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Crimmigration Resistance And The Case Of Sanctuary City Defunding

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INTRODUCTION

Soon after the election of Donald Trump as President of the United States, officials in the City of Santa Ana, California—home to one of the largest Latinx populations in the country—declared itself a “sanctuary city.”¹ Seeking to distance itself from the incoming

1. Cindy Carmuco, *Santa Ana Declares Itself a Sanctuary City in Defiance of Trump*, L.A. TIMES (Dec. 7, 2016 10:15 PM), <http://www.latimes.com/local/california/la-me-santa-ana-sanctuary-city-20161206-story.html>; Lawrence Downes, *A ‘Sanctuary City’ Seizes the Moment, and the Name*, N.Y. TIMES (Mar. 3, 2017) [hereinafter *Seizes the Moment*], https://www.nytimes.com/2017/03/03/opinion/a-sanctuary-city-seizes-the-moment-and-the-name.html?rref=collection%2Fbyline%2Flawrence-downes&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=5&pgtype=collection.

The term “sanctuary cities” has no fixed legal meaning, but it is “often used to refer to jurisdictions that limit the role of local law enforcement agencies and officers in the enforcement of federal immigration laws.” N.Y. ST. ATT’Y GEN’L ERIC T. SCHNEIDERMAN, GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGR. ENFORCEMENT AND MODEL SANCTUARY PROVISIONS 1, n.1 (January 19, 2017), https://ag.ny.gov/sites/default/files/guidance.concerning.local_authority.participation.in_immigration.enforcement.1.19.17.pdf. Some jurisdictions embrace the term, e.g., Coun. of the City of Boul., Res. No. 8162 (Col. 2017), while others eschew it, e.g., Erica Meltzer, *Mayor Michael Hancock: Denver is “Not a Sanctuary City,”* DENVERITE (Jan. 25, 2017, 5:11 PM), <https://www.denverite.com/mayor-michael-hancock-denver-not-sanctuary-city-27986/>. The Trump Administration and other critics of such jurisdictions’ have used the term “sanctuary” pejoratively. See, e.g., Part I.B, *infra*. We do not use the term pejoratively, but we do use it broadly (as those critics have). At times, we also use the term “disentanglement,” which we believe more accurately describes the goal and effect of such policies. See generally

President and his anti-immigrant platform, the City committed itself to implementing a number of measures that would disentangle its local governmental institutions from the federal immigration enforcement machinery.² In the preamble to its sanctuary resolution, the City sought to paint a very different picture of immigrants than the “rapists” and “murderers” that Trump had made a focus of his campaign.³ The resolution recognized Santa Ana’s immigrant families as a vital part of “the economic and social fabric of the City . . . contributing to the arts and culture and achieving significant educational accomplishments.”⁴

Santa Ana’s sanctuary policy has been lauded as “bold” and “far-reaching.”⁵ Even officials in arguably the most immigrant-friendly city in the historically conservative Orange County, however, had to be persuaded to extend its protections to all immigrants, regardless of criminal history. When the City prepared to convert its sanctuary resolution into an ordinance, staff initially proposed a draft that carved out any individual with a felony conviction, outstanding warrant or pending felony charge from the limitations on the use of City resources for immigration enforcement.⁶ This development was not entirely surprising, given the City’s desire to redeem the beneficiaries of its sanctuary policy as “deserving” of protection. But the carve-out would have left exposed some of the most vulnerable and stigmatized members of the community. Advocates came out strongly against the carve-out and were able to defeat it in a 6-0 vote.⁷

Sanctuary policies like Santa Ana’s have become a thorn in President Trump’s side. In order to carry out his agenda of mass deportations, he needs the participation of state and local officials, particularly state and local law enforcement officials.⁸ The Trump

Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 58 B.C. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3045527 (using the term “disentanglement”).

2. Santa Ana, Cal., Res. No. 2016-086 (Dec. 6, 2016) [hereinafter Santa Ana Resolution], http://libguides.law.du.edu/ld.php?content_id=34442441.

3. See *infra* notes 51-61 and accompanying text.

4. See Santa Ana Resolution, *supra* note 2, at 55G-5.

5. See *Seizes the Moment*, *supra* note 1.

6. Santa Ana, Cal., Proposed Ordinance Relating to the City’s Procedures Concerning Immigr. Status ¶ 7(f) (Dec. 20, 2016), http://santaana.granicus.com/MetaViewer.php?view_id=2&event_id=8217&meta_id=41479.

7. E.g., Santa Ana, Cal., City Council Meeting – Archived Video (Dec. 20, 2016), http://santaana.granicus.com/MediaPlayer.php?view_id=2&clip_id=951 (1:18:40-1:22:00, 1:28:18-1:30:15, 1:33:07-1:36:30); Santa Ana, Cal., Ordinance Relating to the City’s Procedures Concerning Immigr. Status (adopted Jan. 17, 2017) [hereinafter Santa Ana Ordinance], http://libguides.law.du.edu/ld.php?content_id=34432113.

8. Daniel Gonzalez, *Trump Will Need Local Police to Help Carry Out Deportation Orders. Will They Comply?* ARIZ. REPUBLIC (Feb. 2, 2017), <https://www.azcentral.com/story/news/politics/immigration/2017/02/02/president-donald-trump-deportation-executive->

Administration has therefore pursued a variety of means to pressure cities, counties and states to abandon their sanctuary policies. But still, many jurisdictions have not backed down. One strategy that has generated a fair amount of controversy has been the attempt to withhold federal funding from jurisdictions that do not accede to the Administration's demands.

Many legal commentators, dusting off conservative judicial precedents, have remarked that sanctuary defunding raises significant federalism concerns.⁹ But it is important to see sanctuary defunding as about more than a clash between federal and local power. Sanctuary defunding has also been the site of a struggle over the appropriate relationship between immigration and crime control. And as with sanctuary policies themselves, resistance to the effort to merge immigration enforcement with criminal justice missions of local law enforcement in the context of sanctuary defunding can take a number of forms.

On the one hand, sanctuary jurisdictions can object that immigration enforcement and crime control are two different things and that the Trump Administration's attempts to conflate the two are spurious. Among the funding streams that the federal government has most frequently threatened to withhold from sanctuary jurisdictions are several law enforcement grants administered by the Department of Justice (DOJ).¹⁰ The lack of a sufficient nexus between unauthorized immigration and the criminal justice goals of the grants can aid jurisdictions seeking to show that immigration-related funding conditions on these grants violate the Spending Clause of the U.S. Constitution and separation of powers principles.¹¹ Highlighting the lack of a correlation between immigration and crime can also help combat some of the harmful stereotypes about immigrants that have been driving policy at the federal level.

But de-linking immigration from crime control, without more, risks retrenching problems with the broader system of crime control in the United States that affect noncitizens and citizens alike. By leaving unquestioned the outcomes of the system of crime control, sanctuary

order-police/97297342/.

9. See, e.g., Ilya Somin, *Federalism, the Constitution, and Sanctuary Cities*, THE VOLOKH CONSPIRACY (Nov. 26, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/26/federalism-the-constitution-and-sanctuary-cities/?utm_term=.302773b306ed; Bill Ong Hing, *How Obamacare Ruling Could Save Sanctuary Cities*, SACRAMENTO BEE (Nov. 28, 2016 3:02 PM), <http://www.sacbee.com/opinion/op-ed/soapbox/article117448298.html>.

10. See *infra* Part I.C-E.

11. See *infra* Part III.

jurisdictions may be tempted, as they were in Santa Ana, to disavow protection of immigrants who *do* apparently commit crime. A more holistic view that connects the fate of immigrants to that of those who have made up the more traditional population in the criminal justice system,¹² in contrast, might lead a jurisdiction confronted with the prospect of losing DOJ law enforcement grants to instead ask what those federal grants have been used for, why states and localities have become dependent on them and whether they are truly worth keeping.

In short, while sanctuary defunding can feel technical and ancillary to the substance of sanctuary policies, it too can be a site of “cimmigration”¹³ resistance. This article draws on the work of scholars and advocates in the field of “cimmigration” law to provide a framework for local policymakers’ and community members as they navigate choices about how best to respond to defunding efforts.

In Part I of the article, we examine the current threats to defund sanctuary jurisdictions. The origin of today’s defunding threats can be traced back to policy transformations in the 1980s that placed downward pressure on local governments to divert crime control resources toward immigration enforcement.¹⁴ Defunding threats are part of this downward pressure, and they have come in many forms in recent years, from presidential campaign promises,¹⁵ to unsuccessful legislative proposals,¹⁶ as part of the Department of Justice’s grant making process,¹⁷ and via Executive Order.¹⁸

Understanding sanctuary defunding as a cimmigration issue allows one to apply the lessons of cimmigration literature. Part II therefore turns to the work of those who have cast a critical eye on the ever-increasing entanglement, since the 1980s, of criminal and immigration law and enforcement and the ideological re-imagining of noncitizens as criminal deviants and security risks.¹⁹ We organize the critiques into two types. “Delineating” critiques attempt to unravel the association between immigrants with criminality and establish a bright line between the two enforcement regimes.²⁰ “Synthesizing” critiques, on the other hand, expand their gaze to those parts of the criminal

12. See *infra* note 180 and accompanying text.

13. For a more in-depth discussion of this term, see *infra* notes 145-51, 154 and accompanying text.

14. See *infra* Part I.A.

15. See *infra* Part I.B.

16. See *infra* Part I.C.

17. See *infra* Part I.D.

18. See *infra* Part I.E.

19. See *infra* Part II.A.

20. See *infra* Part II.B.

justice system that are not related to immigration to probe the parallel logics, cultural and environmental factors that may be driving practices in both the immigration and criminal law systems.²¹

To better understand what role the two types of analyses can play, we discuss in Part III how a delineating critique could be deployed in the sanctuary defunding debate. Examining legal claims made in the litigation opposing the Trump Administration's efforts to withdraw funding from sanctuary jurisdictions, we observe that delineation critiques—despite being constitutionally significant and consistent with the underlying rationales for local sanctuary policies—have been advanced only reluctantly, and incompletely, by the plaintiff jurisdictions.²² We set forth the benefits that a more robust delineation critique informed by the crimmigration literature could offer.²³

Part IV applies a synthesizing critique to the sanctuary defunding debate. First, we develop further what a synthesizing critique looks like in this context, using a logical syllogism about crimmigration to illustrate the analytical moves involved.²⁴ We then probe in detail the history and uses to which the three Department of Justice law enforcement funding programs at risk have been put.²⁵

Ultimately, we conclude that while delineating critiques may be necessary to curb some of the greatest excesses of the criminal justice system in the short term, they should not come at the expense of synthesizing critiques that can yield more radical transformations of both the immigration and criminal justice systems over time.²⁶ Our case study suggests that the analytical framework developed here might be productively applied to other contested issues at the intersection of criminal and immigration law.

I. THREATS TO DEFUND SANCTUARY CITIES AND THEIR ORIGINS

Before turning to the specifics of the current push to defund so-called “sanctuary” jurisdictions, it is important to note that the current debate over such policies is just the latest development in a decades-long struggle between the federal government and states and localities over the proper role of states and localities in immigration enforcement has been ongoing for nearly four decades. This battle has largely been fueled by transformations in immigration law and policy dating back to

21. *See infra* Part II.C.
22. *See infra* Part III.A-B.
23. *See infra* Part III.C.
24. *See infra* Part IV.A.
25. *See infra* Part IV.B.
26. *See infra* Part IV.C.

the 1980s—transformations premised on the recasting of immigration as a public safety issue. As a result, immigration enforcement has become increasingly entangled with the enforcement of criminal laws, giving rise to a new “crimmigration” enforcement regime²⁷ in which contact with criminal justice system actors serves as an entry point to a jail-to-deportation pipeline.²⁸ Sanctuary policies have been, in large part, a form of resistance to this entanglement,²⁹ and sanctuary defunding, an attempt to suppress this resistance.

Sanctuary policies have included “don’t ask” or “don’t police” policies addressing street-level police engagement,³⁰ policies limiting detention solely on the basis of administrative immigration detainers or immigration warrants,³¹ policies limiting disclosure of non-public jail release-date information,³² and general confidentiality policies that can include immigration status information.³³ There is broad consensus among legal scholars that these policies are generally lawful and within the rights of state and local governments to enact, and indeed, may be necessary to protect the civil and constitutional rights of residents.³⁴

27. See *infra* notes 145-51 and accompanying text. As we discuss in Part II below, this regime has been the subject of extensive commentary by scholars and advocates.

28. See, e.g., Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. SCH. L. REV. 1126, 1128 (2013) (“By fostering immigration screening at local jails and courthouses, federal authorities have filled the deportation pipeline with migrants arrested by local police and prosecuted in county courtrooms.”); Hiroshi Motomura, *The Discretion that Matters: Fed. Immigr. Enforcement, State and Local Arrests, and the Civ.-Crim. Line*, 58 UCLA L. REV. 1819, 1856 (2011) (describing how “state and local decision makers . . . act as gatekeepers” for “the enforcement pipeline”); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 254 (2017) (describing “sheriff’s office and municipal police departments” as “key players” in feeding noncitizens into the “pipeline”).

29. See *infra* Part I.

30. See, e.g., Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 254-64 (2016) [hereinafter Eagly, *Immigrant Protective Policies*] (discussing such policies). For a comprehensive review of the different varieties of law enforcement disentanglement policies, see generally Lasch et al., *Understanding “Sanctuary Cities,” supra* note 1.

31. E.g., Cook County Ord. 11-O-73 (adopted Sept. 7, 2011) http://libguides.law.du.edu/ld.php?content_id=34434520 (adding § 46-73). For a description of immigration detainers and their importance, see Christopher N. Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008) [hereinafter Lasch, *Enforcing the Limits*].

32. See *Steinle v. City of San Francisco*, 230 F. Supp. 3d 994, 1003-04 (N.D. Cal. 2017) (discussing March 13, 2015 memorandum issued by San Francisco Sheriff Ross Mirkarimi).

33. E.g., Hartford, Conn., Municipal Code ch. 2, art. XXI (2008), http://libguides.law.du.edu/ld.php?content_id=34434291 [hereinafter Hartford Municipal Code] (discussing § 2-926, which defines “confidential information” to include immigration status, and § 2-929, which limits disclosure of “confidential information”).

34. E.g., *RE: Proposed Termination of Funding to “Sanctuary” Jurisdictions under EO 13768 is Unconstitutional* (March 13, 2017), <https://www.ilrc.org/sites/default/files/>

A. Four Decades (and Four Waves) of “Sanctuary”

Sanctuary policies in recent U.S. history have proceeded in four successive waves.³⁵ The first wave was largely an effort on the part of local law enforcement to protest the perceived unfairness of federal immigration policy during the 1980s.³⁶ Subsequent policies, however, have been more directly tied to the rise of the crimmigration enforcement regime and federal pressure on local jurisdictions to participate in immigration enforcement. For example, the second wave of sanctuary policies followed legislation in the 1990s³⁷ and a legal opinion from the Office of Legal Counsel after September 11th³⁸ that sanctioned arrests by local law enforcement for violations of civil immigration laws. These policy actions, enacted through the first decade of this century, “challenged the federal government’s . . . assertion of cooperative immigration enforcement as essential to domestic security.”³⁹

The third wave of policies likewise arose as a response to federal pressure on local law enforcement to participate in immigration

resources/2017-03-13_law_professor_letter_re_eo_13768_sanctuary_jurisdictions_finalv2.pdf; *Law Professor Letter to Governor Jerry Brown Supporting California Senate Bill 54* (May 17, 2017), <http://www.ndlon.org/en/pressroom/press-releases/item/1271-over-100-law-professors-tell-gov-jerry-brown-the-california-values-act-is-good-law-and-good-policy> (follow “sent a letter to California Governor Jerry Brown” hyperlink); Erwin Chemerinsky et al., “*Trump Can’t Force ‘Sanctuary Cities’ to Enforce His Deportation Plans*,” WASH. POST (Dec. 22, 2016), https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.32a812bd4a85; Bernard W. Bell, *De-Funding Sanctuary Cities*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 28, 2017), <http://yalejreg.com/nc/de-funding-sanctuary-cities-by-bernard-w-bell/>.

35. See, e.g., Spencer Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL’Y REV. 87, 101 n.62, 107 n.91, 118 (2016) [hereinafter Amdur, *The Right of Refusal*] (referencing “waves” of sanctuary policies); Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313, 315 (2015) (describing “second wave” of sanctuary policies from 2001-08); Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 159-61 (2016) [hereinafter Lasch, *Sanctuary Cities*] (describing three waves of sanctuary).

36. See Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 252–53 (2011).

37. Illegal Immigr. Reform and Immigrant Resp. Act, Pub. L. 104-208, § 133, 110 Stat. 3009 (1996) (enacting 8 U.S.C. § 1357(g), allowing cooperative agreements between local law enforcement entities and the federal government, whereby local officers are essentially deputized as immigration officers).

38. See *OLC Memo on State and Local Law Enforcement of Immigr. Laws*, ACLU (July 22, 2005), <https://www.aclu.org/legal-document/olc-memo-state-and-local-law-enforcement-immigration-laws>.

39. Gardner, *supra* note 35, at 324.

enforcement, this time through the “Secure Communities” program, which automatically shared with federal immigration officials the biometric fingerprint data of every person booked into a local jail whose fingerprints were run through the Federal Bureau of Information National Crime Information Center database.⁴⁰ Initially described as a voluntary program, Secure Communities generated a federalism crisis when localities were eventually told in 2011 (three years after the program’s launch) that they could not “opt out” of the program.⁴¹

Resistance to the automatic information sharing regime largely took the form of policies limiting compliance with immigration detainers;⁴² if the flow of information could not be stopped at the front end, localities quickly learned that they could stop holding inmates past their scheduled release date for federal officials to take custody of them at the back end. This wave of policies limiting detainer compliance began in 2010 and intensified following federal court decisions suggesting that jurisdictions that elected to hold people could be liable for violating their Fourth Amendment rights.⁴³

Secure Communities led to record-breaking deportation numbers during the Obama Administration.⁴⁴ But the third wave of disentanglement policies spurred the demise of the program,⁴⁵ and deportations finally began to fall.⁴⁶ By the end of 2016, hundreds of

40. For a description of Secure Communities, see Lasch, *Enforcing the Limits*, *supra* note 31, at 173; see also Christopher N. Lasch, *Rendition Resistance*, 92 N.C.L. REV. 149, 154-56 (2014) [hereinafter Lasch, *Rendition Resistance*].

41. Lasch, *Rendition Resistance*, *supra* note 40, at 156-60.

42. *Id.* at 156-63.

43. Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1279-81 (2015) [hereinafter Stumpf, *D(e)volving Discretion*] (describing policy changes following *Galarza v. Szalczyk*, 745 F. 3d 634 (3d Cir. 2014) and *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317, 2014 WL 1414305 (D. Ore. 2014)).

44. See Brian Bennett, *Obama administration reports record number of deportations*, L.A. TIMES (Oct. 18, 2011), <http://articles.latimes.com/2011/oct/18/news/la-pn-deportation-ice-20111018> (noting third consecutive year of record-setting deportations that officials credited to “programs such as Secure Communities”).

45. See Stumpf, *D(e)volving Discretion*, *supra* note 43, at 1261; Memorandum from Jeh Charles Johnson, Sec’y of the U.S. Dep’t of Homeland Security on Secure Communities to Thomas S. Winkowski, Megan Mack & Philip A. McNamara, 2-3 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

46. From FY2014 to FY2015 there was a thirty percent drop in interior “removals.” U.S. DEP’T OF HOMELAND SECURITY, ICE ENFORCEMENT AND REMOVAL OPERATIONS REP., at 7 (2014) (reporting 102,224 interior “removals”), <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf>; U.S. DEP’T OF HOMELAND SECURITY, ICE ENFORCEMENT AND REMOVAL OPERATIONS REP. at 5 (2015) (reporting 69,478 interior “removals”), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf>.

counties had adopted no-detainer policies,⁴⁷ representing considerable resistance to cooptation by federal immigration enforcement.

The stage was thus set for the most recent iteration of the sanctuary battle. The first two waves of disentanglement policies had each provoked some federal response,⁴⁸ and the third wave of sanctuary would prove no different. Anti-sanctuary backlash swelled throughout Donald Trump's campaign.⁴⁹ With Trump's election, the pendulum would swing once again with a fourth wave of sanctuary⁵⁰ responding to the palpable nativism that has animated his immigration platform.

B. Sanctuary Defunding Becomes a Mainstay of the Trump Campaign

That Donald Trump would rely on a racially-inflected rhetoric of immigrant criminality to promote his immigration policy agenda was evident from the start of his campaign. In announcing his candidacy in June 2015, Trump assailed Mexican immigrants as “bringing drugs” and “bringing crime.”⁵¹ “They’re rapists,” Trump said.⁵² His meandering speech included two promises on immigration, consistent with the rhetoric casting immigrants as a public safety and national security threat: To “immediately” rescind President Obama’s “illegal executive order” establishing the Deferred Action for Childhood Arrivals program, and to “build a great, great wall on our southern border.”⁵³

Less than three weeks later, on July 1, 2015, a young white woman named Kathryn Steinle was killed on a pier in San Francisco.⁵⁴ Steinle was struck by a bullet fired by Jose Ines Garcia Zarate,⁵⁵ a man

47. Immigrant Legal Resource Center, *National Map of Local Entanglement With ICE*, ILRC.ORG (Dec. 19, 2016), <https://www.ilrc.org/local-enforcement-map>.

48. See Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 173-81 (2016) (describing the passage of 8 U.S.C. § 1644 and 8 U.S.C. § 1373, discussed *infra* at notes 70-71 and accompanying text, as a response to first-wave sanctuary policies); *id.* at 175 (stating that “resistance to involvement with federal immigration enforcement did not go unnoticed”); Jennifer M. Hansen, *Sanctuary's Demise: The Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289, 307-09 (2008) (describing proposed anti-sanctuary legislation during the second wave of sanctuary).

49. See *infra* Parts I.B through I.D.

50. See *infra* Part IV.C.

51. *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

52. *Id.*

53. *Id.*

54. Lasch, *Sanctuary Cities*, *supra* note 35, at 165.

55. Initial reporting used the name Juan Francisco Lopez Sanchez, *see id.*, but that was later reported to be an alias. See Jeremy Stahl, *The Exploitation of “Beautiful Kate,”* SLATE (Aug. 10, 2017), <https://slate.com/news-and-politics/2017/08/the-death-of-kate-steinle-and->

who had previously been deported five times and had seven prior felony convictions.⁵⁶ Trump rushed to seize the political opportunity, putting Steinle's death front and center whenever he discussed immigration.⁵⁷

The Steinle case sharpened the Trump campaign's immigration platform in two important ways. First, consistent with his instinct for simplistic yet sensationalist messaging, Trump made "immigrant" synonymous with "murderer" as he peddled the Steinle story on the campaign trail.⁵⁸ The first night of the Republican nominating convention featured three guest speakers—Mary Ann Mendoza, Sabine Durden and Jamiel Shaw—each of whom had evidently lost a child at the hands of immigrants.⁵⁹ In accepting the nomination, Trump asked rhetorically "where was sanctuary for Kate Steinle" and "all the other Americans who have been so brutally murdered, and who have suffered so horribly?"⁶⁰ Later, in his vaunted August 31, 2016 "immigration speech" in Phoenix, Trump claimed that "[c]ountless innocent American lives have been stolen" and detailed five cases in which "illegal immigrants" apparently killed U.S. citizens.⁶¹ By the November 2016 election, Trump's immigrants-as-murderers rhetoric made the bringing-drugs-bringing-crime-rapists messaging he had used at the beginning of the campaign seem complex by comparison.

The second way in which the Steinle case refocused the campaign was that the facts of the case suggested an additional political "solution" (beyond repealing deferred action for DREAMers and building a border wall) to the perceived immigration "problem." On March 27, 2015, two months before Steinle's shooting, while Garcia Zarate was in the custody of the San Francisco Sheriff's Department

the-rise-of-donald-trump.html.

56. Our use of the passive voice here reflects the fact that evidence connected to the Steinle shooting supports multiple possible scenarios, not all of which would have made Garcia Zarate an active agent in Ms. Steinle's death. *See id.* at 186 (noting the possibility that Ms. Steinle's death could have been "simply a tragic accident").

57. *See generally id.* at 173-75 (discussing the coded racial appeals in Trump's tellings of Steinle's death). Trump was not alone in this regard. *See id.* at 175-79 (describing Fox News's treatment of Steinle's death).

58. *Id.* at 173-75, 182-85.

59. Jessica Hopper, *Family of People Killed by Undocumented Immigrants Speak Out at RNC*, ABC NEWS (Jul. 18, 2016, 10:32 PM), <http://abcnews.go.com/Politics/family-people-killed-undocumented-immigrants-speak-gop-convention/story?id=40685407>.

60. *Donald Trump Full RNC Nomination Acceptance Speech*, POLITICO (Jul. 21, 2016, 6:21 PM), <http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974>.

61. Full Text: Donald Trump Immigration Speech in Arizona (Aug. 31, 2016, 10:54 PM) [hereinafter August 31 Speech], <https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614>.

