

# No Sanctuary for Judges: When Legal Ethics Conflict with Federal Law

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## INTRODUCTION

In 2017, U.S. Immigration and Customs Enforcement (“ICE”) agents arrested an undocumented woman at an El Paso County courthouse when she showed up “seeking a protective order against the boyfriend she accused of abusing her.”<sup>1</sup> In Oakland County, Michigan, ICE agents arrested an undocumented father in family court, where he was petitioning for full custody of his three children.<sup>2</sup> Arrests of undocumented immigrants who show up for unrelated court appearances are the product of a Trump Administration policy formally authorizing courthouse arrests of immigrants who are subject to deportation.<sup>3</sup> The presence of ICE agents in courthouses has incited fear among immigrant communities, stopping many from reporting crimes and participating in court proceedings.<sup>4</sup> In response, some states have established themselves as sanctuary jurisdictions—locales that have laws and policies designed to limit state involvement in federal immigration enforcement activities.<sup>5</sup> For example, state courthouses may instruct employees

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1. Katie Mettler, “*This is Really Unprecedented*”: ICE Detains Woman Seeking Domestic Abuse Protection at Texas Courthouse, WASH. POST (Feb. 16, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/this-is-really-unprecedented-ice-detains-woman-seeking-domestic-abuse-protection-at-texas-courthouse/> [<https://perma.cc/EYW8-2AQH>].

2. Sarah Cwiek, *Father Arrested by Immigration Agents at Oakland County Custody Hearing*, MICH. RADIO NPR (Mar. 30, 2017), <https://www.michiganradio.org/post/father-arrested-immigration-agents-oakland-county-custody-hearing> [<https://perma.cc/EY7K-CHQK>].

3. Debra Cassens Weiss, *ICE Formalizes Policy Allowing Courthouse Arrests of Targeted Immigrants*, ABA J. (Feb. 2, 2018), [http://www.abajournal.com/news/article/ice\\_formalizes\\_policy\\_allowing\\_courthouse\\_arrests\\_of\\_targeted\\_immigrants/](http://www.abajournal.com/news/article/ice_formalizes_policy_allowing_courthouse_arrests_of_targeted_immigrants/) [<https://perma.cc/8D5E-4GMQ>].

4. See *Freezing Out Justice: How Immigration Arrests at Courthouses are Undermining the Justice System*, ACLU (May 3, 2018), [https://www.aclu.org/sites/default/files/field\\_document/rep18-icecourthouse-combined-rel01.pdf](https://www.aclu.org/sites/default/files/field_document/rep18-icecourthouse-combined-rel01.pdf) [<https://perma.cc/5LJL-6YK5>] [hereinafter *Freezing Out Justice*]; Press Release, ACLU, New ACLU Report Shows Fear of Deportation is Deterring Immigrants from Reporting Crimes (May 3, 2018), <https://www.aclu.org/press-releases/new-aclu-report-shows-fear-deportation-deterring-immigrants-reporting-crimes> [<https://perma.cc/E46U-VY5U>].

5. CONG. RESEARCH SERV., R44795, “SANCTUARY” JURISDICTIONS: FEDERAL, STATE, AND LOCAL POLICIES AND RELATED LITIGATION (May 3, 2019), <https://fas.org/sgp/crs/homsec/R44795.pdf> [<https://perma.cc/X2BW-YBFW>].

not to help or hinder federal agents to detain immigrants based on civil immigration violations.<sup>6</sup>

Tensions exist between these sanctuary policies, the legal and ethical principle of equal access to justice, and federal law that plainly runs contrary to those values. The interaction of these conflicting ideals came to the forefront in April 2019, when Judge Shelley Richmond Joseph, sitting for the Newton District Court, was indicted in Massachusetts for allegedly preventing federal immigration agents from arresting an undocumented immigrant when she had him escorted through the backdoor of the courthouse, instead of the front, as the ICE agent had anticipated.<sup>7</sup> This Note will use Judge Joseph's case, *United States v. Joseph*<sup>8</sup> to explore the constitutional tensions between federal immigration law and state sanctuary policies. It will also examine the ethical obligations that have emerged alongside the sanctuary movement. Ultimately, this Note will argue that when federal and state law conflict, judges are bound to interpret the law in accordance with their ethical obligations. This puts judges in the position of having to weigh their ethical responsibilities against the requirements of federal law, a particularly precarious circumstance, which necessitates a federal legislative remedy.

Part I will briefly discuss the facts of Judge Joseph's case. Part II will summarize the constitutional issues surrounding the practice of courthouse arrests. Part III will explore the ethical dilemmas judges face while attempting to comport with conflicting federal and state laws. Finally, Part IV will argue for adding courts to list of "sensitive locations"<sup>9</sup> the Department of Homeland Security has made off-limits for immigration enforcement actions, and it will urge Congress to enact the necessary legislation.

## I. BACKGROUND: UNITED STATES V. JOSEPH

The immigration enforcement approach of the Trump Administration has shifted from one that prioritizes removal of persons convicted of serious crimes to one that exempts no groups of removable persons.<sup>10</sup> Trump's Executive Order on Interior Enforcement lays out the administration's "enforcement priorities," subjecting to deportation anyone: who has been charged with, or who carried out

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6. See Andrea Estes & Maria Cramer, *ICE Agent Was in Courthouse. Did Judge and Others Help Man Flee?*, BOSTON GLOBE (Dec. 1, 2018), <https://www.bostonglobe.com/metro/2018/12/01/newton-judge-role-reportedly-examined-after-immigrant-evades-ice/Mshdn3gIIPZhVA7mZ9fa3M/story.html>. [https://perma.cc/QA68-NBFN].

7. Ellen Barry, *When the Judge Became the Defendant*, N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/2019/11/16/us/shelley-joseph-immigration-judge.html> [https://perma.cc/3KY6-D7WW].

8. No. 1:19-CR-10141 (D. Mass. Apr. 25, 2019) (notice of indictment).

9. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, *FAQ on Sensitive Locations and Courthouse Arrests* (Sept. 25, 2018), <https://www.ice.gov/ero/enforcement/sensitive-loc> [https://perma.cc/FE5J-R26N].

