH. POST (Aug. 24, 2017), www.washingtonpost.com/news/made-by-history/wp/2017/08/24/the-core-of-donald-trumps-immigration-policy-fear/ (explaining that Trump's anti-immigrant scare tactics were a critical component of his campaign and are now a governing tool in his presidency); see also Molly Roberts, *The Trump administration isn't just changing words. It's changing the country.*, WASH. POST (Feb. 23, 2018), www.washingtonpost.com/blogs/post-partisan/wp/2018/02/23/the-trump-administration-isnt-just-changing-words-its-changing-the-country/ (stating that "U.S. Citizenship and Immigration Services erased 300 years of American dreaming this week when it revised its stated purpose from securing 'America's promise as a nation of immigrants' to securing 'the homeland' — and, of course, 'honoring our values'").

2. See Haley Sweetland Edwards, *'No One Is Safe.' How Trump's Immigration Policy Is Splitting Families Apart*, TIME (Mar. 8, 2018), time.com/longform/donald-trump-immigration-policy-splitting-families/ (explaining that Trump's January 2017 Executive Order broadened the deportation priority policy to encompass 'all removable aliens,' whose "effect is an implied war on all undocumented immigrants.").

3. See PRATHEEPAN GULASEKARAM & S. KATHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* 119 (Cambridge University Press 2015) (expounding that "as restrictionist fervor had begun to wane in 2012, a countertrend was beginning to emerge, and a growing number of states began passing pro-integration legislation").

4. Gustavo Lopez et al., *Key Findings About U.S. Immigrants*, PEW RES. CTR. (May 3, 2017), www.pewresearch.org/fact-tank/2017/05/03/key-findings-about-u-s-immigrants/ (indicating that the "U.S. has more immigrants than any other country in the world). "Today, more than 40 million people living in the U.S. were born in another country, accounting for about one-fifth of the world's migrants in 2015." *Id.*

5. Jeffrey S. Passel et al., *20 metro areas are home to six-in-ten unauthorized immigrants in U.S.*, PEW RES. CTR. (Feb. 9, 2017), www.pewresearch.org/fact-

community in this country, have basic needs like access to education, healthcare, and public safety.

However, oftentimes undocumented immigrants shy away from accessing these services because they are afraid of being arbitrarily detained by law enforcement even when they have not committed a criminal infraction.⁶ Immigrants may refrain from going to school, seeking treatment at hospitals, and calling the police or going to court when they have been victims of a crime, due to fear of deportation.⁷ While these are regular everyday activities for American citizens, they are not for undocumented immigrants. Some state and local laws attempt to address this problem. While anti-immigrant advocates argue that these laws are in direct conflict with federal immigration laws, they fully comply with federal laws.⁸ On the other hand, pro-immigrant activist groups argue that some of these laws need to be amended in order to fully accomplish their goals.⁹

Picture a woman who has suffered violence at the hands of her own husband for years. She finally has the courage to leave her husband and finds refuge at a shelter, where a victim's advocate

tank/2017/02/09/us-metro-areas-unauthorized-immigrants/ (explaining that “the analysis also shows that unauthorized immigrants tend to live where other immigrants live.) “Among lawful immigrants – including naturalized citizens and noncitizens – 65% lived in those top metros.” *Id.*

6. See Edwards, *supra* note 2 (explaining that Trump's new 2017 policy extending the priority for deportation to all estimated 11 million undocumented immigrants has caused “an explosion of fear among immigrant communities, which are reacting not so much to the spiking number of arrests but to the apparent randomness of the roundups”).

7. See Jan Hoffman, *Sick and Afraid, Some Immigrants Forgo Medical Care*, N.Y. TIMES (June 26, 2017), www.nytimes.com/2017/06/26/health/unauthorized-immigrants-health-care.html (stating that “[i]n a recent national poll of providers by Migrant Clinicians Network, which is based in Austin, Tex., two-thirds of respondents said they had seen a reluctance among [immigrant] patients to seek health care.”); see also Esther Yu Hsi Lee, *3 Services That Immigrants Are Too Afraid to Access Now That Trump Is President*, THINKPROGRESS (Apr. 18, 2017) thinkprogress.org/immigrants-afraid-deportation-services-5936361b4b90/ (explaining that there has been a decrease in the amount of immigrants reporting rape, domestic violence, and injuries while on the job, as well as fewer people registering for safety-net programs.).

8. See CRISTINA M. RODRIGUEZ ET AL., *Legal Limits on Immigration Federalism*, in TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES 31, 35 (Monica W. Varsanyi ed., Stanford University Press 2010) (explaining that “[s]tates and localities tend not to contravene express preemption provisions because of their clarity, and field preemption has become increasingly rare as a general matter, probably because of its malleability and capaciousness.”).

9. Fran Spielman, *Immigrant Groups Want Welcoming City Ordinance Strengthened*, CHI. SUN TIMES (Jan. 26, 2017), chicago.suntimes.com/chicago-politics/immigrant-groups-want-welcoming-city-ordinance-strengthened/ (explaining that immigrant activists are demanding amendments to Chicago's Welcoming City ordinance so that its protections encompass every immigrant without exceptions).

convinces her to go to the courthouse and seek a protective order. Her parents brought her to the United States when she was a teenager. She has been taught to fear authority and stay away from the police, even though she has never committed a crime. This fear of authority has incremented among her community since President Trump was elected due to his anti-immigrant rhetoric.¹⁰

She has been reassured that even though she is undocumented, it is not common for immigration law enforcement to detain people at courthouses.¹¹ She feels safe while she is talking to the judge. All of a sudden the courtroom doors open and she sees an Immigration and Customs Enforcement (“ICE”) agent come in. She knows the agent is here to arrest her. Her husband must have called ICE to pay her back. After the hearing is done, the judge grants her an order of protection, which will now be irrelevant because as soon as she walks out of that courtroom, she will be arrested and eventually deported.¹²

Some cities, counties, and states throughout the country have manifested their concern for immigrants’ fear of accessing social and healthcare services.¹³ In order to lower crime rates and establish better lines of communication with immigrant

10. Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (Apr. 30, 2017), www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html (indicating that “since the presidential election, there has been a sharp downturn in reports of sexual assault and domestic violence among Latinos throughout the country, and many experts attribute the decline to fears of deportation”).

11. Elliot Spagat, *ICE Formalizes Plans for Courthouse Arrests*, CHI. TRIB. (Jan. 31, 2018), www.chicagotribune.com/news/nationworld/politics/ct-ice-plans-courthouse-arrests-20180131-story.html (asserting that “[i]mmigration agents made courtroom arrests under the Obama administration but the pace appears to have picked up under President Donald Trump, whose administration has seen a roughly 40 percent surge in arrests overall and has casted a much wider net.”); see also Mica Rosenberg, *U.S. Immigration Agency Clarifies Policy on Courthouse Arrests*, REUTERS (Jan. 31, 2018) (discussing that “[i]n New York, the number of ICE arrests in courthouses jumped to 139 in 2017 from 11 in 2016, according to the Immigrant Defense Project advocacy group.”).

12. Jonathan Blitzer, *The Woman Arrested by ICE in a Courthouse Speaks Out*, NEW YORKER (Feb. 23, 2017), www.newyorker.com/news/news-desk/the-woman-arrested-by-ice-in-a-courthouse-speaks-out. This hypothetical is based on an actual case where a transgender woman went to a courthouse to seek an order of protection against an abusive ex-boyfriend and was immediately detained by ICE at the courthouse after her hearing was over. *Id.*

13. *Understanding Trust Acts, Community Policing, and “Sanctuary Cities,”* AM. IMMIGR. COUNCIL (Oct. 10, 2015), www.americanimmigrationcouncil.org/research/sanctuary-cities-trust-acts-and-community-policing- explained (delineating that “[s]everal hundred state and local police departments across the country have enacted community policing policies because they make communities safer and they help ensure that law enforcement officers do not run afoul of the law by detaining persons they do not have legal authority to hold (i.e., in violation of the constitutional requirements of the Fourth Amendment)”).

communities, some states, cities, and counties have passed ordinances and laws commonly known as “sanctuary policies;” these sanctuary policies further their immigration enforcement efforts by limiting their cooperation with the federal government.¹⁴ This is generally meant to increase public safety by promoting trust between immigrant communities and local law enforcement so that undocumented immigrants feel confident enough to report crimes and utilize public and social services.¹⁵

Part II of this comment briefly discusses federalism, the federal government’s role in immigration law, and the functions of its agencies charged with enforcing these laws. Next, it touches on the role of several tools used in the enforcement of federal immigration laws like 8 U.S.C. §1373, immigration detainers, Secure Communities, the Priority Enforcement Program, and the 287(g) Program. It discusses the conflict between sanctuary cities and those who oppose its policies. Next, it provides a brief summary of what sanctuary cities are, the history of the movement, and an overview of the sanctuary cities, counties, and states in the United States. Part III discusses Chicago’s history as a sanctuary city, its Welcoming City ordinance, Oak Park’s Welcoming City ordinance, and the tension between federal law and sanctuary policies.

Finally, it discusses the carve-outs in Chicago’s Welcoming City ordinance and why they hinder the goals of the ordinance by eroding the trust between undocumented immigrants and local law enforcement by leaving immigrants unprotected. Part IV proposes an amendment to Chicago’s Welcoming City ordinance that will eliminate these carve-outs. In addition, it proposes certain provisions of the ordinance should be expanded to cover more ground, which will protect immigrants who have been left out, while strengthening certain areas of non-cooperation with federal immigration law enforcement programs.

14. *E.g.* Jazmine Ulloa, *California Becomes ‘Sanctuary State’ in Rebuke of Trump Immigration Policy*, L.A. TIMES (Oct. 5, 2017), www.latimes.com/politics/la-pol-ca-brown-california-sanctuary-state-bill-20171005-story.html.

15. Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017), www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/ (expounding that “economies are stronger in sanctuary counties—from higher median household income, less poverty, and less reliance on public assistance to higher labor force participation, higher employment-to-population ratios, and lower unemployment.”).