(SFSD) on old felony charges relating to the sale of marijuana, federal officials issued an immigration detainer for him.⁶² SFSD policy at the time, however, prohibited disclosure of information relating to release dates,⁶³ and so, pursuant to this policy, Garcia Zarate was released from SFSD custody without any notification to federal immigration officials.⁶⁴

Blaming Steinle's death on San Francisco's sanctuary policy⁶⁵ allowed Trump to make "ending" sanctuary cities another one of the mainstays of his immigration platform.⁶⁶ He made a provocative promise to "cancel all federal funding to sanctuary cities" in the first one hundred days of a Trump presidency.⁶⁷ Shortly before this article went to press, a San Francisco jury acquitted Garcia Zarate of any homicide charges.⁶⁸ But by that time, more than two years had gone by, and the political capital Steinle's death offered the Trump campaign had already been extracted.⁶⁹

C. Failed Legislative Attempts at Sanctuary Defunding

While Trump took aim at sanctuary cities on the campaign trail, Republicans in Congress, for their part, initiated a new round of legislative efforts to defund sanctuary jurisdictions. Much of the attack was based on a pre-existing statute, 8 U.S.C. § 1373, which had been enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁷⁰ Section 1373 prohibits

62. The detainer in Garcia Zarate's case requested "that the Sheriff's Department notify ICE forty-eight hours before releasing [Garcia Zarate] and continue to hold him until ICE could take custody of him." Steinle, 230 F. Supp. 3d at 1004. See also Jennie Pasquarella & Kate Desormeau, *What Went Wrong With the Case of Francisco Lopez-Sanchez*, ACLU (Jul. 14, 2015, 4:00 PM), <https://www.aclu.org/blog/speak-freely/what-went-wrong-case-francisco-lopez-sanchez>.

63. Steinle, 230 F. Supp. 3d at 1003-04 (discussing March 13, 2015 memorandum issued by Sheriff Mirkarimi).

64. *Id.* at 1004.

65. See generally Lasch, *Sanctuary Cities*, *supra* note 35, at 173-75.

66. E.g., August 31 Speech, *supra* note 61 ("We will end the sanctuary cities that have resulted in so many needless deaths."). The White House website states "President Trump is committed to . . . ending sanctuary cities . . .". *Standing Up for Our Law Enforcement Community*, THE WHITE HOUSE, <https://www.whitehouse.gov/law-enforcement-community> (last visited Jun. 30, 2017).

67. Donald J. Trump, *Donald Trump's Contract with the American Voter* (Oct. 23 2016), https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf.

68. Holly Yan and Dan Simon, *Undocumented Immigrant Acquitted in Kate Steinle Death*, CNN.com (Dec. 1, 2017), <http://www.cnn.com/2017/11/30/us/kate-steinle-murder-trial-verdict/index.html>.

69. See, e.g., Matt Stevens, Thomas Fuller and Caitlin Dickerson, *Trump Tweets "Build the Wall" After Immigrant Is Acquitted in Kathryn Steinle Case*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/us/kate-steinle-murder-trial.html>.

70. Section 1373 provides in relevant part: (a) In general[.] Notwithstanding any other

jurisdictions from limiting the exchange of information between government officials of a person's "citizenship or immigration status."⁷¹ Republican legislators claimed sanctuary policies violated this prohibition.

Given its narrow scope, Section 1373 was a curious weapon to wield against sanctuary jurisdictions.⁷² Section 1373 says nothing about whether governments can limit compliance with detention requests or requests for notification of inmate release dates made via immigration detainers, both of which were central preoccupations of those seeking to defund sanctuary cities.⁷³

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. (b) Additional authority of government entities[.] Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual: (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service. (2) Maintaining such information. (3) Exchanging such information with any other Federal, State, or local government entity. 8 U.S.C. § 1373(a)-(b), Pub. L. 104-208, 110 Stat. 3009 § 642 (Sept. 30, 1996). 8 U.S.C. § 1644, enacted earlier that year, has nearly identical language. Pub. L. 104-193, 110 Stat. 2105 § 434 (Aug. 22, 1996).

71. *Id.*

72. The attempt to shoehorn the legal allegations against current sanctuary policies into Section 1373's prohibition may be a product of the current congressional gridlock. See generally Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (describing a phenomenon whereby administrative agencies are forced to "fit" old statutes to new problems due to congressional inability to pass new legislation). Section 1373 was enacted in 1996 at a time long predating Secure Communities and the rise of the controversy surrounding immigration detainers.

73. See *Commerce, Justice, Science, and Related Agencies Appropriations for 2017: Hearings Before a Subcomm. on Commerce, Justice, Sci., and Related Agencies of the Comm. on Appropriations*, 114th Cong. 23 (2017), <https://www.gpo.gov/fdsys/pkg/CHRG-114hrg20680/html/CHRG-114hrg20680.htm> [hereinafter *Appropriations for 2017*] (in which Rep. Culberson rails against sanctuary cities that "refuse to honor a detainer," "will not release" inmates to federal immigration officials or "refuses to share information"); see also Christopher N. Lasch, *The Political Attorney General*, JURIST (Apr. 15, 2017, 9:58 PM), <http://www.jurist.org/forum/2017/04/the-political-attorney-general.php> [hereinafter Lasch, *The Political Attorney General*] (arguing that the Trump Administration's citation to 8 U.S.C. § 1373 without evidence of violations of the statute masks an "obsession with declined detainers"); Michelle Ye See Lee, *Fact Checker: The White Houses's Claim that 'Sanctuary' Cities are Violating the Law*, WASH. POST (Apr. 28, 2017) (noting that "there is a difference between cities that clearly limit information-sharing on immigration and citizenship with the federal government (which Section 1373 is about) and cities that do not comply with immigration detainers (which Section 1373 is not about). The White House lumps both types of cities into one statement[.]"); Steinle, 230 F. Supp. 3d at 1015 (holding that "no plausible reading" of Section 1373 would encompass requests for notification of inmate release dates made via detainers). It is unknown how many "sanctuary" policies actually restrict disclosure of immigration status information. See Eagly, *Immigrant*

Nevertheless, just over a week after Steinle's death, Rep. Duncan Hunter (R-CA) introduced legislation⁷⁴ that sought to strip jurisdictions violating Section 1373⁷⁵ of funding under two federal programs—the Edward Byrne Memorial Justice Assistance Grant (JAG) program (also known as the Byrne JAG grant program) and the Community Oriented Policing Services (COPS) program.⁷⁶ The JAG program, described in more detail in Part IV,⁷⁷ is a leading source of federal law enforcement and criminal justice funding to state and local jurisdictions.⁷⁸ Created in 1988 by the Anti-Drug Abuse Act,⁷⁹ it was later combined with the Local Government Law Enforcement Block Grant program in 2006.⁸⁰ Funds are distributed to grantees according to a formula based in large part upon each state's population and share of violent crime reports.⁸¹ They may be used for a variety of criminal justice-related functions, including policing.⁸² The COPS program, also discussed below,⁸³ was

Protective Policies, *supra* note 30, at 257 (reporting, in a study of sixteen police departments in four large California counties, that “none of the police departments studied have a “don't tell” policy that prohibits local officers from reporting individuals to immigration authorities”). Many jurisdictions have instead adopted “don't ask” policies which prevent them from even obtaining the information addressed by Section 1373, or “don't enforce” policies which prevent them from making immigration arrests, including detaining a prisoner otherwise entitled to release. *Id.* at 256-57. Other jurisdictions have enacted generalized confidentiality provisions following the Second Circuit's suggestion that Section 1373 might be an unconstitutional intrusion on state sovereignty if applied to “generalized confidentiality policies that are necessary to the performance of legitimate municipal functions.” *City of New York v. United States*, 179 F.3d 29, 36-37 (2d Cir. 1999) and have enacted such generalized confidentiality provisions. *See Hartford Municipal Code* ch. 2, art. XXI, *supra* note 33.

74. H.R. 3009, 114th Cong., (2015), <https://www.congress.gov/114/bills/hr3009/BILLS-114hr3009ih.pdf> (“Enforce the Law for Sanctuary Cities Act.”).

75. Jurisdictions punishable under the proposed legislation also included those prohibiting local officials “from gathering information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” *Id.*

76. These programs are discussed in more depth below. *See* Sections III.A.2; IV.B.1 (addressing JAG funding); and IV.B.3 (addressing COPS funding).

77. *See infra* Part IV.B.1.

78. *Edward Byrne Memorial Justice Assistance Grant Program*, OFFICE OF JUSTICE PROGRAMS, <https://www.bja.gov/jag/> (last visited November 21, 2017).

79. Anti-Drug Abuse Act of 1988, H.R. 5210, Pub. L. No. 100-690, § 6091, 102 Stat. 4181 (1988). The program was named after a New York Police Department (NYPD) officer who was shot and killed by gunmen while on detail protecting a witness who had agreed to testify in a drug case. An earlier version of the program was created as part of the Anti-Drug Abuse Act of 1986. Anti-Drug Abuse Act of 1986, H.R. 5484, Pub. L. No. 99-570, § 1302, 100 Stat. 3207 (1986).

80. Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, Pub. L. No. 109-162, § 1111, 119 Stat. 2960 (2006).

81. *Edward Byrne Memorial Justice Assistance Grant (JAG) Program Fact Sheet*, BUREAU OF JUSTICE ASSISTANCE (updated Apr. 26, 2017), <https://www.bja.gov/programs/JAG-Fact-Sheet.pdf>.

82. *See* 34 U.S.C. § 10152(a)(1) (formerly 42 U.S.C. § 3751(a)(1)).

83. *See infra* Part IV.B.3.

created by the Violent Crime Control and Law Enforcement Act of 1994.⁸⁴ Billed as a program to promote community policing efforts, funds have largely been used to put more “cops on the beat.”⁸⁵ Today, the program has initiatives related to officer hiring (CHP), community policing developments (CDP), anti-methamphetamine efforts (CAMP), anti-heroin task force operations (AHTF), preparation for active shooter situations (PASS) and coordinated tribal assistance (CTAS).⁸⁶

In total, no less than eight additional pieces of legislation were introduced in 2015 and 2016 seeking to condition funding on compliance with Section 1373.⁸⁷ None of them were successful. Then-Senator Jefferson Sessions, who would soon become President Trump’s Attorney General, also joined in. Sessions was among the legislators who had introduced anti-sanctuary legislation as long ago as 2005.⁸⁸ His proposed 2015 legislation would have expanded the scope of Section 1373 and withheld law enforcement and DHS grants from noncompliant jurisdictions.⁸⁹ It would also have withheld funding from jurisdictions that did not comply with immigration detainers.⁹⁰

D. Sanctuary Defunding Pursued as Part of the Federal Budgeting Process

Meanwhile, Congressman John Culberson from Texas, likewise

84. Violent Crime Control and Law Enforcement Act, H.R. 3355, Pub. L. 103-322, § 10003, 108 Stat. 1796 (1994) [hereinafter H.R. 3355].

85. See *infra* note 321 and accompanying text. Funds go directly to localities, not states. Amdur, *The Right of Refusal*, *supra* note 35, at 141.

86. Comm’ty Oriented Policing Services, *Funding Opportunities*, U.S. DEP’T OF JUSTICE (2017) <https://cops.usdoj.gov/Default.asp?Item=65>.

87. E.g., H.R. 3002, 114th Cong. (2015) (“Mobilizing Against Sanctuary Cities Act”); H.R. 3073, 114th Cong. (2015) (“Sanctuary City All Funding Elimination Act of 2015”); S. 1814, 114th Cong. (2015) (“Stop Sanctuary Cities Act”); H.R. 3437, 114th Cong. (2015) (“Protecting American Lives Act”); S. 2146, 114th Cong. (2015) (“Stop Sanctuary Policies and Protect Americans Act”); S. 3100, 114th Cong. (2016) (“Stop Dangerous Sanctuary Cities Act”); H.R. 5654, 114th Cong. (2016) (“Stop Dangerous Sanctuary Cities Act”); H.R. 6252, 114th Cong. (2016) (“Ending Sanctuary Cities Act of 2016”).

88. S. 1362, 114th Cong. § 4 (2005) (“Homeland Security Enhancement Act of 2005”) (attempting to expand the coverage of 8 U.S.C. § 1644 and 8 U.S.C. § 1373 to include a prohibition on policies “that prohibit a law enforcement officer . . . from enforcing Federal immigration laws or from assisting or cooperating with Federal immigration law enforcement in the course of carrying out the law enforcement duties of the officer”). When the topic of JAG funding reauthorization came up in 2005, Representative Tom Tancredo also introduced an amendment attempting to tie receipt of JAG funding to compliance with 8 U.S.C. § 1373. 151 Cong. Rec. H4580-02 (daily ed. June 16, 2005) (statement of Rep. Tancredo). The amendment failed after strong opposition from other representatives who argued that adding immigration enforcement to the responsibilities of local police would undermine community trust. *Id.* (statements of Reps. Mollohan and Serrano).

89. S. 1842, 114th Cong. (2015) (“Protecting American Lives Act”).

90. *Id.*

determined to make political hay out of Kate Steinle's death, opted for a different strategy by calling for the Executive Branch to impose funding conditions by interpretive fiat. In his capacity as chair of a subcommittee of the House Committee on Appropriations, Culberson raised the sanctuary city issue during the review of the DOJ's proposed budget.⁹¹

Culberson, like other legislators, premised his attack on sanctuary cities on 8 U.S.C. § 1373. He began by penning a letter to then-Attorney General Loretta Lynch communicating his expectation and hope that the Attorney General would "enforce Section 1373 . . . in the course of the upcoming 2016 grant application process."⁹² Culberson specifically urged the Attorney General to require jurisdictions to certify compliance with Section 1373 when applying for three Justice Department grant programs: the JAG and COPS programs discussed above, and the State Criminal Alien Assistance Program (SCAAP).⁹³ SCAAP, discussed in greater depth later in this article,⁹⁴ is a program that allows localities to seek reimbursement for the cost of incarcerating "undocumented criminal aliens."⁹⁵ Culberson's argument was based on the notion that Section 1373 is "an applicable Federal law" that JAG funding recipients must adhere to,⁹⁶ and that it is "self-evident" that COPS and SCAAP funding should similarly be conditioned on compliance with Section 1373.⁹⁷

While the Justice Department was initially noncommittal as to whether compliance with Section 1373 was a requirement for funding,⁹⁸ Culberson persisted in his plan. At a subcommittee hearing,

91. See Press Release, Culberson Pledges to Use Power of the Purse to Pressure Department of Justice to Block Federal Law Enforcement Grants to Sanctuary Cities, U.S. Congressman John Culberson (Feb. 1, 2016), <https://culberson.house.gov/news/documentsingle.aspx?DocumentID=398387>.

92. Letter from John A. Culberson, Chairman of Subcomm. on Commerce, Justice and Related Agencies to Loretta E. Lynch, Att'y Gen., CONG. OF THE U.S. (February 1, 2016) [hereinafter Culberson Letter], https://culberson.house.gov/uploadedfiles/culberson_letter_to_attorney_general_lynch.pdf.

93. *Id.*

94. See *infra* Part IV.B.2.

95. *Id.* BUREAU OF JUSTICE ASSISTANCE, STATE CRIM. ALIEN ASSISTANCE PROGRAM (2016), https://www.bja.gov/Funding/16SCAAP_Guidelines.pdf [hereinafter SCAAP GUIDELINES].

96. We discuss this assertion more fully in Part III.B, *infra*.

97. Culberson Letter, *supra* note 92. With respect to SCAAP funding, Culberson stated his view that it was "nonsensical" for a jurisdiction to receive federal compensation for incarcerating "criminal aliens" while prohibiting the sharing of "immigration related information" with the Department of Homeland Security. *Id.*

98. The Justice Department responded to Culberson's February 2016 letter by acknowledging that "[a] statutory requirement of the Byrne JAG program is for applicants to certify that they are in compliance with 'applicable federal laws,'" and also acknowledging

Culberson channeled the Trump campaign rhetoric, invoking the Steinle death and claiming that sanctuary policies like San Francisco's had "resulted in the murder of untold thousands of individuals."⁹⁹ Attorney General Lynch, when pressed to commit to defunding sanctuary cities, demurred, testifying that funding conditions must be "tied to the applicable law. . . . [There] has to be a connection between the issue and the grant."¹⁰⁰ However, the Attorney General noted that "if we receive a credible allegation that a grantee has violated a specific applicable federal law, we will make that referral."¹⁰¹ Seizing on this, Culberson immediately offered to provide the Justice Department with a "list of those jurisdictions that do have policies where they will not share information with Federal authorities" so that the Justice Department could "begin an audit process[.]" Before the hearing concluded, Attorney General Lynch had committed to reporting back on this audit on a quarterly basis.¹⁰²

In April 2016, the Justice Department's Office of Justice Programs (OJP), which administers the JAG and SCAAP programs, among others, referred a list of jurisdictions potentially violating Section 1373 to the Office of the Inspector General (OIG) for investigation.¹⁰³ At the end of May, the OIG concluded its

that JAG, COPS and SCAAP funding recipients were all required to certify compliance with "applicable Federal laws" as a matter of practice. Letter from Peter J. Kadzik, Ass't Att'y Gen., to John Culberson, Chairman of Subcomm. on Commerce, Justice and Related Agencies, U.S. DEP'T OF JUSTICE (February 23, 2016) [hereinafter Kadzik Letter], https://culberson.house.gov/uploadedfiles/doj_february_23_letter.pdf. The Justice Department's response to Culberson was silent, however—as was Attorney General Lynch's testimony before Culberson's committee the next day—as to whether 8 U.S.C. § 1373 was deemed an "applicable Federal law" for purposes of these grants. *Id.*; see also *Chairman Culberson Holds Hearing for the Commerce, Justice, Sci. Subcomm.*, YOUTUBE (Feb. 24, 2016), <https://www.youtube.com/watch?v=Pd4jDpTiAp0&feature=youtu.be>.

99. See *Appropriations for 2017*, *supra* note 73 (statement of John Abney Culberson).

100. *Id.*

101. *Id.*

102. *Id.* Two days after Lynch's testimony, Culberson pressed the Attorney General on her commitment "to ensure that entities receiving Department of Justice Grants comply with applicable Federal law," sending a follow up letter accompanied by a list of "sanctuary cities" compiled by the restrictionist Center for Immigration Studies. Letter from John Culberson, Chairman of Subcomm. On Commerce, Justice and Related Agencies to Loretta E. Lynch, Att'y Gen., CONG. OF THE U.S. (February 26, 2016), https://culberson.house.gov/uploadedfiles/doj_and_culberson_correspondence_after_hearing.pdf.

103. Memorandum from Michael E. Horowitz, Inspector Gen. on Dep't of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients to Karol V. Mason, Ass't Att'y Gen. for the Off. of Justice Program (May 31, 2016) [hereinafter May 2016 OIG Report], <https://oig.justice.gov/reports/2016/1607.pdf> (stating its investigation was "in response" to an April 8, 2016 email from the Assistant Attorney General for OJP).

investigation.¹⁰⁴ While the OIG report raised concerns that some local policies might be inconsistent with Section 1373,¹⁰⁵ it did not reach a conclusion as to whether any of the ten jurisdictions examined was in violation of the statute.¹⁰⁶ The OIG concluded the report by urging the Justice Department to clearly communicate to JAG and SCAAP funding recipients whether Section 1373 was an “‘applicable federal law’ with which recipients would be expected to comply.”¹⁰⁷ OJP subsequently issued guidance in July 2016¹⁰⁸ and again in October 2016¹⁰⁹ explaining that compliance with Section 1373 would be required and that submission of general assurances when applying for these programs would be treated as a certification of such compliance. The 2016 application materials for the COPS program also indicated that compliance with Section 1373 would be required,¹¹⁰ though there was no broader public announcement of such.

Culberson declared victory, and citing the Steinle case, claimed the “violence and suffering” caused by sanctuary policies as “completely preventable.”¹¹¹ He touted the change as one that would “save lives and alleviate untold suffering.”¹¹²

104. *Id.*

105. *E.g., id.* at 8 (opining that policies on compliance with immigration detainers “may” be applied so as to be inconsistent with § 1373). The validity of such concerns is beyond the scope of this article. For a short summary, see Letter from Christopher N. Lasch, Ass’t Professor et al., to Bob Goodlatte, Chairman, Comm. on the Judiciary and to Zoe Lofgren, Ranking Member, Subcomm. on Immigr. and Border Sec’y at 3 (Sept. 26, 2016), <http://docs.house.gov/meetings/JU/JU01/20160927/105392/HHRG-114-JU01-20160927-SD003.pdf> (describing the OIG report as presenting an “unjustifiably sweeping view of the reach of Section 1373 that ignores substantial legal issues . . .”).

106. May 2016 OIG Report, *supra* note 103, at 8 n.12.

107. *Id.* at 9.

108. See Kadzik Letter, *supra* note 98.

109. OFFICE OF JUSTICE PROGRAMS, ADDITIONAL GUIDANCE ON COMPLIANCE WITH 8 U.S.C. § 1373 (October 6, 2016), <https://www.bja.gov/funding/Additional-BJA-Guidance-on-Section-1373-October-6-2016.pdf> [hereinafter ADDITIONAL GUIDANCE].

110. See, e.g., U.S. DEP’T OF JUSTICE, COPS OFFICE FY 2016 APPLICATION GUIDE: COPS HIRING PROGRAM 2 (2016), <https://cops.usdoj.gov/pdf/2016AwardDocs/chp/AppGuide.pdf>.

111. *Culberson Cuts Off Federal Grant Funding to Sanctuary Cities*, U.S. CONGRESSMAN JOHN CULBERSON (Jul. 7, 2016), <https://culberson.house.gov/news/documentsingle.aspx?DocumentID=398522>.

112. *Culberson’s Statement on Department of Justice Inspector General’s Report on Sanctuary Cities*, U.S. CONGRESSMAN JOHN CULBERSON (Jul. 29, 2016), <https://culberson.house.gov/news/documentsingle.aspx?DocumentID=398535>. Others have been more sanguine in assessing whether Culberson’s crusade accomplished what he claimed. See, e.g., <http://www.houstonchronicle.com/news/houston-texas/houston/article/Did-Culberson-misfire-when-he-took-a-shot-at-11011942.php>.

E. Sanctuary Defunding under the Trump Presidency

The election of Trump to the presidency in November 2016 revived hopes of a broad-scale defunding of sanctuary jurisdictions.¹¹³ And indeed, on January 25, 2017, less than one week into the Trump presidency, Trump signed an Executive Order directing that:

the Attorney General and the [DHS] Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.¹¹⁴

Consistent with his campaign rhetoric, the President's Executive Order painted those who had violated federal immigration laws as "a significant threat to national security and public safety" and claimed that sanctuary policies "have caused immeasurable harm to the American people and to the very fabric of our Republic."¹¹⁵ The Executive Order did not make any attempt to limit the types of grants that could be affected.¹¹⁶

The day after the Executive Order, Miami-Dade County in Florida capitulated, with its mayor directing the corrections department, "[i]n light of the provisions of the Executive Order . . . to honor all immigration detainer requests received from the Department of Homeland Security."¹¹⁷ Elsewhere, however, litigation followed. By the end of March 2017, five lawsuits had been filed challenging the Executive Order.¹¹⁸ The County of Santa Clara and the City and

113. See *supra* notes 66-67 and accompanying text.

114. Exec. Order No. 13,768, 82 Fed. Reg. 8799 at § 9(a) (Jan. 25, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf> [hereinafter Exec. Order No. 13,768].

115. *Id.* § 1. The President also ordered the DHS Secretary to publish a weekly list of criminal offenses committed by noncitizens, in order to better "inform" the public "regarding the public safety threats associated with sanctuary jurisdictions." *Id.* § 9(b).

116. *Id.* § 9(a).

117. Patricia Mazzei, *Miami-Dade Mayor Orders Jails to Comply with Trump Crackdown on 'Sanctuary' Counties*, MIAMI HERALD (Jan. 26, 2017, 5:25 PM), <http://www.miamiherald.com/news/local/community/miami-dade/article128984759.html>. See also Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. 243, 267 (2017) [hereinafter Chacón, *Immigration and the Bully Pulpit*] (observing that some jurisdictions scaled back or were more hesitant about enacting immigrant-protective measures in the face of the Administration's threats).

118. *City and County of San Francisco v. Donald J. Trump*, No. 3:17-cv-00485 (N.D. Cal. Jan. 31, 2017); *County of Santa Clara v. Donald J. Trump*, No. 5:17-cv-00574 (N.D. Cal. Feb. 3, 2017); *City of Chelsea & City of Lawrence v. Donald J. Trump*, No. 1:17-cv-

County of San Francisco, two California jurisdictions potentially affected by the threatened funding cuts, had filed motions seeking a preliminary injunction against the Executive Order, arguing the Executive Order was creating havoc in their budgeting processes.¹¹⁹

On April 14, 2017, a federal court heard arguments on the preliminary injunction motions filed by Santa Clara and San Francisco.¹²⁰ When the DOJ lawyer defending the Administration took the podium, he took the position, contrary to the text of the Executive Order, that the President's action should be read to only impact DOJ and Department of Homeland Security (DHS) grant funds, and most immediately, only the "three specific DOJ grants"—JAG, SCAAP and COPS—that he claimed already required compliance with Section 1373.¹²¹ The Executive Order, he asserted, was simply a "use of the bully pulpit" meant to "highlight issues" and to "encourage different communities, states, to comply with certain laws and to engage in certain policy perspectives."¹²² Santa Clara and San Francisco objected, pointing out that "the President and now the Attorney General, ha[d] made absolutely plain . . . that [the Order] is a weapon to deprive jurisdictions of the money they need to operate. It's a weapon to cancel all funding to sanctuary cities."¹²³

10214 (D. Mass. Feb. 8, 2017); *City of Richmond v. Donald J. Trump*, No. 3:17-cv-01535 (N.D. Cal. Feb. 22, 2017); *City of Seattle v. Donald J. Trump*, No. 2:17-cv-00497 (W.D. Wash. March 29, 2017).

