

# U.C.L.A. Law Review

## Sanctuary Campuses: The University's Role in Protecting Undocumented Students From Changing Immigration Policies

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### ABSTRACT

Following the election of Donald Trump, students and professors across the country began mounting campaigns for their campuses to become “sanctuaries” for undocumented students. Their petitions varied in demands and language, but generally sought increased protections against immigration enforcement on campus, more financial support for undocumented students, and public rebukes of the new president’s announced immigration policies. This Comment explains how President Trump’s changes to immigration enforcement and attempt to rescind DACA have affected undocumented students, and proposes that the student-university relationship both legally permits and morally obligates postsecondary institutions to adopt policies that protect and insulate undocumented students from the harmful effects of these changing policies.

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## INTRODUCTION

Even before it began, Donald Trump's presidency was defined by his opposition to immigrants and immigration. In his speech announcing his candidacy for the GOP nomination, then-candidate Trump described Mexican immigrants as criminals and pledged to terminate "President Obama's illegal executive order on immigration, immediately."<sup>1</sup> It was initially unclear whether Trump was referring to Deferred Action for Childhood Arrivals (DACA),<sup>2</sup> which grants temporary relief from removal to certain young, undocumented immigrants,<sup>3</sup> or to Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), a different program that sought to protect undocumented parents of U.S. citizens and permanent residents<sup>4</sup> but was never implemented. Released over a year later, Trump's ten-point immigration plan called for an end to both.<sup>5</sup> During his campaign, he promised to build a wall along the U.S.-Mexico border,<sup>6</sup> questioned birthright citizenship's legality,<sup>7</sup> and announced that he intended to implement

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1. *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech> [<https://perma.cc/5H6A-W73F>].
  2. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigrant Services, John Morton, Dir., U.S. Immigration & Customs Enf't (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/5Z9D-WMV6>].
  3. I define "undocumented immigrants" to include individuals who are in the United States without valid immigration status because they overstayed a visa or arrived in the United States without inspection.
  4. Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigrant Services, Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action\\_2.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf) [<https://perma.cc/PBA2-96LA>].
  5. Lisa Desjardins, *What Is Donald Trump's 10-Point Immigration Plan?*, PBS (Sept. 1, 2016, 10:40 AM), <https://www.pbs.org/newshour/politics/donald-trumps-10-point-immigration-plan> [<https://perma.cc/NS9G-6HXE>].
  6. See Ron Nixon & Linda Qiu, *Trump's Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html>; Factbase Videos, *Speech: Donald Trump in Manassas, VA—December 2, 2015*, YOUTUBE (Oct. 27, 2017), <https://www.youtube.com/watch?v=sVvUEcXoUU> [<https://perma.cc/PJ6Y-RHVG>]; Factbase Videos, *Speech: Donald Trump—Ashburn, VA—August 8, 2016*, YOUTUBE (Oct. 26, 2017), <https://www.youtube.com/watch?v=nzgxzfSVGs> [<https://perma.cc/925F-A8TA>].
  7. Ian Schwartz, *Trump vs. Jorge Ramos on Birthright Citizenship, Wall, Deportation: "We're Going to Start With the Gangs"*, REALCLEAR POL. (Aug. 25, 2015), [https://www.realclearpolitics.com/video/2015/08/25/trump\\_vs\\_jorge\\_ramos\\_on\\_birthright\\_citizenship\\_wall\\_building\\_a\\_building\\_thats\\_95\\_stories\\_tall\\_more\\_difficult.html](https://www.realclearpolitics.com/video/2015/08/25/trump_vs_jorge_ramos_on_birthright_citizenship_wall_building_a_building_thats_95_stories_tall_more_difficult.html) [<https://perma.cc/8FB3-STUQ>] ("If you come across for one day and you have a baby, now the

mass deportation campaigns targeting undocumented immigrants living in the United States.<sup>8</sup>

After Trump's election on November 8, 2016, anxiety immediately spread across college and university campuses as students began to worry about how the new president's policies would impact their lives.<sup>9</sup> For undocumented students, this was a period of profound fear and uncertainty.<sup>10</sup> If the president fulfilled his campaign promises, they might lose protections like DACA, which provided work authorization and relief from removal.<sup>11</sup> Family members and friends would also be in heightened danger of deportation.<sup>12</sup> In this climate of uncertainty, students and professors at colleges and universities across the United States began mounting campaigns for their campuses to become sanctuaries<sup>13</sup> for undocumented students.<sup>14</sup>

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- baby is going to be an American citizen. . . . There are great legal scholars, the top, that say that's absolutely wrong. It's going to be tested. Okay?").
8. Scott Pelley, *Trump Gets Down to Business on 60 Minutes*, CBS NEWS (Sept. 27, 2015), <https://www.cbsnews.com/news/donald-trump-60-minutes-scott-pelley> [<https://perma.cc/7DH4-XN2U>]. When asked what he would do about the eleven million immigrants remaining in the country after the border wall was built, Trump responded: "We're rounding 'em up in a very humane way, in a very nice way. . . . I know it doesn't sound nice. But not everything is nice." *Id.*
  9. See Katherine Knott & Shannon Najmabadi, *Traumatized and Indignant, College Students React to a Trump Presidency*, CHRON. HIGHER EDUC. (Nov. 9, 2016), <https://www.chronicle.com/article/TraumatizedIndignant/238357> [<https://perma.cc/BQ4N-LNY8>].
  10. See, e.g., Dana Goodyear, *Defiance and Anxiety Among Undocumented Youth in Trump's America*, NEW YORKER (Nov. 11, 2016), <https://www.newyorker.com/news/news-desk/defiance-and-anxiety-among-undocumented-youth-in-trumps-america> [<https://perma.cc/3CWW-M3AK>].
  11. *Id.* (quoting one college student with Deferred Action for Childhood Arrivals (DACA) as saying that if Trump got rid of DACA "that's pretty much it for me. I will lose what I have and I would be back to zero.").
  12. Between 2009 and 2013, at least 5.1 million children in the United States lived with one or more undocumented parent. RANDY CAPPS, MICHAEL FIX & JIE ZONG, A PROFILE OF U.S. CHILDREN WITH UNAUTHORIZED IMMIGRANT PARENTS, MIGRATION POLICY INST. 1 (2016).
  13. The definition of "sanctuary" varies depending on context and the actor invoking the term. See Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1217–22 (2019); Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1704, 1705, n.4 (2018). For pro-immigration activists, the term typically evokes the idea of providing protection for undocumented immigrants. Cuison Villazor & Gulasekaram, *supra*, at 1221–22. Under President Trump, the federal government itself has used the term sanctuary negatively to refer to jurisdictions with a variety of different policies that resist collaboration between federal immigration authorities and state and local law enforcement. *Id.* The modern sanctuary movement began in the 1980s and 1990s when U.S. Congress started expanding removal grounds and created programs that entangled state and local law enforcement with federal immigration enforcement. See Lasch et al., *supra*, at 1721. Some cities and states responded by enacting policies to protect and integrate undocumented immigrants into the community and limit state and local law enforcement's participation in federal immigration activities. *Id.* at 1722–23. Religious communities were also heavily involved in the sanctuary movement of the 1980s and 1990s; many places of worship along the U.S.-Mexico border took in refugees who had been denied asylum, resulting in felony convictions for some clergy