II. BACKGROUND

A. *The Federal Government's Plenary Power in Immigration Law and Immigration Federalism*

It has been established since the nineteenth century that the federal government has plenary power to control immigration law.¹⁶ The United States Constitution does not expressly mention immigration, but it grants Congress the power to regulate naturalization.¹⁷ Since the late 1800's the Supreme Court has expanded the Executive and Legislative branches' powers to dictate immigration law.¹⁸ These two branches are able to "exclude and deport aliens or deny certain benefits according to political, social, economic, or other considerations."¹⁹ The judicial branch has consistently given deference to the other two branches by asserting that its judicial inquiry regarding immigration legislation has a limited scope.²⁰

Immigration issues have become highly politicized. Some scholars argue there has been a shift in how immigration matters are handled.²¹ Where many immigration violations used to be addressed as civil matters, they are now being treated as criminal offenses.²² This shift is patent in "the transfer of responsibility for immigration control from the Department of Commerce and Labor to the Department of Justice in 1940 and ultimately to the Department of Homeland Security ["DHS"] in 2002."²³

16. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 795 (2008).

17. U.S. CONST. art. I, §8, cl. 4 (establishing that Congress has power to "establish a uniform Rule of Naturalization").

18. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (stating that "the power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

19. Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?*, CTR. FOR IMMIGR. STUDIES (Feb. 25, 2009), cis.org/Report/Plenary-Power-Should-Judges-Control-US-Immigration-Policy#2.

20. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (maintaining that "our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control'" (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)); *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) (stating "[t]he reasons that preclude judicial review of political questions to the text of the note also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization").

21. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, And Sovereign Power*, 56 AM. U.L. REV. 367, 387 (2006).

22. *Id.*

23. *Id.* at 387-388.

The DHS is the federal government's Cabinet department in charge of enforcing immigration laws.²⁴ There are three separate agencies under the Department of Homeland Security, all three share different functions, which are relevant for the purpose of this comment:²⁵ (1) the United States Citizenship and Immigration Services ("USCIS"), which is in charge of the administrative aspects of immigration; (2) the Customs and Border Patrol ("CBP"), which is in charge of protecting the U.S. borders by identifying and barring "illegal aliens" from entering the United States;²⁶ and (3) the Immigration and Customs Enforcement ("ICE"), which is in charge of "enforc[ing] the nation's immigration laws ... [by] identif[ying] and apprehend[ing] removable aliens, detain[ing] those individuals when necessary[,] and remov[ing] illegal aliens from the United States."²⁷

1. *Immigration enforcement tools and programs create tension between federal and local governments*

Immigration is mainly regulated under the rules established by the Immigration and Nationality Act, which was enacted by Congress in 1952 and has been amended multiple times.²⁸ However, there are other relevant pieces of legislation that have been enacted in the last few decades. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")²⁹ and the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").³⁰ Both of these Acts contain provisions that prohibit state and local law enforcement from barring communications with federal law enforcement about the unlawful status of a person.³¹

24. Authority of the Secretary of Homeland Security; Delegations of Authority; Immigration Laws, 68 Fed. Reg. 10922 (Mar. 6, 2013) (explaining the history of the Department of Homeland Security and that it absorbed the functions of the Immigration and Naturalization Services ("INS")).

25. The functions of these agencies are relevant for the purpose of this comment as their purpose and function interplay with sanctuary policies.

26. See *Border Patrol Overview*, U.S. Customs and Border Patrol (Jan. 27, 2015), www.cbp.gov/border-security/along-us-borders/overview.

27. *U.S. Immigration and Customs Enforcement Strategic Plan: 2016-2020*, U.S. Immigration and Customs Enforcement (last visited Oct. 8, 2017), www.ice.gov/sites/default/files/documents/Document/2016/strategic-plan-2020.PDF.

28. *Immigration and Nationality Act*, U.S. Citizenship and Immigration Services (Sept. 10, 2013), www.uscis.gov/laws/immigration-and-nationality-act.

29. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-546, 3009- 707 (codified at 8 U.S.C. § 1373 (2012)).

30. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193.

31. Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed*

- a. Section 1373: an attempt to facilitate state and local immigration policing

8 U.S.C. §1373(a) provides that:

[n]otwithstanding 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.³²

Furthermore, Section 434 of PRWORA, which is now codified as 8 U.S.C. §1644, contains almost the exact same text as Section 1373(a), prohibiting state and local authorities from passing laws that restrict communication with federal law enforcement agencies (“LEA”).³³

These laws were enacted in reponse to a pattern of behavior from states, counties, and cities that decided to limit or avoid cooperation with the federal government through “sanctuary policies” in the 1980s and early 1990s when the federal government implemented several policies to involve state and local law enforcement in its immigration policing efforts.³⁴ Some believe that sanctuary cities and states are infringing upon these laws,³⁵ but

Approach To Immigration Enforcement and a Poor Substitute for Real Reform, 20 LEWIS & CLARK L. REV. 165, 168-69 (2016) (explaining that these laws “were passed within weeks of each other in an attempt to encourage and explicitly authorize state and local law enforcement agencies to communicate with federal immigration authorities regarding the status and presence of unauthorized immigrants in their jurisdictions”).

32. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-546, 3009-707 (codified at 8 U.S.C. § 1373(a)(2012)).

33. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 434, 110 Stat. 2105, 2275 (codified at 8 U.S.C. § 1644 (2012)) (indicating that “notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”); see also Orde F. Kittrie, *Article: Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1495 (2006) (explaining that Section 1373 “prohibits both (1) a government entity or official (e.g., the mayor) from restricting disclosure by another government entity (e.g., the police department), and (2) a government entity or official (e.g., the police department) from restricting disclosure by a government official (e.g., an individual police officer). Section 1644 prohibits the first but not the second type of restriction”).

34. McCormick, *supra* note 31, at 168-69.

35. Alexandra Desantis, *Can Congress Force an End to ‘Sanctuary City’ Policies?*, NAT’L REVIEW (Nov. 30, 2016)

immigrant rights proponents argue that sanctuary policies do not violate federal laws.³⁶ While these two provisions prohibit laws that restrict communications, they do not require state and local governments and officials to cooperate either by collecting and sharing information (including legal status and criminal information) or complying with ICE detainers.³⁷ So, because of the narrow scope of sanctuary policies, most, if not all do not infringe upon these laws.

b. Detainers: a problematic and powerful tool in immigration enforcement

Over the years, the federal government has put several programs in place to involve state and local authorities in the enforcement of immigration laws. One of the most powerful tools immigration law enforcement uses in conjunction with its programs is the “detainer,” also commonly known as an “immigration hold.”³⁸ A detainer is a notice that may be issued by an immigration officer requesting state or local law enforcement to hold a detained person for 48 hours so that federal immigration officers can arrest and deport said person.³⁹ This means that whenever an undocumented person is arrested, immigration officers can ask state and local authorities to detain that person for a longer period of time when otherwise that person would be free to go.

Courts have limited the nature of detainers. In *Galarza v.*

www.nationalreview.com/article/442578/sanctuary-cities-federal-law-congress-power-purse-incentivizes-cooperation-john.

36. *See Fact Sheet on Sanctuary Policies and 8 USC 1373*, Immigrant Legal Resource Center (Feb. 13, 2017), https://www.ilrc.org/sites/default/files/resources/8_usc_1373_and_federal_funding_threats_to_sanctuary_cities.pdf.

37. *Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d Cir. 2014) (emphasizing that “no provisions of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 et seq., authorize federal officials to command local or state officials to detain suspected aliens subject to removal”).

38. *Immigration Detainers*, AM. C.L. UNION, www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers (last visited Apr. 20, 2019) (explaining that “[a]n ICE detainer—or “immigration hold”—is one of the key tools U.S. Immigration and Customs Enforcement (ICE) uses to apprehend individuals who come in contact with local and state law enforcement agencies and put them into the federal deportation system”).

39. *See* 8 C.F.R. §287.7(a) (stating that “a detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien”); *see also* 8 C.F.R. §287.7(d) (explicating that “upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department”).

Szalczyk, a U.S. citizen was held due to an ICE detainer even after posting bail following an arrest on a drug-related offense.⁴⁰ It took immigration officers three days after he posted bail to realize that he was a U.S. citizen and lift the detainer.⁴¹ The Third Circuit held that compliance with ICE detainers is voluntary because they are requests, not commands.⁴² It also established that “a conclusion that a detainer issued by a federal agency is an order that state and local agencies are compelled to follow, is inconsistent with the anti-commandeering principle of the Tenth Amendment.”⁴³

In *Morales v. Chadbourne*, the First Circuit determined that in order to issue an immigration detainer, immigration officers must have probable cause so as not to infringe on a person’s Fourth Amendment rights.⁴⁴ It also held that detaining someone beyond their release date, for another purpose, constitutes a new seizure for Fourth Amendment purposes.⁴⁵ Following the same line, in *Morales v. Napolitano*, the Illinois Northern District Court ruled that most detainers issued by ICE without a warrant are invalid because they go beyond their statutory authority due to their failure to determine whether that person would be likely to escape, as directed in 8 U.S.C. §1357(2).⁴⁶ Furthermore, in *Buquer v. City of Indianapolis*, the district court ruled that it is unconstitutional for immigration officers to arrest a person without a warrant and for matters that are not criminal.⁴⁷

40. *Galarza*, 745 F.3d at 640-41.

41. *Id.*

42. *Id.*

43. *Id.* at 643 (expounding that “under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government”).

44. *Morales v. Chadbourne*, 793 F.3d 208, 216-17, (1st Cir. 2015) (expressing that “based on the ‘robust consensus of cases [and] persuasive authority’ ... it is beyond debate that an immigration officer in 2009 would need probable cause to arrest and detain individuals for the purpose of investigating their immigration status.”).

45. *Id.* at 217 (explaining that “because *Morales* was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes — one that must be supported by a new probable cause justification”).

46. *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1008-09 (N.D. Ill. 2016) (maintaining that “the bottom line is that, because immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained, ICE’s issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2)”).

