ARTICLE

IMMIGRATION FEDERALISM IN MINNESOTA:
WHAT DOES SANCTUARY MEAN
IN PRACTICE?

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INTRODUCTION

In March 2016, the University of St. Thomas Law Journal gathered scholars from around the country to discuss whether Sanctuary can make communities secure. Our symposium title, “Can Sanctuary Keep Communities Secure?” played on two contrasting approaches to immigration—the
notion of Sanctuary, which often stands in tension with legal authority, and Secure Communities, a controversial immigration enforcement program of the Obama Administration designed (but perhaps not implemented as designed) to deport dangerous immigrants.

The conception of this paper arose from the desire to open the symposium by framing issues in the context of Minnesota. I asked the question “What is Sanctuary?” and sought answers from the on-the-ground reality of Minnesota’s immigrant communities. The paper answers the question at six levels in the state of Minnesota: (1) the home, (2) houses of worship, (3) educational institutions, (4) cities (and other sub-state authorities such as counties), (5) the state, and (6) national/federal level. “Sanctuary” inherently suggests the need for safety and security, and begs other questions, namely, who needs security and sanctuary, who makes up our community and “homeland” and who gets to speak about and build the legal protections that make up a tapestry of safety.

At each level, at least one specific policy/legal issue is addressed (e.g. separation ordinances in the city section, driver’s licenses at the state level, and responses to federal enforcement actions) to show how dynamics have played out in Minnesota. I address the dynamics of immigration federalism in Minnesota to assess the state of sanctuary in the land of ten thousand lakes, by identifying institutional and societal actors: the community, the federal government, the state government, regional authorities (most notably sheriffs), city governments, and civil society groups. How individuals inhabit and exercise power within these institutions matters.

I conclude that Minnesota is a state of reluctant welcome, and that the forces arrayed for and against immigrants (particularly those of unauthorized status) are in an unsteady balance, with pro-immigrant forces gaining some ground in recent years. The elections of November 2016 at both the state and national levels may mark another shift toward law and order and away from the grace of Sanctuary.

I. WHAT IS SANCTUARY?

[Jeb Bush]’s terrible. He’s terrible. He’s weak on immigration. You know, the sanctuary cities, do you know he had five of them in Florida while he was governor? Can you believe this? I didn’t know that.

Donald Trump, June 11, 2015

In recent years, the term “Sanctuary” has become a slur, used by forces opposed to more generous immigration policies to tar efforts to be more
hospitable to immigrants, particularly those with unauthorized status. The 2016 presidential election laid bare divisions not only around the country, but in Minnesota as well on immigration issues.²

The concept of Sanctuary has a long and storied history in both religious and civil contexts, from the Greeks to the Romans, from Jewish law to medieval Europe.³ One legal scholar argues that while the Sanctuary impulse has been alive and well in America for well over a century (from the Underground Railroad for runaway slaves, to conscientious objectors in the Vietnam era, and to the Sanctuary movement of the 1980s and the New Sanctuary movement of the 2000s), the concept has never been enshrined in law as it was in England.⁴

Professor Rose Cuison Villazor has persuasively argued against immigrant advocates using the term and has also helpfully distinguished between private forms of sanctuary (which may involve open or clandestine defiance of federal laws concerning harboring by individuals or places of worship) and public sanctuary (such as separation ordinances by cities or states aiming to limit the sharing of immigration information with federal authorities).⁵

The private/public distinction is a helpful one, but one that may be seen more as a continuum as opposed to a strict dichotomy. A strict reading of the concept would be one that treats a particular geographical location (a church or an entire city) as a legally sanctioned place of refuge where a person can seek protection from other forms of legal sanction (such as state-permitted private vengeance in the Old Testament sense, criminal prosecution in the medieval context, or deportation in the modern context).

In this article, I take a broader (and perhaps politically riskier) view of the term as an active stance of hospitality to unauthorized immigrants and other immigrants facing removal. I move from the most private of spaces (home), to places of worship (which may include sheltering persons within the actual walls of church buildings or in the homes of parishioners), to the quasi-public spaces of schools (be they private institutions or formally public ones). Public forms of Sanctuary include city ordinances and state laws that some have argued might be more properly called “disentanglement” policies (such as separation ordinances more pejoratively known as “sanctuary cities” and driver’s licenses not requiring formal immigration status), as well as federal laws and policies that offer permanent or temporary legal

⁴. Id. at 594–608.
cover for immigrants (such as asylum, temporary protected status, deferred action for child arrivals, or formalized enforcement priorities).

II. The Home as Sanctuary—The Limits to One’s Castle

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

William Pitt (1763)⁶

Under jurisprudence that has developed over the centuries, the sanctity of the home comes in for special protections under both the Fourth Amendment prohibitions on unreasonable searches and seizures, and also under the right to privacy. But those protections often mean less to the poor and marginalized than to those with power and status,⁷ and especially to both unauthorized and authorized immigrants.⁸

It is not unusual for immigrant families in the U.S. to be “mixed status,” meaning individuals in a home have a variety of legal statuses. Under one roof, for example, there may be unauthorized immigrants (either visa overstays or those having entered without legal admission), U.S. citizens, legal permanent residents, asylum-seekers, asylees, persons with temporary protected status, and persons with deferred action for childhood arrivals (DACA).

The January 2016 U.S. Immigration and Customs Enforcement (ICE) raids targeted at newly arrived Central American women and children with outstanding removal orders (who in many cases had not had legal representation) created a great deal of fear amongst such immigrant communities.⁹ Even though the action ostensibly was targeted at communities other than those in Minnesota,¹⁰ attorneys in Minnesota received multiple reports of

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⁷. See, e.g., Budd, supra note 6 (recounting “the long and robust history of our right to sanctuary within the ‘castle’ of our homes” and how this right has long been consistently eroded against people who are poor); Stephanie M. Stern, The Inviolable Home: Housing Exceptionalism in the Fourth Amendment, 95 CORNELL L. REV. 905 (2010) (arguing for restrictions on the established notion of the home as an inviolate space and citing cases and articles to the contrary).


⁹. Dan Hernandez, Tom Dart & Jessica Glenza, ‘Fear Overrides Everything’: Immigrants Desperate for Reassurance after ICE Raids, GUARDIAN (Jan. 6, 2016, 8:22 AM), https://www.theguardian.com/us-news/2016/jan/06/ice-raids-immigrant-families-deportation-fear (“Agents arrived at the Morales home around 4:30 am on Saturday. The knocking was so loud, it rattled the windows in the house and it seemed like the agents would break down the door.”).

¹⁰. Reporter Mila Koumpilova of the Minneapolis Star Tribune tweeted on January 7, 2016 that “[n]o detentions in MN during operation last weekend to deport recent arrivals from Central
home raids at that time conducted by ICE agents. “A client of mine in proceedings had ICE show up at her door today. She didn’t let them in,” wrote a colleague on January 7.11

Two related reactions to these raids illustrate protections for Sanctuary at the level of the personal dwelling, reactions that have been exercised with limited success before in Minnesota. The first reaction is the exercise of Fourth Amendment rights against entry into one’s home without a valid search warrant. In January 2016, this came into play both in Minnesota and around the country. Spanish-language press distributed information about the Fourth Amendment, as did immigrants’ rights groups and attorneys.12

Attorneys in Minnesota reported clients refusing entry to ICE agents into their homes.13

But there are limits to the use of the Fourth Amendment to protect even those not targeted specifically by immigration search warrants. A commonly reported occurrence for immigration practitioners is hearing about a warrant-based home raid by ICE agents in which the target of the warrant is not found but others in the home are questioned, detained, and deported—a practice upheld by the Supreme Court in 2005.14 Exigent circumstances also can be used to justify warrantless residential searches.15

ICE conducts so-called consent-based searches of immigrant homes as well, although these often face criticism as being coercive in nature. During Operation CrossCheck (immigration enforcement actions involving federal, county, and local law enforcement), beginning in 2007, ICE raids in Willmar, Minnesota came under scrutiny as being coercive.16 In one federal lawsuit, plaintiffs alleged misconduct like the following:

At 10:15 [A.M.] on April 13, 2007, Cardenas woke up to the sound of loud knocking, the doorbell ringing, men yelling, and

America; @ICEgov says that operation is now over.” @MilaKoumpilova, TWITTER (Jan. 7, 2016, 1:51 AM), https://twitter.com/MilaKoumpilova/status/685186984168402944.

11. E-mail from Elizabeth Streefland to AILA MN-DAK listserv, Re: [mn-dakotas] ICE workplace raids (Jan. 7, 2016, 12:45 PM CST) (on file with author).

12. See, e.g., E-mail from Shiu-Ming Cheer, Nat’l Immig. L. Ctr, RE: Immigration Raids Alert: Information and Resources to Virgil Wiebe (Jan. 6, 2016, 2:00 PM CST) (on file with author); ACLU, What To Do If You’re Stopped By Police, Immigration Agents or the FBI (2015), https://www.aclu.org/print/node/30855; ACLU, Qué Debe Hacer Si la Policía, Agentes de Inmigración o el FBI Lo Detienen (2015), https://www.aclu.org/print/node/30856.


14. “Police officers executing a search warrant at a house need no independent reasonable suspicion in order to question an occupant, who is detained during the search, concerning his or her immigration status; the questioning does not constitute a discrete Fourth Amendment event if it does not prolong the detention.” 3B AM. JUR. 2D ALIENS AND CITIZENS § 1854 (2016) (citing Muehler v. Mena, 544 U.S. 93 (2005)).


banging on the windows. Cardenas looked out of her windows and saw men in black clothing surrounding her house. The noise awoke her son J.A.P., age six, who began crying. Cardenas put J.A.P. in the bathroom with the family dog. After leaving the bathroom, she heard voices in the house and then entered the living room where five armed men were present. Cardenas asked the men what they wanted, and they told her they were police officers with arrest warrants. The officers asked repeatedly for permission to search the home, and Cardenas repeatedly denied these requests. Cardenas alleges that the officers became aggressive, commented on her tattoos, threatened her with arrest, and falsely stated that her fiancé gave them permission to search. Officer Schmidt arrived about fifteen minutes into the incident; his father, Chief Schmidt, did not arrive until the conclusion of the incident. The officers left Cardenas’s home after approximately 45 minutes of requesting consent to search. J.A.P. remained in the bathroom for the entire time the officers were there. Cardenas never gave the officers permission to enter her home.  

Efforts to hold federal and local officials accountable were met with limited success; many claims made in federal court were dismissed on a variety of grounds. The standard for challenging even warrantless searches in the immigration context is quite high. Second, groups and individuals have immediately reacted to home and business raids, using political and policy arguments to pressure the government to cease such activities. January 2016 raids were met with protests, demonstrations, community education sessions, and letters of condemnation at both the local and national level. In Minnesota, Immigrant Law Center of Minnesota, Navigate MN, ISAIAH, The Advocates for Human Rights, Casa de Esperanza, Agora, Catholic Charities of St. Paul & Minneapolis, Conversations with Friends, Jewish Community Action, and others joined

18. Id.
over one hundred and fifty organizations from around the country to decry the raids. Volunteer attorneys from Minnesota played a critical role in stopping the deportation of at least twelve families arrested and taken to the Dilley Detention Center in Texas for removal.

While federal enforcement actions threaten the sanctuary of home, other executive branch actions can be seen as protecting the family unit and thereby protecting the home. The now enjoined DAPA program (first called Deferred Action for Parental Authority and later renamed Deferred Action for Parents of Americans in Residence) sought to allow the authorized parents of U.S. citizens and legal permanent residence authorized presence in the United States. This program, currently enjoined by the actions of Texas and twenty-five other states, purported to provide protection to families while Congress struggles to act on immigration reform. The Supreme Court, in a divided vote, upheld the injunction with a one sentence per curiam decision in June 2016. The election of Donald Trump as President in November 2016 almost certainly signaled that the DAPA program would not come into effect.

III. HOUSES OF WORSHIP—THE QUINTESSENTIAL SANCTUARIES

It is the policy of the Service to attempt to avoid apprehension of persons and to tightly control investigative operations on the premises of schools, places of worship, funerals and other religious ceremonies.

Perhaps the quintessential sanctuary is the house of worship. Among the primary dictionary definitions of sanctuary is “the room inside a church,
synagogue, etc., where religious services are held,” as well as “a place where someone or something is protected or given shelter.”

Davidson does an admirable job of detailing how the physical spaces of churches in medieval England acquired (and then lost through abuse) the status of sanctuary.

In the context of Minnesota, it is worthwhile to look at faith-based sanctuary and immigration through three lenses: the Sanctuary movement of the 1980s; the New Sanctuary movement of the 2000s; and the post-9/11 focus on the Somali community in Minnesota.

A. The Sanctuary Movement of the 1980s in Minnesota

While this article primarily focuses on the period since 2001, the Sanctuary movement of the 1980s forms an important background and inspiration for the New Sanctuary movement. The Sanctuary movement of the 1980s developed in the United States in response to U.S. foreign policy that prevented the vast majority of asylum-seekers from El Salvador and Guatemala from gaining asylum status. During the 1980s, at the height of government-sponsored terror campaigns in El Salvador and Guatemala against real and perceived opposition and indigenous groups, the grant rate for asylum in the U.S. for nationals from those two countries hovered around two percent.

In Minnesota, a number of churches joined the Sanctuary movement, including St. Luke’s Presbyterian of Wayzata, Minnesota, which declared itself a sanctuary in 1982. That church sheltered a refugee under the pseudonym of René Hurtado. Twenty-five years later he recounted his story of leaving the unit of the Salvadoran military that had committed human rights abuses. Churches in Minnesota supported sanctuary congregations in other parts of the country, most notably in Arizona, which faced infiltration by

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27. Davidson, supra note 3.