Although campus demands varied, most asked universities to protect undocumented students from immigration enforcement.<sup>15</sup> Many petitions demanded that universities refuse to share student information with immigration authorities and restrict Immigration and Customs Enforcement (ICE) access to campus.<sup>16</sup> Students at the University of Michigan petitioned their university to “make it clear, now, that ICE does not belong on campus, and a person’s immigration status is a private matter.”<sup>17</sup> New York University alumni asked university administration “to train campus security to respond to federal agents seeking access . . . [and] [t]o prohibit campus security from inquiring about or recording any information regarding an individual’s immigration status . . . .”<sup>18</sup>

Many petitions also demanded that universities publicly support immigrants. Students at Columbia requested that their administration publicly urge the federal government to “affirmatively protect students who are currently under DACA from removal” and that the university state that it “supports a path to permanent status for these students.”<sup>19</sup> Professors at UCLA called on their school to reaffirm its commitment to supporting and protecting all students and workers, regardless

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members. Clyde Haberman, *Trump and the Battle Over Sanctuary in America*, N.Y. TIMES (Mar. 5, 2017), <https://www.nytimes.com/2017/03/05/us/sanctuary-cities-movement-1980-s-political-asylum.html>. President Trump’s campaign reinvigorated the debate surrounding sanctuary, spurring both widespread denouncement of sanctuary by some and the adoption of increasingly protective policies by others. Tessa Stuart, *How Sanctuary Cities Are Plotting to Resist Trump*, ROLLING STONE (Dec. 1, 2016, 9:48 PM), <https://www.rollingstone.com/politics/politics-features/how-sanctuary-cities-are-plotting-to-resist-trump-113081> [<https://perma.cc/9K5W-QQ45>].

14. Rebecca Nathanson, *Sanctuary Campuses Vow to Protect Immigrant Students Under Trump*, ROLLING STONE (Dec. 20, 2016, 3:51 PM), <http://www.rollingstone.com/politics/features/sanctuary-campuses-vow-to-protect-immigrant-students-under-trump-w455882> [<https://perma.cc/5ZL3-U4MS>].

15. *Amid Deportation Threats, Universities Exploring ‘Sanctuary Campuses’ for Immigrants*, CHI. TRIB. (Dec. 3, 2016, 1:36 PM), <http://www.chicagotribune.com/news/nationworld/ct-sanctuary-campuses-immigrants-20161203-story.html> [<https://perma.cc/2SZ3-SPQT>]. The University of Illinois at Chicago (UIC) petition asked that the university “ensure the safety and protection of undocumented, Muslim and all students, staff and their families who may be targeted or put under surveillance by formally declaring UIC a sanctuary campus.” *Id.*

16. *See id.*

17. Anna Haritos, *Students and Faculty Sign Petition for Sanctuary Campus*, MICH. DAILY (Jan. 19, 2017, 11:54 PM), <https://www.michigandaily.com/section/campus-life/students-and-faculty-sign-petition-sanctuary-campus> [<https://perma.cc/E7NF-W5MJ>].

18. Carly A. Krakow & Bailey Theado, *NYU Alumni Urgently Demand a Sanctuary Campus*, CHANGE.ORG, <https://www.change.org/p/nyu-alumni-urgently-demand-a-sanctuary-campus> [<https://perma.cc/K7UZ-7AG3>].

19. Ctr. for Mex. Studies at Columbia Univ., *Columbia Sanctuary Campus Petition*, FACEBOOK (Nov. 15, 2016, 10:48 AM), <https://www.facebook.com/centrodeestudios.mexicano/posts/5512727250614920> [<https://perma.cc/Z4BB-JA3N>].

of status, and to creating “a campus atmosphere of respect by denouncing the hate speech directed at immigrant, minority, and LGBTQ students and workers . . . .”<sup>20</sup>

Students and professors also petitioned campus administrators for increased services for undocumented students. Students at some schools requested that their university hire a staff member that would provide personalized services and resources, such as workshops and academic advice, tailored for undocumented students.<sup>21</sup> Many requested that their university increase its capacity to provide legal services and counseling to students and staff affected by immigration policy changes.<sup>22</sup>

University responses to “sanctuary” petitions varied. Some schools, including Pitzer, Wesleyan, and Columbia, fully embraced the sanctuary campus designation and adopted policies that included pledges to provide enhanced financial support to undocumented students and students with DACA status, along with promises to protect community members from intimidation and removal.<sup>23</sup> Others announced protections akin to sanctuary campus policies but refused to use the term “sanctuary” for fear that it would place students at greater risk of immigration enforcement or result in the loss of federal funding.<sup>24</sup> The University of California

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20. Lauren Duquette-Rury et al., *Petition for UCLA to Become a Sanctuary Campus*, ACTION NETWORK, <https://actionnetwork.org/petitions/ucla-to-become-a-sanctuary-campus> [<https://perma.cc/6GSX-KEA3>].
  21. See Rebecca Tan & Charlotte Laracy, *Students Respond to Gutmann’s Announcement That Penn Is a ‘Sanctuary’ for Undocumented Students*, DAILY PENN. (Nov. 30, 2016, 5:47 PM), <http://www.thedp.com/article/2016/11/gutmann-sanctuary-campus-email> [<https://perma.cc/L3WU-K854>].
  22. Krakow & Theado, *supra* note 18.
  23. Aaron Holmes, *University to Provide Sanctuary, Financial Support for Undocumented Students*, COLUMBIA DAILY SPECTATOR (Nov. 22, 2016, 7:54 PM), <https://www.columbiaspectator.com/news/2016/11/21/university-provide-sanctuary-financial-support-undocumented-students> [<https://perma.cc/EPP3-SN25>]; Melvin L. Oliver, *President Oliver and Board of Trustees Declare Pitzer a Sanctuary College*, PITZER C. (Nov. 30, 2016), <https://www.pitzer.edu/president/president-oliver-and-board-of-trustees-declare-pitzer-a-sanctuary-college> [<https://perma.cc/GR39-EBND>]. Jake Lahut, *President Roth Declares Wesleyan a Sanctuary Campus*, WESLEYAN ARGUS (Nov. 20, 2016), <http://wesleyanargus.com/2016/11/20/roth-declares-sanctuary-campus> [<https://perma.cc/286B-5PQ9>].
  24. See, e.g., Hannah Natanson, *Faust Says Harvard Will Not Be a ‘Sanctuary Campus’*, HARV. CRIMSON (Dec. 7, 2016, 12:12 AM), <http://www.thecrimson.com/article/2016/12/7/faust-sanctuary-campus-policy> [<https://perma.cc/279E-23RV>]; *University of California Statement of Principles in Support of Undocumented Members of the UC Community*, U.C. <https://www.universityofcalifornia.edu/sites/default/files/Statement-of-Principles-in-Support-of-Undocumented-Members-of-UC.pdf> [<https://perma.cc/X83U-8LTM>]. Harvard University President Drew Faust stated, “It . . . risks drawing special attention to students in ways that could put their status in greater jeopardy . . . . I believe it would endanger, rather than protect, our students, and that is not something I am willing for this institution to do.” *Id.* Emory University President Claire E. Sterk declared her university a “safe harbor for students and faculty regardless of faith, nationality or background.” Nancy Seideman, *Emory President Joins Petition to Rescind Executive Order*, EMORY NEWS CTR. (last updated Feb. 6,

(UC), for example, resisted the designation, but announced that it “would vigorously protect the privacy and civil rights of the undocumented members of the UC community and [would] direct its police departments not to undertake joint efforts with any government agencies to enforce federal immigration law” absent a court order.<sup>25</sup>