10. AM. IMMIGRATION COUNCIL, *The End of Immigration Enforcement Priorities Under the Trump Administration* (Mar. 7, 2018), <https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration> [https://perma.cc/8EDG-T8F9].

acts that constitute, a crime; who took part in fraud or willful misrepresentation; who misused any public benefits program; who has been ordered to depart the United States, but has not yet departed; or who “otherwise pose[s] a risk to public safety or national security.”<sup>11</sup>

The executive order is so broad, that “anyone who committed even a minor offense, such as jaywalking, could be deported.”<sup>12</sup> The shift to enforcement without priorities has resulted in more arrests and deportations of noncitizens: “Between January 25, 2017, and the end of fiscal year 2017 (FY) 2017 (September 30, 2017), ICE made 110,568 arrests—a 42 percent increase over the 77,806 arrests made during the same period in 2016.”<sup>13</sup>

Illustrative of this shift in approach is the 2018 policy authorizing arrests of noncitizen immigrants in and around courthouses. This policy allows arrests for “specific, targeted aliens with criminal convictions.”<sup>14</sup> Despite this directive to prioritize enforcement resources, these courthouse arrests have “impacted all noncitizens, documented or not, and may include ‘defendants, victims of human trafficking, targets of domestic violence, witnesses, unaccompanied minors and those suffering from [poor] mental health and severe medical disabilities.’”<sup>15</sup> Incidents have been reported in Arizona, Colorado, Maine, New Jersey, New York, Oregon and Texas.<sup>16</sup>

*United States v. Joseph* is illustrative of how this policy generates substantial constitutional and ethical conflicts for both immigrant communities and judges. On April 25, 2019, Judge Shelley Richmond Joseph was indicted in Newton, Massachusetts, “for allegedly preventing federal immigration agents . . . from arresting an undocumented immigrant,” Jose Medina-Perez.<sup>17</sup> Medina-Perez, who was wrongly identified in a criminal case, was compelled to appear in court so that the charges against him could be dismissed.<sup>18</sup> ICE “had sent its agent to the courthouse to arrest [Medina-Perez] on federal immigration claims if he was

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11. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/> [https://perma.cc/EKE3-PDVT].

12. CENTER FOR MIGRATION STUDIES, *President Trump’s Executive Orders on Immigration and Refugees* (Jan. 2017), <https://cmsny.org/trumps-executive-orders-immigration-refugees/> [https://perma.cc/GP9H-YP7G].

13. AM. IMMIGRATION COUNCIL, *supra* note 10.

14. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, *Civil Immigration Enforcement Actions Inside Courthouses* (Jan. 10, 2018), <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf> [https://perma.cc/SDR2-S77Z].

15. Bing Le, *Constitutional Challenges to Courthouse Civil Arrests of Noncitizens*, 43 N.Y.U. REV. L. & SOC. CHANGE 295, 302 (2019).

16. *Id.*

17. Joey Garrison, *Judge Indicted for Helping Undocumented Immigrant Evade ICE Wants Pay During Suspension*, USA TODAY (May 30, 2019), <https://www.usatoday.com/story/news/nation/2019/05/30/judge-shelley-joseph-wants-pay-indicted-helping-undocumented-immigrant-evade-ice/1290020001/> [https://perma.cc/9NHN-XANL].

18. Meryl Chertoff, *Indictment of Massachusetts Judge Invades State Court Independence*, THE HILL (May 23, 2019), <https://thehill.com/opinion/immigration/444808-indictment-of-massachusetts-judge-invades-state-court-independence> [https://perma.cc/A4GS-D96R].

released on the state charge.”<sup>19</sup> A courtroom clerk, acting at Judge Joseph’s direction, asked the agent to wait outside the courtroom for the defendant.<sup>20</sup> According to the indictment, after the charges were dismissed, the courtroom recorder was turned off, and a court officer brought Medina-Perez out the back door instead of the front, as the ICE agent had predicted.<sup>21</sup> Judge Joseph was subsequently charged with violating federal law—“one count of obstruction of justice, and two counts of aiding and abetting to obstruct justice.”<sup>22</sup> Having the agent wait outside the courtroom went against the policy of the Department of Homeland Security; however, it was perfectly in line with Massachusetts’ policy.<sup>23</sup> Several Massachusetts communities, including Newton, had declared themselves sanctuary cities that would not help ICE round up undocumented residents,<sup>24</sup> and a 2017 memo from the Massachusetts Trial Court instructed court employees, including judges, not to help or hinder federal agents to detain immigrants based on civil immigration violations.<sup>25</sup> However, Medina-Perez “had no choice but to appear before Judge Joseph,” and “ICE sought to take advantage of that state mandate in [an] effort to apprehend” an undocumented immigrant.<sup>26</sup>

## II. TENSIONS BETWEEN FEDERAL IMMIGRATION LAW AND STATE SANCTUARY POLICIES

The federal government has plenary power to regulate immigration.<sup>27</sup> The plenary power doctrine originated in the late 19th century Chinese Exclusion Case, *Chae Chan Ping v. United States*.<sup>28</sup> This doctrine presupposes that Congress’ power to regulate immigration does not come from an enumerated power, but rather comes from the inherent sovereign powers delegated by the Constitution.<sup>29</sup> The plenary power doctrine explains why courts have largely refrained from enforcing constitutional constraints on the federal government’s enforcement of

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19. *Id.*

20. Travis Andersen, *How Did the Mass. Judge Allegedly Break the Law?*, BOSTON GLOBE (Apr. 26, 2019), <https://www.bostonglobe.com/metro/2019/04/26/how-did-mass-judge-allegedly-break-law/JrbG6LWFznUFUgCPIUmp1L/story.html> [<https://perma.cc/PQB9-FA64>].

21. Chertoff, *supra* note 18.

22. Garrison, *supra* note 17.

23. See Maria Cramer, *Judge Accused of Helping Immigrant Escape ICE Asks That “Unprecedented” Charges Be Dropped*, BOSTON GLOBE (Sept. 6, 2019), <https://www.bostonglobe.com/metro/2019/09/06/judge-accused-helping-immigrant-escape-ice-asks-that-unprecedented-charges-dropped/UMASdEKX6G3QpOGvQQWOiL/story.html> [<https://perma.cc/86BX-Z338>].