119. Motion for Preliminary Injunction at 23-24, County of Santa Clara, No. 17-cv-00574 (N.D. Cal. Feb. 3, 2017) [hereinafter Santa Clara PI Motion] (arguing "the Executive Order has created a cloud of financial uncertainty so overwhelming that it irreparably harms the County's ability to budget, govern and ultimately provide services to the residents it serves."); Notice of Motion and Motion for Prelim. Injunction, County of San Francisco, No. 3:17-cv-00485 (N.D. Cal. Mar. 8, 2017) [hereinafter San Francisco PI Motion].

120. San Francisco's case was related to Santa Clara's, and thus, both were heard by the Hon. William Orrick in the Northern District of California. Richmond's suit was also transferred to Judge Orrick, but it did not file a preliminary injunction until April. Notice of Motion and Motion for Prelim. Injunction, *City of Richmond*, No. 3:17-cv-01535 (N.D. Cal. Apr. 4, 2017) [hereinafter Richmond PI Motion]. After Judge Orrick issued a ruling on Santa Clara's and San Francisco's motions for a preliminary injunction, it denied Richmond's motion as moot. Order Denying Motion for Prelim. Injunction as Moot, *City of Richmond*, No. 3:17-cv-01535 (N.D. Cal. May 22, 2017).

121. Transcript of Proceedings, County of San Francisco, No. 3:17-cv-00485, 24, 35 (N.D. Cal. Apr. 14, 2017).

122. *Id.* at 25-28.

123. *Id.* at 9. These latter comments alluded to the President's Super Bowl interview with then-Fox-News-host Bill O'Reilly, wherein he stated: "I don't want to defund anybody. I want to give them the money they need to properly operate as a city or a state. . . . If they're going to have sanctuary cities, we may have to do that. Certainly that would be a weapon." Alexander Mallin & Lissette Rodriguez, *Trump Threatens Defunding Sanctuary States as Weapon*, ABC NEWS (Feb. 5, 2017, 6:01 PM), <http://abcnews.go.com/Politics/trump-threatens-defunding-sanctuary-states-weapon/story?id=45286642>.

On April 25, 2017, the court ruled.¹²⁴ It rejected the Administration's proffered interpretation of the Executive Order as applying only to JAG, SCAAP and COPS funding.¹²⁵ The court further found the Executive Order likely violated constitutional limitations on spending conditions and granted a nationwide preliminary injunction.¹²⁶ On September 18, 2017, the Administration filed a notice appealing the preliminary injunction to the Ninth Circuit Court of Appeals.¹²⁷ And on November 21, 2017, the court granted Santa Clara and San Francisco's motions for summary judgment and entered an order permanently enjoining Section 9(a) of the Executive Order.¹²⁸

Meanwhile, however, the Administration, claiming pre-Executive Order authority to do so, moved forward with punishing jurisdictions it believed to be non-cooperative on immigration enforcement, focusing on JAG and COPS funding. Just one week after the preliminary injunction hearing in the Santa Clara and San Francisco cases, the Justice Department sent letters to nine jurisdictions that received JAG funding for fiscal year 2016 asking for additional documentation to show compliance with Section 1373.¹²⁹ And in July 2017, the Attorney

124. Order granting the County of Santa Clara's and City and County of San Francisco's Motions to Enjoin Section 9(a) of Exec. Order 13768, County of Santa Clara, No. 17-cv-00574 (N.D. Cal. Apr. 25, 2017) [hereinafter PI Order Enjoining Exec. Order].

125. *Id.* at 14 ("With regards to the merits of the Government's construction, the Order is not readily susceptible to the Government's narrow interpretation. Indeed, '[t]o read [the Order] as the Government desires requires rewriting, not just reinterpretation.'") (internal citation omitted).

126. *Id.* at 49. Several weeks later, Attorney General Sessions, apparently still seeking to escape an injunction, issued a memorandum purporting to "interpret" the President's Executive Order to apply only to certain DOJ or DHS grants. Memorandum from U.S. Att'y Gen. Jeff Sessions to All Department Grant-Making Components on Implementation of Exec. Order 13768, 1-2 (May 22, 2017) [hereinafter May 22 Implementation Memo], <https://www.justice.gov/opa/press-release/file/968146/download>. The same day, the federal defendants filed a motion asking the court to reconsider the preliminary injunction in light of the memorandum. Defendants' Notice of Motion and Motion for Reconsideration, County of Santa Clara, No. 17-cv-00574 (N.D. Cal. May 22, 2017) [hereinafter Santa Clara/S.F. Motion for Reconsideration], <http://www.politico.com/f/?id=0000015c-3320-d24c-a7fc-7bb89d4a0002>. The Motion for Reconsideration was eventually denied. Order Denying the Gov't's Motions for Reconsideration and to Dismiss with Regards to the City and County of San Francisco and the County of Santa Clara, County of Santa Clara, No. 17-cv-00574 (N.D. Cal. Jul. 20, 2017) [hereinafter Santa Clara/S.F. Order Denying Reconsideration].

127. Defendants' Notice of Appeal, County of Santa Clara, No. 17-cv-00574 (N.D. Cal. Sept. 18, 2017).

128. Order Granting Motion for Summary Judgment, County of Santa Clara, No. 17-cv-00574 (N.D. Cal. Nov. 21, 2017) [hereinafter Santa Clara/S.F. Summary Judgment Order].

129. *E.g.*, Letter from Alan R. Hanson, Acting Ass't Att'y Gen., Off. of Justice Programs to Kathleen Howard, Exec. Dir., Cal. Bd. of St. and Community Corrections at 1 (April 21, 2017), <http://documents.latimes.com/justice-departments-letter-states-sanctuary-cities/>; *see also* Joseph Tanfani, Justice Department Warns Sanctuary Cities in California, 8 Other Jurisdictions to Cooperate with Immigr. Enforcement, L.A. TIMES (Apr. 21, 2017, 8:43 AM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates->

General issued a statement that the JAG program would, going forward, require that jurisdictions receiving funding not only certify compliance with Section 1373, but also “allow federal immigration [authorities] access to detention facilities[] and provide 48 hours notice before they release an [undocumented immigrant] wanted by federal authorities.”¹³⁰

Jurisdictions soon filed suit challenging the Attorney General’s three conditions on the JAG program announced in July. The City of Chicago was first, followed by San Francisco, the State of California, and the City of Philadelphia.¹³¹ On September 15, 2017, a federal court in Chicago enjoined the Attorney General’s new access and notice conditions on a nationwide basis.¹³² But the court did not enjoin the

justice-formally-wans-sanctuary-1492788670-htmlstory.html. The jurisdictions have since responded. *See, e.g.*, Memorandum from Edward Siskel, Corp. Counsel, Dep’t of L. in the City of Chicago to Tracey Trautman, Acting Dir., Bur. of Justice Assistance, Off. of Justice Programs, U.S. Dep’t of Justice on Validation of Compliance with 8 U.S.C. § 1373 at 1 n.1, CITY OF CHICAGO (June 30, 2017), https://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2017/August/080717_ExAComplaint.PDF; Press Release No. 17-736, Department of Justice Reviewing Letters from Ten Potential Sanctuary Jurisdictions, U.S. Dep’t of Justice (Jul. 6, 2017), <https://www.justice.gov/opa/pr/department-justice-reviewing-letters-ten-potential-sanctuary-jurisdictions>.

130. Press Release No. 17-826, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs, U.S. Dep’t of Justice (Jul. 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial>. The addition of these “new conditions,” particularly the second and third (which are not found in any federal law), raises similar separation-of-powers concerns as those that resulted in the preliminary injunction against the President’s Executive Order. *See* PI Order Enjoining Exec. Order, *supra* note 124, at 36-37 (“Section 9 purports to give the Attorney General and the Secretary the power to place a new condition on federal funds (compliance with Section 1373) not provided for by Congress. But the President does not have the power to place conditions on federal funds and so cannot delegate this power.”). Attorney General Sessions has also announced that participants in the “Public Safety Partnership” (PSP) program—described as a “training and technical assistance program” funded by JAG “designed to enhance the capacity of local jurisdictions to address violent crime in their communities”—would be required to “show a commitment to reducing crime stemming from illegal immigration.” Press Release No. 17-868, Justice Dep’t Announces that Commitment to Reducing Violent Crime Stemming from Illegal Immigr. will be Required for Partic’n in Public Safety Partnership Program, U.S. Dep’t of Justice (Aug. 3, 2017), <https://www.justice.gov/opa/pr/justice-department-announces-commitment-reducing-violent-crime-stemming-illegal-immigration>.

131. *City of Chicago v. Jefferson Beauregard Sessions III*, No. 1:17-cv-05720 (N.D. Ill. filed Aug. 7, 2017); *City and County of San Francisco v. Jefferson B. Sessions III, et al.*, No. 3:17-cv-04642 (N.D. Cal. filed Aug. 11, 2017); *State of California ex rel. Xavier Becerra v. Jefferson B. Sessions, et al.*, No. 3:17-cv-04701 (N.D. Cal. filed Aug. 14, 2017); *City of Philadelphia v. Jefferson Beauregard Sessions III*, No. 2:17-cv-03894 (E. D. Pa. filed Aug. 30, 2017).

132. Memorandum Opinion and Order, *City of Chicago*, No. 1:17-cv-05720 (N.D. Ill. Sep. 15, 2017) [hereinafter *Chicago Order*]. The Justice Department filed appeal papers on September 26, 2017. Notice of Appeal, *City of Chicago*, No. 1:17-cv-05720 (N.D. Ill. Sep. 26, 2017). The Justice Department’s motion to stay nationwide application of the injunction

requirement of compliance with Section 1373, and in October 2017, the Justice Department sent letters to five jurisdictions—Chicago, Cook County (Illinois), New Orleans, New York City, and Philadelphia—indicating that it had preliminarily found them “to have laws, policies, or practices that may violate [Section 1373].”¹³³ The letters demonstrated the Justice Department’s sweeping view of Section 1373’s reach, contrary to its plain text.¹³⁴

On November 15, 2017, a federal court in Philadelphia then enjoined the Attorney General from denying Philadelphia JAG funding based on its certification of compliance with Section 1373.¹³⁵ The court’s injunction was limited to Philadelphia,¹³⁶ but the reasoning supporting the decision is likely to inform other challenges pending against the Attorney General’s conditions on JAG funding.¹³⁷

With regard to COPS funding, the Justice Department inserted

was rejected. Memorandum and Order, City of Chicago, No. 1:17-cv-05720 (N.D. Ill. Oct. 13, 2017).

133. Press Release No. 17-1140, Justice Department Provides Last Chance for Cities to Show 1373 Compliance, U.S. Dep’t of Justice (Oct. 12, 2017), <https://www.justice.gov/opa/pr/justice-department-provides-last-chance-cities-show-1373-compliance>.

134. For example, the Department’s understanding of Section 1373 as preventing jurisdictions from establishing policies limiting notification of inmate release dates, e.g., Letter from Alan Hanson, Acting Asst. Atty. Gen’l, to Jim Kenney, Mayor, City of Philadelphia (Oct. 11, 2017), <https://www.justice.gov/opa/press-release/file/1003046/download>, was criticized by the City of Philadelphia as “a startlingly expansive reading” of the statute and an “attempt to import” the notice condition that had been enjoined in the Chicago litigation “into Section 1373, through a reading that “[t]he text will not bear” Reply in Support of Motion for Preliminary Injunction, City of Philadelphia, No. 2:17-cv-03894 (E.D. Pa. Oct. 19, 2017).

135. Memorandum Re: Pending Motion for Preliminary Injunction, City of Philadelphia, No. 2:17-cv-03894 (E.D. Pa. Nov. 15, 2017) [hereinafter Philadelphia PI Memorandum]. The court also found Philadelphia to be substantially in compliance with Section 1373. *Id.* at 46.

136. Order, City of Philadelphia, No. 2:17-cv-03894 (E.D. Pa. Nov. 15, 2017).

137. For example, the State of California’s motion for preliminary injunction remains pending, Amended Motion for Preliminary Injunction, State of California, No. 3:17-cv-04701 (N.D. Cal. Nov. 7, 2017), as does the federal defendants’ motion for summary judgment in the San Francisco case, Motion for Summary Judgment, City and County of San Francisco, No. 3:17-cv-04642 (N.D. Cal. Oct. 31, 2017).

On the same day the Philadelphia decision was rendered, the Justice Department sent an additional 29 letters to jurisdictions—including the *states* of Illinois, Oregon, and Vermont—preliminarily finding them to be in violation of Section 1373. Press Release No. 17-1292, Justice Department Sends Letters to 29 Jurisdictions Regarding Their Compliance with 1373, U.S. Dep’t of Justice (Nov. 15, 2017), <https://www.justice.gov/opa/pr/justice-department-sends-letters-29-jurisdictions-regarding-their-compliance-8-usc-1373>. *E.g.* Letter from Alan Hanson, Acting Asst. Atty. Gen’l, to James Fitzpatrick, Chief of Police, City of Lawrence, Mass. (Nov. 15, 2017), <https://www.justice.gov/opa/press-release/file/1011571/download> (expressing concern that provision prohibiting responding to ICE requests for “individual’s incarceration status, length of detention, home address, work address, personal information, hearing information, or pending release” violates Section 1373(a) by “restrict[ing] the sending of information regarding immigration status”).

into application materials for 2017 COPS grants a requirement that jurisdictions specifically certify they are complying with Section 1373.¹³⁸ And in September, the Attorney General announced that those jurisdictions that “cooperate with federal law enforcement to address illegal immigration” would receive “additional points in the application scoring process” for funding in 2017.¹³⁹ This attempt to disadvantage jurisdictions with disentanglement policies is being challenged in a lawsuit filed by the City of Los Angeles.¹⁴⁰

The Administration thus appears to not be backing down on sanctuary defunding despite suffering some heavy losses in court. The President’s 2018 budget proposal, released in May, included sweeping revisions that would add detainer compliance to Section 1373.¹⁴¹ In the legislature, the House of Representatives recently passed the “No Sanctuary for Criminals Act,”¹⁴² a measure that proposes to expand the scope of Section 1373 to implicate more disentanglement policies¹⁴³ and explicitly tie receipt of DOJ or DHS grants to compliance with

138. The certification that must be completed and signed by a governing body’s chief legal officer. *See* U.S. DEP’T OF JUSTICE, COPS OFFICE FY 2017 APPLICATION GUIDE: COPS HIRING PROGRAM 2-3 (2017), https://cops.usdoj.gov/pdf/2017AwardDocs/chp/app_guide.pdf.

139. Press Release No. 17-976, Department of Justice Announces Priority Consideration Criteria for COPS Office Grants, U.S. Dep’t of Justice (Sep. 7, 2017), <https://www.justice.gov/opa/pr/departments-justice-announces-priority-consideration-criteria-cops-office-grants>; COPS Office: Immigration Cooperation Certification Process Background, <https://www.justice.gov/opa/press-release/file/995376/download>. Specifically, those jurisdictions that certify compliance with the very notice and access conditions that had been enjoined in the Chicago litigation. *Id.*

140. *City of Los Angeles v. Jefferson B. Sessions, III, et al.*, No. 2:17-cv-07215 (C.D. Cal. Sep. 29, 2017). The City’s motion for a preliminary injunction was withdrawn based on filings by the federal defendants indicating the COPS Office had “putatively determined that Los Angeles’ award application was unaffected by the inclusion of immigration-related considerations.” Notice of Withdrawal of Motion for Preliminary Injunction, *City of Los Angeles*, No. 2:17-cv-07215 (C.D. Cal. Oct. 16, 2017). However, the lawsuit remains pending.

141. Office of the President of the U.S., Office of Management and Budget, Budget of the U.S. Gov’t, Fiscal Year 2018, Apx at 544, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/appendix.pdf>. *See also* Thomas Homan, Acting Dir., Immigration & Customs Enf’t, Keynote Address at the Heritage Foundation: Enforcing U.S. Immigration Laws: A Top Priority for the Trump Administration, 1:01:25–1:02:50 (Oct. 17, 2017), <http://www.c-span.org/video/?435827-1/acting-ice-director-discusses-immigration-enforcement> (calling limitations on ICE access to local jails “un-American,” belittling social science data as “spin” in “op-eds,” and declaring sanctuary cities a “danger to public safety”).

142. H.R. 3003, 115th Cong., (2017), <https://www.congress.gov/115/bills/hr3003/BILLS-115hr3003rds.pdf> (“No Sanctuary for Criminals Act”).

143. *Id.* § 2(a)(2) (proposed 8 U.S.C. § 1373(b)(1)) (prohibiting “don’t ask” policies), § 2(a)(1) (proposed 8 U.S.C. § 1373(a)) (arguably prohibiting policies limiting detainer compliance).

Section 1373.¹⁴⁴ Whatever the outcome of these specific proposals, sanctuary defunding will likely continue to generate vigorous debate about the role of local criminal justice actors in immigration enforcement in the months and years to come.

II. “CRIMMIGRATION” AND ITS TEACHINGS

As can be seen from Part I, the clash over sanctuary defunding, in addition to being a power struggle between the federal and local governments, should also be understood as a fight about the appropriate relationship between immigration enforcement and criminal justice. For some time now, scholars, activists and commentators have expressed deep concern about a phenomenon that Juliet Stumpf dubbed a decade ago the “crimmigration crisis.”¹⁴⁵ One aspect of this crisis—and the aspect many initially focused on—is a trend that has been characterized as “criminalization of immigration” in the United States.¹⁴⁶ This term actually describes several distinct but related shifts that began in the 1980s, ranging from the dramatic expansion of criminal grounds of removal¹⁴⁷ to the increased use of criminal punishment to manage migration¹⁴⁸ to the adoption of methodologies associated with criminal law enforcement and the use of criminal justice actors to enforce civil immigration law.¹⁴⁹ Another

144. *Id.* § 2(a)(4) (proposed 8 U.S.C. § 1373(d)(1)(A)-(B)) (specifying JAG, COPS and SCAAP funding, but also affecting any other DOJ or DHS funds “substantially related to law enforcement, terrorism, national security, immigration, or naturalization”).

145. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U.L. REV. 367, 376-77, 379 (2006) [hereinafter Stumpf, *The Crimmigration Crisis*]. In her seminal piece, Stumpf discusses the increasing convergence of criminal and immigration law and later turns to membership theory to help explain why this trend is “both odd and oddly unremarkable.”

146. Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 616-617 (2003) [hereinafter Miller, *Citizenship & Severity*] (noting that the term “criminalization of immigration law” had been used by both practitioners and scholars).

147. *See, e.g., id.* at 631-39 (tracing the history of changes to immigration law); Jason Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 672 (2015) (observing that “[i]n the modern immigration code, criminal history has become a nearly irrevocable proxy for undesirability.”).

148. Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137-45 (2009) (identifying laws from the 1980s and 1990s that imposed criminal penalties for more and more acts associated with migration); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281-83 (2010) [hereinafter Eagly, *Prosecuting Immigration*] (describing growth in criminal prosecution of immigration-related offenses in the federal system); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1471-75 (2015) [hereinafter García Hernández, *Naturalizing Immigration Imprisonment*] (describing state uses of criminal lawmaking authority to prosecute immigration-related offenses).

149. Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior*

aspect of the crisis has been the “immigrationization of criminal law,”¹⁵⁰ or the interjection of the sometimes less rights-protective standards of immigration administration into the criminal sphere.¹⁵¹

Many sanctuary policies are an attempt to undo the entanglement of local criminal justice actors with federal immigration enforcement brought about by the crimmigration enforcement regime.¹⁵² The Trump Administration has made clear its intention to greatly expand deportations, and in order to do so, it has an interest in ensuring that the immigration and criminal justice systems remain firmly linked.¹⁵³ By conditioning funds earmarked for criminal law enforcement on abandonment of localities’ sanctuary policies, the Administration has an opportunity to further blur the line between immigration and crime control. Understanding this context is important, not only because it has implications for whether the conditioning of law enforcement grants on acquiescence to a federal immigration enforcement agenda should be deemed legally permissible, but because it establishes sanctuary defunding as another front on which the Administration’s broader attempts to frame immigration as a public safety threat can and ought to be challenged.

In this next Part, we survey the literature analyzing trends in “crimmigration”¹⁵⁴ and identify two critical approaches—which we call

Immigration Enforcement, 41 U.C. DAVIS L. REV. 1137, 1160–63 (2008) [hereinafter Kalhan, *The Fourth Amendment*] (describing the use of worksite raids, operations to apprehend so-called “absconders” and reliance on state and local law enforcement officials to enforce civil immigration law); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 489–498 (2007) [hereinafter Legomsky, *The New Path*] (illustrating the incorporation of criminal law enforcement norms into immigration law administration through preventive detention, plea-bargaining and the enlistment of state and local law enforcement actors without the concomitant incorporation of procedural protections associated with criminal adjudication).

150. Miller, *Citizenship & Severity*, *supra* note 146, at 618.

151. This dynamic has been observed when the criminal justice system is used to punish immigration-related offenses or to further immigration enforcement objectives, but the impacts can extend well beyond the immigration context. See Eagly, *Prosecuting Immigration*, *supra* note 148, at 1337–49 (analyzing how law enforcement has been motivated to draw on expanded civil powers rather than criminal powers in federal immigration prosecutions); Jennifer Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129 (2011) (warning that permissive approach to policing endorsed by the Supreme Court’s border enforcement jurisprudence was becoming a norm for some local law enforcement actors).

152. See *supra* notes 27–33, 37–47 and accompanying text.

153. *Supra* note 8 and accompanying text.

154. While useful shorthand, we note that there are also downsides to using this term. See, e.g., Jennifer M. Chacón, *Producing Legal Liminality*, 92 DENV. L. REV. 709, 744, 763–64 (2015) [hereinafter Chacón, *Producing Legal Liminality*] (noting that “crimmigration” can be potentially stigmatizing, as it “conjur[es] up the notion of a system designed to

“delineation” and “synthesis,” respectively—that can be applied to the issue of sanctuary defunding to generate new insights about how jurisdictions might respond to the Administration’s threats. Both of these approaches grow out of a recognition that the policy transformations we have seen over the past several decades at the intersection of immigration and criminal law have been made possible by the successful cultivation of a narrative about immigrant criminality that is empirically false, yet highly potent.

A. The Construction of Immigrant Criminality

In the 1980s and 1990s, political opportunists began to promote a myth of immigrant criminality that would soon drive policy debates at state and federal level.¹⁵⁵ As César Cuauhtémoc García Hernández explains, the “procedural and substantive law that comprises crimmigration law [] reimagined noncitizens as criminal deviants and security risks.”¹⁵⁶ Once the notion of immigrant criminality took hold, immigration enforcement came to be viewed as a proper focus of crime control efforts, and vice versa.¹⁵⁷ The two-way intermeshing of

manage a discrete class of [noncitizen] lawbreakers,” and also potentially limiting, as it obscures the way that “legal vulnerabilities produced by the interaction of civil and criminal legal mechanisms in heavily policed communities” can be experienced by noncitizens and citizens alike).

155. See, e.g., Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 637-642 (2015) [hereinafter Vázquez, *Constructing Crimmigration*] (locating the origins of the “criminal alien” label); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827, 1839-43 (2007) [hereinafter Chacón, *Unsecured Borders*] (describing how proponents of restrictionist policies in the 1990s managed to successfully entrench the notion that immigrants posed a criminal threat); Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1106, 1112 (2013) (citing BROOKINGS INST. 7 UNIV. OF S. CAL. ANNENBERG SCH. FOR COMM’N, DEMOCRACY IN THE AGE OF NEW MEDIA: A REPORT ON THE MEDIA AND THE IMMIGRATION DEBATE 13, 23–27 (2008)) (analyzing coverage of immigration since 1980 and concluding that it has “focused overwhelmingly” on crime and other illegality); see also S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1474-75 (2012) (discussing issue entrepreneurs and their use of the trope of immigrant criminality); Leisy Abrego et al., *Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era*, 5 J. ON MIGRATION & HUMAN SECURITY 694 (2017) (situating President Trump’s promise to deport 2 to 3 million “criminal aliens” in a longer history of the “production of criminality of immigrants”).

156. César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2013).

157. *Id.* at 1458-59 (noting that immigrants become “people to be feared, their risk assessed, and the threat they pose managed.”). An additional thread of scholarship has focused on the move to conceptually link immigration with national security. See, e.g., Chacón, *Unsecured Borders*, *supra* note 155 at 1832 (describing how national security rhetoric has led to distortions in immigration policy); Kevin R. Johnson, *September 11 and*

immigration and criminal law has led to an expansion of state power at the expense of individual freedoms¹⁵⁸ in profound, sometimes disturbingly arbitrary,¹⁵⁹ ways.