29. As of mid-1986, “five Twin Cities churches had declared sanctuary, welcoming illegal aliens from El Salvador and Guatemala at the risk of criminal prosecution of their own members. Only one outstate church, First Unitarian in Duluth, had followed suit.” Conrad deFiebre, Churches are Refugee Stops on Overground Railroad, STAR TRIB. (Minn.), 01-A (May 9, 1986). See also History, St. Luke Presbyterian Church, http://www.stluke.mn/our-history/ (last visited July 25, 2016). By 1987, the number of Sanctuary churches in Minnesota had grown to eight, and dozens of churches and religious organizations had declared their support.” Jean Hopfen-sperger, Sanctuary Movement Finds Itself a Home, STAR TRIB. (Minn.), 01-A. (Mar. 23, 1987). Those eight were five in the Twin Cities and three in Duluth. “Hundreds of other churches and religious groups in Minnesota are involved in everything from collecting bail for refugees held in U.S. detention facilities to fueling the overground railroad that takes refugees to legal asylum in Canada.” Id.
federal agents seeking to investigate and prosecute individuals within churches who had sheltered refugees within their congregations.30

Beyond congregations willing to openly defy federal law against harboring the undocumented, a larger number of congregations supported Central American refugees through the Overground Railroad (ORR). ORR grew out of Reba Place Fellowship in Evanston, Illinois, and Jubilee Partners in Comer, Georgia, inspired both by the Underground Railroad of the 19th century and the efforts of French Huguenot villages in France during World War II that sheltered Jews fleeing Nazi genocide. The effort focused primarily on getting Salvadoran and Guatemalan asylum seekers legally through the United States and into Canada, which at the time was much more receptive to refugee status claims. In a small number of cases, ORR also found placements for asylum seekers to pursue their claims within the U.S. ORR staff, primarily in Texas, screened immigrants (both in U.S. Immigration and Naturalization Service (INS) detention and in various non-governmental refugee shelters) and then assisted them in getting documents allowing them to travel through the United States.31 Churches such as Bethel Mennonite in small-town Mountain Lake, Minnesota, hosted refugees through ORR. Churches in Lake Wilson, Virginia, Preston, Northfield, Two Harbors, Duluth and Rochester, and Minneapolis participated.32

Minnesota played a key role in the network, as border crossing points into Canada were one of two ways to be processed into Canada (the other being through Canadian consulates in Dallas and Atlanta). As the process could often take several weeks or months, Minnesota churches would host refugees in their homes or churches and assist with transportation. By the late 1980s, the Duluth Sanctuary churches had joined the effort, moving from attempting to evade U.S. border authorities in getting refugee applicants to Canada, to more openly participating in the ORR.33

The federal government took aggressive action in the mid-1980s to infiltrate and prosecute members of the Sanctuary movement along the southern border.34 That said, local government officials in Minnesota and elsewhere pushed back in support of the movement. Some local officials and local governments expressed sympathy and support for the Sanctuary

33. Pat Prince, “*Overground* Railroad Tries to Stay Above Board”, STAR TRIB. (Minn.), 01-A (May 10, 1988).
movement. According to a 1987 article, three Minnesota cities declared themselves “cities of refuge,” meaning city officials would “not take action threatening the safety of a sanctuary refugee.” In 1987, the local INS District Director, Gerald Coyle, stated that the INS did not aggressively pursue sanctuary refugees in churches because he did not want to “play into their hands” and cause media attention. In 1988, it was revealed that the FBI had conducted surveillance on St. Luke’s and two other sanctuary congregations in the Twin Cities (Twin Cities Friends Meeting of St. Paul and Walker United Methodist in Minneapolis), a revelation which received harsh criticism by DFL State Representative Phyllis Kahn.

By the end of the 1990s, as the Central American civil wars drew to a close and a major class action lawsuit against the U.S. government exposed the structural bias against Central American asylum claims and forced a restructuring of the entire process, the need for sanctuary in houses of worship diminished.

B. The New Sanctuary Movement in Minnesota

In the current era, a new Sanctuary movement has formed to shelter immigrants facing separation from their families. Unlike the earlier movement, which focused more on political refugees, the current effort has focused on keeping families together. In 2008, ICE in Minnesota, while asserting that it would seek to deport persons on its priority list, also stated that as a general rule it would not conduct enforcement actions against churches, schools, and hospitals. In 2016, the Robbinsdale United Church of Christ proclaimed itself a sanctuary congregation, indicating that it was willing to shelter migrants within its physical building and face legal conse-

35. Hopfensperger, Sanctuary Movement, supra note 29.
36. Id.
40. “ICE spokesman Tim Counts reiterated the agency’s stance on the matter, via e-mail: ‘ICE has authority to arrest anyone in violation of U.S. immigration laws anywhere in the country. Having said that, we understand that there are particular sensitivities surrounding locations such as churches and schools. Like all law enforcement agencies, ICE prioritizes enforcement efforts and we make arrests at the appropriate time and place.’” Cristeta Boarini, New Sanctuary Movement Emerging Among Churches Near and Far, TWIN CITIES DAILY PLANET (Aug. 6, 2008), http://www.tcdailyplanet.net/new-sanctuary-movement-emerging-among-churches-near-and-far/.
quences. In sharing the decision, the pastor explained that the decision was the result of watching two of its own families face the separation and pain caused by deportation. Of some interest is the fact that the church consulted with the city council (one of the church members sits on the city council and is a county attorney) and the police department and felt supported by each in their decision.

By early 2016, the movement had not gathered as much steam or attention as that of the 1980s and 1990s, although the pastor of the Robbinsdale church claimed that over 300 churches had joined the movement. One reason may well be that the home (discussed earlier in this section) had merged with houses of worship as a place of sanctuary of political and economic migrants. Many immigrant families are of mixed legal status, and many are faithful attendees of houses of worship. Unlike the Sanctuary movement of the 1980s and 1990s, in which refugees played more of a behind-the-scenes role and were often depicted more as objects of protective action by Americans with status, Sanctuary became not simply the committee room and homeless shelter of white progressive congregations, but the lived realities of congregations that predominantly serve immigrant communities. And also unlike the Sanctuary movement of the 1980s and 1990s, where refugees were behind-the-scenes or depicted in these roles, immigrants (particularly young people referred to as “Dreamers”) took the lead in pushing for immigration protections.

The November 2016 election of Donald Trump reinvigorated the Sanctuary Movement in Minnesota. On December 6, 2016, the non-profit group ISAIAH held a public meeting at which thirteen Minnesota congregations declared themselves to be sanctuary churches, meaning that churches “would have individuals residing in their place of worship for an undetermined amount of time, while the community of Sanctuary works on the stay of removal orders for each person residing in the space or until those individuals can safely arrive to another place of sanctuary.”

41. Robbinsdale (MN) United Church of Christ, Robbinsdale United Church of Christ is a Sanctuary Congregation (Mar. 1, 2016), https://robbinsdaleucc.org/2016/03/01/we-are-a-sanctuary-congregation/.
42. Hot Topics Cool Talk—Immigration Reform: Economic and Pastoral Perspectives, Univ. of St. Thomas (Mar 19, 2016), https://www.youtube.com/watch?v=xI7F9GZwL8M (see particularly the first fifteen minutes).
43. Id. (starting at minute forty-two). The pastor also happens to be a police chaplain. Id.
44. Id.
46. Id.
1980s movement in Minnesota, another similar number of “‘sanctuary support’ congregations have agreed to assist the faith-based network with donations of food, money, clothing and toiletries, or prayer vigils, news conferences and legal assistance,” rather than actually house individuals.49 The group drew inspiration in part from the Underground Railroad and also from Leviticus 19:33–34: “When a foreigner resides among you in your land, do not mistreat them. The foreigner residing among you must be treated as your native-born. Love them as yourself, for you were foreigners in Egypt. I am the Lord your God.”50

C. Legal Issues Facing Sanctuary Congregations

The practice of the New Sanctuary Movement has been to openly provide shelter, while appealing to the federal government to exercise its discretion and not remove individuals from the U.S. Recent federal practice has been to avoid confrontation with churches and schools. While “not intended to condone violations of federal law,” ICE established a strict policy in 2011 against certain immigration enforcement actions in “sensitive locations,” including churches and schools.51 Whether such a policy survives under the Donald Trump administration very much remains to be seen, as the federal anti-harboring statute, 8 U.S.C. § 1324,52 has been wielded by the federal government in the past to curtail the sanctuary movement. For example, in the 1980s, the FBI used paid informants to infiltrate the movement in Arizona, leading to the convictions of seven sanctuary workers.53 The New Sanctuary Movement contends that because its position is to openly provide shelter, they are not violating the harboring element of the law.54

A leading Ninth Circuit case from 1976 defined harboring as including both concealment and simple shelter.55 In 1975, the Second Circuit found that the term “harbors” should be read broadly “to encompass conduct tend-

50. Id.
ing substantially to facilitate an undocumented person’s remaining in the United States illegally,” a definition which the Fifth Circuit has adopted. More recently, a Second Circuit court has more narrowly held that harboring is “conduct which is intended to facilitate an alien’s remaining in the United States illegally and to prevent detection by the authorities of the alien’s unlawful presence.” The Sixth and Seventh Circuits have also found a narrower definition of harboring, saying that it requires a clandestine element. Legal research indicates that this issue has not been addressed by the Eighth Circuit, the federal court circuit in which Minnesota sits. Congregations taking the step of providing sanctuary should be aware of the risks involved in such prophetic actions.

IV. SCHOOLS, COLLEGES, AND UNIVERSITIES AS PLACES OF SANCTUARY

A. College and University Admission for Unauthorized Immigrants

Shortly after the 9/11 terrorist attacks in 2001, INS officials contacted some colleges and universities in Minnesota to strongly suggest that it would be illegal for them to admit unauthorized immigrants. Over the course of the following decade, many colleges and universities in Minnesota took actions to allow unauthorized students to enroll in their institutions. Often this took the form of “don’t ask” policies.

On application forms, boxes requiring the choice of resident or U.S. citizen were either illuminated or replaced with options such as other. While social security numbers are generally required for federal financial aid, that number is not required for simple admission. At my own institution, the University of St. Thomas, an internal ad hoc committee in 2005 and 2006 studied the issue and suggested to university administration to clear the path for unauthorized immigrants to gain admission to the University of St. Thomas through a “don’t ask” policy. The administration did act positively on that proposal in 2007.

59. In U.S. v. Belevin-Ramales, 458 F. Supp. 2d 409, 410–11 (E.D. Ky. 2006), the court found that the word “harbor” meant “clandestinely shelter, succor and protect improperly admitted aliens” (by stating that Susnjar v. U.S., 27 F.2d 223 (6th Cir. 1928) had not been “abrogated or implicitly overruled.”). In U.S. v. Costello, 666 F.3d 1040, 1047 (7th Cir. 2012), the court held that a woman allowing her undocumented boyfriend to live openly with her was not harboring. It opined that “harboring could involve advertising, for instance if a church publicly offered sanctuary for illegal aliens and committed to resist any effort by the authorities to enter the church’s premises to arrest them,” suggesting that harboring involves an element of resistance. The court went on to state that “concealment (‘clandestinely shelter’) is an element of harboring.” Id. at 1048.
60. The University of St. Thomas “Dream Act” (Feb. 2006) (on file with author).
B. The Minnesota Dream Act: In-State Tuition at State Institutions for Unauthorized Immigrants

In the mid-2000s a movement developed to get in-state tuition for residents of states where they had resided and gained a high school education. Such proposals by and large withstood challenges in federal courts.62

In Minnesota, a similar effort, which spanned several years, was successful. Notably, this effort was spearheaded by the so-called “Dreamers” along with immigrant advocacy organizations. The Minnesota legislature passed the Minnesota Dream Act (also known as the Prosperity Act) in 2013,63 and Governor Mark Dayton signed it into law in May 2013. Undocumented students who attended Minnesota high schools for at least three years, graduated or earned a GED, registered for Selective Service, and have applied for legal status (if a federal process exists for them to apply for) are eligible. Primary benefits include in-state tuition, Minnesota state financial aid, and privately funded financial aid through Minnesota public colleges and universities.64

The passage of the legislation took nearly a decade of effort on the part of state legislators, civil society groups, and community activists, including undocumented students. Republican Governor Tim Pawlenty had halted a similar bill in 2007.65 As of June 2014, other states had passed similar laws, including California, Texas, Washington, and New Mexico.66

C. Anti-Trump Universities?: The Rapid Rise of the “Sanctuary Campus”

In the immediate aftermath of the election of Donald Trump, a movement arose across a number of colleges and universities in a call for “Sanct-

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tuary campuses.” University campuses (along with places of worship, hospitals, other schools, and places of political demonstration) had, in 2011, been designated as “sensitive locations” by ICE, where ICE enforcement actions were not to occur absent exigent circumstances, or when led there by other law enforcement agents.67 Such a policy might not fare well in a Trump administration, but the uproar that would come from enforcement actions on campuses would be considerable.

What constitutes a Sanctuary campus has yet to come fully into focus, but media reports in December 2016 list several approaches under consideration that include refusing to assist federal immigration agents, demanding warrants before allowing such agents onto campus, or offering financial and legal assistance to undocumented students. Some universities have discussed such approaches while eschewing the “Sanctuary” label.68 Swarthmore College in Pennsylvania has clearly laid out its determination of their Sanctuary campus:

Nearly 2,000 members of our community have asked that Swarthmore become a Sanctuary campus. We wholeheartedly pledge to do so. This means that to the fullest extent of the law:

- The College will not voluntarily share student information with immigration enforcement officials;
- The College will not voluntarily grant access to College property to immigration enforcement officials;
- The College will not support the enforcement actions of immigration officials on campus. Public Safety will continue to refrain from inquiring about or recording the immigration status of community members;
- The College is not enrolled in “e-verify” and will not do so; and
- The College does not make housing decisions based on immigration status and will not do so.

The College will do everything within its power to promote the safety of any member of our community who may face heightened threat.69

The protection of student information finds support in federal law. Professor Elizabeth McCormick primarily focused her recent writing on the requirements of the Family Educational Rights and Privacy Act of 1974 (FERPA) as applied to primary and secondary, FERPA applies equally to post-secondary education:

67. Memorandum from John Morton, supra note 51.
The importance of acknowledging the privacy protections afforded by FERPA is nonetheless significant since it serves as an important counterweight to the myth surrounding anti-sanctuary provisions that there can be no restrictions on a school district’s ability to share immigration status information with federal immigration authorities. . . [T]his is an important message not just for immigrant children and families seeking to enroll in public schools but also for school officials and employees who may misunderstand their obligations under FERPA in light of the anti-sanctuary provisions.70

Other moves that have garnered even more nationwide support are calls for a continuation of the Deferred Action for Childhood Arrival program by university and college leaders.71 In Minnesota, as of mid-December 2016, presidents of thirteen colleges and universities had signed the call.72 Additionally, the Minnesota presidents of the University of St. Thomas, the College of St. Scholastica, Saint John’s University, College of Saint Benedict, and St. Catherine University signed along with over a hundred others “A Statement from Leaders in Catholic Higher Education,” which said in part:

Undocumented students need assistance in confronting legal and financial uncertainty and in managing the accompanying anxieties. We pledge to support these students—through our campus counseling and ministry support, through legal resources from those campuses with law schools and legal clinics, and through whatever other services we may have at our disposal.73

A petition signed by more than a thousand students, faculty members, and staff called on the University of Minnesota to declare itself a sanctuary and protect students from deportation,74 including not sharing student infor-

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72. Id. (Augsburg College, Bethel University, Carleton College, St. Catherine University, St. Cloud State University, Hamline University, University of Minnesota, University of St. Thomas, Macalester College, Metropolitan State University, Minneapolis Community and Technical College, Minnesota State University Moorhead, and Winona State University).


mation and preventing campus police from working with ICE agents. University President Eric Kaler committed only to advocating for undocumented students and international students.