24. Christian M. Wade, *Criticism Follows ICE Plan to Send Teams to ‘Sanctuary Cities’*, HAVERHILL GAZETTE (Feb. 20, 2020), [https://www.hgazette.com/news/criticism-follows-ice-plan-to-send-teams-to-sanctuary-cities/article\\_7084cac0-3900-5e65-9186-1d4063ee4f45.html](https://www.hgazette.com/news/criticism-follows-ice-plan-to-send-teams-to-sanctuary-cities/article_7084cac0-3900-5e65-9186-1d4063ee4f45.html) [<https://perma.cc/E3JN-MQFR>].

25. Estes & Cramer, *supra* note 6.

26. Chertoff, *supra* note 18.

27. See CONG. RESEARCH SERV., *supra* note 5, at 4.

28. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS 450 (Wolters Kluwer, 7th ed. 2018).

29. *Id.*

immigration laws.<sup>30</sup> Some academics maintain that the plenary power doctrine itself is premised on the *superior competence* of the political branches over that of the judiciary in questions of immigration and foreign affairs.<sup>31</sup> In addition to this federal plenary power and judicial restraint on matters of immigration, the “Supremacy Clause establishes that lawful assertions of federal authority may preempt state and local laws.”<sup>32</sup> The combination of these forces makes the federal government’s power in regards to immigration extensive, but this power is by no means absolute. Constitutional principles, such as the anti-commandeering doctrine, sketch out the permissible scope in which states may decline to assist in federal efforts to enforce federal immigration law.<sup>33</sup>

This Part first argues how indicting state judges for failing to cooperate with federal ICE agents impinges on judicial independence and is in tension with the anti-commandeering principle. Second, it discusses how the surge of ICE arrests provokes fear among undocumented communities and discourages them from interacting with the mechanisms that strive to provide justice, denying them procedural due process.

#### A. STATE COURT INDEPENDENCE

The Tenth Amendment of the U.S. Constitution establishes a system of dual sovereignty, whereby the states and the federal government are *independent* entities with different governmental functions, and the states retain a substantial degree of autonomy.<sup>34</sup> The Supreme Court, in *Gregory v. Ashcroft*, identified liberty-protection as “[p]erhaps the principle benefit” of federalism.<sup>35</sup> The Court claimed “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”<sup>36</sup>

The anti-commandeering doctrine springs from this constitutional allocation of power,<sup>37</sup> and holds that Congress may not compel state officials to enact a federal regulatory program,<sup>38</sup> nor can Congress require states to legislate according to

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30. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 787 (1977) (“This Court’s cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”)

31. PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS* 450 (Wolters Kluwer, 7th ed. 2018); see, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (“when the Executive exercises th[e] power [to exclude an alien] on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion.”).

32. See CONG. RESEARCH SERV., *supra* note 5, at 6.

33. See *id.* at 4.

34. See e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (noting that “under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause”); *Printz v. United States*, 521 U.S. 898, 919 (1997) (noting “[p]reservation of the States as independent political entities [was] the price of union”).

35. 501 U.S. 452, 458 (1991).

36. *Id.*

37. See CONG. RESEARCH SERV., *supra* note 5, at 7.

38. See *Printz v. United States*, 521 U.S. 898, 935 (1997).

federal instructions because doing so constitutes a commandeering of traditional state functions.<sup>39</sup>

Jurisdictions legally institute sanctuary policies due to the anti-commandeering doctrine. The principles of federalism reserve the power of the states to, for example: restrict police cooperation with federal immigration authorities; to prohibit state officials from inquiring about a person's immigration status; or restrict information sharing between local law enforcement and federal immigration authorities.<sup>40</sup> Or, in the case of Newton, Massachusetts, for the trial court to instruct court employees not to help or hinder federal agents detain immigrants based on civil immigration violations.<sup>41</sup>

In May 2019, a coalition of seventy-eight retired judges condemned the recent indictment of a sitting Massachusetts state court judge, calling it "draconian," as it "unnecessarily and inappropriately impinges on state authority over its courts and threatens judicial independence."<sup>42</sup> The judges cited principles of dual sovereignty noting "the Massachusetts judicial system is parallel to and not subordinate to the federal system . . . [i]t is the duty of state judges to resist outside efforts to influence and intimidate trial court judges and . . . to interfere with state court judicial proceedings."<sup>43</sup> These judges noted that the circumstances underlying Judge Joseph's indictment were not the first instance where ICE had initiated a civil arrest in the state's courthouses, but rather this has become "the new normal" and signals "undue pressure by federal officials."<sup>44</sup>

What's more, when ICE tries to compel the state court judge to do its work, the anti-commandeering doctrine is implicated. In Judge Joseph's case, Medina-Perez was compelled to appear in court in order to have charges brought against him dismissed, and "ICE sought to take advantage of that state legal mandate in its effort to apprehend [immigrants] it seeks to deport."<sup>45</sup> Since "the federal government cannot deputize unwilling state officers to enforce federal law," indicting a sitting judge for failing to aid a federal agent's detention of an undocumented immigrant runs contrary to the principles enshrined in the anti-commandeering doctrine.<sup>46</sup> In an article for *The Hill*, Georgetown Law Professor Meryl Chertoff writes, "[f]or the Department of Justice and [The Department of Homeland Security] to start indicting state judges for doing what is required by state law and state sovereignty sets us up for a dangerous duel."<sup>47</sup>

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39. See *New York v. United States*, 505 U.S. 144, 188 (1992).

40. See CONG. RESEARCH SERV., *supra* note 5, at 3.

41. Estes & Cramer, *supra* note 6.

42. *Coalition of Retired Judges Speaks Out Against Joseph Indictment*, MASS. LAW. WKLY. (May 14, 2019), <https://masslawyersweekly.com/2019/05/14/coalition-of-retired-judges-speak-out-against-joseph-indictment/> [<https://perma.cc/ZZQ3-ERH7>].