47. *Buquer v. City of Indianapolis*, 2013 U.S. Dist. LEXIS 45084, at *35, (manifesting that “even if Section 20 were not preempted by federal law, because it authorizes state and local law enforcement officers to effect warrantless arrests for matters that are not crimes, it runs afoul of the Fourth Amendment, and thus, is unconstitutional on those grounds”).

c. Back to square one: Secure Communities and the Priority Enforcement Program

ICE kicked off the Secure Communities (“S-Comm”) program in 2008 in an effort to involve state and local law enforcement in immigration policing by giving them power to enforce federal immigration laws.⁴⁸ Through S-Comm, every time a person is booked into a jail, the LEA will take that person’s fingerprints and booking information and will submit it to an electronic database where the Federal Bureau of Investigations (“FBI”) and the Department of Homeland Security share information.⁴⁹ If the database shows that the arrestee has an immigration record, ICE is notified.⁵⁰ Then the law enforcement agency will determine the person’s status and based on whether or not she is deportable, it will issue a detainer.⁵¹ Unlike other programs, S-Comm is based on a computerized database and “no local law-enforcement agents are deputized to enforce immigration laws.”⁵² By January 22, 2013, S-Comm had been fully implemented within the “50 states, the District of Columbia, and five U.S. Territories.”⁵³

The S-Comm widely utilized detainers as a tool, which caused a spike in deportations.⁵⁴ While some considered the program a success due to its deportation numbers, many began to oppose it, claiming that it “encourage[d] racial profiling, diverted local resources from crime control, and made communities less safe by

48. See GULASEKARAM & RAMAKRISHNAN, *supra* note 3, at 129 (asserting that S-Comm “was an information-leveraging program that forwarded information about every arrestee in a local jurisdiction to a federal database that checks for lawful status”).

49. *Secure Communities: Overview*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (May 19, 2017), www.ice.gov/secure-communities.

50. Miriam Valverde, *Trump says Secure Communities, 287(g) Immigration Programs Worked*, POLITIFACT (Sept. 6, 2016), www.politifact.com/truth-o-meter/statements/2016/sep/06/donald-trump/trump-says-secure-communities-287g-immigration-pro/.

51. *Secure Communities: A Fact Sheet*, AM. IMMIGR. COUNCIL (Nov. 29, 2011), www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet.

52. *Id.*

53. *Secure Communities: Overview*, *supra* note 49.

54. Christopher N. Lasch, *Supreme Court - October Term 2011: Federal Immigration Detainers After Arizona V. United States*, 46 LOY. L.A. L. REV. 629, 677 (2013); see also Aarti Kohli et al., *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, UNIV. OF CAL., BERKELEY L. SCH. (Oct. 2011) www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf (explaining that “the numbers are sobering: annual deportations have increased over 400% since 1996 and more than a million people have been removed from this country since the beginning of the Obama administration.”) (citing Office of Immigration Statistics, *2010 Yearbook of Immigration Statistics*, U.S. DEPT OF HOMELAND SEC. (Aug. 2011) 15, 94 www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf).

discouraging immigrants from reporting crimes or cooperating with police.”⁵⁵ Although DHS claimed it meant to prioritize the deportation of undocumented immigrants with serious criminal offenses, who were a threat to public safety,⁵⁶ a high number of detainees did not have serious criminal convictions.⁵⁷

For these reasons, some state and local authorities began to refuse to participate in the program and comply with detainers, and started enacting sanctuary policies to counteract the negative effects of S-Comm.⁵⁸ The initial response of DHS was to emphasize that participation in the program was mandatory,⁵⁹ but states and local governments were still getting conflicting and misleading information on the matter.⁶⁰ Opponents and a series of lawsuits challenging the constitutionality of S-Comm and detainers led DHS to give in. In 2014, because the “program had attracted a great deal of criticism, was widely misunderstood, and was embroiled in litigation,” DHS decided to discontinue the S-Comm program.⁶¹

55. Lasch, *supra* note 54; see also Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 151 (2011) (discussing a study by the Consortium for Police Leadership in Equity (“CPLÉ”) that revealed that “police departments continue to have valid concerns about their role in policing immigration”).

56. *Secure Communities: FAQs*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (May 19, 2017) www.ice.gov/secure-communities.

57. Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 28 (2016).

58. See Juliet P. Stumpf, *D(E)volving Discretion: Lessons from The Life and Times of Secure Communities*, 64 AM. U.L. REV. 1259, 1261 (2015) (indicating that “cities and states resisted federal enlistment of their law enforcement resources to aid the program and issued policies and legislation to limit its local effect”).

59. Karen J. Pita Loor, *A Study on Immigrant Activism, Secure Communities, And Rawlsian Civil Disobedience*, 100 MARQ. L. REV. 565, 568 (2016) (citing Homeland Sec. Advisory Council, Task Force on Secure Comtys. Findings and Recommendations (2011), www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf).

60. See Nat'l Day Laborer Org. Network v. United States Immigration & Customs Enft Agency, 811 F. Supp. 2d 713, 742 (S.D.N.Y. 2011) (signaling that “[t]here is ample evidence that ICE and DHS have gone out of their way to mislead the public about Secure Communities”); see also Chen, *supra* note 57, at n. 36 (discussing the confusion regarding the conflicting statements issued by ICE in this period); Maddie Oatman, *Secure Governor, Insecure Communities*, MOTHER JONES (Nov. 4, 2010), www.motherjones.com/politics/2010/11/jerry-brown-secure-communities-program/ (discussing the mixed signals from ICE when the state of California asked for clarification on whether local governments could opt out of S-Comm).

61. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski et al. (Nov. 20, 2014) www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf. “Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation.” *Id.*

As S-Comm was rolled back, the Secretary of the Department of Homeland Security announced that it would be immediately replaced with the Priority Enforcement Program (“PEP”).⁶² PEP, as its predecessor, required the cooperation of state and local law enforcement to submit people’s fingerprints and criminal history into a database shared by the FBI and DHS.⁶³ Some of the differences between PEP and S-Comm that stand out is that, in lieu of issuing a detainer, immigration officers could request notification from LEAs whenever a person of interest was going to be released.⁶⁴

This meant that detainees were to be issued only when a person was an “enforcement priority and that there [was] probable cause to believe that the subject is removable (such as a final order of removal).”⁶⁵ PEP shared more similarities than differences with its predecessor.⁶⁶ It still contained problematic practices that raised concerns of liability for ICE and LEAs due to possible Fourth Amendment violations in the issuance and compliance of detainees.⁶⁷ Particularly, “ICE’s new detainer form ... d[id] not require a judicial warrant, judicial determination of probable cause, or even an individual, particularized statement of probable cause.”⁶⁸

As part of his immigration platform, Trump criticized the Obama administration for eliminating S-Comm and vowed to bring it back.⁶⁹ On January 25, 2017, President Trump issued an executive order where, among other things, he ordered the termination of PEP and the reinstatement of the S-Comm Program.⁷⁰ Since its implementation in 2008 until the second quarter of 2017’s

62. *Id.*

63. Priority Enforcement Program, U.S. Immigration and Customs Enforcement, (June 22, 2017) www.ice.gov/pep.

64. *Id.*

65. *Id.*

66. See generally Barbara E. Armacost, “Sanctuary” Laws: The New Immigration Federalism, 2016 MICH. ST. L. REV. 1197, 1209-11 (2016).

67. Letter from Advancing Justice–AAJC, Advancing Justice-Asian Law Caucus, American Civil Liberties Union, Immigrants’ Rights Project, Immigrant Defense Project, Immigrant Legal Resource Center, National Immigrant Justice Center, National Immigration Law Center, National Immigration Project of the National Lawyers Guild, National Day Laborer Organizing Network, New Orleans Workers’ Center for Racial Justice, Southern Poverty Law Center, Washington Defender Association’s Immigration Project, to Jeh Johnson, Sec’y, U.S. Dep’t of Homeland Sec. (June 17, 2015) www.aclu.org/letter/letter-dhs-regarding-implementation-ices-new-priority-enforcement-program-pep (arguing that the detainer notification forms and detainees themselves may “expose DHS and local law enforcement agencies to liability for extended detentions and transfers of custody that do not meet the Fourth Amendment’s requirements”).

68. *Id.*

69. Domenico Montanaro, et al., *Fact Check: Donald Trump's Speech on Immigration*, NAT’L PUB. RADIO (Aug. 31, 2016), www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration.

70. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

fiscal year, the program affected 315,200 people.⁷¹ The social and legal concerns from the state and local governments who questioned S-Comm remain unresolved.

d. The 287(g) Program: Deputizing state and local law enforcement

Another federal immigration program that promotes the cooperation of state and local law enforcement in its immigration policing is the 287(g) program, which is named after the Immigration and Nationality Act's Section 287(g), and is also known as Section 1357(g) of Title 8 of the United States Code.⁷² This program grants the Attorney General the power to deputize state and local officers to perform the functions of immigration officers.⁷³ It allows state and local law enforcement to partner up with federal immigration authorities through a Memorandum of Agreement ("MOA").⁷⁴

While PEP and S-Comm have hands-off approaches where state and local law enforcement do not perform the functions of immigration officers, with the 287(g) program, deputized officers have the authorization to: (1) interview people regarding their immigration status, access people's information on DHS databases; (2) issue detainers, submit information into ICE's database, issue Notices to Appear; (3) recommend that a person gets voluntary departure instead of undergoing regular removal proceedings; (4) recommend a person be detained and decide whether they should have access to an immigration bond; and (5) transfer people into ICE custody.⁷⁵

The first MOA was signed in 2002 with Florida.⁷⁶ There are three models of the 287(g) program: (1) the Jail Enforcement Model; (2) the Task Force Model; and (3) the Hybrid Model.⁷⁷ In the Jail Enforcement Model, officers can inquire about a person's legal status, maintain communications with ICE regarding the noncitizen in their custody, transfer noncitizens to ICE custody, and

71. *Secure Communities: FAQs*, supra note 56

72. 8 U.S.C. § 1357(g) (2000).