Other universities openly refused to comply with sanctuary campus demands. In a memo explaining his opposition to designating Salem State University a sanctuary, the chief of campus police stated that his force must be free to report students to ICE when cases involve “bad actors . . . street gang participation . . . [or] drug trafficking . . . even absent a warrant or judicial order.”<sup>26</sup> New Mexico State University Chancellor Garrey Carruthers announced that he would not embrace a policy prohibiting ICE officers from coming on campus due to concerns about losing federal funding.<sup>27</sup> Many universities, even amongst those that declared protective policies for students, echoed Chancellor Carruthers’s concerns.<sup>28</sup>

President Trump’s first week in office intensified existing anxieties that adopting sanctuary policies could result in retaliation by the federal government.<sup>29</sup>

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2017), [http://news.emory.edu/stories/2017/02/upress\\_immigration\\_letter/index.html](http://news.emory.edu/stories/2017/02/upress_immigration_letter/index.html) [https://perma.cc/6774-MY7X]. In a prior email, however, President Sterk explicitly refused to declare Emory a sanctuary campus reasoning that “Declaring [Emory] a sanctuary campus, which has potent symbolism, could have the collateral effect of reducing funding for teaching, education and research, directly harming our students, patients, and the beneficiaries of our research.” Email from Claire E. Sterk, President, Emory Univ., to Sanctuary Coalition Members (Jan. 31, 2017, 5:16 PM), [http://mediad.publicbroadcasting.net/p/wabe/files/201702/emory\\_president\\_claire\\_sterk\\_response\\_letter.pdf](http://mediad.publicbroadcasting.net/p/wabe/files/201702/emory_president_claire_sterk_response_letter.pdf) [https://perma.cc/3KZR-5HCU].

25. U.C., *supra* note 24.

26. Aviva Chomsky, *Dividing Immigrants Into Good and Evil Is a Dangerous Game*, NATION (Mar. 13, 2018), <https://www.thenation.com/article/dividing-immigrants-into-good-and-evil-is-a-dangerous-game> [https://perma.cc/ZQR8-PQSN].

27. Garrey Carruthers, *New Mexico State University Comments on Efforts to Create a Sanctuary Campus*, KRWG (Dec. 2, 2016), <http://krwg.org/post/new-mexico-state-university-president-comments-efforts-create-sanctuary-campus> [https://perma.cc/7CVA-8ABZ] (“Doing so would jeopardize our federal funding, as well as our ability to issue student visas to our international students and visiting scholars.”).

28. See Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions Than Answers*, ATLANTIC (Nov. 22, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274> [https://perma.cc/ZDU4-HS9C].

At a conference of college presidents, Trinity College President Joanne Berger-Sweeney stated, when it came to the sanctuary campus concept, “we are not yet sure what is being requested of us” and financial retribution is “of course, a concern.” *Id.* See also Carla Javier, *Why Some Colleges Are Refusing to Call Themselves ‘Sanctuary Campuses’*, SPLINTER (Dec. 6, 2016, 9:21 AM), <https://splinternews.com/why-some-colleges-are-refusing-to-call-themselves-sanct-1793864107> [https://perma.cc/5YQH-HXYN].

29. See, e.g., Austen Macalus, *Planning for the Unknown*, MEDIUM (May 14, 2018),

On January 25, 2017, President Trump issued Executive Order 13768, “Enhancing Public Safety in the Interior of the United States,” which announced, among other policies, an intention to withhold federal funding from so-called “sanctuary jurisdictions.”<sup>30</sup> Because the Trump administration did not explicitly define “sanctuary jurisdiction” and seemed to embrace a broad interpretation of “sanctuary policies,” university administrators became more hesitant to adopt the changes that students, faculty, and alumni demanded.<sup>31</sup> Yet student calls for enhanced university support and protection continued and became even more vehement after the Trump administration announced DACA’s rescission on September 5, 2017.<sup>32</sup>

The issues universities face in adopting protective policies for undocumented immigrant students are complex. The Trump administration’s policies toward sanctuary jurisdictions show that university administrators’ fears of retaliation are well-founded. Yet universities can and should provide meaningful support to those affected by changing immigration policies.<sup>33</sup> As educational institutions equally committed to all students’ learning and development, universities are uniquely positioned to protect young, undocumented students. Moreover, consistent with their stated commitments to diversity, inclusion, and openmindedness,<sup>34</sup> it is incumbent upon universities to promote equity on campus and to ensure that their schools are safe, secure learning spaces for their students. Changes in immigration policy that spread fear, make immigration enforcement more pervasive and intimidating, and strip legal protections from undocumented students threaten to disrupt these values and universities’ commitments to their students.

This Comment proposes that the student-university relationship both legally permits and morally obligates postsecondary institutions to protect undocumented students from restrictive immigration policy changes.<sup>35</sup> Part I of this Comment

<https://medium.com/@austenmacalus/planning-for-the-unknown-d25871543937>

[<https://perma.cc/2VRL-DMXB>] (“Universities are concerned with what the implications of declaring oneself to be sanctuary might be from a federal funding perspective.” (quoting Marissa Hill-Dongre, director of the University of Minnesota’s Immigration Response Team)).

30. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

31. *Id.*

32. At Columbia University, students circulated petitions demanding increased university support for undocumented students, and 4000 students walked out of class to demand that Columbia become a “sanctuary campus” and that the university president publicly declare support for DACA. Holmes, *supra* note 23.

33. See Cuison Villazor & Gulasekaram, *supra* note 13, at 1235–37.

34. See, e.g., *Mission & Values*, UCLA, <http://www.ucla.edu/about/mission-and-values> [<https://perma.cc/RYN6-8LTP>] (“UCLA advances knowledge, addresses pressing societal needs, and creates a university enriched by diverse perspective where all individuals can flourish.”).

35. In this Comment, I only address how changes in immigration policy have impacted undocumented students. But, policy changes under President Trump also threaten many other



explores the student-university relationship and its protective nature. Here, the landmark U.S. Supreme Court case *Plyler v. Doe*,<sup>36</sup> which guarantees access to K–12 education for undocumented students, provides a framework for envisioning the university as a protective entity and key service provider for students. State legislation, which has made college more affordable for undocumented students, and DACA, which has expanded access to higher education, have both strengthened this role and clarified its importance.

Part II explains how President Trump's changes to immigration enforcement and his attempt to rescind DACA have affected undocumented students. Part III discusses proposed responses to enforcement changes, many modeled after student demands expressed in the aftermath of President Trump's election.

Part IV shows that despite President Trump's antisanctuary policies, especially his administration's announced interpretation of 8 U.S.C. § 1373, universities are legally able to protect undocumented students without fear of federal retaliation. Because of their special relationship to students, and supported by sanctuary jurisdiction litigation, universities should confidently protect confidential student information, limit campus law enforcement's entanglement with federal immigration authorities, and provide a host of affirmative services, including increased financial support and legal services, to undocumented students.

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groups within university communities, such as international students and faculty, especially those from countries in the president's Travel Ban. See, e.g., Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017); Proclamation No. 9645, 3 C.F.R. § 135 (Sept. 24, 2017). The current Travel Ban halts visa issuance to individuals from the Muslim-majority countries of Libya, Iran, Somalia, Syria, and Yemen, and from North Korea and Venezuela. Proclamation No. 9645, *supra*. The Ban contains exceptions for student visas, but since the Ban went into effect, applications for student visas from affected countries have dropped sharply. See Rick Gladstone & Satoshi Sugiyama, *Trump's Travel Ban: How It Works and Who Is Affected*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/world/americas/travel-ban-trump-how-it-works.html> [<https://perma.cc/SH2Z-ULUL>]. The Ban has also made current student visa holders reluctant to travel to their home countries for fear they will face significant delays in visa processing outside the United States or not be allowed to return. See Susan Svrluga, *A Libyan Student Confronts the Uncertainty of Trump's Travel Ban, With a Harvard Education at Stake*, WASH. POST (Aug. 14, 2018), [https://www.washingtonpost.com/news/grade-point/wp/2018/08/14/a-libyan-student-confronts-the-uncertainties-of-trumps-travel-ban-with-a-harvard-education-at-stake/?utm\\_term=.a814f13d9093](https://www.washingtonpost.com/news/grade-point/wp/2018/08/14/a-libyan-student-confronts-the-uncertainties-of-trumps-travel-ban-with-a-harvard-education-at-stake/?utm_term=.a814f13d9093) [<https://perma.cc/CD38-7AXB>].

