

CITATION, NOT DEPORTATION: BROADENING SANCTUARY POLICY THROUGH ABOLITIONIST ALTERNATIVES

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INTRODUCTION

Criminal arrest is essential to the American deportation machine. Every day in communities across the United States, non-citizens are arrested by local police for typically minor criminal offenses, taken to local jails, and promptly handed over to Immigration and Customs Enforcement (ICE) for detention and eventual deportation from the United States, often before being convicted of the offense for which they were initially arrested.¹ To protect immigrant residents from detention and deportation, states and localities are increasingly enacting “sanctuary” policies that limit collaboration between local law enforcement and ICE. Yet, these sanctuary policies fail to meaningfully inhibit the continued functioning of detention and deportation systems. Even the most ambitious sanctuary policies are undermined by carveouts, inconsistent compliance, interjurisdictional battles, and state and federal coercion.

While the Biden administration is expected to push forward some modest reforms to the American immigration system, it is unlikely that ICE under Biden will significantly depart from its long-standing practice of deputizing local law enforcement to enforce federal immigration law. The number of ICE “detainers” lodged against non-citizens in local criminal custody was higher on average under the Obama administration than under President Trump.² Sanctuary policies will therefore remain necessary for jurisdictions seeking to shield their residents from federal immigration enforcement. At the same time, the Biden administration’s more focused enforcement priorities³ and its lack of open hostility toward sanctuary jurisdictions⁴ may present an opportunity to broaden the scope of local sanctuary policy in new, creative ways.

This Note proposes a broader sanctuary policy that focuses less on limiting police-ICE collaboration and more on reducing the scope of police and

1. See Miriam Jordan, *After a Pandemic Pause, ICE Resumes Deportation Arrests*, N.Y. TIMES (Sep. 12, 2020), <https://www.nytimes.com/2020/09/12/us/ice-immigration-sweeps-deportation.html>.

2. TRACIMMIGRATION, *Latest Data: Immigration and Customs Enforcement Detainers*, <https://trac.syr.edu/phptools/immigration/detain/> (last visited April 23, 2021) (comparing average annual number of ICE detainers issued between 2009 and 2016 to average annual number issued between 2017 and 2020).

3. Memorandum from Acting ICE Dir. Tae Johnson to All ICE Employees, Interim Guidance: Civil Immigration Enforcement and Removal Priorities 3–5 (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

4. See Camille Squires, *What does Joe Biden mean for sanctuary cities?*, CITY MONITOR (Jan. 19, 2021), <https://citymonitor.ai/joe-biden/what-does-joe-biden-mean-for-sanctuary-cities> (predicting that sanctuary cities will have more leeway under Biden administration); DORIS MEISSNER & MICHELE MITTELSTADT, MIGRATION POL’Y INST., *AT THE STARTING GATE: THE INCOMING BIDEN ADMINISTRATION’S IMMIGRATION PLANS* 6 (2020), https://www.migrationpolicy.org/sites/default/files/publications/mpi-biden-starting-gate-brief_final.pdf (distinguishing Biden’s immigration plans from Trump’s aggressive interior enforcement and attacks on sanctuary cities).

prisons to close off avenues through which ICE can detain and deport non-citizens. Specifically, this Note recommends that jurisdictions implement comprehensive “citation in lieu of arrest” policies that obligate the police to cite instead of arrest individuals for most criminal offenses. An expansion of citation in lieu of arrest, which has already been implemented to some degree in most jurisdictions across the country, would not only prevent non-citizens from being placed in criminal custody through which they may be transferred to ICE, but would also minimize exposure to police violence and mass incarceration more broadly. Furthermore, citation in lieu of arrest reframes sanctuary policy as a mechanism for gradual abolition rather than status quo reform. Modern sanctuary policy, which is generally framed as a tool for enhancing community trust in police and which often implicitly divides immigrant communities into the “good” and the “bad,” falls short of the calls for abolition that have echoed across the United States recently. The new sanctuary policy proposed here presents a unique opportunity to move closer toward an abolitionist future.

This Note begins in Section I with a brief history of sanctuary in the United States and posits a spectrum of modern sanctuary and anti-sanctuary policies. Section II gives two examples of the shortcomings of modern sanctuary policy. Section III then provides a brief overview of the past and current use of citation in lieu of arrest policies in the United States. Subsequently, Section IV proposes expanding the use of citation in lieu of arrest and framing it as a new form of sanctuary policy that would fill important gaps, circumvent restrictions, and avoid some of the negative consequences suffered by jurisdictions that have attempted to limit collaboration with ICE. Finally, Section V discusses how citation in lieu of arrest, when broadly and rigorously implemented, serves as an abolitionist experiment that pushes sanctuary policy in a more ambitious direction.

I. SANCTUARY AND ANTI-SANCTUARY: A BACK-AND-FORTH BATTLE

The immigration sanctuary movement began to take its current form in the 1980s and has expanded rapidly throughout the United States recently.⁵ Yet, the movement has been met with an equally powerful anti-sanctuary crusade that significantly inhibits sanctuary’s effectiveness and illustrates the need for alternatives approaches. This section lays out the history and modern landscape of sanctuary policy.

A. *A History of Sanctuary: From Ad Hoc Resistance to Citywide Policy*

The concept of immigration “sanctuary” in the United States originated with a small group of religious congregations speaking out against arbitrary

5. See Allan Colbern, Melanie Amoroso-Pohl, & Courtney Gutiérrez, *Contextualizing Sanctuary Policy Development in the United States: Conceptual and Constitutional Underpinnings, 1979 to 2018*, 46 FORDHAM URB. L.J. 489, 517–19, 544 (2019).

federal immigration policy and openly shielding undocumented immigrants from immigration enforcement. The movement built upon a long history of abolitionist defiance to racially oppressive laws beginning with the Underground Railroad's resistance to the Fugitive Slave Laws.⁶ In the 1980s, Central Americans fled en masse to the United States in search of refuge from civil wars and genocidal violence.⁷ After finding futile their attempts to work with the U.S. government to help Central American migrants secure asylum, religious congregations began publicly declaring "sanctuary" and housing immigrants on church premises to shield them from deportation.⁸ By 1985, a nationwide network of hundreds of sanctuary churches and supporting secular groups had formed.⁹ Many sanctuary leaders, including pastors of churches that declared sanctuary, faced federal criminal prosecution for "harboring" undocumented immigrants.¹⁰

Starting in the mid-1980s, state and local governments began to codify the sanctuary movement by passing resolutions supporting the efforts of local congregations and enacting laws limiting collaboration between local officials and federal immigration authorities. By 1987, twenty-eight cities and four states had some type of sanctuary policy in place.¹¹ Some of these early policies were more far-reaching on their face than their modern counterparts. A set of policies enacted in San Francisco during the 80s and 90s, for example, not only banned all use of city resources for federal immigration enforcement but also condemned immigration raids within the city, established strong mechanisms for ensuring compliance, and broadly barred all city officials from "acting in a way that may cause [an individual's] deportation."¹²

Following the passage of the highly restrictive 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA) and the vast expansion of immigration enforcement under the newly formed Department of Homeland Security after 9/11, state and local sanctuary policy resurged in a slightly different form. Beginning in 2010, jurisdictions began passing more targeted laws barring local jails and other law enforcement agencies from facilitating the transfer of non-citizens arrested for criminal offenses to ICE.¹³ A significant portion of these policies specifically limited compliance with ICE "detainers,"¹⁴ through which ICE requests that a local jail shares the release date of an individual alleged to be removable and, in certain circumstances, hold that individual past their release date to allow ICE to make

6. A. Naomi Paik, *Abolitionist futures and the US sanctuary movement*, 59 RACE & CLASS 3, 6 (2017), https://solidarity-city.eu/app/uploads/2018/06/Sanctuary_USA.pdf.

7. Colbern et al., *supra* note 5, at 518–19.

8. *Id.*

9. *Id.* at 520.

10. *Id.* at 524.

11. *Id.* at 523.

12. *Id.* at 527–28 (citing to Res. 1087-85 (Bd. of Supervisors, S.F., Cal. 1985)).

13. *Id.* at 541–42.