73. *Id.*; see also *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (May 15, 2017), www.americanimmigrationcouncil.org/research/287g-program-immigration.

74. 8 U.S.C. § 1357(g) (2000).

75. Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Oct. 3, 2017), www.ice.gov/287g.

76. Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POL'Y INSTITUTE 9 www.migrationpolicy.org/pubs/287g-divergence.pdf.

77. *Id.*

issue detainers.⁷⁸ In the Task Force Model, officers can inquire about a person's legal status, issue detainers in the field (as opposed to 287(g) jail officers who can only do so in detention facilities), and issue and enforce warrants for immigration-related violations.⁷⁹ Finally, in the Hybrid Model, both the Jail and Task Force Models operate side by side.⁸⁰

Detractors of the 287(g) program have raised many concerns regarding its implementation. Some argue that the program allows for racial profiling, is too expensive, that ICE does not give enough guidance and supervision to the deputized officers and that it harms the relationship between immigrant communities and local police, which obstructs their law enforcement efforts.⁸¹ It has been found that the program is not targeting serious criminal offenders, resulting in the detention of noncitizens with misdemeanors or traffic violations.⁸² Due to its constant criticism, the DHS launched several investigations, which led ICE to shut down the Task Force Model.⁸³ ICE currently has agreements with seventy-eight law enforcement agencies within twenty states, utilizing the Jail Enforcement Model.⁸⁴

2. *Sanctuary cities: What are they and why are they protecting immigrants?*

a. Are undocumented immigrants criminals?

The idea that undocumented immigrants are criminals is a common misconception among the American population. This is a relevant factor affecting the current, highly politicized, debate regarding immigrants. Not all undocumented immigrants are committing a crime simply because they stepped foot on U.S. soil.⁸⁵ There is a distinction between illegal entry and unlawful presence,

78. *Id.* at 14.

79. *Id.* at 15; see also Mimi E. Tsankov & Christina J. Martin, *Immigration Law Symposium: Measured Enforcement: A Policy Shift in the ICE 287(g) Program*, 31 U. LA VERNE L. REV. 403, 417 (explaining that the Task Force Model “allows law enforcement officers participating in criminal task forces, such as drug or gang task forces, to screen arrested individuals using federal databases to assess their immigration status”).

80. Capps et al., *supra* note 76.

81. *The 287(g) Program: An Overview*, *supra* note 73.

82. Capps et al., *supra* note 76, at 2.

83. Armacost, *supra* note 66, at 1208.

84. Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Oct. 3, 2017), www.ice.gov/287g.

85. *Issue Brief: Criminalizing Undocumented Criminals*, American Civil Liberty Union 1 (Feb. 2010) www.aclu.org/files/assets/FINAL_criminalizing_undocumented_immigrants_issue_brief_PUBLIC_VERSION.pdf.

which most Americans are unaware of.⁸⁶ Illegal entry is when a person enters the United States without being inspected by an immigration official, by eluding them or by willful, false representation.⁸⁷ Illegal entry is a criminal offense that can amount to a misdemeanor or a felony.⁸⁸

Conversely, unlawful presence is when a person enters the United States with proper authorization and they either overstay their visa, work without authorization, or violate the conditions stipulated on their visa.⁸⁹ Unlawful presence is only a civil violation.⁹⁰ As of 2006, 45% of undocumented immigrants in the United States had not entered illegally, but entered with a visa and overstayed.⁹¹ While criminal law is meant to punish, civil law is meant to compensate.⁹² The distinction between civil and criminal offenses in the context of immigration is important due to the social stigma the latter can carry.⁹³

The United States is currently divided in its stance on immigration. Its opponents argue that immigrants not only take away lower and middle class jobs that should be given to American citizens, but are also a burden on our economy.⁹⁴ They further argue that immigrants increase crime and contribute to the decline in public safety.⁹⁵ On the other hand, immigration proponents argue

86. *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (emphasizing that “[a]lthough we have recognized that illegal presence may be some indication of illegal entry, unlawful presence need not result from illegal entry”) (internal quotation marks omitted).

87. *Issue Brief: Criminalizing Undocumented Criminals*, *supra* note 85; see also 8 U.S.C.S. § 1325 (2019).

88. *Issue Brief: Criminalizing Undocumented Criminals*, *supra* note 85.

89. *Id.*

90. *de Jesus Ortega Melendres*, 695 F.3d at 1000 (underscoring that “unlike illegal entry, mere unauthorized presence in the United States is not a crime”).

91. *Issue Brief: Criminalizing Undocumented Criminals*, *supra* note 85 (citing *Modes of Entry for the Unauthorized Migrant Population*, PEW RES. CTR. (May 22, 2006), www.pewhispanic.org/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/).

92. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law.*, 101 YALE L.J. 1795, 1796 (1992).

93. NATALIE MASUOKA & JANE JUNN, *THE POLITICS OF BELONGING: RACE, PUBLIC OPINION, AND IMMIGRATION* 168 (Univ. of Chicago Press, 2013) (“the link between illegal immigration and criminality has effectively framed illegal immigration as a violation of cherished American norms of respect for institutions and violation of cherished American norms of respect for institutions and fairness”).

94. Spencer P. Morrison, *A \$116 Billion Burden: The Economics of Illegal Immigration*, AM. GREATNESS (Sept. 29, 2017), amgreatness.com/2017/09/29/a-116-billion-burden-the-economics-of-illegal-immigration/ (arguing that “illegal immigration has real economic consequences—whatever the Left may tell you.”).

95. Loren Collingwood & Benjamin Gonzalez-O'Brien, *Jeff Sessions Used Our Research to Claim That Sanctuary Cities Have More Crime. He's Wrong.*, WASHINGTON POST (July 14, 2017), www.washingtonpost.com/news/monkey-

the direct opposite. Besides claiming that cultural diversity enriches the country, they argue that immigrant workers reinforce productivity growth and strengthen labor markets.⁹⁶

Immigrants' contribution to the labor market actually reduces the costs of goods and services, which leaves the average consumer with money in their pocket.⁹⁷ The increase in immigrant population has caused home services to become more affordable, forging the path for American women to join the workforce.⁹⁸ In addition, immigrants are a great force of entrepreneurship and innovation in America.⁹⁹ Some state and local governments understand that immigrants benefit them economically, socially, and culturally. Those state and local governments are trying to protect the health, safety, and general welfare of its residents pursuant to the Tenth Amendment. Consequently, local interests may not always be the same as federal interests.

b. What is a sanctuary city?

The term “sanctuary city” is a broad term used to describe a city, county, or state that has set policies to limit cooperation between local law enforcement and federal immigration agencies.¹⁰⁰ Each of these policies vary in their scope; therefore, not all sanctuary city policies completely bar local police from cooperating with immigration officers.

The Sanctuary Movement was born in the 1980's in response to a heavy influx of Central Americans who came to the United States because they were fleeing from civil wars in their countries.¹⁰¹ Particularly, citizens of El Salvador and Guatemala

cage/wp/2017/07/14/jeff-sessions-used-our-research-to-claim-that-sanctuary-cities-have-more-crime-hes-wrong/ (stating that Attorney General Jeff Sessions incorrectly cited a study by saying that sanctuary cities have higher crimes in average.).

96. Giovanni Peri, *The Economic Benefits of Immigration*, 2013 BERKELEY REV. OF LATIN AM. STUD. 14 (2013).

97. David Bier, *How Immigration Benefits America's Middle Class*, THE HILL (March 9, 2015, 6:00 AM), thehill.com/blogs/pundits-blog/immigration/235003-how-immigration-benefits-americas-middle-class.

98. Peri, *supra* note 96.

99. Samier Mansur, *How Immigration Benefits Americans And Is Key to US Leadership in The World*, HUFFINGTON POST (Sept. 13, 2017), www.huffingtonpost.com/entry/how-immigration-benefits-americans-and-is-key-to-us_us_59b6db42e4b02bebae75f071 (stating that more than 50% of the billion-dollar companies in America were founded by immigrants and they “on average, create 760 new jobs. 25% of all new businesses in the US are started by immigrants; and these businesses have experienced 60% increase in wages over the last decade”).

100. Tal Kopan, *What Are Sanctuary Cities, And Can They Be Defunded?*, CNN (Jan. 25, 2017), www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html.

101. Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*,

were fleeing from bloody civil wars and requested asylum in America, which was denied.¹⁰² At the time, the U.S. government was supporting the Salvadoran and Guatemalan government; therefore, they were concerned that the international community would view “[e]very approval of an application for political asylum . . . [as] an admission that the United States [wa]s aiding governments that violate the civil rights of their own citizens.”¹⁰³

Immigrants sought and found refuge in American churches, which “declared their grounds as public sanctuary ‘in defiance of federal immigration law’ risking their own freedoms.”¹⁰⁴ This phenomenon was a response to the inaction of the American government to provide relief to fleeing immigrants seeking asylum.¹⁰⁵ Following this sentiment, approximately twenty-three cities and four states passed “sanctuary laws” that granted “refugees the right to remain freely within their boundaries.”¹⁰⁶ In time, “cities with no ties to the original sanctuary movement began passing similar generalist resolutions prohibiting information disclosure by public authorities.”¹⁰⁷

In 2007, during the Bush Administration, there was a resurgence of this movement.¹⁰⁸ The New Sanctuary Movement gained momentum when religious leaders met with immigrants to talk about American immigration policies and the practical effects in their communities.¹⁰⁹ One of the main concerns was that immigration raids were separating children born in the United States from their undocumented parents.

This national initiative was led by churches across the country, provided emotional support to immigrant communities, and pushed for comprehensive immigration reform.¹¹⁰ The churches affiliated with the movement also provided shelter to immigrants who were

MIGRATION POL’Y INST. (Apr. 1, 2006), www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era.

102. *Id.*

103. Katherine Bishop, *U.S. Adopts New Policy for Hearings On Political Asylum for Some Aliens*, N.Y. TIMES (Dec. 20, 1990), www.nytimes.com/1990/12/20/us/us-adopts-new-policy-for-hearings-on-political-asylum-for-some-aliens.html.