The process of criminalization is deeply dehumanizing; immigrants are reduced to the sum of their so-called transgressions and their existence deemed undesirable.¹⁶⁰ Since it has often been associated with Latinx identity, the trope of immigrant criminality has also furthered racial salience and exacerbated racial hierarchy.¹⁶¹ As is often the case, narratives that are peddled to promote a particular policy or viewpoint can take on a life of their own. Today we live in a world where the federal government operates a 34,000 daily bed quota for an immigration detention system that is only nominally “civil,”¹⁶² where prosecutors introduce un-Mirandized statements about manner of entry into criminal proceedings¹⁶³ and where, operating on a logic of “deterrence,” families with children fleeing violence in Central America are locked up as a matter of course¹⁶⁴ and the relatives of

Mexican Immigrants: Collateral Damage Comes Home, 52 DEPAUL L. REV. 849, 850–52 (2003). That move has justified further resort to harsh, sometimes militarized tactics in immigration enforcement and often works in concert with the re-imagining of immigrants as a criminal threat. See, e.g., TODD MILLER, *BORDER PATROL NATION: DISPATCHES FROM THE FRONTLINES OF HOMELAND SECURITY* (2014) (documenting the growing militarization of the U.S. Border Patrol since the September 11th terror attacks).

158. Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. L. REV. 879, 882-83 (2015) (summarizing literature discussing the vast power of the state when criminal lawmaking authority is joined with the plenary powers associated with immigration law).

159. See, e.g., Stephen Lee, *De Facto Immigration Courts*, 101 Cal. L. Rev. 553, 575-77 (2013) (discussing how the federal executive generally lacks mechanisms to oversee how local prosecutors exercise their discretion to effectuate convictions that can then serve as the basis for removability).

160. See Lai, *Confronting Proxy Criminalization*, *supra* note 158, at 894-96 (describing the harms of criminalization); Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 81 (1998) (“The process of criminalizing the immigrant and her dreams is multi-stepped. First the immigrant is labeled a problem through demonization, then she is dehumanized, until at last her actions or conditions are criminalized.”).

161. See generally Vázquez, *Constructing Crimmigration*, *supra* note 155; Lasch, *Sanctuary Cities*, *supra* note 35, at 163-64; but see BLACK ALLIANCE FOR JUST IMMIGRATION (BAJI) AND THE NEW YORK UNIVERSITY SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, *THE STATE OF BLACK IMMIGRANTS* (2016) (calling attention to the heightened risk of deportation on the basis of a criminal conviction and overall vulnerability of Black immigrants).

162. García Hernández, *Naturalizing Immigration Imprisonment*, *supra* note 148, at 1453-55 (explaining that large-scale immigration detention has become a “central feature” of the immigration system).

163. See Anjana Malhotra, *The Immigrant and Miranda*, 66 SMU L. REV. 277, 280-282 (2013) (describing how un-Mirandized immigration questioning has become routine in the criminal justice system); Eagly, *Prosecuting Immigration*, *supra* note 148, at 1308-12 (discussing examples from illegal entry and reentry prosecutions).

164. See, e.g., *ICE to open additional facility in South Texas to house adults with*

minor children who had little choice but to pay for them to be taken across the border are targeted for arrest.¹⁶⁵ As discussed in Part I, Trump and his Administration have shown no qualms about intensifying the public's association between migration and crime.¹⁶⁶

B. Delineation

The responses to the narrative of immigrant criminality and merger of immigration with crime control have been varied, but one important set of critiques—appearing in both scholarship and advocacy materials—has focused on attempting to deconstruct the paradigm of the “criminal alien,” for example, by using empirical studies,¹⁶⁷ narrative storytelling¹⁶⁸ or other methods to show that the alleged connection between migration and crime is a myth. Variations on this theme have included analyses that show crimmigration enforcement strategies are over-inclusive, affecting many people who pose no criminal threat to their communities,¹⁶⁹ or that they are misguided,

children, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Sept. 21, 2014), <http://www.ice.gov/news/releases/ice-open-additional-facility-south-texas-house-adults-children>; Rebecca Sharpless, *Cosmopolitan Democracy and the Detention of Immigrant Families*, 47 N.M.L. REV. 19, 19-22 (2017) [hereinafter Sharpless, *Cosmopolitan Democracy*].

165. See Garence Burke, *Feds Will Now Target Relatives Who Smuggled in Children*, ASSOCIATED PRESS (June 30, 2017), <https://apnews.com/291d565801984005886f5a22c800fee6>.

166. See *supra* notes 51-61 and accompanying text.

167. See, e.g., RUBÉN RUMBAUT & WALTER EWING, *THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION*, IMMIGR. POL'Y CTR. (2007); RUBÉN G. RUMBAUT ET AL., *DEBUNKING THE MYTH OF IMMIGRANT CRIMINALITY: IMPRISONMENT AMONG FIRST- AND SECOND-GENERATION YOUNG MEN*, MIGRATION POLICY INST. (2006). See also Kristen F. Butcher & Anne Morrison Piehl, *Why are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigr., Deterrence, and Deportation*, NAT'L BUREAU OF ECON. RESEARCH (July 2007), <http://www.nber.org/papers/w13229.pdf>.

168. See, e.g., Alma Campos, *Chicago Activists Start 'The Other Immigrant List' to County Trump's Crime List*, GOZAMOS (Feb. 7, 2017), <http://gozamos.com/2017/02/theotherimmigrantlist/>; see also Grace Yukich, *Constructing the Model Immigrant: Movement Strategy and Immigrant Deservingness in the New Sanctuary Movement*, SOCIAL PROBLEMS 60:302-20 (2013) (describing what she calls the “model movement strategy,” a practice of “lifting up ‘model’ members of a group to transform negative stereotypes associated with the group as a whole”).

169. See, e.g., MICHELE WASLIN, IMMIGR. POL'Y CTR., *THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS* 11 (updated November 2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Secure_Communities_112911_updated.pdf (reporting on the high numbers of individuals with no criminal record or minor criminal convictions deported under the Secure Communities program); Lasch, *The Political Attorney General*, *supra* note 73 (arguing that Trump administration's “policy positions [opposing sanctuary jurisdictions] . . . are contradicted by all available data. Study after study has shown that immigrants, regardless of status, commit crimes at lower rates than citizens.”).

branding people as deviants for conduct that is not deviant.¹⁷⁰

These “delineation” or “delineating” critiques serve a variety of purposes. For example, one might make such a critique in the hopes of reversing the dignity-stripping effects of the association of all immigrants with criminality.¹⁷¹ Another significant goal of some delineation critiques—particularly those focusing on the deeper, race-based logic of the “criminal alien” paradigm¹⁷²—is to restore equal treatment for immigrants or Latinos.¹⁷³ The critiques aim to undo some of the bias, including racial bias, that the specter of immigrant criminality introduces into policymaking.¹⁷⁴ Finally, those making delineation critiques often do so in order to advocate for a return to a system of migration control that is “civil” and “administrative” (rather than penal) in nature, or if that is not possible, to demand incorporation of some of the protections of legal regimes, such as the criminal system, that have been more overtly punitive.¹⁷⁵

Whatever their more specific purpose or form, delineation critiques focus as a general matter on the treatment of *immigrants* in the crimmigration regime—and other minority community members, to the extent they experience the harmful effects of immigrant stereotyping—and use that as the starting point for diagnosing maladies

170. Lai, *Confronting Proxy Criminalization*, *supra* note 158 (arguing that immigrants should not be criminally punished for activities “linked closely to their social and economic survival”).

171. Cf. Randall Kennedy, *Lifting as We Climb: A Progressive Defense of Respectability Politics*, HARPER’S MAGAZINE (Oct. 2015) [hereinafter Kennedy, *Lifting as We Climb*], <https://harpers.org/archive/2015/10/lifting-as-we-climb/2/> (arguing that “any marginalized group should be attentive to how it is perceived” and that while “[t]he politics of black respectability has not banished antiblack racism, [] it has improved the racial situation dramatically and has kept alive some black people who might otherwise be dead”).

172. See, e.g., Vázquez, *Constructing Crimmigration*, *supra* note 155 at 656 (observing that “[c]rimmigration was fashioned through race-neutral laws, policies and procedures, established through cultural values and supported through political choice, to create, maintain and perpetuate the unequal relationship between Latinos and dominant society.”).

173. See, e.g., Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481 (2015) (defending statewide sanctuary legislation as responsive to racial profiling engendered by the federal Secure Communities program).

174. RUMBAUT & EWING, *supra* note 167, at 14 (warning that the myth is “undermining the development of reasoned public responses to both immigration and crime.”).

175. See, e.g., Legomsky, *The New Path*, *supra* note 149, at 470 (calling for a “return to an immigration regime that accepts the civil regulatory model as its foundation”); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1405-13 (2014) (positing a different type of immigration detention system that is “truly civil” and treats “detention [a]s the exception”); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1332-50 (2011) (observing that *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), marked the beginning of the Supreme Court’s reconceptualization of deportation as neither truly civil nor truly criminal and proposing a framework for partial incorporation of some of the protections commonly associated with criminal proceedings).

and making proposals for reform.

C. *Synthesis*

A second approach in the crimmigration literature expands its gaze outward to those parts of the criminal justice system that are not related to immigration and examines the ways in which cultural and environmental factors driving practices in the crimmigration regime may animate the criminal system more broadly. These “synthesis” or “synthesizing” critiques are concerned less with trying to separate immigration from crime control and more with problematizing the impulses and governance strategies that appear to be endemic to both the immigration and criminal justice systems. The focus of these critiques is explicitly not limited to the treatment of immigrants.

In certain ways, synthesis critiques reflect an effort by social movement leaders to evolve beyond the respectability messaging that has become a mainstay of immigrant rights’ advocacy. In 2015, Mónica Novoa wrote on the website of the group Families for Freedom that “‘We’re not criminals!’” was “probably the most embarrassing, anti-criminal justice, anti-black mantra of the mainstream movement.”¹⁷⁶ Families for Freedom itself denounced President Obama’s announcement in November 2014 that his Administration intended to focus enforcement efforts on “felons, not families,”¹⁷⁷ as “insensitive and criminalizing language” that “denies both redemption and the context in which people of color are criminalized in the U.S.”¹⁷⁸ The year before, Marisa Franco, then with the National Day Laborer Organizing Network (NDLON), called on Latino and immigrant communities to connect their own struggle to that of African-Americans in Ferguson, Missouri.¹⁷⁹ More recently, however, scholars like Becky Sharpless have begun to pick up on these perspectives and bring them into academic legal writing. In a recent piece, Sharpless calls attention to the way in which narratives of the “overcriminalization” variety tend to evoke a contrast between some

176. Mónica Novoa, *Letter to the Movement: Inciting Love & Casting out Shame in 2015*, FAMILIES FOR FREEDOM (Jan. 15, 2015), <http://familiesforfreedom.org/news/letter-movement-inciting-love-casting-out-shame-2015-mónica-novoa>.

177. PRES. BARACK OBAMA, REMARKS BY THE PRESIDENT IN ADDRESS TO THE NATION ON IMMIGR. (Nov. 20, 2014, 8:01 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

178. *Executive Action and the Latest Felony Disenfranchisement*, FAMILIES FOR FREEDOM (Nov. 26, 2014), <http://familiesforfreedom.org/news/executive-action-and-latest-felony-disenfranchisement>.

179. Marisa Franco, *Latino Communities Must See Ferguson Fight As Their Own*, MSNBC (Aug. 20, 2014, 5:59 PM), <http://www.msnbc.com/569elissa-harris-perry/latino-communities-must-see-fergusons-fight-their-own>.

noncitizens (who deserve better treatment) and other noncitizens (who belong properly in the criminal category), or alternatively, between “innocent” noncitizens and a mixed group of “guilty” citizens and noncitizens, disproportionately Black and brown, who make up the more traditional population in the criminal justice system.¹⁸⁰ She argues for a more inclusive approach that identifies racial and class inequality as causes of hyperincarceration and proliferating social control in both the immigration and criminal justice systems.¹⁸¹

Scholar Angélica Cházaro has also argued for an examination of immigration policy “within the organic logic of the totality of [the] carceral state” in the United States.¹⁸² Analyzing the 2014 Executive Actions on immigration through the lens of net-widening—a lens commonly associated with critiques of criminal justice policy—she observes, among other things, that the prioritization of “criminal aliens” in immigration enforcement relies on the regular production of populations who can be labeled as such, a production that, consonant with the practices of the criminal justice system, frequently “occurs along lines of race, class and other vectors of social vulnerability.”¹⁸³ In another piece, Jennifer Chacón examines the proliferation of liminal legal statuses (such as Deferred Action for Childhood Arrivals) in the immigration sphere and calls attention to the fact that the experience of legal liminality is not limited to noncitizens granted reprieve from removal.¹⁸⁴ She suggests that a transsubstantive study of liminal legality in the immigration and criminal justice realms (and beyond) is necessary to identify the common legal structures and regulatory practices that control and punish diverse categories of individuals and “generate[] . . . social normalization of liminal legality.”¹⁸⁵

180. Rebecca Sharpless, *Immigrants Are Not Criminals: Respectability, Immigration Reform and Hyperincarceration*, 532 HOUS. L. REV. 691 (2016).

181. *Id.* at 692.

182. Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 659-60 (2016) [Cházaro, *Challenging the “Criminal Alien” Paradigm*] (citing Dylan Rodríguez, *I Would Wish Death on You . . . Race, Gender, and Immigr. In the Globality of the U.S. Prison Regime*, S&F ONLINE (2008) <http://sfonline.barnard.edu/immigration/drodriguez01.htm>).

183. *Id.* at 598-99. Cházaro further notes that the deployment of an innocence narrative for some immigrants has the effect of shoring up problems with the criminal justice system. *Id.* at 651-66.

184. Chacón, *Producing Legal Liminality*, *supra* note 154. Chacón describes liminal legal statuses as functioning simultaneously as a means of “effectuating administrative resource conservation” and as a form of “‘preservation through transformation,’ allowing governmental actors to reassert and maintain shifting forms of control over racialized and otherwise marginalized populations identified as risky in ways that do not trigger [. . .] rights-protective schemes[.]” *Id.* at 763.

185. *Id.* at 709-710.

The above writings suggest that a singular focus on trying to disrupt the management of migration using crime control strategies can cause scholars and advocates to miss important insights, for example, about how the treatment of immigrants in the crimmigration system is, contrary to conventional understandings, not so exceptional or unique. Indeed, when coining the term “crimmigration,” even Stumpf observed that immigration and criminal law share an ability to express and police the boundaries of membership.¹⁸⁶ While this formidable power can be used to affirm an expansive view of membership, welcoming newcomers (or those re-joining a community) into the fold, it can also be used to produce a narrow understanding of membership, by detecting, labeling and controlling an undesirable “other.”¹⁸⁷ Others undertaking “synthesis”-type critiques have sought to further illuminate the ways in which both the immigration and criminal justice systems have been used (sometimes in interconnected ways) to further agendas based on race,¹⁸⁸ labor¹⁸⁹ or profit.¹⁹⁰

186. Stumpf, *The Crimmigration Crisis*, *supra* note 145, at 379-81, 396-402 (observing that criminal and immigration law “are, at their core, [both] systems of inclusion and exclusion”).

187. *See id.* at 413-18 (discussing the costs of narrowing the scope of membership); *see also* Lai, *Confronting Proxy Criminalization*, *supra* note 158, at 898 (observing how low-level ordinances criminalizing homelessness, like the proxy criminalization of immigration, operate to “manage, control, and sometimes expel” poor people from a jurisdiction).

188. *See, e.g.*, Vázquez, *Constructing Crimmigration*, *supra* note 155, at 626-27; Kevin Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1000 (2016); Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064940. Lasch, *Rendition Resistance*, *supra* note 40 (grounding modern-day rendition resistance in the form of immigration detainee policies in the history of resistance to interstate rendition of fugitive slaves and newly freed slaves in pre-and post-Civil War America); Jorge Rivas, *Black Lives Matter is Joining the Fight Against Deportations—And It Could Be a Game Changer*, SPLINTER (Aug. 3, 2016, 6:10 PM), <http://fusion.kinja.com/black-lives-matter-is-joining-the-fight-against-deporta-1793860869>.

189. *See, e.g.*, DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 107 (Harvard University Press: 2007) (describing how immigrant laborers were often used as strikebreakers and as an alternative to hiring freed Black slaves in the South); Jennifer Rae Taylor, *Const'ly Unprotected: Prison Slavery, Felon Disenfranch't and the Crim. Exception to Citizenship Rights*, 47 GONZ. L. REV. 365, 371-75, 380-86 (2012) (discussing the evolution of labor exploitation from convict leasing to modern prison labor in the criminal justice system); Madison Pauly, *How a Private Prison Company Used Detained Immigrants for Free Labor*, MOTHER JONES (Apr. 3, 2017, 10:00 AM), <http://www.motherjones.com/politics/2017/04/geo-forced-labor-lawsuit/>.

190. *See, e.g.*, García Hernández, *Naturalizing Immigration Imprisonment*, *supra* note 148, at 1507-11 (discussing the role of the private prison industry in immigration imprisonment); Mariela Olivares, *Intersectionality at the Intersection of Profiteering and Immigration Detention*, 94 NEB. L. REV. 963, 977-990 (2016); Todd Miller's description of a border patrol technology expo, MILLER, *supra* note 157, at 35-55, provides a description

* * *

The entanglement of the immigration and criminal law systems is far from new. A rich literature now informs how we might understand its history, motivations, manifestations, and potential long-term consequences. In this Part we have discussed two types of critical responses—“delineation” and “synthesis”—that scholars and advocates have put forth. In doing so, we do not mean to suggest that these are the only approaches that exist, nor that crimmigration literature always falls cleanly into one category or another.¹⁹¹ However, we do believe the approaches are useful to organize this way, and that their relationship is ultimately complementary.

The Administration’s move to condition receipt of law enforcement-related grants on acquiescence to the federal government’s immigration enforcement agenda should be understood as part of the larger political project to further frame immigration as a public safety and crime control issue. Teachings from the crimmigration literature have yet to be applied in any studied way to the sanctuary defunding issue. The next two sections reflect our effort to do so.

III. DELINEATION: TAKING DISENTANGLEMENT SERIOUSLY IN THE CONSTITUTIONAL DEBATE ABOUT SPENDING CONDITIONS

In this Part, we explore the potential role that a delineation critique can play in the debate over sanctuary defunding. We examine the extent to which such a critique has found expression in disputes about the legality of the Trump Administration’s efforts to withdraw federal funding from sanctuary cities. Given the congruity between a delineation critique and the motivation for many sanctuary policies—*i.e.*, to distance local government and criminal justice functions from federal immigration enforcement—one would expect such a critique to have featured prominently in the plaintiff jurisdiction’s presentations. Delineation would be significant to any analysis about whether

of the profit motive at work in immigration enforcement that is chillingly commonplace.

191. See, e.g., Eagly, *Immigrant Protective Policies*, *supra* note 30, at 251, 295-97 (2016) (examining local immigrant-protective criminal justice policies and proposing a framework of “immigrant equality” that would address the way in which immigration enforcement can subject immigrants “to “harsher and more punitive criminal justice punishment than citizens” and “incentivize and mask racial and ethnic profiling and discrimination in policing and prosecution”); Yolanda Vazquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093 (2017) (arguing that overlooking the interrelationship between immigration and criminal justice in criminal justice reforms can exacerbate some of the fairness and equity concerns that reform is intended to combat).

immigration-related spending conditions bear a sufficient nexus to the purpose of the DOJ law enforcement grant programs under the Spending Clause¹⁹² or are authorized by Congress as arising from an “applicable [f]ederal law.”¹⁹³ But our review reveals that delineation critiques have been advanced somewhat reluctantly, and incompletely, by litigants. Perhaps decades of rhetoric and practice linking immigration to crime have rendered their role in any constitutional analysis less visible.

We set forth the benefits that a more robust delineation critique informed by the crimmigration literature in this context could offer in both constitutional and moral terms. Whatever the rationale, such a critique would serve as an important countervailing force to the Administration’s regrettable portrayal of an entire group of persons as dangerous criminals.

A. The Spending Clause and the Requirement that Funding Conditions Be Germane to Congress’s Purpose

1. Substance of the Requirement

When Congress imposes a condition on the receipt of federal funds, it must comply with certain requirements as set forth in the Supreme Court’s Spending Clause jurisprudence. In *South Dakota v. Dole*,¹⁹⁴ the Court announced that in addition to being made in pursuit of “the general welfare,” any conditions placed on federal funding must be “unambiguous,”¹⁹⁵ cannot induce states to engage in conduct that was itself unconstitutional,¹⁹⁶ and must be reasonably related, *i.e.*, germane, to the federal purpose in particular projects or programs.¹⁹⁷

In *Dole*, the majority’s discussion of the germaneness requirement was relatively perfunctory because the focus of the parties’ dispute lay elsewhere.¹⁹⁸ At issue in *Dole* was a new law enacted by Congress that “direct[ed] the Secretary of Transportation to withhold [five percent] of federal highway funds otherwise allocable [to] [s]tates” unless a state

192. See *infra* Part III.A.

193. See *infra* Part III.B.

194. *South Dakota v. Dole*, 483 U.S. 203 (1987).

195. *Id.* at 207 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The Court in *Pennhurst* noted the importance of states and localities having notice in advance so that could “voluntarily and knowingly accept [such] terms. 451 U.S. at 17.

196. *Dole*, 483 U.S. at 210-11 (noting that such a condition “would be an illegitimate exercise of Congress’s . . . spending power”).

197. *Id.* at 207; See also *New York v. United States*, 505 U.S. 144, 171-72 (1992) (affirming and applying *Dole* factors).

198. See *Dole*, 483 U.S. at 208-09.

had a minimum drinking age of 21.¹⁹⁹ After conducting a brief analysis, the Court found the condition to satisfy the germaneness requirement because “the condition imposed by Congress [was] directly related to one of the main purposes for which highway funds are expended—safe interstate travel.”²⁰⁰

In a dissenting opinion, Justice O’Connor disagreed with the majority’s conclusion that the minimum drinking age condition bore a reasonable relationship to the purpose for which federal highway funds were expended.²⁰¹ She further urged the Court to adopt the view put forth by *amici curiae* National Conference of State Legislators and others that spending conditions be limited to specifying in some way how money is spent, or, in the words of the majority, “relate[] *directly to the purpose of the expenditure* to which it is attached”,²⁰² otherwise, they should be independently justified under some other regulatory power of Congress.²⁰³ The majority declined to “define the outer bounds” of the germaneness limitation on Spending Clause authority, finding the limitation to have been met in any case.²⁰⁴

The relationship between a spending condition and the funds to which it is attached can also have significance for the question of whether funding conditions amount to unconstitutional coercion. As a general matter, the federal government may not commandeer local officers to administer a federal program²⁰⁵ or interfere with local affairs to such a degree that it impairs local sovereign function.²⁰⁶ When a spending condition is not merely a rule about how funds are to be used, in addition to the *Dole* factors outlined above, any condition imposed by the federal government must remain in the realm of “encouragement” and “inducement” and cannot amount to a “gun to the head”—otherwise, it would leave states with “no real option but to acquiesce” to federal policy preferences.²⁰⁷ In *NFIB v. Sebelius*,²⁰⁸ the

199. *Id.* at 205.

200. *Id.* at 208-09.

201. *Dole*, 483 U.S. at 212-18 (O’Connor, J., dissenting). She viewed it instead as a prohibited attempt to regulate the sale of liquor and noted that if Congress were truly interested in deterring drunken drivers, then a minimum drinking age would be an ill-fitted way of going about it, since it was both over-inclusive and under-inclusive. *Id.* at 212, 214-15.

202. *Id.* at 208 n.3 (emphasis added) (citing brief of *amici curiae* National Conference of State Legislators et al.).

203. *Id.* at 215-17 (O’Connor, J., dissenting).

204. *Id.* at 208 n.3.

205. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 935 (1995).

206. *See, e.g.*, *City of New York v. United States*, 179 F.3d. 29, 36 (2nd Cir. 2000).

207. *See* Nat’l Fed’n of Indep. Bus. V. *Sebelius*, 132 S. Ct. 2566, 2604-05 (2012) (“NFIB”); *see also* *Amdur, The Right of Refusal*, *supra* note 35, at 124-26.

208. 132 S. Ct. at 2604-05.

Court struck down a provision of the Affordable Care Act (ACA) that conditioned continued receipt of federal Medicaid monies on a substantial expansion of states' Medicaid programs.²⁰⁹ In doing so, the Court noted that conditions are more likely to be viewed as coercive when they "take the form of threats to terminate other significant independent grants."²¹⁰

2. Discussion of the Germaneness Requirement in the Sanctuary Defunding Litigation

The discussion of germaneness in the litigation challenging the President's Executive Order was initially brief and general in nature. Because of the Executive Order's odd structure—it appeared to cover all federal funding except that "deemed necessary for law enforcement purposes by the Attorney General or the Secretary [of Homeland Security]"²¹¹—the parties largely focused their germaneness arguments on non-law-enforcement grants.²¹² Judge Orrick's April decision temporarily enjoining the Order likewise largely discussed the lack of a

209. *Id.* at 2504-07.

210. *Id.* at 2604. Ultimately, Justice Roberts, who authored the majority opinion, characterized spending condition in the ACA as not simply a threat to withhold funds earmarked for the same program in which the condition was imposed, but a demand to create "in reality a new program" that "accomplishes a shift in kind, not merely degree" in Medicaid as it had previously been envisioned. *Id.* at 2604-06. Such a transformation exceeded Congress's right to make reasonable alterations or amendments to the Medicaid program after states had begun to receive (and rely on) such funds. *Id.* at 2605-06.