14. *Id.*

an arrest at the jail.¹⁵ The number of sanctuary jurisdictions in the United States grew gradually throughout the Obama administration and then spiked in response to the anti-immigrant agenda of President Trump.¹⁶

B. *The Spectrum of Modern Sanctuary Policy*

“Sanctuary” is an elusive term that resists precise definition and often leads to confusion about which policies and practices are properly considered forms of sanctuary. Local sanctuary policies are best understood on a spectrum from active collaboration with ICE to complete non-cooperation with ICE. Roughly 200 counties across the United States actively collaborate with ICE either through 287(g) agreements, which deputize local law enforcement to help enforce federal immigration law, or through other agreements under which ICE pays local jails to hold individuals in long-term detention or perform other services.¹⁷ The vast majority of U.S. jurisdictions do not have any such agreement with ICE.¹⁸ But jurisdictions that merely decline to engage in optional collaboration with ICE without implementing any policies specifically limiting collaboration cannot be properly regarded as “sanctuary” jurisdictions. These jurisdictions continue to facilitate ICE enforcement through activities such as sharing information about individuals in their custody upon ICE’s request.

Many jurisdictions chart a middle ground between active collaboration and complete noncooperation by prohibiting local jails from holding people for ICE past their release dates or limiting information sharing pursuant to detainer requests.¹⁹ More than 900 counties in the United States have one or both of these policies on the books.²⁰ Policies limiting compliance with ICE detainers typically contain exceptions for detainers lodged against individuals charged or convicted of an offense deemed particularly serious.²¹ These middle ground policies might be regarded as “sanctuary-lite” in that they limit, but do not eliminate, collaboration between ICE and local law enforcement. Policies barring jails from holding individuals past their release dates

15. *ICE Detainers: Frequently Asked Questions*, IMMIGR. AND CUSTOMS ENF’T (ICE), <https://www.ice.gov/identify-and-arrest/detainers/ice-detainers-frequently-asked-questions> (last visited April 23, 2021).

16. See Colbern et al., *supra* note 5, at 544 (finding that sanctuary policy expanded in response to harsh federal immigration enforcement and pro-immigrant state-level policy under Obama and then continued to expand under Trump); LEAN GRABER & KRSNA AVILA, IMMIGRANT LEGAL RES. CTR. (IRLC), *GROWING THE RESISTANCE: HOW SANCTUARY LAWS AND POLICIES HAVE FLOURISHED DURING THE TRUMP ADMINISTRATION* 13 (2019), https://www.ilrc.org/sites/default/files/resources/2019.12_sanctuary_report-final-12.17.pdf (finding that, from 2016 to 2019, more counties expanded their sanctuary policies than expanded collaboration with ICE).

17. See GRABER & AVILA, *supra* note 16, at 12 (finding that up to 27 counties have 287(g) agreements and additional 162 have service contracts with ICE).

18. See *id.* at 10.

19. See *id.* at 10–12.

20. See *id.* (finding that 715 counties refuse to hold individuals past their release dates for ICE and an additional 196 limit compliance with ICE detainers).

21. See, e.g., D.C. Act 19-442, Immigration Detainer Compliance Amendment Act of 2012, 59.34. D.C. Reg. 010153 (Aug. 2, 2012).

are largely superfluous, given that multiple federal courts have noted that this practice violates the Fourth Amendment.²² Furthermore, criminal carveouts in detainer policies are often so broad that they swallow the rule. Chicago's detainer policy, for instance, contains broad exceptions for individuals charged with or convicted of any prior felony.²³ Exceptions also exist for individuals suspected to be gang members based on the city's notoriously overbroad gang database.²⁴

A handful of jurisdictions have enacted policies that bar almost all collaboration with ICE, although no jurisdiction has achieved complete noncooperation. The strongest existing sanctuary policies are those that bar compliance with ICE detainers in *all* circumstances, ban ICE from the jail premises, or generally prohibit the use of local resources for the enforcement of federal immigration law. Sanctuary policies in more than 100 U.S. jurisdictions have most of these features,²⁵ but each falls short in at least one respect. The District of Columbia, for instance, has an outright ban, without criminal carveouts, on compliance with ICE detainers, and D.C. nominally denies ICE access to the jail premises. However, D.C. allows ICE to interview individuals in its custody in certain circumstances and does not have the authority to shield individuals held on federal charges from enforcement or to fully prevent collaboration between the U.S. Marshals and ICE at the D.C. courthouse.²⁶

It is virtually impossible for a jurisdiction to completely refrain from facilitating ICE enforcement using the typical noncollaboration tactics that characterize modern sanctuary policy. Even a jurisdiction that completely refuses to collaborate with ICE might still end up passively facilitating ICE enforcement simply by taking non-citizens into criminal custody, making it much easier for ICE to track down those individuals and detain them.²⁷ Jurisdictions interested in making sanctuary policy stronger must move further along the sanctuary spectrum, from declining to cooperate with ICE to actively thwarting ICE enforcement. Sections III and IV explain how jurisdictions might accomplish this within the bounds of their lawful authority.

22. See, e.g., *Gonzalez v. ICE*, 416 F. Supp. 3d 995, 1015–16 (C.D. Cal. 2019) (“ICE violates the Fourth Amendment by issuing detainers through state and local officers who lack authority to make civil immigration arrests.”); see also *Arizona v. United States*, 567 U.S. 387, 413 (2012) (“[D]elay[ing] the release of some detainees for no reason other than to verify their immigration status . . . would raise constitutional concerns.”).

23. CHICAGO, ILL., MUN. CODE § 2-173-042(c).

24. See Mike Dumke, *Chicago's Inspector General Finds the City's Gang Database is Riddled With Errors*, PROPUBLICA ILLINOIS (Apr. 11, 2019), <https://www.propublica.org/article/chicago-police-department-gang-database-inspector-general-report>.

25. See GRABER & AVILA, *supra* note 16, at 12.

26. See D.C. Code § 24-211.07 (2021).

27. See GRABER & AVILA, *supra* note 16, at 19 (“[A]ny contact with the criminal legal system, however minimal, creates a serious risk that ICE will intervene. . .”); Will Lennon, *D.C.'s Department of Corrections Has Processed Over 40 'ICE Pick-Ups' From Its Facilities Since 2016*, WASH. CITY PAPER (Aug. 23, 2019), <https://washingtoncitypaper.com/article/178824/dcs-department-of-corrections-has-processed-over-40-ice-pickups-from-its-facilities-since-2016/> (“ICE also sometimes waits outside DOC facilities to detain undocumented people shortly after their scheduled release times.”).

C. *Anti-sanctuary Strikes Back*

As jurisdictions across the country have joined the sanctuary movement, the federal government and some state governments have pushed back in an attempt to prevent the expansion of sanctuary. The federal government's most recent anti-sanctuary effort came in the form of a 2017 Department of Justice (DOJ) policy withholding Byrne Memorial Justice Assistance Grant (Byrne JAG) funds from sanctuary jurisdictions that decline to comply with detainer requests or to grant ICE access to their jails.²⁸ While three of four federal circuit courts held that the DOJ lacked the statutory authority to condition the receipt of Congressionally-appropriated Byrne JAG funds on immigration-related grounds,²⁹ whether the federal government can coerce sanctuary cities into cooperating with ICE remains an open question.³⁰

State legislatures have also recently entered the anti-sanctuary fray by passing preemptory statutes prohibiting localities from enacting sanctuary policies. The most aggressive example of anti-sanctuary legislation is S.B. 4 in Texas. S.B. 4 not only bans localities from adopting policies that “materially limit” cooperation with federal immigration authorities,³¹ but also makes any violation of the law a misdemeanor punishable by up to a year in jail.³² While some state anti-sanctuary laws limit the authority of localities to enact sanctuary legislation, others directly require localities to collaborate with ICE.³³ In either case, by robbing jurisdictions of mechanisms for opting out of collaboration, these anti-sanctuary laws function as unfunded mandates that deputize local law enforcement for the execution of federal immigration law.³⁴ Although federal litigation challenging the DOJ-imposed Byrne JAG conditions and other federal attempts to inhibit sanctuary policy has had some success, legal challenges to state anti-sanctuary laws have largely failed

28. See *New York v. Dep't of Justice*, 951 F.3d 84, 91 (2d Cir. 2020).

29. Compare *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019) (upholding preliminary injunction against DOJ policy because DOJ lacked delegated authority to impose conditions) and *City of Philadelphia v. Attorney Gen. of United States*, 916 F.3d 276 (3rd Cir. 2019) (modifying but upholding permanent injunction against DOJ policy because DOJ lacked delegated authority to impose conditions) and *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (upholding preliminary injunction against DOJ policy because DOJ lacked delegated authority to impose conditions) with *New York*, 951 F.3d 84 (reversing district court injunction and holding that DOJ had delegated authority to impose conditions).