V. SANCTUARY CITIES: “SEPARATION” OR “NONCOOPERATION”?

It is at the level of cities that the notion of Sanctuary has received the most attention. The 2015 case of Kathryn Steinle in San Francisco reignited controversy over so-called Sanctuary Cities. These local ordinances and policies have faced efforts to eliminate them at both the state legislative level in Minnesota, as well as around the country. And, a federal statute has had limited effect in curtailing them. These jurisdictions see the role of local government and law enforcement to be primarily public safety and service provision, rather than civil immigration enforcement.

A. City Ordinances

The Kate Steinle murder in San Francisco in summer 2015 reignited debate about Sanctuary City policies across the country. In a thorough re-examination of the Federal Anti-Sanctuary legislation from 1996 and court cases considering efforts to use it against municipalities, Professor Elizabeth McCormick concluded that:

(1) “the federal anti-sanctuary statutes do not mandate that states and localities do anything,”77 (2) “the anti-sanctuary statutes prohibit restrictions on communication; they do not prohibit restrictions on other activities by state and local agencies and officers,” and “[t]herefore, a state or municipal government can prohibit its employees or officers from inquiring about immigration status where it is not otherwise required by law,”78 (3) “the anti-sanctuary statutes do not provide for a private right of action for individuals claiming harm in connection with them, whether that claim is for damages or to compel compliance with the statutes,”79 (4) “the federal anti-sanctuary measures do not repeal or otherwise override the privacy protections in other federal statutes . . . they do not provide a blank check for the voluntary sharing of information that is otherwise protected from disclosure under federal law,”80 and (5) “states and municipalities may mandate certain

75. See Tom Steward, Universities Face Loss of Funding Over Sanctuary Campuses, Ctr. for the American Experiment (Dec. 8, 2016), http://www.americanexperiment.org/2016/12/universities-face-loss-funding-sanctuary-campuses/.
76. Id.
77. McCormick, Federal Anti-Sanctuary Law, supra note 70, at 229 (citation omitted).
78. Id. at 229. “On the other hand, states and municipalities may not . . . place restrictions on immigration-related information sharing with the federal immigration authorities, unless that restriction is part of a broader policy to protect confidential information from disclosure.” Id. at 230 (citation omitted).
79. Id. at 230.
80. Id.
types of cooperation with federal immigration enforcement” such as mandatory status checks, so long as they do not conflict with federal immigration authority.\textsuperscript{81}

Minneapolis and St. Paul, through their city councils, had each passed separation ordinances in 2003\textsuperscript{82} and 2004\textsuperscript{83} respectively. These ordinances fall into the broad category of “Don’t Ask” ordinances, as opposed to “Don’t Tell” ordinances, in that both ordinances placed limits on collecting immigration data during the conduct of municipal business, rather than explicating limiting the ability of agencies or individuals to share immigration information. For example, the St. Paul ordinance states in part that:

With the exception of inquiries allowed by law or as necessary for law enforcement purposes, no St. Paul city officer or employee should inquire into the immigration status of any person or request any documents or information verifying the immigration status of any individual. Employees shall comply with any properly issued subpoena for the production of documents or witnesses, even if related to immigration issues or issues of homeland security.\textsuperscript{84}

That said, there are notable exceptions to those limits. In both ordinances, for instance, criminal division employees of the cities are allowed to do the following:

\begin{itemize}
\item[a.] Inform persons of the possible immigration consequences of a guilty plea.
\item[b.] Question and conduct cross-examination of a witness or defendant regarding immigration status.
\item[c.] Inquire about immigration status for purposes of bail or conditional release.
\item[d.] Investigate and inquire about immigration status when relevant to the potential or actual prosecution of the case or when immigration status is an element of the crime.
\item[e.] Take immigration status and collateral effects of possible deportation into consideration during discussions held for the purpose of case resolution.\textsuperscript{85}
\end{itemize}

Additionally, both ordinances state that nothing “shall prohibit public safety personnel from assisting federal law enforcement officers in the in-

\textsuperscript{81} Id. at 230–31 (citation omitted).
\textsuperscript{84} St. Paul, Ordinances § 44.02(a)(1).
\textsuperscript{85} Minneapolis, Ordinances § 19.30(a)(2); St. Paul, Ordinances § 44.03(a)(2).
vestigation of criminal activity involving individuals present in the United States who may also be in violation of federal civil immigration laws.”

Both ordinances do direct their employees not to engage in immigration enforcement activities. It is this element that brought on efforts by Republican Governor Tim Pawlenty and Republican allies in state legislature to characterize the city ordinances as “noncooperation” policies. At least one legal scholar argued at the time that such ordinances did not violate federal preemption on immigration.

In the spring of 2011, State Representative Bob Barrett (R) led a concerted effort to repeal those ordinances, through HF 358. Hearings on the bill provoked intense public debate. In written testimony before the Minnesota House Public Safety Committee, I argued that the statute could expose local governments to costly lawsuits (both by private citizens wanting greater immigration enforcement, and by persons alleging racial profiling); that privatizing immigration enforcement by way of citizen suits was bad policy; that the statute could interfere with local law enforcement management authority by allowing low level officers to decide that their priority was immigration enforcement; that the statute potentially would impinge on how localities allocate resources; that the statute could reach into other public institutions (e.g., a public school teacher might take on the role of immigration enforcement); and that the current separation ordinances did not prohibit cooperation between local and federal agencies in the area of criminal investigation.

In testifying against the legislation, then St. Paul Police Chief Tom Smith attributed a drop in the crime rate to the ordinance and said that “[i]f word gets out that police officers, after arrest or during an interview, might ask somebody what nationality, what their immigration status is, that word’s going to get out immediately.”

86. MINNEAPOLIS, ORDINANCES § 19.30(a)(4); ST. PAUL, ORDINANCES § 44.03(a)(4).

87. MINNEAPOLIS, ORDINANCES § 19.20(a)(3) (“Other than complying with lawful subpoenas, city employees and representatives shall not use city resources or personnel solely for the purpose of detecting or apprehending persons whose only violation of law is or may be being undocumented, being out of status, or illegally residing in the United States (collectively ‘undocumented’’); ST. PAUL, ORDINANCES § 44.02(a)(3) (same).


Despite spirited opposition, the bill passed in the Republican controlled House in the spring of 2012, but languished in the Democrat controlled Senate.93

The November 2016 election of Donald Trump and the fact that the Republicans in Minnesota narrowly took full control of the state legislature,94 potentially set the stage for further confrontations, as sanctuary cities had taken center stage in political campaigns. In the wake of the presidential election, Minneapolis mayor Betsy Hodges joined a number of big-city mayors to make clear her commitment to separating local law enforcement from federal immigration enforcement:

I will continue to stand by immigrants in Minneapolis. For years, Minneapolis has codified in ordinance that our police officers will not do the work of the Federal government and ICE regarding immigration status. If police officers were to do the work of ICE it would harm our ability to keep people safe and solve crimes. Witnesses and victims of crimes won’t come forward if they think our police officers will question or detain them about their immigration status. Our ordinance has helped us solve crime and keep communities safer. If our police were doing the work of ICE, Minneapolis would be less safe for everyone, regardless of immigration status. In his quest to scapegoat immigrants, Donald Trump has threatened cities’ [f]ederal funding if we do not change this practice. I repeat: I will continue to stand by and fight for immigrants in Minneapolis regardless of President-elect Trump’s threats.95

Chris Coleman, the mayor of St. Paul, waited several days before making a more muted defense of the strikingly similar separation ordinance in the other Twin City. He made clear that “officers can take someone into custody if they have evidence of an immigration violation or take action against employers who knowingly hire undocumented workers. This is true of any city in the country.” He also made clear that “City of Saint Paul employees are not immigration officials” and that the city “will resist any attempt by the federal government to tell us how to police our community or to turn our officers into ICE agents.” He indicated that “the City works cooperatively with the [Department of Homeland Security (DHS)], as it

93. See S. 2433, 87th Leg., 2d Reg. Sess. (Minn. 2012). The bill never made it out of committee.
does with all state and federal agencies, but the City does not operate DHS programs for the purpose of enforcing federal immigration laws.”

The mayor went on to say that the “City of Saint Paul wants all its residents to feel comfortable seeking out City services—including law enforcement—when they are in need” but also that the “City of Saint Paul does not provide safe harbor to criminals.”

B. Law Enforcement Policies

According to one source, the “Minneapolis Police Department has had a policy in place for years that prohibits officers from asking about immigration status,” predating the city ordinance discussed above.

Police understand that building trust is a challenge for immigrant communities, including newcomers like Somalis. With the sanctuary policy as a foundation, and with use of bilingual interpreters, police work to establish trust by building relationships through regular meetings and conversations with community members, accessing Somali radio shows, distributing flyers in neighborhoods, and even making door-to-door visits.

In contrast, some Minnesota police departments have been criticized for racial profiling of Latino motorists. The ACLU criticized the Gaylord police for not sufficiently addressing concerns surrounding one officer with a record of disproportionately stopping and ticketing Latinos in a predominantly white community.

The efforts to roll back so-called Sanctuary Cities in Minnesota have thus far been unsuccessful. Those efforts by a Republican governor and restrictionist Republicans in the mid-to-late 2000s nonetheless served to mobilize pro-immigrant forces to oppose those legislative efforts. That set

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98. Id. An area ripe for additional research is the extent to which some Minnesota police may have used advancing technology in license plate readers in heavily immigrant neighborhoods to conduct de facto immigration sweeps by identifying unlicensed drivers. See generally Benjamin Feist, Teresa Nelson & Ian Bratlie, Racial Profiling in Greater Minnesota and the Case for Expanding the Driver’s License Privilege to All Minnesota Residents, 5 LAW RAZA 82, 103–104 (2013), http://open.wmitchell.edu/lawraza/vol5/iss1/3. Such a practice would undermine efforts to build trust in immigrant communities.

the stage for those forces to go on the legislative offensive in the late 2000s and into the following decade. Some of those efforts have paid off (such as the state DREAM act), and some have not (such as allowing unauthorized immigrants to be issued drivers’ licenses), as we shall see in the following sections. Also, as will be addressed below, there have been threats to cut-off federal funding to Sanctuary jurisdictions.

VI. LOCAL POLICING AND FEDERAL IMMIGRATION ENFORCEMENT MEET COUNTY SHERIFFS: THE RISE OF THE CRIMINAL ALIEN PROGRAM (CAP), SECURE COMMUNITIES, AND LIMITED REJECTION OF FEDERAL IMMIGRATION DETAINERS IN MINNESOTA

In this section, we will consider the rise (and slight demise) of immigration detainers in the U.S. and Minnesota. Because the detainer issue has been most publicized at the level of county sheriffs in Minnesota, the issue is placed here, between city separation ordinances and state level policies. That said, the issue is multi-layered, involving local policing policies, driver’s license policies at the state level (discussed below in Part VIII), and how ICE goes about seeking to detect, detain, and deport immigrants it believes should be removed from the United States. Nationwide, ICE uses the Criminal Alien Program (CAP) to identify immigrants in local law enforcement custody. In Minnesota, because county sheriffs often play the role of jailer for local law enforcement, it is the federal immigration detainer that has frequently taken the role of mediating between federal and local law enforcement.

ICE relies on its CAP to effectuate the majority of its removals from the interior of the United States. CAP “provides ICE wide-direction and support in the biometric and biographic identification, arrest, and removal of priority aliens who are incarcerated within federal, state, and local prisons and jails, as well as at-large criminal aliens that have circumvented identification.” When its predecessor was created in 1988, CAP was “originally conceived as a ‘jail check’ program narrowly tailored to remove noncitizens incarcerated for serious criminal convictions.” At that time, only a limited number of crimes, generally serious and violent ones, made a person removable. That list was dramatically expanded between 1990 and 1996. Congress dramatically expanded funding for CAP over the past decade, from $6.6 million in FY 2004 to $322 million in FY 2015.

100. See infra text accompanying notes 126–53.
103. Id. at 2, 7.
104. Id. at 2, 7–8.
The “jail check” component formed the bedrock of the CAP program: “[O]ver 4,000 federal, state, and local facilities that provide ICE information about the foreign nationals in their custody.” While this is required of federal facilities, “certain state and local facilities voluntarily provide ICE with lists of foreign nationals in custody, targeted lists of suspected noncitizens, or access to detainees or records, depending on the level of cooperation. . . . From FY 2010 to FY 2013, only 6.4 percent of CAP encounters were referred from federal facilities, compared to 91.8 referred from state or local law enforcement.”

In a series of immigration-related executive actions, Republican Governor Tim Pawlenty announced on January 7, 2008 that Minnesota state corrections facilities would “participate in the Criminal Alien Program (CAP) which identifies criminal aliens who are incarcerated within federal, state and local facilities. CAP works to ensure that criminal aliens are not released into the community by securing a final order of removal prior to the termination of their sentence.”

Many county and local jails also participate in the CAP program in Minnesota:

The increased capacity of ICE officers to identify and interview noncitizens who are in the custody of Minnesota’s county jails means that noncitizens in jail may be identified and questioned by ICE and turned over for deportation without any criminal charges being filed. People reported that immigrants in local jails were not given any explanation of their rights, nor of the potential consequences of voluntarily providing information prior to being placed on the telephone with or interviewed by ICE officers and were not represented by counsel at any point in the process. “Sometimes they just say ‘sign here’ and we don’t know what to do,” stated one immigrant.