104. Pamela Begaj, *An Analysis Of Historical And Legal Sanctuary And A Cohesive Approach To The Current Movement*, 42 J. MARSHALL L. REV. 135, 142-43 (2008).

105. *Id.* at 145.

106. *Id.*

107. Cristina M. Rodriguez, *The Significance Of The Local In Immigration Regulation*, 106 MICH. L. REV. 567, 601 (2008).

108. Begaj, *supra* note 104, at 145.

109. *Id.*

110. Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and The Provision Of Sanctuary*, 63 SYRACUSE L. REV. 71, 103 (2012).

members of their congregation facing deportation.¹¹¹

c. Overview of current sanctuary cities

The Sanctuary Movement began to spread to the point where certain cities who were sympathetic to their local immigrant communities started limiting their cooperation with federal immigration enforcement. These cities began calling themselves “sanctuaries” and established that their actions were meant to promote public safety and strengthen their relationship with immigrant communities.¹¹² There are currently at least five states, thirty-nine cities, and 364 counties that have sanctuary policies in place.¹¹³

Because their laws and ordinances do not line up with “federal policy, sanctuary cities use an anti-commandeering defense, maintaining that the federal government ‘may not compel the States to implement, by legislation or executive action, federal regulatory programs.’”¹¹⁴ This line of defense has been successful in court, especially when the claim is that sanctuary policies are preempted by federal laws.¹¹⁵ In fact, certain sanctuary cities have been ingeniously drafting their policies to circumvent provisions like 8 U.S.C. §1373.¹¹⁶ This is achieved by implementing “don’t ask” policies, which are meant to limit the amount of information local law enforcement knows.¹¹⁷ Under this rationale, if local police do

111. *Id.* at 103-04.

112. McCormick, *supra* note 31, at 173-74.

113. See Amanda Sakuma, *No Safe Place*, MSNBC (last visited Oct. 8, 2017), www.msnbc.com/specials/migrant-crisis/sanctuary-cities.

114. Raina Bhatt, *Pushing An End To Sanctuary Cities: Will It Happen?*, 22 MICH. J. RACE & L. 139, 140 (2016); see also *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the “Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program”).

115. Bhatt, *supra* note 114 (citing *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718 (Cal. Ct. App. 2009)).

116. *Id.* at 141; see also Michelle Ye Hee Lee, *The White House’s claim that ‘sanctuary’ cities are violating the law*, WASH. POST (Apr. 28, 2017), www.washingtonpost.com/news/fact-checker/wp/2017/04/28/the-white-houses-claim-that-sanctuary-cities-are-violating-the-law/ (explaining that the “sanctuary” jurisdictions accused of violating federal law “did not have explicit policies limiting communication with the federal government on immigration and citizenship, so they were not in clear violation of Section 1373”).

117. Bhatt, *supra* note 114; see also Priscilla Alvarez, *Sessions’s Climbdown on Sanctuary Cities*, THE ATLANTIC (May 23, 2017), www.theatlantic.com/politics/archive/2017/05/sessionss-climbdown-on-sanctuary-cities/527844/ (explaining that cities have written their policies around Section 1373: “Section 1373 is a ‘don’t-tell policy,’ so to work around it, some localities changed it to a ‘don’t-ask policy’ or a ‘don’t-use-municipal-resources’ policy”); Kelly Cohen, *Mayors tell Jeff Sessions: We are not ‘sanctuary cities’*, WASH. EXAMINER (Apr. 25, 2017), www.washingtonexaminer.com/mayors-tell-jeff-sessions-we-are-not-

not inquire into a detainee's immigration status, the police will not have any information to share with federal immigration law enforcement. The goal of the "don't ask" policy is two-fold: (1) to prevent local authorities from obtaining information about their detainees' immigration status so they will have nothing to hide if they are required to submit information regarding their detainees to the federal government; and (2) to allow immigrants to feel safe enough to report crimes.

III. ANALYSIS

This comment will make a comparative analysis between Chicago's Welcoming City ordinance and Oak Park's Welcoming Village ordinance. It will discuss the conflict between these two sanctuary policies and federal immigration law, their political and legal challenges and carve-outs in the ordinances that are currently hindering the full accomplishment of their goals.

A. *Chicago's History As a Sanctuary City*

Chicago has a decades-long history as a city that strives to embrace diversity while recognizing its responsibilities to its residents, regardless of their citizenship. The first step in becoming a sanctuary city was made by Mayor Harold Washington when he issued Executive Order 85-1 on March 7, 1985.¹¹⁸ The order expressed its intention to "assure that all residents of the City of Chicago, regardless of nationality or citizenship, shall have fair and equal access to municipal benefits, opportunities and services."¹¹⁹ In furtherance of this goal, Executive Order 85-1 provided that no

sanctuary-cities/article/2621223 (stating that several Mayors, including Jorge Elorza, Mayor of Providence, Rhode Island claim they are in compliance with Section 1373 because they are not "blocking the flow of information at all between the federal government and state and local governments, and thus aren't in violation of the law").

118. See City of Chicago, Exec. Order No. 85-1 (Mar. 7, 1985); see also DORIS MARIE PROVINE ET AL., *POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES* 24-25 (Univ. of Chicago Press 2016) (explaining that sanctuary policies, like Chicago's, "generally prevented local government officials (including police) from communicating the immigration status of local residents to federal immigration authorities"); Pablo A. Mitnik & Jessica Halpern-Finnerty, *Immigration and Local Governments: Inclusionary Local Policies in the Era of State Rescaling*, in *Taking Local Control: Immigration Policy Activism in U.S. Cities and States* 51, 55 (Monica W. Varsanyi ed., Stanford University Press 2010) (discussing that between 1985 and 1989, Chicago, Takoma Park, San Francisco, and New York "passed city ordinances or issued executive orders prohibiting city employees from gathering, keeping, or sharing with ICE's precursor, the Immigration and Naturalization Service (INS), information on the immigration status of their residents...").

119. See City of Chicago, Exec. Order No. 85-1 (March 7, 1985).

city agents or agencies would “request information about or otherwise investigate or assist in the investigation of the citizenship or residency status of any person” unless required by a law or court decision.¹²⁰ Additionally, they would not disseminate information about a person’s immigration status unless required by legal process.¹²¹ Washington emphasized that it was the city’s legal mandate to pursue the public good and that the city would not participate in the infringement of human rights.¹²²

After Mayor Richard M. Daley took office in 1989, he issued Executive Order 89-6 on April 25, 1989, which was similar to Executive Order 85-1.¹²³ On March 29, 2006, both of the executive orders were incorporated by the City Council into an ordinance, Chapter 2-173 of the Municipal Code.¹²⁴ In the ordinance’s preamble, the City Council expressed its concern that the promotion of immigration enforcement by local agencies would increase “immigrant and minority profiling and harrassment.”¹²⁵ It emphasized that this kind of cooperation would have “a chilling effect on crime prevention and solving if both witnesses and victims are called upon to weigh a need to cooperate with local authorities against a fear of deportation...”¹²⁶

On September 2012, Mayor Rahm Emmanuel expanded the ordinance and renamed it the Welcoming City Ordinance. This amendment was in response to the increasing number of immigration detainer requests the City was receiving.¹²⁷ Its intention was to provide basic protections to “undocumented Chicagoans who have not been convicted of a serious crime and are not wanted on a criminal warrant.”¹²⁸ Thus, Chicago law

120. *Id.*

121. *Id.*

122. See Craig B. Mousin, *A Clear View from the Prairie: Harold Washington and the People of Illinois Respond to Federal Encroachment of Human Rights* 29 S. ILL. U. L. J. 285, 295 (2005).

123. See City of Chicago, Exec. Order No. 89-6 (Apr. 25, 1989) (reiterating that “[n]o agent or agency shall condition the provision of City of Chicago benefits, opportunities or services on matters related to citizenship or residency status unless required to do so by statute, ordinance, federal regulation or court decision”).

124. See Complaint at 7, City of Chi. v. Sessions No. 17 C 5720, 2017 U.S. Dist. LEXIS 149847 (N.D. Ill. Sep. 15, 2017).

125. See Chi. Mun. Code §2-173 (2006), chicityclerk.com/legislation-records/journals-and-reports/journals-proceedings.

126. *Id.* (stating that the effect of victims’ and witnesses’ fear of deportation would undermine “long-standing efforts to engender trust and cooperation between law enforcement officials and immigrant communities”).

127. See Complaint at 7, City of Chi. v. Sessions No. 17 C 5720, 2017 U.S. Dist. LEXIS 149847 (N.D. Ill. Sep. 15, 2017) (explaining that the Welcoming City ordinance expansion intended to “address increasing federal requests that Chicago detain individuals suspected of immigration-related offenses”).

128. Press Release, *Office of the Mayor City of Chicago, Mayor Emanuel Introduces Welcoming City Ordinance* (July 10, 2012) www.cityofchicago.org/

enforcement will not “arrest, detain or continue to detain a person solely on the belief that the person is not present legally in the United States, or that the person has committed a civil immigration violation,” or when an administrative warrant or detainer is only based on a “violation of a civil immigration law.”¹²⁹

Finally, in 2016 the Welcoming City Ordinance underwent another amendment to protect immigrants from being “subjected to physical abuse, threats or intimidation.”¹³⁰ This was in response to a highly publicized case in 2014 where a police officer threatened and verbally abused the manager of a tanning salon while operating a raid.¹³¹ Additionally, Donald Trump’s anti-immigrant statements during his presidential campaign further fueled the decision to pass an amendment that would promote respectful treatment toward immigrants.¹³² However, while Chicago’s sanctuary city policies have paved way toward a more respectful treatment of immigrants, its Welcoming City Ordinance still contains carve-outs (or loopholes) that exclude a great amount of immigrants from basic protections.

