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REGIONAL IMMIGRATION ENFORCEMENT

FATMA MAROUF*

ABSTRACT

Regional disparities in immigration enforcement have existed for decades, yet they remain largely overlooked in immigration law scholarship. This Article theorizes that bottom-up pressure from states and localities, combined with top-down pressures and policies established by the President, produce these regional disparities in enforcement. The Article then provides an empirical analysis demonstrating enormous variations in how Immigration and Customs Enforcement's field offices engage in federal enforcement around the United States, focusing on field offices located in "sanctuary" regions, which provide a more hospitable political climate for immigrants, and "antisanctuary" regions, where the climate is more hostile. By analyzing data related to detainers, arrests, removals, and detention across these field offices, the Article demonstrates substantial differences between field offices located in sanctuary and antisantuary regions, as well as variations within each of those groups. In order to promote more equitable and transparent enforcement, the Article offers recommendations regarding agency guidelines, rulemaking, performance metrics, and institutional designs, examining the strengths and limitations of these approaches.

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INTRODUCTION

Stark variations exist in immigration enforcement depending on the region of the United States.¹ Such disparities persist even when one compares field offices in regions with generally similar political climates. For example, Immigration and Customs Enforcement (ICE)'s Seattle field office—which oversees Washington, Oregon, and Alaska—arrests noncitizens with no criminal history at nearly four times the rate of the San Francisco field office—which oversees northern California and Hawaii—and removes them at nearly eight times the rate of the San Francisco field office.²

Although these regional disparities in immigration enforcement have existed for decades, they remain largely overlooked in immigration law scholarship. Legal scholarship focused on immigration federalism tends to “treat[] the federal government as a singular entity vis-à-vis the states,”³ while articles scrutinizing the federal government tend to probe the allocation of immigration authority between the President and Congress.⁴ This Article, on the other hand, looks *within* the Executive Branch, specifically within ICE, an agency within the Department of Homeland Security (DHS), in order to explore how ICE Enforcement and Removal Operations (ERO) field offices actually engage in federal enforcement around the country.⁵ By analyzing data related to detainers, arrests, removals, and detention across ICE ERO's field offices, this Article demonstrates drastic regional variations in key aspects of federal immigration enforcement.

This analysis indicates that federal immigration enforcement reflects a type of “checkerboard federalism,” where substantive national policies are geographically differentiated.⁶ The regional focus of this Article also adds

1. See *infra* Part III.

2. *Id.*

3. Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 106 (2016).

4. See, e.g., Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460–62 (2009).

5. As used in this Article, “ICE's field offices” specifically refers to ICE Enforcement and Removal Operations (ERO) field offices.

6. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 997–98 (2016) (arguing that partisan polarization in the United States has produced a version of “executive federalism” that facilitates “state-differentiated national policy”). The “executive federalism” that Professor Bulman-Pozen describes unfolding in the United States is “loosely akin to Canada's checkerboard federalism or Europe's differentiated integration.” *Id.* at 955; see also ALKUI KOLLIKER, FLEXIBILITY AND EUROPEAN UNIFICATION: THE LOGIC OF DIFFERENTIATED INTEGRATION (2006);

to a nascent body of scholarship shining light on the geographic structure of federal agencies and analyzing the implications of regional organization for federalism and federal administrative law.⁷ As David Owen has observed, “all the new spotlights illuminating administrative federalism have yet to shine on the geographic structure of federal agencies themselves.”⁸ By offering an innovative regional analysis, this Article makes both theoretical and empirical contributions to our understanding of federal agencies and to our understanding of ICE in particular.

To date, the legal scholarship on “immigration federalism” has examined a wide range of issues related to federal, state, and local relations, with little attention to regional dynamics. Among other things, scholars have examined state power and preemption doctrines;⁹ efforts of states and localities to resist federal enforcement;¹⁰ the federal government’s attempts to “commandeer” states and localities in order to secure their cooperation;¹¹ regulation of access to social benefits as a way for states and localities to impact immigrant integration;¹² the impact of overlapping local, state, and

Herman Bakvis, *Checkerboard Federalism? Labour Market Development Policy in Canada, in CANADIAN FEDERALISM: PERFORMANCE, EFFECTIVENESS, AND LEGITIMACY* 197 (Herman Bakvis & Grace Skogstad eds., 2002).

7. Yishai Blank & Issi Rosenc-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895 (2018) (arguing that the federal government advances federalist ideals by administering authority through its regional offices); Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377 (2018) (examining federalist ideals in federal regional schemes); David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727 (2018) (arguing that federal decentralization promotes federalist ideals); Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2016) (arguing that federal decentralization promotes federalist values, using the structure of the U.S. Army Corps of Engineers as an example); see also Elizabeth Magill & Adrian Vermulc, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011) (noting the need to “crack[] open the black box of agencies”).

8. Owen, *supra* note 7, at 62.

9. See, e.g., Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 760–61 (2017) (arguing that crime-based deportation should be handled by states instead of by the federal government); Pratheepan Gulasekaram & Karthik Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008).

10. See, e.g., PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 57–86 (2015) (surveying state and local laws pertaining to noncitizens).

11. See, e.g., Christine Kwon & Marissa Roy, *Local Action, National Impact: Standing Up for Sanctuary Cities*, 127 YALE L.J.F. 715 (2018); Christopher N. Lasch et al., *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703, 1709–13 (2018); Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313 (2015); Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL’Y REV. 87 (2016).

12. GULASEKARAM & RAMAKRISHNAN, *supra* note 10, at 57–86; Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087, 1091 (2014) (arguing for cooperative federalism in law that regulate immigrants “between borders,” such as “regulations that touch on education, housing, drivers’ licenses, and health care”); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 703 (2013) (discussing the potential for

federal law enforcement on particular communities;¹³ conflicts between state laws and local “sanctuary” or “antsanctuary” laws (“immigration localism”);¹⁴ and multilayered “sanctuary networks.”¹⁵

In this rich body of literature, the only articles discussing “immigration regionalism”—a term coined a decade ago by Professors Keith Aoki and John Shuford—propose a regional approach to developing solutions to multifaceted immigration issues, such as employment and labor.¹⁶ As Professor Shuford explained, “[i]ndividual states, interstate areas, and sub-state districts might function as federal immigration regions (‘FIRs’) in a manner and structure similar to the federal court system.”¹⁷ Cristina M. Rodríguez has also argued that immigration’s distinct regional implications require regional solutions, at least with respect to integration.¹⁸ While these innovative arguments merit further exploration, they do not emphasize enforcement or address ICE’s *existing regional structure*, which is the focus of this Article.

Only a handful of prior articles have examined regional variations in immigration enforcement. Professors Shoba Sivaprasad Wadhia and Leon Wildes documented regional variations in two types of prosecutorial discretion: deferred action status and stays of removal based on information obtained through FOIA requests.¹⁹ Virgil Wiebe analyzed state and local policies in Minnesota and found that differences in federal regional offices

“immigrant-inclusionary rulemaking” by states and localities); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (arguing that diverse state and local policies that affect immigrant integration are beneficial).

13. See, e.g., Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330 (2019).

14. See, e.g., Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837 (2019).

15. Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1251–71 (2019).

16. Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing “Dystopian Dreams” and “Usable Futures” of Immigration Reform, and Considering Whether “Immigration Regionalism” Is an Idea Whose Time Has Come*, 38 FORDHAM URB. L.J. 1, 63 & n.252 (2010).

17. John Shuford, *In the Key of Aoki: Immigration Regionalism (eco)*, 45 U.C. DAVIS L. REV. 1655, 1693 (2012).

18. Rodríguez, *supra* note 12, at 582–90, 600–05, 641.

19. Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345, 347–56 (2013) (examining disparities in grants of stays of removal and deferred action status, two forms of prosecutorial discretion); Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 829 (2004) (examining variations in grants of deferred action status); see also Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1196–1121 (2016) (providing case studies indicating that frontline immigration officers can influence executive policy).

resulted in different outcomes.²⁰ Spencer Amdur highlighted significant variations *among states* in Criminal Alien Program removals and the use of immigration detainers, noting that “these data suggest some real geographic variation along political lines” but that “[m]uch more empirical work remains to understand federal enforcement practices.”²¹ Additionally, Emily Ryo and Ian Peacock have provided an impressive empirical analysis of county participation in immigration detention that found geographic disparities.²² In a distinct but related context, Jaya Ramji Nogales, Andrew Schoenholtz, and Philip Schrag’s seminal article, *Refugee Roulette*, documented disparities in asylum decisions, including by asylum officers within DHS.²³

This Article is the first to provide a more comprehensive analysis of regional variations by ICE field office in several key aspects of immigration enforcement. Part I begins by presenting historical background on the regional nature of immigration enforcement, explaining how the Immigration and Naturalization Service (INS), which was ICE’s predecessor, struggled to control autonomous regional offices. Part I then explains ICE ERO’s current geographic structure, which, at the time of writing, divided the territory of the United States into twenty-four field offices that oversee areas that vary in size from groups of states to single states to groups of counties.

Part II provides a theoretical framework for regional variations by examining the different forces on ICE field offices that can produce regional effects. First, it discusses bottom-up pressure by states and localities that cooperate or refuse to cooperate with ICE in multiple ways. States and localities can decide to cooperate or refuse to cooperate with ICE by making critical decisions about whether to enter into 287(g) agreements that deputize law enforcement agencies to be involved in immigration enforcement, honoring ICE detainer requests, allowing ICE officers into jails and prisons, adopting “sanctuary” or “antisanctuary” policies, and entering into contracts with ICE regarding detention facilities. Because ICE’s field offices are physically located in regions with dramatically

20. Virgil Wiebe, *Immigration Federalism in Minnesota: What Does Sanctuary Mean in Practice?*, 13 U. ST. THOMAS L.J. 581 (2017).

21. Amdur, *supra* note 11, at 156–57 (noting that, “[i]f true, this [variation] would be a prime example of the ‘executive federalism’ explored by Professor Jessica Bulman-Pozen in a recent article”).

22. Emily Ryo & Ian Peacock, *Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983–2013*, 54 L. & SOC’Y REV. 66, 83–94 (2020).

23. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 372–78 (2007) (examining disparities in the decisions made by asylum officers within DHS, immigration judges and members of the Board of Immigration Appeals within DOJ, and federal appellate court judges).

different policies and politics regarding immigration enforcement, those differences may affect federal enforcement decisions.

At the same time, there are top-down pressures on ICE field offices by the President, the Secretary of DHS, and the Director of ICE, and those pressures can come in various forms, such as Executive Orders, guidelines, regulations, internal agency procedures, and performance metrics. The President can seek to promote consistency in enforcement decisions by setting clear national priorities, or the President can encourage decentralization by leaving much to the discretion of frontline officers. Part II argues that the convergence of pressures from above and below on individual ICE ERO field offices produces substantial regional variations. This Part also contends that although immigration enforcement is usually discussed as an example of “cooperative federalism,” it also reflects a form of “checkerboard federalism” or “executive federalism” based on geographically disparate enforcement policies and practices.

Part III presents an empirical analysis of variations in immigration enforcement across ICE’s twenty-four field offices using data from Fiscal Year 2019. This Part analyzes data on detainer requests, administrative arrests, removals, detention, and alternatives to detention. The data demonstrate enormous disparities among ICE’s field offices in all of these areas. Not only are there striking differences between field offices located in sanctuary regions and field offices in antisanctuary regions, but there are substantial differences within each of these categories as well. These disparities are not limited to cases involving noncitizens who have been charged or convicted of a crime, where variations in state and local policies regarding cooperation or noncooperation would have the most impact on federal enforcement. Substantial variations also exist regarding the arrest, detention, and removal of noncitizens with no criminal history. The results indicate that ICE field offices are not simply implementing central policies. Rather, they are applying *their own versions* of federal immigration policies, which are influenced by the state and local policies in their region.²⁴

Part IV examines the implications of these regional variations for policymaking and institutional design. First, Part IV examines the benefits and challenges involved in using enforcement guidelines, rulemaking, and performance metrics to achieve more uniformity in the implementation of immigration policies. Second, Part IV offers three modifications to institutional design that could help achieve more uniform federal immigration enforcement. The Article concludes by stressing the

24. Blank & Rosen-Zvi, *supra* note 7, at 1895 (arguing that “[federal] regions are misguidedly viewed as mere enforcers and implementers of central policies” and proposing alternative views of federal regions as mediators and coordinators).

importance of more consistent and transparent enforcement practices when fundamental liberties are at stake.

I. THE REGIONAL STRUCTURE OF IMMIGRATION ENFORCEMENT

A. *The Creation of INS and Its Autonomous Regional Offices*

The history of immigration enforcement in the United States shows geographical disparities going back centuries and regional variations among field offices that persist to this day. For nearly a century after the United States was founded, individual states passed laws regulating immigration.²⁵ That practice ended in 1875, when the Supreme Court held that immigration regulation was solely within the authority of the federal government.²⁶ In the late 1880s, Congress passed several statutes regulating immigration.²⁷ With these new statutes came a need for *federal* officials to become involved in immigration enforcement. U.S. Customs Collectors were stationed at ports of entry to collect the fifty-cent head tax imposed on each immigrant by the Immigration Act of 1882, while “Chinese Inspectors” enforced the Chinese Exclusion Act of 1882.²⁸ States also remained involved in immigration enforcement through state boards and commissions that received direction from the Treasury Department.²⁹

The Immigration Act of 1891 created the first federal agency in charge of immigration.³⁰ That agency was initially located within the Treasury Department and then moved to the Department of Labor in 1913, where it split into two parts: one focused on immigration and the other on naturalization.³¹ In 1933, these two components merged again and became

25. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993).

26. *Chy v. Freeman*, 92 U.S. 275 (1875).

27. These include the Immigration Act of 1882, Pub. L. No. 47-376, 22 Stat. 214 (1882) (codified as amended at 8 U.S.C. § 1551); Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882) (repealed 1943); and Alien Contract Labor Laws, Pub. L. No. 48-164, 23 Stat. 332 (1885) (repealed 1952).

28. U.S. CITIZENSHIP AND IMMIGR. SERVS., OVERVIEW OF INS HISTORY 3 (2012), <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf> [<https://perma.cc/2M94-64SB>].

29. *Id.*

30. The agency was called “the Office of the Superintendent of Immigration” until 1895, when it became the “Bureau of Immigration and Naturalization.” *Id.* at 4.

31. *Id.* at 5. The Bureau of Immigration and Naturalization became part of the Department of Commerce and Labor in 1903. In 1913, the Department of Commerce and Labor split into two separate cabinet departments, and the Bureau of Immigration and Naturalization divided into the Bureau of Immigration and the Bureau of Naturalization, which were both housed within the new Department of Labor. *Id.*

the Immigration and Naturalization Service (INS), which was moved to the Department of Justice in 1940.³²

INS had two main units: one focused on enforcement and the other on granting immigration benefits.³³ Initially, INS operated through “field and branch” offices, but in 1942, the field offices were redesignated as headquarters for twenty-two districts.³⁴ The number of districts fluctuated between sixteen in 1943 and thirty-seven in 1963, at times including several districts abroad.³⁵ Four regional offices were established in 1955 to oversee the district offices.³⁶ The district offices handled adjudications, inspections, investigations, detention, and deportation. Some of these district offices launched their own initiatives. For example, in the 1950s, INS’s San Francisco office initiated a “Chinese Confession Program” that offered “amnesty” to Chinese immigrants who confessed to fraud.³⁷

In 1974, the Office of Management and Budget set a long-term goal for federal agencies to adopt ten standard regions with uniform boundaries and common regional office locations.³⁸ The Attorney General asked INS to adjust its regional structure accordingly, but INS determined that adopting the standard structure would be impractical “because its personnel and workload are centered in areas with many [noncitizens].”³⁹

INS proposed an alternative plan in 1975 that shifted regional boundaries “to equalize personnel distribution, workload, and span of control among the regions.”⁴⁰ The new plan created four regional offices, with headquarters in San Pedro, California (Western), Burlington, Massachusetts (Eastern), St. Paul, Minnesota (Northern), and Dallas, Texas (Southern).⁴¹ The new

32. *Id.* at 5, 8.

33. *Id.* at 9–10.

34. *See Records of Immigration and Naturalization Service, 85.5 District Office Records of INS and its Predecessors*, NAT’L ARCHIVES, <https://www.archives.gov/research/guide-fed-records/groups/085.html#85.5> [<https://perma.cc/GJ4R-WVYY>].

35. *Id.*

36. *Id.*

37. Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47, 107 (2019).

38. *See EXEC. OF. OF THE PRESIDENT, OFF. OF MGMT. & BUDGET, CIRCULAR A-105* (1974), in OFF. OF MGMT. & BUDGET, GEN. SRVCS. ADMIN., FPCD-77-39, STANDARDIZED FEDERAL REGIONS—LITTLE EFFECT ON AGENCY MANAGEMENT OF PERSONNEL app. I at 25 (1977), <https://www.gao.gov/assets/fpcd-77-39.pdf> [<https://perma.cc/8SDL-DW3V>].

39. Letter from Comptroller General of the United States to Sen. Byrd, GGD-76-27 (Nov. 11, 1975) [hereinafter Letter to Senator Byrd], <https://www.gao.gov/assets/120/114022.pdf> [<https://perma.cc/MX3Z-K5JX>].

40. *Id.*

41. *Id.* *See also* U.S. GOV’T ACCOUNTABILITY OFF., GAO/GGD-86-130-BR, BRIEFING REPORT TO CONGRESSIONAL REQUESTORS, IMMIGRATION: PROPOSED CLOSING OF INS’S NORTHERN REGIONAL OFFICE: BENEFITS UNCERTAIN (1986), <https://www.gao.gov/assets/80/76001.pdf> [<https://perma.cc/6JBE-DNSP>].

boundaries aligned INS's four regional offices with the ten standard federal regional offices.⁴²

By this point, there was already recognition of significant disparities in INS decisions. In fact, in 1979, under the Carter administration, INS proposed regulations to codify standards on the use of discretion in adjustment of status applications and other matters in order to promote greater consistency,⁴³ but the proposed regulations were rescinded in 1981 by the Reagan administration.⁴⁴ Practices following the passage of the Immigrant Responsibility and Control Act (IRCA) in 1986 further highlighted regional variations. The IRCA established a legalization program and made it illegal for employers to hire undocumented workers, authorizing INS to sanction employers who failed to comply.⁴⁵ However, regional offices had different evidentiary requirements for legalization applications⁴⁶ and followed different procedures and policies in issuing sanctions against employers.⁴⁷

In 1989, an issue paper prepared for the Attorney General observed that INS's structure had created "*autonomous regional offices* whose officials often compete with the Commissioner and Deputy Commissioner of INS for control over their operations."⁴⁸ The paper further noted that "[e]ach Regional Commissioner exercise[d] *independent control over both immigration policy and management for 'their' part of the country.*"⁴⁹

A 1991 report by the Government Accountability Office (GAO) similarly criticized INS for having "*degenerated into a group of segmented*

42. The INS's Western Regional Office covered standard federal region IX; the Eastern Regional Office covered standard federal regions I, II, and III; the Northern Regional Office covered standard federal regions V, VII, VIII, and X; and the Southern Regional Office covered standard federal regions IV and VI. See Letter to Senator Byrd, *supra* note 39.

43. Factors to Be Considered in the Exercise of Administrative Discretion, 44 Fed. Reg. 36,187, 36,191 (proposed June 21, 1979) (stating that the purpose of the rule was "to assure that all applicants and petitioners receive fair and equal treatment before the Service").

44. Factors to Be Considered in the Exercise of Administrative Discretion, 46 Fed. Reg. 9,119, 9,119 (proposed Jan. 28, 1981) (reasoning that "it is impossible to foresee and enumerate all of the favorable or adverse factors which may be relevant and should be considered in the exercise of administrative discretion" and expressing concern that "[l]isting some factors, even with the caveat that such list is not all inclusive, poses a danger that use of guidelines may become so rigid as to amount to an abuse of discretion"); see also Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 92-97 (1983) (criticizing INS's refusal to codify standards for exercising discretion).

45. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 8 U.S.C. § 1324a(a)-(b).

46. U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-91-28, REPORT TO THE CONGRESS, IMMIGRATION MANAGEMENT: STRONG LEADERSHIP AND MANAGEMENT REFORMS NEEDED TO ADDRESS SERIOUS PROBLEMS 80 (1991), <https://www.gao.gov/assets/160/150030.pdf> [<https://perma.cc/793H-2L6N>].

47. *Id.* at 35-36.

48. *Id.* at 79 (quoting the issue paper without citation) (emphasis added).

49. *Id.* (emphasis added).

autonomous programs, each trying to handle its own set of problems with little attention to their interrelatedness.”⁵⁰ The report stressed that “[r]egional priorities began to take precedence over national priorities,” which “hampered effective resource allocation and resulted in inconsistent program implementation.”⁵¹ Regional Commissioners had “developed their own policy agendas and frequently refused to follow guidance and advice from headquarters.”⁵² Compounding this situation, the agency’s leadership in Washington “refused to directly confront” the politically appointed Regional Commissioners, implicitly encouraging regional autonomy.⁵³

In 1993, criticism about INS’s regional inconsistencies came directly from the Supreme Court. In *Reno v. Flores*, the Court observed that INS’s treatment of detained juveniles had varied “on a regional and ad hoc basis, with some INS offices releasing unaccompanied alien juveniles not only to their parents but also to a range of other adults and organizations,” while the Western Regional Office had “adopted a policy of limiting the release of detained minors to a parent or lawful guardian, except in unusual and extraordinary cases.”⁵⁴

The following year, INS made changes to its organizational structure in order to provide “more direct oversight of field units.”⁵⁵ One of the main problems was that a single INS headquarters manager in Washington, D.C. was responsible for supervising thirty-three district directors and twenty-one chiefs of Border Patrol sectors. It was such a large number that supervision was “too far removed” and “district directors and Border Patrol chiefs were often able to operate independently of headquarters direction.”⁵⁶ The reorganization established four Executive Association Commissioner positions for policy and planning, programs, management, and field operations, which helped shift some management activity to officials closer to the field.⁵⁷

In 1996, Congress enacted two sweeping new immigration laws: The Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal

50. *Id.* at 3 (emphasis added).

51. *Id.* at 78 (emphasis added).

52. *Id.* at 79.

53. *Id.*

54. *Reno v. Flores*, 507 U.S. 292, 295–96 (1993) (internal quotation marks omitted).

55. U.S. GOV’T ACCOUNTABILITY OFF., GAO/GGD-97-132, REPORT TO THE COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, INS MANAGEMENT: FOLLOW-UP ON SELECTED PROBLEMS 4 (1997) [hereinafter GAO REPORT], <https://www.govinfo.gov/content/pkg/GAOREPORTS-GGD-97-132/pdf/GAOREPORTS-GGD-97-132.pdf> [<https://perma.cc/7JQE-DTWT>].

56. *Id.* at 39.

57. *Id.* at 86–88.

Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁵⁸ These new laws expanded the range of criminal offenses that trigger mandatory detention,⁵⁹ eliminated key defenses to deportation,⁶⁰ made it more difficult to apply for asylum,⁶¹ and established a process of expedited removal that allows for removal without a hearing before an immigration judge.⁶²

Despite INS's organizational restructuring in 1994 and huge increases to its staff and budget, the agency was still in disarray after the 1996 laws were implemented.⁶³ A 1997 GAO report found that field managers still generally viewed headquarters as not being "in touch with events, problems, and concerns of the field."⁶⁴ There was "uncertainty among INS managers about the roles and responsibilities of headquarters executives," as well as "confusion among field managers regarding roles and responsibilities."⁶⁵ According to GAO, "field manuals containing policies and procedures on how to implement immigration laws" were still "out-of-date" in 1997.⁶⁶ One consultant "reported that three different versions of guidance on naturalization procedures had been distributed throughout INS and that some offices were using the wrong version."⁶⁷ So some people may have been denied citizenship by one office even though they would have been granted by another.