In the national context, in 2013, Minnesota ranked #22 in terms of CAP arrests per 1000 noncitizens, and #20 for removals per 1,000 noncitizens:

105. Id. at 6 (citations omitted).
An American Immigration Council report ventured that state-specific factors could affect the differences between CAP activities in different states: “most relevant may be the extent of local cooperation with ICE generally, through programs such as 287(g) that deputize local officers to enforce immigration law, and CAP specifically, through ‘jail check’ agreements and policies regarding ICE detainer requests.”

Secure Communities began in 2008 and came to Minnesota in February 2012. As the program was being rolled out, Hennepin County Sheriff Rich Stanek “hailed the state’s involvement and said he [was] confident that thousands more illegal and dangerous immigrants booked into the jail will be identified by federal authorities for deportation proceedings.”

Under Secure Communities “all fingerprints from individuals detained by local and state authorities [were] automatically scanned and sent to ICE to determine their immigration status.” Thus, rather than having to rely on cooperation from state and local law enforcement officials to send data or allow them to visit jails, ICE, through CAP, can now simply identify individuals electronically.

At its outset, a number of jurisdictions (both at the state and municipal levels) “joined” Secure Communities, often under the impression that participation was voluntary and that only people with serious criminal back-

<table>
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<tr>
<th>FY 2013 State</th>
<th>CAP Arrests</th>
<th>CAP Removals</th>
<th>Non-citizen Population</th>
<th>Arrests per 1,000 Non-citizens</th>
<th>Arrests National Rank</th>
<th>Removals Per 1,000 Non-citizens</th>
<th>Removals National Rank</th>
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<td>153,641</td>
<td>4.4</td>
<td>34</td>
<td>2.2</td>
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</table>

Table Source: American Immigration Council

108. CANTOR ET AL., supra note 102, at 20–21. The data sources were DHS Criminal Alien Removals, 2013, and the American Community Survey, 2009–2013. Id.
109. Id. at 22.
112. McEnroe, Minnesota Becomes Twenty-Seventh State, supra note 110.
113. Id.
grounds would be targeted by ICE. David Martin, a law professor and former general counsel for INS, has defended the program on grounds that it struck a balance between the concerns of local law enforcement (avoiding too much entanglement with immigration by not requiring them to do anything beyond regular booking procedures) while identifying people potentially susceptible to removal on criminal grounds.114

By the time Secure Communities came to Minnesota, a number of other jurisdictions had rebelled against the program, seeking to withdraw from it on grounds that people with low-level offenses or no criminal convictions were being swept up for removal. Two critiques of CAP in recent years have been (1) that it sweeps up far more people for removal than serious criminals;115 and (2) that there are strong indications of racial and national origin profiling in CAP arrests and removals.116 These concerns have been raised in Minnesota:

In Minnesota, ICE uses the Criminal Alien Program (CAP), Secure Communities (S-COMM), detainer requests, and stipulated removal orders to identify, interrogate, and secure deportation orders against aliens who are booked into county jails. Although characterized in ICE’s public communications and congressional appropriations requests as tools which target “criminal aliens,” data indicates that many people identified and deported through these programs have no criminal convictions, or have convictions for minor offenses.117

In a 2014 report, the Advocates for Human Rights raised concerns over national origin profiling in traffic stops and cooperation between local law enforcement and ICE, leading to a funneling of individuals with no criminal records into the Criminal Alien Program and eventual removal.118

Essential to the operation of Secure Communities was not only knowing where immigrants susceptible to removal were located, but also securing their custody. For decades, the method of securing federal immigration custody for someone in local criminal custody was the detainer, or “immi-

115. See CANTOR ET AL., supra note 102, at 2. “Between FY 2010 and FY 2013, CAP encountered over 2.6 million persons and removed fewer than 508,000,” and individuals convicted of violent or serious crimes accounted for only seventeen percent of that total. Id. “27 percent of those removed had no criminal convictions recorded, ‘traffic offenses’ accounted for twenty percent, and dangerous drug convictions, eighteen percent.” Id. at 10 (citations omitted).
116. Id. (“Mexican and Central American nationals are overrepresented in CAP removals compared to the demographic profiles of those populations in the United States. People from Mexico and the Northern Triangle (Guatemala, Honduras, and El Salvador) accounted for 92.5 percent of all CAP removals between FY 2010 and FY 2013, even though, collectively, nationals of said countries account for 48 percent of the noncitizen population in the United States. Nationals of those countries, however, are not markedly more likely to be convicted of violent crimes or crimes the FBI classifies as serious.”).
117. ADVOCATES FOR HUMAN RIGHTS, supra note 107, at 59.
118. Id. at 61–62.
immigration hold.” For much of their use over the years, detainers were per-
ceived by many in the law enforcement community to be mandatory. A 
series of lawsuits for damages were brought against local law enforce-
ment by persons claiming to have been held illegally. In addition, DHS internally 
clarified that detainers were requests and not legally enforceable orders.119

It was in this national context that in June 2014 the Ramsey County 
Sheriff’s Office, under the leadership of Matt Bostrom, made public a pol-
icy to not honor federal immigration detainers in the absence of “a judicial 
order or criminal probable cause.”120 This came on the heels of letters sent 
by the Minnesota American Civil Liberties Union “to every county sheriff 
in Minnesota urging them to abandon detainers, citing the growing number 
of federal court decisions against the practice.”121 Hennepin County also 
announced in June 2014 a decision not to honor detainers, with Hennepin 
County Attorney Mike Freeman stating that “[t]here is no legal basis to 
hold people with detainers” and Hennepin County Sheriff Rich Stanek cit-
ing the costs of holding immigrants on two day detainers and noting that 
public safety would not be affected as ICE would still have information on 
all detainees.122

In November 2014, the Obama administration announced a slew of 
executive immigration reforms, including the ending of Secure Communi-
ties and its replacement; the Priority Enforcement Program (PEP).123 PEP 
sought to allay local concerns by (1) focusing on and addressing a shorter 
list of criminal priorities for removal and (2) to replace detainers with “re-
quests for notification.”124 In the two years following its rollout, critics 
pointed out that many pre-PEP practices continued. One study in August 
2016 concluded that the detainer reform program had little impact in those 
two areas: “Half of the I-247s [detainers] during the first two months of FY 
2016 target individuals who have no criminal record—up slightly from 
before the Secretary’s announcement” and “[f]our out of every five I-247s

119. See T. Alexander Aleinikoff et al., Immigration and Citizenship: Process and Policy 1223 
(8th ed. 2016). For a critical review of Secure Communities and detainers in historical context, see 

120. See Ramsey County Jail stops honoring immigration holds, PIONEER PRESS (June 10, 
2014, 11:01 PM, updated Nov. 4, 2015, 1:13 AM), http://www.twincities.com/2014/06/10/ramsey-
county-jail-stops-honoring-immigration-holds.

121. Id.

122. David Chanen, Hennepin County no longer will honor ‘ICE hold’ requests, STAR TRIB. 
(Minn.) (June 12, 2014, 1:19 AM), http://m.startribune.com/henn-co-jail-will-stop-honoring-feds-
request-to-hold-immigration-violators/262719361; see also Memorandum from Jim Keeler, Ass’t 
Hennepin Cty. Att’y, to Michael O. Freeman, Hennepin Cty. Att’y (June 14, 2014); Press Release, 
Rich Stanek, Sheriff, Hennepin Cty. Sheriff’s Office, Statement on U.S. Immigration and Customs 
Detainers (June 11, 2014), https://www.aclu-mn.org/files/4214/0251/2290/06_11_2014_Sher-
iff_Stanke_Statment_on_ICE_detainers.pdf.

123. See Memorandum from Jeh Charles Johnson, Sec. of Homeland Security, to Thomas S. 
Winkowski, Acting Dir. U.S. Immigration and Customs Enforcement, et al. (Nov. 20, 2014), 

124. ALEINIKOFF ET AL., supra note 119, at 1224.
ICE issued in the latest data ask that individuals be detained beyond their normal period, rather than the new protocol where ICE is just notified.125

In the Minnesota context, it seems that few county sheriffs (at least publicly) followed the lead of Hennepin and Ramsey counties, raising the likelihood of greater local law enforcement collaboration in Greater Minnesota beyond the Twin Cities.

As addressed in the following section, the rise of opposition to detainers by states and localities was met by accusations of such jurisdictions being “Sanctuary cities” to be stripped of federal funding.

VII. EFFORTS TO CUT OR RESTRICT FUNDING TO “SANCTUARY” JURISDICTIONS

The previous two sections of this article have addressed two types of policies often labeled as “Sanctuary jurisdictions”—separation ordinances in Minneapolis and St. Paul, and detainer policies in Ramsey and Hennepin counties that seek to disentangle local law enforcement from federal immigration enforcement. Can the federal government cut funding to such jurisdictions? Republican efforts in Congress in 2015 and 2016 to increase penalties for illegal reentry into the United States on the one hand and to cut funding to so-called Sanctuary jurisdictions on the other, failed to garner enough votes in the U.S. Senate to overcome democratic opposition.126 At the same time, under pressure from House Republicans, the Office of the Inspector General of the Department of Justice (OIG) conducted a review of selected local and state jurisdictions identified by immigration restrictionists for compliance with the federal anti-sanctuary statute, 8 U.S.C. § 1373, and whether noncompliance put certain law enforcement related federal funding at risk. All ten jurisdictions singled out for attention by the OIG had policies related to responding to federal immigration detainers.127 This Part briefly considers (1) whether ordinances and policies in Minnesota violate federal anti-sanctuary statutes and how constitutional arguments concerning anti-commandeering and federal coercion apply to the interaction of local ordinances and policies and the federal statutes; and (2) if disentangle-

125. TRAC IMMIGRATION, REFORMS OF ICE DETAINER PROGRAM LARGELY IGNORED BY FIELD OFFICERS 1 (Aug. 9, 2016), http://trac.syr.edu/immigration/reports/432/.


ment ordinances and policies do violate federal statutes, what types of funding are subject to being cut.

A. Do the Separation Ordinances of Minneapolis and St. Paul and Detainer Policies of Ramsey and Hennepin Counties Violate the Federal Anti-Sanctuary Statute 8 U.S.C. § 1373 and how does the Constitution come into play?

Two federal statutes, created in 1996, govern the issue. 128 8 U.S.C. § 1373 has received the most attention. In most relevant part it reads:

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities.
Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

The separation ordinances of Minneapolis and St. Paul at their core are “don’t ask” policies, meaning that the systematic collection of immigration related information is not to be done in the course of regular interactions with the public, resulting in little immigration information to be available to be passed onto federal authorities pursuant to 8 U.S.C. § 1373. That said, there are some provisions of the ordinances that allow for city employees, particularly public safety officials, to inquire about immigration status in limited circumstances. Whether that information is systematically maintained is another question.

In terms of general city services, the Minneapolis ordinance states that: City employees shall only solicit immigration information or inquire about immigration status when specifically required to do so by law or program guidelines as a condition of eligibility for the service sought. City employees may require evidence of a person’s identity and may ask to see a person’s personal identifying documents only when specifically authorized and required to do

128. These statutes are 8 U.S.C. § 1373 (2012) and 8 U.S.C. § 1644 (2012). Section 1373 has been at the center of recent controversies; I focus my analysis on that statute below.
so by the employee’s work duties. . . . Other than complying with lawful subpoenas, city employees and representatives shall not use city resources or personnel solely for the purpose of detecting or apprehending persons whose only violation of law is or may be being undocumented, being out of status, or illegally residing in the United States.\textsuperscript{129}

Public safety officials (police, fire, city prosecutors) have greater latitude:

1. Public safety officials shall not undertake any law enforcement action for the sole purpose of detecting the presence of undocumented persons, or to verify immigration status, including but not limited to questioning any person or persons about their immigration status.

2. City attorney’s office—criminal division employees shall be permitted to:
   a. Inform persons of the possible immigration consequences of a guilty plea.
   b. Question and conduct cross-examination of a witness or defendant regarding immigration status.
   c. Inquire about immigration status for purposes of bail or conditional release.
   d. Investigate and inquire about immigration status when relevant to the potential or actual prosecution of the case or when immigration status is an element of the crime.
   e. Take immigration status and collateral effects of possible deportation into consideration during discussions held for the purpose of case resolution.

3. Public safety officials may not question, arrest or detain any person for violations of federal civil immigration laws except when immigration status is an element of the crime or when enforcing 8 U.S.C. § 1324(c).

4. Nothing in this ordinance shall prohibit public safety personnel from assisting federal law enforcement officers in the investigation of criminal activity involving individuals present in the United States who may also be in violation of federal civil immigration laws.\textsuperscript{130}

The city and state ordinances under scrutiny by the DOJ OIG in the summer of 2016, such as the New Orleans Police Department (NOPD), contain more assertive noncooperation policies than the policies of Minneapolis and St. Paul. Those policies might be referred to as “don’t tell” ordinances, as opposed to the “don’t ask” policies of Minneapolis and St. Paul. The NOPD policy in 2016 read that “[m]embers shall not disclose information regarding the citizenship or immigration status of any person unless (a)

\textsuperscript{129} Minneapolis, Ordinances §§ 19.20(2), (3) (2017).

\textsuperscript{130} Id. § 19.30(a).
required to do so by federal or state law; or (b) such disclosure has been authorized in writing by the person who is the subject of the request for information; or (c) the person is a minor or otherwise not legally competent, and disclosure is authorized in writing by the person’s parent or guardian.”

The OIG opined that such prohibitions on information sharing, notwithstanding the savings clause, “is inconsistent with the plain language of Section 1373 prohibiting a local government from restricting a local official from sending immigration status information to ICE.”

In terms of preventing action, the Minneapolis ordinance denies the use of city resources or personnel solely for the “purpose of detecting or apprehending persons” for immigration purposes, but does not explicitly prohibit information sharing. Public safety officials “may not undertake any law enforcement action for the sole purpose of detecting the presence of undocumented persons, or to verify immigration status.” This language is more ambiguous, but again does not explicitly limit information sharing or maintenance.

The OIG report also addressed state and local policies with respect to federal immigration detainer requests. Of note is that the OIG report focuses on the “spirit” of 8 U.S.C. § 1373 rather than the letter of the law, stating that “local policies and ordinances that purport to be focused on civil immigration detainer requests, yet do not explicitly restrict the sharing of immigration status information with ICE, may nevertheless be affecting ICE’s interactions with the local officials regarding ICE immigration status requests.” As an example, the OIG report points to a Newark, NJ police department policy that “[t]here shall be no expenditure of any departmental resources or effort by on-duty personnel to comply with an ICE detainer request.”