B. Oak Park’s Welcoming Village Ordinance

On February 6, 2017, Oak Park passed the Welcoming Village Ordinance.¹³³ The goal of the ordinance is to make Oak Park an “immigrant-friendly Village” and strengthen the city’s relationship with its immigrant communities by promoting equal treatment of its residents notwithstanding their immigration status.¹³⁴ The

city/en/depts/mayor/press_room/press_releases/2012/july_2012/mayor_emanuel_introduceswelcomingcityordinance.html (stating that the ordinance expansion will “ensure that undocumented Chicagoans will only be detained if they are wanted on a criminal warrant by local or federal authorities, if they have been convicted of a serious crime and remain in the United States illegally, or if they are otherwise a clear threat to public safety or national security”).

129. See CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-042(a) (2012).

130. See CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-005 (2012).

131. See John Byrne, *Chicago Police Banned from Threatening Immigrants Under Emanuel-backed Measure*, CHI. TRIB. (Sept. 28, 2016) www.chicagotribune.com/news/local/politics/ct-emanuel-immigrant-treatment-ordinance-met-20160928-story.html; see also Associated Press, *City Approves Settlement for Tanning Salon Manager in Police Abuse Case*, NBC CHI. (Sept. 8, 2014), www.nbcchicago.com/news/local/City-Approves-Settlement-for-Tanning-Salon-Manager-in-Police-Abuse-Case-274400761.html (stating that the Chicago City Council Finance Committee approved a settlement of \$150,000 for the tanning salon manager who was verbally abused by an officer).

132. Byrne, *supra* note 131 (quoting Alderman Scott Waguespack, one of the Aldermen promoting the amendment: “I want to encourage all our city leaders and officials, all of our organizations out there, to continue to move our city forward in a way that is inclusive, that doesn't take the clock backwards, as our Republican nominee for president wants to”).

133. OAK PARK, IL., VILLAGE CODE 13-7 (2017).

134. *Id.*

initial version of the ordinance was similar to those enacted by Chicago and Evanston, thus it contained loopholes allowing certain instances where local police would still have the opportunity to collaborate with federal immigration law enforcement.¹³⁵ However, the final version of the ordinance was updated so that it would be exemption-free.

Oak Park's Welcoming Village Ordinance has been praised as "the strongest, most progressive and inclusive ordinance in the country."¹³⁶ Whereas many sanctuary ordinances allow for some local police cooperation with ICE, Oak Park will collaborate with ICE only if it has a valid criminal warrant.¹³⁷ The ordinance also provides that local law enforcement will not "stop, arrest, detain, or continue to detain a person after that person becomes eligible for release from custody or is free to leave an encounter with an agent or agency" when: (1) an immigration detainer has been issued; (2) there is an administrative warrant; and (3) there is a belief that the person is not legally present in the United States, or the person committed a civil immigration infraction.¹³⁸

The ordinance also states that agents and agencies will not assist federal immigration authorities with immigration enforcement operations unless provided by law.¹³⁹ It further provides that no agents or agencies are to inquire about a person's immigration status unless it is court-ordered.¹⁴⁰ Moreover, Oak Park will not enter into MOAs with federal immigration law enforcement to deputize Oak Park's officers to perform immigration officer functions under Section 1357(g).¹⁴¹

The ordinance prohibits agents or agencies to "coerce, including using threats of deportation, or engage in verbal abuse of any person" based on a person's immigration status or a person's

135. Oak Park, Ill., Town Hall Meeting Minutes (January 1, 2008) oak-park.legistar.com/Calendar.aspx.

136. See Timothy Inklebarger, *Oak Park Approves Sanctuary City Ordinance*, OAKPARK.COM (Feb. 7, 2017), www.oakpark.com/News/Articles/2-7-2017/Oak-Park-approves-sanctuary-city-ordinance/.

137. See OAK PARK, ILL., VILLAGE CODE 13-7-5(D) (2017) (stating that "unless presented with a valid and properly issued criminal warrant, no agency or agent shall: (1) Permit ICE agents access to a person being detained by, or in the custody of, the agency or agent; (2) Transfer any person into ICE custody; (3); Permit ICE agents use of agency facilities, information ... (4) Expend the time of the agency or agent in responding to ICE inquiries or communicating with ICE regarding a person's custody status, release date, or contact information").

138. See OAK PARK, ILL., VILLAGE CODE 13-7-5(A) (2017).

139. See OAK PARK, ILL., VILLAGE CODE 13-7-5(B) (2017).

140. See OAK PARK, ILL., VILLAGE CODE 13-7-2 (2017) (articulating that no agent or agency "shall request information about or otherwise investigate or assist in the investigation of the citizenship or immigration status of any person unless such inquiry or investigation is required by an order of a court of competent jurisdiction").

141. See OAK PARK, ILL., VILLAGE CODE 13-7-5(C) (2017).

family member's perceived or actual immigration status.¹⁴² It prevents local agents and agencies from "conditioning benefits, services, or opportunities" based on a person's immigration status.¹⁴³ In addition, the Village accepts a photo identity document from the person's country of origin in lieu of a state driver's license or identification card.¹⁴⁴ It also establishes that if any information regarding a person's immigration status is acquired for the purpose of providing benefits, services or opportunities, this information will be promptly deleted after its use.¹⁴⁵

C. Potential Conflicts between Chicago and Oak Park's Policies and Federal Immigration Law

The polarization of the United States regarding its stance on immigration is reflected in the policies of its municipalities, which may drastically differ from one another even when they are geographical neighbors.¹⁴⁶ Some states and cities are actively cooperating with federal immigration law enforcement through one or several of its enforcement tools and have enacted restrictive policies to increase immigration enforcement.¹⁴⁷ On the other hand, many cities like Chicago and Oak Park are passing ordinances that acknowledge responsibility over their residents and are striving to provide them with basic rights notwithstanding their immigration status.¹⁴⁸

Sanctuary city opponents have questioned the validity of some of these provisions arguing that they are in conflict with Section

142. See OAK PARK, ILL., VILLAGE CODE 13-7-3 (2017) (explaining that a family member may be the person's immediate family; a legal guardian appointed by the court; or the person's domestic partner and most of the domestic partner's immediate family).

143. See OAK PARK, ILL., VILLAGE CODE 13-7-4(A) (2017) (providing that no agent or agency "shall condition the provision of the Village benefits, opportunities, or services on matters related to citizenship or immigration status unless required to do so by statute, federal regulation, or an order of a court of competent jurisdiction").

144. See OAK PARK, ILL., VILLAGE CODE 13-7-4(B) (2017).

145. See OAK PARK, ILL., VILLAGE CODE 13-7-4(C) (2017).

146. See Provine et al., *supra* note 118, at 47 (explaining that "it is not unusual for a city that has a supportive policy to be embedded in a county with an enforcement orientation").

147. See GULASEKARAM & RAMAKRISHNAN, *supra* note 3, at 85 (2015) (asserting that there is considerable component of partisanship in places with restrictive legislation where "a high proportion of restrictive ordinances (77 percent) have passed in Republican-majority municipalities").

148. *Id.* at 78 (stating that out of their study's dataset of 25,000 cities, "125 had proposed restrictive ordinances between 2005 and 2011, and 93 had proposed pro-immigrant ordinances, including measures limiting cooperation with federal authorities on deportations").

1373 of the United States Code.¹⁴⁹ One of Donald Trump's presidential campaign's central themes was his harsh position on immigration.¹⁵⁰ As President of the United States, his anti-immigrant rhetoric has not mellowed and his administration began to target sanctuary cities within his first year in office.

On January 25, 2017, five days after President Trump was inaugurated, he issued Executive Order 13768.¹⁵¹ Section 9(a) of this Executive Order states that the Executive branch must ensure that local jurisdictions are complying with Section 1373.¹⁵² It grants the Attorney General and the Secretary of Homeland Security the discretion to determine whether cities should receive federal grants based on their compliance with Section 1373 and whether they prevent or hinder federal immigration law enforcement.¹⁵³ On July 25, 2017, the Department of Justice announced that new conditions would be added to the Byrne Memorial Justice Assistance Grant ("Byrne JAG") in an effort to "increase information sharing between federal, state, and local law enforcement, [while] ensuring that federal immigration authorities have the information they need to enforce immigration laws and keep our communities safe."¹⁵⁴ The Department of Justice is threatening to withdraw the Byrne JAG funds from Chicago and for this reason the City sued the Attorney

149. See Ilya Somin, *Fight over sanctuary cities is also a fight over federalism* THE HILL (Apr. 7, 2018), thehill.com/opinion/immigration/381998-fight-over-sanctuary-cities-is-also-a-fight-over-federalism (discussing the Trump Administration's efforts to deny Edward Byrne Memorial Justice Assistance Grants to any states or localities that do not comply with Section 1373).

150. Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASH. POST (Oct. 20, 2016), www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/ (quoting Donald Trump during his announcement speech in June 2015 saying that when Mexico sends people to the U.S. "[t]hey're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists").

151. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

152. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

153. See Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (providing that the Attorney General "shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law").

154. Press Release, U.S. Dep't of Justice Office of Public Affairs, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial (asserting that "from now on, the Department will only provide Byrne JAG grants to cities and states that comply with federal law, allow federal immigration access to detention facilities, and provide 48 hours notice before they release an illegal alien wanted by federal authorities").