In short, immigration enforcement in the years leading up to 9/11 was uneven at best and could even be described as chaotic, with semiautonomous regional offices making inconsistent decisions and lack of clarity about the law among frontline officers.

58. See Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.); Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.).

59. See Immigration and Nationality Act of 1965 (INA) § 236(c), 8 U.S.C. § 1226 (mandatory detention grounds).

60. See, e.g., INA § 212(c), 8 U.S.C. § 1182(c) (waiver of excludability) (repealed 1996); INA § 244, 8 U.S.C. § 1254 (suspension of removal) (repealed 1996).

61. See INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (imposing a one-year deadline to apply for asylum after entering the United States).

62. See INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i).

63. See *Immigration and Naturalization Service: Overview of Management and Program Challenges, Testimony Before the Subcomm. on Immigr. and Claims of the H. Comm. on the Judiciary*, GAO/T-GGD-99-148 4-5 (1999) [hereinafter *GAO Testimony*] (statement of Richard M. Stana, Associate Director, Administration of Justice Issues, General Government Division), <https://www.gao.gov/assets/110/108056.pdf> [<https://perma.cc/RKY7-NG5M>]. Between 1993 and 1998, INS's staff increased from 19,000 to 31,000 and its budget more than doubled. *Id.* at 2.

64. GAO REPORT, *supra* note 55, at 45.

65. *GAO Testimony*, *supra* note 63, at 5.

66. *Id.*

67. GAO REPORT, *supra* note 55, at 48.

B. The Current Geographic Structure of Immigration Enforcement

The attacks of 9/11 prompted massive reorganization within the federal government. The Homeland Security Act, passed in November 2002, created DHS by integrating all or part of twenty-two different federal agencies and programs.⁶⁸ INS was among the agencies incorporated into DHS.⁶⁹ In the Homeland Security Act, Congress required the Secretary of DHS to submit a plan “for consolidating and co-locating . . . any regional offices or field offices” of the agencies transferred to DHS, as well as “portions of regional and field offices of other Federal agencies, to the extent such offices perform functions” transferred to the Secretary of DHS.⁷⁰

DHS began operating in March 2003 and includes ICE, Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS), which absorbed the main functions previously performed by INS.⁷¹ In 2004, DHS informed Congress that it would implement a “Regional Concept” to integrate internal functions and improve coordination with external partners.⁷² A 2010 DHS Bottom-Up Review report recommended “realign[ing] component regional configurations into a single DHS regional structure.”⁷³ However, in April 2012, a senior DHS officer involved in that report announced that DHS would *not* implement that recommendation.⁷⁴ DHS later identified operational and budgetary constraints as challenges to implementing “a single DHS regional/field office structure,” noting that each of DHS’s components have “a different regional or field office structure based on unique mission needs.”⁷⁵ Establishing a single set of regional offices would be challenging because a regional footprint that made sense for CBP along the border may not be well suited to another component, like ICE, which operates in the interior.⁷⁶

While DHS’s components use different terms, including “regions,” “field offices,” “districts,” and “sectors,” these offices all function like

68. See The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered titles of U.S.C.).

69. See Homeland Security Act §§ 402, 471, 6 U.S.C. §§ 202, 291.

70. 6 U.S.C. § 346.

71. U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 28, at 11.

72. U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-185R, LETTER AND BRIEFING TO SENATE AND HOUSE COMMITTEES ON HOMELAND SECURITY AND GOVERNMENT, DEPARTMENT OF HOMELAND SECURITY: EFFORTS TO ASSESS REALIGNMENT OF ITS FIELD OFFICES STRUCTURE I (2012), <https://www.gao.gov/assets/650/649000.pdf> [<https://perma.cc/D8PE-PXLD>].

73. *Id.* at 2.

74. *Id.*

75. *Id.* at 14.

76. *Id.* at 25.

federal regions in the sense that they cover the entire territory of the United States and there is no higher office between them and headquarters.⁷⁷ As Professor Jessica Bulman-Pozen has pointed out, “there is substantial divergence in federal agencies’ regional organization.”⁷⁸ The ten-region scheme actually “remains a minority approach, and the ‘chaos’ of various regional configurations that past Presidents have sought to quell remains.”⁷⁹

At the time of writing, ICE ERO was organized into twenty-four “field offices” across the United States, with no higher-level “regional offices.”⁸⁰ ICE’s field offices are not like the field offices of some agencies that are “located in smaller towns far removed from the seats of political power” and “in charge of relatively small territories.”⁸¹ Rather, nine of them are located in the same major cities included among the ten “standard” federal regions: Boston, New York City, Philadelphia, Atlanta, Chicago, Dallas, Denver, San Francisco, and Seattle.⁸² The fifteen other offices are also located in major cities, including multiple cities in California and Texas, due to the size of the immigrant population in those states. ICE’s field offices are, therefore, similar to the regional offices of other agencies.⁸³

The geographical boundaries of ICE’s field offices vary greatly. Ten ICE field offices are responsible for multiple states: Atlanta, Boston, Chicago, Denver, Detroit, New Orleans, Philadelphia, Salt Lake City, Seattle, and St. Paul.⁸⁴ Five of ICE’s field offices are responsible for a single state: Baltimore, Miami, Newark, Phoenix, and Washington, D.C. (responsible for Virginia and D.C.).⁸⁵ Six field offices are responsible for multiple counties within a state: Buffalo, Houston, Los Angeles, New York City, San Antonio, and San Diego.⁸⁶ And three ICE field offices combine interstate areas: Dallas (North Texas and Oklahoma); El Paso (West Texas and New Mexico); and San Francisco (northern California and Hawaii).⁸⁷ Two of the

77. See generally Blank & Rosen-Zvi, *supra* note 7 (explaining federal regions).

78. Bulman-Pozen, *supra* note 7, at 389.

79. *Id.* at 390.

80. See ICE: 2021 ERO Field Offices, ICE (Dec. 3, 2020), <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFieldOffices.pdf> [<https://perma.cc/P56C-TCXV>]. In 2021, after this Article was completed, the San Antonio Field Office was split into two, creating a new field office in Harlingen, Texas. The analysis presented here does not include the Harlingen field office. See U.S. IMMIGR. & CUSTOMS ENF’T, ICE ANNUAL REPORT FISCAL YEAR 2021 8 (2022), <https://www.ice.gov/doclib/eoy/iceAnnualReportFY2021.pdf> [<https://perma.cc/LE2S-844U>].

81. Blank & Rosen-Zvi, *supra* note 7, at 1911.

82. Kansas City is the tenth “standard” federal region and does not have an ICE field office. For a map of the ten “standard” regions, see HHS *Regional Offices*, DEP’T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/about/agencies/iea/regional-offices/index.html> [<https://perma.cc/7DX7-QQW5>].

83. ICE: 2021 ERO Field Offices, *supra* note 80.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

offices are also responsible for U.S. territories: San Francisco (Guam and Saipan) and Miami (Puerto Rico and U.S. Virgin Islands).⁸⁸

The chart below explains each field office's geographic area of responsibility. The chart also provides the estimated unauthorized population of the geographic area within each field office's jurisdiction to assist with comparisons across field offices.⁸⁹ Unfortunately, information about the personnel and resources allocated to each ERO office was not available and therefore could not be included in this chart. Differences in how resources are allocated among field offices may certainly play a role in explaining some of the variations. As discussed further below, allocation of resources is one way that the federal government can push enforcement in a certain direction.

88. *Id.*

89. The size of the undocumented population is used as a reference point in other studies when comparing states and localities. See, e.g., *Ten-Fold Difference in Odds of ICE Enforcement Depending Upon Where You Live*, TRAC IMMIGR. (Apr. 11, 2019), <https://trac.syr.edu/immigration/reports/555/#f4> [<https://perma.cc/79YS-UU8E>]. This Article relies upon estimates of the undocumented population in states and counties developed by the Migration Policy Institute (MPI). *Unauthorized Immigrant Population Profiles*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles> [<https://perma.cc/5BJQ-GMKY>]. Other sources have their own estimates. See, e.g., *U.S. Unauthorized Population Estimates by State, 2016*, PEW RSCH. CTR., <https://www.pewhispanic.org/interactives/u-s-unauthorized-immigrants-by-state/> [<https://perma.cc/A2Q4-TVMH>]; *Estimates of Undocumented and Eligible-to-Naturalize Populations by State*, CTR. FOR MIGRATION STUD., <http://data.cmsny.org> [<https://perma.cc/NT9Y-H74R>]. For the New York Field Office, MPI provides estimates of the unauthorized population for the following counties: Bronx, King, Nassau, New York, Queens, Richmond, Suffolk, and Westchester (totaling 754,000). See MIGRATION POL'Y INST., *supra*. For the remaining counties, the undocumented population was estimated as one-third of the foreign-born population using data from censusreporter.org, which yielded the following estimates: Dutchess (11,267), Putnam (4,575), Sullivan (2,035), Orange (14,100), and Ulster (4,494), totaling 36,471. That total was conservatively rounded down to 36,000. See *Dutchess County, NY*, CENSUS REP., <https://censusreporter.org/profiles/05000US36027-dutchess-county-ny/> [<https://perma.cc/5NGD-C7PB>]; *Putnam County, NY*, CENSUS REP., <https://censusreporter.org/profiles/05000US36079-putnam-county-ny/> [<https://perma.cc/4F6D-3LG8>]; *Orange County, NY*, CENSUS REP., <https://censusreporter.org/profiles/05000US36071-orange-county-ny/> [<https://perma.cc/67QX-7W7M>]; *Ulster County, NY*, CENSUS REP., <https://censusreporter.org/profiles/05000US36111-ulster-county-ny/> [<https://perma.cc/3MJL-QAM4>]. The estimated undocumented population for the area overseen by the Buffalo field office was calculated by subtracting the estimated undocumented population for the area overseen by the New York field office from the total estimated undocumented population for the state of New York. For the Los Angeles Field Office, the estimate of the undocumented population for San Luis Obispo County was provided by the Public Policy Institute of California. See Joseph Hayes & Laura Hill, *Undocumented Immigrants in California*, PUB. POL'Y INST. OF CAL. (Mar. 2017), https://www.pplic.org/content/pubs/jtf/JTF_UndocumentedImmigrantsJTF.pdf [<https://perma.cc/S4UG-DYHB>].

Table 1: ICE ERO's Geographical Structure in FY 2019: 24 Field Offices with Area of Responsibility and Estimated Size of Unauthorized Population.

ICE Field Office	Area of Responsibility	Unauthorized Population
Atlanta	Georgia, North Carolina, South Carolina	716,000
Baltimore	Maryland	226,000
Boston	Massachusetts, Connecticut, New Hampshire, Vermont, Rhode Island	370,000
Buffalo	Upstate New York	45,000
Chicago	Illinois, Indiana, Wisconsin, Missouri, Kentucky, Kansas	788,000
Dallas	North Texas, Oklahoma	687,000
Denver	Colorado, Wyoming	186,000
Detroit	Michigan, Ohio	189,000
El Paso	West Texas, New Mexico	148,000
Houston	East Texas	643,000
Los Angeles	Counties of Los Angeles, Orange, Riverside, San Bernardino, Ventura, Santa Barbara and San Luis Obispo	1,456,000
Miami	Florida, Puerto Rico, U.S. Virgin Islands	732,000
New Orleans	Louisiana, Alabama, Mississippi, Tennessee, Arkansas	339,000
New York City	Counties of New York, Kings, Bronx, Richmond, Queens, Dutchess, Nassau, Putnam, Suffolk, Sullivan, Orange, Rockland, Ulster, and Westchester	790,000
Newark	New Jersey	425,000
Philadelphia	Pennsylvania, West Virginia, Delaware	187,000
Phoenix	Arizona	281,000
Salt Lake City	Utah, Nevada, Montana, Idaho	288,000
San Antonio	South Texas and Central Texas	411,000
San Diego	San Diego County, Imperial County	187,000
San Francisco	Northern California, Hawaii, Guam, Saipan	1,074,000
Seattle	Washington, Oregon, Alaska	359,000
St. Paul	Iowa, Minnesota, Nebraska, North Dakota, South Dakota	184,000
Washington, D.C.	Washington, D.C. and Virginia	276,000

Given the long history of regional disparities in immigration enforcement operations, it is not surprising that differences among ICE's field offices persist to this day. However, a deeper examination of the forces that can produce such regional effects is necessary to better understand them, especially given the rapidly changing landscape of the relationship between states and the federal government when it comes to immigration.

II. FORCES THAT PRODUCE REGIONAL EFFECTS

A regional perspective focusing on the geographic areas of responsibility for ICE field offices provides valuable information about how immigration enforcement works in practice that cannot be understood by looking at federal, state, and local policies alone. This section first considers how states and localities can influence ICE's field offices through various forms of cooperation or noncooperation. Then I turn to top-down pressure on ICE's field offices from the President and leadership of DHS and ICE in Washington, D.C.

A. Bottom-Up Influence of States and Localities

Immigration is often mentioned as an example of cooperative federalism because the Immigration and Nationality Act allows states and localities to help enforce immigration laws, with federal supervision.⁹⁰ Under the conventional view of cooperative federalism, states are perceived as the subordinated agents of the federal government.⁹¹ Because the federal government utilizes states (or localities) to enforce federal law, this relationship can be perceived as undermining traditional notions of state autonomy.⁹² Additionally, "voluntary state or local cooperation" can easily turn into "involuntary commandeering" in an area like immigration, where the federal government has long enjoyed great deference from the courts.⁹³

90. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 472 (2012) (explaining that cooperative federalism schemes commonly "preserve a significant role for the federal executive even when they empower the states"); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 672 (2001); DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 162 (2d ed. 1972) (proposing that the states and the federal government have a web of cooperative relationships through the federalist system); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544, 1554 (1994) (discussing how working alliances form between federal and state counterparts).

91. See David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 193 (2015) ("Because of that subordination, the autonomy model does not neatly capture cooperative-federalism arrangements.").

92. See Kramer, *supra* note 90, at 1544; Weiser, *supra* note 90, at 672; Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 58 (2008); Margarit H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011) (discussing various contexts where Congress calls on states to enforce federal law); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1685 (2011) ("In theory, states working under an agreement with [ICE] should be able to serve federally defined goals while developing unique enforcement techniques based on local expertise."); Bulman-Pozen, *supra* note 90, at 472 (explaining that cooperative federalism schemes commonly "preserve a significant role for the federal executive even when they empower the states").

93. Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 41 (2018) (explaining that "the

Administrative federalism, which “features agencies, rather than Congress, as the primary deciders of where to draw lines between federal and state authority,”⁹⁴ recognizes that federal agencies make crucial decisions “about the actual scope of state powers and autonomy.”⁹⁵

On the other hand, Professors Jessica Bulman-Pozen and Heather Gerken assert an alternative view of states exerting substantial power in arrangements where they administer a federal program or enforce federal law.⁹⁶ They reason that the federal government *depends* on states in these types of relationships, so states have “leverage” and “discretion in choosing how to accomplish [their] tasks and which tasks to prioritize.”⁹⁷ According to Professor Bulman-Pozen, states engaged in cooperative federalism can operate as a check on the Executive Branch because they can “diverge from federal executive policy, curb the federal executive’s own implementation of the law, or goad the federal executive to take particular actions.”⁹⁸ Professors Bulman-Pozen and Gerken specifically mention immigration as an example of what they call “*uncooperative* federalism,” where “states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law.”⁹⁹

States and localities can influence federal immigration enforcement through multiple forms of cooperation or noncooperation. First, Congress has authorized states to be involved in enforcing immigration laws through section 287(g) of the Immigration and Nationality Act.¹⁰⁰ This statutory provision allows the executive to deputize state or local law enforcement officers to perform immigration functions related to “investigation, apprehension, or detention of aliens in the United States.”¹⁰¹ There are three different models that law enforcement agencies have followed in implementing 287(g) agreements: (1) a jail enforcement model, where local law enforcement officers identify individuals *in jail* who have been charged

line between involuntary commandeering and voluntary state or local cooperation with federal authorities is elusive” and that “[t]hese complexities mount when immigration laws are involved” due to judicial deference).

94. Rubenstein, *supra* note 91, at 197; *see also* Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 445–46 (2014) (describing administrative federalism and the power it gives agencies).

95. Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 570 (2011).

96. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265 (2009).

97. *Id.* at 1266.

98. Bulman-Pozen, *supra* note 90, at 478 (emphasis omitted).

99. Bulman-Pozen & Gerken, *supra* note 96, at 1259 (emphasis added); *see also id.* at 1281.

100. 8 U.S.C. § 1357(g); *see also* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011) (describing how Congress involves states in enforcing federal laws in various contexts).

101. 8 U.S.C. § 1357(g).

with or convicted of crimes for removal; (2) a task force model, where local law enforcement officers identify removable individuals *in the community* during the course of their regular duties; and (3) a hybrid model that combines the two.¹⁰²

All 287(g) agreements between the federal government and state or local law enforcement agencies require supervision by ICE.¹⁰³ However, a 2009 GAO report documented “wide variation” in the nature and extent of ICE field offices’ supervisory responsibility over the implementation of 287(g) programs.¹⁰⁴ GAO found that lack of controls made it difficult for ICE to ensure that the program was being operated as intended. For example, although the program was intended to address “serious crime,” GAO found that four out of the twenty-nine program participants reviewed were using 287(g) authority to process individuals for “minor crimes, such as speeding, contrary to the objective of the program.”¹⁰⁵ ICE subsequently modified the template for its 287(g) agreements to address GAO’s concerns: for example, by specifying ICE’s enforcement priorities and describing ICE’s supervision role with greater specificity. However, the Migration Policy Institute found that the new template did not have any “substantial effect on 287(g) priority setting, program operations, . . . or community impacts.”¹⁰⁶ As Professor Huyen Pham has explained, “decisions about enforcement priorities continued to be made at the sub-federal levels, driven by local political pressures.”¹⁰⁷ Such variation in how law enforcement agencies exercise their delegated authority under section 287(g) can result in regional disparities in immigration enforcement. Although President Obama curtailed 287(g) agreements, dozens of new agreements were established under President Trump.¹⁰⁸

102. Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1263–64 (2018); Ryo & Peacock, *supra* note 22, at 70.

103. 8 U.S.C. § 1357(g). Although this section of the INS still references the Attorney General, in 2003, the authority to enforce immigration laws vested in the Secretary of the Department of Homeland Security, who may delegate such authority to any official, officer, or employee of DHS. *See* 8 C.F.R. § 2.1 (2021).

104. U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 4 (2009), <https://www.gao.gov/assets/290/285583.pdf> [<https://perma.cc/9N2N-TFKU>].

105. *Id.*

106. RANDY CAPPS, MARC R. ROSENBLUM, CRISTINA RODRÍGUEZ & MUZAFFAR CHISHTI, MIGRATION POL’Y INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 3 (2011), <https://www.migrationpolicy.org/pubs/287g-divergence.pdf> [<https://perma.cc/HK5F-J95V>].

107. Pham, *supra* note 102, at 1269.

108. *See id.* at 1253–56.

Another way that state and local law enforcement agencies can voluntarily cooperate with ICE is through the Criminal Alien Program (CAP), which allows federal immigration officers to screen people in jails and prisons to identify potentially removable noncitizens.¹⁰⁹ CAP officers can issue a notice to the law enforcement agency asking to be informed prior to an individual's release so that ICE can take custody, or they can issue an "immigration detainer" requesting the facility to hold the individual for an additional forty-eight hours to allow ICE to take custody.¹¹⁰

Many local law enforcement agencies have decided not to cooperate with ICE by refusing to enter into 287(g) agreements, blocking access to jails, or refusing detainer requests.¹¹¹ However, ICE can still access information about noncitizens booked into the local jails through a program called Secure Communities. Established by the George W. Bush Administration, Secure Communities was revitalized and then deactivated by President Obama in 2013,¹¹² and it was then reinstated by President Trump in 2017.¹¹³ Secure Communities electronically links local jails to databases maintained by the Federal Bureau of Investigation (FBI) and DHS so that the fingerprints of individuals booked into local jails are automatically sent to the FBI and DHS in order to identify potentially

109. *Criminal Alien Program*, ICE (Sep. 16, 2021), <https://www.ice.gov/identify-and-arrest/criminal-alien-program#> [<https://perma.cc/G8ZT-PA32>].

110. See 8 C.F.R. § 287.7(d) (2021); AM. IMMIGR. COUNCIL, *THE CRIMINAL ALIEN PROGRAM (CAP): IMMIGRATION ENFORCEMENT IN PRISONS AND JAILS* 5 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/cap_fact_sheet_8-1_fin_0.pdf [<https://perma.cc/QZW7-CTBW>].

111. Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 BROOK. L. REV. 1085, 1089–90 (2019). In March 2017, the Trump administration issued a new detainer policy designed to increase compliance by addressing constitutional concerns around detainers. This new policy created a single detainer form that asserts probable cause and states that the detainer is cancelled if ICE does not take custody within forty-eight hours. *Id.* at 1096.

112. The Obama Administration replaced Secure Communities with the Priority Enforcement Program. See Memorandum from Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski et al., Acting Dir., ICE (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<https://perma.cc/7CKW-45HW>]. See also Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 207–08 (2014) (describing Secure Communities under Obama); Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1260 (2015) (arguing that the devolution of discretion that occurred through Secure Communities will be difficult to undo through the Priority Enforcement Program); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1858 (2011) (arguing that federal policies like Secure Communities that allow state and local governments to decide who to expose to federal immigration enforcement by exercising discretion over arrests risks abdicating federal authority over immigration).

113. Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801 (Jan. 30, 2017) (terminating the Priority Enforcement Program and reinstating Secure Communities).

removable noncitizens.¹¹⁴ Since state and local law enforcement agencies cannot opt out of Secure Communities, this program limits their ability to prevent noncitizens in their communities who have entered the criminal justice system from getting funneled into the removal system.¹¹⁵

A third way that local governments can cooperate with ICE is by entering into a contract with ICE, called an Intergovernmental Service Agreement (IGSA), to detain apprehended noncitizens for ICE in city or county jails.¹¹⁶ Under these agreements, ICE pays the locality a set amount per day for each person detained. Local governments can then decide to subcontract out detention operations to a private correctional company, allowing ICE to avoid the more complicated bidding procedures required to contract directly with a private company. An empirical analysis of immigration detention in county jails by Professors Emily Ryo and Ian Peacock found that between 1983 and 2013, “[t]he most substantial rise occurred in the South, followed by the Midwest and the West,” while “the Northeast remained relatively flat over the years.”¹¹⁷ They further found that, “[w]ithin regions, a large share of the growth was concentrated within a relatively small number of states. By 2013, approximately half of all counties holding ICE detainees were in just ten states”¹¹⁸

States and localities can also *resist* cooperating with ICE by terminating these IGSA contracts. For example, the cities of Adelanto, California and Williamson County, Texas both terminated IGSA after reports of abhorrent conditions related to medical and mental health care, sexual abuse, and family separations.¹¹⁹ At the state level, California banned new private

114. *Secure Communities*, ICE (Feb. 9, 2021), <https://www.ice.gov/secure-communities> [<https://perma.cc/2VDG-DSCG>].