Two constitutional arguments come up in arguments to limit funding to Sanctuary jurisdictions.

The first is the Tenth Amendment anti-commandeering doctrine. In *U.S. v. Printz*, 521 U.S. 898 (1997), the Supreme Court held that the federal government could not compel local law enforcement officials to perform background checks on prospective handgun buyers. The Newark policy mentioned in the previous paragraph brings this issue into sharp relief—it might be argued that the policy of prohibiting staff from using work time to share immigration information with the federal authorities violates 8 U.S.C. § 1373 but that 8 U.S.C. § 1373 violates the Tenth Amendment if it re-

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132. *Id.* at 5 (also referring to Chicago city code, which states, “Except as otherwise provided under applicable federal law no agent or agency shall disclose information regarding the citizenship or immigration status of any person unless required to do so by legal process . . . .”).
133. *Id.* at 7.
134. *Id.* at 8 n.11.
quires sub-federal governmental entities to allow its employees to act as information resources for federal immigration enforcement.

Two constitutional scholars argue that the anti-commandeering doctrine does not apply to protect Sanctuary jurisdictions when Congress “merely requests information,” pointing to Reno v. Condon, 528 U.S. 141 (2000).135 David Rivkin and Elizabeth Price Foley argue that Condon stands for the proposition that because the Driver’s Protection Privacy Act (DPPA) requires the disclosure of certain driver’s license information to the federal government, and the statute was upheld, that the federal government requesting information does not violate the anti-commandeering doctrine.136 Rivkin and Price Foley, however, misstate the issue the Court addressed. The DPPA was passed to restrict a state’s ability to blithely share driver’s license information with anyone willing to pay for it. At issue in the case were not the exceptions that did allow for some disclosures of information (such as required disclosures, for instance, under the Clean Air Act), but whether the time and effort spent by state employees to read and understand the limitations on what information they could and could not share violated the anti-commandeering statutes. The Court held unanimously that the DPPA did not do so.137 But 8 U.S.C. § 1373 does not require disclosure of immigration information. Additionally, the detainers that have been opposed by many state, county, and local jurisdictions have been repeatedly found to be requests and not mandates.138 Other scholars also argue that singling out and forcing state and local governments to disclose confidential information would violate Supreme Court precedent—“Congress can require states and cities to disclose information where a statute also requires private parties to turn over the same kind of information. The Court has never held that Congress can single out states and cities to share information with the federal government.”139

Rivkin and Price Foley also argue that the anti-coercion doctrine provides no shield for sanctuary jurisdictions. In short, the doctrine allows Congress to condition receipt of federal monies to sub federal entities so

136. Id.
138. See, e.g., Horowitz Memo, supra note 126, at 4 n.6 (citing cases).
long as states are not coerced into accepting the conditions and so long as
the funding is relevant to the federal interest involved. They cite two cases, South Dakota v. Dole, 483 U.S. 203 (1987) and NFIB v. Sebelius, 132 S.Ct. 2566 (2012). In Dole, the Supreme Court upheld a law that required states to raise the drinking age to twenty-one or lose five percent of their federal highway dollars (or, in the case of Dole, only 0.19% of the total state budget). On the flip side is the Sebelius case. The Affordable Care Act would have cut 100% of state Medicaid funding (or about 20% of total state budgets) to states not expanding those programs. That law was found to be coercive and the Supreme Court overturned it.\textsuperscript{140} The line between coercion and persuasion thus likely depends on the specific jurisdiction. Any attempts to condition federal funding to sanctuary cities would have to be “reasonably related to the federal interest animating the grant program.”\textsuperscript{141} Additionally, “funding conditions cannot themselves be used to induce states to violate the Constitution, for example, by unlawfully detaining people on immigration detainers without a judicial determination of probable cause.”\textsuperscript{142}

In sum, the separation ordinances of Minneapolis and St. Paul, being primarily “don’t ask” approaches, face less scrutiny than other more aggressive “don’t tell” jurisdictions. The 2016 OIG report, however, focuses not only on the letter of policies but also on the spirit. If city employees feel they are unable to share information with the federal government and seek to do so during work hours that could set up a conflict between the federal statute and the Tenth Amendment. The counties of Ramsey (in which St. Paul is located) and Hennepin (in which Minneapolis is located) adopted policies not honoring free-standing federal immigration detainers. Such an approach did not eliminate cooperation with ICE, and seems perfectly legal under the Fourth Amendment. Nor did such an approach eliminate federal immigration enforcement, although it did increase the costs of such actions. Rather than being able to simply pick up suspects for potential removal from county jails, ICE agents need to conduct surveillance and seek to apprehend individuals at the homes or workplaces after release from local custody.\textsuperscript{143}

B. What Sorts of Funding Could Be Cut?

Assuming the policies of St. Paul, Minneapolis, Ramsey County, and Hennepin County are found to be in conflict with federal law, what are the

\textsuperscript{140} See Rivkin & Price Foley, Can Trump cut off funds for sanctuary cities?, supra note 135.

\textsuperscript{141} Chemerinsky, Lai & Davis, Trump can’t force ‘sanctuary cities’, supra note 139.

\textsuperscript{142} Id.

financial consequences? As mentioned in the previous section,\textsuperscript{144} the federalism principle of anti-coercion would place (albeit fluid) limits on what funding could be threatened. The funding in question would need to be “reasonably related” to the federal purpose, and not be so significant as to be coercive (what that magic percentage of budget would be is not fixed, but likely falls somewhere less than 20%).

Reporting on the issue in November and December 2016, in the immediate wake of the federal election, focused on total federal funding received by Minneapolis and St. Paul and Ramsey and Hennepin Counties. For instance, in Minneapolis, total “federal funding accounted for 3\% (about $40 million) of the city’s 2015 budget, and 2\% (around $26 million)” in 2016.\textsuperscript{145} In St. Paul, about 6\% (or about $31 million) of its budget is federal funding.\textsuperscript{146}

In its 2016 budget, Hennepin County received $195.7 million from the federal government out of its total $1.93 billion budget. . . . Of Ramsey County’s $660 million 2016 budget, federal funds account for $89.5 million, or 13.6 percent.\textsuperscript{147}

But because of the constitutional limits on conditioning federal funds, law enforcement dollars are a more likely place where pressure can be brought to bear. The DOJ OIG report in 2016 focused on funding directed at law enforcement activities, which arguably is the most directly related to federal immigration law enforcement. The Justice Department in October 2016 conditioned SCAAP\textsuperscript{148} and JAG\textsuperscript{149} grant reception on certified compliance with 8 U.S.C. § 1373.\textsuperscript{150} According to a December 2016 report in

\begin{itemize}
  \item \textsuperscript{144} See supra text accompanying notes 128–43.
  \item \textsuperscript{145} Mullen, Betsy Hodges: Minneapolis will remain a ‘sanctuary city’, supra note 95.
  \item \textsuperscript{146} Sam Brodey, Sanctuary cities threat: Just how much could Trump cut?, Mn\textsuperscript{e}Post (Dec. 23, 2016), https://www.minnpost.com/politics-policy/2016/12/sanctuary-cities-threat-just-how-much-could-trump-cut. “Washington kicked in $6.4 million of Community Development Block Grant funding for St. Paul—the very program targeted by the GOP senators in their sanctuary bill [that did not pass in 2016]—in fiscal year 2016.” Id.
  \item \textsuperscript{147} Id.
  \item \textsuperscript{148} SCAAP is the State Criminal Alien Assistance Program, a program jointly administered by the DOJ and the DHS to provide “federal payments to states and localities that incurred correctional officer salary costs for incarcerating undocumented criminal aliens with at least one felony or two misdemeanor convictions for violations of state or local law, and incarcerate for at least four consecutive days during the reporting periods.” STATE CRIMINAL ALIEN ASSISTANCE PROGRAM, BUR. OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE (2016), https://www.bja.gov/ProgramDetails.aspx?Program_ID=86.
  \item \textsuperscript{149} JAG is the Edward Byrne Memorial Justice Assistance Program, which provides “funding necessary to support a range of programs including law enforcement, prosecution, indigent defense, courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives.” EDWARD BYRNE MEM’L JUSTICE ASSISTANCE GRANT PROGRAM (JAG) PROGRAM, BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=59 (last visited Dec. 30, 2016).
  \item \textsuperscript{150} Horowitz Memo, supra note 127, at 9–10; BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, ADDITIONAL GUIDANCE REGARDING COMPLIANCE
MinnPost, federal law enforcement funding for Minneapolis is over $2 million. ‘Funding sources like the Justice Assistance Grant are useful from time to time, says [Mark] Ruff [Minneapolis’ Chief Financial Officer]. Recently, JAG funds provided body cameras for Minneapolis police officers. ‘For us,’ he adds, DOJ money ‘is not a major source of funding for our programs.’”

SCAAP funding for fiscal year 2015 came to $683,014 for the State of Minnesota, $143,186 for Hennepin County, $100,464 for Ramsey County, and another $210,455 for an additional seventeen counties combined. JAG funding for the State of Minnesota for fiscal year 2016 came to $2,923,423 and $1,016,126 for all Minnesota localities combined. While such amounts are certainly more than *de minimus*, such funding likely does not fall into the coercive range.

The year 2017 promises to bring considerable activity around this issue, as a new Republican administration takes office in Washington, accompanied by a Republican-controlled Congress.

VIII. State Level Sanctuary: The Right to Free Movement and the Decades’ Long Debate over Driver’s Licenses

At the level of statewide policies and legislation, the obvious key players are the governor, both houses of the legislature, and state agencies charged with implementing policies and laws. Additional players include community groups, lobbyists, and other governmental actors, both at the federal level and the municipal level. State and federal courts can also play a role. To illustrate a state-level policy that has been debated for nearly two decades in Minnesota, we can look to the issue of driver’s licenses. Other fruitful issues of state-level actions with federal immigration implications include flawed implementation of the federal E-Verify system by state
agencies\textsuperscript{154} and the deputation of state law enforcement officials to conduct federal immigration enforcement under INA 287(g).\textsuperscript{155}

Restricting access to driver’s licenses acts as an indirect way to make the lives of unauthorized immigrants more difficult, and thus make the state less hospitable. The tightening of access in the late 1990s, coupled with the rise of automated license plate readers in the mid-2000s and growing awareness of racial profiling of drivers of color, led to the gradual loss of licenses to unauthorized immigrants.


1. From Requiring Proof of Identity to Proof of Immigration Status—1998 Rule Changes and Community Reactions

Prior to 1998, Minnesota did not require proof of immigration status in order to receive a driver’s license. The rules did allow the Minnesota Department of Public Safety (DPS) to accept immigration-related documents (namely a passport or an I-94) to prove identity, but other documents also sufficed (like birth certificates or baptismal records).\textsuperscript{156} Applicants without one of the enumerated documents could request a variance under a fairly generous policy in order to prove identity.\textsuperscript{157}

In 1998, the DPS significantly revised the rules. Apart from being almost unintelligible due to poor drafting, the new rules prevented undocumented immigrants (other than such persons from Canada) from getting a Minnesota driver’s license. To prove identity, an applicant could show a driver’s license (or identity card) issued in a U.S. state or territory or a Canadian province. If you did not have such a document, you had to provide both a primary and a secondary document. All foreign birth certificates


\textsuperscript{155} GOV. TIM PAWLERTY, STATE OF MINN. EXEC. DEP’T, EXEC. ORDER 08-02, DIRECTING COOPERATION WITH FEDERAL IMMIGRATION AUTHORITIES (JAN. 7, 2008), http://www.leg.mn/archive/execorders/08-02.pdf.

\textsuperscript{156} MINN. R. 7410.0400 (1997).

\textsuperscript{157} MINN. R. 7410.0600 (1997).
(except for Canadian ones) and all baptismal certificates were eliminated as primary identity documents. Foreign passports were acceptable as primary documents. Also included were a list of U.S. issued immigration documents. Foreign birth certificates and driver’s licenses were included in the list of secondary documents, but DPS had added anti-fraud provisions to the driver’s license rules.

In November 1998, Jesse “The Body” Ventura shocked the political establishment in Minnesota by winning the governor’s race as a Reform Party candidate. At least one newspaper has drawn comparison between the appeal Ventura had with blue-collar white voters and another loose-lipped populist, Donald Trump. Unlike Trump, Ventura as governor generally was critical of right wing restrictionist immigration policies. Ventura appointed Charlie Weaver as Public Safety Commissioner (the head of DPS) in January 1999, after Weaver had lost his election bid in November 1998 to be Attorney General.

Efforts to tighten the rules barring unauthorized immigrants from drivers’ licenses continued under Ventura’s administration, with Minnesota-based federal immigration officials also interjecting themselves into the debate. In 1999, Curtis Aljets, the INS District Director for Minnesota and the Dakotas,

[T]old a state legislative committee that Minnesota was “one of the weakest points” in the Midwest in deterring illegal aliens, and urged lawmakers to amend the state’s data privacy act to make it easier for state employees to cooperate with INS agents investigating illegal aliens. Aljets complained that Minnesota was lax in issuing birth certificates and driver’s licenses, and that it was not cooperating with immigration authorities.