30. DOJ petitioned for certiorari in one of the Byrne JAG cases. See *City & Cty. of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020) (cert petition docketed as *Wilkinson v. City and Cty. of San Francisco* (No. 20-666)). The Supreme Court dismissed the case at the request of the Solicitor General. See Joint Stipulation to Dismiss, *Wilkinson v. City and Cty. of San Francisco* (No. 20-666) (granted Mar. 4, 2021).

31. TEX. GOV'T CODE ANN. § 752.053(a) (West 2019).

32. TEX. PENAL CODE ANN. § 39.07 (West 2019).

33. See Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 U.C. DAVIS L. REV. 549, 562–63 (2018), https://lawreview.law.ucdavis.edu/issues/52/1/symposium/52-1_villazor_gulasekaram.pdf; GRABER & AVILA, *supra* note 16, at 14.

34. See Pratheepan Gulasekaram, Rick Su, & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 863–65 (2019), <https://columbialawreview.org/content/anti-sanctuary-and-immigration-localism/> (“By banning both formal policies and informal customs that limit cooperation with federal immigration authorities, local governments are essentially left with no alternative other than to permit or encourage such cooperation.”).

due to the relatively narrow set of powers possessed by local governments vis-à-vis their state governments.³⁵

As a result of this federal and state repression, conventional sanctuary policies have become less and less viable. Localities in anti-sanctuary states are legally barred from enacting policies limiting collaboration with ICE, and localities in other states face the risk of significant blowback from the federal government. Jurisdictions are in need of new, creative forms of sanctuary to circumvent restrictions and protect immigrant residents from federal immigration enforcement without suffering intolerable consequences.

II. A TALE OF TWO CITIES: SANCTUARY POLICY AND ITS FAILURES IN THE DISTRICT OF COLUMBIA AND AUSTIN, TEXAS

The District of Columbia and Austin, Texas, are illustrative of the gaps in modern sanctuary policy and the need for new solutions. Sanctuary laws in the District of Columbia have been gradually strengthened over the course of the last decade, yet they are continuously undermined by lack of compliance and by the heavy presence of federal law enforcement in the city. Meanwhile, the city of Austin and surrounding Travis County have enacted policies limiting collaboration with ICE, but the Texas state government has cracked down to prevent the county from implementing those policies. As a result, the District of Columbia and Austin continue to turn their residents over to ICE.

A. *District of Columbia*

In 2011, District of Columbia Mayor Vincent Gray issued an executive order barring city law enforcement officials from inquiring into anyone's immigration status, from holding individuals in custody based solely on their immigration status, and from permitting ICE to interview inmates absent a legitimate criminal investigation.³⁶ The executive order was followed in 2012 by legislation barring the D.C. Jail from sharing information with ICE regarding individuals in its custody, except for those convicted of offenses defined as "dangerous."³⁷ Amendments in 2019 and 2020 eliminated the criminal carveouts in the 2012 bill and barred compliance with ICE detainer requests by all D.C. agencies, in addition to restricting ICE's access to the

35. See *id.* at 851–52 (attributing the success of state-federal litigation to the "federalism structure of the United States prohibit[ing] the federal government from commandeering" and the failures of local-state litigation to the fact that "as a matter of law [localities] are largely understood to be nothing more than creatures of the state."); Villazor & Gulasekaram, *supra* note 33, at 564 (arguing that state anti-sanctuary laws have been successful "[b]ecause states can avoid the constitutional pitfalls that have thus stalled like-minded federal efforts and because states traditionally have enjoyed plenary control over localities . . .").

36. M.O. 2011-174, Disclosure of Status of Individuals: Policies and Procedures of District of Columbia Agencies, 58.42 D.C. Reg. 009084 (Oct. 21, 2011).

37. 59.34 D.C. Reg. 010153 (Aug. 2, 2012).

D.C. jail premises.³⁸ The D.C. Council has taken significant strides toward limiting collaboration with ICE, yet D.C. residents continue to be turned over to the agency.

D.C. law enforcement agencies have been reluctant to fully implement the city's sanctuary policies. The D.C. Jail, run by the D.C. Department of Corrections (DOC), shared with ICE the release dates of at least 43 non-citizens in its custody in the years leading up to the 2019 amendment, and even after the amendment passed, DOC's internal policy continues to allow for information sharing with ICE.³⁹ Meanwhile, the Metropolitan Police Department (MPD) reportedly continues to affirmatively contact ICE about individuals in its custody, in violation of the amended sanctuary law.⁴⁰

Even if all D.C. agencies were to fully comply with local sanctuary laws, the federal government's outsized role in the city would continue to drive a large gap in D.C.'s sanctuary status. In the D.C. Superior Courthouse, the U.S. Marshals act as custodians over most individuals awaiting arraignment on D.C. criminal charges. Individuals are arrested by MPD and handed over at the courthouse to the U.S. Marshals, who routinely contact ICE and hold individuals they suspect to be removable until ICE can apprehend them.⁴¹ While a federal court preliminarily enjoined the U.S. Marshal's practice of holding individuals for ICE, the court order is subject to relatively wide exceptions.⁴² The D.C. Council recently took a significant step toward closing this courthouse sanctuary gap by providing arrested individuals with the option of being out-processed from the courthouse by D.C. officials rather than the federal Marshals,⁴³ but it remains to be seen to what extent this new procedure will inhibit ICE activity.

B. *Austin, Texas*

Travis County, where the city of Austin is located, became one of the strongest sanctuary jurisdictions in Texas in 2017 when newly elected Sheriff Sally Hernandez announced a policy barring the county jail from holding individuals for ICE past their release dates and from sharing information with ICE about inmates, subject to certain exceptions.⁴⁴ Prior to Travis County's

38. 67.46. D.C. Reg. 013034 (Nov. 6, 2020).

39. See Lennon, *supra* note 27; AM. UNIV. WASH. COLL. OF LAW & JUST FUTURES LAW, SANCTUARY OR SNARE? SANCTUARY POLICIES IN THE DISTRICT OF COLUMBIA 12–13 (2021), <https://www.wcl.american.edu/academics/experientialedu/clinical/theclinics/ijc/ijc-impact-reports/sanctuary-or-snare/>.

40. Will Lennon, *Court Documents Describe MPD Sharing Information with ICE*, WASH. CITY PAPER (Sept. 3, 2020), <https://washingtoncitypaper.com/article/308837/dc-sanctuary-city-mpd-ice/>.

41. Martin Austeruhle, *D.C.'s Sanctuary City Status Has a Major Loophole: Superior Court*, DCIST (Sep. 20, 2018), <https://dcist.com/story/18/09/20/sanctuary-city/>.

42. See *N.S. v. Hughes*, 335 F.R.D. 337, 355 (D.D.C. 2020) (excluding individuals with final orders of deportation from certified class to which relief was granted).

43. D.C. Act 23-573, Sanctuary Values Amendment Act of 2020, 68.4. D.C. Reg. 001103 (Jan. 22, 2021).

44. See John Burnett, *Austin Sheriff Says She'll Limit Cooperation with Federal Immigration Authorities*, NPR (Jan. 28, 2017), <https://www.npr.org/2017/01/28/512129954/austin-sheriff-says-shell->

policy, the Austin Police Department's internal rules against ICE collaboration were largely symbolic because anyone arrested by the Austin police would end up in jails run by the county.⁴⁵ After the county policy was enacted, the city and the county began working in concert to limit ICE enforcement in the region. Sheriff Hernandez defended her policy by arguing that it would promote trust between the police and immigrant communities and eliminate the fear many immigrant residents have of reporting crime.⁴⁶

Yet almost as soon as Travis County began implementing its policy, the Texas state legislature responded aggressively with S.B. 4, a state law mandating that all law enforcement agencies in the state cooperate fully with ICE. S.B. 4 preempts all local policies that "materially limit[] the enforcement of immigration laws,"⁴⁷ and makes failure to comply a misdemeanor punishable by fines and jail time.⁴⁸ A coalition of jurisdictions, including the city of Austin and Travis County, won an injunction against S.B. 4 at the federal district court level,⁴⁹ but the Fifth Circuit stayed most of the injunction and allowed the provisions mandating information sharing with ICE to go into effect.⁵⁰ As a result, Travis County has returned to its previous policy of complying with all of ICE's requests for information,⁵¹ and Austin police have begun collaborating extensively with ICE in accordance with S.B. 4.⁵²

Sanctuary policy in the District of Columbia and Austin, Texas, has thus far failed to live up to its potential. Cities like these should explore new ways of building sanctuary.