115. ICE initially presented Secure Communities as a “voluntary” program but by October 2010, ICE acknowledged that the program was mandatory because it involved information sharing between federal agencies. See Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 GEO. IMMIGR. L.J. 431, 484 (2021) (discussing the confusion created by ICE’s conflicting messaging about whether participation in Secure Communities was voluntary); Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1343 (2019) (noting that DHS instructed certain counties that opting out of Secure Communities was not an option, leading those jurisdictions to find other paths of resistance such as declining to comply with ICE detainer requests).

116. See 8 U.S.C. § 1103(a)(11)(A) (authorizing DHS to contract with state or local government agencies “for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by [ICE]”).

117. Ryo & Peacock, *supra* note 22, at 84.

118. *Id.* The ten states are: “Texas (107 counties holding ICE detainees), Georgia (45), North Carolina (35), California (34), Florida (28), Kentucky (25), Virginia (24), Wisconsin (22), Indiana (22), and Colorado (20).” *Id.*

119. Lora Adams, *State and Local Governments Opt Out of Immigration Enforcement*, CTR. FOR AM. PROGRESS (July 25, 2019), <https://www.americanprogress.org/issues/immigration/news/2019/07/25/472535/state-local-governments-opt-immigrant-detention/> [<https://perma.cc/CE5G-UZ8Y>].

detention contracts or expanding existing ones; Michigan blocked the sale of a former state prison that would have become a privately operated immigration detention center; and Illinois banned private immigration detention centers altogether.¹²⁰ These actions at the state and local level aim to curtail the number of people in immigration detention by making it harder for ICE to find detention facilities and operators.

Whether a state or locality resists or cooperates with immigration enforcement in the ways described above is usually the basis for being labeled either a “sanctuary” or “antisantuary.”¹²¹ It is important to remember, however, that there is no single definition of a “sanctuary” or “antisantuary” state or locality, and that a wide range of subfederal laws, not just policies directly related to criminalization and immigration enforcement, affect the political climate regarding immigrants. State and local laws impacting immigrants’ ability to obtain health care, social services, identification documents, employment and professional licenses, education, housing, and language access collectively help establish an inclusive or exclusive climate for immigrants that may exert political pressure on ICE.

The reality is that most states have a mix of inclusive and exclusive policies. Even neighboring localities may have different stances towards immigrants. But researchers in different fields have found ways to try to quantify the overall effects of inclusive and exclusive policies. One detailed typology is The Immigrant Climate Index (ICI), developed by Professors Huyen Pham and Pham Hoang Van, which assigns a score to every state that reflects the political climate for immigrants in that state based on legislation enacted at the state and local levels from 2005 to 2020.¹²² The ICI classifies laws affecting all of the areas noted above into four weighted tiers to capture the overall climate for immigrants, with a higher positive score denoting a more hospitable climate and a lower negative score denoting a more hostile climate.

A similar, but cruder, analysis by two professors of public health, Dr. Maria-Elena De Trinidad Young and Dr. Steven P. Wallace, summed the total number of criminalization and integration policies separately for each state and came up with a typology of four policy contexts: “high integration,

120. *Id.*

121. See Cuisson Villazor & Gulasekaram, *supra* note 15; Wiebe, *supra* note 20.

122. Huyen Pham & Pham Hoang Van, *The Immigrant Climate Index*, BAYLOR UNIV. https://sites.baylor.edu/van_pham/the-immigrant-climate-index-ici/ [https://perma.cc/NA2C-QXNJ]; see also Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 NYU L. REV. 125 (2019); Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION LAW (Gabriel Jack Chin & Carissa Hessick eds. 2014).

low criminalization (eighteen states); high integration, high criminalization (thirteen states); low integration, high criminalization (sixteen states); and low integration, low criminalization (four states).¹²³ States in the first category (high integration, low criminalization) are the most hospitable to immigrants, while those in the third category (low integration, high criminalization) are the most hostile.

Part IV below, which categorizes certain ICE offices as located in either “sanctuary” or “antisanctuary” locations, draws on these efforts to assess the cumulative impact of subfederal policies. As discussed further in Part IV, in regions composed of multiple states that are especially hospitable or hostile to immigrants, one might expect either a dampening or amplifying effect on federal enforcement due to the political pressure exerted by states and localities on ICE field offices. Before turning to the empirical analysis, however, it is necessary to understand the political pressure exerted in the other direction by the federal government.

B. Top-Down Impact of Central Policies

While states and localities exert bottom-up pressure on ICE field offices, the President, the Secretary of DHS, and the Director of ICE exert top-down pressure through regulations, guidance documents, and internal agency procedures. Top-down forces can “resolve discrepancies taking place on the ground and [] ensure that immigration policy achieves the goals set by those both responsible and accountable for making across-the-board decisions.”¹²⁴ However, there are at least two major challenges in ensuring that central policies are implemented as intended: bureaucratic buy-in and field office discretion. Additionally, it is important to recognize that the federal government can drive regional differences through decisions about where detention centers are located, whether detention center contracts include a “guaranteed minimum” number of beds, and how resources are allocated among ERO field offices.

1. Bureaucratic Buy-In

As Professor Jennifer Chacón has observed, in the last two years of his administration, President Obama “made a number of high-profile efforts to reduce some of the wild local variability and punitive excesses of

123. Maria-Elena De Trinidad Young & Dr. Steven P. Wallace, *Included, but Deportable: A New Public Health Approach to Policies that Criminalize and Integrate Immigrants*, 109 AM. J. PUB. HEALTH 1171, 1173 (2019).

124. Landau, *supra* note 19, at 1234.

immigration enforcement.”¹²⁵ These efforts, which included setting forth clear immigration enforcement priorities and encouraging the use of prosecutorial discretion, were met with resistance by many ICE officers. For example, “ICE officers in Houston publicly contested [ICE Director] Morton’s prosecutorial discretion policy. . . .”¹²⁶ The National Immigration and Customs Enforcement Council, which represented 7,700 of ICE’s 20,000 employees at that time, went so far as to vote no confidence in ICE Director Morton.¹²⁷

Professors Marjorie S. Zatz and Nancy Rodriguez stress that “[t]he slow and, at best, uneven, response to the Morton Memos across jurisdictions was noted by many.”¹²⁸ They point out that a survey of immigration attorneys conducted by the American Immigration Lawyers Association and the American Immigration Council found that “in the majority of offices ICE agents, trial attorneys and supervisors admitted that they had not implemented the memoranda and there had been *no changes in policy or practice*.”¹²⁹

Tensions between DHS leadership and ICE field offices heated up again immediately after the new policy of Deferred Action for Childhood Arrivals (DACA) went into effect. A group of ICE officers, including the President of the National Immigration and Customs Enforcement Council, Chris Crane, sued to stop DACA from being implemented.¹³⁰ Another lawsuit was brought in 2014 by the supervising attorney of ICE’s Phoenix Field Office, also challenging the guidance on prosecutorial discretion, reflecting “continued tensions within the agency’s ranks over the appropriate use of prosecutorial discretion in deportation proceedings.”¹³¹ Although these lawsuits were not successful, they reflect overt rejection of central policies by ICE officers.

125. Chacón, *supra* note 13, at 1349.

126. Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 L. & SOC. INQUIRY 666, 677 (2014).

127. *Id.* at 677–78.

128. *Id.* at 680.

129. *Id.* (emphasis added) (quoting AM. IMMIGR. LAWS. ASS’N, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION (2011)).

130. *Id.* at 677; Crane v. Napolitano, No. 12-CV-03247-O, 2013 WL 8211660 (N.D. Tex. July 31, 2013) (dismissing lawsuit brought by Immigration and Customs Enforcement agents challenging new immigration initiatives for lack of standing), *aff’d sub nom*, Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015).

131. Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 693 n.204 (2015) (citing Julia Preston, *Suit Previews Turmoil That Immigration Overhaul May Cause Its Enforcers*, N.Y. TIMES, Dec. 12, 2014, at A21).

2. Field Office Discretion

Besides the problem of bureaucratic buy-in, central policies can fail to promote uniformity if they leave too much discretion to field offices. For example, the Trump Administration's executive order addressing immigration enforcement in the interior of the country failed to designate any clear priorities, giving ICE officers wide discretion in deciding who to arrest, detain, and deport.¹³² The Biden Administration's prosecutorial discretion memorandum dated September 30, 2021 provides more guidance than Trump's executive order did, as it delineates three major priority categories (threats to national security, threats to public safety, and threats to border security) and provides a list of mitigating factors. However, ICE field offices still have wide discretion in any given case.¹³³

3. Allocation of Resources and Decisions about Detention Facilities

The federal government itself can also drive regional differences through decisions about how to allocate resources among field offices. For example, in its Fiscal Year (FY) 2019 annual report, ICE stated that the "sustained increase in migration" that year required ERO to "redirect its enforcement personnel and detention capacity to support border enforcement efforts as well as a significantly increased detained population."¹³⁴ According to the report, this "negatively impacted the number of ERO's interior arrests, as well as the percentage of removals stemming from such arrests."¹³⁵ In FY 2019, ERO reassigned 350 officers to Southwest Border operations.¹³⁶ That number increased in FY 2021, when "ERO had up to 1,000 of its 6,228 officers supporting Southwest Border efforts, roughly one sixth of the operational workforce."¹³⁷

132. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 § 13 (Jan. 30, 2017); *see also* Chacón, *supra* note 13, at 1350 ("If 2014–2016 was a period of increasingly centralized control over immigration enforcement discretion, the period from 2017 to the present is largely characterized by federal immigration enforcement initiatives aimed at decentralizing and diffusing immigration enforcement discretion.").

133. Memorandum from Alejandro N. Mayorkas, Sec'y, Dep't Homeland Sec., to Tae D. Johnson, Acting Dir., ICE (Sep. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [<https://perma.cc/9ZNX-BVBB>].

134. U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 3, [hereinafter ICE FY 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT] <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf> [<https://perma.cc/5K4X-G8WW>].

135. ICE FY 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT, *supra* note 134, at 3.

136. *Id.* at 12.

137. ICE ANNUAL REPORT FISCAL YEAR 2021, *supra* note 80, at 11. The creation of a new field office in Harlingen, Texas, in 2021 was part of this response to increased migration along the Southwest Border. *Id.* at 8.

Shifting resources to the Southwest Border impacts not only arrests, but also the makeup of the detained population. CBP arrests migrants within 100 miles of the border, most of whom have no criminal history but are subject to mandatory detention under the INA.¹³⁸ By contrast, the vast majority of arrests by ERO in the interior involve individuals with a pending criminal charge or a conviction.¹³⁹ When ERO shifts resources from arresting people in the interior to detaining individuals arrested by CBP, more of the detained population will have no criminal history.¹⁴⁰

Decisions by DHS/ICE leadership about where to locate detention centers also exerts top-down pressure on field offices. States and localities play an important role in deciding whether to participate in immigration detention, as discussed above, but the federal government can also make strategic decisions to seek out locations for detention facilities that serve its interests. For example, the concentration of detained individuals in Louisiana and Texas is advantageous to ICE for several reasons, including:¹⁴¹ the proximity to Mexico and Central America facilitates removals; harsh immigration judges deny the vast majority of asylum cases;¹⁴² federal district courts rarely grant habeas petitions filed by noncitizens challenging their detention;¹⁴³ and cases are in the jurisdiction of the Fifth Circuit, a conservative court.¹⁴⁴ Detention is therefore an area where bottom up and top down pressures converge.

The federal government's contractual agreements with detention facility owners and operators may amplify the pressure to detain. In particular, many detention facility contracts include "mandatory minimums," meaning

138. ICE FY 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT, *supra* note 134, at 3.

139. *Id.*

140. *Id.* at 3, 6, 12. In FY 2019, 63% of the detained population was initially apprehended by CBP. *Id.* at 6.

141. In FY 2019, ICE's average daily detained population was 16,567 in Texas and 6,171 in Louisiana, making these the two states with the largest numbers of individuals in ICE custody. ICE FY 19 Detention Statistics (on file with author).

142. See *Judge-by-Judge Decisions in Immigration Courts: FY 2016-2021*, TRAC IMMIGR. (2021) <https://trac.syr.edu/immigration/reports/judge2021/denialrates.html> [<https://perma.cc/J4GZ-PJBB>] (showing denial rates greater than 90% among many judges in the Jena and Oakdale Immigration Courts, which handle detained cases in Louisiana).

143. TULANE UNIVERSITY LAW SCHOOL IMMIGRANT RIGHTS CLINIC, NO END IN SIGHT: PROLONGED AND PUNITIVE DETENTION OF IMMIGRANTS IN LOUISIANA 12 (2021), <https://law.tulane.edu/sites/law.tulane.edu/files/TLS%20No%20End%20In%20Sight%20Single%20Pages%20FINAL.pdf> [<https://perma.cc/CJ9J-9BQB>] (examining habeas petitions filed by noncitizens in the Western District of Louisiana over a ten-year period and finding that the court ordered release in less than 1% of cases, although ICE decided to release the petitioner in 22% of cases after a habeas was filed).

144. See Ramji-Nogales, Schoenholtz & Schrag, *supra* note 23, at 362, tbl.2 (finding that the Fifth Circuit remanded only 2.4% of asylum and related cases); Jess A. Velona, *Partisan Imbalance on the U.S. Courts of Appeals*, 89 JUDICATURE 25, 31 (2005) (finding that the chance of getting an all-Republican panel was 50 times higher in the Fifth Circuit than in two other circuits in 2005).

ICE must pay a per diem for a certain number of beds regardless of whether they are filled. Some field offices, like San Antonio and New Orleans, have over 6,000 “guaranteed minimum” beds, while others have none.¹⁴⁵ Knowing that the federal government must pay for a certain number of beds may lead to transfers to locations with high numbers of guaranteed minimums and put pressure on field offices to keep those beds filled. States and localities that include guaranteed minimums in their contractual agreements with ICE are also exerting pressure on field offices in this situation, so bottom-up as well as top-down forces are involved.

In sum, decisions made by DHS leadership about how to allocate resources and how to handle detention can impact the way that field offices approach arrests and detention. It is difficult to disentangle the impact of these decisions by DHS leadership from the role of discretion by field offices. However, the data discussed in Part III below show variations across all field offices, not just those that oversee the Southwest Border or large detained populations, suggesting that discretion does play an important role.

C. Regional Effects

ICE field offices are where these bottom-up and top-down pressures converge. Although all ICE field offices are supposedly enforcing the same body of federal laws, there are many reasons why differences may emerge besides those discussed above. First, ICE’s field offices are physically, socially, and politically rooted in localities and states. As Dave Owen has argued, federal officials can be influenced by the “awareness that comes from geographic proximity,”¹⁴⁶ since many of them “live in the areas where they work, and have often done so for decades, if not their entire lives.”¹⁴⁷

Second, ICE’s dependence on state and local cooperation can lead to “a continuous process of . . . negotiation” with state and local governments.¹⁴⁸ As a result of these negotiations, federal immigration enforcement may look different in different parts of the country. ICE’s field offices may serve as mediators “by bridging gaps and conflicts between Washington and the

145. ICE FY2019 Detention Statistics (on file with author). The data from FY2019 show that the New Orleans field office had 6,415 guaranteed minimum detention beds in its jurisdiction and San Antonio had 7,235, compared to an average of 1255. Several field offices including Boston, Chicago, Dallas, New York City, and Salt Lake City, did not have any guaranteed minimums in their areas of responsibility.

146. Owen, *supra* note 7, at 73.

147. *Id.* at 108.

148. RONALD L. WATTS, EXECUTIVE FEDERALISM: A COMPARATIVE ANALYSIS 2–4 (1989); Bulman-Pozen, *supra* note 6, at 973 (quoting WATTS, *supra*, at 3–4).

regions over which they are responsible.”¹⁴⁹ Variations in enforcement practices at the field office level may reflect these efforts to mediate competing pressures.¹⁵⁰

Third, as noted above, regional effects may emerge from the *aggregate* effects that can occur when groups of states or localities exert pressure on ICE field offices. Looking only at an individual state (or localities within a state) fails to capture that impact. Professor Jennifer Chacón has noted that “national data suggest that where a state’s enforcement policies are aligned with, rather than compete with, federal policies, federal enforcement efforts will be amplified.”¹⁵¹ A regional approach takes this analysis one step further by examining the amplifying effects that may occur when *multiple* states or localities are aligned with federal policies.

Fourth, as discussed above, decisions made by DHS/ICE leadership about how to allocate resources, including personnel, among field offices can produce regional differences. Likewise, decisions made by DHS/ICE leadership about detention facility locations and contracts can influence how field offices approach arrest and detention. To the extent that variations resulting from these decisions by DHS/ICE leadership reflect the agency’s centralized goals, they should be distinguished from variations resulting from factors outside the agency’s control. But untangling the impact of these different factors on field offices is difficult.

The empirical analysis presented below informs this discussion by examining variations among ICE’s field offices in key aspects of immigration enforcement.

III. REGIONAL VARIATIONS IN IMMIGRATION ENFORCEMENT

This section analyzes data from FY 2019 to examine disparities among ICE’s twenty-four field offices in detainer requests, arrests, removals, the use of detention, and the use of alternatives to detention. More recent data from FY 2020 was not used because the COVID-19 pandemic affected many aspects of immigration enforcement in ways that will likely be temporary. State and county-level data on immigration detainees is published by Transaction Records Access Clearinghouse (TRAC) based at Syracuse University.¹⁵² This data was compiled based on the geographical area of responsibility for each ICE field office in order to analyze

149. See Blank & Rosen-Zvi, *supra* note 7, at 1907.

150. For a thorough discussion of the merits and drawbacks of federal regions, see *id.* at 1943–66.

151. Chacón, *supra* note 13, at 1391.

152. See *About Us*, TRAC, <https://trac.syr.edu/aboutTRACgeneral.html> [<https://perma.cc/5W7E-TJXH>].

differences in detainer requests among field offices.¹⁵³ With respect to arrests and removals, ICE publishes data that is already broken down by field office, which ICE calls “local statistics.”¹⁵⁴ ICE publishes detention data by detention facility. For FY 2019, ICE published data on 212 detention facilities, which were sorted and compiled by field office.¹⁵⁵ ICE publishes data on alternatives to detention by field office.¹⁵⁶

Because field offices are responsible for geographic regions with immigrant populations of different sizes, rates are calculated based on the number of detainees requested and the number of noncitizens arrested, removed, and detained *for every 1000 unauthorized individuals in the field office’s area of responsibility*. Additionally, percentages are calculated where appropriate to reflect how national numbers are distributed among field offices, as well as to examine what proportion of a field office’s arrests, removals, and detentions involved noncitizens with a certain profile (e.g., no criminal history, conviction, pending charge).

The analysis below specifically examines and compares field offices in sanctuary and antisanctuary regions. Sanctuary regions are those that generally resist cooperation with ICE and have a more hospitable and inclusive climate for immigrants, while antisanctuary regions are those that cooperate with ICE and have a more hostile and exclusive climate for immigrants. In order to categorize regions as sanctuary or antisanctuary, this Article relies on maps created by organizations such as the Immigrant Legal Resources Center.¹⁵⁷ The Immigrant Climate Index (ICI) developed by Professors Huyen Pham and Pham Hoang Van, which assigns a score to every state’s reflecting political climate for immigrants, is also a very useful tool in assessing the climate for immigrants across multiple states.¹⁵⁸ More

153. The spreadsheet of compiled data is on file with author.

154. See *ERO FY19 Local Statistics*, ICE, <https://www.ice.gov/sites/default/files/documents/Report/2019/ero-fy19-localstatistics.pdf> [<https://perma.cc/6EX8-S4P5>].

155. ICE’s FY 2019 detention statistics are on file with author.

156. Alternatives to Detention is included as one of the tabs in ICE’s FY 2019 Detention Statistics.

157. For maps of sanctuary and antisanctuary states and localities, see *National Map of Local Entanglement with ICE*, IMMIGRANT LEGAL RES. CTR. (Nov. 13 2019), <https://www.ilrc.org/local-enforcement-map> [<https://perma.cc/SCP9-WFNS>]; *Anti-Sanctuary States Map*, FACING SOUTH, <https://www.facingsouth.org/files/anti-sanctuary-states-map-v3png> [<https://perma.cc/F738-PSBB>]; *Sanctuary Policy FAQ*, NAT’L CONF. OF STATE LEGISLATORS (June 20, 2019), <https://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx> [<https://perma.cc/7DPY-8ET2>].

158. Pham & Hoang Van, *supra* note 122; see also Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125 (2019); Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION LAW (Gabriel Jack Chin & Carissa Hessick eds., 2014).

comprehensive tables that include data for all ERO field offices are included in the Appendix.

The analysis below refers to the following seven field offices as being located in sanctuary regions: Baltimore, Boston, Los Angeles, New York City, Newark, San Francisco, and Seattle. The Seattle Field Office oversees two sanctuary states, Washington and Oregon. The Boston Field Office oversees four sanctuary states, Massachusetts, Connecticut, Vermont, and Rhode Island. The other field offices in this category (Los Angeles, San Francisco, Baltimore, Newark, and New York City) are composed of part or all of a state where numerous localities have adopted sanctuary policies. Data on the Chicago Field Office is often reported with data on these seven field offices because Illinois is a sanctuary state and has, by far, the largest undocumented population among the group of states overseen by that field office, which may make it particularly influential.

The field offices that are considered located in antisanctuary regions are: Atlanta, Dallas, Houston, Miami, New Orleans, Phoenix, and San Antonio. The states of Texas, Florida, and Arizona all have state antisanctuary laws. Because the El Paso Field Office oversees not only West Texas but also New Mexico, which is not an antisanctuary state, it is not categorized as being in an antisanctuary region. The San Diego Field Office is located in a state with a sanctuary law, but it oversees only San Diego County and Imperial County, and San Diego County joined the lawsuit challenging California's sanctuary law. San Diego therefore is not included in either category. In the jurisdiction of the New Orleans field offices, Mississippi, Alabama, and Tennessee have antisanctuary laws, while Arkansas and Louisiana do not. Given the extremely negative cumulative score of these five states using the ICI developed by Professors Huyen Pham and Pham Hoang Van, the New Orleans office is classified as located in an antisanctuary region.¹⁵⁹ The Atlanta Field Office also oversees three states that cumulatively have a highly negative score based on the ICI (Georgia, North Carolina, and South Carolina) and is therefore placed in the antisanctuary category.¹⁶⁰

159. The states overseen by the New Orleans field office had a cumulative ICI score of -182 at the time of writing. The states scores utilized here were previously published online and are on file with the author. At the time of publication, the state scores were being updated and not yet publicly available.

160. The states overseen by the Atlanta field office had a cumulative ICI score of -179 at the time of writing. After Arizona passed SB1070 in 2010, an anti-immigrant statute that was partly struck down as unconstitutional by the Supreme Court, the states that immediately passed similar laws in 2011 were Alabama (HB 56) (part of the New Orleans field office), Georgia (HB 87) and South Carolina (SB 20) (both part of the Atlanta field office). See Support Our Law Enforcement and Safe Neighborhoods Act, S. 1070 (SB 1070), 49th Leg., 2d Reg. Sess. (Ariz. 2010), amended by H.R. 2162, 49th Leg., 2d Reg.