36. *Plyler v. Doe*, 457 U.S. 202 (1982).

## I. THE UNIVERSITY'S PROTECTIVE ROLE AND UNDOCUMENTED STUDENTS

### A. *Plyler v. Doe*'s Guarantee of Undocumented Students' Access to Primary and Secondary Education

About 65,000 undocumented students graduate from U.S. high schools each year.<sup>37</sup> Their access to public elementary and secondary education is guaranteed by the 1982 Supreme Court decision *Plyler v. Doe*.<sup>38</sup> *Plyler*'s guarantee has made schools places of "togetherness and inclusion" for undocumented children.<sup>39</sup> Although the dichotomy between citizen and noncitizen remains present in the classroom, it becomes far less salient in public school.<sup>40</sup> Roberto Gonzales argues that public schools' "socialization mechanisms" contribute to the assimilation experiences of undocumented students.<sup>41</sup> While students' parents and older siblings may work and spend a majority of their time with others who share the same language and country of origin, in public school, students develop a "unity of experiences,"<sup>42</sup> with their U.S.-born friends and classmates who share similar aspirations<sup>43</sup> and coming-of-age experiences.<sup>44</sup>

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37. U.S. DEP'T OF EDUC., RESOURCE GUIDE: SUPPORTING UNDOCUMENTED YOUTH 3 (2015).

38. 457 U.S. at 229–30.

39. To be sure, undocumented children face unique and difficult challenges throughout elementary and secondary school. See, e.g., Carola Suárez-Orozco et al., *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438 (2011) (describing the ways in which immigration status affects children and youth's daily experiences "as they move through the developmental spectrum"); Leisy Janet Abrego, "I Can't Go to College Because I Don't Have Papers": Incorporation Patterns of Latino Undocumented Youth, 4 LATINO STUD. 212, 225 (2006) [hereinafter Abrego, *Incorporation Patterns*]. Undocumented children are more likely to grow up in poverty, attend low-performing schools, and have parents with low levels of educational attainment. Leisy J. Abrego & Roberto G. Gonzales, *Blocked Paths, Uncertain Futures: The Postsecondary Education and Labor Market Prospects of Undocumented Latino Youth*, 15 J. EDUC. FOR STUDENTS PLACED RISK 144, 147–48 (2010).

40. See Hiroshi Motomura, *Brown v. Board of Education, Immigrants, & the Meaning of Equality*, 49 N.Y.U.L. REV. 1145, 1147 (2005).

41. Roberto G. Gonzales, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood*, 76 AM. SOC. REV. 602, 604 (2011).

42. *Id.* (quoting Rubén G. Rumbaut, *Assimilation and Its Discontents: Between Rhetoric and Reality*, 31 INT'L MIGRATION REV. 923, 944 (1997)).

43. See, e.g., Priscilla Alvarez, *Borrowed Time*, ATLANTIC (Sept. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/09/whats-next-for-daca-recipients/539262> [https://perma.cc/QD36-N3FW] (discussing Yessenia Sontay, a DACA recipient who "fits the profile of thousands of American college students: she attends class, thinks about her future career (she wants to be a teacher), and works part-time to pay for university expenses, like tuition and books"); Mallika Kallungal & Michelle Krupa, *She's Undocumented and in Med School. Now What?*, CNN (Mar. 16, 2017, 6:43 AM), <https://www.cnn.com/2017/03/15/health/undocumented-medical-students-trump-trnd/index.html> [https://perma.cc/ZE5R-837R] (describing Jennifer Chang, one of approximately seventy DACA recipients studying at medical schools across the United States); Jennifer Medina, *A Defender of the Constitution, With No Legal Right to Live Here*, N.Y. TIMES (July 17, 2017),

The public education system also provides protections and experiences that are not otherwise available to older, out-of-school, undocumented immigrants. Schools offer a number of services that aim to advance equity including free and reduced meals,<sup>45</sup> special education,<sup>46</sup> healthcare,<sup>47</sup> and counseling.<sup>48</sup> These services are especially valuable for undocumented students, who are not only more likely to grow up in poverty than their U.S.-born peers,<sup>49</sup> but who also come from families that are less likely to access public benefits, both due to fear that interaction with the government could trigger removal and due to laws, like the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), that restrict immigrants' access to such benefits.<sup>50</sup>

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<https://www.nytimes.com/2017/07/17/us/undocumented-immigrants-illegal-citizenship.html> (describing the story of Lizbeth Mateo, an undocumented immigrant, practicing law); Linda Wang, *Undocumented Students Remain in the Shadows of the Chemical Sciences*, CHEMICAL & ENGINEERING NEWS (Apr. 17, 2017), <https://cen.acs.org/articles/95/i16/Undocumented-students-remain-shadows-chemical.html> [<https://perma.cc/7YRN-Y6EE>] (describing undocumented immigrant students studying to be engineers).

44. Gonzales, *supra* note 41, at 604.

45. *School Meals: FAQs*, U.S. DEP'T AGRIC.: FOOD & NUTRITION SERV., <https://www.fns.usda.gov/school-meals/faqs> [<https://perma.cc/56K6-BPPR>]; *School Breakfast Program: Fact Sheet*, U.S. DEP'T AGRIC.: FOOD & NUTRITION SERV. (Aug. 11, 2017), <https://www.fns.usda.gov/sbp/fact-sheet> [<https://perma.cc/TR38-JSTJ>].

46. Individuals with Disabilities Education Act, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. § 1400 (2012)) (ensuring free, appropriate public education, including special education and related services, for eligible children with disabilities).

47. For more information on health-related services public K–12 schools provide, see ALLENSWORTH ET AL., *SCHOOLS AND HEALTH: OUR NATION'S INVESTMENT*, INST. MED. 161–81, [https://www.ncbi.nlm.nih.gov/books/NBK232691/pdf/Bookshelf\\_NBK232691.pdf](https://www.ncbi.nlm.nih.gov/books/NBK232691/pdf/Bookshelf_NBK232691.pdf) [<https://perma.cc/MM3W-TXL2>].

48. See generally Sarah Schmanke et al., *Student Mental Health: The Public School's Legal Role*, NAT'L SCH. BOARDS ASS'N (October 2016), <https://cdn-files.nsba.org/s3fs-public/10.%20Schmanke%20Helfrich%20Student%20Mental%20Health.pdf> [<https://perma.cc/H226-YE4J>] (describing federal legislation that provides mental health funding for public schools and case law relating to schools' duty to address student mental health issues).

49. See Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW RES. CTR. (Apr. 14, 2009), <http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states> [<https://perma.cc/69MU-DZ5K>]. One-third of children with undocumented parents live in poverty, compared to 18 percent of children with U.S.-born parents. *Id.*; see also Abrego & Gonzales, *supra* note 39, at 147–48.