43. *Id.*

44. *Id.*

45. Chertoff, *supra* note 18.

46. *Id.*

47. *Id.*

## B. PROCEDURAL DUE PROCESS

The Fifth and Fourteenth Amendments' Due Process Clauses require that "no person shall . . . be deprived of life, liberty, or property, without due process of law."<sup>48</sup> The Supreme Court has repeatedly invoked the Due Process Clause to establish the rights of litigants to "equal" access to the courts.<sup>49</sup> The right to access the courts was first expounded on in a line of prisoners' rights cases,<sup>50</sup> where the Supreme Court reiterated that it is "unconstitutional [for] officials[] to impede prisoner's direct appeals."<sup>51</sup> Later, in 1977, in *Bounds v. Smith*, state prison inmates brought a case alleging that a state, by failing to provide adequate libraries, was denying its prisoners access to the courts.<sup>52</sup> The Supreme Court held that "the fundamental constitutional right of access to courts requires prison authorities to . . . [provide] prisoners with adequate law libraries or adequate assistance from persons trained in the law."<sup>53</sup> In finding that due process violations existed even when the government did not actually block physical access to the courts,<sup>54</sup> the Supreme Court enshrined the notion that access to the courts is a fundamental principle of due process under the law.<sup>55</sup>

The right to seek legal redress in state courts is not limited to U.S. citizens. Non-citizens also benefit from the due process protections.<sup>56</sup> In *Zadvydas v. Davis*, the Supreme Court explained "[o]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary or permanent."<sup>57</sup> Specifically at issue with courthouse arrests of noncitizens is a violation of their procedural due process rights. The Constitution requires the government give an individual notice and the opportunity to be heard before denying them of a liberty interest, and courthouse arrests deny noncitizens the opportunity to be heard.<sup>58</sup>

In fiscal year ("FY") 2018, ICE arrested 158,581 undocumented immigrants, representing an eleven percent increase over FY 2017.<sup>59</sup> Although this data includes all locations of arrest, the 2018 policy encouraging ICE officers to make

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48. U.S. CONST. amend. V; *id.* amend. XIV, § 1 (reading "nor shall any state deprive any person of life, liberty, or property, without due process of law").

49. See JESSE H. CHOPER ET AL. CONSTITUTIONAL LAW: CASES, COMMENTS AND QUESTIONS 1641 (West Academic Publ'g, 13th ed. 2019).

50. Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2118 (2009).

51. *Le*, *supra* note 15, at 345.

52. 430 U.S. 817, 817 (1977).

53. *Id.* at 828.

54. See *Le*, *supra* note 15, at 346.

55. See *id.*

56. Chertoff, *supra* note 18.

57. 533 U.S. 678, 679 (2001).

58. See *Le*, *supra* note 15, at 349.

59. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report* (Apr. 2, 2019), <https://www.ice.gov/features/ERO-2018> [<https://perma.cc/XBV9-UU96>].

arrests within courthouses is in part to blame for the increase from the year prior.<sup>60</sup> The Immigrant Defense Project reported that in New York State alone, ICE operations around courthouses increased by seventeen hundred percent from 2016 to 2018.<sup>61</sup> Although the Trump Administration stated that it will “focus its immigration enforcement efforts on individuals with criminal backgrounds,” about 40,000 immigrants without prior criminal records were arrested in the second quarter of FY 2018.<sup>62</sup>

Expanded immigration enforcement, whose presence extends to family, landlord-tenant, and traffic courts, has “created deep insecurity and fear among immigrant communities, stopping many from coming to court or even calling police in the first place.”<sup>63</sup> Reported incidents include the decision of four women in Denver not to pursue domestic violence cases following the release of a videotape of ICE agents waiting in a courthouse hallway to make an arrest.<sup>64</sup>

The National Immigrant Women’s Advocacy Project (“NIWAP”) compared data from 2016 and 2017 “on crime survivor participation in investigations and court proceedings.”<sup>65</sup> This study found that [f]ifty-four percent of judges participating in this survey reported court cases were interrupted due to an immigrant crime survivor’s fear of coming to court”; that “[eighty-two] percent of prosecutors reported that since President Trump took office, domestic violence . . . is now underreported and harder to investigate”; that “[s]eventy percent of prosecutors reported the same for sexual assault”; additionally, advocates and legal services providers who represent immigrant survivors of crime found in 2017 “the number of cases their offices filed for immigrant crime survivors decreased 40 percent from 2016.”<sup>66</sup> The study found that “clients were staying in abusive, even dangerous situations, afraid to go to court and pursue claims that would provide them . . . with protection.”<sup>67</sup> The study maintains that “instilling fear [in immigrant communities] and essentially excluding noncitizens and their relatives from the

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60. See *id.*; IMMIGRANT DEFENSE PROJECT, *The Courthouse Trap* (Jan. 2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf> [<https://perma.cc/3VYK-EWNX>] [hereinafter *The Courthouse Trap*].

61. *The Courthouse Trap*, *supra* note 60.

62. Michael Burke, *ICE Arrests and Removals Continue to Surge Under Trump*, THE HILL (July 6, 2018), <https://thehill.com/homenews/administration/405405-ice-arrests-of-noncriminal-immigrants-continue-to-surge> [<https://perma.cc/VV4F-H8ZJ>].

63. *Freezing Out Justice*, *supra* note 4, at 1, 3.

64. Heidi Glenn, *Fear of Deportation Spurs 4 women to Drop Domestic Abuse Cases in Denver*, NPR (Mar. 21, 2017), <https://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver> [<https://perma.cc/4J53-8HR2>].

65. *Freezing Out Justice*, *supra* note 4, at 1; NAT’L IMMIGRANT WOMEN’S ADVOC. PROJECT, PROMOTING ACCESS TO JUSTICE FOR IMMIGRANT AND LIMITED ENGLISH PROFICIENT CRIME VICTIMS IN AN AGE OF INCREASED IMMIGRATION ENFORCEMENT: INITIAL REPORT FROM A 2017 NATIONAL SURVEY, 4 (May 3, 2018), available at <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf> [<https://perma.cc/E4DU-LKPD>].

66. *Freezing Out Justice*, *supra* note 4, at 2.