One of the challenges of this approach is that two of the field offices in antisantuary regions (San Antonio and Phoenix) also oversee parts of the Southwest Border. This makes it especially difficult to distinguish variations related to the substantial resources they receive to support operations along the Southwest Border from variations related to the exercise of discretion and other factors. However, there are still five other field offices in antisantuary regions that are not in border regions, so one can set aside the San Antonio and Phoenix field offices if one chooses and focus on the other five. Additionally, not all of the variables examined below are affected by proximity to the border. For example, detainer requests generally pertain to individuals already in the United States who were arrested for a crime, not migrants who recently crossed the border.

Using the data in the Appendix for all twenty-four field offices, one can also compare field offices in sanctuary regions to field offices in the interior of the country that do not fit in either the sanctuary or antisantuary categories. Comparisons of field offices in the interior that do not fit in either category to each other also reveal disparities. While not knowing the resources that each field office receives is still a limitation of the study, there is no particular reason to think that field offices apart from those that oversee major border crossing areas or especially large detained populations receive resources disproportionate to their unauthorized population.

Overall, the analyses below demonstrate substantial variations among field offices after taking the size of the unauthorized population into account. Not only are there stark differences between field offices in sanctuary and antisantuary regions, but striking differences also exist within each of these categories. The discrepancies regarding the arrest, detention, and removal of noncitizens with no criminal history are especially important since these areas involve the greatest exercise of discretion by field offices, and the variations cannot be explained by the decisions of state and local law enforcement agencies to cooperate or not cooperate with ICE.

Sess. (Ariz. 2010); Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, No. 535, 2011 Ala. Laws 888 (codified as amended at ALA. CODE § 31-13-1 to - 35); Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, No. 252, 2011 Ga. Laws 794 (codified in scattered sections of GA. CODE ANN. tits. 13, 16, 17, 35, 36, 42, 45, 50); S.B. 20, No. 69, 2011 S.C. Acts 325 (codified in scattered sections of S.C. CODE ANN. tits. 6, 8, 16, 17, 23, 41).

A. ICE Detainer Requests

Nationwide, ICE issued 165,768 detainer requests in FY 2019, and information about location was available in 163,813 cases.¹⁶¹ About a quarter of the detainer requests (39,268 or 24%) were in California, and 19% (31,462) were in Texas.¹⁶² Much of the discussion about detainers focuses on California and Texas because the numbers there are so high. But looking at detainer requests by field office, after taking the size of the undocumented population into account, provides a more expansive view of geographic disparities around the country.

Examining the number of detainer requests issued by each field office per 1,000 undocumented individuals shows a wide range, from a rate of 6.2 by the New York City Field Office to 80.3 by the Buffalo Field Office. Buffalo had, by far, the highest detainer request rate, as the field office with the next highest number of detainer requests was New Orleans, with a rate of 28.2. The Buffalo Field Office is unusual in that its area of responsibility has a very small undocumented population (44,000) but includes a major border crossing with Canada and a large detention center (Batavia). By comparison, other field offices that oversee border areas (e.g. San Antonio, El Paso, Phoenix, and San Diego) have much larger undocumented populations. The Buffalo Field Office may therefore receive resources for enforcement that are disproportionate to its undocumented population, and it may feel pressure from headquarters to arrest and detain due to its location. Upstate New York has also experienced a major increase in its foreign born population during the past decade, including a large influx of refugees, although the region remains predominantly non-Hispanic White.¹⁶³ This demographic shift could be leading to reactionary anti-immigrant backlash.¹⁶⁴ But taking a step back, the Buffalo Field Office was

161. *Latest Data: Immigration and Customs Enforcement Detainers, ICE Data Through June 2020*, TRAC, <https://trac.syr.edu/phptools/immigration/detain/> [<https://perma.cc/B5NW-6LAN>].

162. *Id.* The next highest states were Florida (6% or 10,012), Georgia (5% or 8,524), New York (5% or 8,506), and Arizona (4% or 5,878). At the local level, the jails that received the most detainer requests were Harris County Jail in Texas (5,089), Maricopa County Jail in Arizona (2,910), Hidalgo County Jail in Texas (2,451), Gwinnett County Jail in Georgia (2,321), and Dallas County Jail in Texas (2,162). *Id.*

163. See OFFICE OF THE STATE COMPTROLLER, A PORTRAIT OF IMMIGRANTS IN NEW YORK 7 (2016), <https://www.osc.state.ny.us/files/reports/special-topics/pdf/economic-immigrants-2016.pdf> [<https://perma.cc/WW4Y-QXEW>]; *New York State Population Topped 20 Million in 2020*, U.S. CENSUS BUREAU, NEW YORK: 2020 CENSUS (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/new-york-population-change-between-census-decade.html> (showing that counties in upstate New York had Hispanic populations well below 10%).

164. See generally Daniel J. Hopkins, *Politicized Places: Explaining Where and When Immigrants Provoke Local Opposition*, 104 AM. POL. SCI. REV. 40 (2010) (concluding that “hostile

responsible for only 2.2% of all detainer requests, so its overall role in detainer requests remains quite small.

The average detainer request rate across field offices was 18.0 (or 15.3 if you exclude Buffalo as an outlier). Following Buffalo (80.3) and New Orleans (28.2), the field offices with the highest rates of detainer requests were San Antonio (25.0), St. Paul (21.7), Phoenix (20.9), Atlanta (20.3), El Paso (19.6), and Philadelphia (18.8). Four of the eight field offices comprising the top third in detention requests were in antisantuary regions (New Orleans, San Antonio, Phoenix, and Atlanta). It makes sense for there to be a higher rate of detainer requests in antisantuary regions, where the requests are likely to be more effective due to cooperation by state and local law enforcement. However, even among field offices in antisantuary regions, there is substantial variation in detainer requests. For example, the New Orleans Field Office's rate of detainer requests was 40% higher than that of the Phoenix Field Office.

Turning to the bottom third, the five field offices with the *lowest* rates of detainer requests were all in sanctuary regions: New York City (6.2), Boston (6.9), Baltimore (6.9), Newark (7.6), and Seattle (10.0). After Seattle was the Chicago Field Office (10.5), which includes the sanctuary state of Illinois. The two field offices in sanctuary regions that were *not* in the bottom third were Los Angeles (14.1) and San Francisco (15.6). Looking at variation among field offices in sanctuary regions, the Los Angeles Field Office had a rate that was twice as high as the New York City, Boston, and Baltimore field offices, and the San Francisco Field Office had a rate that was twice as high as Newark's.

There are several possible reasons why ICE offices in five out of seven sanctuary regions are requesting relatively low numbers of detainees. First, if ICE officers know that a detainer request is going to be rejected, they may decide there is no point in issuing a request. Alternatively, the attitudes of the ICE officers may be influenced by state and local politics, making them

political reactions to neighboring immigrants are most likely when communities undergo sudden influxes of immigrants and when salient national rhetoric reinforces the threat"); Benjamin J. Newman, *Acculturating Contexts and Anglo Opposition to Immigration in the United States*, 57 AM. J. POL. SCI. 374 (2012) (showing that "over-time growth in local Hispanic populations triggers threat and opposition to immigration among whites residing in contexts with few initial Hispanics but reduces threat and opposition to immigration among whites residing in contexts with large preexisting Hispanic populations"); Ryan D. Enos, *Causal Effect of Intergroup Contact on Exclusionary Attitudes*, 111 PROC. NATL. ACAD. SCI. U.S.A. 3699 (2014) (demonstrating with a randomized controlled trial that even minor demographic changes cause strong exclusionary effect); cf. Eric Kaufmann & Matthew J. Goodwin, *The Diversity Wave: A Meta-Analysis of the Native-Born White Response to Ethnic Diversity*, 76 SOC. SCI. RES. 120 (2018) (concluding, based on 171 studies, that "higher diversity predict[s] threat responses at the smallest and largest scales, whereas in units of 5000–10,000 people (such as tracts or neighbourhoods), diversity is associated with reduced threat").

less aggressive with enforcement in the form of detainer requests. Field offices could also be intentionally mediating or negotiating the political environment by moderating detainer requests. Another possibility is that ICE's field offices in San Francisco and Los Angeles are retaliating against those sanctuary regions or trying to send a message through more aggressive use of detainers than field offices in other sanctuary regions. Regardless of the explanation, there are clearly regional variations in ICE's practices around detainer requests. Of note, the average detainer request rate among field offices in antisanctuary regions was more than twice as high as the average among those in sanctuary regions.

Table 2: Detainer Request Rates for Field Offices in Sanctuary and Antisanctuary Regions in FY 2019. (Rates Represent the Number of Detainer Requests for Every 1,000 Unauthorized Individuals in a Field Office's Geographic Area of Responsibility).

Field Office	Detainer Request Rate
Baltimore	6.9
Boston	6.9
Los Angeles	14.1
New York City	6.2
Newark	7.6
San Francisco	15.6
Seattle	10
<i>Sanctuary Average</i>	9.6
Atlanta	20.3
Dallas	14.8
Houston	16.9
Miami	13.9
New Orleans	28.2
Phoenix	20.9
San Antonio	25
<i>Antisanctuary Average</i>	20

B. Administrative Arrests

In FY 2019, ICE's twenty-four field offices made a total of 143,099 administrative arrests.¹⁶⁵ Six out of the twenty-four field offices were responsible for over 50% of these arrests, all of them in antisantuary regions: Dallas (11.8%), Atlanta (9.3%), San Antonio (8.4%), Houston (8.2%), New Orleans (7.3%), and Miami (6.6%). The Los Angeles and San Francisco field offices, which are responsible for the two areas with the largest number of unauthorized individuals in the country, respectively made only 4.7% and 3.6% of all arrests nationwide.

The average arrest rate (i.e., number of arrests per 1,000 undocumented individuals) was 15.4, with a range from 3.1 by the New York City Field Office to 29.0 by the New Orleans Field Office, nearly *ten times* as high. The lowest arrest rates were by field offices in sanctuary regions: New York City (3.1), Los Angeles (4.6), San Francisco (4.7), Baltimore (6.4), Boston (6.7), Newark (6.8), and Seattle (7.1). These seven field offices in sanctuary regions were the only ones with an arrest rate below 10, followed by the Chicago Field Office (10.7).¹⁶⁶ State and local policies regarding cooperation or noncooperation with ICE therefore appear to impact arrests.¹⁶⁷ Comparing sanctuary regions to each other, however, we still find significant disparities. For example, the arrest rate by the Newark Field Office is twice as high as the New York City Field Office.

The *highest* arrest rates were by the following field offices: New Orleans (29.0), San Antonio (28.7), Buffalo (28.6), Dallas (24.6), St. Paul (23.6), Philadelphia (21.9), Phoenix (21.0), and Salt Lake City (18.7). Looking at regions with especially large undocumented populations to help put these numbers into perspective, the Dallas Field Office had nearly *twice* the arrest rate of Miami (13.0), the Phoenix Field Office (21.0) had *twice* the arrest rate of Chicago (10.7), and the Atlanta Field Office (18.5) had over *four times* the arrest rate of Los Angeles (4.5). Interestingly, several field offices

165. *ERO Administrative Arrests by Filed Office (Area of Responsibility) and Month*, ICE, <https://www.ice.gov/sites/default/files/documents/Report/2019/ero-fy19-localstatistics.pdf> [<https://perma.cc/MZ5Z-VK44>]. Administrative Arrests include all ERO Programs. ERO Programs include Detention and Deportation (DDP), Fugitive Operations (FUG), Alternatives to Detention (ATD), Criminal Alien Program (CAP), Detained Docket Control (DDC), Non-Detained Docket Control (NDD), Violent Criminal Alien Section (VCS), Joint Criminal Alien Response Team (JCT), Juvenile (JUV), Law Enforcement Area Response (LEA), Mobile Criminal Alien Team (MCT), and 287(g). *Id.* The total number of administrative arrests (143,099) includes 2,653 administrative arrests that were not assigned to any field office. *Id.*

166. The other states overseen by the Chicago Field Office have relatively small undocumented populations, so Illinois is likely to be the most influential state in that group.

167. Chacón, *supra* note 13, at 1380 (explaining that “noncooperation policies shape federal enforcement outcomes”).

that are not in antisantuary regions have relatively high arrest rates, including St. Paul, Philadelphia, and Salt Lake City. These offices, along with New Orleans, Dallas and Houston, also do not oversee border areas. In addition to these overall arrest rates, it is helpful to examine the arrests of noncitizens with no criminal history, those with convictions, and those with a pending criminal charge. As noted above, differences in state and local cooperation policies are most likely to affect arrests of individuals with a conviction or pending charge, since the criminal justice system is where state and local law enforcement agencies come into play. Variations in arrests of individual with no criminal history have more to do with differences in how field offices exercise discretion.

1. Arrests of Noncitizens with No Criminal History

Across all field offices, the average arrest rate of individuals with *no criminal history* was 2.4, with a range from 0.3 for the Los Angeles Field Office to 7.2 for San Antonio. The bottom four were all in sanctuary regions—Los Angeles (0.3), San Francisco (0.4), New York City (0.5), and Boston (0.6)—followed by Houston (1.0), Newark (1.0), Dallas (1.2), and Salt Lake City (1.3). Two other sanctuary cities were ranked ninth and tenth: Baltimore (1.4) and Seattle (1.5). These figures show that arrest rates of noncitizens with no criminal history by field offices in sanctuary regions are well below the average, undercutting the notion that failure to cooperate with ICE will result in more people without a criminal history being arrested.

Interestingly, although Dallas, Houston, and Salt Lake City all have high overall arrest rates, ranking in the top third, when it comes to arrests of noncitizens with *no criminal history*, they are in the bottom third, with lower arrest rates than two sanctuary regions. Since Dallas and Houston are both in Texas, an antisantuary state, these figures suggest that factors other than state sanctuary policies play an influential role when it comes to decisions about arrests of noncitizens with no criminal history.

Turning to the field offices with the *highest* arrest rates of noncitizens with no criminal history, the top third included: San Antonio (7.2), Buffalo (6.5), Phoenix (4.3), Detroit (4.3), Philadelphia (4.1), El Paso (3.9), and New Orleans (3.5). Only three of these are in antisantuary regions (San Antonio, Phoenix, and New Orleans). Again, there are obvious disparities among field offices in antisantuary regions, with the San Antonio Field Office having an arrest rate seven times as high as Houston and six times as high as Dallas. San Antonio's especially high arrest rate is likely related to its role overseeing a long stretch of the Southwest Border and the additional

resources that ICE deployed to this region to help apprehend recent migrants.¹⁶⁸ The same may be true of Buffalo, although Buffalo's extremely high rate of detainer requests suggests that its arrests include a significant number of individuals already in the United States who have been charged with crimes, not just recent migrants.

Another way to look at this data is by the *percentage* of a field office's arrests that involve noncitizens with no criminal history. Examining percentages can help shed light on how a field office chooses to utilize its resources. The average percentage of noncriminal arrests across all field offices was 14.9%, with a range of approximately 5–25%. The two field offices that arrested the *lowest* percentage of people with no criminal history were Dallas (4.9%) and Houston (5.4%), and the two that arrested the *highest* percentage with no criminal history were San Antonio (25.2%) and El Paso (25.4%). The especially high rates by the San Antonio and El Paso Field Offices are likely due, in part, to the large number of recent migrants with no criminal history being arrested in those jurisdictions.

Looking at the percentage of noncriminal arrests in sanctuary regions complicates the picture. The data demonstrate a large spread among field offices in sanctuary regions with respect to the percentage of noncriminal arrests. Three field offices in sanctuary regions ranked among the bottom third in the percentage of noncriminal arrests: Los Angeles (7.1%), San Francisco (8.9%), and Boston (9.2%). Two ranked in the middle third: Newark (14.7%) and New York City (14.9%). And two ranked in the top third, along with Chicago (20.8%): Seattle (20.5%) and Baltimore (21.3%). Thus, the percentage of a field office's arrests involving noncitizens with no criminal history varies significantly among sanctuary regions, even though the arrest rates for noncitizens is low across field offices in sanctuary regions.

2. Arrests of Noncitizens with Convictions

Across all field offices, the average arrest rate for *convicted* noncitizens was 9.8, with a range from 1.9 for the New York City Field Office to 20.5 for Buffalo. The field offices in the bottom third consisted of all those in sanctuary regions, followed by Chicago: New York City (1.9), Newark (3.6), Baltimore (3.8), Boston (3.9), Los Angeles (4.0), San Francisco (4.0), Seattle (4.9), and Chicago (6.3).

The field offices with the *highest* arrest rates of noncitizens with convictions were Buffalo (20.5), Dallas (18.3), New Orleans (17.3), San

168. See *supra* notes 134–137 and accompanying text.

Antonio (15.9), St. Paul (15.8), Philadelphia (14.0), Salt Lake City (13.8), and Houston (12.9). Only half of these field offices are located in antisanctuary regions. These figures suggest that achieving a high rate of arrests of noncitizens with convictions does not require an antisanctuary law. Nor do antisanctuary laws necessarily correspond to very high rates of arrests of individuals with convictions. For example, the field offices in Phoenix (10.7) and Atlanta (11.2) are located in antisanctuary regions but had arrest rates closer to the average of 9.8.

Another way to look at the data is to examine the percentage of a field office's total arrests involving noncitizens with convictions. The average percentage of noncriminal arrests was 64.5%, with a range of approximately 50–87%. In all but two of the field offices, 50–75% of noncitizens arrested in FY 2019 had a criminal conviction. The two field offices that stand out are Los Angeles and San Francisco, where, respectively, 87% and 84% of arrested noncitizens have a conviction. These field offices demonstrate that it is possible for a field office to focus primarily on criminal arrests in a sanctuary region, even if overall arrest rates remain low compared to other parts of the country. Other field offices with high percentages of arrests involving noncitizens with convictions were Dallas (74.4%), Salt Lake City (74.0%), Denver (72.3%), Buffalo (71.6%) and Houston (71.5%). The Dallas, Houston, and Salt Lake City field offices all had low arrest rates of noncitizens without a criminal history, ranking in the bottom third, but maintained high arrest rates of noncitizens with convictions, ranking in the top third.

3. *Arrests of Noncitizens with Pending Charges*

The average arrest rate for noncitizens with a pending charge was 3.2, with a range from 0.29 in Los Angeles to 8.17 in New Orleans, *twenty-eight times as high*. The five field offices with the lowest arrest rates of noncitizens with pending charges were all in sanctuary regions—Los Angeles (0.3), San Francisco (0.3), New York City (0.7), Seattle (0.8), and Baltimore (1.3)—followed by Buffalo (1.6), San Diego (1.8), and Denver (1.9). The two other field offices in sanctuary regions, Boston (2.2) and Newark (2.2), ranked in the middle third but were still below average. At the high end, six out of the eight field offices in the top third were in antisanctuary regions: New Orleans (8.17), Phoenix (6.0), St. Paul (5.6), San Antonio (5.5), Atlanta (5.5), Dallas (5.1), Houston (4.2), and Washington, D.C. (3.0). Once again, there is variation among field offices in sanctuary regions, as well as among field offices in antisanctuary regions. For example, the Baltimore Field Office's arrest rate was four times as high

Los Angeles's, and the New Orleans Field Office had an arrest rate twice as high as Houston.

Table 3: Arrest Rates for Field Offices in Sanctuary and Antisanctuary Regions in FY 2019. (Rates Represent the Number of Arrests for Every 1000 Unauthorized Individuals in a Field Office's Geographic Area of Responsibility).

Field Office	Overall Arrest Rate	Arrest Rate: No Criminal History	Arrest Rate: Convicted	Arrest Rate: Pending Charge
Baltimore	6.4	1.4	3.8	1.3
Boston	6.7	0.6	3.9	2.2
Los Angeles	4.6	0.3	4	0.3
New York City	3.1	0.5	1.9	0.7
Newark	6.8	1	3.6	2.2
San Francisco	4.7	0.4	4	0.3
Seattle	7.1	1.5	4.9	0.8
Sanctuary average	5.6	0.8	3.7	1.1
Atlanta	18.5	1.8	11.2	5.5
Dallas	24.6	1.2	18.3	5.1
Houston	18	1	12.9	4.2
Miami	13	1.6	7.6	3.8
New Orleans	29	3.5	17.3	8.2
Phoenix	21	4.3	10.7	6
San Antonio	28.7	7.2	15.9	5.5
Antisanctuary average	21.8	2.9	13.4	5.5

C. Removals

There were 267,136 removals in FY 2019. One field office, San Antonio, was responsible for nearly a quarter of all the removals in the country (23.7%). San Antonio's exceptionally high removal rate is no doubt related to the removal of recent migrants, since this field office oversees a long stretch of the Southwest Border where crossings commonly occur. The number of removals carried out by San Antonio was nearly double the number of removals by Phoenix (12.6%), which also oversees part of the Southwest Border. Following Phoenix are two other field offices situated near the border, San Diego (8.8%), and El Paso (7.9%). Then come Houston (7.2%), Dallas (5.6%), Atlanta (5.4%), and New Orleans (5.1%), none of

which oversee a border area but all of which have large numbers of detention beds (to collect people before deportation), are located in antisanctuary regions, and are in the southern part of the United States, which facilitates deportation to Mexico and Central America. Each of the other field offices is responsible for only around 1–2% of the total number of removals nationwide.

Extreme variations existed among field offices in removal rates, which ranged from 3.5 in New York City to 154.2 in San Antonio, *forty-five times* higher. The average was 35.6, but only six field offices had a removal rate above the average because very high removal rates by just four field offices with jurisdiction over border areas distorted the average: San Antonio (154.2), El Paso (142.0), San Diego (125.6), and Phoenix (119.8). Setting aside these Southwest Border locations with especially high removal rates, the next highest were Buffalo (41.8), New Orleans (40.2), Houston (29.7), and Detroit (21.8), tied with Dallas (21.8).

Looking only at field offices in antisanctuary regions, the removal rate of the San Antonio Field Office was over *three times* the removal rate of New Orleans (40.2), *five times* the removal rate of Houston (29.7), *seven times* the removal rate of Dallas (21.8), and *over eleven times* the removal rate of Miami (13.3).

Six field offices in sanctuary regions had the lowest removal rates: New York City (3.4), Baltimore (4.2), San Francisco (4.7), Newark (5.8), Los Angeles (5.9), and Boston (6.2), followed by Chicago (7.2). The variation among them is relatively small compared to the variations among field offices in antisanctuary regions noted above. But it is still notable that the Chicago Field Office had over twice the arrest rate of the New York City Field Office.

The sections below break down removals for noncitizens with no criminal history, those with convictions, and those with a pending criminal charge.

1. Removals of Noncitizens with No Criminal History

The removal rate of noncitizens with no criminal history ranged from 0.6 for the San Francisco Field Office to 79.0 for San Antonio, *132 times higher*, with an average of 12.6. The field offices with the highest removal rate of noncitizens with no criminal history were: San Antonio (79.0), San Diego (71.8), Phoenix (45.1), El Paso (25.9), Buffalo (12.8), New Orleans (12.6), Detroit (8.5), and Houston (7.6).

The field offices with the lowest removal rates of noncitizens with no criminal history were: San Francisco (0.6), Baltimore (1.1), New York City

(1.2), Washington, D.C. (1.4), Boston (1.5), Chicago (1.5), Salt Lake City (1.5), and Los Angeles (1.8) tied with Newark (1.8). Six of these field offices are in sanctuary regions. But the Dallas Field Office (1.9), which is an antisantuary region, has a removal rate that was very close to Los Angeles and Newark. The Seattle Field Office stood out as the only field office in a sanctuary region that was not in the bottom ten, with a removal rate of 4.7, which is *eight times* as high as San Francisco.