50. See Abrego & Gonzales, *supra* note 39, at 148; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (codified as amended at 8 U.S.C. §§ 1601–46 (2012)); HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 72–73 (2014). Undocumented immigrants are now even less likely to access public benefits due to a proposed Department of Homeland Security (DHS) regulation that alters guidance on the public charge inadmissibility and deportability determination under Section 212(a)(4) of the Immigration and Nationality Act. See *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018). The regulation would make it more difficult for individuals to become permanent residents if they, or their dependents, use any of an expanded set of publicly provided benefits or tax credits including Special Supplemental Nutrition Program for Women, Infants, and

## B. Financial Uncertainty and Its Effects in Postsecondary Education

Even though undocumented students move through the public school system with their U.S. citizen and resident peers, they often recognize the limits their immigration status presents early, when milestones available to their U.S.-born peers—like obtaining a driver’s license and getting an afterschool job—are not as easily accessible to them.<sup>51</sup> The transition from K–12 to college can also be a stage of significant “shock and vulnerability” as students realize that their undocumented status poses a barrier to accessing higher education.<sup>52</sup>

Despite *Plyler*’s guarantee of an elementary and secondary education, access to college and university level education is not guaranteed to undocumented immigrants. Because of this, many undocumented students face significant hurdles in accessing postsecondary education.<sup>53</sup> They are ineligible for federal financial aid.<sup>54</sup> And PRWORA’s restrictions on public benefits availability for all immigrants make undocumented students ineligible for state financial aid as well, unless the state affirmatively provided for eligibility after PRWORA was signed into law in 1996.<sup>55</sup> As a result, and although many undocumented students come from households that have an average annual income below \$30,000,<sup>56</sup> they are ineligible

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Children (WIC), Supplemental Nutrition Assistance Program (SNAP), and food banks. See JEANNE BATALOVA ET AL., CHILLING EFFECTS: THE EXPECTED PUBLIC CHARGE RULE AND ITS IMPACT ON LEGAL IMMIGRANT FAMILIES’ PUBLIC BENEFITS USE 5–7, 11, (Migration Policy Institute June 2018); Emily Baumgaertner, *Spooked by Trump Proposals, Immigrants Abandon Public Nutrition Services*, N.Y. TIMES (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/us/politics/trump-immigrants-public-nutrition-services.html>.

51. Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 47 (2013) (“[B]eing undocumented only [becomes] salient when matched with experiences of exclusion.” (quoting Roberto Gonzales in Myles Dannhausen, Jr., *An Undocumented Student Running out of Options*, DOOR COUNTY PULSE (Aug. 16 2012), <https://doorcountypulse.com/an-undocumented-student-running-out-of-options> [https://perma.cc/HL27-HTHP])). See also Suárez-Orozco et al., *supra* note 39, at 454. For an exploration of how young, undocumented immigrants become aware of and come to understand their undocumented status’s legal significance, see generally Gonzales, *supra* note 41.

52. Suárez-Orozco et al., *supra* note 39, at 454.

53. *Id.*; see also Abrego, *Incorporation Patterns*, *supra* note 39 at 220 (“Undocumented youth must face the most difficult challenge associated with their status upon high school graduation, when educational expenses make college inaccessible.”).

54. 20 U.S.C. § 1091(a)(5) (2018).

55. 8 U.S.C. § 1621 (2018). “A state may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible for under subsection (a) only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.” *Id.* § 1621(d).

56. ROBERT T. TERANISHI ET AL., INST. FOR IMMIGRATION, GLOBALIZATION & EDUC. AND THE UNDOCUSCHOLARS PROJECT, IN THE SHADOWS OF THE IVORY TOWER: UNDOCUMENTED UNDERGRADUATES AND THE LIMINAL STATE OF IMMIGRATION REFORM at i (2015). This average

for many forms of financial aid that make college affordable for their authorized peers with similar financial circumstances. These challenges are compounded, as undocumented students rarely qualify for private loans because they lack social security numbers, adequate credit, or cosigners.<sup>57</sup>

Unlike their U.S.-born peers, undocumented students lack work authorization, so finding jobs that help them pay their way through school can be difficult or impossible.<sup>58</sup> Furthermore, without work authorization, it is more difficult for students to pursue a career related to their field of study, which can lessen the value of a college education.<sup>59</sup> For many students, these obstacles mean that college is neither affordable<sup>60</sup> nor worth the investment.<sup>61</sup>

Financial obstacles prevent many undocumented students from pursuing higher education. A portion of these students drop out of high school; others graduate but decide not to apply to college, either because they cannot afford it, or because they do not think school is worth the time and investment.<sup>62</sup> Some students apply to college but decide not to attend after they see the significant price tag.<sup>63</sup> As a result, fewer than half of undocumented students who graduate from

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was calculated from a survey of 909 undocumented undergraduate students across thirty-four states. *Id.*

57. Cf. Stacy Cowley, *Suit Challenges Denial of Education Loan to Unauthorized Immigrants*, N.Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/05/business/dealbook/wells-fargo-student-loan-illegal-immigrants.html> (noting that even if students possess a social security number, banks such as Wells Fargo and PNC Bank require those who take out student loans to be U.S. citizens or permanent residents.) Private loans also typically carry much higher interest rates than federal loans. *Id.* Interest rates on federal loans disbursed in 2017 were fixed at 3.76 percent, while some private loans from Discover and Sallie Mae had interest rates above 11 percent. *Id.*

58. ROBERTO G. GONZALES, *YOUNG LIVES ON HOLD: THE COLLEGE DREAMS OF UNDOCUMENTED STUDENTS* 21 (2009) (“Financial barriers are exacerbated by the limited pool of jobs that are available to these students because they are not able to work legally in the United States.”).

59. *Id.*; see also Abrego, *Incorporation Patterns*, *supra* note 39, at 223 (noting that, for undocumented immigrant students, “their undocumented status complicates their ability to get what they consider desirable jobs”).

60. Abrego, *Incorporation Patterns*, *supra* note 39, at 223.

61. *Id.* at 224 (“[F]or most undocumented students, thoughts about their future are automatically connected to their legal status. Only after resolving documentation problems can these students think about pursuing their goals.”).

62. Lindsay Perez Huber & Maria C. Malagon, *Silenced Struggles: The Experiences of Latina and Latino Undocumented College Students in California*, 7 NEV. L.J. 841, 853 (2007). In one recollection, a third-year Latina community college student named Laura recalled that “Senior year came and . . . I found out [that] I can’t go to any of the UC’s because I won’t [be eligible] for financial aid . . . I kind of felt like my world collapsed.” *Id.*

63. *Id.*; see also William Pérez et al., “Cursed and Blessed”: Examining Socioemotional and Academic Experiences of Undocumented Latina and Latino College Students, 131 NEW DIRECTIONS FOR STUDENT SERVS. 35, 35 (2010) (describing the experience of “Guillermo” an undocumented California high school student who had to forgo matriculation at University of California (UC), Berkeley because he did not qualify for federal and institutional aid).

high school attend college, and most of these students attend two-year community colleges because tuition is more affordable.<sup>64</sup>

### C. *Plyler v. Doe*'s Protective Legacy in Postsecondary Education

Some scholars have argued that *Plyler v. Doe*'s equal protection logic should extend to higher education.<sup>65</sup> In *Plyler*, the Supreme Court invalidated a Texas statute that denied school districts funding for any undocumented immigrant students and allowed school districts to either refuse admission to undocumented students or to charge them tuition to make up the funding gap.<sup>66</sup> The Court found that undocumented immigrants were entitled to equal protection and that as such, the Texas statute unconstitutionally denied an important right to the children, inflicting on them an "enduring disability" of illiteracy.<sup>67</sup> Scholars who advance a similar argument for higher education assert that, for example, barring undocumented students from postsecondary institutions is contrary to *Plyler* because doing so subjects them to a similar "enduring disability."<sup>68</sup>