211. Exec. Order No. 13,768, *supra* note 114, at § 9(a).

212. See Complaint for Declaratory Judgment and Injunctive Relief, City of Chelsea, City of Lawrence, No. 1:17-cv-10214 at 4, 24 (D. Mass. Feb. 8, 2017) [hereinafter Chelsea/Lawrence Complaint]; Complaint for a Declaratory and Injunctive Relief, County of Santa Clara, No. 5:17-cv-00574 at 34 (N.D. Cal. Feb. 3, 2017) [hereinafter Santa Clara Complaint]; Complaint for Injunctive and Declaratory Relief Concerning Fed. Exec. Order 13768, City of Richmond, No. Case 3:17-cv-01535 at 19 (N.D. Cal. Mar. 21, 2017) [hereinafter Richmond Complaint]; Complaint for Declaratory Judgment and Injunctive Relief, City and County of San Francisco, No. 3:17-cv-00485 at 21-22 (N.D. Cal. Jan. 31, 2017), [hereinafter San Francisco 1st Am. Complaint]; Complaint for Declaratory Relief, City of Seattle, No. 2:17-cv-00497 at 30 (W.D. Wash. March 29, 2017) [hereinafter Seattle Complaint]. It appears that the jurisdictions received the majority of their funding in other areas, San Francisco PI Motion, *supra* note 119, at 11 (noting 92% of federal funds received went to "entitlement programs such as Medicare, Medicaid, Temporary Assistance to Needy Families, and Supplemental Nutrition Assistance Programs"); Richmond PI Motion, *supra* note 120, at 12 (noting that majority of federal funds received was for "affordable housing for low-income, elderly and disabled residents, and to increase access to City facilities for persons with disabilities"); Chelsea/Lawrence Complaint, *supra* note 212, at 24 (noting that majority of federal grant money received was for education). Richmond was the only jurisdiction that addressed law enforcement directly, arguing that "there is no nexus between immigration and [] federal funds" such as \$2.7 million that was used for "hiring five police officers, expanding the body-worn camera program, and supporting the East Bay Mentoring Collaborative to provide vulnerable youth in low-income, high-crime neighborhoods with adult mentors." Richmond PI Motion, *supra* note 120, at 12.

relationship between immigration and grant funding outside of the law enforcement context, such as healthcare and social services spending, and found that § 9(a) did not meet the germaneness requirement.²¹³

It became harder to avoid addressing the nexus question with respect to immigration and criminal law enforcement funding after the Administration declared its intent to move forward with conditioning JAG, SCAAP and COPS grants on cooperation with immigration enforcement. In its response to the federal defendants' motion for reconsideration based on the Sessions memo, San Francisco adjusted its position and argued that JAG and COPS grants "have nothing to do with immigration enforcement."²¹⁴

In the next round of litigation, focused specifically on the Administration's conditioning of JAG grants and prioritization of COPS grants based on cooperation with the federal government's immigration demands,²¹⁵ the relationship (or lack thereof) between immigration enforcement and crime control was more front and center. Chicago, for example, argued that the three conditions Attorney General Sessions sought to place on the JAG grant²¹⁶ were irrelevant to the program.²¹⁷ But even then, the argument fell short of critiquing the Administration's unjustified conflation of immigration with crime control,²¹⁸ and the City abandoned its germaneness argument with respect to the Section 1373 certification requirement at the preliminary injunction stage.²¹⁹ Philadelphia, for its part, asserted that immigration-enforcement conditions were unrelated to the JAG program's criminal-justice-related purpose, "if not antithetical to it."²²⁰ Judge Michael M.

213. PI Order Enjoining Exec. Order, *supra* note 124, at 38-39.

214. S.F. Oppos'n to Motion to Reconsider, City and County of San Francisco, No. 17-cv-00485, 21-22 & n.14 (N.D. Cal. June 6, 2017). San Francisco, while not conceding that law enforcement funding was germane, had initially described the exempted law enforcement funds as the only ones that "might arguably be germane to Section 1373." San Francisco 1st Am. Complaint, *supra* note 212, at 13; San Francisco PI Motion, *supra* note 119, at 12. Santa Clara said nothing about germaneness, opting to focus instead on arguments about the law enforcement grants on the lack of congressional authorization to condition the grants on compliance with 8 U.S.C. § 1373. Santa Clara Oppos'n to Motion to Reconsider, County of Santa Clara, No. 17-cv-00574, 20-21 (N.D. Cal. June 6, 2017).

215. See *supra* notes 129-40 and accompanying text.

216. Press Release No. 17-826, *supra* note 130.

217. Complaint for Declaratory Judgment and Injunctive Relief, City of Chicago, No. 1:17-cv-05720 at 30-32 (N.D. Ill. Aug. 7, 2017).

218. *Id.* The City argued that the conditions were not germane to the "federal interest in the Byrne JAG program" of "respecting local judgment in setting law enforcement strategy." *Id.* at 32.

219. Chicago Order, *supra* note 132, at 25-26.

220. Memo. In Support of Mot. For Prelim. Injunction, City of Philadelphia, No. 2:17-cv-03894 at 46 (E.D. Pa. Sep. 28, 2017) [hereinafter Philadelphia PI Motion]. See also City of Los Angeles' Memo. In Support of Appl. For Prelim. Injunction, City of Los Angeles,

Baylson's findings and conclusions explaining his preliminary injunction order reflect acceptance of this reasoning.²²¹ He found that the funding conditions "have no relationship to successful police practice or the enforcement of criminal laws in the City" and "disclosing . . . immigration status to ICE has nothing to do with law enforcement, and will not prevent crime."²²²

B. Congressional Authorization and the "Other Applicable Federal Laws" Provision

1. Substance of the Requirement

Another legal question that a delineation analysis can help answer relates to whether the Executive Branch has been authorized by Congress to impose immigration-related spending conditions such as the Section 1373 certification requirement. As a general matter, it is Congress, not the President, who may exercise the spending powers conferred by the Constitution.²²³ Accordingly, any conditions that are attached to federal funds must be imposed or authorized by Congress.²²⁴ Conditions imposed by Executive fiat that are not authorized by Congress can violate separation of powers principles.²²⁵

The Justice Department insists it has the power to condition the receipt of JAG, SCAAP and COPS monies on compliance with Section 1373 based on a federal statute, 34 U.S.C. § 10153(a)(5)(D) (formerly

No. 2:17-cv-07215 at 16-17 (C.D. Cal. Sep. 29, 2017) (arguing purpose of COPS program, to advance community policing by "developing partnerships between law enforcement agencies and the communities they serve," has nothing to do with civil immigration enforcement, and that state and local participation in the latter "often sows *distrust* between communities and police"); Pl. State of California's Notice of Amended Mot. and Amended Mot. for Prelim. Injunction; Memo. Of Points and Authorities in Support Thereof, State of California, No. 3:17-cv-04701 at 15-16 (N.D. Cal. Nov. 7, 2017) (distinguishing between immigration and criminal enforcement).

221. Philadelphia PI Memorandum, *supra* note 135, at 64 (finding no link between Section 1373 certification condition and public safety); *see also id.* at 96-98.

222. *Id.* at 41.

223. *See* U.S. Const. art. I, § 8, cl. 1.

224. *See* *Dole*, 483 U.S. at 206 (noting that, "[i]ncident to [the spending] power, Congress may attach conditions on the receipt of federal funds") (emphasis added). Some have taken the view that all spending conditions must themselves be imposed by Congress. *See* Ilya Somin, *Why Trump's Executive Order on Sanctuary Cities Is Unconstitutional*, THE VOLOKH CONSPIRACY (Jan. 26, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.0972d4174768. For purpose of this discussion, we assume that Congress can grant the President some discretion to decide how to spend and administer funds; however, the President cannot refuse to disburse funds duly appropriated by Congress on terms not contemplated by Congress. *See* PI Order Enjoining Exec. Order, *supra* note 124, at 36.

225. *See* Santa Clara/S.F. Summary Judgment Order, *supra* note 128, at 17-20.

42 U.S.C. § 3752(a)(5)(D)), which—when describing various requirements associated with an application for JAG funding—requires grant applicants to certify that they will, among other things, “comply with . . . *all other applicable Federal laws.*”²²⁶ To be clear, there is no such language in the implementing statutes for COPS or SCAAP; the Justice Department simply asserts that the JAG provision can be extended to those programs as well.²²⁷

There are several reasons why 34 U.S.C. § 10153 (a)(5)(D) should not be read as authorizing any new conditions on even JAG funding. First, it is far from clear what Congress meant by the word “applicable” in this context. The Justice Department believes that “applicable” means any law that applies to state and local governments,²²⁸ but that could be thousands of provisions of the U.S. code. It is just as plausible that Congress intended to refer unremarkably to the body of laws that apply to state and local government *as grantees*. This would include spending conditions that had been separately enacted by Congress²²⁹ and other laws that apply to federal grantees in connection with the management and expenditure of federal funds. Where Congress’s intent is not clear, the Spending Clause cases require that statutes be construed in favor of states and localities, given the federalism concerns at stake.²³⁰ In other words, Congress must speak clearly if it intends to authorize a new spending condition.²³¹

226. 34 U.S.C. § 10153 (a)(5)(D) (emphasis added).

227. See notes 100-02, *supra*, and accompanying text.

228. Philadelphia PI Memorandum, *supra* note 135, at 56.

229. For example, there are a number of cross-cutting spending conditions that prohibit various forms of discrimination in “program[s] or activit[ies] receiving Federal financial assistance.” See, e.g., 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color or national origin); 29 U.S.C. § 794(a) (prohibiting discrimination on the basis of disability under the Rehabilitation Act); 42 U.S.C. § 2000cc-1 (protecting free exercise rights of institutionalized persons).

230. See e.g., *Dole*, 483 U.S. at 215-17 (O’Connor, J., dissenting) (expressing concern that if Congress’s spending power was not appropriately limited, then, given the “vast financial resources of the federal government,” Congress could “invade the states’ jurisdiction, and [] become a parliament of the whole people[.]”) (citing *United States v. Butler*, 297 U.S. 1, 78 (1936); David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1198-1201 (2004) (discussing vast policymaking power of the federal government through Congress’s exercise of the Spending Clause).

231. See *Pennhurst*, 451 U.S. at 17 (“[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”); *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”). Congress has created numerous spending conditions for JAG funding using unambiguous language over the years, and if it had wanted to do so here, it certainly knew how.

To the extent that courts are not persuaded that 34 U.S.C. § 10153(a)(5)(D) can be limited to only a narrow set of federal grant-making laws, a delineation critique can help show why Section 1373 still should not be treated as a law “applicable” to the JAG program.

2. Discussion of “Applicable Federal Laws” in the Sanctuary Defunding Litigation

Initially, the litigation over sanctuary defunding via Executive Order provided little occasion to advance a delineation argument. The Executive Order appeared to apply to nearly all federal funding streams, not just JAG funding,²³² and thus the parties argued that Congress had not authorized any spending condition based on compliance with 8 U.S.C. § 1373 generally.²³³ In granting a preliminary injunction, Judge Orrick remarked that no act of Congress authorized the Executive Branch to withhold federal funds on the basis of an alleged or actual violation of 8 U.S.C. § 1373; to the contrary, Congress had repeatedly declined to condition federal grants on such compliance.²³⁴

In the Trump Administration’s motion to reconsider, however, the DOJ asserted that 34 U.S.C. § 10153 (a)(5)(D) authorized the federal government to condition receipt of JAG funds on compliance with Section 1373.²³⁵ Santa Clara County then began to engage with the

232. Exec. Order No. 13,768, *supra* note 114, at § 9(a).

233. *E.g.*, San Francisco 1st Am. Complaint, *supra* note 212, at 20-21 (arguing the Executive Order “impos[es] conditions or limitations on federal spending without express statutory authority”); San Francisco PI Motion, *supra* note 119, at 9 (“Defendants cannot argue that there has been any delegation of the spending power here. Congress has repeatedly considered and rejected legislation to defund sanctuary cities or require them to cooperate with federal immigration authorities”); Santa Clara Complaint, *supra* note 212, at 22 (“The INA says nothing about withdrawing or restricting federal funds from jurisdictions that fail to comply with 8 U.S.C. § 1373”); *id.* at 33 (“The Executive Order claims the power to establish conditions governing federal spending—which Congress has declined to impose through legislation.”).

234. PI Order Enjoining Exec. Order, *supra* note 124, at 36-37. The President’s power to act unilaterally in such situations is “at its lowest ebb.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

235. *See* Santa Clara/S.F. Motion for Reconsideration, *supra* note 126, at 8; Declaration of Ralph Martin, Attach. 2 to Santa Clara/S.F. Motion for Reconsideration, *supra* note 126, ¶ 15 (referring to the “provision in the Byrne JAG program statute that requires an application to the Byrne JAG program to include a certification . . . [of compliance with] *all other applicable* federal laws) (emphasis in original).

In their motion for reconsideration, the federal government also relied on 34 U.S.C. § 10102(a)(6) (formerly 42 U.S.C. § 3712(a)(6)), which permits the Office of Justice Programs to place “special conditions” on grants. Santa Clara/S.F. Motion for Reconsideration, *supra* note 126, at 8. This subsection, enacted as part of the H.R. 3402, *supra* note 80, § 1152, had not previously been invoked in any of the Justice Department memoranda or guidance documents. Rather than constituting congressional authorization

language of 34 U.S.C. § 10153. Nevertheless, its argument was limited to asserting that 34 U.S.C. § 10153 (a)(5)(D) contained “generic[]” language.²³⁶ San Francisco noted only that it did not concede that the DOJ’s Section 1373 certification requirements were authorized by Congress.²³⁷ Judge Orrick denied reconsideration without addressing 34 U.S.C. § 10153 (a)(5)(D).²³⁸

In the cases challenging the Attorney General’s July conditions on JAG funding, some plaintiff jurisdictions argued that Section 1373 compliance could not be made a condition of the JAG program under 34 U.S.C. § 10153 (a)(5)(D). The City of Chicago, for example, maintained that “applicable Federal laws” does not mean “all Federal laws” but rather describes “laws that *by their own terms* are applicable specifically to recipients of federal funds[.]”²³⁹ It did not assert that Section 1373 was not “applicable” federal law based on its unrelatedness to the JAG program, however, and the district court ultimately found that 34 U.S.C. § 10153 (a)(5)(D) authorized the Section 1373 certification condition.²⁴⁰

The City of Philadelphia presented a similar argument to Chicago, but notably, supplemented it with a claim that the term “‘applicable’ requires a substantive relationship, and Section 1373 lacks one to Byrne JAG grants.”²⁴¹ Judge Baylson responded positively to Philadelphia’s effort at delineation, finding that Section 1373 and Byrne JAG were quite possibly unrelated.²⁴²

for such a condition, the subsection more likely refers to conditions that the Justice Department is otherwise authorized by law to impose. *See* Chicago Order, *supra* note 132, at 13-19; Philadelphia PI Memorandum, *supra* note 135, at 52-53. Though some might argue that SCAAP should come with an implied authorization to condition receipt of funds on adherence to 8 U.S.C. § 1373, since it is a program designed to assist localities with the cost of incarcerating “undocumented criminal aliens,” *see infra* note 303, a closer look at SCAAP’s purposes reveals that such an inference would not be justified. It was never supposed to be a program that enlisted state and local governments into federal service to enforce immigration laws. *See infra* notes 308-12 and accompanying text.

236. Santa Clara Oppos’n to Motion to Reconsider, *supra* note 214 at 20-21.

237. S.F. Oppos’n to Motion to Reconsider, *supra* note 214 at 19 n. 11.

238. Santa Clara/S.F. Order Denying Reconsideration, *supra* note 126.

239. Memo. of Law in Support of Pl.’s Mot. for Prelim. Injunction, City of Chicago, No. 1:17-cv-015720, 19-20 (N.D. Ill. Aug. 10, 2017).

240. Chicago Order, *supra* note 132, at 22-25.

241. Philadelphia PI Motion, *supra* note 220, at 18-19 (“[Section 1373] deals with federal immigration enforcement, and has nothing to do with . . . Byrne JAG’s programmatic purpose of enhancing local criminal justice systems.”).

242. Philadelphia PI Memorandum, *supra* note 135, at 93-98, 100-01. Judge Baylson ultimately did not decide on the reach of 34 U.S.C. § 10153 (a)(5)(D), *id.* at 57-58; *see also id.* at 101-06, resting his preliminary injunction on other grounds.

C. *The As-Yet Untapped Potential of a Delineation Critique*

As can be seen from the above, the jurisdictions challenging the Trump Administration's sanctuary defunding efforts have raised delineation critiques inconsistently and incompletely. Nothing prevented them from making more robust delineation arguments earlier, and indeed, doing so would have been consistent with the rationales for their disentanglement policies. But it is as though the parties waited until the relationship between immigration enforcement and crime control could not be ignored, making only the arguments that were minimally necessary to reach a ruling in their favor.

Failing to articulate a more complete vision of the appropriate line between immigration enforcement and the stated goals of criminal justice funding earlier seems like a missed opportunity.²⁴³ First, a delineation critique could have helped strengthen any argument that immigration enforcement does not have a sufficient nexus to criminal law enforcement to allow the federal government to carry through with its threats to withdraw JAG or COPS funding consistent with the Spending Clause.²⁴⁴ While, as attorney Spencer Amdur has observed, lower courts have generally applied the germaneness requirement deferentially in the years following Dole,²⁴⁵ Judge Baylson recently suggested in the Philadelphia case that a Section 1373 certification condition would be distinguishable from the types of conditions at issue in other Spending Clause cases.²⁴⁶ This creates space for a

243. Cf. Cara Cunningham Warran, *Sanctuary Lost? Exposing the Reality of the 'Sanctuary-City' Debate & Liberal States-Rights' Litigation*, WAYNE L. REV. (forthcoming 2018) (arguing that while liberals have pursued states' rights litigation to protect federal funding, they have failed to reframe the Administration's powerful anti-immigrant narrative by asserting an integrationist counter-narrative).

244. We defer our discussion of SCAAP to Part IV of this article. See Part IV.B.2, *infra*. It is worth noting, however, that SCAAP was conceived of as a *reimbursement* program for time that noncitizens spend in state and local custody on state charges "as a result of the Federal Government's failure to enforce [the] immigration laws[.]" *Infra* notes 304-12 and accompanying text. Thus, its use as a program that enlists state and local governments into federal service to enforce immigration laws is still a departure from its original purpose.

245. Amdur, *The Right of Refusal*, *supra* note 35, at 124; see also Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 466-67 & nn. 47-49 (2003). For this reason, Amdur concludes that immigration enforcement conditions "are probably germane to the local law enforcement funds." Amdur, *The Right of Refusal*, *supra* note 35, at 146.

246. Philadelphia PI Memorandum, *supra* note 135, at 93-101 (discussing *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 176 (3d Cir. 2002) and explaining that while the court in *Koslow* found a "discernable relationship" between provisions of the Rehabilitation Act and SCAAP, the Justice Department's Section 1373 certification condition applied to *all* city officials, regardless of their function). Other cases addressing the germaneness of spending conditions vis-a-vis JAG or SCAAP funds include *A.W. v. Jersey City Pub. Sch.*, 341 F.3d 234, 244, 254 (3d Cir. 2003) (finding same with respect to

delineation critique informed by crimmigration literature. Providing important historical perspective for the entanglement between immigration and criminal law enforcement could help denaturalize their unquestioned association with each other.²⁴⁷ It could also help to make more visible the race-based logic of this association as peddled by the Trump Administration.²⁴⁸ In such a case, courts might decide that deference on the question of germaneness is not appropriate.

Alternatively, a robust discussion about the distinction between immigration and crime control would strengthen any analysis of whether termination of those grants might be considered “coercive” under *NFIB* (or arbitrary and capricious under the Administrative Procedures Act). In the decades since the programs were created, as Amdur points out, neither JAG nor COPS have historically funded any activities having to do with immigration enforcement.²⁴⁹ The Administration’s move thus may well be treated as a “threat[] to terminate other significant . . . grants” independent of immigration enforcement.²⁵⁰ The crimmigration literature would help lend weight

the Rehabilitation Act and the Individuals with Disabilities Act and SCAAP); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 844-45 (S.D. Ohio 2002) (finding same with respect to the Religious Land Use and Institutionalized Persons Act and SCAAP); and *United States v. Hernandez*, 615 F. Supp. 2d 601, 622 (E.D. Mich. 2009) (finding compliance with the federal Sex Offender Registration and Notification Act (SORNA) to be an appropriate condition for receipt of JAG funds). Immigration conditions could also be found to be distinguishable from the conditions discussed in those cases. In *Hernandez*, the court treated SORNA as a criminal justice issue and proceeded therefore to find that it could be considered related to the purposes of the JAG program. 615 F. Supp. 2d at 622. The cases dealing with SCAAP dealt with the application of civil rights laws that have long been recognized as having the necessary nexus to federal grant programs because of the federal government’s interest in not having its dollars spent on discriminatory activities. Some also derive independent authority from Section 5 of the Fourteenth Amendment.

247. See *supra* notes 155-57 and accompanying text.

248. See *supra* note 166 and accompanying text. The authors contributed to the drafting of amicus briefs filed in the Chicago and Philadelphia cases attempting to incorporate some elements of a delineation critique relevant to this point. Brief *Amici Curiae* of Administrative Law, Constitutional Law, and Immigration Law Scholars in Support of Plaintiff’s Motion for a Preliminary Injunction, City of Chicago, No. 1:17-cv-05720 (N.D. Ill. Aug. 31, 2017); Brief *Amici Curiae* of Administrative Law, Constitutional Law, and Immigration Law Scholars in Support of Plaintiff’s Motion for a Preliminary Injunction, City of Philadelphia, No. 1:17-cv-03894 (E.D. Pa. Oct. 19, 2017).

249. Amdur, *The Right of Refusal*, *supra* note 35, at 146. This year, for the first time in its twenty-plus year history, the Trump Administration has made COPS funds available for activities related to immigration enforcement. See *infra* notes 139, 333-34 and accompanying text. Such a move is arguably beyond the scope of statutory authority for the COPS program.

250. *NFIB*, 132 S. Ct. 2566 at 2604. The fact that compliance with 8 U.S.C. § 1373 had never before been asserted by federal officials to be a condition of receipt of JAG, COPS and even SCAAP before 2016 raises additional problems, since it may violate the rule that Congress may not surprise states with “post-acceptance or retroactive conditions.” *Id.* at 2506 (citing *Pennhurst*, 451 U.S. at 25).

to the argument that law enforcement grants should, for purposes of this analysis, be treated as independent from immigration enforcement.

A delineation critique drawing on the crimmigration literature would do similar work when it comes to interpreting the “applicable Federal laws” provision of 34 U.S.C. § 10153 (a)(5)(D). A delineation critique would call on courts to treat Section 1373 (though it purports to govern all government entities) as primarily an immigration statute and the JAG program as primarily a criminal law enforcement program.²⁵¹

But even if a careful explanation of the distinction between immigration and crime control (and of the problematic reasons why the two are so often merged) did not inspire a more rigorous analysis of germaneness or congressional authorization of the Section 1373 certification requirement, it would at least bring any unjustified assumptions about the asserted relationship between the two to the surface rather than allowing them to go unchallenged.²⁵² A delineation critique also allows jurisdictions to signal to community members that they stand by the values that animated their decision to embrace disentanglement and will continue to resist the attempt to mire their law enforcement officers in the business of immigration enforcement at every turn.

Failure to advance more complete delineation arguments appears to have been to great degree a response to the demands of litigation. For example, as we noted above, the arguments made in the Executive Order litigation were initially shaped by the expansive nature of the Executive Order. But whatever the reasons for this approach, it not

251. In the Philadelphia litigation, Judge Baylson rejected one possible objection to our analysis—that the relevant connection, for the purpose of analyzing the nexus between the funding conditions and the funding purposes, or the applicability of the funding conditions to the funding, is not the connection (or lack thereof) between immigration and crime, but the fact that the same personnel who are subject to the funding condition (local law enforcement) are the recipients of the funding. In the context of the Administrative Procedures Act challenge to the funding conditions, Judge Baylson found that gearing funding conditions to the *user* of the funds, rather than the *use* of the funds, was arbitrary and capricious. Philadelphia PI Memorandum, *supra* note 135, at 63.

252. Some jurisdictions did reference the social science data showing that noncitizens are less prone to commit crime and that sanctuary jurisdictions have lower crime rates overall in their complaints in the Executive Order litigation, but this information was generally presented more in the spirit of explaining their own policies than it was for critiquing the Administration’s actions. See Richmond Complaint, *supra* note 212, at 10; Santa Clara PI Motion, *supra* note 119, at 7; San Francisco 1st Am. Complaint, *supra* note 212, at 7; Seattle Complaint, *supra* note 212, at 10; see also TOM K. WONG, THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY, CTR. FOR AMERICAN PROGRESS & NAT’L IMMIGR. LAW CTR. 6 (Jan. 26, 2017), <https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf>.

only had the consequence of signaling a potentially weak commitment to earlier expressed values underlying sanctuary policies, but also resulted in simply kicking the can down the road for subsequent rounds of litigation. The Trump Administration has at all times been faithful to its ideological agenda as described above—indeed, victory lies in the battle itself, as every well-publicized shot taken at sanctuary policies signals its own values to its increasingly agitated base. Challenging the Administration's ideological frame is important, not only to inform the debate about sanctuary defunding but precisely because the conflation of immigration with crime has come to play such a vexing role in policymaking and public opinion.