While driver’s license rules tightened for unauthorized immigrants, prominent African Americans in Minnesota began raising questions about racial profiling in traffic stops in the late 1990s going into 2000, including state Supreme Court Justice Alan Page, U.S. Attorney B. Todd Jones, Hen-

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164. Nick Coleman, Stepping Into a State of Change, ST. PAUL PIONEER PRESS, Feb. 13, 2000, at 1A.
Hennepin County Chief Public Defender William McGee, and Hennepin County District Judge Pamela Alexander.\textsuperscript{165} Rep. Rich Stanek, a Republican state representative from Maple Grove, chairman of the House Crime Prevention Committee, as well as a Minneapolis police captain claimed “[i]t [racial profiling] hasn’t been a problem in Minnesota.” Charlie Weaver acknowledged he had the power to mandate putting one’s race on drivers’ licenses but declined to do so without legislative support.\textsuperscript{166} In the spring of 2001, the state legislature nonetheless passed legislation calling for local law enforcement agencies to voluntarily participate in a calendar year 2002 study.\textsuperscript{167}

In reaction to the driver’s license rule changes, community groups supporting immigrant communities pushed back, with the assistance of the St. Paul Police Chief William Finney and Minneapolis Police Chief Robert Olson. In May 2001, Jewish Community Action and ISAIAH (an organization made up of over eighty congregations) proposed a pilot project to DPS to allow residents of Minneapolis and St. Paul to apply under the old rules, or to use a federal IRS tax ID number. Their insurance enrollment rates and compliance with traffic laws would then be tracked.\textsuperscript{168}

2. 9/11 and Status Checks: More Executive Action by State Agency When Legislature Fails

Following the 9/11 terrorist attacks, the Minnesota Department of Public Safety (DPS) took steps in January 2002 to require immigrants to prove their lawful presence in order to acquire drivers’ licenses in Minnesota, as well as marking the license and limiting its duration to one’s visas status.\textsuperscript{169} DPS Commissioner Weaver first went to the state legislature for permission to issues driver’s licenses that would expire with the immigration status of a non-citizen cardholder, and also to require additional primary documentation regarding identity.\textsuperscript{170} Weaver equated being undocumented with being a “bad guy”:

By tying the expiration dates of a driver’s license and a visa, it would make it harder for a person to use a legal driver’s license to

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\textsuperscript{165} James Walsh, \textit{Racial Profiling in Traffic Stops Draws Attention, but No Action}, \textit{STAR Trib.} (Minn.), Mar. 12, 2000, at 1B.
\textsuperscript{166} Id.
\textsuperscript{168} Todd Nelson, \textit{Project Aims To Get Licenses For Illegal Workers, Advocates Say Legal Drivers Will Make For Safer Drivers}, \textit{ST. PAUL PIONEER PRESS}, May 5, 2001, at 1A.
\textsuperscript{169} Conrad deFiebre, \textit{Anti-terror efforts still divisive DFL-led panel rejects driver’s license changes, favors other measures}, \textit{STAR Trib.} (Minn.), Mar. 27, 2003, at 5B, 2003 WLNR 14269521.
\end{flushleft}
remain here illegally, Weaver said. His proposal would make sure “bad guys can’t move around freely without being detected.”

The rulemaking effort was put on hold while the state legislature debated the issue that spring. When the legislature was unable to pass a proposal, in early June 2002, Weaver pushed through an emergency rule to institute the changes anyway, without public comment. Community groups met the change with a legal challenge. In June of 2002, Governor Ventura also announced he was not running for re-election.

Tim Pawlenty, the former Republican House Majority leader in the state legislature, made the driver’s license issue a centerpiece of his successful campaign for governor, linking it to fears of terrorism. Following his election, Governor Pawlenty took on Charlie Weaver as his chief of staff. Weaver had served as the Commissioner of Public Safety during the driver’s license policy changes under Governor Ventura.

In March 2003, the Minnesota Court of Appeals invalidated the DPS driver’s license rule on the narrow grounds that the DPS could not show good cause for implementing the rule outside the normal process of notice and public comment. On the limited record, DPS had not shown the connection between the rule and a serious and immediate threat to public safety: “The DPS has not demonstrated a particularly strong link between license regulation and the perpetration of terrorist crimes.” The court avoided entirely the question of federal immigration preemption.

Meanwhile, in the legislature, the Republicans had made the issue its number one priority for 2003 and passed a driver’s license bill through the House, only to see it blocked in the DFL-controlled Senate.

In late July 2003, Minnesota’s chief administrative law judge ruled on resubmitted regulations and first found that the requirement of a full facial image on licenses was unconstitutional on religious liberty grounds and called for additional language. The judge upheld both the requirement of...
providing lawful status or presence and the temporary nature of immigrants’ access to drivers’ licenses. In doing so, he confirmed that state agencies had statutory authority to require immigration status and rely on federal documents and that the regulations were not federally preempted. The Chief Judge, in overruling the lower administrative law judge, distinguished *Hines v. Davidowitz*, 312 U.S. 52 (1941). In that case, Pennsylvania had impinged on federal authority by requiring aliens to register annually with the state. The Minnesota rule “does not seek to separately regulate aliens” simply because it relied on federal documents to establish identity and legal status.181

He also concluded that while evidence of a connection between state IDs and terrorism was not firmly established, the regulation was reasonably related to a purpose “that states and the national government are seeking ways to strengthen their coordination and the integrity of the documents they issue to help keep unauthorized persons from entering and remaining in the United States” and “the need to assure that the licenses and identification documents are issued based on accurate identification and to individuals who have the legal right to be residents of Minnesota.”182

To argue that the state cannot rely on federally issued documents to determine lawful residence turns the issue of federal preemption on its head. If the state took the position that one can be a lawful resident of Minnesota—complete with license or identification card—regardless of compliance with federal immigration law, the state would be establishing a separate system for immigration into Minnesota or would be, at a minimum, failing to cooperate with federal immigration authority. Such an outcome would clearly violate the United States Constitution’s grant of authority to the federal government, “to establish a uniform Rule of Naturalization,” and “regulate commerce with foreign nations.” The Department of Public Safety’s proposed rules properly defer to federal determinations on the issue of lawful presence in the United States and one of its states—Minnesota. The proposed rules are not preempted by any federal law or constitutional provision.183

In September 2003, DPS issued a revised rule, including a variance for religious objection to not cover the head for an ID photo, but retaining the immigration status requirements and restrictions.184

Despite the legal challenges, the rule ultimately went into effect. According to one report, neither had the changes been shown to result in stopping terrorists, nor had anyone come forward claiming discrimination based

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181. *Id.* at *4.
182. *Id.* at *15–16.
183. *Id.* at *17.
on their visually different driver’s licenses. What did happen was that persons who had four-year licenses issued under the earlier rule were unable to renew their licenses.

B. Legislative Efforts to Restore Drivers’ Licenses for All Gathers Slow Support: 2009–2016

During the spring of 2009, Democratic state representatives introduced driver’s license legislation. The law would have “allow[ed] certain identification cards issued by a foreign government as a form of proof of identity” and would have “eliminate[d] an administrative rule that the applicant provide proof of legal residency in the United States.” The bill cleared committee in the spring of 2010, but had faced a grassroots organizing effort to stop it, with opponents claiming driver’s licenses for the undocumented would not encourage greater insurance coverage, would threaten national security, encourage voter fraud, and take jobs from Minnesotans and legal residents.

In 2009, researchers at the University of Minnesota published a study based on the “veil of darkness” methodology applied to the traffic stop data gathered in 2002, showing statistically significant racial profiling in traffic stops in Minneapolis for both Black and Latino drivers. The methodology allowed them to “circumvent[] a key statistical problem that undermines the results of [the] previous studies—namely that the characteristics of drivers of different racial and ethnic groups also differ on dimensions other than race and ethnicity.”

That same spring, the legislature did pass another driver’s license bill: one prohibiting the state from compliance with the 2005 federal REAL ID.
Act. Out of concern for privacy, the bill passed the House unanimously and by a vote of 64-1 in the Senate and was signed by Republican Governor Tim Pawlenty. By that point, twenty-three states had passed similar legislation.192

In the fall of 2012, the Minnesota Democratic Farm Labor party (DFL) took control of both houses of the Minnesota legislature, after having regained the governor’s mansion in 2010.193 This raised hopes amongst immigrant advocates that progress could be made on the driver’s license issue. Efforts to lift restrictions on access to drivers’ licenses were renewed in the spring of 2013, with the bill passing in the Senate without any Republican votes,194 but getting stuck again in the House.195 While primarily championed by the DFL, four co-authors in the House were Republicans from Greater Minnesota (i.e., outside the metro area of the Twin Cities).196 Republican Representative Rod Hamilton hails from Mountain Lake, a small farming community in southwestern Minnesota and claims the occupation of pork producer.197 Opponents had again raised the specter of voter fraud and pointed out abuses in other states with similar laws where a small number of nonresidents had obtained drivers’ licenses.198 More than 200 advocates for the bill staged a hunger strike at the end of the session, demanding a meeting with the governor, arguing that such legislation would make for safer roads with more insured and licensed drivers.199

Efforts were renewed by immigrant advocates led by Mesa Latina; in the spring of 2014, in an effort to bring together community activists, and labor and business support for immigration reform. As the legislative session from the prior year had not officially closed and the Senate vote pass-

196. Id. The Republican Representatives were Rod Hamilton of Mountain Lake, Bob Gunther of Fairmount, Kelby Woodard of Belle Plaine, and Mike Beard of Shakopee. Id.
ing the legislation still stood, advocates focused their efforts on DFL House leader Paul Thissen and an unenthusiastic Governor Mark Dayton.\(^{200}\)

Advocates argued that extreme weather and inadequate public transportation forced immigrants to drive to get to work and take children to school. Driving without a license could lead to arrest and being turned over to ICE for deportation, separating families.\(^{201}\) At a rally at the Capitol rotunda in March 2014, the local president of the American Federation of State, County, and Municipal Employees (AFSCME) said “[i]t is a basic right to be able to get to and from work free from fear.”\(^{202}\) The efforts fell short, with the session coming to an end with no legislation.

In November 2014, Republicans regained control of the Minnesota House while Democrat Mark Dayton won reelection as governor,\(^{203}\) further complicating ongoing efforts to pass similar legislation in 2015. While the legislation again passed the Senate, the Republican controlled House failed to move the legislation,\(^{204}\) notwithstanding support from the Minnesota Chamber of Commerce, the American Civil Liberties Union, the United Commercial and Food Workers Union, religious organizations, and numerous local law enforcement officials.\(^{205}\)

In a turnabout from the previous decade when a Republican controlled state government argued that the federal government could not preempt driver’s license regulations, at least one Republican opponent raised federal preemption as a reason NOT to restore drivers’ licenses to unauthorized immigrants:

> “Realistically this is a federal issue. I would like to see it resolved, but Congress and the President have not seen fit to do


\(^{201}\) Id.

\(^{202}\) Id.


that,” said state Rep. Mark Uglem, R-Champlin. “So until they
do, I don’t know what we as a state should be doing. Should we
override the federal government? I don’t think so.”

But Rod Hamilton, the Republican pork producer from Mountain
Lake, came out more strongly for the bill in 2015:

“It will boil down to the Declaration of Independence and the
moral belief that we all believe is a right: that we are all created
equal with a right to liberty and happiness. . . . This is bigger than
a driver’s license, and we all know that.

In 2015, over 600,000 undocumented immigrants received drivers’ li-
censes in California, likely the largest number amongst the fourteen
states providing for drivers’ licenses regardless of immigration status as of
June 2016.

Conditions in 2016 initially seemed to spell success for advocates in
favor of drivers’ licenses for unauthorized immigrants in Minnesota. Civil
libertarians from both the left and the right in the state legislature had long
resisted federal mandates under the REAL ID Act to mandate certain re-
quirements for drivers’ licenses to be used for air travel and access to fed-
government buildings. By late 2015, however, widespread opposition
amongst other legislatures to REAL ID had melted from twenty-three states
in 2009 to only four (New York, Minnesota, New Hampshire, and
Louisiana).

Under rising pressure from the Governor and a deadline for compli-
ance looming in 2018, both the Democrat controlled Senate and the Re-
publican controlled House passed bills allowing for two types of licenses—
one federally compliant and useable for all purposes, and a noncompliant
version that could be used for driving but not for air travel or access to
federal buildings. The House version, however, removed rulemaking au-
thority from DPS and required proof of citizenship. DPS rulemaking would

206. Peter Cox, Advocates to Push Immigrant Driver’s License Bill, supra note 204.
207. Jared Goyette, Bill to Allow Undocumented Immigrants to Obtain Driver’s Licenses Hits
Roadblock in the House, MINNPOST (Mar. 26, 2015), https://www.minnpost.com/community-
sketchbook/2015/03/bill-allow-undocumented-immigrants-obtain-drivers-licenses-hits-roadblo.
208. Brenda Gazzar, 605,000 Undocumented Immigrants Received Driver’s Licenses Last
20160126/605000-undocumented-immigrants-received-drivers-licenses-last-year.
209. State Laws Providing Access to Driver’s Licenses or Cards, Regardless of Immigration
drivers-license-access-table.pdf.
210. Abby Simons, REAL ID Worries For Minnesota Driver’s Licenses About to Get Real,
STAR TRIB. (Minn.) (Sept. 27, 2015), http://www.startribune.com/real-id-issues-are-about-to-get-real-for-minnesotans/329655171/.
211. SECOND ENGROSSMENT B. SUMMARY, S.F. 244, 89th Leg., Reg. Sess. (Minn. 2015),
www.senate.leg.state.mn.us/departments/scr/billsumm/summary_display_from_db.php?ls=89&id
=3062.
212. It should be noted that SF 271 from the 2013-14 session had similar provisions, but
support from the governor was lacking. S.F. 271, 2013 Sen., Reg. Sess. (Minn. 2009).
leave open the possibility of allowing unauthorized immigrants to receive the noncompliant licenses. Conferees from the House and Senate were unable to reach a resolution before the session ended for the year.213 Hopes that the issue would be taken up in a special legislative session soon faded.

As noted, a central issue behind this decades-long debate are data privacy concerns on both the left and the right. While presumably anyone concerned about keeping their data from the federal government could opt for the non-compliant ID or driver’s license, how that database would be secured from disclosure by a state employee wishing to share it with the federal government under 8 U.S.C. § 1373 would raise vexing Tenth Amendment questions addressed above in Part VII. As 2016 drew to a close and cities braced for an enforcement minded Trump administration, this issue came to the fore as two Republican New York City Council members sued to enjoin the city from destroying data it collected to issue IDs used by many unauthorized immigrants living there.214

At the time of writing, the 2017 legislative session was about to commence with uncertainty on the issue. The need to comply with the federal mandates of REAL ID was set to meet up in an especially contentious legislative session. Efforts to call a special session in late 2016 to resolve budgetary and health care issues collapsed in rancor between the Democratic Governor and Republican House leader. Republicans had regained control of both houses of the state legislature as well.215

C. The Interplay of Driver’s Licenses, License Plate Readers, Racial Profiling, and Federal Immigration Detainers

How does all of this matter to unauthorized immigrants and their families? The lack of a driver’s license can lead to arrest by local law enforcement and being turned over to federal authorities for removal. If conscious or implicit bias leads in the first place to the arrest, such racial profiling


leads to intentional or de facto immigration enforcement by local law enforcement. This section looks at how the pieces fell into place in the late 1990s and 2000s for an integrated process of mass deportation through traffic tickets.