General seeking declaratory and injunctive relief.¹⁵⁵

As sanctuary cities, both Chicago and Oak Park are vulnerable to accusations regarding their compliance with Section 1373. However, there is no language in Section 1373 that indicates there is a mandatory obligation for local law enforcement to cooperate with federal immigration authorities.¹⁵⁶ It only prohibits state and local jurisdictions from restricting state and local agencies from sharing information, but it does not create a duty for them to share such information.¹⁵⁷ Additionally, Section 1373 does not instruct local authorities on what to do with any acquired information when federal law enforcement has not requested it.¹⁵⁸

Chicago's Welcoming City Ordinance provides that local agencies not request or keep any information regarding a person's immigration status.¹⁵⁹ Therefore, Chicago is fully complying with Section 1373, as it does not prohibit its employees from sharing information regarding people's immigration status because it has no information to provide federal immigration agencies with.¹⁶⁰ Moreover, Section 30 of the Welcoming City Ordinance provides that the City's agents or agencies are required to share any information and assist in the investigation of a person's immigration status if federal law requires it, thus the ordinance is in full compliance with Section 1373.¹⁶¹

155. See Complaint, City of Chi. v. Sessions No. 17 C 5720, 2017 U.S. Dist. LEXIS 149847 (N.D. Ill. Sep. 15, 2017).

156. McCormick, *supra* note 31.

157. Memorandum from Edward Siskel, Corporation Counsel, City of Chicago, to Tracey Trautman, Acting Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Dep't of Justice at 7 (June 30, 3017), www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2017/August/080717_ExAComplaint.PDF [hereinafter Siskel] (indicating that Section 1373 "relates solely to prohibitions on sharing an individual's citizenship or immigration status among governmental entities, and does not require that such information be shared").

158. See Complaint at 17, City of Chi. v. Sessions No. 17 C 5720, 2017 U.S. Dist. LEXIS 149847 (N.D. Ill. Sep. 15, 2017) (asserting that Section 1373 "imposes no affirmative obligation on state or local entities to collect immigration status information; does not require state or local entities to take any specific actions upon receiving immigration status information absent a request for that information.>").

159. See CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-020 (2012) (providing that "no agent or agency shall request information about or otherwise investigate or assist in the investigation of the citizenship or immigration status of any person unless such inquiry or investigation is requires by Illinois Statute, federal regulation, or court decision").

160. See Siskel, *supra* note 157, at 7 (arguing that Chicago's "non-collection policy means that Chicago generally does not possess information to "send[]," but that policy does not prevent any 'sending' or 'receiving'").

161. See CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-030 (2012) (stating that "except as otherwise provided under applicable federal law, no agent or agency shall disclose information regarding the citizenship or immigration status of any person unless required to do so by legal process...").

D. Sanctuary Cities' Commitment to its Residents

The regulation of immigration is the responsibility of the federal government; state and local law enforcement agencies do not have the constitutional authority to enforce immigration law.¹⁶² However, the Fourteenth Amendment's Equal Protection Clause dictates that no state shall discriminate against its residents.¹⁶³ Nevertheless, oftentimes city residents are subjected to racial profiling and other civil rights violations, which leads to distrust in local law enforcement.¹⁶⁴

For this reason, many cities with large populations of immigrants, like Chicago and Oak Park, are focusing on increasing public safety through the enforcement of local laws instead of enforcing federal immigration laws.¹⁶⁵ Cities like Chicago and Oak Park intend to increase public safety by promoting trust between immigrant communities and local law enforcement. The rationale is that the city's responsibility is to treat its residents with respect and dignity, regardless of their immigration status. Equal treatment of all residents will also create trust in local police so that immigrants feel safe enough to contact them and report crimes without fear of deportation.¹⁶⁶

162. RODRIGUEZ ET AL., *supra* note 8, at 33 (explaining that in *De Canas v. Bica*, “the [Supreme] Court noted that regulating immigration is the exclusive responsibility of the federal government”).

163. U.S. CONST. amend. XIV (stating that “no State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; not deny any person within its jurisdiction the equal protection of the laws”).

164. Mitnik & Halpern-Finnerty, *supra* note 118, at 53 (explaining that local police cooperation in immigration enforcement “can lead to community mistrust, racial profiling, and civil rights violations”); *see also* Provine et al., *supra* note 118, at 21 (articulating that “[s]tate legislatures have repeatedly sought to diminish the rights of some of their foreign-born residents and their American progeny on the basis of discriminatory conceptions of racial and cultural identity”).

165. Press Release, Office of the Mayor City of Chicago, Mayor Emanuel Introduces Welcoming City Ordinance (July 10, 2012), www.cityofchicago.org/city/en/depts/mayor/press_room/press_releases/2012/july_2012/mayor_emanuel_introduceswelcomingcityordinance.html (stating that in Chicago, things are done “a little differently because we put public safety above political stunts and we put creating a united, cohesive society over trying to draw dividing lines”).

166. *See* CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-005 (2012) (emphasizing that “cooperation of all persons, both documented citizens and those without documentation status, is essential to achieve the City’s goals of protecting life and property, preventing crime and resolving problems”).

E. Is it enough? Carve-outs in Chicago's Welcoming City Ordinance

Sanctuary policies can differ greatly from one another. All the term means is that a state or local jurisdiction has enacted a policy that limits cooperation with federal immigration enforcement agencies.¹⁶⁷ So, this can take many shapes. Pro-immigrant advocates have asserted that many of these sanctuary policies do not protect immigrants in a significant way that would accomplish the goals of its city due to carve-outs in the law itself.

While Chicago's Welcoming City Ordinance has evolved in the past several years through amendments, there are four particular carve-outs that still allow sufficient cooperation with federal immigration agencies and are likely hindering the full accomplishment of its goals. Pursuant to the ordinance, Chicago law enforcement will comply with an immigration detainer when a person "has an outstanding criminal warrant" or has a felony conviction.¹⁶⁸ These two requirements for compliance with an immigration detainer are concerning because they are operating under the misunderstanding that undocumented immigrants with outstanding criminal warrants or felony convictions have committed violent offenses, thus excluding them from sanctuary. However, not all outstanding criminal warrants and felony convictions pertain to violent offenses, and many of these outstanding warrants and convictions may be decades-old.¹⁶⁹ Thus, a person may face disproportionate consequences, like deportation, for a decades-old non-violent offense, which could be a traffic violation or an old parole violation.¹⁷⁰

167. Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html (explaining that "sanctuary policies often mean local officials do not ask about a person's immigration status, but there is no universal definition for a sanctuary city").

168. *See* CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-042(c) (2012).

169. Jennifer Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297 (2017). Since the passage of the 1996 immigration laws, the criminal enforcement system has aided immigration enforcement by prioritizing immigration offenses: "As of 2011, immigration offenses were the single largest category of federal criminal prosecutions, and the bulk of those prosecutions were for misdemeanor illegal entry and felony reentry." *Id.* at 304.

170. Letter from the American Civil Liberties Union to Mayor Rahm Emanuel and Chicago City Council (July 10, 2017), www.scribd.com/document/355384873/ACLU-Letter-in-Support-of-Strengthening-Chicago-Welcoming-City-Ordinance (explaining that "under the carve-out for any individual with a prior felony conviction, a person with a 20-year-old"); *see also* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 135 (Harvard University Press 2010) (explaining that "[e]ven misdemeanor shoplifting could not result in deportation in some circuits").

Furthermore, law enforcement will also comply with a detainer when a person “is a defendant in a criminal case ... where a judgment has not been entered and a felony charge is pending; [or] has been identified as a known gang member either in a law enforcement agency’s database or by his own admission.”¹⁷¹ These two requirements are problematic because people under these situations are not given due process. Police may still communicate with ICE when a person who has a felony charge is in their database. This means that even though a person has not been convicted of a crime, she will be treated as if she had a criminal conviction before proven guilty.¹⁷² And regardless of the outcome of her criminal case, police will have already alerted federal immigration authorities of her presence, so she will likely be subject to deportation, despite being innocent of the charges against her.

Additionally, Chicago’s police can communicate with ICE when a person comes up in their database as a gang member. This provision is concerning because the gang database system has no procedural protections in place and is known to be unreliable.¹⁷³ Further, the public does not know the criteria for including people’s names and when a person is added to the database, they are not informed of such action.¹⁷⁴

Many immigrants are left vulnerable and unprotected due to these carve-outs. Yet, the carve-outs do not provide extra protections to the public as a whole. Although one may initially believe only the violent criminals are excluded from sanctuary to enhance public safety, the reality of these provisions tells us otherwise.

IV. PROPOSAL

In order to protect the immigrants who have been left out from the current Welcoming City Ordinance, Chicago should amend its ordinance by looking to Oak Park’s Welcoming Village ordinance

171. CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-042(c) (2012).

172. Spielman, *supra* note 9 (quoting Tania Unzueta, a representative for Mijente, an immigrant rights organization, stating that “we have a court system in the United States that says people are innocent until proven guilty. It is a complete violation of due process for someone to be considered a dangerous person when they actually haven’t gone through the court system”).

173. Rebecca A. Hufstader, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U.L. REV. 671, 689 (2015) (discussing that gang databases “do not employ sufficient safeguards of fairness and accuracy to merit their increasing significance in the immigration context”).

174. *Id.* (explaining that “unlike a criminal conviction, documentation in a gang database requires no criminal conduct whatsoever, making it especially difficult for an individual who fits the racial profile of a gang member in his geographic area to avoid documentation”).

and adopting some of its language. There are four main areas that are highly problematic and need to be stricken if Chicago wants to truly protect immigrants' basic rights by avoiding cooperation with federal immigration agencies. The four areas that should be eliminated from the Welcoming City Ordinance provide that Chicago law enforcement will comply with a detainer and arrest, detain, or continue to detain a person if: (1) there is an outstanding criminal warrant against them; (2) she has a felony conviction; (3) she has a pending felony charge and no judgment has been entered yet; and (4) she has been identified as a gang member in the Chicago Police Department's ("CPD") gang database.¹⁷⁵

Moreover, Chicago's Welcoming City ordinance should expand its definitions of "verbal abuse" and "coercion." Chicago should also strengthen its commitment to establishing a bridge of trust between immigrant communities and law enforcement by following Oak Park's footsteps and adding a "Federal Registry Program" provision and a provision against entering into agreements (MOA's) under Section 1357(g). These amendments would sufficiently strengthen the ordinance and would consequently make it exemption-free.