64. Abrego & Gonzales, *supra* note 39, at 149; see also Gustavo Arellano, *Free Community College for... Some. It's a Start*, L.A. TIMES (Feb. 14, 2018, 4:05 AM), <http://www.latimes.com/opinion/op-ed/la-oe-arellano-community-colleges-20180214-story.html> [https://perma.cc/X5UE-7CF2] (describing California legislation that makes community college affordable). This route can also present significant financial and emotional challenges for students. Abrego, *Incorporation Patterns*, *supra* note 39, at 223–24. High-achieving students who are admitted to four-year colleges but choose to attend community college due to financial constraints battle feelings of frustration. See *id.* (quoting Amanda, a formerly undocumented immigrant who attended community college despite being admitted to multiple UCs and stated, "[I feel] like I wasted my years in high school! Cuz I'm basically doing it all over again!"). Additionally, legislation that makes community college more affordable may not help all undocumented students. In California, for example, the California College Promise, which waives first-year fees for first-time, full-time community college students, is only available to undocumented students who attended a California high school for at least three years. More recent immigrants and students who attended high school out-of-state do not qualify. See CAL. EDUC. CODE § 68130.5 (West 2018).

65. See MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 63 (2012); Michael A. Olivas, *Plyler v. Doe*, Toll v. Moreno, and *Postsecondary Admissions: Undocumented Adults and Enduring Disability*, 15 J.L. & EDUC. 19, 28 (1986); Michael A. Olivas, *The Political Efficacy of Plyler v. Doe: The Danger and the Discourse*, 45 U.C. DAVIS L. REV. 1, 12 (2011); see also Danielle Holley-Walker, *Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities*, 2011 MICH. ST. L. REV. 357, 361 (arguing that *Plyler v. Doe* "provides a viable avenue to meaningfully challenge state bans on admitted undocumented students").

66. *Plyler v. Doe*, 457 U.S. 202 (1982).

67. *Id.* at 222.

68. Olivas, *Plyler v. Doe*, Toll v. Moreno, and *Postsecondary Admissions*, *supra* note 65, at 28–29 ("[J]ust as surely as undocumented children are disadvantaged relative to other children, so are undocumented adults disadvantaged relative to other adults. Therefore, the weight of evidence

At the same time, Justice Brennan's opinion in *Plyler* provides another basis of support for undocumented immigrants' access to colleges and universities. *Plyler* recognizes that the nature of the relationship between school and student reflects the key role education plays in social and civic participation and individual advancement.<sup>69</sup> Quoting *Brown v. Board of Education*,<sup>70</sup> the Court reasoned that education is a key function of state and local governments, a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment."<sup>71</sup> To deny children a basic education would be to "deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."<sup>72</sup> Framed this way, *Plyler* embraces educational institutions as protective, egalitarian spaces that fulfill obligations to students by giving them tools to flourish in the United States and to society, by shaping future citizens. That is, in order to fulfill their roles as "the great equalizers,"<sup>73</sup> universities must also be accessible to all students, regardless of socioeconomic status, race, or immigration status.

#### D. The Facilitator-University as a Model for University Action

This framing of *Plyler* is consistent with Robert Bickel and Peter Lake's conception of universities as "facilitators" for their students.<sup>74</sup> The facilitator-university model envisions the university as a space that provides "a reasonably safe background for student life in which reasonable choices, decisions, and personal

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would be in favor of public school districts being required to allow undocumented adults admission to adult education courses and, by extension, to other courses of study for which they are academically eligible.").

69. Hiroshi Motomura, *Who Belongs: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 362 (2012).

70. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

71. *Plyler*, 457 U.S. at 223 (quoting *Brown*, 347 U.S. 483 (1954)).

72. *Id.*

73. See Cameron Brenchley, *In America, Education Is Still the Great Equalizer*, U.S. DEP'T OF EDUC.: HOMEROOM (Dec. 12, 2011), <https://blog.ed.gov/2011/12/in-america-education-is-still-the-great-equalizer> [<https://perma.cc/JW4R-S63B>] (quoting former Secretary of Education Arne Duncan). But see David Rhode, Kristina Cooke, & Himanshu-Ojha, *The Decline of the 'Great Equalizer'*, ATLANTIC (Dec. 19, 2012), <https://www.theatlantic.com/business/archive/2012/12/the-decline-of-the-great-equalizer/266455> [<https://perma.cc/Z78X-B86K>]; David Witteveen & Paul Attewell, *Family Background and Earnings Inequality Among College Graduates*, 95 SOC. FORCES 1539, 1566 (2017) (noting that class-related gaps in income persist even between college graduates).

74. Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post in Loco Parentis College*, 37 IDAHO L. REV. 531, 551–53 (2001).

and intellectual growth can flourish.<sup>75</sup> This model recognizes that while the university is not a substitute for a parent, “it nonetheless stands in a unique relationship to its students,”<sup>76</sup> rightly acknowledging the university as an entity that students depend on for many purposes beyond education.

Indeed, universities provide many services that are similar to those students received throughout elementary and secondary school, like special education, counseling, and healthcare.<sup>77</sup> They also provide students with access to food and lodging, recreational facilities, and professional development opportunities.<sup>78</sup> This holistic approach to the student experience illustrates the university’s commitment to fulfilling the educator-as-equalizer role *Plyler v. Doe* embraced for elementary and secondary education.<sup>79</sup>

University initiatives aimed at helping low-income students also demonstrate this commitment to equity. Many universities have programs that offer emergency funding or loans to students in need, which help ensure that low-income students do not drop out when unforeseen expenses arise.<sup>80</sup> Many also offer resources like textbook lending, laptops, grocery money, affordable housing,<sup>81</sup> and mentorship programs dedicated to serving low-income students.<sup>82</sup>

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75. *Id.* at 552.

76. Jason A. Zwara, *Student Privacy, Campus Safety, and Reconsidering the Modern Student-University Relationship*, 38 J.C. & U.L. 419, 436 (2012). Although Robert Bickel and Peter Lake envisioned the facilitator-university as a model courts can use in guiding their decisions about institutional duty to students for liability purposes, the relationship they envision is also relevant to considering the university’s overall role both in society and in students’ lives.

77. See, e.g., *University Services*, PRINCETON UNIV., [http://www.princeton.edu/university\\_services](http://www.princeton.edu/university_services) [<https://perma.cc/4QWG-W5TK>]; *University Services*, UNIV. OF MINNESOTA, <https://www.uservices.umn.edu> [<https://perma.cc/78Z8-UF3R>].

78. See, e.g., *id.*; *Student Affairs Programs and Services*, UCLA STUDENT AFF., <http://www.studentaffairs.ucla.edu/sa-programs-and-services> [<https://perma.cc/GHQ6-S456>].

79. For example, the UCLA Office of Equity, Diversity and Inclusion’s mission is to “build an equal learning and working environment.” *Our Mission*, UCLA EQUITY, DIVERSITY AND INCLUSION, <https://equity.ucla.edu/about-us/our-mission> [<https://perma.cc/G66Z-KR8P>]. Other colleges and universities across the country have similar offices dedicated to advancing campus equity. See, e.g., *Office of Diversity and Inclusion*, UNIV. OF DENVER, <https://www.du.edu/diversity-inclusion> [<https://perma.cc/P5E2-2P8T>]; *Office of Diversity and Inclusion*, CAL. STATE UNIV., CHICO, <https://www.csuchico.edu/diversity> [<https://perma.cc/4ZJW-TSR5>]; *Diversity & Inclusion*, NORTHWESTERN UNIV., <https://www.northwestern.edu/diversity> [<https://perma.cc/4ZJW-TSR5>].