IV. SYNTHESIS: DOJ GRANT FUNDING IN CONTEXT

In Part III, we saw how a delineating critique informed by the crimmigration literature could be productively applied to counter the rhetoric and tactics of the Trump Administration that falsely conflate immigration with crime control in the legal fight over sanctuary defunding. In this Part, we apply a second approach from the crimmigration literature—the synthesizing approach—which looks at the criminal justice system beyond entanglement with immigration and examines how some of the distortions and practices thought to be hallmarks of a crimmigration regime may instead be a reflection of forces common to both immigration and criminal justice systems—forces which can concurrently be interrogated and critiqued.

We first present a framework for developing and understanding the delineation and synthesis modes of critique, expressed in terms of a multi-step analysis that attacks distinct points on a logical syllogism about crimmigration. The syllogism makes it easier to see the path from a delineation critique to a synthesis critique and how the latter differs from the former. We then apply a synthesizing critique to the issue of sanctuary defunding by examining in greater detail the history of the three threatened federal law enforcement funding programs—JAG, SCAAP, and COPS—and the uses to which they have been put. One result of a synthesizing critique, we observe, may be to cause jurisdictions to question whether their continued receipt of these funding streams is consistent with the values expressed in their sanctuary policies and worth fighting for at all. We also contrast in this Part the relative absence of synthetic critiques from the legal debates over sanctuary defunding with the way they have been embraced and advanced by advocates in the latest iteration of sanctuary campaigns. Ultimately, we conclude that delineation and synthesis approaches each have important roles to play. We chart out some preliminary ways that

“practitioners”²⁵³ of crimmigration resistance can deploy both, intentionally and strategically.

A. A Framework for Analysis: Crimmigration’s Syllogism

The synthesizing critique that we seek to apply in this Part involves moving beyond the effort to delineate or de-link immigration from crime control to examine more skeptically the system of crime control. Doing so allows us to surface some of the deeper patterns lurking in both the immigration and criminal justice systems.

One way to illustrate the analytical moves we are describing is by visualizing policymakers’ attempt to link immigration control to crime control as driven by a particular logic. Expressed in terms of a logical syllogism,²⁵⁴ and as depicted in Figure 1, the argument proceeds like this:²⁵⁵

- (A) The *major premise* posits that strategies of penal control like detention and militarized policing are productive responses to criminal threats;
- (B) the *minor premise* posits that immigrants (or unauthorized immigrants) are a criminal threat;²⁵⁶ and
- (C) the logically driven *conclusion* follows, that immigrants (or unauthorized immigrants) should be met with strategies of penal control like detention and militarized policing.

253. When using this term, we intend to refer not only to lawyers but to policymakers and non-lawyer activists.

254. For a concise explanation of the logical syllogism, see Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U.L. REV. 53, 64 & n. 30 (1992) [hereinafter McClurg, *The Rhetoric of Gun Control*]. As he notes, a syllogism is a deductive argument consisting of three propositions—a major premise, a minor premise and a conclusion. The idea is that “[i]f the premises of the syllogism are true and the syllogism is valid, the conclusion must be true.”

255. To be clear, the syllogism does not represent *our* argument, but an argument we ascribe to those, including President Trump and his Administration, who seek to further entrench the relationship between immigration and crime control. Additionally, the syllogism we present here is just one possible variant of “crimmigration’s syllogism,” one that we have tailored to highlight the issues we view as salient to the sanctuary defunding issue.

256. The syllogism, as written, invites a response that “immigrants are *not* a criminal threat” which might in turn invite the counter-response that “*some* immigrants are a criminal threat.” But *some* immigrants being a criminal threat does not lead the conclusion that *all* immigrants should be met with strategies of penal control, but rather only that *some* should. The syllogism’s potency in pointing to policy solutions depends in part on the categorical nature of its assertions, which is likely why President Trump can engage in an immigrants-are-murderers rhetoric, see *supra*, notes 58-61 and accompanying text.

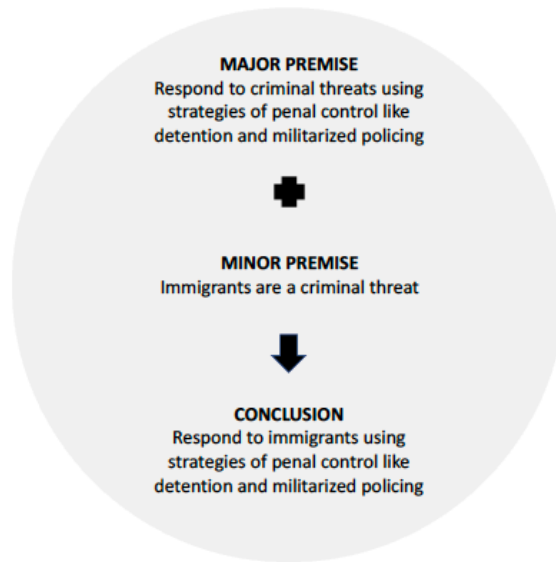


Fig. 1. Crimmigration's syllogism

While there are many ways to attack this logic,²⁵⁷ a common way to address a logical syllogism is to examine the truth or falsity of its premises.²⁵⁸ The delineation critique we applied in Part III above, and the natural starting point for immigration scholars or advocates, is an attack on the minor premise (B).²⁵⁹ This analysis, as we have seen, is focused on immigrants and attempts to undo the association of immigrants with criminality (and therefore immigration with crime control). It is depicted in Figure 2.

257. See generally Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741 (1988) [hereinafter McClurg, *Logical Fallacies*] (exploring a variety of logical fallacies).

258. *E.g.*, *id.* at 776 (examining arguments from false premises).

259. *Cf.*, *e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 473-74, 118 S. Ct. 2091, 2120, 141 L. Ed. 2d 393 (1998) (Breyer, J., dissenting) (attacking syllogism by attacking truth of minor premise).

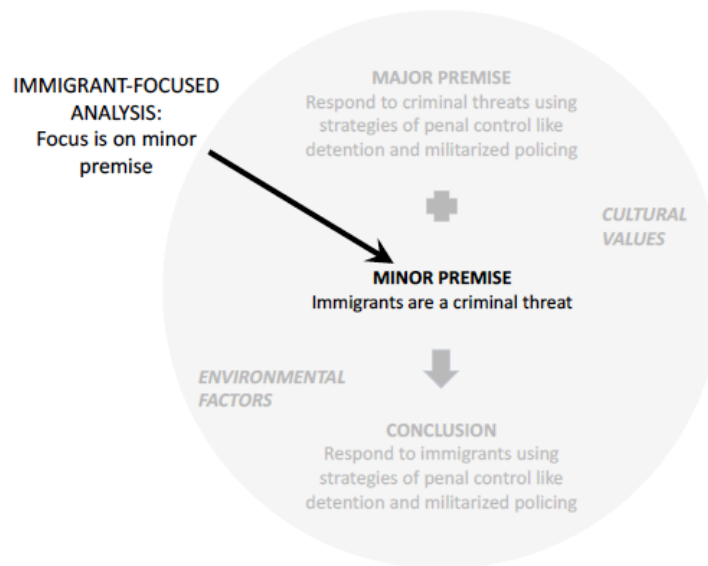


Fig. 2. Immigrant-focused analysis

But while a successful attack on the minor premise (B) alone would be sufficient to undermine the conclusion (C), considering the treatment of immigrants in isolation leaves the assumptions underlying the major premise (A) undisturbed and can reinforce the idea that relative criminality should determine appropriate immigration policy.²⁶⁰ *Some* immigrants *do* commit crime, and this possibility will continue to animate policy responses unless a deeper analysis is undertaken. An analysis focused on criminal justice, therefore, seeks to attack the major premise (A).²⁶¹ This may take the form of interrogating whether strategies of penal control like detention and militarized policing are in fact productive responses to crime, for example, or whether the term “criminal threats” has a definite meaning that has integrity.²⁶² This analysis is depicted in Figure 3.

260. As Angélica Cházaro has cautioned, quoting Lisa Marie Cacho, “Unfortunately, disavowing criminality or illegality does not challenge the logic of crime and punishment but actually strengthens, sustains, and substantiates it. This logic leaves those who are most legally vulnerable in both communities with very few allies.” Cházaro, *Challenging the “Criminal Alien” Paradigm*, *supra* note 182, at 651-52.

261. For an example of an attack on the major premise of a syllogism, see *United States v. Gaudin*, 515 U.S. 506, 511 (1995) (describing the government’s argument “that the major premise is flawed”).

262. Cf. McClurg, *Logical Fallacies*, *supra* note 257, at 760-61 n. 89 (noting the

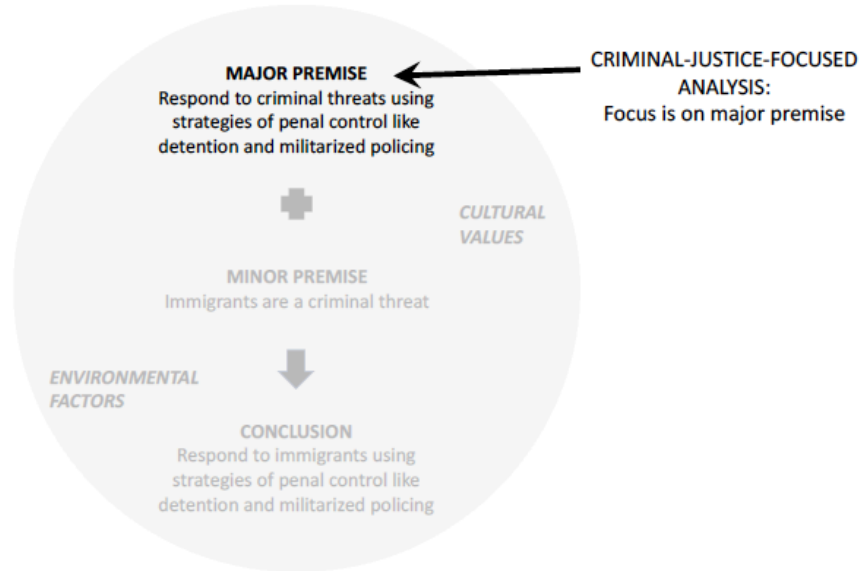


Fig. 3. Criminal-justice-focused analysis

A final analytical move proceeds to a level of inquiry that is focused less on the truth content of either the minor or major premises and interrogates the cultural and environmental factors that contribute to the framing of the syllogism.²⁶³ Rather than seeking to prove that immigration and crime control are *different*, a synthesis analysis (depicted in Figure 4) instead, explores the common forces that may be driving the treatment of immigrants and the treatment of subjects in the system of crime control. As the crimmigration literature teaches us, these forces may relate to the perpetuation of racial status regimes, the enlargement of institutions of social control, the disciplining and controlling of labor, the generation and preservation of profit and capital, or to the expression and policing of the boundaries of

“fallacy of equivocation” that occurs when a term is used “in two different senses in the same context”); *id.* at 814-15 (discussing logical fallacies that “share in common an attempt to represent an abstraction as something tangible, concrete and measurable”).

263. Race and class bias, for example, would be factors that contribute to the framing of crimmigration’s syllogism. See, e.g., Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC’Y REV. 695, 721 (2010) [hereinafter *Penology of Racial Innocence*].

membership.²⁶⁴ The synthesis analysis steps through a criminal-justice-focused consideration of the major premise (A) to consider the minor premise (B) in a new light or, alternatively, to reject the framing of the syllogism altogether.

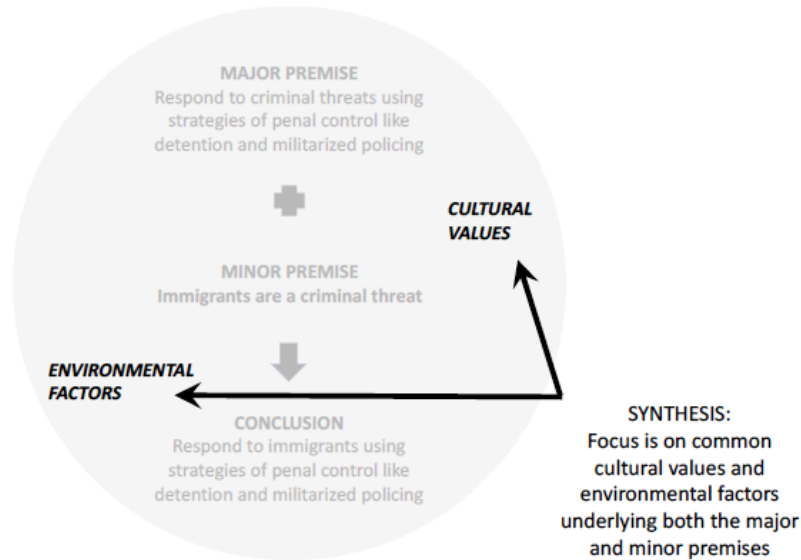


Fig. 4. Synthesis

The analysis we apply in the rest of Part IV below reflects this journey. Moving from an immigrant-focused delineation critique through a criminal-justice-focused analysis, we end up at a synthesis critique that calls into question whether the DOJ law enforcement grants are worth preserving in their current form at all.²⁶⁵ Our goal in describing crimmigration's syllogism is not to inspire an overly formal treatment of the subject,²⁶⁶ but simply to share a framework that might

264. See *supra* notes 182-90 and accompanying text.

265. See *infra* at Part IV.B.4.

266. See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 63 (1991) (noting that "[a]s a socially constructed category with multiple meanings, race cannot be easily isolated from lived social experience. . . . Any effort to understand its nature must go beyond legal formalism."). The analytical moves we explore here seek out "informal logical fallacies" in crimmigration's syllogism. While "formal fallacies" are errors in the *form* of a syllogism, informal fallacies are errors that can only be detected by examining the *content* of the syllogism. McClurg, *The Rhetoric of Gun Control,*

be useful for organizing, discussing and developing the modes of critique we discuss here. Our attempt is not to suggest a single, exclusive approach²⁶⁷ but one that might complement those that others have pursued—to open up, not restrict, critique.

B. The Three Department of Justice Grant Programs Examined

As discussed above, the argument can be made that immigration enforcement is not the same as crime control, and thus, that grant funding for law enforcement should not be conditioned on local law enforcement's participation in immigration enforcement.²⁶⁸ Moving past that set of arguments, we seek here to examine (1) what the three DOJ law enforcement grants at stake have been used for in the criminal justice context, (2) why states and localities have become dependent on them, and (3) whether using them to further a seemingly tangential agenda, such as immigration enforcement, is actually anomalous. The first two of these questions implicate a criminal-justice-focused analysis, attacking the crimmigration syllogism's major premise by asking whether the funding programs have made a positive contribution to *crime control*. The last question corresponds to a synthesis critique, seeking out the cultural and environmental factors that may be driving unwarranted expansion of the criminal justice apparatus when it comes to *both* immigration and more traditional areas of crime control such as drug enforcement. We consider each of the three grant programs individually, and then together.

1. The Edward Byrne Memorial Justice Assistance Grant Program (JAG)

As discussed in Part I, the JAG program has been in existence since the 1980s and is the main source of federal dollars going to state

supra note 254, at 63-64. Here, the immigrant-focused analysis and the criminal-justice-focused analysis are examinations of the content of the minor and major premises, respectively. *See id.* at 64 (using syllogism with false major premise as example of informal fallacy). The synthesizing critique also goes beyond the mere form of the syllogism to search out other informal fallacies by examining the norms and environmental factors supporting both the major and minor premises.

267. For other approaches to the task of deciphering informal fallacies by examining the cultural values underlying syllogistic reasoning, *see, e.g.*, McClurg, *The Rhetoric of Gun Control*, *supra* note 254, at 65 (examining fallacies in the gun control debate by “dividing the fallacies of gun control into three broad categories: fallacies of emotion, fallacies of diversion, and fallacies of proof”); Cory S. Clements, *Comment, Perception and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win the War of Words*, 2013 BYU L. REV. 319, 361 (exploring “informal fallacies and cognitive biases [as] two sides of the same coin”).

268. *See supra* Part III.

and local jurisdictions for law enforcement and criminal justice.²⁶⁹ Funds are provided for a variety of functions.²⁷⁰ In 2016, a total of \$274.9 million was awarded to states, localities, U.S. territories and the District of Columbia.²⁷¹ The states that received the highest amount of funds in 2016 were California, Texas, Florida, New York and Illinois, respectively.²⁷²

The JAG program was born of America's War on Drugs.²⁷³ Annual federal spending on fighting the drug war increased six-fold during the eight years of the Reagan Administration,²⁷⁴ and the grants to state and local law enforcement agencies were seen by Congress to be a critical component of that spending.²⁷⁵ The additional resources were to some extent sought out by states, but they ultimately came to have a substantial impact on how state and local law enforcement agencies did business. For example, state and local governments suddenly had to be concerned with what the federal government thought about their policing strategies and priorities, as the JAG program tied financial assistance to a certain acquiescence to the federal drug enforcement agenda.²⁷⁶ Also, because the level of federal

269. See *supra* at notes 77-79 and accompanying text.

270. See *supra* at note 82 and accompanying text.

271. Alexia D. Cooper, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS TECH. REPORT: JUSTICE ASSISTANT GRANT PROGRAM 2016, 1 (Sept. 2016), <https://www.bja.gov/jag/pdfs/JAG-Technical-Report.pdf>.

272. *Id.*

273. See Eric Blumenson & Eva Nilson, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 42-43 (1998) [hereinafter Blumenson & Nilson, *Policing for Profit*] (explaining that before the 1980s, federal block grants to states for law enforcement had not been specifically tied to drug enforcement efforts).

274. See *DEA and Overall Trends in Federal Drug Expenditures*, TRAC DEA, <http://trac.syr.edu/tracdea/findings/aboutDEA/drugBudget.html> [hereinafter *DEA Trends*].

275. See, e.g., 134 Cong. Rec. S17300-42, S 17334 (Oct. 21, 1988) (Sen. Biden discussing H.R. 5210's state and local grant program package and advocating for "a significant portion" of the funds go to "street crime programs," so that "our law enforcement priorities will include tough drug enforcement where the communities will see and appreciate it—right on their own streets"). Interestingly, the Reagan Administration, under pressure to balance the budget, had proposed cutting funding to state and local agencies at one point, stating that the grants authorized by the 1986 Anti-Drug Abuse Act were supposed to be for "one-time capital expenditures" or "'start-up' assistance." Bernard Weinraub, *'A National Crusade'; In Reagan's Drug War, Congress Has the Big Guns*, N.Y. TIMES (Mar. 15, 1987), <http://www.nytimes.com/1987/03/15/weekinreview/a-national-crusade-in-reagan-s-drug-war-congress-has-the-big-guns.html>. But Congress did not acquiesce. *Id.*

276. H.R. 5210, *supra* note 79, at § 6091 (requiring states seeking funds to submit applications that detailed a statewide plan for "drug and violent crime control" and an analysis of how proposed state efforts relate to the "national drug control strategy"). See also MICHELE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 72-73 (The New Press: 2000) [hereinafter ALEXANDER, *THE NEW JIM CROW*] (noting that some state and local law enforcement officials "were less than pleased with the attempt by the federal government to assert itself in local crime fighting, viewing

funding was tied to city and county arrests, localities experienced pressure to get their arrest numbers up.²⁷⁷ Once the agencies became reliant on federal funding, they also became invested in perpetuating the notion to local constituents and would-be critics that the drug war should be a top priority.²⁷⁸

The JAG program has faced at least two more specific criticisms. First, as state and local resources for drug enforcement—augmented by federal funding—grew, so naturally did rates of incarceration for nonviolent drug offenders.²⁷⁹ The racially disparate impacts of the War on Drugs have been well documented.²⁸⁰ Not only does the United States have the highest rate of incarceration in the world today, largely as a result of the War on Drugs,²⁸¹ African Americans and Latinos comprise nearly sixty percent of those incarcerated (though they make up less than a third of the population).²⁸² It is therefore no surprise that counties that spend the most on law enforcement would have greater disparities in rates of incarceration for people of color.²⁸³ Drug laws have been an important factor in the persistence of racial and ethnic disparities in the criminal justice system.²⁸⁴

the new drug war as an unwelcome distraction”).

277. Steven Elbow, *Hooked on SWAT*, MADISON CAPITOL TIMES (Aug. 18, 2001), http://host.madison.com/ct/news/local/writers/steven_elbow/hooked-on-swat/article_f1bc13e6-b29b-5ab0-a7cf-ba46b1b3860c.html.

278. See ALEXANDER, *THE NEW JIM CROW*, *supra* note 276, at 73 (noting “In order for the war to actually work—that is, in order for it to succeed in achieving its political goals—it was necessary to build a consensus among state and local law enforcement agencies that the drug war should be a top priority in their hometowns. The solution: cash.”).

279. PHILLIP BEATTY ET AL., JUSTICE POLICY INSTITUTE, *THE VORTEX* 13-15 (December 7, 2007) [hereinafter BEATTY ET AL., *THE VORTEX*], <http://www.justicepolicy.org/research/1953>; Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. (Sept. 18, 2008) (statement of Pill Piper, Drug Policy Alliance) (noting point made by sentencing reform advocates that “as long as states do not have to pay the full costs of their criminal justice system, they will never have to consider alternatives to incarceration”).

280. See, e.g., ALEXANDER, *THE NEW JIM CROW*, *supra* note 276 (documenting the evolution of African-American subordination from Jim Crow’s *de jure* discrimination to the *de facto* legalized discrimination of modern day mass incarceration); Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L & SOC. SCI. 41 (2011) (describing how the War on Drugs has harmed and stigmatized minority populations while a “pervasive ideology of colorblindness” ensures societal indifference to inherent racial bias in the system).

281. *Id.* at 6 (explaining that drug convictions account for the majority of the increase over the last thirty years).

282. Jamal Hagler, *8 Facts You Should Know About the Criminal Justice System and People of Color*, CTR. FOR AMERICAN PROGRESS (May 18, 2015, 12:01 AM), <https://www.americanprogress.org/issues/race/news/2015/05/28/113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/>.

283. BEATTY ET AL., *THE VORTEX*, *supra* note 279, at 14-15.

284. ASHLEY NELLIS, THE SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 10 (June 14, 2016),

Second, and relatedly, the JAG program is seen as having precipitated the rise of specialized multijurisdictional drug task forces in American policing.²⁸⁵ By 1993, such task forces had become the single largest category of expenditure in the JAG program.²⁸⁶ Federal funding through the JAG program was augmented by millions of dollars of military equipment from the Pentagon that helped to turn the drug war from a rhetorical one to a literal one.²⁸⁷ Local police departments were also enriched by civil forfeiture dollars.²⁸⁸

All of these developments created perverse incentives for task forces to arrest high numbers of low-level offenders and to cut constitutional corners. For example, a civil rights case filed against several task force officers in Oakland, CA, provided a stark portrayal of a task force corrupted by its dependency on federal drug money.²⁸⁹ In the words of one member, the task force operated “more or less like a wolf pack.”²⁹⁰ Their commander “regularly exhorted Task Force officers to keep their arrest numbers up” in order to keep the federal monies on which their jobs depended, and would send officers out to begin a shift with comments like, “[E]verybody goes to jail tonight for everything, all right?”²⁹¹ A 2002 report published by the ACLU of Texas identified numerous scandals involving JAG-funded anti-drug task forces in the state, including cases of witness tampering, falsification of evidence and records, stealing drugs from evidence lockers and other transgressions.²⁹²

<http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> (follow “Download PDF” hyperlink).

285. See, e.g., Blumenson & Nilsen, *Policing for Profit*, *supra* note 273, at 43-44.

286. *Id.*

287. ALEXANDER, THE NEW JIM CROW, *supra* note 276, at 74-78 (explaining how these new resources led to militarized SWAT teams created for the purpose of conducting drug raids). The transfer of surplus weapons and other equipment from the military to state and local law enforcement was curtailed at the end of the Obama Administration, but the Trump Administration has announced plans to resume the program. Tom Jackman, *Trump to Restore Program Sending Surplus Military Weapons, Equipment to Police*, WASH. POST (Aug. 27, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/08/27/trump-restores-program-sending-surplus-military-weapons-equipment-to-police/?utm_term=.1f1b9f88be0a.

288. Blumenson & Nilsen, *Policing for Profit*, *supra* note 273, at 44-57 (describing the history and role of asset forfeiture laws); García Hernández, *Immigration Detention as Punishment*, *supra* note 175, at 1365 (citations omitted) (noting civil forfeiture’s role in overcoming ‘police officials’ hesitation to join the federal government’s antidrug efforts).

289. Blumenson & Nilsen, *Policing for Profit*, *supra* note 273, at 82 (citing *United States v. Reese*, 2 F.3d 870 (9th Cir. 1993)).

290. *Reese*, 2 F.3d at 874.

291. *Id.*

292. SCOTT HENSEN, ACLU OF TEXAS, TOO FAR OFF TASK: WHY, AFTER TULIA, TEXAS SHOULD RE-THINK ITS BIG GOVERNMENT APPROACH TO THE DRUG WAR, ABOLISH NARCOTICS TASK FORCES, AND SAVE \$200 MILLION THIS BIENNIUM 5 (Dec. 2002).