III. CITATION IN LIEU OF ARREST: BROADLY IMPLEMENTED YET INFREQUENTLY UTILIZED

"Citation in lieu of arrest" refers to a set of state and local policies that permit or require police to issue citations instead of making an arrest for certain criminal offenses, allowing the cited individual to remain outside of physical custody for the entirety of their court proceedings.⁵³ Generally, state law classifies the range of criminal offenses for which citations are permitted. Local

limit-cooperation-with-federal-immigration-authorities; Stephanie Federico, *After Court Ruling, Travis County Will Comply With All ICE Detention Requests*, KUT 90.5 (Sept. 25, 2017), <https://www.kut.org/post/after-court-ruling-travis-county-will-comply-all-ice-detention-requests>.

45. See Jay Root, *Austin Poised to Become First True "Sanctuary City" In Texas*, TEX. TRIB. (Aug. 31, 2016), <https://www.texastribune.org/2016/08/31/austin-poised-become-first-sanctuary-city-texas/> (explaining that ICE previously picked Austin residents up at the Travis County jail on daily basis despite Austin's "symbolic" policy in 2014 calling for end to collaboration with ICE).

46. See *id.*; Burnett, *supra* note 44.

47. TEX. GOV'T CODE ANN. § 752.053(a) (West 2017).

48. TEX. PENAL CODE ANN. § 39.07 (West 2017).

49. See *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017).

50. See *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018).

51. Federico, *supra* note 44.

52. Audrey McGlinchy, *Austin Police Shared Data With Federal Immigration Officials More Than 500 Times In 2018*, KUT 90.5 (Mar. 1, 2019), <https://www.kut.org/post/austin-police-shared-data-federal-immigration-officials-more-500-times-2018>.

53. Citation in lieu of arrest is also referred to as "citation release" and "field release," amongst other terms. See e.g., INT'L ASS'N. OF CHIEFS OF POLICE, CITATION IN LIEU OF ARREST: EXAMINING LAW

policy, in the form of legislation or police department guidance, lays out the specific circumstances in which police should or should not issue a citation instead of making an arrest.⁵⁴ Citation in lieu of arrest typically takes one of three forms.⁵⁵ Under “field release,” the most common form of citation in lieu of arrest policy, police cite a person for an alleged offense without taking the person into any form of physical custody.⁵⁶ Through “stationhouse release,” police transport the person to the local police station to run checks before issuing a citation and releasing the person.⁵⁷ Under “jail release,” the procedure most closely resembling traditional pre-trial detention, police transfer the person to the local jail, which then assumes responsibility for booking, citing, and releasing the person.⁵⁸ This section will focus largely on field release.

A. *The Limited Expansion of Citation in Lieu of Arrest*

Police departments have used citation in lieu of arrest procedures since at least the early 1900s when the expansion of automobile usage made frequent arrests for traffic offenses infeasible.⁵⁹ By the 1940s, a large portion of states had laws allowing or requiring citations for traffic offenses.⁶⁰ Citation in lieu of arrest for non-traffic criminal offenses was later popularized in the 1960s when the bail reform movement brought national attention to the injustices of prolonged pre-trial detention.⁶¹ After a successful pilot carried about by the Manhattan Bail Project, jurisdictions across the country began implementing pre-trial detention reforms, including citation in lieu of arrest policies.⁶² By the early 1980s, several national criminal justice organizations had endorsed citation in lieu of arrest policies,⁶³ and the vast majority of states had passed legislation authorizing citation in lieu of arrest for some criminal offenses.⁶⁴ Still, in the 1980s, even as citation in lieu of arrest policies were widely implemented and celebrated in name, only a small portion of potential arrest encounters nationwide resulted in citations instead of arrests.⁶⁵

Enforcement’s Use of Citation Across the United States 7 (2016), <https://www.theiacp.org/sites/default/files/all/i-j/IACP%20Citation%20Final%20Report%202016.pdf> [hereinafter IACP].

54. See *id.*; *Citation in Lieu of Arrest*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx> (last visited April 23, 2021) [hereinafter NCSL].

55. DEBRA WHITCOMB, BONNIE P. LEWIN, & MARGARET J. LEVINE, U.S. DEP’T OF JUSTICE, *CITATION RELEASE* vii (1984), <https://www.ncjrs.gov/pdffiles1/Digitization/94200NCJRS.pdf>.

56. *Id.* at 9.

57. *Id.* at 12.

58. *Id.* at 13, 15.

59. *Id.* at 1.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 2.

64. *Id.* at 3.

65. Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 336 (2016); see also WHITCOMB et al., *supra* note 55, at 4, 8.

Today, citation in lieu of arrest remains widely implemented yet utilized much less frequently than it feasibly could be. All fifty states and the District of Columbia currently allow for citations in lieu of arrest for at least some misdemeanor offenses.⁶⁶ Eight of these states specifically authorize citations for certain felonies, and an additional seven states give general citation authority without distinguishing between misdemeanors and felonies.⁶⁷ No statewide legislation requires the use of citations; rather, state laws typically afford discretion to local police and local governments to establish citation procedures for certain offenses while foreclosing the use of citations for other offenses. The District of Columbia's citation in lieu of arrest law is representative. The law permits but does not require citations for certain minor misdemeanor offenses, and it bars citations for all felonies and some misdemeanors deemed dangerous.⁶⁸

Tracking state legislative trends, most local police departments use citation in lieu of arrest, but few use it frequently. More than 85% of police departments that participated in a recent nationwide survey reported that they currently issue citations or have used citations in the recent past for at least some criminal offenses.⁶⁹ However, the median percentage of arrestable offenses for which police issued citations was just 31%.⁷⁰ The relatively low utilization of citation in lieu of arrest is at least partially a result of carveouts in state laws, city ordinances, and departmental policies that prohibit citations for certain offenses. The vast majority of police departments only issue citations for misdemeanors and other minor infractions,⁷¹ most commonly for offenses like theft, disorderly conduct, trespass, and small-scale drug possession.⁷² Only 18% of police departments said they had the authority to issue citations for felonies, while only 4% said they had such authority for violent felonies.⁷³

The infrequent usage of citation in lieu of arrest is likely also a result of the discretion afforded to individual police officers. Only 11% of police departments are *required*, by law or by their own internal policies, to issue citations for eligible offenses.⁷⁴ A few additional jurisdictions have policies establishing a presumption in favor of citation for eligible offenses and requiring police officers to explain why they did not issue a citation if they opt instead for arrest.⁷⁵

66. NCSL, *supra* note 54.

67. *Id.*

68. D.C. CODE § 23-584(a)–(b) (2021).

69. IACP, *supra* note 53, at 10.

70. *Id.*

71. *Id.* at 11.

72. *Id.* at 14.

73. *Id.* at 11.

74. *Id.* at 12.

75. See, e.g., WHITCOMB et al., *supra* note 55, at 10 (noting that in California “an officer who opts not to issue a field citation for a misdemeanor offense must note on the arrest report the reason(s) for making a physical arrest.”).