80. Emma Kinery, *Emergency Aid Helps Keep Students in College*, USA TODAY: COLLEGE (May 2, 2016), <https://www.usatoday.com/story/college/2016/05/02/emergency-aid-helps-keep-students-in-college/37415563> [<https://perma.cc/DC27-3NF9>].

81. UNIV. OF CALIF., OFF. OF THE PRESIDENT, STUDENT HOUSING INITIATIVE, <https://www.ucop.edu/student-housing-initiative> [<https://perma.cc/DC27-3NF9>].

82. Farran Powell, *Colleges Offer Campus Programs for Low-Income Students*, U.S. NEWS (Dec. 11, 2017, 8:00 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-12-11/colleges-offer-programs-to-assist-low-income-students>. Many of



In recent years, colleges and universities have also enhanced the resources they provide to undocumented students. For example, some universities now provide immigration legal services to students and their families<sup>83</sup> and have resource centers for undocumented students.<sup>84</sup> These centers provide information about admissions and financial aid, connect students with DACA- and undocu-friendly employers, and host events and workshops to support and empower students.<sup>85</sup> Through initiatives that strive to make educational and social experiences on campus more equitable, universities advance their commitment to their special, protective relationship with students and guarantee that their role in student life is not limited to academics.

### E. Legal Developments Emphasizing the University's Protective Role

State legislation that allows undocumented students to pay in-state tuition also embraces education's protective role. For example, California Assembly Bill 540 (AB 540) allows students who attended a California high school for at least three years and received a diploma or a GED to attend state colleges and universities at in-state tuition rates.<sup>86</sup> This law was intended to increase educational access<sup>87</sup> and has made college significantly more affordable for undocumented students who attended high school in the state.<sup>88</sup> About twenty other states and

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these programs, however, identify eligible students based on receipt of federal Pell Grants, for which undocumented students do not qualify. *Id.*; see also 20 U.S.C. § 1091(a)(5) (2018) (stating that only U.S. citizens, permanent residents, and individuals who can show they are "in the United States for other than a temporary purpose with the intention of becoming a permanent resident" are eligible for federal financial aid).

83. See, e.g., *UC Immigrant Legal Services Center*, UC DAVIS SCHOOL OF LAW, <https://law.ucdavis.edu/ucimm> [<https://perma.cc/BNL3-NQNW>]. The UC Immigrant Legal Services Center also hosts informational know your rights sessions for students. *Legal Resources—Undocumented at Harvard*, HARV. UNIV., <https://undocumented.harvard.edu/campus-resources> [<https://perma.cc/8AA3-T479>].

84. See, e.g., *Mission*, UCLA UNDOCUMENTED STUDENT PROGRAM, <http://www.usp.ucla.edu/About/Mission> [<https://perma.cc/4Q8E-VNLJ>].

85. See, e.g., *id.*

86. CAL. EDUC. CODE § 68130.5 (West 2018). Undocumented immigrant students must also declare in an affidavit their intent to legalize their status as soon as possible. *Id.*

87. 2001 Cal. Legis. Serv. Ch. 814 (A.B. 540) (West) ("A fair tuition policy for all high school pupils in California ensures access to our state's colleges and universities and increases the state's collective productivity and economic growth.").

88. Nonresident UCLA students paid \$28,992 more in university fees than California residents during the 2018–2019 academic year. See *Cost of Attendance*, UCLA FIN. AID & SCHOLARSHIPS, [http://www.financialaid.ucla.edu/Undergraduate/Cost-of-Attendance#49\\_5781581-residence-halls](http://www.financialaid.ucla.edu/Undergraduate/Cost-of-Attendance#49_5781581-residence-halls) [<https://perma.cc/7NXC-3CH7>].

public university systems have similar policies.<sup>89</sup> Some states, including California, also allow undocumented students to access state financial aid.<sup>90</sup> By making college more affordable, these policies have expanded undocumented students' access to higher education, thus allowing students to continue to benefit from the protections that school offers even after high school ends.

DACA has also enhanced access to postsecondary institutions and their protective policies. The Obama administration implemented DACA in 2012 to provide a two-year period of work authorization and relief from removal to certain young, undocumented immigrants.<sup>91</sup> In some states, DACA provided undocumented students with access to postsecondary education for the first time. For example, although Alabama does not permit undocumented students to receive state financial aid or to enroll at state colleges and universities, the state permits DACA recipients to enroll and pay in-state tuition at these institutions.<sup>92</sup>

In states that allowed undocumented students to enroll before DACA, the program increased access by providing students with work authorization, the lack of which was a significant barrier to social mobility and educational attainment prior to DACA.<sup>93</sup> Before DACA, many undocumented students were relegated to

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89. See Diana Ali, *In-State Tuition for Undocumented Students*, STUDENT AFF. ADMINISTRATORS IN HIGHER EDUC. (July 21, 2017), <https://www.naspa.org/rpi/posts/in-state-tuition-for-undocumented-students-2017-state-level-analysis> [https://perma.cc/3H7S-S4NK].

90. *Id.*

91. Memorandum from Janet Napolitano re. Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, U.S. DEP'T OF HOMELAND SEC. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [https://perma.cc/RB7X-6DN2]. In order to qualify for DACA, individuals must be at least fifteen years old and must have been under thirty years old on June 15, 2012. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Feb. 14, 2018), <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [https://perma.cc/W45Q-VF3U]. Applicants must also have come to the United States before age sixteen, have continuously resided in the United States since June 15, 2007 and have been physically present in the United States with no lawful status since June 15, 2012. *Id.* Additionally, individuals must either be in school, have received a high school diploma or GED, or be an honorably discharged Coast Guard or Armed Forces veteran. *Id.* Individuals are disqualified if they committed any serious crimes or pose a threat to national security. *Id.*

92. TERANISHI ET AL., *supra* note 56, at 14.

93. Roberto G. Gonzales, *Here's How DACA Changed the Lives of Young Immigrants, According to Research*, VOX (Feb. 16, 2018, 8:50 AM), <https://www.vox.com/2017/9/2/16244380/daca-benefits-trump-undocumented-immigrants-jobs> [https://perma.cc/YHC5-P62F]. Importantly, DACA has also provided a "bridge status" for certain individuals, allowing some to become permanent residents. Before President Trump rescinded DACA, individuals who initially entered the United States without inspection, making them ineligible to adjust status, could obtain advance parole through DACA, which allowed them to leave the United States, "parole" back in, and then adjust status if they had a family member who could petition for them. See Immigration and Nationality Act § 245, 8 U.S.C. § 1255 (2018).

low-wage occupations, even after graduating from college, because they did not have work authorization.<sup>94</sup> Work authorization made it easier for students to find more flexible, higher-paid work that fit with their field of study and helped them finance their education.<sup>95</sup> DACA recipients also have more opportunities for internships while in school that prepare them for their careers.<sup>96</sup> Thus, although many DACA recipients still face significant financial barriers that make college access difficult,<sup>97</sup> they are more likely than nonrecipients to attend four-year colleges and universities.<sup>98</sup>

DACA has also increased students' sense of belonging on campus and in society.<sup>99</sup> Students reported reduced feelings of stigma and shame and a decline in feelings of "pervasive social invisibility,"<sup>100</sup> all of which made recipients more likely to access campus opportunities and resources. Thus, DACA, combined with student services and legislation that improves access to in-state tuition and financial aid, has bolstered the protective nature of the student-university relationship for undocumented students.