After news broke of the Tulia case, in which a sizeable percentage of the African-American population in a small town in Texas was arrested on drug charges based on the falsified testimony of a single undercover officer, and of a similar case involving a confidential informant for a task force in Hearne, Texas,²⁹³ Congressional representatives began paying attention. When the topic of JAG funding reauthorization came up in 2005, Representative Sheila Jackson Lee proposed an amendment that would have withheld federal funding for narcotics task forces unless states improved their criminal records to provide greater transparency and accountability.²⁹⁴ The amendment did not pass; however, support for the program began to wane and funding dropped to \$170 million a year by the end of the Bush Administration.²⁹⁵ The program was given a fresh infusion of funding at the behest of President Obama and Vice President Joe Biden in 2009 as part of the American Recovery and Reinvestment Act.²⁹⁶

While the drug war has produced record numbers of arrests and prosecutions, by many accounts it has failed to achieve its goals. Drug use and abuse has not declined, and meanwhile, criminal drug organizations have grown in size and influence.²⁹⁷ For all the spending on the drug war over the last three decades, relatively little has been made available for treatment and rehabilitation.²⁹⁸ Meanwhile, the problems with narcotics tasks forces continue, as do efforts to reform them.²⁹⁹

293. *Id.*; see also Bob Herbert, *Railroaded in Texas*, N.Y. TIMES (Aug. 8, 2002), <http://www.nytimes.com/2002/08/08/opinion/railroaded-in-texas.html>.

294. 151 Cong. Rec. H4580-02 (daily ed. June 16, 2005) (statement of Rep. Jackson Lee).

295. RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* 247 (PublicAffairs: 2013).

296. *Id.* at 247-48; see also Michelle Alexander, *Obama's Drug War*, THE NATION (Dec. 9, 2010), <https://www.thenation.com/article/obamas-drug-war/> [hereinafter Alexander, *Obama's Drug War*]; Radly Balko, *Bad Cop: Why Obama is Getting Criminal Justice Wrong* (Oct. 6, 2008), http://www.slate.com/articles/news_and_politics/jurisprudence/2008/10/bad_cop.html [hereinafter Balko, *Bad Cop*].

297. WAR ON DRUGS—REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY 3-4 (2011), https://www.globalcommissionondrugs.org/wp-DOC7Acontent/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf.

298. See, e.g., *DEA Trends*, *supra* note 274 (noting broad decline in relative spending on drug treatment from 1981 to 1998).

299. See, e.g., Radley Balko, *Another Narcotics Task Force Is in the Midst of A Corruption and Brutality Scandal. This is Nothing New*, WASH. POST (Jul. 6, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/07/06/another-narcotics-task-force-is-in-the-midst-of-a-corruption-and-brutality-scandal-this-is-nothing-new/?utm_term=.69519cab8335; No More Tulias Act, H.R. 46, 114th Cong. (2015-2016) (introduced by Rep. Jackson Lee).

2. *The State Criminal Alien Assistance Program (SCAAP)*

The State Criminal Alien Assistance Program (SCAAP)³⁰⁰ was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.³⁰¹ It is administered by the Justice Department's Office of Justice Programs in conjunction with the Department of Homeland Security.³⁰² As discussed above, the program allows localities to seek compensation for the cost of incarcerating “undocumented criminal aliens.”³⁰³ SCAAP is administered as a reimbursement program,³⁰⁴ which means, among other things, that grant applications are submitted after the inmate custody period for which compensation is sought.³⁰⁵ Last year, \$210 million was allocated towards the program.³⁰⁶ Funds can be applied towards salary and overtime for correctional officers, workforce recruitment and retention, training, the building of new facilities and inmate services, among other things.³⁰⁷

SCAAP was originally portrayed as a program that could “free up local and State revenues for other public purposes[.]”³⁰⁸ The remarks

300. 8 U.S.C. § 1231(i); *see generally* Malhotra, *The Immigrant and Miranda*, *supra* note 163, 328-35 (discussing SCAAP program); Lasch, *Enforcing the Limits*, *supra* note 31, at 169-72 (same).

301. H.R. 3355, *supra* note 84, at § 20301 (“Incarceration of Undocumented Criminal Aliens”).

302. SCAAP Guidelines, *supra* note 95.

303. *Id.* Initially, localities could seek reimbursement costs for the incarceration of undocumented immigrants who were convicted of a felony and sentenced to a term of imprisonment. *Id.* Currently reimbursement can be sought for incarcerating “undocumented criminal aliens” who have at least one felony or two misdemeanor convictions. 8 USC § 1231(i). The federal government does not currently compensate states and localities for the cost of complying with immigration detainers. LENA GRABER & NIKKI MARQUEZ, IMMIGR. LEG. RESOURCE CTR., SEARCHING FOR SANCTUARY: AN ANALYSIS OF AMERICA’S COUNTIES & THEIR VOLUNTARY ASSISTANCE WITH DEPORTATIONS 6 (December 2016), https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf.

304. *See* PI Order Enjoining Exec. Order, *supra* 124, at 29 (“The Counties receive large portions of their federal grants through reimbursement structures—the Counties first spend their own money on particular services and then receive reimbursements from the federal government based on the actual services provided.”).

305. U.S. DEP’T OF JUSTICE, OFF. OF THE INSPECTOR GEN., AUDIT DIV., COOP’N OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIM. ALIENS FROM THE U.S. (January 2007), <https://oig.justice.gov/reports/OJP/a0707/final.pdf>. [hereinafter 2007 OIG AUDIT REPORT]. For example, grant applications submitted in March and April 2016 were seeking reimbursement for incarceration occurring between July 1, 2014 and June 30, 2015. SCAAP Guidelines, *supra* note 95, at 5.

306. NATHAN JAMES, CONGRESSIONAL RESEARCH SERV., FY2017 APPROPRIATIONS FOR THE DEPARTMENT OF JUSTICE GRANT PROGRAMS (May 30, 2017), <https://fas.org/sfp/crs/misc/R44430.pdf>.

307. *Notice to SCAAP Applicants*, BUREAU OF JUSTICE ASSISTANCE (last visited Oct. 1, 2017) https://www.bja.gov/ProgramDetails.aspx?Program_ID=86.

308. 140 Cong. Rec. H8957-9005 (daily ed. Aug. 21, 1994) (statement of Rep. Beilenson). Congress later narrowed the uses that could be made of the funds to

of Representative Anthony Beilenson (D-CA) advocating for SCAAP's adoption placed responsibility for the "costs of imprisoning criminal illegal aliens"³⁰⁹ with the federal government. He noted:

[The costs] are the result of the Federal Government's failure to enforce our immigration laws. . . . [W]hile State and local governments have the responsibility for incarcerating criminal aliens. . . . the[y] have no jurisdiction, obviously, over the enforcement of immigration laws, no authority to deport aliens who are convicted of crimes, and no authority to ensure that those deported are not permitted to re-enter the country.³¹⁰

While the program has consistently been underfunded, with jurisdictions receiving only a small fraction of their actual incarceration expenses,³¹¹ the theory underlying SCAAP was that immigration enforcement is a *federal* job.³¹²

Today, SCAAP has evolved into a program that places substantial pressure on state and local government actors to themselves participate in immigration enforcement. Scholar Anjana Malhotra has called SCAAP "the central referral tool for incorporating local law enforcement agencies into civil and criminal immigration enforcement."³¹³ In order to receive compensation, localities are required to provide a "detailed inmate file reflect[ing] the jurisdiction's good faith and due diligence efforts to identify and list undocumented criminal aliens housed in its correctional facilities."³¹⁴ Each SCAAP inmate file submitted is supposed to include the inmate's name, "alien number," foreign country of birth, among other information.³¹⁵ From

"correctional purposes" only. H.R. 3402, *supra* note 80, at § 1196 ("Reauthorization of State Criminal Alien Assistance Program").

309. 140 Cong. Rec. H8957-9005 (daily ed. Aug. 21, 1994) (statement of Rep. Beilenson).

310. *Id.*

311. 2007 OIG AUDIT REPORT, *supra* note 305, at iii (reporting 12 to 25% reimbursement rate); SCAAP Guidelines, *supra* note 95, at 4-5 (reporting 15% reimbursement for fiscal year 2015); see Kim Johnson, *Arizona Sheriffs Lobby to Save SCAAP Program*, KAWC NEWS (Apr. 3, 2017), <http://kawc.org/post/arizona-sheriffs-lobby-save-scaap-program> (quoting Arizona sheriff claiming SCAAP reimbursement at rate of "five cents on the dollar"); Stan Weekes, *Weekes: Taxpayers Footing Millions in Colorado's Criminal Alien Sanctuary Policies*, COLORADO POLITICS (Feb. 6, 2017), <https://coloradopolitics.com/weekes-100-million-hidden-annual-taxpayer-costs-colorados-criminal-alien-sanctuary-policies/> (claiming decline in SCAAP reimbursements to Colorado "from 32 cents on the dollar in 1996 to 8.3 cents in 2007 and 2.7 cents in 2016").

312. See also 2007 OIG AUDIT REPORT, *supra* note 305, at 8-9 (reporting ICE officials' view that "payment for the past costs of incarceration does not further the removal of undocumented criminal aliens currently in the United States").

313. Malhotra, *The Immigrant and Miranda*, *supra* note 163, at 328 *et seq.*

314. SCAAP Guidelines, *supra* note 95, at 3.

315. *Id.* Once grant applications are submitted, DHS has ICE "vet" the data to determine the eligibility for SCAAP reimbursement of each inmate custody period claimed

the assumption that *some* inmates may be “undocumented criminal aliens” for which localities might obtain reimbursement flowed the practice of obtaining place-of-birth or immigration status information from *every* inmate.³¹⁶ The “alien number” of an inmate is unlikely to be produced by the inmate herself, thus, jails have also adopted a practice of contacting ICE’s Law Enforcement Support Center as a routine part of booking whenever a foreign place of birth is reported.³¹⁷

SCAAP has also reinforced the logic of crimmigration’s syllogism by placing a spotlight on a class of noncitizens who have criminal convictions. Indeed, SCAAP’s reliance on “facts” about immigrant criminality and federal failure shared more with the logic supporting California’s exclusionary Proposition 187 (which combined those “facts” to produce a proposed solution of local involvement in immigration enforcement)³¹⁸ than it did with the logic supporting sanctuary policies. Thus, despite its differentiation of federal and local responsibility for immigration control and crime control, respectively, the program did not lead to a separation of immigration enforcement

by a grant applicant. 2007 OIG AUDIT REPORT, *supra* note 305, at ii; SCAAP Guidelines, *supra* note 95, at 5. ICE officials believe SCAAP payments should be “graduated payments based on the SCAAP recipient taking steps toward the removal of criminal aliens from the United States” or should be contingent upon a jurisdiction’s participation in a 287(g) program. 2007 OIG AUDIT REPORT, *supra* note 305, at 9.

316. Malhotra, *The Immigrant and Miranda*, *supra* note 163, at 280-81.

317. *Id.* at 330-31 (reporting rise in LESC inquiries). From one co-author’s practice, we are aware of a Colorado jail’s practice of submitting a “Detained Alien Status Inquiry Form” to the local ICE duty officer, which is then returned to the jail with the alien number inserted by ICE.

318. See generally Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995). That SCAAP shared an underpinning with Proposition 187 leads to additional Step 3 analysis, given the permeation of the Proposition 187 campaign with racist and nativist rhetoric. *Id.* at 650-51. Rep. Beilenson, who spoke in favor of adopting SCAAP, reportedly was against Proposition 187, see Fred Alvarez, *Officials Take Sides on Worth of Prop. 187: Politics: Controversy Builds Over ‘Save Our State’ Measure that Would Deny Many Public Benefits to Illegal Immigrants*, L.A. TIMES (Aug. 14, 1994), http://articles.latimes.com/1994-08-14/local/me-27169_1_illegal-immigrants/2, but sponsored other measures “stak[ing] out [a] position on the new hot-button issue” of immigration, such as a proposed repeal of birthright citizenship, ANDREW WROE, THE REPUBLICAN PARTY AND IMMIGR. POL.: FROM PROP. 187 TO GEORGE W. BUSH 122 (2008), co-sponsored with the “vehemently anti-immigrant Elton Gallegly” (R-CA). Nancy Cervantes et. al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 5 (1995). Notably, early third-wave detainer policies recognizing that the Tenth Amendment prohibited “federal commandeering of local resources” and permitting detention by federal authorities on an immigration detainer only if there existed “a written contract for reimbursement of costs,” see, e.g., Santa Clara, Cal., Res. (2010), http://libguides.law.du.edu/ld.php?content_id=34432102; Santa Clara, Cal., Policy 3.54 (2011), http://libguides.law.du.edu/ld.php?content_id=34432167, suffer from the same risk of suggesting that crimmigration’s syllogism is sound.

from the criminal law enforcement functions of state and local actors.

In short, SCAAP has demonstrated an ingenuous capacity to render jurisdictions complicit with immigration enforcement through compensation. The program, even if not initially intended to expand the immigration enforcement machinery, took on an institutional momentum of its own. It reinforced the “criminal alien” paradigm and created channels of communication, reporting, and, perhaps, the sense of a shared mission between local and federal officials. The Administration’s attempts to withdraw SCAAP funding to sanctuary jurisdictions, therefore, can be seen as just another way by which federal authorities are using the program to enlist localities in the immigration enforcement effort.³¹⁹

3. *Community Oriented Policing Services (COPS)*

While billed as a program to promote community policing efforts and create initiatives to allow community members to assist law enforcement in crime prevention,³²⁰ the primary effect of the COPS program (and indeed one of its express purposes) has been to facilitate the hiring of police officers by grantee agencies.³²¹ In 2016, a total of

319. The threat to cut off SCAAP funding to localities that resist participation in federal immigration enforcement is not entirely new. In January 2012, for example, after Cook County, Illinois, enacted an ordinance that limited compliance with immigration detainers, Cook County, Ill., Ordinance § 46-37(a) (enacted 2011), ICE Director John Morton sent a letter to the Board of County Commissioners of Cook County claiming that the ordinance “directly undermines public safety” and suggesting the ordinance would prevent Cook County from receiving SCAAP funding because it “inhibits ICE’s ability to validate Cook County’s” SCAAP reimbursement application. Letter from John Morton, U.S. Immigr. and Customs Enforcement Dir., to Toni Preckwinkle, President, Cook Cnty. Bd. of Comm’r’s (Jan. 4, 2012), https://www.scribd.com/doc/82722213/ICE-Letter-to-Cook-County?irgwc=1&content=27795&campaign=VigLink&ad_group=1726779&keyword=ft500noi&source=impactradius&medium=affiliate. Morton’s letter demonstrated the logical connection to local participation in immigration enforcement that the SCAAP program has come to represent. See *id.* at 2 (arguing it is “fundamentally inconsistent” for Cook County to receive SCAAP funds “while at the same time thwarting ICE’s efforts” at immigration enforcement). Cook County responded by defending its policy while simultaneously insisting on its entitlement to SCAAP payments. Letter from Toni Preckwinkle, President, Cook Cnty. Bd. of Comm’r’s to John Morton, U.S. Immigr. and Customs Enforcement Dir. (Jan. 19, 2012), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Preckwinkle%20Response%20to%20Morton%20%2801%2019%2012%29.pdf>. Cook County continued to receive SCAAP funding in the years following Morton’s letter. See, e.g., *2015 SCAAP Awards*, BUREAU OF JUSTICE ASSISTANCE (2015), <https://www.bja.gov/funding/FY-2015-SCAAP-Awards.pdf> (showing \$1.4 million awarded to Cook County in 2015).

320. H.R. 46, *supra* note 299, at § 10002.

321. See H.R. Rep. No. 1030324, pt. 1, at 1, 7-8 (1993) (noting that 75% of grant funds would be earmarked for the hiring of “cops on the beat” while the remainder would be available for “training, community relations, and other costs[.]”); U.S. DEP’T OF JUSTICE, COMMUNITY POLICING (COPS), FY 2017 BUDGET REQUEST AT A GLANCE (2017),

\$212 million was allocated by Congress for the program.³²²

As can be seen from the list of current initiatives, rather than being mission-oriented, COPS program monies actually go to a sundry of different efforts, from drug enforcement and the stationing of police officers in schools,³²³ some with only a tenuous link to community policing. Accounts of the program's overall impact on crime rates have been mixed.³²⁴ While reports commissioned by the DOJ have tended to show that COPS has reduced crime rates,³²⁵ a study published in the journal *Criminology* in 2007 found that COPS had little or no effect on crime.³²⁶

Certainly, the COPS program's focus on enhancing community trust, even if sometimes only symbolic, is preferable to a disregard of minority community perceptions. Some have even proposed reforms to the COPS program so that it may be used as a tool to curb police misconduct.³²⁷ But much community policing ultimately still reflects—at its core—a victim-centered philosophy; its goal is to encourage “good” community members to feel comfortable interacting with the police.³²⁸ There is also a thin line separating community

<https://www.justice.gov/jmd/file/822291/download> [hereinafter COPS 2017 BUDGET] (identifying the COPS Hiring Program as greatest expenditure).

322. COPS 2017 BUDGET, *supra* note 321.

323. See *supra* note 86 and accompanying text; 2016 COPS Hiring Program Fact Sheet, U.S. DEP'T OF JUSTICE 2 (2016), https://cops.usdoj.gov/pdf/2016AwardDocs/chp/2016_CHP_PostAward_FactSheet.pdf.

324. Michael D. Reisig, *Community and Problem-Oriented Policing*, 39 CRIME & JUST. 1, 23-24 (2010).

325. See, e.g., Jihong “Solomon” Zhao et al., *Funding Community Policing to Reduce Crime*, 2 CRIMINOLOGY & PUBLIC POLICY 7 (Nov. 2002); Phillip Cook et al., *The Effects of COPS Office Funding on Sworn Force Levels, Crime, and Arrests: Evidence from a Regression Discontinuity Design*, WASH., DC: OFF. OF COMM'Y ORIENTED POLICING SERV'S (January 18, 2017), <https://ric-zai-inc.com/Publications/cops-w0827-pub.pdf>.

326. John L. Worrall & Tomislav V. Kovandzic, *COPS Grants and Crime Revisited*, 45 CRIM'GY & PUB. POL'Y 159 (Feb. 2007); see also U.S. GOV'T ACCOUNT'Y OFF. (GAO), REPORT TO THE CHAIRMAN, HOUSE COMM. ON THE JUDICIARY, COMM'Y POLICING GRANTS: COPS GRANTS WERE A MODEST CNTR'N TO DECLINE IN CRIME IN 1990S, GAO-06-104 (2005), <http://www.gao.gov/assets/250/248152.pdf> (finding that the COPS program may have contributed to a one percent decline in crime in the late 1990s—at a cost of \$8.8 billion).

327. See, e.g., Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 383 (2011) (proposing that the COPS program be amended to condition full funding on compliance with minimum standards of accountability for police misconduct).

328. As Angélica Cházaro points out in the context of anti-Secure Communities advocacy, this approach draws on the idea that those who meet the exacting standards of respectability “are . . . innocents needing protection from the police.” Cházaro, *Challenging the “Criminal Alien” Paradigm*, *supra* note 182, at 651-53. Such a call for “healthy relationships between police and communities may ring hollow” for “people of color . . . especially Black and Latino [] and queer and gender non-conforming [residents] . . . who are targeted by the police whether or not ICE is collaborating with them.” *Id.*

policing as it is practiced by some departments, from the type of controversial “order-maintenance policing” that has been broadly criticized for its discriminatory effects and costliness.³²⁹

More generally, the grab bag of potential uses of COPS funding has limited its potential to truly improve police-community relations. As with JAG, funding for the COPS program had begun to diminish by the end of the Bush Administration, but Obama and Biden ensured that trend would be reversed.³³⁰ President Trump has likewise proposed an increase for COPS funding for 2018.³³¹ The lack of a coherent organization in the program has made it easier for the Trump Administration to eliminate initiatives to support police accountability and outreach to marginalized communities³³² and change the program to fit his agenda without raising an eyebrow. For the 2017 application cycle, the DOJ has stated that it will give extra consideration to proposals for the COPS Hiring Program that focus on “Illegal Immigration.”³³³ In its Community Development Program (CPD), one of the new areas in which applicants can propose projects is “Cooperative Partnerships with Federal Law Enforcement to Combat Illegal Immigration.”³³⁴ While some, including law enforcement professionals, would agree that these activities appear at odds with the concept of community policing,³³⁵ similar claims can be made of other priorities that have been set for 2017.³³⁶

329. See, e.g., Sarah E. Waldek, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable With the Others?* 34 GA. L. REV. 1253, 1254-58 (2000) (examining the relationship between community policing and order-maintenance policing); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009) (identifying economic and legitimacy costs of aggressive policing of misdemeanor and lesser offenses and proposing reforms).

330. Alexander, *Obama's Drug War*, *supra* note 296; Balko, *Bad Cop*, *supra* note 296.

331. U.S. DEP'T OF JUSTICE, COMMUNITY POLICING (COPS), FY 2018 BUDGET REQUEST AT A GLANCE (2017), <https://www.justice.gov/jmd/page/file/968286/download>.

332. U.S. DEP'T OF JUSTICE, COPS OFFICE FY 2016 APPLICATION GUIDE: COMMUNITY POLICING DEVELOPMENT (CPD) at 9-16, <https://cops.usdoj.gov/pdf/2016AwardDocs/cpd/AppGuide.pdf>.

333. U.S. DEP'T OF JUSTICE, COPS HIRING PROGRAM (CHP) [hereinafter 2017 CHP Priorities] <https://cops.usdoj.gov/default.asp?Item=2367>.

334. U.S. DEP'T OF JUSTICE, COMM'Y POLICING DEV'T (CPD), <https://cops.usdoj.gov/default.asp?Item=2450>. Other areas where applicants can propose projects include “Interrupting drug markets” and “Violent crime and/or gang reduction.”

335. See, e.g., Letter of Law Enforcement Immigr. Task Force to Chuck Grassley, Chairman, Comm. on the Judiciary and Patrick Leahy, Ranking Member, Comm. on the Judiciary (Jul. 20, 2015), http://immigrationforum.org/wp-content/uploads/2015/07/7_20_2015-LEITF-Letter-re-sanctuary-proposals-Senate.pdf.

336. 2017 CHP Priorities, *supra* note 333 (listing, among other problem/focus areas that will receive extra consideration for community policing, “Homeland Security Problems” and “Violent Crime”).

4. A Synthesis Critique of Sanctuary Defunding

Under a criminal-justice-focused analysis,³³⁷ it is apparent that the three DOJ grant programs have played a significant role, not so much in assisting local communities develop organic responses to crime, but in expanding the missions of local law enforcement—as well as their literal size—pursuant to a federal agenda. JAG funding has been responsible for bringing the militaristic approach and discriminatory impacts of the War on Drugs to every local neighborhood and street corner.³³⁸ SCAAP reimbursement, though grounded in a theory of federal and local differentiation, has become a primary way by which local law enforcement is being pulled into immigration enforcement.³³⁹ And part of the COPS legacy has been to ensure that local governments will always be able to hire enough officers to carry out their expanded missions.³⁴⁰

For the amount of money involved, it is notable how much influence these programs have been able to wield. But after agencies began bringing employees on, it became harder to turn down money that would continue to fund their salaries. Many localities, rather than taking steps towards self-sufficiency, have allowed substantial parts of their policing budget to be funded by federal dollars, moving local dollars to other areas. A criminal-justice-focused analysis makes it easier to see that the type of policy leverage federal spending can have—and with which the constitutional doctrine is so concerned—is present even if no explicit spending conditions are imposed.³⁴¹ Unlike explicit spending conditions, however, this “softer,” less visible leverage is exercised after Congressional appropriations are made, with little democratic or judicial scrutiny.³⁴²

A synthesizing analysis leads one to the observation that the use

337. Recall that this approach examines whether the grants have made a positive contribution in the area of *crime control*. See *supra* note 261-62 and accompanying text.

338. See *supra* notes 276-88 and accompanying text.

339. See *supra* notes 313-17 and accompanying text.

340. See *supra* notes 321 and accompanying text.

341. See, e.g., Kate Mather, *L.A. Asked for \$3 Million for Community Policing. The DOJ Said No. Some Fear It's a Sign of What's Ahead*, L.A. TIMES (Dec. 5, 2017 5:10 PM), <http://www.latimes.com/local/lanow/la-me-ln-lapd-funding-20171205-story.html> (describing how the Justice Department recently declined to award Los Angeles any money out of \$98 million in grants for community policing initiatives, possibly due to disagreement with the City's immigration policies).

342. See Jane Chong, *Sanctuary 101, Part III: Can Trump Condition Federal Funds in this Way*, LAWFARE (Mar. 15, 2017, 9:30 AM), <https://www.lawfareblog.com/sanctuary-101-part-iii-can-trump-condition-federal-funds-way> (observing that apart from “creating extra conditions in contravention of Congress’s will . . . executive branch departments and agencies tasked with administering [] grants ‘wield considerable sway over their allocation’”).

of law enforcement funds to further an incongruous agenda like immigration enforcement, though still legally problematic, is less anomalous than it first appears. The availability and structure of federal law enforcement funding programs seem to have also incentivized the expansion of the carceral state to tackle more social dilemmas (e.g., drug use and abuse, poverty, mental illness) at the expense of other, non-law-enforcement-centric approaches.³⁴³ The unequal impacts of both the entanglement with immigration enforcement and discriminatory policing tactics in other arenas are compounded at each step of the criminal justice process,³⁴⁴ producing a system of hyperincarceration that disproportionately looks black and brown.³⁴⁵

C. Advocacy Approaches Paving the Way

A holistic analysis that poses more fundamental questions about the criminal justice system and aligns the treatment of immigrant communities with the unequal treatment of poor communities and other communities of color has been notably absent from legal debates about sanctuary defunding. Synthesis critiques have, for example, found little voice in the litigation challenging the Administration's defunding efforts. Though some plaintiff jurisdictions had embraced the sanctuary label³⁴⁶ and, in doing so, sought to celebrate diversity and renew

343. In the case of SCAAP, funding directly incentivizes incarceration over non-carceral options, and does so particularly for noncitizens. See *supra* notes 304-05, 314 and accompanying text. One is reminded of the differential payment given to federal magistrates under the Fugitive Slave Act of 1850—magistrates were paid five dollars for each hearing under the Act and five additional dollars if the hearing resulted in the return of a fugitive slave. Fugitive Slave Act of 1850, ch. 60, § 8, 9 Stat. 462, 464 (1850) (repealed 1864).