The first step toward making Chicago's Welcoming City ordinance exemption-free is to completely get rid of Section 2-173-042(c), which contains the four main carve-outs discussed above. Section 2-173-042(c)(1) provides that the CPD will comply with detainers if there is an outstanding criminal warrant for a person.¹⁷⁶ This provision does not necessarily protect Chicago residents from dangerous criminals, but it does make non-dangerous immigrants vulnerable to unfair treatment. This is because more than half of Cook County's criminal warrants are more than ten years old.¹⁷⁷ Further, the fact that there is an outstanding warrant against someone does not make that person dangerous.¹⁷⁸ These warrants may have been issued for non-violent offenses like traffic violations, including speeding or parking tickets, or violations of probation or supervision conditions, among others.¹⁷⁹ Therefore, the repercussions of having an outstanding

175. See CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-005 (2012).

176. See CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-042(c)(1) (2012).

177. See Frank Main, *Dart Supports Plan to Keep Warrants from Languishing for Decades*, CHI. SUN-TIMES (Apr. 3, 2017), chicago.suntimes.com/chicago-politics/dart-supports-bill-to-keep-warrants-from-languishing-for-decades/.

178. Chacón, *supra* note 169, at 304 (explaining that although scholars have questions the legality and harshness of the immigration detention system, "[f]ederal legislators and executive branch officials have justified the ongoing rapid expansion of immigration detention on both retributive and general deterrence grounds that seem ill-suited to a purportedly civil system").

179. Main, *supra* note 177 (stating that "according to a sheriff's office study of 41,149 warrants that were outstanding in Cook County on Jan. 19, most were issued because a defendant had violated a judge's conditions of probation or supervision — such as passing a drug test or doing community service").

warrant issued against someone for a non-violent offense are absurdly disproportionate. A Chicago police officer may decide to comply with an immigration detainer and have that person potentially deported for a decade-old traffic violation. This means that old criminal warrants and more recent criminal warrants may result in the deportation of an undocumented immigrant.

Second, under Section 2-173-042(c)(2), Chicago law enforcement may comply with an immigration detainer when a person has a felony conviction.¹⁸⁰ This has very similar repercussions as Section 2-173-042(c)(1), discussed above. Not all felony convictions correlate to violent offenses. Also, a police officer may comply with a detainer even when a person has a decades-old felony conviction for a non-violent offense. This means that if someone is detained and later released because law enforcement finds that she did not commit an offense, a police officer can still comply with an immigration detainer and hold her after she is eligible for release due to a twenty-year-old felony conviction.

Third, Section 2-173-042(c)(3) provides that local law enforcement may comply with an immigration detainer when a person has a pending felony charge.¹⁸¹ This provision allows for police officers to treat undocumented immigrants as convicted criminals when no judgment has been entered yet. Consequently, even if a person is ultimately found not guilty of the felony charge, the consequences caused by the CPD's compliance with an immigration detainer cannot be backtracked. Thus, the person may end up in removal proceedings, and possibly deported.

Fourth, Section 2-173-042(c)(4) provides that local law enforcement can comply with an immigration detainer by detaining or prolonging someone's detention if her name is in their gang database. This provision is concerning because the accuracy of gang databases has been known to be questioned.¹⁸² Although it varies from jurisdiction to jurisdiction, it has been propounded by legal scholars that the criteria used to include a person's name in gang databases is overbroad and fuzzy.¹⁸³ Further, there are concerns of

180. CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-042(c)(2) (2012).

181. CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-042(c)(3) (2012).

182. Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J.C.R. & C.L. 115, 129 (2005) (asserting that "gang databases appear to be riddled with factual inaccuracies, administrative errors, lack of compliance with departmental guidelines, and lack of oversight").

183. *Id.* at 129-30 (stating that "commentators have argued that anti-gang injunctions, which generally apply to documented gang members, are unconstitutionally vague, overly broad, impinge on rights to free association, and suggest guilt by association."); see also K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 652 (2011) (asserting that "the result of these broad criteria is that individuals who never belonged in a gang, but were observed with friends or relatives, photographed with them, and dress in the normal styles for urban youth, are included in gang databases").

procedural due process violations: the police have full discretion as to who is included in the list; people who are on the list are not aware of it until they encounter a problem because they are on the list; people who are included on the list can only fight to be removed from it once they have faced legal problems due to their inclusion on the list; and there is little oversight on the databases, so those who are found to be non-gang members are rarely deleted from the list.¹⁸⁴ Considering that there is a high risk of mistake due to the inaccuracies in the gang databases, this should not be used as a reason under which local law enforcement has the discretion to comply with detainers. Therefore, Section 2-173-042(c)(4) should be stricken from the ordinance.

Moreover, the definitions of “coercion” and “verbal abuse” in the Welcoming City ordinance should be expanded in order to incorporate behavior from law enforcement that should be deterred. The definition of coercion establishes that it is “the use of improper or unlawful force or threats, express or implied, in order to compel a person to act against his or her will.”¹⁸⁵ It also includes “compelling a person to make statements.”¹⁸⁶ Even though this definition is almost as complete as Oak Park’s Welcoming Village ordinance, it misses a particular element that is necessary to avoid police misconduct.

A common issue undocumented immigrants encounter when they interact with law enforcement is that either they will receive express or implied threats by the police to coerce them to act a certain way, or their family members will be threatened. In many occasions, the undocumented immigrant’s family members will have legal status in the United States, therefore the ordinance would arguably not cover them. For this reason, following Oak Park’s steps in including “a person or family member” into Chicago’s definition would expand the definition, making it wholly inclusive to undocumented immigrants and their family members.¹⁸⁷

The Chicago’s definition of “verbal abuse” should also be modified to be more inclusive. Oak Park’s Welcoming Village ordinance defines “verbal abuse” as “the use of oral or written remarks that are overtly insulting, mocking or belittling, directed at a person based upon the actual or perceived race, immigration

184. K. Babe Howell, *Juvenile Justice: Gang Databases: Labeled For Life*, 35 THE CHAMPION 28, 34 (2011) (explaining that “once an individual is placed in a law enforcement gang database, whether accurately or inaccurately, there is little oversight or incentive to ensure the databases are purged of non-gang members or former gang members”).

185. See CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-010 (2012).

186. *Id.*

187. See OAK PARK, ILL., VILLAGE CODE 13-7-1 (2017) (defining “Coerce: To use express or implied threats towards a person or any family member of a person that attempts to put the person in immediate fear of the consequences in order to compel that person to act against his or her will”).

status, color, ancestry, or national origin.”¹⁸⁸ Given our current political climate where people are harrassed on the streets due to their religion, English proficiency, sex, sexual orientation, or gender identity, we should follow the footsteps of Oak Park’s Welcoming Village ordinance and expand the defintion to encompass these other reasons by which one may receive verbal abuse.¹⁸⁹

Chicago’s Welcoming City ordinance establishes that unless local law enforcement has a legitimate law enforcement purpose that does not relate to civil immigration law, it shall not “expend their time responding to ICE inquiries or communicating with ICE regarding a person’s custody or release” while on duty.¹⁹⁰ Nonetheless, this provision could be strengthened by detailing other forms of non-cooperation. The “Federal Registry Program” provision in Oak Park’s Welcoming Village ordinance is a good example of such a provision. It states that law enforcement shall not expend any resources in facilitating the creation, publication or upkeep of a federal program that maintais a registry of people based on place of origin, ancestry or religion.¹⁹¹ Not collaborating in any way, shape, or form in the maintenance of these databases will surely enhance the trust between immigrants and the police. Thus, Chicago should look into adapting Oak Park’s text into the Welcoming City ordinance.

Finally, it is common knowledge that Chicago is currently opposed to cooperating with federal immigration law enforcement, evidenced by its refusal to enter into MOA’s with federal authorities under Section 1357(g). However, adding a provision to the ordinance Welcoming Village’s Section 13-7-5(C), specifying that the city shall not enter into any agreements would further strengthen the ordinance and would make it harder for future administrations to overcome this obstacle should it attempt to enter into an agreement with DHS.¹⁹²

188. OAK PARK, ILL., VILLAGE CODE 13-7-1 (2017).

189. *Id.*

190. *See* CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-042(b)(1)(C) (2012).

191. *See* OAK PARK, ILL., VILLAGE CODE 13-7-1 (2017) (establishing that “no agency shall expend any time, facilities, equipment, information, or other resources of the agency or agent to facilitate the creation, publication, or maintenance of any federal program to register individuals present in the United States based on their ancestry, national origin, or religion, or the participation of any village residents in such a registry”).

192. *See* OAK PARK, IL., VILLAGE CODE 13-7-5(C) (2017) (providing that “no agency or agent shall enter into an agreement under Section 1357(G) of Title 8 of the United States Code or any other federal law that permits state or local governmental entities to enforce federal immigration laws”).

V. CONCLUSION

Chicago is one of the most diverse cities in the world, as one out of five of its residents is an immigrant.¹⁹³ Chicago's Welcoming City ordinance still contains carve-outs that allow for some cooperation between the Chicago Police Department and federal immigration law enforcement. The primary goal of sanctuary ordinances is to strengthen the relationship between local law enforcement and immigrant communities by treating immigrants, regardless of their immigration status, with "respect and dignity."¹⁹⁴

Unfortunately, the protections the ordinance provides does not extend to all immigrants. The carve-outs discussed above exclude certain immigrants and leave most vulnerable. Because there may be uncertainties as to whether these carve-outs apply to them or not, undocumented immigrants will continue to shy away from contacting law enforcement when they have witnessed a crime or been victims of a crime. These proposed amendments to Chicago's Welcoming City ordinance would include the group of immigrants that has been excluded, exposed, and vulnerable. Broadening the ordinance will strengthen the immigrant community's trust in local law enforcement, which will ultimately accomplish the City's objective of protecting the life and property of all its residents.

193. See CHICAGO, ILL., ILL. CODE OF ORDINANCES §2-173-005 (2012) (stating that "the vitality of the City of Chicago (the "City"), one of the most ethnically, racially and religiously diverse cities in the world, where one-out-of-five of the City's residents is an immigrant, has been built on the strength of its immigrant communities").

194. See *id.* (emphasizing that "immigrant community members, whether documented citizens or not, should be treated with respect and dignity by all City employees and should not be subjected to physical abuse, threats, or intimidation").