Shifting to the percentage of a field office's removals involving individuals with no criminal history, the average was 27.8%, but ranged from 8.8% in Dallas to 57% in San Diego. After Dallas, the field offices with the lowest percentage of noncriminal removals were San Francisco (12.9%), Salt Lake City (14.0%), St. Paul (14.4%), Washington, D.C. (14.6%), El Paso (18.2%), Philadelphia (20.4%), and Chicago (20.8%). Thus, none of the field offices in sanctuary regions except for San Francisco were in the bottom third when looking at the percentage of removals involving noncitizens with no criminal history, even though they had low removal rates (i.e., number of removals for every 1,000 unauthorized individuals in their geographical area of responsibility).

The field offices with the highest percentages of noncriminal removals were San Diego (57.2%), San Antonio (51.2%), Detroit (39.1%), Seattle (38.3%), Phoenix (37.6%), New York City (36.4%), Miami (32.6%), and Newark (31.5%). The San Diego, San Antonio, and Phoenix Field Offices likely remove large numbers of recent migrants with no criminal history due to their location overseeing parts of the Southwest Border. For field offices away that do not oversee the border, however, the percentage of noncriminal removals may well reflect how the field office exercises discretion in using its resources, rather than differences in the populations they encounter.

The spread among field offices in sanctuary regions is especially notable. Three of the field offices in sanctuary regions (Seattle, New York City, and Newark) were among the top third of all field offices in terms of the percent of their removals that involved individuals with no criminal history. Three other field offices in sanctuary regions were in the middle third: Boston (23.6%), Baltimore (25.8%), and Los Angeles (29.9%). Their percentages of noncriminal removals were comparable to certain field offices in antisantuary regions, such as Houston (25.1%), Atlanta (26.5%), and New Orleans (31.2%). No field offices in sanctuary regions were among the bottom third of field offices with the lowest percentage of noncriminal removals.

2. *Removals of Noncitizens with Convictions*

Turning to *convicted* noncitizens, the removal rate ranged from 1.7 for the New York City Field Office to 108.7 for the El Paso Field Office, with an average of 20.1. The highest removal rates for convicted noncitizens were by El Paso (108.7), Phoenix (66.4), San Antonio (65.9), San Diego (47.3), Buffalo (27.3), New Orleans (21.2), Houston (19.6), and Dallas (17.2). Here, too, the field offices that oversee border regions had especially high rates of removals. Since recent migrants usually don't have convictions, as explained above, the high removal rates of convicted individuals by field offices that oversee border areas may reflect decisions by ICE to move convicted noncitizens to detention facilities in these regions in preparation for deportation. Following the five field offices mentioned above were Philadelphia (13.0), Atlanta (12.1), and St. Paul (11.2).

The field offices with removal rates for convicted noncitizens in the bottom third included all of the field offices in sanctuary regions except Seattle: New York City (1.7), Baltimore (2.3), Newark (2.9), Boston (3.3), Los Angeles (3.9), and San Francisco (3.9), which were followed by Chicago (4.9) and Miami (6.4). The Seattle Field Office's removal rate (6.8) was not much higher than Miami's.

If we look at the percentage of a field office's removals involving convicted noncitizens, the average was 60%, with a range of 37.7% to 83.3%. The field offices in the top third, with the largest percentage of removals involving convicted noncitizens, were: San Francisco (83.3%), Dallas (78.7%), El Paso (76.5%), Salt Lake City (73.7%), Washington, D.C. (72.1%), Philadelphia (69.4%), Chicago (66.6%), and St. Paul (66.0%). The San Francisco Field Office, located in a sanctuary region, tops the list, followed closely by Dallas, located in an antisantuary region. The other field offices in the top third were neither in sanctuary nor antisantuary regions.

The middle and bottom third both included a mix of sanctuary and antisantuary regions. The field offices in the bottom third were San Diego (37.7%), San Antonio (42.8%), Miami (48.4%), Newark (49.4%), Detroit (49.9%), New York City (50.0%), Boston (52.8%), and New Orleans (52.8%). Four of these field offices are in sanctuary regions (Newark, New York City, and Boston), and three are in antisantuary regions (San Antonio, Miami, and New Orleans), with percentages that are very similar.

3. *Removal of Noncitizens with a Pending Criminal Charge*

The removal rate of noncitizens with a *pending* charge (not a conviction) ranged from 0.18 for the San Francisco Field Office to 9.3 for the San Antonio Field Office, *fifty times higher*, with an average of 2.7. All of the sanctuary cities except Boston were in the bottom third—San Francisco (0.18), Los Angeles (0.27), New York City (0.46), Seattle (0.70), Baltimore (0.74), and Newark (1.1)—along with Atlanta (0.66), Chicago (0.84), Washington, D.C. (1.3), and Salt Lake City (1.3). The top third, with the highest rates, consisted of San Antonio (9.3), Phoenix (8.3), El Paso (7.5), New Orleans (6.2), San Diego (6.4), St. Paul (3.2), Dallas (2.7), and Miami (2.5), which includes five field offices in antisanctuary regions.

With respect to the percentage of a field office's removals involving noncitizens with a pending criminal charge, the average was 10.9%, with a range from 3.3% for the Atlanta Field Office to 23.7% for the Boston Field Office. A mix of field offices located in sanctuary and antisanctuary regions were in both the top third and the bottom third, suggesting that factors other than the region's sanctuary status were driving field offices' decisions about how much to focus on noncitizens with pending charges.¹⁶⁹

169. The top third of field offices, with the highest percentages of removals involving individuals with a pending charge, were: Boston (23.7%), Newark (19.1%), Miami (19.0%), St. Paul (19.0%), Baltimore (17.9%), New Orleans (16.0%), New York City (13.6%), and Washington, D.C. (13.3%). The bottom third, with the lowest percentages, were: Atlanta (3.3%), San Francisco (4.0%), Buffalo (4.0%), Los Angeles (4.6%), San Diego (5.1%), El Paso (5.3%), Seattle (5.7%), and San Antonio (6.0%).

Table 4: Removal Rates for Field Offices in Sanctuary and Antisanctuary Regions in FY 2019. (Rates Represent the Number of Removals for Every 1000 Unauthorized Individuals in a Field Office's Geographic Area of Responsibility).

Field Office	Overall Removal Rate	Removal Rate: No Criminal History	Removal Rate: Convicted	Removal Rate: Pending Charge
Baltimore	4.2	1.1	2.3	0.7
Boston	6.2	1.5	3.3	1.5
Los Angeles	5.9	1.8	3.9	0.3
New York City	3.5	1.2	1.7	0.5
Newark	5.8	1.8	2.9	1.1
San Francisco	4.7	0.6	3.9	0.2
Seattle	12.2	4.7	6.8	0.7
Sanctuary Average	6.1	1.8	3.5	0.7
Atlanta	20.2	5.3	12.1	0.7
Dallas	21.8	1.9	17.2	2.7
Houston	29.7	7.5	19.6	2.5
Miami	13.3	4.3	6.4	2.5
New Orleans	40.2	12.6	21.3	6.4
Phoenix	119.8	45.1	66.4	8.3
San Antonio	154.2	79	65.9	9.3
Antisanctuary Average	57.0	22.2	29.8	4.6

D. Detention

Huge disparities also exist among ICE field offices with respect to the size and profile of the detained population, as well as the use of ICE's Alternatives to Detention (ATD) program.¹⁷⁰ These are discussed below.

1. Detained Population

The total average daily detained population in FY 2019 was 49,143. At the extremes, the Baltimore Field Office oversaw an average daily detained population of just 313, while the San Antonio field office oversaw an

170. Significant variations among field offices also exist in detention center *conditions*, but that is beyond the scope of this Article. See U.S. DEP'T OF HOMELAND SEC., OFF. OF INSPECTOR GENERAL, OIG-19-18, ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS 12 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf> [<https://perma.cc/Y5T7-8YDY>]; U.S. GOV'T ACCOUNTABILITY OFF., IMMIGRATION DETENTION: ICE SHOULD ENHANCE ITS USE OF OVERSIGHT DATA AND MANAGEMENT OF DETAINEE COMPLAINTS 18, 22, 27, 41 (2020), <https://www.gao.gov/assets/710/708961.pdf> [<https://perma.cc/S9K8-GPUH>].

average daily detained population of 7,769. Just five field offices oversaw over half of all detained immigrants in the country: San Antonio (16%), New Orleans (13%), Phoenix (8%), Houston (8%), and El Paso (7%). The next highest was Atlanta (6%), and all other field offices had just 1–3% of the nation’s immigration detainees.

If we look at the detention rate for every 1,000 unauthorized individuals within each field office’s jurisdiction, the average is 6.5 with a range from 0.6 for the San Francisco Field Office to 22.3 for El Paso. The top four, with the highest detention rates, were El Paso (22.3), San Antonio (18.9), Phoenix (14.8), and New Orleans (18.2). The bottom four, with the lowest detention rates, were all located in sanctuary regions: San Francisco (0.6), New York City (1.3), Baltimore (1.4), and Los Angeles (1.5), followed by Chicago (1.8).

Variation in detention numbers is not surprising, given that detention beds are clustered in certain states such as Texas and Louisiana.¹⁷¹ Additionally, field offices responsible for areas along the U.S.-Mexico border oversee especially large numbers of “arriving aliens” and “certain other aliens” who recently entered the United States without inspection and are generally subject to so-called “mandatory” detention under INA § 235(b).¹⁷² Although detention under this INA section is called mandatory, ICE officers still have discretion to parole noncitizens (i.e. release them) in “for urgent humanitarian reasons or significant public benefit.”¹⁷³ There is no administrative or judicial review of parole decisions.

But there are also other unique pressures to detain on certain field offices based on “guaranteed minimums,” which, as explained above, refers to the minimum number of beds that ICE is required to pay for under a contract with a detention center operator, regardless of whether ICE fills those beds. Nationwide, ICE’s contracts included a total of 30,117 “guaranteed minimums” in FY 2019. Of those, 7,235 (24%) were within the jurisdiction of the San Antonio Field Office and 6,415 (21%) were within the jurisdiction of the New Orleans Field Office. The San Antonio and New

171. *Immigration and Customs Enforcement Detention: ICE Data Snapshots as of July 2019*, TRAC IMMIGRATION, <https://trac.syr.edu/phptools/immigration/detention/> [<https://perma.cc/6FCU-ZVQM>] (showing that Texas and Louisiana are the states with the largest numbers of detained immigrants).

172. An “arriving alien” means someone who seek admission at a port of entry or who is interdicted at sea. 8 C.F.R. § 1001.1(q) (2021); *see also* INA § 235(b), 8 U.S.C. § 1225(b) (generally requiring the detention of individuals seeking admission to the United States who appear subject to removal, including those arriving at a port of entry). Although detention is generally mandatory under INA § 235(b)(1), 8 U.S.C. § 1225(b)(1), ICE still has authority under this statutory provision to parole a noncitizen in “for urgent humanitarian reasons or significant public benefit.” There is no administrative or judicial review of the parole decision.

173. INA § 235(b)(1), 8 U.S.C. § 1225(b)(1).

Orleans Field Offices are therefore under unique pressure to keep people detained (as well as to arrest in order to fill detention beds). The field offices with the next highest numbers of guaranteed minimums are Atlanta (2,482 or 8%) and Phoenix (2,048 or 7%), which also have high arrest and detention rates.

At the opposite end of the spectrum, several field offices had *no* guaranteed minimums, including Boston, Chicago, Dallas, New York City, and Salt Lake City. In theory, the absence of guaranteed minimums should give these field offices greater freedom to exercise discretion to release someone, or not to detain someone in the first place. However, if we look at the detention centers with the highest percentages of discretionary detention (i.e., detention that is not mandated by statute), the three field offices at the top of the list are Chicago (44.9%), Salt Lake City (48.3%), and New York City (50.4%). Additionally, Boston (33.2%) and Dallas (35.6%) are in the top half and above the average of 30.8% nonmandatory detainees. Thus, even field offices with no guaranteed minimums decide, as a matter of discretion, to detain *one-third to one-half* of their total detained population.

Given that the New York City Field Office is in a sanctuary region, it is particularly surprising to find a high percentage of discretionary detention there. Newark (41.2%) is another field office in a sanctuary region that has a high percentage of discretionary detainees, and so does Chicago (44.9%). For four other field offices in sanctuary regions, the percentage of detainees not subject to mandatory detention is close to the average of 30.8%: Seattle (29.0%), San Francisco (29.3%), Baltimore (31.9%), and Boston (33.2%). Only one field office in a sanctuary region is below average: Los Angeles (23.5%). These figures suggest that field offices in sanctuary regions are not necessarily concentrating their resources on mandatory detainees.

2. *Detainees Classified as “No Threat”*

Turning to the profile of detained individuals, there is significant variation regarding both criminal history and threat level. ICE categorizes detained individuals as “No Threat Level” if they have no conviction. If a noncitizen has a conviction, ICE assigns them a “threat level” of 1, 2, or 3, with level 1 being the “greatest threat.”¹⁷⁴ According to ICE, threat level is based on the “criminality of the detainee, including the recency of the criminal behavior and its severity.”¹⁷⁵

174. ICE FY 19 Detention Statistics (on file with author).

175. *Id.* at n.24.

In total, there were 29,701 detainees classified as “no threat” in FY 2019. Just four field offices were responsible for *over half* of these detainees: San Antonio (20.5%), New Orleans (15.1%), Phoenix (10.1%), and Houston (7.8%). The high number of detainees without any convictions in these jurisdictions is likely due, at least in part, to the large number of asylum seekers who are subject to mandatory detention as “arriving aliens” if they request asylum at a port of entry.¹⁷⁶

The number of detainees classified as “no threat” for every 1000 undocumented individuals ranged from 0.2 in San Francisco to 14.8 in San Antonio, with an average of 3.9. The field offices with the highest rate of “no threat” detainees were: San Antonio (14.8), El Paso (13.3), New Orleans (13.2), Phoenix (10.7), San Diego (8.1), Buffalo (6.4), and Denver (3.8). Half of these are in antisanctuary regions (San Antonio, Phoenix, New Orleans, and Houston). The field offices with the lowest numbers were San Francisco (.2), New York City (0.4), Baltimore (0.6), Salt Lake City (0.6), Chicago (0.7), and Los Angeles (0.8), followed by a four-way tie between Boston, Dallas, Newark, and St. Paul (all at 1.2). Among the bottom six, four are in sanctuary regions.

The variation here is enormous, with the San Antonio Office having *seventy-four times* the detention rate of the San Francisco Field Office for individuals classified as “no threat.” Even comparing El Paso to other field offices responsible for border areas, El Paso stands out, with more than double the detention rates of San Antonio and Phoenix for noncitizens with no criminal history. Comparing the detention rate of San Francisco to a nonborder field Office, New Orleans, there is still a huge difference, with the New Orleans Field Office having *sixty-six times* the detention rate of the San Francisco Field Office for noncitizens without any convictions. There is also substantial variation among field offices in sanctuary regions, as exemplified by Seattle having *ten times* the detention rate of San Francisco.

Turning to the percentage of a field office’s detained population that was classified as “no threat,” there was a wide range from 27% to 79.4%, with an average of 51%. The eight field offices with the highest percentages of detainees who had no convictions were: San Diego (79.4%), San Antonio (78.4%), New Orleans (72.6%), Phoenix (72.3%), Denver (60.7%), Houston (60.5%), El Paso (59.7%), and Los Angeles (54.4%). Four of these eight are in antisanctuary regions (San Antonio, New Orleans, Phoenix, and Houston).

At the opposite end of the spectrum, with the lowest percentage of detainees classified as “no threat,” were San Francisco (27.3%), St. Paul

176. See 8 C.F.R. §.1001.1(q).

(29.5%), Salt Lake City (31.8%), New York City (34.4%), Chicago (38.8%), Washington, D.C. (38.9%), Philadelphia (41.3%), and Baltimore (41.5%). Three of these (San Francisco, New York City, and Baltimore) are in sanctuary regions. The other field offices in sanctuary regions were closer to the average: Newark (48.8%), Seattle (51.7%), Boston (54.1%), and Los Angeles (54.4%).

These numbers show significant variations even among field offices located in sanctuary regions with respect to the percentage of detainees classified as “no threat.” The Los Angeles Field Office, for example, oversees a detained population where over half the noncitizens are classified as “no threat,” while only about a quarter of the detainees overseen by the San Francisco Field Office are in the “no threat” category.

3. Detainees Classified as Highest Threat

The number of detained noncitizens classified as the highest threat level per 1000 unauthorized individuals ranged from 0.3 in San Francisco to 4.4 in Buffalo, with a mean of 1.0. The field offices in the top third were Buffalo (4.7), Detroit (2.6), Philadelphia (1.8), New Orleans (1.6), St. Paul (1.3), San Diego (1.1), Denver (1.0), and Washington, D.C. (1.0). None of the field offices in sanctuary regions were in the top third. At the same time, New Orleans was the only field office in the top third that is in an antisantuary region.

The field offices in the bottom third, with the lowest detention rate for noncitizens in the highest threat category were: San Francisco (0.3), New York City (0.3), Los Angeles (0.4), Baltimore (0.4), Dallas (0.5), Chicago (0.5), Salt Lake City (0.5), and San Antonio (.5). The bottom four are all in sanctuary regions, but Dallas and San Antonio are in antisantuary regions.

With respect to the percentage of detainees within a field office’s jurisdiction who are categorized as the highest threat level, the average was 22.9%, with a range of 2.9% to 54.3%. The field offices with highest percentages of detainees in this category were: Detroit (54.3%), San Francisco (49.7%), Buffalo (32.2%), Philadelphia (31.5%), St. Paul (30.9%), Baltimore (29.1%), Salt Lake City (27.2%), and Boston (26.5%). Three of these (San Francisco, Baltimore, and Boston) are in sanctuary regions. Notably absent from this list are any field offices in antisantuary regions, so antisantuary regions did not detain high percentages of “threat level 1” individuals.

In fact, several field offices in antisantuary regions were among the field offices with the lowest percentages of detained individuals classified as “threat level 1.” The bottom third included: San Antonio (2.9%), El Paso

(4.1%), Phoenix (5.7%), New Orleans (8.6%), San Diego (11.1%), Houston (12.1%), Denver (15.5%), and Atlanta (17.8%). Five of these eight are in antisanctuary regions (San Antonio, Phoenix, New Orleans, Houston, and Atlanta), and none are in sanctuary regions.

4. Alternatives to Detention

While there are many alternatives to detention, including release on bond or under an order of supervision, this section refers to ICE's official ATD program, which is limited to three forms of electronic monitoring.¹⁷⁷ The most invasive is GPS monitoring, which requires the noncitizen to wear an ankle bracelet.¹⁷⁸ Less physically invasive versions involve telephonic check-ins with voice recognition software and checking in with ICE through a phone App called SmartLINK.¹⁷⁹

There are substantial variations in the use of ATDs by field offices, just as there are huge disparities in detention rates. A 2014 GAO report found differences in how ICE guidance on ATDs was implemented by field offices and specifically noted that ICE "has not monitored the extent to which ERO field offices have consistently implemented the guidance" on ATDs.¹⁸⁰ According to the GAO, some field offices may limit their use of ATDs because they lack the resources to respond to instances of noncompliance.¹⁸¹

177. See generally Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141 (2017); Mary Holper, *Immigration E-Carceration: A Faustian Bargain* (Bos. Coll. L. Sch. Legal Stud., Research Paper No. 539, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689912 [<https://perma.cc/P7KD-RV87>].

178. Sarah Betencourt, 'Traumatizing and Abusive: Immigrants Reveal Personal Toll of Ankle Monitors', GUARDIAN (July 12, 2021), <https://www.theguardian.com/us-news/2021/jul/12/immigrants-report-physical-emotional-harms-electronic-ankle-monitors> [<https://perma.cc/BA6H-5A2B>]. A report by the Benjamin N. Cardozo School of Law Immigration Justice Clinic, Freedom for Immigrants, and Immigrant Defense Project documents the mental and physical toll of GPS monitors based on survey responses from 150 immigrants across the country and aggregate data of over 950 cases from three major legal service providers. See TOSCA GIUSTINI ET AL., IMMIGRATION CYBER PRISONS: ENDING THE USE OF ELECTRONIC ANKLE SHACKLES (2021), <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1002&context=faculty-online-pubs> [<https://perma.cc/RG2Z-GSRY>]; see also ALY PANJWANI, ICE DIGITAL PRISONS: THE EXPANSION OF MASS SURVEILLANCE AS ICE'S ALTERNATIVE TO DETENTION (2021), <https://www.flipsnack.com/JustFutures/ice-digital-prisons-1u8w3fnd1j.html> [<https://perma.cc/Q2F5-W6WF>].

179. AUDREY SINGER, CONG. RSCH. SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 8 (2019), <https://sgp.fas.org/crs/homsec/R45804.pdf> [<https://perma.cc/LC3C-SMM7>]. For a general discussion of many forms of electronic surveillance, see JAMES KILGORE, UNDERSTANDING E-CARCERATION: ELECTRONIC MONITORING, THE SURVEILLANCE STATE, AND THE FUTURE OF MASS INCARCERATION (2022).

180. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-36, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 13 (2014), <https://www.gao.gov/assets/670/666911.pdf> [<https://perma.cc/SC59-HLMH>].

181. *Id.* at 29.

In FY 2019, there were a total of 83,186 noncitizens enrolled in ATDs. Looking at the number of people enrolled in ATDs for every 1000 unauthorized individuals in a field office's jurisdiction, the average ATD enrollment rate across field offices was 8.8, with a range from 2.0 for the Seattle Field Office to 26.2 for the El Paso Field Offices. The field offices ranking in the top third, with the highest ATD rates, were El Paso (26.2), New Orleans (22.0), Miami (18.0), Washington, D.C. (16.7), Boston (12.1), and Baltimore (11.8). The field offices in the bottom third, with the lowest ATD rates were Seattle (2.0), Salt Lake City (2.6), San Francisco (3.4), Buffalo (3.6), Los Angeles (3.7), Chicago (3.7), Newark (3.8), and Buffalo (3.9).

Some field offices relied more on ATDs than detention. Looking at the ratio of the number of noncitizens in ATDs compared to the detained population, Baltimore had over eight times as many people in ATDs as detained, followed by San Francisco, with six times as many people in ATDs as detained. Miami, New York City, and Washington, D.C. had four to five times as many people in ATDs as detained. Field offices with *fewer* people in ATDs than detention included Buffalo (ratio of 0.3, meaning Buffalo had an ATD rate that was less than one-third of its detained rate), San Antonio (ratio of 0.4), Phoenix (ratio of 0.5), Seattle (ratio 0.5), and Denver (ratio of 0.8).

The average ATD enrollment rate among field offices in antisantuary regions was 82% higher than in sanctuary regions, but the overall detention rate was four times higher.

Table 5: Detention and ATD Rates for Field Offices in Sanctuary and Antisanctuary Regions in FY 2019. (Rates Represent the Number of People Detained or Enrolled in ATDs for Every 1000 Unauthorized Individuals in a Field Office's Geographic Area of Responsibility).