The Minnesota Supreme Court held in 1996 that it “is not unconstitutional for an officer to make a brief, investigatory, Terry-type stop of a vehicle if the officer knows that the owner of the vehicle has a revoked license so long as the officer remains unaware of any facts which would render unreasonable an assumption that the owner is driving the vehicle.”

Questions have been raised about racial profiling in traffic stops for some time in Minnesota. It is the ACLU’s opinion that because a valid vehicle stop will not, absent other evidence, lead to liability for racial profiling, targeting Latino-looking drivers and making pretextual stops based on minor traffic infractions (or the registered owner’s lack of a driver’s license) can be a low-risk, high-reward proposition for police officers who feel compelled to engage in informal immigration enforcement. Discriminatory policing may also occur when officers who have unrecognized, internalized racial biases or anti-immigrant biases when they choose to focus their efforts on identifying unlicensed drivers as opposed to observable traffic violations such as speeding or careless driving.

More explicit racist profiling has also occurred. The Metro Gang Strike Force, a joint law enforcement operation involving police departments and sheriff’s offices, ran off the rails in the mid-2000s. Immigrants fell victim to shakedowns when their vehicles were impounded and taken to the Minneapolis impound lot. There were reports of officers forcing undocumented Honduran and Mexican immigrants to pay to recover their vehicles and then reporting them to ICE in violation of Minneapolis ordinance. The report into the operation of the Strike Force also found that “[t]he Strike Force’s mission does not support the creation of roving ‘saturation’ details that stop people for traffic violations or seize the funds of an undocumented alien who has committed no other offense. Yet this is what we found, many times over.”

In another example, the Chaska, Minnesota police department fired a veteran officer in 2015 after Latino residents complained that they had been

217. See generally Walsh, supra note 165; Ritter & Bael, supra note 191.
221. Id. at 11.
targeted for abuse, ticketing, and arrest. Natalie Lopez complained that the officer had staked out her house for several days before stopping her. She said the officer “gave her a ticket for not having a driver’s license, telling her he wanted to send all people without licenses back to Mexico.” She told the city council “I don’t think he has the right to ask me if I’m legal here.”

The mid-2000s also saw a dramatic rise in the use of automated license plate readers using high speed cameras to collect and analyze thousands of plates. While serving some legitimate law enforcement purposes, the practice raised racial profiling concerns.

License plate reader systems can also facilitate discriminatory targeting. An agent who manually enters plates into a license plate reader system based on discriminatory rationales could check far more plates than he could without the technology. Also, discrimination can exist in deciding where to place the cameras. Whole communities may be targeted based on their religious, ethnic, or associational makeup.

The rapid rise in the use of immigration detainers by ICE in the late 2000s added more fuel to the fire, with observers making the links between these dynamics in the past few years at the national level.

IX. FEDERAL LEVEL SANCTUARY: REMOVAL PRIORITIES, REFUGEES, AND ASYLUM SEEKERS

The general period under consideration, 2001-2016, saw two presidents put their mark on immigration policy, one Republican and one Democrat. Each tried and failed to pass comprehensive immigration reform in the face of stiff opposition. This Part briefly addresses how each administration’s removal priorities, including deferred action, provided some forms of


223. American Civil Liberties Union, You Are Being Tracked: How License Plate Readers Are Being Used to Record Americans’ Movements (July 2013), https://www.aclu.org/files/assets/071613-aclu-alpreport-opt-v05.pdf. It bears noting that the Minnesota State Patrol’s practice of deleting massive license plate data after forty-eight hours has been seen as a model national policy. Id. at 17, 20.


de facto protection to immigrants and refugees. Immigration enforcement by the executive branch involves the exercise of considerable discretion by federal immigration law enforcement. Federal law also provides a variety of legal statuses that can be characterized as Sanctuary—protection from past or future harm. In another article, I have portrayed immigration law as making up a “hotel” with different floors, including a floor of Sanctuary. Included on it are the following statuses: Asylum (and related relief of Withholding of Removal and Convention Against Torture), Refugee Status, Special Immigrant Juvenile Status, the Violence Against Women Act, Temporary Protected Status, and U & T visas for victims of crime and human trafficking. Here, we will briefly look at refugee status (which immigrants are processed for abroad), and asylum (which is sought after arriving in the U.S. through other means).

A. Federal Immigration Enforcement in Minnesota since 2001

George W. Bush’s administration (2001–2008) was characterized by a schizophrenic approach to federal immigration enforcement that would be continued under the Barack Obama administration (2009–2016). The Bush administration was marked on the one hand with increasingly aggressive interior enforcement of immigration laws in the form of workplace raids targeting unauthorized workers; and on the other hand with ultimately unsuccessful support for a bi-partisan comprehensive immigration reform package in Congress in the years of the president’s time in office. Bush’s efforts at heightened border security were pushed forward under the Obama administration, with ample financial support from Congress.

The DHS under Barack Obama initially ended workplace raids aimed at arresting and deporting workers, and shifted the focus to greater scrutiny of employers’ record keeping responsibilities. Rather than raid, arrest, and deport workers at their job sites, the approach got them fired when records were audited and employers required workers to renew I-9 forms. Presumably, unauthorized workers simply failed to show up for work and employers faced increasing fines for failing to properly document their worker’s eligi-


bility for employment. Well-publicized raids in Minnesota followed this national pattern. Obama also earned the moniker “Deporter-in-Chief” by presiding over record-breaking numbers of deportations in a fruitless effort to convince hardliners that he was serious about enforcement, while making efforts at comprehensive immigration reform. On the other hand, in 2014, after another failed bi-partisan attempt at comprehensive immigration reform, the Obama administration followed up its 2012 Deferred Action for Childhood Arrivals (DACA) program with a series of executive actions in November 2014.

Extended DACA and related Deferred Action to Parents of Americans and Lawful Permanent Residents (DAPA) garnered the most press due to being enjoined by twenty-six states. DACA resulted in approximately 750,000 people coming forward to claim deferred action. In Minnesota, over 5000 people received deferred action.

What would happen to those recipients under a Trump administration was very much in question. The range of options included a proposal for President Obama to grant pardons to DACA recipients as a closing act; attempting to immediately revoke the deferred action and take steps to remove DACA recipients upon President Trump taking office; letting DACA


expire without renewal and return recipients to fully unauthorized status; renewing DACA; or seeking a legislative fix such as the bi-partisan BRIDGE act to extend the status for three years while Congress works on a long-term fix.237

The exercise of executive branch discretion in immigration enforcement arguably reached its limits under President Obama, a reach which may well be exercised in unforeseen ways by a Trump administration.

B. Refugee Resettlement

In the modern era of refugee resettlement, Minnesota has become a destination both for newly-arrived refugees and for secondary resettlement.238 Since 2001, among the most significant groups resettled include Hmong refugees from Laos, Karen refugees from Burma, and Somalis.

Refugee resettlement is directed by the federal government. In Minnesota, the state government assists in such resettlement in collaboration with religious and secular non-profit resettlement agencies known as VOLAGS (voluntary agencies).239 Resettlement numbers in fiscal year 2016 were 2,630, up 15% over the previous year and up from a low of 990 in 2009. Resettlement agencies predicted a leveling off of refugee numbers in the state in 2017 due to a challenge in finding affordable housing and the uncertainty following the election of Donald Trump.240

Hmong refugees began arriving in Minnesota in significant numbers in the 1970s and 1980s, as part of the resettlement of refugees from the Vietnam War. Recruited by the CIA to fight in a secret war against the Lao communist forces, the Hmong were on the losing end of the war and many fled to camps in Thailand. In response to Thai government efforts to close the camps in the 2000s, the U.S. admitted one last significant wave of Hmong refugees in 2004, with many being resettled in Minnesota.241

The Karen refugees from Burma had also fled in large numbers to camps in Thailand (and to some extent India), as a result of repression from the central Burmese government. Many were supporters of the Karen National Liberation Army, which has been engaged in a decades’ long struggle

240. Mila Koumpilova, Amid Affordable Housing Shortage, Minnesota Plans to Keep Refugee Arrivals Level, Star Trib. (Minn.) (Nov. 21, 2016, 6:15 AM), http://startribune.com/2fiki6V.
for greater independence and autonomy. Karen are predominantly animist, Buddhist, and Christian, but most resettled to the U.S. are Christian. As a result of considerable missionary activity from the United States in the nineteenth and twentieth century, many of the Karen had converted to the Baptist faith and found welcome in a number of Baptist congregations in Minnesota.242

Government resettlement of the Karen began in 2005 and it is estimated that there are about 10,000 Karen in Minnesota, the largest concentration in the United States.243

Somali refugees began being resettled in Minnesota in the mid-1990s and make up the largest concentration of Somali refugees in the United States.244 Minnesota came into the election spotlight and Donald Trump’s calls for “extreme vetting” in the wake of two high-profile events involving Somali refugees.245 During the summer of 2016, nine young Somali men were convicted of conspiring to join the terror group ISIS. They were sentenced in November to terms of imprisonment ranging from time served (twenty-one months) to thirty-five months, reportedly setting a national example for attempting a nuanced approach at balancing punishment and deterrence for extremist recruiters with hopes of rehabilitation for those susceptible to being drawn in.246 On September 19, a knife wielding assailant later identified as a Somali immigrant injured ten people at a mall in St.
Cloud, Minnesota before being killed by an off-duty police officer. St. Cloud, another welcoming destination over the years for Somali immigrants, has also become a focal point for anti-immigrant forces, “with anti-refugee and anti-Muslim speakers [making] numerous stops in Central Minnesota, often to packed houses.”

Has the Somali community in Minnesota become a hotbed of terror recruitment? Somali community leaders say that “unemployment, not radicalization, is the biggest obstacle facing young Somali men in the Twin Cities,” with an unemployment rate in the heavily Somali Cedar-Riverside neighborhood of Minneapolis at 17% (three times that of the Twin Cities overall). Addressing unemployment will reduce susceptibility to recruitment.

These events came on the heels of controversy around the resettlement of Syrian refugees in the United States. Unlike governors from many states that called for a halt to Syrian refugee resettlement in 2015 and 2016 (and in some cases unsuccessfully sued the federal government or local non-profit resettlement agencies to halt Syrian refugees), Governor Mark Dayton of Minnesota joined other governors in declaring that he would not take steps to block Syrian refugees, so long as they were thoroughly screened. Following the election of Donald Trump, the St. Paul City Council took the largely symbolic step of passing a resolution in December 2016, welcoming Syrian refugees to Minnesota, both because of the tiny numbers of Syrians coming to Minnesota and because cities have little say in actual policy making on the issue.


The future of refugee resettlement is very much in play as a new administration comes into office in Washington. Vice President Mike Pence as Governor of Indiana unsuccessfully sued a refugee aid organization to block Syrian refugees, with the Seventh Circuit ruling that the Refugee Act prohibits national origin discrimination.\textsuperscript{253} Georgia Republican Tom Price, tapped to head the U.S. Department of Health and Human Services (charged with the task of resettling refugees) unsuccessfully sponsored legislation to block Syrian refugees, a move supported by Alabama Senator Jeff Sessions (nominated to be the Attorney General).\textsuperscript{254}

C. Asylum and Related Forms of Immigration Relief

Similar to refugee status, asylum seekers must qualify based on the refugee definition found in the INA. Refugee adjudication takes place abroad, whereas asylum adjudication occurs in the United States. Persons who are in some form of legal status or who have not been placed in removal proceedings apply for asylum affirmatively at USCIS Asylum Offices, and, if unsuccessful there, may take their cases before immigration judges. Persons that the DHS seeks to deport must press their cases before immigration judges. Bars to asylum may prevent someone from getting such status for which they may otherwise qualify—including missing the one year filing deadline, committing certain crimes in the U.S. or abroad, torturing or persecuting others, or being a security or terrorist threat.\textsuperscript{255}

A person seeking asylum after arrival in Minnesota faces perplexing choices and challenges. In my experience, asylum seekers in Minnesota usually come here because they have family or friends, or friends of friends. In my experience as an attorney supervising a law school immigration clinic, the most basic needs of shelter and daily provision drive the choice to come to Minnesota and seek asylum rather than relocating elsewhere. What factors affect one’s chance of success after arriving?

1. Non-adjudicative Factors

Legal Resources. Being represented has long been shown to increase one’s chances of winning asylum. One study in the mid-2000s showed that 93% of unrepresented asylum seekers in court lost asylum, while only 64% of represented asylum seekers were denied.\textsuperscript{256} Minnesota is blessed with an


\textsuperscript{254} Forliti, \textit{supra} note 244.

\textsuperscript{255} \textit{See generally} DREE K. C OLLOPY, AILA A SYLUM PRIMER (7th ed. 2015).

\textsuperscript{256} TRAC IMMIGRATION, \textit{Immigration Judges} (July 31, 2006), http://trac.syr.edu/immigration/reports/160/index.html; TRAC IMMIGRATION, \textit{Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality} (Dec. 13, 2016), http://trac.syr.edu/immigration/reports/448 (in FY 2016, “more than five out of every ten represented asylum seekers were successful as compared with only one out of every ten who were unrepresented”).
active and well-trained private immigration bar populated by skilled and often multi-lingual attorneys, as well as an array of legal aid and non-profit organizations and law school clinics that provide representation to low and moderate income immigrants.

Mental Health providers. Minnesota is also the home of service providers especially focused on the multi-varied needs of asylum seekers and refugees, including the Center for Victims of Torture, the Community-University Health Care Center (CUHCC), and the University of St. Thomas Interprofessional Center for Counseling and Legal Services (IPC). Beyond providing mental health services, these agencies also often provide expert mental health reports documenting the immediate and ongoing effects of persecution and torture on asylum seekers, which can bolster their claims for legal relief.

2. Adjudicative Factors

The chance of winning asylum often depends upon who decides your case, and in what jurisdiction the case is heard. National studies of grant rates by judges and asylum officers have shown wildly diverging chances of success, even when adjudicators in the same jurisdiction are hearing similar types of cases from the same country. In December 2016, TRAC Immigration at Syracuse University concluded that the “outcome for asylum seekers has become increasingly dependent upon the identity of the immigration judge assigned to hear their case. . . . Differences in judge denial rates have significantly increased during the last six years.”