67. *Id.*



courts, threatens constitutional rights, like equal protection and due process.”<sup>68</sup> This chilling effect led chief justices of California, New Jersey, and Seattle to ask ICE to stop enforcement actions at courthouses.<sup>69</sup> In Massachusetts, two district attorneys filed and won a lawsuit seeking an injunction on DHS’ directive authorizing courthouse arrests, arguing that the practice undermines the judicial system by making “[e]ntire communities . . . view the Massachusetts courts as places where they cannot go . . . , greatly impeding access to justice.”<sup>70</sup>

### III. TENSIONS BETWEEN FEDERAL IMMIGRATION LAW AND LEGAL ETHICS

The conflict between sanctuary jurisdictions and the federal government has prominently featured constitutional arguments,<sup>71</sup> but the ethical issues invoked by the sanctuary movement have been largely overlooked. While there is no literal conflict between federal immigration law and state judicial ethics rules, the law is in tension with the underlying values that are embodied in the canons of legal and judicial ethics. These canons broadly reflect the legal profession’s commitment to the principle that all persons in our society should be able to obtain necessary legal services, and judges are encouraged to promote this universal accessibility to the courts.<sup>72</sup>

This Part will examine how the ethics rules embody the principle of universal accessibility to the courts and highlight where the federal immigration laws are in tension with the fundamental judicial responsibility to safeguard physical access to courthouses. Ultimately, this Part will explore the ways in which Judge Joseph acted in compliance with her ethical responsibilities.

#### A. AN ETHICAL OBLIGATION TO PROMOTE EQUAL ACCESS TO JUSTICE

While there is not one rule that establishes the principle of equal access to justice, several of the ethics canons broadly reflect the legal profession’s commitment to the principle that all persons in our society should be able to obtain necessary legal services. More importantly, efforts made by the American Bar Association (“ABA”) to further equal access to justice and the creation of access to justice commissions reflect the fact that this principle is so deeply ingrained in the legal profession, it exists predominantly outside of the disciplinary rules. This Section will examine how (i) the *Model Rules of Professional Conduct* and the *Model Code of Judicial Conduct*, (ii) the ABA and (iii) the Access to Justice

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68. *Id.* at 6.

69. Renae Reints, *ICE Arrests in Courthouses Leave Local Communities on Edge*, FORTUNE (May 17, 2019), <https://fortune.com/2019/05/17/ice-courthouse-arrests-sanctuary-cities/> [https://perma.cc/YE3P-4H9D].

70. Jacqueline Thomsen, *Massachusetts Prosecutors Sue ICE over Courthouse Arrests*, THE HILL (Apr. 29, 2019), <https://thehill.com/latino/441158-massachusetts-district-attorneys-sue-ice-over-courthouse-arrests> [https://perma.cc/T9JH-ZGBG].

71. See Le, *supra* note 15, at 298–301.

72. See Marta-Ann Schnabel, *What is Justice?*, 64 LA. B.J. 264, 264 (2017).

Commissions reflect the legal profession's ethical commitment to protect equal access to justice.

## 1. THE RULES

The rules of legal ethics are designed to promote the requisite standards of professional behavior and highlight the obligations lawyers owe to their clients and to society.<sup>73</sup> The *Model Rules of Professional Conduct* and the *Model Code of Judicial Conduct* are the ABA's guiding standards for lawyers and judges, respectively.

### a. The *Model Rules of Professional Conduct*

The *Model Rules* incorporate those ethical obligations and prohibitions that apply to all lawyers.<sup>74</sup> The Preamble recognizes lawyers as the “gatekeepers”<sup>75</sup> of the justice system: “a lawyer . . . is . . . an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>76</sup> As further elaborated in the Preamble, this “special responsibility” means that “all lawyers should devote professional time . . . and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”<sup>77</sup> This definition stipulates that “economic and social barriers” are in fact impairing access to justice and that those barriers must be addressed.<sup>78</sup> Rule 6.1 is emblematic of this ideal, as it establishes a “responsibility to provide legal services to those unable to pay.”<sup>79</sup> Additionally, the Rule goes further, calling on lawyers to work to address power imbalances.<sup>80</sup> Rule 6.1(b) adds that attorneys should provide not only *pro bono* services but also legal services at low or no cost “to secure or protect civil rights, civil liberties or public rights.”<sup>81</sup> Although the *Model Rules* suggest a voluntary understanding of *pro bono* services in Rule 6.1,<sup>82</sup> the *Rules* begin with “a [P]reamble that

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73. See, e.g., MODEL RULES OF PROF'L CONDUCT pmb1. (2018) [hereinafter MODEL RULES] (noting “[l]awyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.”).

74. See AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/) [https://perma.cc/38BL-F83G]. (last visited April 8, 2020).

75. Schnabel, *supra* note 72, at 264.

76. MODEL RULES pmb1.

77. MODEL RULES pmb1.

78. See MODEL RULES pmb1.

79. MODEL RULES R. 6.1.

80. Spencer Rand, *Social Justice as a Professional Duty: Effectively Meeting Law Student Demand for Social Justice by Teaching Social Justice as a Professional Competency*, 87 U. CIN. L. REV. 77, 89 (2018).

81. MODEL RULES R. 6.1(b)(1).

82. MODEL RULES R. 6.1 (“A lawyer should aspire to render at least (50) hours of *pro bono* public legal services per year.”).

forcefully endorses a quite mandatory understanding of it.”<sup>83</sup> As of 2008, forty-one states embrace these significant portions of the *Model Rules’* Preamble—portions that embrace this obligatory understanding of Rule 6.1.<sup>84</sup>

b. The *Model Code of Judicial Conduct*

The *Model Code*, on the other hand, provides the framework for judicial ethics. Consisting of four primary canons, the *Code* is further explained through rules and accompanying commentary. Canons 1 and 2 emphasize the fundamental obligations of all judges to (1) promote public confidence in the judiciary, (2) apply the law impartially, and (3) ensure a “right to be heard.”<sup>85</sup> Underlying these canons is the fundamental value that justice should be accessible to all.

In the first canon—which requires judges to promote confidence in the judiciary<sup>86</sup>—the commentary to Rule 1.2 reads “[j]udges should . . . support professionalism within the judiciary and the legal profession, and *promote access to justice for all.*”<sup>87</sup> Another comment notes: “A judge should initiate and participate in community outreach activities for the purpose of promoting public . . . confidence in the administration of justice.”<sup>88</sup> The first canon and commentary suggest that promoting access to justice “promotes public confidence in the independence, integrity and impartiality of the judiciary,”<sup>89</sup> which is a judicial requirement under these rules.