Field Office	Overall Detention Rate	Detention Rate: No Threat	Detention Rate: Highest Threat	ATD Enrollment Rate
Baltimore	1.4	0.6	0.4	11.8
Boston	2.3	1.2	0.6	12.1
Los Angeles	1.5	0.8	0.4	3.7
New York City	1.3	0.4	0.3	5.7
Newark	2.5	1.2	0.6	3.8
San Francisco	0.6	0.2	0.3	3.4
Seattle	3.8	2	0.9	2
<i>Sanctuary Average</i>	1.9	0.9	0.5	6
Atlanta	4.2	2.2	0.7	9.5
Dallas	2.4	1.2	0.4	4.5
Houston	5.9	3.6	0.7	8.2
Miami	3.3	1.6	0.8	18
New Orleans	18.2	13.2	1.6	22
Phoenix	14.8	10.7	0.8	6.7
San Antonio	18.9	14.8	0.5	7.3
<i>Antisanctuary Average</i>	9.7	6.8	0.8	10.9

D. Summary of Results

The New Orleans Field Office, which oversees five southern states, stands out as having one of the most aggressive approaches to enforcement. Its numbers are often comparable to San Antonio, although the New Orleans field office does not oversee a U.S.-Mexico border region. Whether compared to the New York City Field Office, which is in a sanctuary region, or to the Miami Field Office, which is in another antisanctuary region, New Orleans is far more aggressive. For example, the New Orleans Field Office had over four times the detainer request rate of New York City and double the detainer request rate of Miami; its overall arrest rate was ten times that of the New York City more than twice that of Miami; its removal rate was almost twelve times higher than New York City and three times higher than Miami; its overall detention rate was fourteen times higher than New York City's and over five times higher than Miami's. The large number of

detention beds and “guaranteed minimums” in the jurisdiction of the New Orleans Field Office is likely an important factor that influences the use of discretion and drives arrests, detention, and removal.

While some degree of variation in federal immigration enforcement is expected and may even be desirable to allow for experimentation by frontline officers, as Professor Landau contends,¹⁸² the dramatic differences discussed above signal a deeply flawed and unfair system. The magnitude of the variations discussed above are simply incompatible with a goal of equitable enforcement. These differences cannot be chalked up to implicit bias, because, as Professor Michael Siegel has noted, “implicit racial bias simply does not vary that much across geographic areas.”¹⁸³ It is therefore important to consider other explanations, such as the convergence of various state, local, and federal pressures on field offices, which can incorporate elements of structural racism.¹⁸⁴ Geography and allocation of resources clearly play an important role too.

Beyond the sheer scale of the disparities, several other valuable lessons can be derived from the data discussed above. First, field offices in sanctuary regions had the lowest rates of detainer requests, the lowest overall arrest rates, the lowest arrest rates of noncitizens with no criminal history, the lowest arrest rates of noncitizens with convictions, the lowest overall removal rates, and the lowest removal rates of convicted noncitizens. The fact that sanctuary jurisdictions have the lowest arrest rates for noncitizens with no criminal history is especially important because it undercuts the notion that failure of state and local law enforcement to cooperate with ICE will lead to more noncriminal arrests.

However, it is also important to recognize the disparities that exist among field offices in sanctuary regions. For example, the San Francisco and Los Angeles field offices had approximately double the detainer request rates of the New York City, Boston, Baltimore, and Newark field offices. The Newark Field Office had double the arrest rate of the New York City Field Office. The Baltimore and Seattle field offices had arrest rates of noncitizens with no criminal history that were three to five times higher than the Los Angeles, San Francisco, and New York City field offices. And Seattle had an overall removal rate that was more than three times that of

182. See Landau, *supra* note 19, at 1235 (pointing out that variation allows for “creative exercises of discretion”).

183. Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069, 1081 (2020) (observing that “the average level of implicit racial bias of people living in the state with the highest average level (measured by scores on the racial Implicit Attitudes Test) differs from that in the state with the lowest average level by only 34%”).

184. *Id.* (discussing structural racism as an alternative explanation).

New York City, a removal rate of noncitizens with no criminal history that was nearly eight times that of San Francisco, and a removal rate for convicted noncitizens that was four times that of New York City.

Additionally, despite having low detention rates, certain field offices in sanctuary cities do not appear to be focusing their resources on *mandatory* detainees. It is particularly striking that *half* of the detained population in the jurisdiction of the New York City Field Office, and over 40% of the detained population in the jurisdiction of the Newark Field Office, are detained as a matter of discretion, not because the statute requires it.

Compared to field offices in sanctuary locations, field offices in antisanctuary regions had, on average, a detainer request rate that was twice as high (9.6 vs. 20), an overall arrest rate that was over three times as high (5.6 vs. 21.8), an arrest rate for noncitizens with no criminal history that was over three times as high (0.8 vs. 2.9), an arrest rate for convicted noncitizens that was over three times as high (3.7 vs. 13.4), and an arrest rate for noncitizens with a pending criminal charge that was five times as high (1.1 vs. 5.5). With respect to removals, field offices in antisanctuary regions had, on average, an overall removal rate that was nine times higher than the average for field offices in sanctuary regions (6.1 vs. 57.0), a removal rate for noncitizens with no criminal history that was over twelve times higher (1.8 vs. 22.2), a removal rate for convicted noncitizens that was more than eight times higher (3.5 vs. 29.8), and a removal rate for noncitizens with a pending criminal charge that was over six times higher (0.7 vs. 4.6). Although field offices in antisanctuary regions have an ATD enrollment that was twice as high as field offices in sanctuary regions, their detention rate was *five times* higher (1.9 vs. 9.7). Further, the average detention rate for noncitizens deemed “no threat” (i.e., noncitizens with no convictions) was *over seven times* higher among field offices in antisanctuary regions (0.9 vs. 6.8), while the detention rate for noncitizens classified as “threat level 1” (the highest threat level) was only 60% higher (0.5 vs. 0.8).

Nevertheless, field offices in antisanctuary regions tended to be less clustered at one end of the spectrum. The eight field offices with the highest detainer request rates (i.e., the top third) included only four of the seven field offices in antisanctuary regions. Similarly, only four out of the eight field offices with the highest overall arrest rates were in antisanctuary regions; only three out of the eight field offices with the highest arrest rates of noncitizens with no criminal history were in antisanctuary regions; and only four out of the top eight field offices with the highest arrest rates of convicted noncitizens were in antisanctuary regions. These figures suggest that while being in an antisanctuary region plays a role in detainer requests

and arrests, other important factors also influence the decisions made by field offices.

As with field offices in sanctuary regions, substantial variations exist among field offices in antisanctuary regions. For example, the San Antonio Field Office's overall arrest rate was over twice as high as Miami's, its arrest rate for noncitizens with no criminal history was seven times higher than Houston's and six times higher than Dallas's. San Antonio, New Orleans, and Phoenix had higher rates in almost every category than Atlanta, Dallas, Houston, and Miami. Two notable exceptions are the high rate of detainer requests by the Atlanta Field Office, which was the same as Phoenix's, and the Dallas Field Office's arrest rate for convicted noncitizens, which was the highest in the country.

Arrests of noncitizens with no criminal history are least likely to be affected by location in a sanctuary or antisanctuary region, since those classifications primarily affect noncitizens who have entered the criminal justice system. Disparities in arrests of noncitizens with no criminal history can therefore highlight differences in how field offices exercise their discretion about whom to arrest, although field offices in border areas are faced with the largest numbers of recent migrants with no criminal history. The data show that Dallas and Houston rank in the bottom third of field offices in arrests rates of noncitizens with no criminal history, despite having overall arrest rates in the top third. In fact, Dallas and Houston had lower arrest rates for noncitizens with no criminal history than two field offices in sanctuary regions, Baltimore and Seattle. This suggests that Dallas and Houston may be exercising their discretion more favorably for noncitizens with no criminal history than other field offices in antisanctuary regions. Local politics in these "blue" cities could also be influencing decisions about arrests by these two field offices.

In theory, noncriminal arrest rates should be shaped primarily by national enforcement priorities. While there was less variation in this category than some of the others, with about half the field offices having noncriminal arrest rates between 1 and 2, the range was still wide, from 0.3 in San Francisco to 7.2 in San Antonio, which is *twenty-four times* higher. Even comparing San Francisco with Detroit, which is not in an antisanctuary region or responsible for a U.S.-Mexico border region, Detroit had a noncriminal arrest rate that was *fourteen times higher*. These disparities suggest that field offices may be applying their own priorities or discretionary standards, and that there is great variation among them. As noted above, the Trump Administration never set clear priorities, so it would not be surprising if field offices made different choices about arrests of noncitizens with no criminal history.

Similarly, when it comes to the detention and removal of noncitizens with no criminal history, there is substantial variation among field offices in the absence of central policies. Detention rates of individuals without convictions ranged from 0.2 in San Francisco to 14.8 in San Antonio, which is *seventy-four times higher*. Notably, the Dallas and Miami field offices had detention rates for noncitizens with no criminal history comparable to those of Newark and Seattle, suggesting that decisions involving the exercise of discretion in this category were not dictated by sanctuary/antisanctuary classifications.

With respect to removal rates of noncitizens with no criminal history, there is also a wide range, suggesting that field offices are exercising discretion in different ways. As previously noted, these rates ranged from 0.6 for the San Francisco Field Office to 79.0 for San Antonio, which is *132 times higher*. Even if we exclude the four field offices that oversee U.S.-Mexico border regions and have particularly high removal rates, there is a wide range among the remaining field offices. The New Orleans Field Office, for example, has over *twenty times* the removal rate of San Francisco for noncitizens with no criminal history.

Finally, insofar as ICE's goal is to detain and remove noncitizens that pose a threat, it is important to note that there was less variation among field offices in detention rates for noncitizens in the highest threat category than in other categories. The average among field offices in sanctuary regions was 0.5 compared to 0.8 in antisanctuary regions.

IV. IMPLICATIONS

A. Implications for Immigration Policymaking

Administrative law generally assumes that federal agencies implement laws and policies consistently across the nation.¹⁸⁵ The data discussed above, however, show enormous disparities in how ICE field offices approach immigration enforcement around the country. Regional variations in the implementation of federal laws and policies are not necessarily negative. For example, Professors Yishai Blank and Issi Rosen-Zvi have persuasively argued that federal regional offices can be meaningful policymakers in certain contexts.¹⁸⁶ They point out that variation at the federal level can promote federalist values of experimentation and

185. Owen, *supra* note 7, at 116; Blank & Rosen-Zvi, *supra* note 7, at 1992.

186. Blank & Rosen-Zvi, *supra* note 7, at 1903.

innovation, just like variation at the state level.¹⁸⁷ In areas such as environmental regulation, emergency management, and housing and urban development, federal regional variation may indeed be desirable.

In the immigration context, however, even Professors Blank and Rosen-Zvi recognize that regional variations would be problematic. They acknowledge that “when core liberty interests are at stake and when vulnerable regional minorities are endangered, consistent application with very little regional variation should be the rule.”¹⁸⁸ Among immigration scholars, Michael Wishnie has famously warned against creating “laboratories of bigotry.”¹⁸⁹ Similarly, Professor Aziz Huq has observed that “[o]smotic absorption of prevailing racial norms is . . . a function of decentralization and the diffusion of discretion.”¹⁹⁰

When considering the high arrest, detention, and removal rates by field offices that oversee regions in the South, such as New Orleans, it is also important to keep in mind the history of racism in regional variations in the implementation of federal laws and policies. As Professor Bulman-Pozen has explained, federal programs established by New Deal legislation were intentionally designed to have regional variations in order to “accommodate[] Jim Crow” and “leave untouched the South’s racial order.”¹⁹¹ These federal programs “both subsidized a brutal caste system [based on a supply of black labor] and normalized a regional approach to federal law.”¹⁹² Federal statutes “shifted decisionmaking authority to federal executive officials, who in turn provided for regional adjustments.”¹⁹³ To the extent that ICE field offices overseeing regions in the South have disproportionately high rates of arrest, detention, and removal, they are exacerbating racial injustices that have long plagued the region, especially given the large number of black migrants from African countries detained in those jurisdictions and their allegations of physical abuse and coercion.¹⁹⁴

187. Similarly, David Owen asks, “What would administrative law look like if we sometimes accorded regional variation *within* federal administrative agencies some of the same value that we attribute to variation *outside* those agencies?” Owen, *supra* note 7, at 117.

188. Bank & Rosen-Zvi, *supra* note 7, at 1959.

189. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 515–18 (2001).

190. Huq, *supra* note 37, at 107–08.

191. Bulman-Pozen, *supra* note 7, at 402.

192. *Id.*

193. *Id.* at 403.

194. See, e.g., Joe Penney, *The Hunger Strikes of Pine Prairie: Protesting Indefinite Detention by ICE*, N.Y. REV. BOOKS (Sept. 8, 2020), <https://www.nybooks.com/daily/2020/09/08/the-hunger-strikers-of-pine-prairie-protesting-indefinite-detention-by-ice/> [<https://perma.cc/8JZ6-F7A9>]; *ICE Is Using Torture Against Cameroonian Immigrants to Coerce Deportation, According to New Complaint Filed by Immigrant Rights Group*, S. POVERTY L. CTR. (Oct. 8, 2020),

Overall, the variations among field offices discussed above highlight a need to increase fairness, predictability, and transparency in immigration enforcement. This can be done while still preserving flexibility and some opportunity for experimentation by field offices.¹⁹⁵ Strong central controls do not necessarily eliminate the potential for bottom-up solutions from within DHS/ICE. As Joseph Landau has described, frontline officers have proposed innovative immigration policies in the past that were adopted by higher-ups.¹⁹⁶ Keeping channels of communication open among frontline officers, field office directors, and headquarters is essential to promoting consistency and problem solving when obstacles to consistent implementation arise.

From ICE's perspective, consistency should also be valued because inequitable enforcement decreases the agency's legitimacy in the public's view. In the policing context, studies have found that public perceptions of fairness and legitimacy are associated with cooperation and compliance.¹⁹⁷ Three ways for the President (or DHS/ICE, under the President's direction) to try to promote more consistent enforcement practices are issuing guidelines, promulgating regulations, and expanding performance metrics to reflect multiple goals.

1. Enforcement Guidelines

Agency guidelines on how to exercise discretion are one way to try to achieve greater consistency in enforcement decisions nationwide. President Obama adopted such guidelines, and President Biden has done the same.¹⁹⁸

<https://www.splcenter.org/presscenter/ice-using-torture-against-cameroonian-immigrants-coerce-deportation-according-new> [https://perma.cc/D6J3-3KFV]; "After About 5 Minutes of Struggle, They Forced My Index Finger on the Paper": ICE Forcing More Asylum Seekers to Sign Deportation Paperwork as Another Deportation Flight to Cameroon Looms, S. POVERTY L. CTR. (Nov. 9, 2020), <https://www.splcenter.org/presscenter/after-about-5-minutes-struggle-they-forced-my-index-finger-paper-ice-forcing-more-asylum> [https://perma.cc/UXQ4-2EDS].

195. Cf. Medha D. Makhoul, *Laboratories of Exclusion: Medicaid, Federalism & Immigrants*, 95 N.Y.U. L. REV. 1680, 1775 (2020) (arguing, in the context of noncitizens' access to health care, that "Congress might consider giving states some flexibility—'microspheres of autonomy'—to make policy choices that best serve their populations within a federal scheme that promotes national goals").

196. Landau, *supra* note 19, at 1176–77.

197. See Hadar Aviram & Daniel L. Portman, *Inequitable Enforcement: Introducing the Concept of Equity into Constitutional Review of Law Enforcement*, 61 HASTINGS L.J. 413, 453 (2009) (explaining that an "insistence on police adherence to a sense of proportion" will have a "long-term benefit for police activities" by "generating a public sentiment that police enforcement is fair" and citing empirical studies).

198. See Memorandum from David Pekoske, Acting Sec'y, Dept. of Homeland Sec. to Troy Miller et al., Senior Off. Performing the Duties of the Comm'r, U.S. Customs and Border Prot. (Jan. 20, 2021) [hereinafter Memorandum from David Pekoske],

However, as discussed above, not all field offices and ICE agents complied with the memos on enforcement priorities and prosecutorial discretion to the same extent, with some actively opposing them. Similarly, in the context of prosecutor's offices, certain U.S. attorney's offices resisted implementing memos from the Attorney General on prosecutorial discretion because they perceived the memos as undermining their law enforcement duties.¹⁹⁹ As Professor Rachel Barkow has observed, "while presidential directives can bring about policy changes, the hardest change to effectuate is in the minds of the frontline law enforcement officials at agencies."²⁰⁰

In both the immigration and criminal contexts, guidelines on enforcement are challenging because they trigger concerns within the agency about compromising deterrence.²⁰¹ Additionally, it is difficult to determine the right amount of detail for such guidelines. If they are too vague, they fail to curb discretion; if they are too detailed, they risk omitting certain situations where prosecutorial discretion may be warranted.

The potential for litigation over prosecutorial discretion guidelines also remains. In the immigration context, internal guidelines regarding enforcement discretion have repeatedly been challenged through lawsuits arguing that they actually constitute rules that should have gone through the notice and comment rulemaking process, as exemplified by the DACA case that was ultimately decided by the Supreme Court.²⁰² While internal guidelines and policy documents are exempted from notice and comment, legislative rules are not. Yet the line between these categories is far from clear.²⁰³

https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf?fbclid=IwAR1_3OJluWv0GzmC2sgRNqjscrFRMn65skMo1O188xgT0zlxalGXqP6_Gus [<https://perma.cc/V58U-9KYR>]. This memo identifies three priority categories: (1) noncitizens involved in terrorism, spying, or other threats to national security; (2) noncitizens who entered the United States without inspection on or after November 1, 2020; and (3) noncitizens imprisoned in local, state, or federal jails or prisons who have an "aggravated felony" conviction, which is a term of art under the INA, and who are deemed a threat to public safety. *Id.* at 2.

199. Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1136 (2016).

200. *Id.* at 1135.

201. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 912 (2009); see also Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1019–22 (2005) (discussing why prosecutorial guidelines have not been adopted).

202. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (holding that DHS's rescission of DACA violated the Administrative Procedure Act (APA) because the agency did not provide a reasoned explanation for its action).

203. See, e.g., David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010) ("There is perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable distinction between legislative and

Nevertheless, imperfect as they are, guidelines that clearly identify priority categories and encourage the use of discretion at all stages of immigration enforcement are helpful to have as one strategy to promote greater consistency across field offices. Along these lines, the memo issued by the Biden Administration on the first day in office stresses that the prosecutorial discretion priorities shall “apply not only to the decision to issue, serve, file or cancel a Notice to Appear,” which is the charging document in immigration court, “but also to a broad range of other discretionary enforcement decisions, including decision: whom to stop, question, arrest; whom to detain or release whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action or parole.”²⁰⁴

Besides addressing enforcement priorities and prosecutorial discretion, guidelines or other internal rules of agency procedure could impose requirements that must be satisfied before an officer takes certain enforcement actions.²⁰⁵ For example, if the agency establishes a presumption that asylum seekers should be released on parole, then the agency could mandate a higher level of approval (e.g., by Field Office Directors or Assistant Field Office Directors) for decisions *denying* parole to asylum seekers.²⁰⁶ Similarly, higher-level review could be required for all decisions to detain or pursue removal proceedings against someone who does not fall within a priority category. Mandating higher-level approval would improve transparency within a field office and provide a way to check for consistency with central policies.

For this type of higher-level review to be effective, however, exceptions must be constrained. The issue of transfers between detention facilities during the COVID-19 pandemic provides a cautionary tale. ICE’s COVID-19 Pandemic Response Requirements tried to reduce the number of unnecessary transfers, which risked spreading the virus, by generally prohibiting transfers unless the transfer was for purposes of “medical evaluation, medical isolation/quarantine, clinical care, extenuating security

nonlegislative rules.”); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 547 (2000) (“For over fifty years, courts and commentators have struggled to identify, and to apply, criteria that are appropriate to distinguish between legislative rules and interpretative rules.”).

204. See Memorandum from David Pekoske, *supra* note 198, at 2.

205. Barkow, *supra* note 199, at 1148.

206. The court’s injunction in *Fraihat*, for example, requires a written decision with justification. *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), *order clarified*, No. EDCV191546, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020), *rev’d*, 16 F.4th 613 (9th Cir. 2021).

concerns, release or removal, or to prevent overcrowding.”²⁰⁷ Any other type of transfer required the “justification and pre-approval” of the Field Office Director.²⁰⁸ One of the reasons this directive did not prove effective is because the enumerated exceptions allowing transfers swallowed the rule.²⁰⁹

In short, while guideline and internal agency procedures can be very helpful in curbing discretion, they are unlikely to resolve the issue of disparities on their own. Therefore, it is also important to consider other reforms that may change the behavior of immigration officers, such as binding rules and performance metrics.

2. Notice and Comment Rulemaking

If ICE articulated enforcement policies through written rules, with opportunity for public input through notice and comment, field office directors and rank-and-file officers may perceive them as more legitimate than priorities or prosecutorial discretion policies announced in guidelines and may therefore feel more bound to follow them.²¹⁰ In the policing context, prominent scholars have supported this approach, arguing that the public rulemaking process not only constrains discretion,²¹¹ but also

207. ICE ERO, COVID-19 PANDEMIC RESPONSE REQUIREMENTS 37–38 (2021), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf> [<https://perma.cc/U2UP-K3MS>].

208. *Id.*

209. For examples of transfers resulting in outbreaks around the country, see Lisa Riordan Seville & Hannah Rappleye, *ICE Keeps Transferring Detainees Around the Country, Leading to COVID-19 Outbreaks*, NBC NEWS (May 31, 2020, 5:08 AM), <https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856> [<https://perma.cc/2WGS-KKKF>]; Dianne Solis, *Virus Began Spreading in Texas Detention Center as Positive Immigrants Were Quickly Transferred in from Northeast*, DALL. MORNING NEWS (Apr. 27, 2020, 10:38 PM), <https://www.dallasnews.com/news/public-health/2020/04/27/virus-began-spreading-in-texas-detention-center-as-positive-immigrants-were-quickly-transferred-in-from-northeast/> [<https://perma.cc/DDX3-MHB7>].

210. See Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2015) (developing an account of noncooperation based on perceptions of federal action’s legitimacy).

211. See, e.g., Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 594–608 (2000) (arguing in favor of rulemaking to cabin enforcement discretion); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1843–48 (2015) (discussing notice-and-comment rulemaking as one model for how the public could have an opportunity to weigh in on police policies that affect them); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 525 (2015).

promotes professionalism within police agencies,²¹² improves the overall functioning of the criminal justice system,²¹³ and bolsters democracy.²¹⁴

In a recent article, Professors Christopher J. Walker and Shoba Sivaprasad Wadhia highlight the value of the deliberative process that is part of rulemaking, explaining that “[t]he proposed rule has to reflect considered judgment through weighing regulatory alternatives, assessing the intended and unintended consequences, and making the data supporting the proposed rule publicly available.”²¹⁵ They further argue that rulemaking promotes “deliberative accountability,” because the agency must explain its actions in light of public input.²¹⁶

On the other hand, as Professor Maria Ponomarenko points out, agency rulemaking is usually aimed at regulating *the public*, whereas scholars who support rulemaking in the policing context are really interested in rules the police would use to regulate *themselves*.²¹⁷ The same concern applies in the context of immigration enforcement, where the types of rules critics of the current system would like to see generally pertain to regulating ICE officers, not the public.²¹⁸

Rulemaking is particularly difficult when the desired rules pertain to the use of discretion because agencies generally have no incentive to issue such rules.²¹⁹ Like guidelines, rules addressing prosecutorial discretion can

212. Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1130 (1967).