Statistically significant factors include the gender of the immigration judge (women generally have lower denial rates), whether the adjudications are made by judges or asylum officers, and the identity of the judge or officer. Even when adjudicators in the same jurisdiction are hearing similar types of cases from the same country, the outcome for asylum seekers has become increasingly dependent upon the identity of the immigration judge assigned to hear their case. Differences in judge denial rates have significantly increased during the last six years.


258. AHR, ILCM, MMLA, SMLRS, AILA, law clinics.


264. RAMI-NOGALES ET AL., supra note 262, at 47. Curiously, the gender of asylum officers apparently does not make a difference. Id. This may be due to the fact that, unlike for immigration judges, all asylum officer decisions must be approved by both an immediate supervisor and the director of the particular asylum office in question.
tor worked for a non-governmental organization (which tends to lead to lower denial rates),\(^{265}\) whether the adjudicator has worked for the government (which tends to lead to significantly higher denial rates amongst immigration judges but not amongst asylum officers),\(^{266}\) and how long they have been on the job (the longer on the job, the higher the denial rate for judges, but the lower for asylum officers).\(^{267}\)

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\(a.\) Minnesota Immigration Judges Have Some of the Highest Asylum Denial Rates in the Country.

Since 2001, the Bloomington Immigration Court, which covers Minnesota and the Dakotas, has had two or three sitting immigration judges at any given time. These judges have granted asylum at rates considerably below the national average, for a variety of reasons.

Judge Susan Conley de Castro of the Bloomington Immigration Court both defies and falls in line with the national characteristics. Like most judges, she has come to deny a higher percentage of cases over time. Prior to becoming a judge, she worked as an attorney for the former INS (the predecessor of ICE) (which generally leads to a higher denial rate), as well as for legal aid organizations, including one that advocated for the rights of immigrants in Minnesota (a characteristic which generally leads to a lower denial rate).\(^{268}\) Compared to Judge Castro’s denial rate of 75.6% from 2009–2014, “nationally during this same period, immigration court judges denied 48.5% of asylum claims. In the Bloomington Immigration Court where Judge Conley de Castro was based, judges there denied asylum 79.4% of the time.”\(^{269}\) Prior to taking over as chief judge in Minnesota, Judge Castro served in San Antonio, Texas. While in San Antonio, Judge Castro had the second highest denial rate in that court of five judges (64%), well-above the national average of 53% during that time period.\(^{270}\)

\(^{265} Id.\) at 49–51.

\(^{266} Sachs\)en\)holtz et al., supra note 262, at 180. The difference may be accounted for by the fact that prior government experience amongst asylum officers is more varied than that of immigration judges, who come more heavily from immigration enforcement posts. Id.

\(^{267} Id.\) at 189–92 (asylum officers—various theories discussed as to why the rate increases over time).


\(^{269} Id.\)

Differences between adjudicators in the same locale reviewing similar populations can be significant. Between 2000 and 2005, Judge Kristin W. Olmanson of the Bloomington court had an asylum denial rate of 77.1%, ranking her fifty-sixth of 208 judges nationally. Judge Joseph R. Dierkes, on the other hand, from the same court, had a 63.9%, placing him 109th nationally. In subsequent years up until Judge Dierkes retired (and was replaced by Judge Castro), the denial rate differences between the two judges narrowed somewhat, but still remained significant. Prior to becoming an immigration judge, Dierkes practiced both as a private attorney representing immigrants in Missouri and as an attorney for the INS. Judge Olmanson had an asylum denial rate and ranking (74.9% and sixty-ninth of 270 judges) quite similar to that of Judge Castro for the 2009–2014 time period while both served in Bloomington. Judge Olmanson spent her entire career in government service prior to judicial service, either as an immigration prosecutor with INS or as an assistant county attorney. She also attended college (Gustavus Adolphus) and law school (William Mitchell) in Minnesota.

The particular docket being seen by a judge can make a difference in asylum denial rates. Judges that see primarily persons in immigration detention are more likely to deny asylum simply because there is a higher likelihood that an asylum seeker also has criminal convictions that would bar them from asylum (although not necessarily Withholding of Removal or Convention Against Torture relief). In 2008, the Bloomington Court acquired a long needed third immigration judge in William Nickerson. Prior to coming to Minnesota, Judge Nickerson had an asylum denial rate of 81.6% from 2004–2006 at the Lancaster, California Immigration Court. From 2008–2010, his denial rate in Minnesota was 78.1%. Judge Nickerson
son reportedly asked to do nothing but detained cases. His asylum denial rate from 2011–2016 skyrocketed to 97.4\% and placed him as one of the highest deniers of asylum in the country (eleventh of 268) and can be explained, perhaps, due to the nature of his docket. Judge Nickerson’s past likely also contributed to his high denial rates.277

After perhaps two years informing the local bar of his eminent retirement, Judge Nickerson made true on his promise in March 2016.278 Rumors at the time of writing of this piece strongly suggest that he will be replaced by a local member of the ICE Office of Chief Counsel. While no doubt an honorable individual in his or her own right, such an appointment continues a disturbing nation-wide trend of the EOIR appointing almost exclusively former prosecutors of the Office of Chief Counsel to be immigration judges. Reports are also that additional judges will be appointed to the Bloomington Court.

Researchers found in 2009 that “work experience in an enforcement capacity with the former Immigration and Naturalization Service or the current Department of Homeland Security made judges less likely to grant asylum.”279 Judges without such experience granted asylum at a rate of 48.2\%, while judges with one to five years’ experience granted at a rate of 42.5\%. Judges with eleven or more years of immigration enforcement experience granted asylum at a rate of only 31.2\%.280

From November 2015 to June 2016, EOIR swore in twenty-eight new immigration judges. Twenty-two of the judges had worked in federal immigration enforcement (primarily with ICE or INS, but also with Customs and Border Patrol) for between six and twenty-three years (for an average of thirteen years). Three others had served as assistant U.S. attorneys (for an average of twenty-one years). Of the remaining three, one worked in the Marine Corps primarily as a judge, one for the Civil Rights division of U.S. DOJ, and one for Legal Services.281 Can justice be served when former prosecutors are primarily selected to be immigration judges?

278. Posting of David Wilson, dwilson@wilsonlg.com, to mn-dakotas@lists.aila.org (Mar. 29, 2016) (on file with author).
279. RAMJI-NOGALES ET AL., supra note 262, at 49.
280. Id. at 50.
b. Immigrants Chances for Asylum Success are Low in the Eighth Circuit Court of Appeals

The Bloomington Immigration Court sits in one of the most difficult federal circuits in which to win asylum, the Eighth Circuit. Twelve of sixteen active sitting judges (both in regular and senior status) were appointed by Republican presidents. Professor Ben Casper analyzed all 642 immigration decisions issued by the Eighth Circuit from January 1, 2006 to December 31, 2015. 432 of those decisions (67%) involved asylum claims. The court granted relief to the non-citizen petitioner (including remand) in only 9% of the cases.

These findings are in line with the national study on asylum grant rates by Professors Schoenholtz, Schrag, and Ramji-Nogales. The Eighth Circuit covers fifteen states, the largest geographical area of any federal circuits.

c. The Chicago Asylum Office, Which Serves Minnesota, has a Relatively High Denial Rate

The Chicago Asylum Office, whose jurisdiction includes Minnesota, granted asylum at a rate of 38.3% in a period studied in 2015. The highest approval rate of the nation’s eight asylum offices was found in San Francisco (76.5%) and the lowest in Houston (27.5%) and New York (22.6%). These grant rates largely paralleled the grant rate of 37% found by researchers for the period from 1996–2009, putting it at the fifth lowest grant rate. Schoenholtz and his colleagues also analyzed grant rates by taking into account applicants from countries with more abusive and less abusive human rights records to account for regional differences in caseloads. For countries determined to be “less abusive,” the Chicago office had the second lowest grant rate (29%), and for the “most abusive” countries, the fourth highest grant rate (52%).
These researchers also looked at the success rates for applicants from the same countries across different asylum offices, settling on applicants from Cameroon, Columbia, Ethiopia, Indonesia, Russia, and Somalia. It considered offices where there had been at least 500 decisions. The Chicago office therefore was compared to other asylum offices for four of those countries. For Cameroon applicants, Chicago had the highest grant rate (56%) of the four offices with sufficient volume. The lowest grant rate was in Houston (40%). For Ethiopian applicants, Chicago had nearly the lowest grant rate (58%) of the five offices with sufficient volume. The lowest grant rate was in Houston (57%). The highest grant rate was in San Francisco (81%). For Somali applicants, Chicago had the lowest grant rate (34%) of the five offices with sufficient volume. The grant rate in Houston was next lowest (40%). The highest grant rate was in San Francisco (89%), with Arlington at 70% and Los Angeles having 73% grant rates. For Russian applicants, Chicago again had nearly the lowest grant rate (32%) of the five offices with sufficient volume. The lowest grant rate was in New York (28%). The highest grant rate was in San Francisco (65%).

Why the disparities? Qualitative interviews with asylum officers pointed to differences in office cultures and different controlling precedent in federal circuit courts. One asylum officer, not from Chicago, said “I have the perception that Chicago is a conservative office.” Supervisory approaches and the influence of the office director affect outcomes. Also discussed were patterns of fraud, without identifying which offices were most affected. Whether an applicant was represented made a big difference in Chicago—with an attorney, chances of success were 42%; without a lawyer, the chances sank to 32%. The Chicago office’s large differential between represented and unrepresented individuals compared to other offices suggests that perhaps the quality of attorneys in the area is relatively high.

**CONCLUSION**

What does immigration federalism look like in Minnesota? Are we a state of hospitality and welcome? As this article has laid out in considerable detail, those questions are not easily answered, but some patterns emerge. Minnesotans have largely embraced a welcome of refugees and asylees through civil society organizations and state level policies. Gaining asylum through the immigration courts and the Chicago Asylum Office is more difficult than most other places in the country, but asylum seekers do have a variety of civil society resources upon which to draw in their search for safety.

288. *Id.* at 147–51.
289. *Id.* at 152–55.
290. *Id.* at 161.
National trends and policies definitely affect the immigration climate in Minnesota, but forces were so evenly balanced that often efforts at progressive reform or restriction were stymied. Over the course of the fifteen years under examination, Minnesota neither saw the arrival of California-level welcome to immigrants nor Arizona-style comprehensive restrictionist legislation at the state level. In-state tuition at the state level for some unauthorized immigrants passed, but the concerted effort to reinstate drivers’ licenses for all Minnesota residents fell just short as of 2016. The interplay between local law enforcement actions and immigration detainers documented in other parts of the country played out in Minnesota—the lack of drivers licenses combined with federal immigration detainers led to removals. Restrictionist efforts to broaden E-Verify and to punish “Sanctuary” cities fell short as well. And while the state voted for Hillary Clinton in the 2016 presidential election, the outcome was narrower than predicted and Donald Trump emphasized refugees as a source of terrorism on his last visit to the state in the waning days of the campaign. While Minnesota might be seen nationally as a liberal state that provides social benefits attractive to immigrants of all stripes, the reality is more nuanced as the push and pull between largely Republican restrictionists based in rural and suburban districts and largely Democratic proponents of greater welcome from urban areas do legislative battle at the state House over issues like drivers’ licenses, sanctuary cities, and E-Verify.

Individuals in leadership matter at all levels. Elected executives in particular make a big difference. Stalemate by deliberative bodies can lead to more aggressive actions by persons elected to executive positions like president, governor, sheriff, and mayor. At the federal level, executive branch decisions on immigration removal priorities mattered a great deal to the daily lives of Minnesotans in the absence of legislative action (such as whether to enforce immigration laws through raids targeting unauthorized employees for removal, by focusing on employer compliance with work authorization documentation, or by exercising discretion aggressively to provide work permits through deferred action on a large). At the state level, gubernatorial executive actions have an impact. For instance, the decision by Governor Pawlenty to require proof of lawful immigration status to acquire a driver’s license has had a ripple effect on individual lives and state politics for years. While Governor Dayton arguably has the power to reverse that decision, the drivers’ license issue has largely moved to the legislature for resolution. The governor also has the veto threat, which has been used to stop both immigrant friendly and restrictionist legislation over the past decade. Elected sheriffs make a big impact at the intersection of local law enforcement and federal immigration enforcement as they decide whether or not to honor civil immigration detainers. The sheriffs of the two largest counties in the state opposed immigration detainers in 2014, but found few sheriffs in Greater Minnesota willing to follow their lead. May-
ors also can provide push back, with the support of city councils, against federal policies by supporting ordinances and service provision that seek to disentangle local policies from federal enforcement. 2017 promises to be a year of change at the executive level. President Trump will assume office at the end of January. Mark Dayton announced he would not run for reelection as governor. Democratic mayor of St. Paul Chris Coleman announced plans to run for governor in December 2016, and immigration restrictionist Hennepin County Sheriff Rich Stanek was seen as considering a run for the same office. Ramsey County Sheriff Matt Bostrom resigned to pursue an academic career, and Minneapolis Mayor Betsy Hodges faces reelection in 2017.

Executive branch initiatives are not unfettered. At the national level, both immigrant friendly Deferred Action for Parental Accountability (DAPA) and immigration enforcement focused detainers ran into trouble in litigation in federal courts. Executive action can be undone by the next election as well. Matt Bostrom’s election over long-time Ramsey County Sheriff Bob Fletcher disrupted a closer relationship between ICE and the county. Efforts by civil society groups such as the ACLU to change detainer policy affected actions by sheriffs around the state.

Actions by Minneapolis and St. Paul to pass “Don’t Tell” separation ordinances, while not going as far as other ordinances around the country, made federal and state efforts to restrict those policies less likely to succeed.

As this article goes to press, there is a sense that immigration federalism is about to enter a new era in the nation and in Minnesota. Republicans with a restrictionist bent inhabit the White House and control both houses of Congress. Republicans with concern over unauthorized immigrants and refugees seen as a threat to national security have taken control again of both houses of the Minnesota legislature, and the governor’s office will soon be an open seat. The divide between urban welcome and rural/suburban caution (and even outrage) seems to have grown. At the same time, the election of Donald Trump seems to have energized the integrationist element within the state, with calls for Sanctuary campuses, Sanctuary churches, and Sanctuary cities growing louder (while facing efforts to shut those efforts down).