In the second canon, impartiality is expounded on; in short, the canon necessitates the administration of justice be similarly available across all classes of people.<sup>90</sup> Rule 2.3 speaks to the specifics of impartiality, which require judges to refrain lawyers from “manifesting bias or prejudice . . . based upon attributes including but not limited to race, sex, gender, national origin, ethnicity . . . .”<sup>91</sup> The impartiality of judges is particularly relevant in the immigration context, and this provision speaks to the efforts of the ABA to eradicate distinctions in citizenship when it comes to adjudicating a case or administering legal resources.<sup>92</sup> Rule 2.6 reflects this fundamental principle of universal accessibility to the courts by

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83. Justin Hansford, *Lippman’s Law: Debating the Fifty-Hour Pro Bono Requirement for Bar Admission*, 41 *FORDHAM URB. L.J.* 1141, 1151–52 (2014).

84. Douglas L. Colbert, *Professional Responsibility in Crisis*, 51 *HOW. L.J.* 677, 684 (2008).

85. See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011) [hereinafter MODEL CODE] (“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety”); MODEL CODE Canon 2, R. 2.6(a) (“A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”).

86. MODEL CODE Canon 1.

87. MODEL CODE Canon 1, R. 1.2 cmt. 4 (emphasis added).

88. MODEL CODE Canon 1, R. 1.2 cmt. 6.

89. See MODEL CODE Canon 1, R. 1.2.

90. See MODEL CODE Canon 2 (“A judge shall perform the duties of judicial office impartially, competently, and diligently.”).

91. MODEL CODE Canon 2, R. 2.3(c).

92. See MODEL CODE Canon 2, R. 2.6(a).

requiring judges to ensure “the right to be heard”; specifically, “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”<sup>93</sup> The commentary reiterates this injunction: “The right to be heard is an essential component of a fair and impartial system of justice.”<sup>94</sup> These judicial ethical obligations—to promote confidence in the judicial system, to administer justice impartially and to ensure “a right to be heard”—necessitate equal physical accessibility to the state courthouses.

## 2. THE AMERICAN BAR ASSOCIATION

The ABA is the most prominent forum in which codes of professional and judicial conduct are drafted and debated, and it is a consistent voice for promoting the ethical obligation to ensure equal access to justice.<sup>95</sup> The ABA has spent a tremendous amount of time studying many issues related to the delivery of legal services, and advocating for equal access to those services.<sup>96</sup> In 2006, the ABA House of Delegates passed Resolution 112A, which embodied the right to legal services—the resolution “encourag[ed] legislatures to ‘provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake.’”<sup>97</sup>

In 2014, the ABA set up a Commission called the Commission on the Future of Legal Services to study the “access to justice crisis”, and provide recommendations accordingly.<sup>98</sup> In 2016, the ABA published its report, whose uncompromising first conclusion was an insistence on “100 percent access to effective assistance for civil legal needs.”<sup>99</sup> In furtherance of that goal, the commission made several recommendations including: the “[c]oordination and collaboration among . . . the courts, the bar, [and] government agencies . . . to support and facilitate *access to justice for all*.”<sup>100</sup> The report also asked courts to “ensure that all litigants have some form of effective assistance in addressing significant legal needs . . . [and these] services should be uniformly available throughout each state.”<sup>101</sup>

93. MODEL CODE Canon 2, R. 2.6(a).

94. MODEL CODE Canon 2, R. 2.6 cmt. 1.

95. See AM. BAR ASS’N, [https://www.americanbar.org/about\\_the\\_aba/](https://www.americanbar.org/about_the_aba/) [<https://perma.cc/4834-7QAB>].

96. See e.g., COMMISSION ON THE FUTURE OF LEGAL SERVICES, *Report of The Future of Legal Services in the United States*, AM. BAR. ASS’N (2016), [https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport\\_FNL\\_WEB.pdf](https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf) [<https://perma.cc/8Z7L-HQEZ>].

97. Mark C. Brown, *Establishing Rights Without Remedies? Achieving an Effective Civil Gideon by Avoiding a Civil Strickland*, 159 U. PA. L. REV. 893, 894 (2011) (citing AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A, at 1 (2006), <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> [<https://perma.cc/3GJ8-EEX6>]).

98. Mark C. Surprenant, *Follow the Natural Law: Provide Access to Justice, Improve Someone Else’s Life (and Your Own)*, 63 LOY. L. REV. 227, 229 (2017); COMMISSION ON THE FUTURE OF LEGAL SERVICES, *supra* note 96, at 1, 8 (2016).

99. COMMISSION ON THE FUTURE OF LEGAL SERVICES, *supra* note 96, at 37.

100. *Id.* at 38 (emphasis added).

101. *Id.*

Most pertinent to the immigration context, in 2017, the ABA House of Delegates proposed Resolution 10C in response to the significant increase in enforcement actions by Immigration and Customs Enforcement around courthouses.<sup>102</sup> The resolution explained the ABA “is committed to supporting everyone’s right to the fair and unfettered access to justice,” and the “unrestrained and unguided immigration enforcement practices in and around courthouses” impede the administration of justice by obstructing access to the courts.<sup>103</sup> Clearly, the ABA’s most recent efforts serve to support the legal community’s long-standing insistence on equal access to justice.

### 3. THE JUDICIAL COMMUNITY

The Preamble to the *Model Code* suggests that the rules are “not intended as an exhaustive guide for the conduct of judges.”<sup>104</sup> The ABA asserts that judges are additionally “governed in their judicial and personal conduct by general ethical standards as well as by the Code.”<sup>105</sup> The plain implication is that there are ethical values that are so central to the legal profession that they can exist outside of the disciplinary rules and yet continue to bind lawyers to act in accordance with them. The role of the judicial community in creating “Access to Justice Commissions” demonstrates that one of these general ethical standards is promoting equal access to justice.