B. *Advantages of Citation in Lieu of Arrest*

Law enforcement agencies have generally viewed citation in lieu of arrest policies as necessary for prioritizing enforcement against more serious offenders and helping police do their jobs more effectively. Police departments report that citation in lieu of arrest policies increase the productivity and efficiency of their officers, reduce costs, enhance community-police relations, and keep officers safe.⁷⁶ Several jurisdictions have temporarily expanded their use of citations in order to minimize risky physical contact during the COVID-19 pandemic.⁷⁷ Still, many jurisdictions have declined to implement or have refrained from frequently using citation in lieu of arrest because of concerns that cited persons might fail to appear in court, that the practice enables re-offending, or that crime victims might view citations in lieu of arrest as too lenient.⁷⁸

Citation in lieu of arrest policies also have several advantages independent of law enforcement justifications. Issuing citations eliminates or significantly mitigates the harmful effects of criminal arrest, such as the disruption of families and the loss of employment or government benefits.⁷⁹ Similarly, citation in lieu of arrest takes away some of the police's power to inflict legally authorized violence and invade individual privacy. Without making an arrest, police do not have the established constitutional authority to search incident to arrest,⁸⁰ strip search during booking,⁸¹ collect sensitive information,⁸² compel individuals to spend several nights in jail,⁸³ or use physical, deadly force.⁸⁴ The benefits of citation in lieu of arrest center around a fundamental

76. *See id.* at 17–20; IACP, *supra* note 53, at 17–18.

77. *See, e.g., MPD and the Coronavirus (COVID-19)*, DC.GOV, <https://mpdc.dc.gov/page/mpd-and-coronavirus-covid-19> (last visited April 23, 2021) (“Following the DC Superior Court order restricting court operations, MPD has expanded criteria that district stations will use to determine which arrestees will be released on citation pending a future court date instead of being held for presentment to court the next court day.”).

78. *See* IACP, *supra* note 53, at 20–21, 24; WHITCOMB et al., *supra* note 55, at 20–21.

79. *See* Harmon, *supra* note 65, at 313–14, 317 (“[A]rrests are often frightening and humiliating. Arrestees lose income during the arrest, and sometimes their jobs when they do not show up for work. They pay arrest fees, booking fees, and perhaps attorney’s fees, if they hire a lawyer for their first appearance . . . An arrest can affect child custody rights, it can trigger deportation, and it can get a suspect kicked out of public housing. Over the long term, individuals with arrest records may have worse employment and financial prospects.”).

80. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (authorizing police to search incident to arrest); Knowles v. Iowa, 525 U.S. 113, 118–19 (1998) (holding that police must make a full arrest in order to search incident to arrest).

81. *See* Florence v. Bd. of Chosen Freeholders of Cty. of Burlington, 132 S. Ct. 1510, 1523 (2012).

82. *See* Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990) (holding that police can compel answers to routine booking questions after arrest); Maryland v. King, 569 U.S. 435, 465–66 (2013) (holding that police can collect DNA after arrest).

83. *See* City of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991).

84. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (authorizing use of force in the course of arrest if “objectively reasonable”); Tennessee v. Garner, 471 U.S. 1, 11–12 (1985) (authorizing use of deadly force in course of arrest if suspect presents significant threat to officer or community).

principle of modern police reform and abolition movements: that the “best way to reduce the violence of policing is to reduce contact with cops.”⁸⁵

Citation in lieu of arrest not only minimizes contact with police officers but also keeps people out of jails during their court proceedings. Shortly before the spread of the COVID-19 pandemic, approximately 470,000 Americans were detained pre-trial in local jails without a conviction or sentence.⁸⁶ This population of individuals legally presumed to be innocent pending trial consistently makes up two-thirds of the total jail population in the United States on any given day.⁸⁷ If all local jurisdictions enacted comprehensive citation in lieu of arrest policies, most of these individuals held pre-trial in local jails would not enter jail in the first place. Citation in lieu of arrest provides a more efficient and equitable route to what the criminal justice system already produces through cash bail procedures. Most people facing felony charges are released on bail until trial. And the vast majority of those who are not released are granted bail but cannot afford to pay it.⁸⁸ Like cash bail, citation in lieu of arrest policies reflect the statistically supported truth that releasing people during their court proceedings generally leads to significant societal benefits without leading to an increase in crime.⁸⁹

IV. FRAMING CITATION IN LIEU OF ARREST AS SANCTUARY POLICY

Sanctuary advocates have recently called for intersectional criminal justice reforms that not only strengthen sanctuary policy but also reduce police violence and mass incarceration disproportionately affecting Black and Brown communities.⁹⁰ As Naomi Paik argues, “[t]he centrality of law enforcement in targeting immigrants . . . means that processes of criminalisation and policing practices in general, not solely for immigrants, must be core arenas in the

85. Rachel Herzing, *Big Dreams and Bold Steps Toward a Police-Free Future*, in WHO DO YOU SERVE, WHO YOU PROTECT? POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 111, 115 (Maya Schenwar et al., eds., Haymarket Books 2016).

86. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

87. *Id.*

88. TIMOTHY R. SCHNACKE, NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 11 (2014), <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>; see also Harmon, *supra* note 65, at 355 (“Comparing our existing arrest practice to our system of pretrial release shows how bizarre it is that we take for granted the necessity of so many arrests.”).

89. Tiana Herring, *Releasing people pretrial doesn’t harm public safety*, PRISON POL’Y INITIATIVE (Nov. 17, 2020), <https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/>.

90. See CTR. FOR POPULAR DEMOCRACY & LOCAL PROGRESS, PROTECTING IMMIGRANT COMMUNITIES: MUNICIPAL POLICY TO CONFRONT MASS DEPORTATION AND CRIMINALIZATION 2 (2017), [https://populardemocracy.org/sites/default/files/Sanctuary-Cities-Toolkit_web_051117%20\(1\).pdf](https://populardemocracy.org/sites/default/files/Sanctuary-Cities-Toolkit_web_051117%20(1).pdf)

(“Reforms to policing and to the criminal justice system more broadly . . . must be part of any comprehensive sanctuary policy”); TANIA A. UNZUETA, MIJENTE, EXPANDING SANCTUARY: WHAT MAKES A CITY A SANCTUARY NOW? 14 (2017) <https://mijente.net/2017/01/sanctuary-report/> (“Reducing criminalization and mass incarceration is now an essential and irreplaceable component of sanctuary policy that seeks to have a meaningful impact in the current moment.”); GRABER & AVILA, *supra* note 16, at 19 (“Because any contact with the criminal legal system, however minimal, creates a serious risk that ICE will intervene, local policies to tamp down on aggressive policing are an important avenue for thinning the pipeline to jail and deportation.”).

fight for true sanctuary.”⁹¹ A comprehensive citation in lieu of arrest policy is an effective supplement or alternative to conventional sanctuary policy and also has broader curative effects on the criminal justice system.

A. *How Citation in Lieu of Arrest Serves Sanctuary Purposes*

Criminal arrest and jail custody are crucial to the full-fledged functioning of immigration detention and deportation systems. Under the Secure Communities Program and the Criminal Alien Program, federal initiatives in which all jurisdictions are required to participate, the fingerprints of every person arrested and booked in local custody are automatically sent to ICE via federal databases, allowing ICE to issue a detainer request.⁹² Conventional sanctuary policies deal with this problem on the back-end by prohibiting law enforcement from holding a person for ICE or sharing a person’s release date once ICE has already identified the person for arrest. A field release citation in lieu of arrest policy, on the other hand, would prevent ICE from identifying individuals for arrest in the first place by keeping them out of criminal custody.

While citation in lieu of arrest would not do much to prevent ICE from apprehending individuals from jails and prisons after they are convicted and serve their sentences, it would all but eliminate ICE’s common practice of arresting individuals pre-trial before they have been convicted of any offense.⁹³ This would substantially disrupt ICE’s detention and deportation systems. Of the roughly 95,000 ICE detainers issued in 2015, nearly half (47,000) were issued against individuals held pre-trial with no criminal convictions.⁹⁴ It would also allow non-citizens to zealously defend against criminal charges before suffering the immigration consequences of those charges, affording them the same due process that their citizen peers receive.

To provide meaningful sanctuary, a citation in lieu of arrest policy should be collaborative, comprehensive, and compulsory. First, it should be collaborative in that state and local policy work in conjunction to implement it. For sanctuary purposes, the strongest citation in lieu of arrest policy would be comprised of a state law providing general citation authority regardless of the offense⁹⁵ and a city or county law establishing a detailed field release policy for local police.⁹⁶ A local law carrying binding legal authority is preferable to

91. Paik, *supra* note 6, at 14.

92. See CTR. FOR POPULAR DEMOCRACY & LOCAL PROGRESS, *supra* note 90, at 30–31; Colbern et al., *supra* note 5, at 494 n.17. Secure Communities was replaced with the Priority Enforcement Program in 2014, and then restored by the Trump administration in 2017. President Biden has returned to a policy resembling the Priority Enforcement Program, which functions similarly to Secure Communities but purportedly prioritizes more serious offenders. See UNZUETA, *supra* note 90, at 3.