344. See Murakawa & Beckett, *Penology of Racial Innocence*, *supra* note 263, at 721-22 (noting that “seemingly minor criminal justice interventions beget yet more criminal justice intervention to produce significant racial inequality, as ripples of disadvantage spread over the individual life cycle, the neighborhood, and the racial group in cumulative and compounding ways.”).

345. See, e.g., Hope Metcalf, *Foreword: When Words Fail: Confronting the Carceral State*, 38 WM. MITCHELL L. REV. 1209, 1209–10 (2012) (distinguishing between “mass incarceration” and “hyperincarceration”); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016) (describing a “war on crime” focused on young Black men, driven by federal funding that guided penal strategies, including detention and militarized policing, at the local level); Geiza Vargas-Vargas, *The Investment Opportunity in Mass Incarceration: A Black (Corrections) or Brown (Immigration) Play?* 48 CAL. W. L. REV. 351, 358 (2012) (describing “anti-immigration policy both at the state and federal level,” as the “next frontier in the incarceration of black and brown bodies.”).

346. E.g., Chelsea/Lawrence Complaint, *supra* note 212, at 13 (“Chelsea declared itself a sanctuary city in a June 4, 2007 Resolution”); San Francisco 1st Am. Complaint, *supra* note 212, at 4 (“San Francisco is a Sanctuary City and has been since 1989.”).

commitments to nondiscrimination,³⁴⁷ they did not attempt to make nondiscrimination a theme of the litigation or turn a critical eye toward the role of DOJ funding in criminal justice.³⁴⁸ Even the celebrated Philadelphia decision, which recognized a distinction between immigration enforcement and the criminal justice goals of JAG, stopped short of articulating a principled bright line. Some of the Philadelphia policies at issue in that case allowed for information-sharing where an individual was suspected of criminal activity.³⁴⁹ Accordingly, Judge Baylson concluded that, by “provid[ing] ample data to ICE to identify criminal aliens who are situated in Philadelphia prisons,” Philadelphia had “mesh[ed]” the “needs of the federal government to remove criminal aliens with the City’s promotion of

347. Seattle, in its complaint, heralded the city as a “welcoming and internationally minded city” that held this status “central to its identity.” Seattle Complaint, *supra* note 212, at 5. See also, e.g., Seattle, Cal., Ordinance No. 121063 (Feb. 5, 2003), http://libguides.law.du.edu/ld.php?content_id=34866603 (including celebration of diversity and commitment to equal service regardless of “race, ethnicity, or immigration status”); Seattle, Cal., Res. No. 31730 (Jan. 30, 2017), http://libguides.law.du.edu/ld.php?content_id=34437121 (same); Chelsea, Mass., Res. (2007), http://libguides.law.du.edu/ld.php?content_id=35254235 (celebrating Chelsea as “a city with a rich and diverse ethnic and cultural identity” that “respects all persons regardless of race, class, ethnicity or legal status”); Lawrence, Mass., Trust Ord. § 9.20.020(2) (2015), http://libguides.law.du.edu/ld.php?content_id=36312978 (“Citizenship, immigration status, lack of immigration documentation, national origin, race and ethnicity shall have no bearing on an individual’s treatment by Lawrence law enforcement personnel”); Richmond, Cal., Res. No. 11-07 (2007), http://libguides.law.du.edu/ld.php?content_id=34433718 (declaring that “[t]he City of Richmond welcomes and values all of its residents and supports them to live and work free from discrimination”); Richmond, Cal., Police Dept. Policy § 428.4 (2013), http://libguides.law.du.edu/ld.php?content_id=34433110 (stating that race and ethnicity provide no basis for arrest).

348. Certainly, this may have been because they did not view those topics to be the focus of their legal claims. Indeed, they may not have wanted to risk raising questions about the desirability of federal funding at the same time that they were litigating to protect federal funding. It may also have been due to the perceived challenges of introducing a racial justice narrative in the litigation context or the desire not to have the critical eye meander over to their own criminal justice policies. Santa Clara noted in its complaint that the county was facing a class action lawsuit over prison overcrowding, Santa Clara Complaint, *supra* note 212, at 15; see also Santa Clara PI Motion, *supra* note 119, at 8 (arguing that “forcing the County to honor ICE civil detainer requests would impose significant, non-reimbursable costs that would strain the County’s already severely impacted jail system”).

Notably, the Richmond preliminary injunction motion did mention the allocation of law enforcement funds for the purchase of body-worn cameras, Richmond PI Motion, *supra* note 120, at 8, perhaps alluding to the potential for such funds to help address systemic racism in the criminal justice system. See, e.g., Letter from Sherrilyn Ifill, President, NAACP Leg. Defense & Edu. Fund, to Eric Holder, Att’y Gen. 1, 4 (August 14, 2014), http://www.naacpldf.org/files/case_issue/8-14-2014%20Letter%20to%20AG%20Holder%20re%20use%20of%20excessive%20force%20by%20police.pdf (urging Department of Justice to “take immediate action to address the unjustified use of lethal and excessive force by police officers in jurisdictions throughout this country against unarmed black people,” including encouraging the use of police body-worn cameras).

349. Philadelphia PI Memorandum, *supra* note 135, at 14-15.

health and safety” and was in substantial compliance with Section 1373.³⁵⁰

In contrast to the legal fights over sanctuary defunding, synthesis-informed approaches have been making their way into some sanctuary *policies*, thanks to pressure by social movement actors who have embraced a more transformative vision of sanctuary. In Philadelphia, for example, notwithstanding the City’s policy allowing for information-sharing with ICE where an individual is suspected of criminal activity,³⁵¹ community organizers advocating for a detainer policy brought together a broad coalition to reject “any policy that engaged in what [one 1Love Movement organizer] called ‘harmful divisions over criminal history or levels of criminality.’”³⁵² Coalition members called for changes that would address “deep root causes of inequity and disparity,” and that encompassed both immigration and criminal justice reform.³⁵³ They demanded “education investment not incarceration” and offered a vision of criminal justice focused on “rehabilitation, redemption and forgiveness” that would include “meaningful re-entry services that re-build people and communities.”³⁵⁴

After Trump’s election of intensified concerns about discriminatory treatment, a grassroots coalition in Santa Ana was able to secure a sanctuary policy with no carve-outs based on criminal history, as discussed in the Introduction, and committing the City to criminal justice reforms around cite-and-release practices.³⁵⁵ The cite-and-release reforms would prevent residents from being unnecessarily booked into the Orange County Jail, where the local sheriff’s office had been operating a 287(g) agreement³⁵⁶ with ICE.³⁵⁷ In Chicago, a

350. *Id.* at 45, 128.

351. *See supra* note 349 and accompanying text.

352. *How Community Organizers Fought Deportation in Philadelphia and Won*, NEWSWORKS (May 20, 2014), <http://www.newsworks.org/index.php/local/essayworks/67980-how-community-organizers-fought-deportation-in-philadelphia-and-won> [hereinafter *Community Organizers*]. Ultimately, the Mayor’s office issued an executive order that did include limited carve-outs—but also contained a judicial warrant requirement that advocates believed would “effectively put an end to ICE holds in Philadelphia.” *Id.* *See also* PFUN Core Principles, PHILA. FAM. UNITY NETWORK, <http://paimmigrant.org/sites/default/files/PFUN%20Core%20Principles.pdf> (committing to “resist[] identities and labels that divide our communities”).

353. SOUTHEAST ASIAN AM. COMM’TY STATEMENT ON DEPORTATION & IMMIGR. REFORM, 1LOVEMOVEMENT (Apr. 11, 2013), <https://1lovemovement.wordpress.com/2013/04/11/southeast-asian-american-community-statement-on-deportation-immigration-reform/>.

354. *Id.*

355. Santa Ana Ordinance, *supra* note 7, at ¶ 4(3).

356. Kalhan, *The Fourth Amendment*, *supra* note 149, at 1162 (explaining that 287(g) agreements are voluntary agreements between localities and ICE that allow local officers to be cross-deputized to perform certain immigration enforcement functions).

357. Jordan Graham, *Orange County Sheriff Hutchins Asks Trump Administration to*

coalition of immigrant and Black-led groups, as part of a campaign to create a “real sanctuary city,” filed a request for information from the City of Chicago to investigate the role that gang databases were having on the criminalization and deportation of community members.³⁵⁸ These advocacy campaigns did not stop at disentanglement, but instead treated the threat of deportations as a starting place to open up conversations about broader criminal justice reform.

Similar approaches can be seen in materials put out by nonprofit organizations and allies on the issue of sanctuary since the election.³⁵⁹ A report by the group Mijente, for example, begins with the statement, “[u]nder a ‘law and order’ Trump Administration, cities must address the criminalization of Black people, transgender women, and other people of color as part of the minimum standard in defining a city as a ‘sanctuary’ today.”³⁶⁰ Other advocacy materials have emphasized the

Help Her Hold Undocumented Immigrants, O.C. REGISTER (Mar. 13, 2017, 5:06 PM), <http://www.ocreger.com/2017/03/13/orange-county-sheriff-sandra-hutchens-asks-trump-administration-to-help-her-hold-undocumented-immigrants/> (explaining that Orange County is the only county in California to still have a 287(g) agreement with ICE).

358. *Groups Investigate Chicago’s ‘Gang Database’ for Civil Rights Violations, Connection to Immigration Raids*, OCAD (May 4, 2017) <http://organizedcommunities.org/groups-investigate-chicago-gang-database-for-civil-rights-violations-connection-to-immigration-raids/>.

359. THE FAIR PUNISHMENT PROJECT, IMMIGRANT DEFENSE PROJECT & IMMIGRANT LEG. RESOURCE CTR., *THE PROMISE OF SANCTUARY CITIES AND THE NEED FOR CRIM. JUSTICE REFORMS IN AN ERA OF MASS DEPORTATION* (Apr. 2017), <http://fairpunishment.org/wp-content/uploads/2017/04/FPP-Sanctuary-Cities-Report-Final.pdf> (urging cities committed to immigrant-protective policies to institute eight concrete changes to address problems with the criminal justice system); MIJENTE, *WHAT MAKES A SANCTUARY NOW?* (Jan. 2017), <https://drive.google.com/file/d/0B1xgl8UTis-QLUYtbndueGtVaVE/view>; ANDREA J. RITCHIE & MONIQUE W. MORRIS, ED.D., NATIONAL BLACK WOMEN’S JUSTICE INSTITUTE, *CENTERING BLACK WOMEN, GIRLS, GENDER NONCONFORMING PEOPLE AND FEM(ME)S IN CAMPAIGNS FOR EXPANDED SANCTUARY AND FREEDOM CITIES* (Sep. 2017), <https://forwomen.org/wp-content/uploads/2017/09/Centering-Black-women-final-draft6.pdf> (building on the work of Mijente and BAJI to expand the framework for sanctuary to include over-policing and hyperincarceration, and to account for the shared experiences of citizen and noncitizen Black women, girls, trans and gender-nonconforming people). See also Tracey Ross & Sara Treuhft, *To Truly Resist Trumpism, Cities Must Look Within*, N.Y. TIMES (Jun. 2, 2017), <https://www.nytimes.com/2017/06/02/opinion/to-truly-resist-trumpism-cities-must-look-within.html> (urging politically progressive local leaders to consider policy agendas address systemic racism); Rev. Allison Harrington, *Sanctuary is a Stronghold of the Movement*, AUBURN SEMINARY, <https://auburnseminary.org/sanctuary-stronghold-movement/> (concluding with three recommendations for how the sanctuary movement can stand in solidarity with all movements for civil rights); Serin D. Houston & Olivia Lawrence-Weilmann, *The Model Migrant and Multiculturalism: Analyzing Neoliberal Logics in US Sanctuary Legislation in MIGRATION POLICY AND PRACTICE: INTERVENTIONS AND SOLUTIONS* (Palgrave Macmillan: 2016) (arguing that “simultaneous reaction against and incorporation of neoliberal rationales and approaches mitigate the possibilities for sanctuary legislation to bear out [their] goal[s]”).

360. MIJENTE, *WHAT MAKES A SANCTUARY*, *supra* note 359, at 1.

importance of building broader coalitions in the current moment.³⁶¹ It is probably for this reason that Richmond's December 2016 resolution, which connected sanctuary with the Black Lives Matter movement,³⁶² looked so different from its 1990 ordinance, which had touted "trust and cooperation" to be "important to law enforcement efforts . . . in the war on drugs and criminal activity generally."³⁶³ Seattle's 2017 resolution similarly connected immigrant justice and criminal justice reform in its "inclusion for all" message by expressing, among other things, that it rejected any attack on the "Black Lives Matter social justice movement . . . or any other social justice movement that seeks to address inequalities, inequities and disparities present in Seattle."³⁶⁴

Fourth-wave sanctuary policies are thus beginning to reflect the incorporation of a synthesis approach. Applying a synthesizing analysis in the sanctuary defunding context would take the policy response a step further. As alluded to above, a critical examination of the history and uses of JAG, SCAAP and COPS grants may well lead to the conclusion that sanctuary jurisdictions should reject such funding, or at least, closely study the effects that federal funding has had on local law enforcement practices and commit to reforming such practices. Notably, Santa Clara has foregone JAG and SCAAP funds in order to "retain its full discretion" on sanctuary policies.³⁶⁵ But it did so without saying anything in its pleadings about the broader criminal justice-related problems these funding streams have been associated with. Jurisdictions may be reluctant to apply a synthesis approach to sanctuary defunding on their own, but they may be urged to do so same

361. See, e.g., Yani Kunichoff, *Sanctuary in the Streets: How New Alliances are Revitalizing a Past Movement*, IN THESE TIMES (May 18, 2017), http://inthesetimes.com/features/sanctuary_cities_movement_trump.html (quoting the national chair of Black Youth Project 100 as saying, "We recognize sanctuary shouldn't be a single-issue movement, because we don't live single-issue lives").

362. Richmond, Cal., Res. 106-16 (Dec. 6, 2016), http://libguides.law.du.edu/ld.php?content_id=34432066 (asserting that "Black Lives Matter in Richmond and we will continue using our community-involved policing model to strengthen trust between police and communities of color so all residents feel safe in their neighborhoods").

363. Richmond, Cal., Ord. 29-90 (1990), http://libguides.law.du.edu/ld.php?content_id=34866534 (preamble).

364. Seattle, Cal., Res. No. 31730, *supra* note 347.

365. Santa Clara PI Motion, *supra* note 119, at 6 & n.5. Other jurisdictions started to forego funding as well. See, e.g., Denver, Colo., Exec. Order 142, ¶ 6.0 (Aug. 31, 2017), [https://www.denvergov.org/content/dam/denvergov/Portals/643/documents/Office%20of%20Immigrant%20and%20Refugee%20Affairs/FINAL%20XO%20142%20\(Standing%20with%20Immigrants%20&%20Refugees\)\(PDF\).pdf](https://www.denvergov.org/content/dam/denvergov/Portals/643/documents/Office%20of%20Immigrant%20and%20Refugee%20Affairs/FINAL%20XO%20142%20(Standing%20with%20Immigrants%20&%20Refugees)(PDF).pdf) (directing Denver Sheriff Department to "no longer seek" SCAAP funding to the extent SCAAP's requirements would require violating the City's commitment not to seek immigration status information from people held in Denver jails).

advocates that have been effective in integrating a more holistic approach into sanctuary policy campaigns.

As localities grapple with new challenges in local law enforcement entanglement with ICE, a synthesizing analysis will continue to play an important role. For example, one practice that some sanctuary policies had not addressed (or had exempted from their protections) was local law enforcement participation in joint task force operations with federal agencies, including ICE.³⁶⁶ In a recent case out of Santa Cruz, which considers itself a sanctuary city, a multi-jurisdictional task force operation that had been presented to the City by federal officials as a gang sweep ended up resulting in immigration arrests.³⁶⁷ The Santa Cruz case opened up a fresh round of questions about the nature of local law enforcement collaboration with ICE. As stakeholders decide how they will respond to these trends, a more holistic inquiry might lead them to consider, as San Francisco recently did, whether localities' participation on such task forces is worth it at all.³⁶⁸

We recognize that synthesis critiques may not be appropriate in all cases or at all times. The institutional context and political reality may constrain the types of arguments that can move one's audience to act, and local policymakers and advocates may feel duty-bound to pursue whatever messages will achieve concrete gains for their constituents. As discussed in Part III, delineation critiques, if made robustly, can be a potent weapon in the legal fight to protect federal funding to sanctuary jurisdictions. In the crimmigration context, delineation critiques have greatly advanced scholars' and advocates' understanding of how noncitizens came to be treated as deviants³⁶⁹ and inspired reforms to halt some of the most bloated aspects of a system of mass incarceration and expanding social control. Delineation critiques may have particular appeal in the current moment when federal authorities have abandoned all sense of proportionality or prioritization in the

366. Ali Winston, *How Sanctuary Cities Can Protect Undocumented Immigrants from ICE Data Mining*, THE INTERCEPT (Jun 16, 2017, 5:48 AM), <https://theintercept.com/2017/06/16/how-sanctuary-cities-can-protect-undocumented-immigrants-from-ice-data-mining/> (discussing joint federal-local task forces).

367. *Santa Cruz and Fed Agents in War of Words*, L.A. TIMES (FE. 23, 2017, 9:20 PM), <http://www.latimes.com/local/lanow/la-me-ln-santa-cruz-ice-raid-20170223-story.html>.

368. Ellen Nakashima, *San Francisco Police Department Pulls Out of FBI Anti-Terrorism Task Force*, WASH. POST (Mar. 10, 2017), https://www.washingtonpost.com/world/national-security/san-francisco-police-department-pulls-out-of-fbi-anti-terrorism-task-force/2017/03/10/62e05bcc-fd09-11e6-8f41-ea6ed597e4ca_story.html?utm_term=.eed4d4b3252 (describing similar efforts underway in other states).

369. See *supra* notes 155-57 and accompanying text.

arrest, detention, prosecution and deportation of immigrants.³⁷⁰ Whatever the specific reason, delineation critiques are here to stay.

However, it is imperative that scholars and practitioners push beyond delineation critiques wherever possible. Without a corresponding synthesizing analysis, reforms proposals may be too modest and simply reinforce the logics that drive overcriminalization in the first place.³⁷¹ Social movement organizations that center the most vulnerable in their community have understood this for some time.³⁷² To ensure that crimmigration resistance is attentive to these broader dynamics, scholars and practitioners should seek to explicitly incorporate a synthesizing ethic into their work.³⁷³ If delineation critiques are advanced, they should at least be advanced in such a way that doesn't make it harder to build towards synthesis critiques later.

CONCLUSION

In this piece, we have sought to bring some of crimmigration literature's most important insights to bear on the sanctuary defunding debate. By taking seriously the call to de-link immigration enforcement from crime control, we uncovered in Part III arguments that could provide a powerful rebuke to the Trump Administration's efforts to condition federal funding on cooperation with the federal government's immigration enforcement agenda, but which so far have been raised only intermittently by jurisdictions challenging the Administration's defunding attempts in court. In Part IV, we applied a second mode of critique to the sanctuary defunding debate. Rather than emphasizing the difference between immigration and crime, this critique complicated

370. See Kennedy, *Lifting as We Climb*, *supra* note 171 (proposing, in the context of black respectability politics, that a "sound assessment of its deployment in a given instance depends on its goals, the manner in which it is practiced, and the context within which a given struggle is waged").

While the Obama Administration, in response to strong pressure from advocates, had begun to scale back the most controversial examples of police-ICE collaboration and exercise its discretion more selectively (though it did little to try to complicate the problematic narrative about "criminal aliens"), the Trump Administration has reversed those trends. Chacón, *Immigration and the Bully Pulpit*, *supra* note 117, at 244, 249-52, 254-57 (observing that "[u]nderstanding the Trump Administration's emerging immigration policies and the reactions to them [] requires looking backward as well as forward"); see also Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. (forthcoming 2017), <https://ssrn.com/abstract=3032662>.

371. See *supra* notes 180-83 and accompanying text.

372. See *supra* notes 176-79 and accompanying text.

373. Cf. Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015) (arguing, in the prison abolition context, for an "aspirational ethic" and "a framework of gradual decarceration," which "entails a positive substitution of other regulatory forms for criminal regulation").

the story about the federal law enforcement grants under threat and makes it easier to see how the grants have altered the landscape and practices of local law enforcement at the expense of marginalized communities, not only in the area of immigration enforcement but beyond.

Our goal in describing crimmigration's two modes of critique—and the three-step analysis tied to “crimmigration's syllogism”—was to help make crimmigration's rich literature accessible and useful to scholars and practitioners engaged in crimmigration resistance. The sanctuary defunding cases illustrate the limits of allowing public consciousness about an issue to be driven and defined by litigation and legal discourse,³⁷⁴ particularly when that litigation and discourse is controlled by government lawyers. A combined delineation and synthesis approach expands our moral and political imagination, revealing local responses that can simultaneously accommodate a theory of incremental progress and the possibility of more radical transformation of both the immigration and criminal justice systems over time. The particular choices that practitioners make will depend on the relative strength of social movement actors and other stakeholders, the status of prior efforts to reform local institutions (such as the police), and the political ecosystem in a jurisdiction.

We also hope that the framework discussed in this article might be productively applied to other thorny issues at the intersection of immigration and criminal law. For example, the framework could help make visible the potential long-term consequences of locally-funded immigrant legal defense initiatives that have carve-outs for less sympathetic immigrants.³⁷⁵ It could also shed light on how the detention of a population that seemed to pose so little threat to public safety—families with children seeking refuge from Central America—came so naturally to the federal government.³⁷⁶ Moving beyond the

374. See, e.g., Diala Shamas, *Lawyers Alone Can't Save Us from Trump. The Supreme Court Just Proved It*. WASH. POST (Jun. 27, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/06/27/the-supreme-courts-travel-ban-order-shows-that-lawyers-cant-save-us-from-trump/?utm_term=.27ed4877452c.

375. See, e.g., Dakota Smith, *A \$10 Million Fund Will Help Immigrants Fight Deportation. But Should It Help Immigrants with Violent Criminal Convictions?* L.A. TIMES (Apr. 17, 2017 3:00 PM), <http://www.latimes.com/local/lanow/la-me-ln-la-justice-fund-20170417-story.html>.

376. The government's portrayal of the families as lawbreakers rather than asylum seekers, thus justifying the use of crime-control strategies like detention and deterrence reflected crimmigration's syllogism at work. DEP'T OF HOMELAND SECURITY, FACT SHEET: ARTESIA TEMPORARY FACILITY FOR ADULTS WITH CHILDREN IN EXPEDITED REMOVAL PROCEEDINGS (Jun. 20, 2014), <https://www.dhs.gov/news/2014/06/20/fact-sheet-artesia-temporary-facility-adults-children-expedited-removal>. Those challenging the federal government's practices in court employed a delineation critique, arguing that the women

immigration realm, a modified version of the framework might also be applied to interrogate criminal justice reform proposals that focus on the “non, non, nons.”³⁷⁷ In closing, we believe the framework we have set out brings into sharper focus the values at stake in a particular reform or advocacy message and charts how those values (rather than superficial forms of interest convergence) might be put to work to bring together diverse stakeholders in a more abiding, authentic way.

and children detained at Artesia did not deserve to be treated in the way they were. *See, e.g.*, Complaint for Injunctive and Declaratory Relief, *M.S.P.C. v. Jeh Johnson*, No. 1:14-cv-01437 at 4-5 (D.D.C. Aug. 22, 2014), <http://us-legalsolutions.com/wp-content/uploads/2014/08/M.S.P.C.-et-al.-v.-Jeh-Johnson-Secretary-of-Homeland-Security.pdf>; *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 189 (D.D.C. 2015) (relying on Supreme Court precedent to argue that “general deterrence” rationale may not be used to justify civil detention). But it is possible to also apply a synthesizing lens that examines the underpinnings of a broader system of carceral control. *See, e.g.*, Sharpless, *Cosmopolitan Democracy*, *supra* note 164, at 46-47 (arguing that family detention at Artesia, like criminal detention, communicated “that the group characteristics of the people detained are deviant or undesirable” and “relied on, and perpetuated, a racial and class message”); Debora M. Ortega et al., *Enacting and Sustaining Trauma and Violence Through Policy Enforcement: Family Immigration Detention*, 30 *AFFILIA: J. OF WOMEN AND SOC. WORK* 281, 284 (2015); Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 *NEB. L. REV.* 963, 965 (2016).

377. *See* Marie Gottschalk, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (Princeton University Press: 2015) (discussing the challenge of criminal justice reform that goes beyond non-violent, non-serious, and non-sex offenders).