The Conference of Chief Justices and the Conference of State Court Administrators have adopted a number of resolutions over the years that reaffirm the judicial community’s responsibility for protecting access to justice.<sup>106</sup> Resolution 23 acknowledges that “judicial leadership . . . is essential to ensuring equal access to the justice system;”<sup>107</sup> Resolution 2 “encourage[s] the members of the conferences in each state . . . to continue to take steps to ensure that no citizen is denied access to the justice system;”<sup>108</sup> and Resolution 8 calls for expanding Access to Justice Commissions by establishing such commissions in every state and U.S. territory.<sup>109</sup>

Access to Justice Commissions are “entities that bring together courts, the bar, civil legal aid providers, and other stakeholders in an effort to remove barriers to

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102. AM. BAR. ASS’N., REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 10C, at 1 (2017), [https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/immigration\\_enforcement\\_10c.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/immigration_enforcement_10c.authcheckdam.pdf) [<https://perma.cc/2SJM-GHGL>].

103. *Id.*

104. MODEL CODE pmb1.

105. *Id.*

106. *See e.g.*, CONFERENCE OF CHIEF JUSTICES, REPORT TO THE FAIRNESS AND PUBLIC TRUST COMMITTEE, RESOLUTION 13 (July 31, 2013) <https://ccj.nesc.org/~media/Microsites/Files/CCJ/Resolutions/07312013-Reaffirming-Commitment-Justice-Leadership-Expressing-ATJ-Collaboration-CCJ-COSCA.ashx> [<https://perma.cc/7NFA-NWEK>].

107. *Id.* (discussing Resolution 23).

108. *Id.* (citing Resolution 2).

109. *Id.* at 2 (citing Resolution 8).

civil justice for low-income and disadvantaged people.”<sup>110</sup> The body must be recognized by a state’s highest court to be accepted as a Commission, and they “operate mostly under the auspices of state supreme courts and usually include the active participation of state judges.”<sup>111</sup> The “Commissions explore ways to boost legal aid funding, encourage pro bono legal services, improve court access for self-represented individuals, and consider the extension of a right to counsel to additional areas of civil legal assistance.”<sup>112</sup> In addition to the Conferences, the ABA adopted a formal policy resolution in 2013 supporting the establishment of state Access to Justice Commissions.<sup>113</sup> Likewise, the National Center for State Courts set up a Center on Court Access to Justice for All to expand access to justice commissions.<sup>114</sup> As of August 2018, forty states have established such commissions.<sup>115</sup>

These commissions represent the collective voice of the national legal community, and the judicial leadership that permeates these entities demonstrates that this commitment to equal access to justice is at the core of the legal profession.

#### B. PROMOTING ACCESS TO JUSTICE IN THE IMMIGRATION LAW CONTEXT

The ethical obligation to promote equal access to justice is embodied in the disciplinary codes, but that obligation is also independent of them.<sup>116</sup> The idea of equal access to justice so thoroughly pervades the legal profession that it is “emblazoned above the entrance of the United States Supreme Court.”<sup>117</sup> At the same time, federal law that authorizes courthouse arrests of immigrants subject to deportation clearly restricts access to justice.<sup>118</sup>

This clash between a fundamental ethical value, state sanctuary policy, and federal immigration law creates a peculiar situation for judges. For Marla Greenstein, executive director of the Alaska Commission on Judicial Conduct, the choice is clear: When confronted with the attempt of law enforcement to obstruct access to the court, “a judge will face the essential mandate of judicial ethics: to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.”<sup>119</sup> In essence, where

110. AM. BAR. ASS’N., *Access to Justice Commissions*, [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/resource\\_center\\_for\\_access\\_to\\_justice/atj-commissions/](https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/atj-commissions/) [<https://perma.cc/4RPT-6RN9>].

111. Louis S. Rulli, *Roadblocks to Access to Justice: Reforming Ethical Rules to Meet the Special Needs of Low-Income Clients*, 17 U. PA. J. L. & SOC. CHANGE 347, 352 (2014).

112. *Id.*

113. *Id.* at 354.

114. AM. BAR. ASS’N., *supra* note 110.

115. Jason Tashea, *ABA Releases New Report on Access to Justice Commissions in the US*, ABA J. (Sept. 14, 2018), [http://www.abajournal.com/news/article/aba\\_releases\\_new\\_report\\_on\\_state\\_access\\_to\\_justice\\_commissions](http://www.abajournal.com/news/article/aba_releases_new_report_on_state_access_to_justice_commissions) [<https://perma.cc/ZRM8-HKCU>].

116. See *supra* Part III.A.

117. Justin Hansford, *supra* note 83, at 1157 (2014). Hansford is referring to the words “equal justice under law.” *Id.*

118. See Weiss, *supra* note 3.

119. Marla N. Greenstein, *The Ethics of a Sanctuary Courthouse*, 56 NO. 3 JUDGES’ J. 40, 40 (2017).

federal laws conflict with state sanctuary policies, judges need to interpret the laws in accordance with their ethical obligations. Clearly, this puts judges in the position of having to weigh their ethical responsibilities against the requirements of federal law.

### C. EXAMINING JUDGE JOSEPH'S DECISION FROM AN ETHICS PERSPECTIVE

Acting in her judicial capacity, Shelley Richmond Joseph was operating in a legal system that supports conflicting federal laws—including both the fundamental constitutional right of access to courts as well as immigration policies that permit federal agents to block such access. At the same time, the pertinent state policy instructed her not to help federal agents detain immigrants based on civil immigration violations.<sup>120</sup> Since no precedent existed on the issue, Judge Joseph was not on notice as to whether a judge could be criminally prosecuted, under an obstruction of justice statute, for making the “constitutionally-protected decision whether to help enforce federal immigration law” or for deciding how to handle her own courtroom.<sup>121</sup> She therefore had to interpret the law in accordance with her ethical values. As noted earlier, the ABA asserts that judges “are governed in their judicial and personal conduct by general ethical standards as well as by the Code.”<sup>122</sup> Both general ethical standards and the Code speak to the judicial obligation to promote equal access to justice. Judge Joseph therefore made a justified and logical decision to interpret the law in a way that protected Medina-Perez’ right to be heard. She ensured that he would not be chilled from seeking legal redress in the future by enabling his safe exit from the courthouse. In allowing Medina-Perez to safely utilize the courthouse as a mechanism for justice, Judge Joseph acted in accordance with federal law, by protecting Medina-Perez’s “fundamental constitutional right of access to courts”<sup>123</sup> and upheld her ethical responsibility “to ensure equal access to our system of justice.”<sup>124</sup>

## IV. THE REMEDY

Successful arguments can be made on either side of Judge Joseph’s case—that this was or was not a violation of federal law. This is so because Congress has yet to address (1) the constitutionality of courthouse arrests, or (2) whether the federal law accommodates for judicial decision-making in accordance with state sanctuary policies. Until Congress provides greater clarity, it is a waste of prosecutorial resources to bring a case that may chill judicial independence as well as the ethical values the legal profession is founded upon.