93. See *Tracking Immigration and Customs Enforcement Detainers*, TRACIMMIGRATION, <https://trac.syr.edu/phptools/immigration/detainhistory/> (last visited April 23, 2021); Jordan, *supra* note 1.

94. TRACIMMIGRATION, *supra* note 93.

95. See, e.g., ME. STAT. tit. 17-A, § 15-A (West 2019).

96. See, e.g., Res. 20180614-073, City Council of Austin (June 14, 2018), <https://www.austintexas.gov/edims/document.cfm?id=301064>.

a departmental policy, which can be modified and violated without significant oversight.⁹⁷ Meanwhile, a field release system is superior to other alternatives because it keeps individuals entirely out of criminal custody.

Second, a citation in lieu of arrest policy should be comprehensive in that it covers most criminal offenses, with no or minimal exceptions. As previously noted, most existing citation in lieu of arrest policies are limited to select misdemeanor offenses, and many contain additional exceptions barring the use of citations in certain circumstances regardless of the nature of the offense.⁹⁸ An ideal policy would cover all misdemeanors and nonviolent felonies without exception, as well as codifying a rebuttable citation presumption for more serious felonies, requiring a police officer to justify the arrest based on danger to the community or other relevant circumstances.⁹⁹

Finally, a citation in lieu of arrest policy must be mandatory in order to have a meaningful impact. The gap between the existence of citation policies and the actual use of citations suggests that, if police officers are not legally required to issue a citation for a given offense, they will generally make an arrest in their discretion instead.¹⁰⁰ Only by making citations mandatory for certain offenses can citation in lieu of arrest produce significant sanctuary benefits and have a transformative impact on the criminal justice system.

A citation in lieu of arrest policy would best serve sanctuary purposes if it also included a decriminalization component. Citation in lieu of arrest policies generally involve *criminal* citations requiring the cited person's appearance in court at a later date.¹⁰¹ Decriminalization goes further by converting formerly criminal offenses punishable by jail time into civil offenses punishable only by fine, but it generally preserves the police's authority to arrest and temporarily detain individuals accused of civil infractions.¹⁰² To cure each of these shortcomings, citation in lieu of arrest and decriminalization should be implemented together such that police must cite rather than arrest individuals for certain offenses and those citations must be civil rather than criminal.

Like citation in lieu of arrest, decriminalization efforts have significant precedent in the United States. Many traffic offenses are classified as civil infractions for which appearance in court is not required. 26 states and more than 50 localities have either decriminalized or fully legalized recreational

97. See WHITCOMB et al., *supra* note 55, at 8 (“[I]n many agencies, citation release procedures are implemented without explicit goals and without sufficient monitoring mechanisms. . . Effective planning and operation of citation release programs requires integrated action among a broad and disparate array of departments, agencies, and officials.”).

98. See, e.g., D.C. CODE § 23-584(a)-(b) (2021).

99. See, e.g., WHITCOMB et al., *supra* note 55, at 10.

100. See *id.* at 21 (“There is always a risk that certain officers may apply the procedure in a discriminatory or arbitrary fashion . . . In several departments visited, line officers were skeptical of the citation release procedure . . .”).

101. IACP, *supra* note 53, at 7.

102. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VANDERBILT L. REV. 1055, 1079 (2019), <https://scholarship.law.vanderbilt.edu/vlr/vol68/iss4/2> (noting that California and Nebraska permit arrests for civil drug offenses).

marijuana.¹⁰³ Municipalities generally have the legal authority to at least partially decriminalize certain offenses in the absence of state legislation, as many have done for marijuana.¹⁰⁴ Localities could feasibly decriminalize most or all of the misdemeanor offenses for which they already issue criminal citations, such as drug possession, as well as decriminalizing other offenses not traditionally cited, such as misdemeanor domestic violence.¹⁰⁵ While decriminalization would not entirely eliminate the potential federal immigration consequences of most offenses, some of which would likely still be considered “convictions” for immigration purposes upon an admission of guilt,¹⁰⁶ it has the potential to keep alleged offenses out of the courtroom and out of individuals’ criminal records, thereby minimizing exposure to immigration enforcement. When combined with citation in lieu of arrest, decriminalization of misdemeanor offenses could help keep thousands of non-citizens out of the hands of ICE.¹⁰⁷

B. *Citation in Lieu of Arrest v. Conventional Sanctuary Policy*

As illustrated by the examples of D.C. and Austin described in Section I, conventional sanctuary policies limiting collaboration between local law enforcement and ICE have significant gaps and are often undermined by state and federal repression. Citation in lieu of arrest can help fill many of these gaps and circumvent many state and federal restrictions. First, by keeping cited individuals out of criminal custody, citation in lieu of arrest largely robs local law enforcement of the opportunity to covertly transfer individuals to ICE in violation of sanctuary laws. Similarly, it robs ICE of its ability to apprehend individuals at local jails, with or without local collaboration.

Second, citation in lieu of arrest gives localities an opportunity to chart their own sanctuary path despite contradictory county, state, or federal law. If, for example, a progressive city is located within a more conservative

103. *Decriminalization*, NORML, <https://norml.org/laws/decriminalization/> (last visited April 23, 2021).

104. *See, e.g., Decriminalization is sweeping Florida — one city at a time*, MARIJUANA POL’Y PROJECT (MPP), <https://www.mpp.org/states/florida/decriminalization-is-sweeping-florida-one-city-at-a-time/> (last updated Jan. 16, 2020).

105. *See* IACP, *supra* note 53, at 14 (listing commonly cited misdemeanor offenses); Natapoff, *supra* note 102, at 1071 (providing examples of decriminalized misdemeanors, including petty theft in California and driving while uninsured in Massachusetts). *See generally* LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED APPROACH TO INTIMATE PARTNER VIOLENCE* (2018) (advocating for the decriminalization of most forms of domestic violence).

106. *See* Frequently Asked Questions: The Impact of Marijuana Decriminalization, Vacatur, and Expungement Legislation on Immigrants in New York, IMMIGR. DEF. PROJECT (Aug. 28, 2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/Imm-Attys-and-Advocates-FAQ-2019-MJ-Decrim.pdf> (explaining that “decriminalization statute [in New York] did not eliminate the negative immigration consequences of marijuana possession”); Natapoff, *supra* note 102, at 1090 (“Nonjailable misdemeanors are still criminal convictions with immigration consequences. And while a fully decriminalized offense may not technically generate a criminal record, the underlying conduct can still trigger deportation.”).

107. *See* TRACIMMIGRATION, *supra* note 93 (showing that, of approximately 95,000 detainees issued in 2015, roughly 18,000 were for individuals with misdemeanor convictions only).

country that runs the local jail, any conventional sanctuary policy adopted by the city would have little impact because the county jail could still turn over local inmates to ICE.¹⁰⁸ Citation in lieu of arrest allows localities to protect their own residents by keeping them out of county jails, from which they may be transferred to ICE. Similarly, a comprehensive citation in lieu of arrest policy in the District of Columbia would help keep the city's undocumented residents out of courthouse custody, through which they may be transferred to ICE by the U.S. Marshals.¹⁰⁹

Lastly, citation in lieu of arrest policies present a unique opportunity to craft sanctuary policy firmly within jurisdictions' legal authority and without significant resistance or retribution from states and the federal government. State anti-sanctuary laws like S.B. 4 in Texas, which criminalizes the act of materially limiting cooperation with ICE, could not be feasibly applied to local laws and departmental policies like citation in lieu of arrest that do not directly limit ICE collaboration. Similarly, it is unlikely that the federal government, especially the Biden administration, would sue or seek to withhold funds from jurisdictions that enact creative criminal justice reforms with an indirect impact on immigration enforcement, in part because these reforms fall squarely within state and local police powers.¹¹⁰

Austin, Texas stands as a prime example of how jurisdictions can use citation in lieu of arrest to creatively build sanctuary despite the limitations of and resistance to conventional sanctuary policy. Because most people arrested in Austin go to the Travis County Jail for pre-trial detention, the Austin city government had few options for unilaterally enacting meaningful sanctuary policy until the Travis County Sheriff Sally Hernandez announced a new detainer policy in 2017.¹¹¹ Almost as soon as this policy went into effect, the Texas state legislature responded with S.B. 4. Yet, instead of capitulating to state control, Austin charted a new path toward becoming a "freedom city."¹¹² In June 2018, the Austin City Council passed Resolution 73, which requires the Austin police to issue citations for certain misdemeanor offenses unless exceptions apply.¹¹³ As one council member noted, "If people are being arrested less, we can also prevent people from being put in the

108. See, e.g., Root, *supra* note 45.

109. See Austermuhle, *supra* note 41 (describing the U.S. Marshal's practice of turning individuals over to ICE at the D.C. Superior Courthouse).