213. *Id.*

214. Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1453 (2017) (arguing in favor of “[s]ubjecting wholesale police, prosecutorial, and sentencing policies to some variant of a notice-and-comment process”); Jonathan M. Smith, *Closing the Gap Between What Is Lawful and What Is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315, 336 (2016) (calling for democratization of policing, including the policy formulation process).

215. Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1225 (2021).

216. *Id.* at 1232 (citing Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 967 (2021)).

217. Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 7 (2019) (arguing that rulemaking is not an effective way to govern the police and proposing “regulatory intermediaries” as an alternative).

218. See, e.g., Brian Tashman, *Congress Needs to Hold ICE Accountable for Abuses*, ACLU (Feb. 2, 2018), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/congress-needs-to-hold-ice-accountable-abuses> [<https://perma.cc/NZ8Y-MYZE>] (arguing that “ICE needs to be held to account for its abuses and lawlessness” and criticizing ICE officers for actions such as “[going] after parents dropping off their children at school; primary caregivers to family members with disabilities; domestic abuse survivors seeking legal protections; religious minorities who fear persecution; political activists; community leaders; and people who work everywhere from convenience stores to dairy farms”).

219. Ponomarenko, *supra* note 217, at 44 (arguing that “[f]or enforcement discretion, the primary obstacle is that policing agencies have few incentives to adopt guidelines and rules, and it may not be possible to adopt a workable standard that requires them to do so”).

undermine the goal of deterrence.²²⁰ This concern is even greater in the rulemaking context because the notice and comment process draws public attention to the proposed rules.²²¹ ICE may also be concerned that such rules would send a message to Congress that the agency is not enforcing the statute as intended, which could affect appropriations. In addition, ICE may be motivated to avoid litigation challenging the rules. Given that the ICE employees' union has sued multiple times in the past to challenge prosecutorial discretion policies under President Obama,²²² it is not unreasonable to anticipate lawsuits challenging rules that establish similar policies.

Rulemaking could also backfire. If the political environment requires being "tough on crime" and "enforcing our borders," rulemaking may actually result in harsher policies than the agency would adopt informally without such a public procedure.²²³ And even if the agency did decide to issue rules about the use of discretion, they would be as challenging to draft as guidelines, and compliance could still be a problem, especially if supervisors tolerate or encourage noncompliance.²²⁴

Further, as Professor Ponomarenko explains, "One significant limitation of rulemaking procedures is that they are designed primarily to regulate discrete changes to the status quo. . . . Traditional rulemaking is not an invitation to rethink an entire regulatory scheme from top to bottom."²²⁵ To the extent substantial reforms are envisioned, rather than discrete changes to enforcement practices, rulemaking may not be the best approach. Scholars have already recognized these limitations of rulemaking in the context of other agencies, such as intelligence agencies,²²⁶ local law enforcement agencies,²²⁷ and prosecutors' offices.²²⁸ Consequently, while

220. *Id.* at 16.

221. *Id.* at 16 (citing Barkow, *supra* note 199).

222. Complaint, *Crane v. Napolitano*, No. 12-cv-03247, 2012 WL 3629252 (N.D. Tex. July 31, 2013); see also David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 *YALE L.J.F.* 167 (2012) (disputing the legal claims made in the *Crane* litigation); Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 *WASHBURN L.J.* 1, 25 (2015) (discussing the *Crane* litigation).

223. Ponomarenko, *supra* note 217, at 16 (making the same argument in the context of policing).

224. *Id.* at 16–17.

225. *Id.* at 40–41.

226. See, e.g., Samuel J. Rascoff, *Domesticating Intelligence*, 83 *S. CAL. L. REV.* 575 (2010).

227. See, e.g., Ponomarenko, *supra* note 217, at 7.

228. See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 *U. PA. L. REV.* 959, 964 (2009) ("The moral of the story is that institutionalized regulations are inherently blunt weapons, too crude and too sporadic to constrain prosecutors."); Barkow, *supra* note 201 (arguing that reforms to the institutional design of federal prosecutors' offices, such as separation-of-functions requirements and greater supervision, would be a more effective and politically viable way of curbing discretion than the leading alternative proposals).

rulemaking can certainly play a role, it is useful to also look at other types of oversight mechanisms and institutional designs that can improve consistency and fairness in immigration enforcement.

3. *Expanding Performance Metrics to Reflect Multiple Goals*

Professor Barkow explains that “having an agency pay attention to *multiple values and goals* . . . might help the agency to curb overenforcement if consideration of those additional values emphasizes factors that help to limit agency excess.”²²⁹ The COVID-19 pandemic highlighted how this can work in practice by forcing ICE to pay attention to protecting public health as a value separate from enforcement. As a result of a nationwide injunction issued in a case called *Fraihat v. ICE* (and a court order enforcing that injunction), ICE had to release more people in high-risk categories from detention and report those numbers to the court.²³⁰ Performance metrics that can be quantified are one way to measure progress towards an expanded range of values and goals.

ICE’s self-described mission is to “protect[] the homeland through the arrest and removal of noncitizens who undermine the safety of our communities and the integrity of our immigration laws.”²³¹ Accordingly, ICE’s performance metrics currently focus on the quantity of arrests and removals, with particular attention to the number of people arrested and removed with convictions or pending criminal charges.²³² ICE also prominently features the number of detainers issued, emphasizing those with serious crimes.²³³ Additionally, ICE reports the number of people enrolled in alternatives to detention, along with the “absconder rate.”²³⁴

One way to try to modify enforcement behavior is for ICE to adopt a broader set of goals and priorities, with achievement measured by new

229. Barkow, *supra* note 199, at 1147 (emphasis added).

230. ICE’s COVID-19 Pandemic Response Requirements, *supra* note 207, at 38, urged field offices to reduce the detained population in all immigration facilities to 75% of capacity based on CDC’s recommendation. Additionally, under the injunction in *Fraihat*, ICE had to review its custody determination for all detained individuals with a condition that placed them at risk of serious illness from COVID-19, with a presumption favoring release for those not subject to mandatory detention. See *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), *order clarified*, No. EDCV191546, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020), *rev’d*, 16 F.4th 613 (9th Cir. 2021).

231. See *Enforcement and Removal Operations*, ICE (Dec. 30, 2021) <https://www.ice.gov/about-ice/ero> [<https://perma.cc/KDX6-VYEP>].

232. See *FY 2020: ICE Annual Report Highlights Operational Successes in Year Shrouded by COVID-19*, ICE (Dec. 23, 2020) [hereinafter *ICE Annual Report*], <https://www.ice.gov/news/releases/fy-2020-ice-annual-report-highlights-operational-successes-year-shrouded-covid-19> [<https://perma.cc/CGF2-F44G>].

233. *ERO FY 2020 Achievements*, ICE (Oct. 29, 2021) [hereinafter *ICE ERO FY 2020 Achievements*], <https://www.ice.gov/features/ERO-2020> [<https://perma.cc/8H6P-FMM8>].

234. *Id.*

metrics.²³⁵ Professor Barkow observes, “If you tell an agency official that his or her budget or career advancement hinges on a particular outcome measure, the official will have an incentive to focus on that measure.”²³⁶ While determining the specific metrics that ICE should use is beyond the scope of this Article, one illustrative example is for ICE to prioritize reducing the detained population as a goal, not just during the pandemic, but long term.²³⁷ This idea is not unprecedented, as former Attorney General Eric Holder embraced the idea of prioritizing the goal of reducing mass incarceration for federal prosecutors.²³⁸ During the pandemic, ICE has already demonstrated that it is able to reduce the detained population when it wants to, as detention numbers dropped to less than half the usual average between March 2020 and September 2020.²³⁹

Another possible goal for ICE could be to uphold constitutional due process rights, which could be measured in a variety of ways. In the policing context, Professor Samuel Walker has argued that “the central problem of governing the police is that we suffer not from a lack of democratic control, but from a rather well functioning process of democratic governance *in the pursuit of the wrong values*.”²⁴⁰ The values he highlights as critical are “commitment to constitutional policing . . . and a commitment to the equal protection of the law.”²⁴¹

One way to apply the value of upholding constitutional rights in the immigration context is to include a performance metric based on the number of civil rights complaints submitted to the DHS Office of the Inspector General (OIG) and the DHS Office for Civil Rights and Civil Liberties (CRCL) regarding alleged violations for every field office (or detention facilities within that field office’s jurisdiction). Additionally, ICE could examine the number of complaints of misconduct involving ICE officers by

235. Barkow, *supra* note 199, at 1170–73.

236. *Id.* at 1170.

237. The Brennan Center suggested a similar priority of reducing mass incarceration for federal prosecutors. LAUREN-BROOKE EISEN, NICOLE FORTIER & INIMAI CHETTIAR, BRENNAN CTR. FOR JUST., *FEDERAL PROSECUTION FOR THE 21ST CENTURY* 33 (2014).

238. Eric Holder’s Keynote Address: *Shifting Law Enforcement Goals to Reduce Mass Incarceration*, BRENNAN CTR. FOR JUST. (Sept. 23, 2014), <https://www.brennancenter.org/analysis/keynote-address-shifting-law-enforcement-goals-to-reduce-mass-incarceration> [<https://perma.cc/E9BQ-4KRH>].

239. In FY 2020, ICE reported reaching a target of 70% of the population capacity for its “dedicated facilities,” meaning facilities that hold only immigration detainees, as opposed to local and county jails that often hold immigration detainees and prisoners together. See *ICE Annual Report*, *supra* note 232. Overall, ICE’s detained population, which has usually averaged around 45,000, dropped to 20,000 by the end of FY 2020. See *ICE ERO FY 2020 Achievements*, *supra* note 233.

240. Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 616 (2016).

241. *Id.*

field office. DHS currently does not collect or monitor misconduct data regarding its component agencies, including ICE.²⁴² Nor has DHS “analyzed trends to determine whether misconduct issues are systematic.”²⁴³ However, according to a report submitted to Congress, the Joint Intake Center for CBP and ICE received over “16,368 allegations of misconduct . . . in fiscal year 2014 alone.”²⁴⁴ A survey of DHS employees conducted by OIG found that nearly *half* (47%) of the ICE employees who responded “did not agree that employees at all levels [of ICE] are held accountable for conduct.”²⁴⁵ Creating metrics that capture misconduct and accountability would prioritize the value of upholding constitutional rights.

Critically, in light of the regional disparities discussed above, reports on all performance metrics should be broken down *by field office and detention facility* to allow the agency, as well as the public, to analyze regional differences. As Kate Andrias has persuasively argued, agencies’ reports should *highlight regional disparities*, not just provide the statistical information needed to examine them.²⁴⁶ Currently, ICE reports some statistics by field office, but reports others only at the national level. Other statistics are reported by detention facility. While ICE provides information about the field office responsible for each detention facility, this requires an extra level of calculation to analyze regional differences in detention, masking those differences instead of highlighting them.

Of course, performance metrics also have potential drawbacks if not designed well. There is a risk of developing metrics that are easy to track rather than measurable goals to reach the outcomes that are truly desired.²⁴⁷ One example of the perverse incentives that poorly designed performance metrics can create is provided by Professors Brett McDonnell and Daniel Schwarcz. They explained that in the 1990s, GAO’s performance metrics

242. DHS OFF. OF THE INSPECTOR GEN., OIG-19-48, DHS NEEDS TO IMPROVE ITS OVERSIGHT OF MISCONDUCT AND DISCIPLINE 6 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-48-Jun19.pdf> [<https://perma.cc/48BS-M52F>].

243. *Id.* at 7.

244. *Id.* at 1 (citing U.S. DEP’T OF HOMELAND SEC., INVESTIGATION OF DHS EMPLOYEE CORRUPTION CASES (2015), https://www.dhs.gov/sites/default/files/publications/Departmental%20Management%20and%20Operations%20%28DMO%29%20-%20Investigation%20of%20DHS%20Employee%20Corruption%20Cases_0.pdf [<https://perma.cc/5H6Q-MDDP>] (jointly issued by DHS OIG, ICE, and CBP)).

245. *Id.* at 10.

246. Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1105 (2013) (arguing that agencies should be required to submit reports for presidential review that include enforcement priorities and highlight regional disparities).

247. Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1677 (2011) (discussing the potential of poorly designed performance metrics to create perverse agency incentives).

“were process oriented, not outcome oriented, measuring easy-to-count items such as the number of reports issued or the number of hearings attended.”²⁴⁸ When GAO changed its metrics to be more outcome-oriented, GAO had to focus more “on making realistic recommendations and on aggressively lobbying to have those recommendations implemented,” resulting in steady improvements.²⁴⁹ A broader range of outcome-oriented metrics for ICE that reflect a broader range of values could help address some of the disparities discussed above.

B. Implications for Institutional Design

In considering oversight mechanisms, judicial oversight is often the first to come to mind, but it is of limited use in the immigration enforcement context due to legal constraints on judicial review. Under the Administrative Procedure Act (APA), the basic presumption of judicial review can be rebutted by showing that an “agency action is committed to agency discretion by law.”²⁵⁰ Enforcement decisions are generally considered discretionary and therefore unreviewable.²⁵¹ When it comes to enforcement, then, the main question is not about how much deference an agency should receive, but whether any type of judicial review is permitted.²⁵² To the extent that courts may be able to review constitutional violations related to enforcement, this “at best touch[es] only a small portion of all [enforcement] activities.”²⁵³

Because of these constraints on judicial review, the use of institutional design to act as a check on an agency’s use of discretion becomes critical.²⁵⁴ This section offers a few recommendations for ways to bolster internal checks on discretion. First, greater separation of enforcement and

248. *Id.*

249. *Id.* at 1678.

250. 5 U.S.C. § 701(a)(2).

251. Heckler v. Chaney, 470 U.S. 821, 831–32 (1985); Barkow, *supra* note 199, at 1131–33 (explaining that an agency’s decisions about whether to initiate an enforcement action, whether to provide frontline officers with guidance on enforcement, the substance of any nonbinding enforcement policies, and budgetary allocations for enforcement activities are all exempt from judicial review).

252. A prominent example of a case involving immigration enforcement where the Supreme Court exercised judicial review involved the legal challenge to the Trump Administration’s decision to rescind DACA. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020). In that case, the Government argued that DACA is a nonenforcement policy equivalent to the nonenforcement decision in *Chaney*, but the Court rejected that argument. The Court reasoned that the DACA Memorandum not only declined to institute enforcement proceedings, but also conferred affirmative benefits, and access to benefits is “an interest ‘courts often are called upon to protect.’” *Id.* at 1906 (quoting *Chaney*, 470 U.S. 821, at 832).

253. Walker, *supra* note 240, at 616–17 (describing the limitation of judicial review in the context of policing).

254. Barkow, *supra* note 199, at 1146–47.

adjudicative functions, such that more removal decisions can be reviewed by immigration judges who belong to a different agency (DOJ instead of DHS), is one way to check unfettered discretion by ICE officers, especially with respect to removals. Second, DHS could empower two existing oversight bodies, OIG and CRCL, to enable them to respond more effectively to concerns about inequitable enforcement and abuse of discretion. Third, civilian oversight over enforcement at the field office level could help identify, monitor, and critique regional practices and disparities.

1. Separation of Enforcement and Adjudicative Functions

Separation of enforcement and adjudicative functions is protected to only a limited degree in the immigration context. Agencies responsible for enforcement, like ICE, are part of DHS, while the immigration judges and Board of Immigration Appeals, which are responsible for adjudication, are part of DOJ. As others have already persuasively argued, immigration judges and the BIA are not truly independent.²⁵⁵ More importantly, however, for the focus of this Article, thousands of enforcement decisions result in removals every year *without an immigration judge ever being involved*.²⁵⁶ Professor Jennifer Koh's scholarship has shed light on the sweeping use of expedited removal, reinstatement of prior removal, administrative removals, stipulated removal, and in absentia removal, all processes that involve no adjudication at all.²⁵⁷ These types of removal orders defy the principle that "the person who brings the enforcement action should not also be the final judge of what should happen to the target."²⁵⁸ Eliminating these processes that allow removal to occur without any review by someone outside DHS would require a substantial change to immigration laws, but it would also protect against unchecked power in the hands of frontline agents.

Separation of functions can also be improved with respect to custody determinations (i.e., detention). ICE makes the initial custody determination about whether to detain or release someone during removal proceedings, and what type of supervision or monitoring, if any, should be required when

255. See generally Stephen H. Legomsky, *Restructuring Immigration Litigation*, 59 DUKE L.J. 1635 (2010); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006).

256. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 184 (2017).

257. *Id.*

258. Barkow, *supra* note 199, at 1148–49.

someone is not detained.²⁵⁹ A noncitizen can ask an immigration judge to review ICE's custody decision at a "bond hearing" in immigration court, but at that hearing the noncitizen bears the burden of proving that he or she is not a flight risk or danger to the community, rather than ICE.²⁶⁰ By contrast, in criminal proceedings, the government bears the burden of showing, by clear and convincing evidence, that a pretrial defendant should be detained.²⁶¹ The custody determination process for noncitizens effectively gives ICE, an adverse party in the removal proceeding, more power than the immigration judge to determine whether someone should be detained. That decision about detention, in turn, affects the likelihood of finding an attorney, the likelihood of submitting an application for relief from removal, and ultimately the likelihood of being ordered removed, since detained individuals fare worse at each of these stages.²⁶² Simply shifting the burden of proof in a custody determination hearing to the government, instead of placing it on the noncitizen, could help make detention decisions more consistent and equitable, thereby also affecting removal rates.

2. Empowering OIG and CRCL

OIG and CRCL are two bodies within DHS that oversee "compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department."²⁶³ Between January 2010 and

259. 8 C.F.R. § 236.1(g)(1) (2021) ("At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, an immigration official may issue a Form I-286, Notice of Custody Determination.").

260. 8 C.F.R. § 1236.1(d)(1) (providing for custody redetermination by the immigration judge); *Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019) ("[T]he alien may secure his release if he can convince the officer or immigration judge that he poses no flight risk and no danger to the community." (citing *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006), *abrogated by Hernandez-Lara v. Lyons* 10 F.4th 19 (1st Cir. 2021))). *But see Hernandez-Lara*, 10 F.4th (holding that the government has burden of proving danger by clear and convincing evidence or flight risk by preponderance of evidence in an immigration bond hearing).

261. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 751–52 (1987) (finding pretrial detention based on dangerousness constitutional and reasoning that one of the important procedural protections is that "[t]he government must prove its case by clear and convincing evidence" (emphasis added) (citing 18 U.S.C. § 3142(f))); *see also* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 133 (2016) (arguing that the government should bear the burden of proof in immigration bond hearings and analogizing to bail hearings for pretrial defendants).

262. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 1–2 (2015).

263. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 62 (2014) (quoting 6 U.S.C. § 345(a)(4)).

July 2016, OIG received over 33,000 complaints, 44% of them against ICE.²⁶⁴ Fewer than 300 of those complaints were investigated.²⁶⁵

Professor Margo Schlanger, who was the former head of CRCL, has explained that the purpose of bodies like OIG and CRCL is to protect and promote values that the agency might otherwise overlook.²⁶⁶ Along the same lines, Professor Barkow notes that inspector general offices can “analyze how the agency is allocating limited resources to explore how its decisions might be undermining its broader goals.”²⁶⁷ For DHS, this could mean highlighting the large percentage of certain field office’s budgets spent on arresting, detaining, and deporting noncitizens with no criminal history, those who have been charged but not yet convicted of any crime, and those with only minor convictions. In order to draw more attention to the value of consistency in enforcement, OIG could specifically request that ICE provide more data broken down by field office, as well as explain disparities among field offices in the rates of detainer requests, arrests, removal, and detention in order to better understand the root causes of these disparities.²⁶⁸

Additionally, CRCL could be empowered with greater authority to take action in response to complaints involving abuse of discretion.²⁶⁹ For example, CRCL could be given: authority to discipline officers and provide individual remedies to complainants; subpoena power; greater operational independence; independent legal counsel; and a larger role in policy

264. Alice Speri, *Detained, Then Violated*, INTERCEPT (Apr. 11, 2018, 11:11 AM), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-icc-dhs/> [<https://perma.cc/Q3AG-DYWW>].

265. *Id.* CRCL reports receiving 1,683 complaints against ICE between 2011 and 2016. *Data on Complaints Received*, DHS (Apr. 29, 2019), <https://www.dhs.gov/data-complaints-received> [<https://perma.cc/9VCS-Z53Z>].

266. See Schlanger, *supra* note 263, at 103; see also Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 290 n.386 (2015) (arguing that IGs benefit from “conventions of independence” that help prevent agency interference); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1070–74 (2013) (finding that the DOJ IG’s investigation into the treatment of post-9/11 detainees led to important reforms); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2347 (2006) (noting that IGs do not focus on the development of sound agency policy).

267. Barkow, *supra* note 199, at 1178.

268. OIG offices have examined disparities among district or regional offices in other contexts. For example, OIG audited Warning Letters issued by FDA District Offices between 1994 and 1997, which revealed that some offices had issued almost five times as many Warning Letters as others. OIG found that these disparities could not be explained by differences in staff size or the distribution of regulated firms, concluding that “District Offices vary in their philosophy and use” of Warning Letters. 8 No. 2 FDA Enforcement Manual Newsl. 1 (1999).

269. See 6 U.S.C. § 345 (authorizing CRCL to investigate complaints, provide policy advice to Department leadership and components on civil rights and civil liberties issues, and communicate with the public about CRCL and its activities, coordinate with the Inspector General, and submit an annual report to Congress).

development.²⁷⁰ According to a report by the Center for American Progress, CRCL struggles to ensure access to information and responses from DHS component agencies, which may cause delays and hamper investigations.²⁷¹ Although CRCL receives thousands of complaints each year, it is able to process only a “representative sample”²⁷² and conducts very few onsite investigations.²⁷³ In FY 2019, for example, CRCL conducted only nine onsite investigations.²⁷⁴ Yet even those nine onsite investigations resulted in 215 recommendations, indicating a need for substantial reforms within DHS.

As Professor Ponomarenko notes, “purely advisory bodies can prompt policymaking in a variety of ways—by making problems more difficult to ignore and by arming advocates with information they need in order to push for change[,]” but “[a]t the federal level, inspectors general often have been ignored when they raise issues involving matters about which legislators have decided not to care.”²⁷⁵ Congress therefore also has a critical role to play in responding to concerns flagged by OIG. OIG has already reported various disparities in immigration enforcement in the past and has required

270. Schlanger, *supra* note 263, at 98–99; SCOTT SHUCHART, CTR. FOR AM. PROGRESS, BUILDING MEANINGFUL CIVIL RIGHTS AND LIBERTIES OVERSIGHT AT THE U.S. DEPARTMENT OF HOMELAND SECURITY 19 (2019), <https://cdn.americanprogress.org/content/uploads/2019/03/28064808/DHS-Civil-Rights-Oversight-report1.pdf> [<https://perma.cc/L4XP-6CLT>]. By contrast, the U.S. Department of Agriculture’s civil rights office has authority to order the agency to take corrective actions. Schlanger, *supra* note 263, at 85.

271. *Id.* at 8–11.

272. U.S. COMM’N ON CIV. RTS., ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT: NOVEMBER 2019 STATUTORY REPORT 45 (2019), <https://www.usccr.gov/files/pubs/2019/11-21-Are-Rights-a-Reality.pdf> [<https://perma.cc/BD83-LZLD>].