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120. Estes & Cramer, *supra* note 6.

121. Chris Villani, *Indicted Mass. Judge Claims Immunity to ICE Escape Charge*, LAW360 (Sept. 6, 2019), <https://www-law360-com.proxygt-law.wrlc.org/articles/1196290/indicted-mass-judge-claims-immunity-to-ice-escape-charge> [<https://perma.cc/P9GM-V8RJ>].

122. MODEL CODE pmbl.

123. *See, e.g.*, Vladeck, *supra* note 48, at 2120 (citing *Bounds v. Smith*, 430 U.S. 817, 828 (1977)).

124. *See, e.g.*, MODEL RULES pmbl.

Ultimately, to avoid putting judges in these precarious situations and to eliminate the procedural due process concerns that courthouse arrests implicate, the DHS should heed the requests of former state and federal judges and add courthouses to the ICE list of “sensitive locations,” which would prevent its ICE officers from taking enforcement action.<sup>125</sup> The list currently prohibits immigration enforcement in “schools,” “medical treatment and health care facilities,” “places of worship,” “religious or civil ceremonies,” and “during a public demonstration.”<sup>126</sup> Adding courthouses to this list will encourage immigrant communities to seek constitutionally-protected services and will begin to repair some of the damage to police-community relations that results when courts are not seen as safe spaces.<sup>127</sup> Additionally, should courthouses be designated as sensitive locations, the constitutional concerns, including the threats to judicial independence and procedural due process, would be diminished, and judges would no longer be in a position where they had to weigh their ethical obligations with the requirements of federal law.

However, a DHS modification of the sensitive locations list is not enough. Congress needs to codify the list to ensure its implementation. In March of 2017, the Protecting Sensitive Locations Act (H.R. 1815) was introduced, which sought to amend section 287 of the Immigration and Nationality Act and effectively expand and codify DHS’ list, adding federal, state and local courthouses to the group of locations.<sup>128</sup> The bill extended the scope of sensitive locations, ensuring that immigration enforcement is prohibited within 1,000 feet of all designated locations.<sup>129</sup> The bill was never enacted,<sup>130</sup> but should it be re-introduced, it has a greater chance of success now than ever before. There is an emerging trend among state supreme courts to prohibit civil immigration arrests inside or near courthouses without a judicial warrant or other procedural requirement.<sup>131</sup> Oregon, New York, and New Jersey have instituted such rules, as well as several municipal courts in Washington State and New Mexico.<sup>132</sup> Additionally, California enacted a statewide law “that requires a judicial warrant for civil arrests of people attending a court proceeding.”<sup>133</sup> These developments in

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125. See, e.g., BRENNAN CTR. FOR JUSTICE, *Letter from Former Judges – Courthouse immigration Arrests*, SCRIBD (Dec. 12, 2018), <https://www.scribd.com/document/395488473/Letter-From-Former-Judges-Courthouse-Immigration-Arrests> [<https://perma.cc/Z57X-3A9H>] [hereinafter *Letter from Former Judges*].

126. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, *supra* note 9.

127. See, e.g., *Freezing Out Justice*, *supra* note 4, at 6 (recommending that DHS add courts as a sensitive location).

128. H.R. 1815, 115th Cong. (2017).

129. *Id.*

130. *Id.* (latest action – referred to the House Committee on the Judiciary).

131. Douglas Keith, *States Push Back Against ICE Courthouse Arrests*, BRENNAN CTR. FOR JUSTICE (Nov. 22, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/states-push-back-against-ice-courthouse-arrests> [<https://perma.cc/4TM3-UT9Z>].

132. *Id.*

133. *Id.*



conjunction with the publicity<sup>134</sup> surrounding Judge Joseph's case, and the outrage it has produced amongst the judicial community<sup>135</sup> all create a promising legislative backdrop for re-introduction of H.R. 1815 in 2020.

### CONCLUSION

The “get-tough” approach to immigration enforcement under the Trump Administration has eroded trust between law enforcement and the immigrant community.<sup>136</sup> Fears of deportation, in a time of increased immigration enforcement, undermine the ability of the justice system to operate fairly and to serve the cause of public safety.<sup>137</sup> According to the National Immigrant Women's Advocacy Project survey, in 2017, law enforcement officers reported declines in the immigrant community's willingness to: make a police report (by twenty-two percent); participate in crime scene investigation (by twenty-one percent); work with prosecutors (by eighteen percent).<sup>138</sup> A large majority of prosecutors also reported that, since President Trump took office, incidents of domestic violence, sexual assault, human trafficking, and child abuse are now underreported and harder to investigate.<sup>139</sup> Victim advocates asserted three reasons for victims' reticence to cooperate with law enforcement: fears of deportation, threats by violent perpetrators that they will be deported if they cooperate with law-enforcement, and fears that police will turn them over to ICE.<sup>140</sup> To assuage such fears and restore the relationship between law enforcement and immigrant communities, these fears need to be addressed. Creating a statutory list of locations deemed to be “sensitive locations” is part of the solution, but Congress needs to enact a comprehensive response to this emerging ethical conflict for judges as they contend with immigration policies that are needlessly tearing families apart, inciting fear in U.S. communities, and undermining the cause of justice.<sup>141</sup>

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134. See, e.g., Ellen Barry, *supra* note 7.

135. See, e.g., *Letter from Former Judges; Coalition of retired judges speaks out against Joseph Indictment*, MASS. LAW. WKLY. (May 14, 2019), <https://masslawyersweekly.com/2019/05/14/coalition-of-retired-judges-speak-out-against-joseph-indictment/> [https://perma.cc/9NBU-SCRL].

136. See AM. IMMIGR. COUNCIL, *supra* note 10.

137. See *id.*

138. NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT, *supra* note 65, at 42.

139. *Id.* at 52.

140. *Id.* at 49.

141. AM. IMMIGR. COUNCIL, *supra* note 10.