110. See *United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."); *United States v. California*, 921 F.3d 865, 887 n.11 (9th Cir. 2019) ("A state's ability to regulate its internal law enforcement activities is a quintessential police power.")

111. See Burnett, *supra* note 44; Root, *supra* note 45.

112. Jaweed Kaleem, 'Freedom city'? Going beyond 'sanctuary,' Austin, Texas, vows to curtail arrests, L.A. TIMES (June 19, 2018), <https://www.latimes.com/nation/la-na-austin-freedom-city-2018-story.html>.

113. Res. 20180614-073, City Council of Austin (June 14, 2018), <https://www.austintexas.gov/edims/document.cfm?id=301064>.

deportation pipeline.”¹¹⁴ Austin also passed a resolution requiring police to advise arrested individuals of their right to remain silent regarding their immigration status¹¹⁵ and later became one of the first cities in the country to successfully transfer funds from its police department to alternative social services programs.¹¹⁶ Although Austin’s citation in lieu of arrest policy is relatively narrow and could be significantly expanded to have a broader sanctuary impact, Austin’s approach serves as a model for how localities can pursue a creative, affirmative sanctuary policy despite an unfriendly state and federal landscape.

While citation in lieu of arrest can serve as a helpful alternative for jurisdictions like Austin that are legally barred from limiting collaboration with ICE, citation in lieu of arrest and conventional collaboration-limiting sanctuary policies best work in tandem. Even under a relatively comprehensive citation in lieu of arrest policy, some people, particularly those charged with felonies, would likely still be held pre-trial in jails at which ICE may apprehend them. Furthermore, as previously noted, citation in lieu of arrest does not address the potential immigration consequences an individual may experience after going to court and being convicted of a criminal offense. Rules barring local institutions from communicating with ICE are therefore still necessary to partially fill these gaps. Together, citation in lieu of arrest and limitations on ICE collaboration can build a broader, stronger sanctuary.

V. MAKING SANCTUARY POLICY ABOLITIONIST

The intersection of citation in lieu of arrest and sanctuary policy moves the discourse and everyday practice of sanctuary policy in a more abolitionist direction. Calls to abolish or significantly reduce the role of police and prisons in American communities have recently gained substantial momentum in response to mass incarceration and police killings of predominantly Black and Brown people.¹¹⁷ Advocates are increasingly rejecting piecemeal reforms that ultimately preserve long-standing punitive institutions, opting instead for abolitionist tactics that seek to reduce the scope of police and prisons. In contrast to this growing movement, conventional sanctuary policy has been largely reformist in nature, motivated by a desire to expand local law enforcement’s reach in immigrant communities and centered around a distinction between law-abiding immigrants worthy of protection and immigrants perceived to be dangerous. Citation in lieu of arrest, on the other hand, is more abolitionist in nature because it reduces exposure to police and

114. Kaleem, *supra* note 112.

115. Res. 20180614-074, City Council of Austin (June 14, 2018), <https://www.austintexas.gov/edims/document.cfm?id=300891>.

116. Leif Reigstad, *How Austin Cut One Third of Its Spending on the Police Department*, TEX. MONTHLY (Nov. 17, 2020), <https://www.texasmonthly.com/politics/austin-police-department-defunding/>.

117. See, e.g., Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>.

prisons and promotes alternatives to arrest and incarceration. Framing citation in lieu of arrest as sanctuary policy therefore helps fold the sanctuary movement into the movement for police and prison abolition.

A reformist mindset has historically dominated the discourse surrounding police violence and mass incarceration. Scholars, advocates, and politicians have traditionally argued that the police will operate more justly and inflict less violence if they are better trained, better regulated, and better resourced.¹¹⁸ Similarly, discussions around mass incarceration and oppressive prison conditions have almost exclusively focused on improving the existing prison system, ignoring the possibility that the very concept of prison could be replaced.¹¹⁹ An array of recent scholarship, however, contends that historical efforts to reform police and prisons are short-sighted and inhibit meaningful change by legitimizing and at times expanding the power of punitive, historically racist institutions.¹²⁰ Advocates and scholars further point out that the reformist mindset is often criminalizing in nature, dividing communities into those worthy of mercy or protection and those who are deemed dangerous and irredeemable.¹²¹

Rejecting reformism as a tool for preserving the status quo, a growing movement is calling for the abolition of police and prisons as the only viable solution for meaningfully dismantling police violence and mass incarceration.¹²² Yet many recognize that abolition will not, and probably should not, happen overnight.¹²³ Born out of this recognition is a growing distinction in the literature between “reformist reforms” and abolitionist experiments.¹²⁴ While reformist reforms fortify the status quo, abolitionist experiments reduce the scope of police and prisons and directly challenge the persistent assumption that police and prisons, as currently structured, are necessary to

118. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1802 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3670952 (“Because policing is seen as socially useful or normatively desirable, scholars locate the problem with police violence as a problem for regulation.”).

119. See ANGELA DAVIS, ARE PRISONS OBSOLETE? 20–21 (2003) (“[F]rameworks that rely exclusively on reforms help to produce the stultifying idea that nothing lies beyond the prison.”).

120. See *id.*; Akbar, *supra* note 118, at 1814 (“[T]he danger of the conventional reform agenda is not simply that it advances ineffectual solutions to police violence. [The logic of the conventional agenda is one that] invites investments in police and, therefore, builds the power and legitimacy of police, including their discretion for violence.”); Dylan Rodriguez, *The Magical Thinking of Reformism: Reformism Isn’t Liberation, It’s Counterinsurgency*, LEVEL (Oct. 20, 2020), https://level.medium.com/amp/p/7ea0a1ce11eb?_twitter_impression=true (“[R]eformism seeks to preserve social, political, and economic orders by modifying isolated aspects of their operation.”).

121. See Akbar, *supra* note 118, at 1824 (“Criminalization at the level of discourse and material reality—who gets policed, how, and with what frequency, and who is behind bars, for what reason, and for how long—marks people of color, poor people, and queer and trans people as undeserving and unworthy of social benefits.”).

122. See, e.g., Kaba, *supra* note 117 (“We can’t reform the police. The only way to diminish police violence is to reduce contact between the public and the police.”).

123. See Akbar, *supra* note 118, at 1787 (“Reform is one strategy toward the transformation abolition seeks.”).

124. See CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS IN POLICING, https://static1.squarespace.com/static/59ead8f9692ebec25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf (last visited April 23, 2021).

maintain community safety.¹²⁵ Abolitionist experiments are reforms without reformism: they take gradual, small steps toward change, but they do so with the purpose of moving society closer toward an “abolitionist horizon.”¹²⁶

Modern sanctuary policy is more reformist than abolitionist. It seeks to separate local law enforcement from federal law enforcement but does little to diminish the power of either. In fact, sanctuary policy has typically been framed as a mechanism for expanding the reach of local law enforcement by encouraging immigrant communities to call the police without fear of immigration consequences.¹²⁷ By “justify[ing] . . . protections in terms of law enforcement objectives,” conventional sanctuary policy preserves the notion that police are always necessary for keeping communities safe.¹²⁸ Sanctuary policies also generally include criminal carveouts, which feed into criminalizing narratives that both ICE and the police have historically exploited to justify harsh enforcement. For instance, detainer compliance laws that exclude individuals charged or convicted of crimes perceived to be serious foster the perception that some immigrants are too dangerous to live in the community and therefore deserve to be detained and deported.¹²⁹ A growing contingent of immigrants’ rights advocates, building upon the movement to abolish ICE, have recently called for a more abolitionist sanctuary policy that rejects criminalizing trends of status quo reform and intersects with broader goals of racial justice.¹³⁰

Citation in lieu of arrest, if broadly implemented and utilized, is an abolitionist experiment that diminishes the power of police, prisons, and ICE, while simultaneously illustrating that those institutions may be unnecessary and replaceable in many situations. A comprehensive and mandatory citation in lieu of arrest policy would significantly curtail the power to arrest, thereby reducing the everyday footprint of police in the community. Citation in lieu of arrest also reduces the number of individuals held in local jails, thereby taking a small but proportionally significant step toward ending pre-trial

125. *See id.*; Akbar, *supra* note 118, at 147.