273. REBECCA GAMBLER, U.S. GOV’T ACCOUNTABILITY OFF., GAO 20-596, REPORT TO CONGRESSIONAL COMMITTEES, IMMIGRATION DETENTION: ICE SHOULD ENHANCE ITS USE OF FACILITY OVERSIGHT DATA AND MANAGEMENT OF DETAINEE COMPLAINTS 8 (2020) <https://www.gao.gov/assets/gao-20-596.pdf> [<https://perma.cc/SG4D-KA3S>] (noting that CRCL received 4,865 complaints related to detention along from fiscal years 2017 through 2019).

274. *Id.* at 19; *see also* DANIEL E. MARTÍNEZ, GUILLERMO CANTOR & WALTER A. EWING, AM. IMMIGR. COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE (2014), <https://www.americanimmigrationcouncil.org/research/no-action-taken-lack-cbp-accountability-responding-complaints-abuse> [<https://perma.cc/9CAX-F68N>] (finding that 97% of complaints were about abuses by Border Patrol agents between 2009 and 2012); GUILLERMO CANTOR & WALTER EWING, AM. IMMIGR. COUNCIL, STILL NO ACTION TAKEN: COMPLAINTS AGAINST BORDER PATROL AGENTS GO UNANSWERED 1 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/still_no_action_taken_complaints_against_border_patrol_agents_continue_to_go_unanswered.pdf [<https://perma.cc/9JDW-RXA8>] (finding that 95.9% of 1,255 cases in which an outcome was reported resulted in “no action taken” against the officer or agent accused of misconduct).

275. Ponomarenko, *supra* note 217, at 53.

ICE to make more statistical information public,²⁷⁶ enabling the types of analyses presented in this Article. Giving OIG and CRCL greater authority to ensure that their recommendations are implemented would help shift their role from merely exposing problems to addressing them.

3. *Establishing Regional Committees for Civilian Oversight*

Civilian oversight has been part of the conversation on policing for many decades, but it is a relatively recent addition to discussions of oversight of federal agencies.²⁷⁷ While there are dozens of articles by legal academics on community policing,²⁷⁸ hardly any law review articles have discussed civilian oversight of ICE. One exception is an article by Professor Bill Ong Hing that examines how ICE's raids of Swift meatpacking plants in 2006 led the United Food and Commercial Workers Union to create a commission that included "former elected officials, labor leaders, academics, civil rights leaders and immigration and legal experts who spent more than a year holding regional hearings, interviewing witnesses and soliciting input from a wide range of workers, elected officials, policy experts, psychologists, and religious and community leaders."²⁷⁹ Subsequently, the commission issued a report that documented serious, systemic issues and recommended "vigorous oversight."²⁸⁰

ICE has at least two existing mechanisms that provide potential opportunities for civilian engagement. First, in some jurisdictions, local law enforcement agencies have established steering committees to oversee their involvement in immigration enforcement through 287(g) agreements. In 2010, DHS OIG recommended that ICE "[r]equire 287(g) program sites to maintain steering committees with external stakeholders, with a focus on

276. See, e.g., OFF. OF INSPECTOR GEN., OIG-21-29, DHS' FRAGMENTED APPROACH TO IMMIGRATION ENFORCEMENT AND POOR PLANNING RESULTED IN EXTENDED MIGRANT DETENTION DURING THE 2019 SURGE 30-31 (2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-03/OIG-21-29-Mar21.pdf> [<https://perma.cc/G6FY-DDMX>] ("Disparities and inconsistencies in several aspects of immigration enforcement operations, navigable when apprehensions are low, were magnified during the surge."); OFF. OF INSPECTOR GEN., OIG-18-67, ICE'S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMIC IMPROVEMENTS 12 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf> [<https://perma.cc/43JH-E8ET>] ("ERO field offices' engagement in detention oversight varies widely.").

277. For a recent example of this, see Barkow, *supra* note 199, at 1180-85.

278. See, e.g., Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513 (2002); Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793 (2016).

279. Bill Ong Hing, *Ethics, Morality, and Disruption of U.S. Immigration Laws*, 63 U. KAN. L. REV. 981, 1041 (2015).

280. *Id.* at 1042.

ensuring compliance with the [Memorandum of Agreement].”²⁸¹ OIG explained that

[s]teering committees should not be narrowly viewed as a means to enhance ICE and [law enforcement agency] communications, but as a way to (1) improve program oversight and direction, (2) identify issues and concerns regarding immigration enforcement activities, (3) increase transparency, and (4) offer stakeholders opportunities to communicate community-level perspectives.²⁸²

Although ICE agreed with OIG’s recommendation,²⁸³ it was not implemented.

Subsequently, in 2017, Congress directed ICE to “require the establishment and regular use of steering committees for each [287(g)] jurisdiction,” including the participation of external stakeholders.²⁸⁴ But the language typically included in 287(g) agreements still only requires local jurisdictions to participate in steering committee meetings “as necessary.”²⁸⁵ When the Center for American Progress reached out to seventy-eight localities with 287(g) agreements in 2018 to find out if any steering committee meetings had taken place, it discovered that only seventeen had held steering committee meetings, and only nine had any public records of those meetings.²⁸⁶ Additionally, community groups complained about restricted public access to those meetings due to last minute changes, prohibitions on recording meetings, and inconvenient locations that could be hours away.²⁸⁷ These findings indicate that steering committees have not provided an effective mechanism for community oversight to date.

Another potential opportunity for civilian involvement is through ICE’s Community Engagement Office, which was established under President Obama in 2016 and is comprised of twenty-five community relations

281. OFF. OF INSPECTOR GEN., THE PERFORMANCE OF 287(G) AGREEMENTS 49 (emphasis added).

282. *Id.* at 16.

283. *Id.* at 49.

284. U.S. DEP’T OF HOMELAND SEC., DIVISION F — DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS ACT EXPLANATORY STATEMENT (2018), <https://docs.house.gov/billsthisweek/20180319/DIV%20F%20HOMELAND%20SOM%20FY18%20OMNI.OCR.pdf> [<https://perma.cc/LA5M-EGJW>]; see also H.R. Rep. No. 115-239 (2017).

285. Claudia Flores, *Rapidly Expanding 287(g) Program Suffers from Lack of Transparency*, CTR. FOR AM. PROGRESS (Oct. 9, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/10/09/459098/rapidly-expanding-287g-program-suffers-lack-transparency/> [<https://perma.cc/V5WT-CCTM>].

286. *Id.*

287. *Id.*

officers (CROs) located at field offices around the country.²⁸⁸ These CROs are supposed to “serve as liaisons to the public, key stakeholders, and ICE leadership”²⁸⁹ and seek to “foster trust and collaboration” while “promoting ICE’s mission.”²⁹⁰ However, the Community Engagement Office is one of two offices within the Office of Partnership and Engagement. The other office is Victims of Immigration Crime Engagement (VOICE), which was originally proposed by President Trump’s Executive Order on interior enforcement.²⁹¹ As the name suggests, VOICE focused on helping the victims of crimes committed by noncitizens and was criticized for vilifying immigrants, rather than helping victims.²⁹² CROs became responsible for the VOICE office, undermining trust with communities.²⁹³

Given these challenges and limitations with respect to steering committees and CROs, a more effective mechanism is needed for civilian oversight. Professor Samuel Walker, an expert on civilian oversight in policing, argues that the best model of civilian oversight of police departments is the “auditor/inspector general model.”²⁹⁴ Unlike a traditional civilian review board, which “investigat[es] individual citizen complaints with the goal of determining whether an officer violated department policy, the auditor/inspector general reviews a police department’s policies and practices with the ultimate goal of changing the organization.”²⁹⁵

As discussed above, DHS already has an OIG that is responsible for oversight of the entire department.²⁹⁶ A civilian body with a similar mission

288. See *Office of Partnership and Engagement*, ICE (Nov. 22, 2021), <https://www.ice.gov/leadership/ope> [<https://perma.cc/N5RE-WKQ5>] (explaining the Community Engagement Office).

289. *Id.*

290. *ICE Office of Community Engagement Already Hard at Work in 2017*, ICE (Oct. 8, 2020), <https://www.ice.gov/news/releases/ice-office-community-engagement-already-hard-work-2017> [<https://perma.cc/J8N7-RJJV>].

291. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 § 13 (Jan. 30, 2017); *DHS Secretary Kelly Issues Memorandum Regarding Executive Order on Interior Enforcement*, 94 Interpreter Releases 9, Art. 2 (Feb. 27, 2017).

292. See Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 712 (2018) (describing VOICE as “an office to generate publicity regarding crimes committed by immigrants” and discussing the political creation of the “criminal alien”); see also Michele Waslin, *DHS Launches Controversial Immigration Victims Office*, IMMIGR. IMPACT (Apr. 27, 2017), <https://immigrationimpact.com/2017/04/27/dhs-launches-controversial-immigration-victims-office/#.YCbZi9h3FQ> [<https://perma.cc/BX42-9XLL>] (quoting Brent Wilkes, chief executive of the League of United Latin American Citizens as saying, “[i]t’s really about trying to vilify the immigrant population”); Dean DeChiaro, *Republicans, Advocates Divided on New ICE office to Track Immigrant Crimes*, CQ ROLL CALL, Apr. 27, 2017, 2017 WL 1505013.

293. Waslin, *supra* note 292 (stating that the community relations officers would assume responsibility for VOICE despite advocates’ concerns that they did not have the proper skillset).

294. Walker, *supra* note 240, at 646–50.

295. *Id.* at 647.

296. See *supra* Section IV.B.2.

but a regional focus would help bring regional issues to light that OIG or GAO could then take up. These civilian committees could help define the regional problems that require investigation and issue their own reports and recommendations for changes in regional practices. Members of the civilian oversight body should have regional expertise in immigration policies and enforcement practices, for example through work with organizations in the region that focus on issues of immigration, detention, racial profiling, and policing.

When Professors Keith Aoki and John Shuford coined the term “immigration regionalism” a decade ago, they proposed that the federal government create “immigration regions and a governance structure that incorporates representatives of state and local governments, as well as private sector and civil society groups.”²⁹⁷ They contemplated that these regional units “would gather and assess data and formulate policy recommendations.”²⁹⁸ This “participatory administrative structure for rational reforms” would, in their view, encourage “regional experimentation,” with robust federal oversight.²⁹⁹ Professor Aoki and Shuford referred to these units as “regional immigration councils.”³⁰⁰ They were interested in innovative regional solutions to problems like labor, employment, access to public services, and integration.³⁰¹ Their innovative proposal can inform ideas about how to set up regional civilian oversight committees, which could be similarly structured but with a focus on ICE’s enforcement operations.

Civilians have played a role in enforcement by federal agencies in other contexts, such as protecting endangered species,³⁰² measuring air quality,³⁰³ and addressing regulatory challenges related to energy.³⁰⁴ In those situations, however, the civilians involved were *assisting* the agency with

297. Aoki & Shuford, *supra* note 16, at 5.

298. *Id.*

299. *Id.* at 63.

300. *Id.* at 64.

301. *Id.*

302. Karen Bradshaw Schulz & Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507, 2525 (2015) (discussing how Bison are “treated as domestic animals so that landowners can gain from contracting for large bison landscapes”); *see also* Hannah J. Wiseman, *Delegation and Dysfunction*, 35 YALE J. ON REG. 233, 256–57, 298–99 (2018) (arguing for regulatory design changes to cooperative federalism schemes, including enhanced monitoring of federal agencies and subfederal governments and describing the critical role played by citizens).

303. Dara O’Rourke & Gregg P. Macey, *Community Environmental Policing: Assessing New Strategies of Public Participation in Environmental Regulation*, 22 J. POL’Y ANALYSIS & MGMT. 383 (2003) (describing citizens’ involvement in monitoring air quality).

304. Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 804–05 (2013) (discussing regional transmission organizations comprised of private actors that operate the transmission grid, plan for necessary upgrades and new transmission capacity, and even decide how to allocate transmission rates among utilities to cover this new capacity).

enforcement, whereas the type of civilian involvement proposed here would involve oversight and monitoring of the agency's own actions, which would be more controversial and challenging. However, it helps that DHS has already acknowledged a role for civilian involvement through existing initiatives. Making existing opportunities for engagement more meaningful would be a starting point.

There are also other steps the federal government could take to encourage more community involvement. DHS could incentivize field offices by making meaningful community engagement a performance metric.³⁰⁵ This is similar to the proposal set forth in *The Vision for Black Lives*, which urges the Department of Justice to incentivize state and local law enforcement agencies to adopt civilian oversight boards with meaningful powers through a relevant performance metric.³⁰⁶ Additionally, the federal government could give grants for community-oriented immigration enforcement, just as it gives millions in grants for Community Oriented Policing Services.³⁰⁷ As long as ICE continues to rely on state and local law enforcement agencies, those agencies have an incentive to support civilian oversight of ICE in order to establish and maintain trust with their own communities. Expanding the concept of community-oriented policing to include community oversight of immigration enforcement would be one way for state and local law enforcement agencies to build trust with immigrant groups and support more equitable enforcement.

CONCLUSION

Regional variations in the activities of federal agencies are by no means unique to immigration.³⁰⁸ However, there are unique implications when immigration enforcement practices, which affect core liberties, differ so dramatically across the country. By revealing the extent and nature of regional variations in immigration enforcement across ICE's twenty-four field offices, and specifically comparing field offices in sanctuary and antisanctuary regions, this Article highlights the importance of adding a regional lens to federal, state, and local analyses. Paying attention to ICE's

305. See A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM, & JUSTICE, DEMOCRATIC COMMUNITY CONTROL OF LOCAL, STATE, AND FEDERAL LAW ENFORCEMENT AGENCIES, <https://m4bl.org/wp-content/uploads/2020/05/CommControlofLawEnforcement-OnePager.pdf> [https://perma.cc/7G29-L5HB].

306. *Id.*

307. *Id.*

308. See, e.g., J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1447–48 (2003) (finding “alarming” regional variation in the implementation of the Endangered Species Act); Owen, *supra* note 7, at 105–07 (examining how federal regional offices generate different regional policy outcomes in environmental regulation).

own geographic organization reveals disparities in immigration enforcement that may otherwise be overlooked and that risk deepening structural racism in the United States. This Article proposes a combination of approaches, including internal agency guidelines, rulemaking, performance metrics, and institutional designs to help promote greater consistency in enforcement.

APPENDIX

Table 6: Detainer Request Rates for All Field ERO Field Offices in FY 2019. (Rates Represent Number of Detainers Requested or Arrests Made for Every 1,000 Unauthorized Individuals in the Field Office's Geographic Area of Responsibility).

Field Office	Number of Detainer Requests	Detainer Request Rate
Atlanta	14502	20.3
Baltimore	1560	6.9
Boston	2552	6.9
Buffalo	3615	80.3
Chicago	8303	10.5
Dallas	10151	14.8
Denver	2934	15.8
Detroit	2385	12.6
El Paso	2897	19.6
Houston	10878	16.9
Los Angeles	20555	14.1
Miami	10140	13.9
New Orleans	9567	28.2
New York City	4891	6.2
Newark	3251	7.6
Philadelphia	3521	18.8
Phoenix	5878	20.9
Salt Lake City	5104	17.7
San Antonio	10293	25.0
San Diego	2088	11.2
San Francisco	16772	15.6
Seattle	3592	10.0
St. Paul	3997	21.7
Washington DC	4387	15.9
Mean	6825.5	18.0
Avg. Dev. Mean	4144.3	7.6

Table 7: Arrests for All ERO Field Offices in FY 2019. (Rates Represent Number of Detainers Requested or Arrests Made for Every 1,000 Unauthorized Individuals in the Field Offices Geographic Area of Responsibility).

Field Office	Number of Arrests	Overall Arrest Rate	Arrest Rate: No Criminal History	Arrest Rate: Convicted	Arrest Rate: Pending Charge	Percentage of Arrests with No Criminal History	Percentage of Field Office's Arrests with Conviction
Atlanta	13247	18.5	1.8	11.2	5.5	9.8	60.5
Baltimore	1450	6.4	1.4	3.8	1.3	21.3	59.1
Boston	2469	6.7	0.6	3.9	2.2	9.2	58.3
Buffalo	1287	28.6	6.5	20.5	1.6	22.8	71.6
Chicago	8427	10.7	2.2	6.4	2.1	20.8	59.8
Dallas	16900	24.6	1.2	18.3	5.1	4.9	74.4
Denver	2408	12.9	1.7	9.4	1.9	13.2	72.3
Detroit	3318	17.6	4.3	9.8	3.4	24.6	55.8
El Paso	2270	15.3	3.9	7.6	3.8	25.4	49.9
Houston	11584	18.0	1.0	12.9	4.2	5.4	71.5
Los Angeles	6657	4.6	0.3	4.0	0.3	7.1	86.6
Miami	9512	13.0	1.6	7.6	3.8	12.4	58.6
New Orleans	9831	29.0	3.5	17.3	8.2	12.2	59.6
New York City	2477	3.1	0.5	1.9	0.7	14.9	61.2
Newark	2903	6.8	1.0	3.6	2.2	14.7	52.8
Philadelphia	4096	21.9	4.1	14.0	3.8	18.7	64.1
Phoenix	5904	21.0	4.3	10.7	6.0	20.6	50.9
Salt Lake City	5382	18.7	1.3	13.8	3.5	7.1	74.0
San Antonio	11780	28.7	7.2	15.9	5.5	25.2	55.6
San Diego	2280	12.2	2.5	8.0	1.8	20.3	65.2
San Francisco	5098	4.7	0.4	4.0	0.3	8.9	84.3
Seattle	2550	7.1	1.5	4.9	0.8	20.5	68.5
St. Paul	4340	23.6	2.2	15.9	5.6	9.2	67.2
Washington DC	4276	15.5	1.5	10.1	3.9	9.4	65.4
Mean	5851.9	15.4	2.4	9.8	3.2	14.9	64.5
Avg. Dev. Mean	3431.2	6.8	1.5	4.4	1.7	5.9	7.7

Table 8: Removals for All ERO Field Offices in FY 2019. (Rates Represent Number of Detainers Requested or Arrests Made for Every 1,000 Unauthorized Individuals in the Field Office's Geographic Area of Responsibility).

Field Office	Total Removals	Overall Removal Rate	Removal Rate: No Criminal History	Removal Rate: Convicted	Removal Rate: Pending Charge	Percent of Removals with No Criminal History	Percent of Removals with Conviction	Percent of Removals with Pending Charge
Atlanta	14473	20.2	5.3	12.1	0.7	26.5	59.7	3.3
Baltimore	938	4.2	1.1	2.3	0.7	25.6	56.5	17.9
Boston	2283	6.2	1.5	3.3	1.5	23.6	52.8	23.7
Buffalo	1879	41.8	12.8	27.3	1.7	30.5	65.4	4.0
Chicago	5673	7.2	1.5	4.9	0.8	20.8	67.5	11.7
Dallas	14981	21.8	1.9	17.2	2.7	8.8	78.7	12.5
Denver	3125	16.8	4.6	10.5	1.6	27.5	62.7	9.8
Detroit	4122	21.8	8.5	10.9	2.4	39.1	49.9	11.0
El Paso	21020	142.0	25.9	108.7	7.5	18.2	76.5	5.3
Houston	19117	29.7	7.5	19.6	2.5	25.1	66.0	8.4
Los Angeles	8598	5.9	1.8	3.9	0.3	29.9	65.5	4.6
Miami	9750	13.3	4.3	6.4	2.5	32.6	48.4	19.0
New Orleans	13640	40.2	12.6	21.3	6.4	31.2	52.8	16.0
New York City	2752	3.5	1.2	1.7	0.5	36.4	50.0	13.6
Newark	2484	5.8	1.8	2.9	1.1	31.5	49.4	19.1
Philadelphia	3512	18.8	3.8	13.0	1.9	20.4	69.4	10.2
Phoenix	33665	119.8	45.1	66.4	8.3	37.6	55.4	6.9
Salt Lake City	3131	10.9	1.5	8.0	1.3	14.0	73.7	12.3
San Antonio	63394	154.2	79.0	65.9	9.3	51.2	42.8	6.0
San Diego	23480	125.6	71.8	47.3	6.4	57.2	37.7	5.1
San Francisco	5057	4.7	0.6	3.9	0.2	12.9	83.1	4.0
Seattle	4368	12.2	4.7	6.8	0.7	38.3	55.9	5.7
St. Paul	3101	16.9	2.4	11.2	3.2	14.4	66.6	19.0
Washington DC	2701	9.8	1.4	7.1	1.3	14.6	72.1	13.3
Mean	11135.2	35.6	12.6	20.1	2.7	27.8	60.8	10.9
Avg. Dev. Mean	9557.4	35.6	12.6	20.1	2.7	27.8	60.8	10.9

Table 9: Detention and ATD Enrollment for All ERO Field Offices in FY 2019. (Rates Represent Number of Detainers Requested or Arrests Made for Every 1,000 Unauthorized Individuals in the Field Office's Geographic Area of Responsibility).

ERO Field Office	Average Daily Detained (ADP)	Percent of ADP Subject to Mandatory Detention	Guaranteed Minimum Beds	Overall Detention Rate	Detention Rate: No Threat	Detention Rate: Low Threat (Level 3)	Detention Rate: Highest Threat (Level 1)	ATD Enrollment Rate
Atlanta	2972	74.5	2482	4.2	2.2	0.8	0.7	9.5
Baltimore	313	68.1	40	1.4	0.6	0.2	0.4	11.8
Boston	836	66.7	0	2.3	1.2	0.3	0.6	12.1
Buffalo	661	80.9	400	14.7	6.4	2.5	4.7	3.9
Chicago	1444	55.1	0	1.8	0.7	0.3	0.5	3.7
Dallas	1669	64.4	0	2.4	1.2	0.5	0.4	4.5
Denver	1169	78.4	957	6.3	3.8	0.8	1.0	5.3
Detroit	905	65.3	375	4.8	2.6	1.0	2.6	6.7
El Paso	3307	68.9	1464	22.3	13.3	6.9	0.9	26.2
Houston	3822	73.8	1500	5.9	3.6	1.1	0.7	8.2
Los Angeles	2181	76.5	1455	1.5	0.8	0.1	0.4	3.7
Miami	2436	63.1	1200	3.3	1.6	0.5	0.8	18.0
New Orleans	6171	80.6	6415	18.2	13.2	2.4	1.6	22.0
New York City	1032	49.6	0	1.3	0.4	0.3	0.3	5.7
Newark	1074	58.8	285	2.5	1.2	0.4	0.6	3.8
Philadelphia	1051	76.0	96	5.6	2.3	0.8	1.8	8.2
Phoenix	4163	68.5	2048	14.8	10.7	2.6	0.8	6.7
Salt Lake City	529	51.6	0	1.8	0.6	0.4	0.5	2.6
San Antonio	7769	81.9	7235	18.9	14.8	2.9	0.5	7.3
San Diego	1905	87.8	1640	10.2	8.1	0.6	1.1	9.8
San Francisco	598	70.7	320	0.6	0.2	0.1	0.3	3.4
Seattle	1379	71.0	1181	3.8	2.0	0.5	0.9	2.0
St. Paul	745	66.8	300	4.0	1.2	0.8	1.3	8.7
Washington DC	1012	62.6	724	3.7	1.4	0.7	1.0	16.7
Mean	2047.6	69.2	1254.9	6.5	3.9	1.1	1.0	8.8
Avg Dev. Mean	1370.0	7.5	1183.3	5.0	3.6	1.0	0.6	4.7