126. Akbar, *supra* note 118, at 107.

127. *See, e.g.*, CHI., ILL. MUN. CODE § 2-173-005 (declaring that sanctuary law’s purpose is to encourage “the cooperation of all persons, both documented citizens and those without documentation status . . . to achieve the City’s goals of protecting life and property, preventing crime and resolving problems.”).

128. Paik, *supra* note 6, at 16.

129. *See id.* (“By selecting certain immigrants or carving out exceptions . . . local governments play into a dichotomy that valorises ‘good immigrants’ against unspoken ‘bad immigrants’, who do not deserve protection.”).

130. *See id.* at 5–6 (arguing that sanctuary policy “must adopt abolitionist strategies that not only grapple with populations under duress, but also with the structures through which they become targeted”); MIJENTE, FREE OUR FUTURE: AN IMMIGRATION POLICY PLATFORM FOR BEYOND THE TRUMP ERA 1 (2018), https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf (“We offer immigration policies that not only call for the abolition of immigration enforcement agencies, but for full-scale decriminalization of immigration.”); *Black Lives Matter*, SANCTUARY DMV (June 3, 2020), <http://sanctuarydmv.org/2020/06/black-lives-matter/> (“Across the county, police departments systematically arrest Black and Brown people in our communities and turn them over to ICE to be detained and deported. These police departments must also be subjected to systemic divestment. They do not keep us safe; we keep us safe.”).

detention.¹³¹ Moreover, citation in lieu of arrest relegates the police to a narrow role as citation distributors, gradually illustrating to the community that police may not be needed to address some instances of interpersonal harm. It similarly helps demonstrate that justice can be served and safety can be maintained in many situations without pre-trial incarceration. As previously noted, citation in lieu of arrest has historically been framed and utilized by police departments as a reformist, cost-saving, and capacity-expanding tool.¹³² But if advocates were to take hold of the core concept behind citation in lieu of arrest, make it mandatory, and significantly expand its implementation, they might transform it from a reformist reform into an abolitionist experiment.

Citation in lieu of arrest also has indirect abolitionist effects in the sphere of immigration enforcement insofar as it inhibits ICE from carrying out its core functions. ICE relies on the collaboration of state and local law enforcement, without which it likely would not have the capacity to apprehend, detain, and deport the number of individuals needed to meet its enforcement goals and fill bed quotas.¹³³ ICE “custodial” arrests made through state and local collaboration typically comprise more than two-thirds of total immigration arrests in the interior of the United States.¹³⁴ If citation in lieu of arrest were to keep out of custody any substantial number of these individuals typically arrested by ICE at state and local jails, ICE would be forced to employ alternative enforcement methods like home “raids,” which they do not currently have the resources to carry out on a broad scale and which have become less and less effective in recent years due to the spread of Know Your Rights information and Rapid Response networks across the country.¹³⁵

In addition to the practical effects of citation in lieu of arrest on criminal and immigration enforcement, the intersection of citation in lieu of arrest and sanctuary policy fundamentally reconstitutes the underlying logic and purpose of the sanctuary movement. First, it shifts the discourse surrounding sanctuary policy from a focus on enhancing police-community relations for

131. See Sawyer & Wagner, *supra* note 86 (noting that individuals held pre-trial in local jails make up

about two-thirds of the total jail population in the United States on any given day).

132. See IACP, *supra* note 53, at 17–18; WHITCOMB et al., *supra* note 55, at 17–20. Some have criticized citation in lieu of arrest for having a “net-widening” effect, arguing that it allows police to cite more people than they would typically arrest. See *id.* at 20–21.

133. See Villazor & Gulasekaram, *supra* note 33, at 553 (arguing for an enhanced focus on the role of state and local stakeholders in immigration enforcement because “federal immigration statutory and administrative regulatory scheme relies on the participation of state, local, and private individuals.”); DET. WATCH NETWORK & CTR. FOR CONST. RTS., BANKING ON DETENTION: LOCKUP QUOTAS & THE IMMIGRANT DRAGNET 1 (2015), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf> (indicating that ICE faces pressure to fill national and local bed quotas through frequent enforcement); *Detention Quotas*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-quotas> (last visited April 23, 2021) (noting that local contract quotas continue despite recent elimination of national quota).

134. *Immigration and Customs Enforcement Arrests*, TRACIMMIGRATION, <https://trac.syr.edu/phptools/immigration/arrest/> (last visited April 23, 2021).

135. See Manny Fernandez & Kerry Lester, ‘Nobody Opened the Door’: Neighbors Rally During an ICE Raid in Houston, N.Y. TIMES (July 5, 2019), <https://www.nytimes.com/2019/07/15/us/ice-raids-trump-houston.html>.

the sake of combating crime to a faith in the ability of immigrant and other marginalized communities to keep themselves safe without always resorting to punitive institutions that divide society into the good and the bad. Conventional sanctuary policy is “ethically negative”;¹³⁶ it reaffirms long-standing rationales for local law enforcement and seeks to protect a select group of law-abiding immigrants from enforcement but stops short of presenting a broader set of community values. The intersection of citation in lieu of arrest and conventional sanctuary policy helps fill this ethically negative space with a basic principle: that *all* members of a community deserve to be treated with equal dignity, and *no* community member deserves to be permanently banished.

Second, citation in lieu of arrest gives jurisdictions the tools to actively resist federal immigration enforcement. Most sanctuary policies merely limit direct collaboration between ICE and local officials, ignoring the reality that any local law enforcement involving physical custody facilitates immigration enforcement to at least some degree. Citation in lieu of arrest, on the other hand, actively challenges the foundation of federal immigration enforcement by keeping people out of the jails from which ICE can take them. It brings sanctuary back to its origins as a movement of open, unapologetic resistance to arbitrary law enforcement¹³⁷ while remaining within the realm of jurisdictions’ lawful authority. Sanctuary should be regarded less as a label that jurisdictions do or do not have, and more as a spectrum of protections on which jurisdictions advance as they become increasingly more willing to stand up for their immigrant communities.¹³⁸

VI. CONCLUSION

Conventional sanctuary policy is flawed, and jurisdictions are in need of new, creative ways to shield their residents from ICE enforcement. Citation in lieu of arrest is just one of many potential solutions. As jurisdictions contemplate their options, they should pay particular attention to policies that, like citation in lieu of arrest, help build a broader, stronger sanctuary. Sanctuary, as proposed in this Note, is active resistance to immigration enforcement, conscious of the ways that everyday policing facilitates the deportation machine. Sanctuary is abolitionist in nature: it challenges fundamental assumptions about the need for local and federal law enforcement and refuses to distinguish between “good” immigrants and “bad” immigrants. Finally, sanctuary is for everyone: it is not merely a set of protections for a select group of immigrants, but rather a commitment to welcoming *all* city residents as neighbors and standing in solidarity with those society has historically sought to banish.

136. Gary Slater, *From Strangers to Neighbors: Toward an Ethics of Sanctuary Cities*, 7 J. MORAL THEOLOGY 57, 59–61 (2018).

137. See Colbern et al., *supra* note 5, at 518–19.

138. See Serin Houston, *Conceptualizing Sanctuary as a Process in the United States*, 109 GEOGRAPHICAL REV. 562, 564 (2019) (arguing that “sanctuary is a process rather than a place designation.”).