## II. CHANGES IN INTERNAL ENFORCEMENT AND EFFECTS ON UNDOCUMENTED STUDENTS

President Trump's immigration rhetoric and policy changes undermine the protective nature of the student-university relationship.<sup>101</sup> Throughout his 2016 presidential campaign, he linked immigrants with criminality<sup>102</sup> and used this

94. Gonzales, *supra* note 93.

95. Tom K. Wong et al., *Amid Legal and Political Uncertainty, DACA Remains More Important Than Ever*, CTR. FOR AM. PROGRESS (Aug. 15, 2018), <https://www.americanprogress.org/issues/immigration/news/2018/08/15/454731/amid-legal-political-uncertainty-daca-remains-important-ever> [https://perma.cc/E8CD-TPS8] (noting that 77 percent of DACA recipients reported in a nationwide survey that increased earnings due to DACA helped them finance their educations).

96. TERANISHI ET AL., *supra* note 56, at 10 (quoting a student as saying "Before DACA, I could not obtain any internship because I was always asked for a work permit and a social security number. As soon as I received DACA, I was accepted as an engineering intern at a biotech company where I developed my professional and academic skills").

97. *Id.* at 13. In one study, 76.9 percent of DACA college students self-reported "moderate to extreme concern[]" regarding paying for education. *Id.* In contrast, only 67.8 percent of college students surveyed nationwide reported the same concern. *Id.*

98. TERANISHI ET AL., *supra* note 56, at i.

99. *Id.* at 11.

100. *Id.*

101. Dara Lind, *Fear Itself: Donald Trump's Real Immigration Policy*, VOX (Sept. 29, 2017), <https://www.vox.com/policy-and-politics/2017/9/14/16293906/trump-immigration-deportation> [https://perma.cc/9NSY-XZVX].

102. During his presidential announcement speech, Trump infamously referred to Mexican immigrants as drug dealers and rapists. *Here's Donald Trump's Presidential Announcement*

narrative to justify his support for anti-immigrant policies like mass deportation<sup>103</sup> and DACA's termination. President Trump's election renewed a sense of vulnerability for many undocumented students.<sup>104</sup> These fears were amplified by the changes in enforcement priorities that Trump ordered during his first week in office<sup>105</sup> and by his announcement ending DACA on September 5, 2017.<sup>106</sup> His rhetoric and actions made students fear they would become targets for immigration enforcement, even on campus.<sup>107</sup> Because of these policy changes, undocumented students need more protection from their universities.

### A. Expanding Enforcement Priorities Under Trump

President Trump's internal enforcement actions are a stark departure from President Obama's. The Obama administration made significant efforts to limit enforcement priorities and detangle state and local law enforcement from federal immigration authorities.<sup>108</sup> In 2014, the Obama administration significantly revised its enforcement priority list to include only individuals who posed "threats to national security, public safety, and border security."<sup>109</sup> Under these priorities, the administration focused predominantly on deporting individuals with serious criminal convictions.<sup>110</sup> Noting the impracticability of responding to all

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*Speech*, *supra* note 1. "When Mexico sends its people, they're not sending their best . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." *Id.*

103. In a *60 Minutes* interview, Trump said, "We have to keep the families together, but they have to go." NBC News, *Campaign Flashback: Donald Trump Talks Rescinding DACA in 2015*, YOUTUBE (Sept. 5, 2017), <https://www.youtube.com/watch?v=L01yYp3vTbA>.

104. See Maddie Hanna, *College Students Fear Deportation or Loss of Rights*, PHILA. INQUIRER (Nov. 21, 2016), [http://www.philly.com/philly/news/politics/20161121\\_College\\_students\\_fear\\_deportation\\_or\\_loss\\_of\\_rights.html](http://www.philly.com/philly/news/politics/20161121_College_students_fear_deportation_or_loss_of_rights.html) [<https://perma.cc/KH9U-QH3V>]; Alan Gomez, *Colleges Brace to Shield Students From Immigration Raids*, USA TODAY (Jan. 26, 2017, 7:51 AM), <https://www.usatoday.com/story/news/2017/01/26/colleges-universities-shield-students-immigration-deportation-raids/96968540> [<https://perma.cc/K5G N-RJDE>].

105. See Exec. Order No. 13,768, *supra* note 30.

106. Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/2LUB-9ZNF>].

107. Gomez, *supra* note 104.

108. See Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. FORUM 243, 249–50 (2017).

109. Memorandum from Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas W. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memoProsecutorialDiscretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memoProsecutorialDiscretion.pdf) [<https://perma.cc/M7DF-D2BL>] [hereinafter *Priorities Memorandum*].

110. *Id.* ("Due to limited resources, DHS . . . cannot respond to all immigration violations or remove all persons illegally in the United States."). This included individuals who had committed

immigration violations across the country, Department of Homeland Security (DHS) Secretary Jeh Johnson ordered personnel to exercise discretion at all stages in the enforcement process, including when deciding “whom to stop, question, and arrest, whom to detain or release; whether to settle, dismiss, appeal, or join in a motion of a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case.”<sup>111</sup> Importantly, during the Obama years DHS also rolled back several programs that allowed state and local law enforcement to aid in federal immigration enforcement.<sup>112</sup>

In contrast, President Trump’s executive order on interior enforcement expanded the executive branch’s priorities for removing undocumented immigrants in the United States.<sup>113</sup> The order deems any individual charged with a criminal offense a priority, even if she has not been convicted.<sup>114</sup> The order also grants officers discretion to deem an immigrant a priority if in the officer’s judgment, the person otherwise poses a safety or security risk.<sup>115</sup> In practice, this means that immigration agents are making more arrests in the U.S. interior,<sup>116</sup> and, as a result, undocumented students are more vulnerable to arrest and detention.

President Trump’s first year in office was marked by a sharp increase in immigration arrests in the U.S. interior. While the total number of deportations fell over fiscal year 2017, ICE agents made 42 percent more arrests than they did during

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aggravated felonies, significant misdemeanors, and people with gang-related allegations or convictions. *Id.*

111. *Id.*

112. See *FY 2012: ICE Announces Year-End Removal Numbers*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Dec. 20, 2012), <https://www.ice.gov/news/releases/fy-2012-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities-and#statement> [<https://perma.cc/4UY3-MDGU>]; *Priorities Memorandum*, *supra* note 110. *ICE Apprehensions Half Levels of Five Years Ago*, TRAC IMMIGRATION (June 12, 2018), <http://trac.syr.edu/immigration/reports/517> [<https://perma.cc/2UFW-362W>].

113. Exec. Order No. 13,768 *supra* note 30.

114. *Id.*

115. *Id.* The order also indicates that individuals who “have engaged in fraud or willful misrepresentation . . . before a governmental agency; Have abused any program related to receipt of public benefits; Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States” are removal priorities. *Id.*

116. Immigration arrests in the interior rose by 40 percent over the 2017 fiscal year. Joseph Tanfani, *Immigration Enforcement Under Trump: Fewer People Caught at Border, More Arrested in U.S. Interior*, L.A. TIMES (Dec. 5, 2017, 3:10 PM), <http://www.latimes.com/politics/la-na-pol-immigration-enforcement-20171205-story.html> [<https://perma.cc/2Y-TR-W8SQ>]. Further, arrests of individuals without criminal convictions more than doubled over FY 2017, to more than 37,000, and about 8 percent of total arrests made were “collateral arrests,” made when Immigration and Customs Enforcement (ICE) agents came looking for someone other than the arrestee. *Id.*

the Obama years.<sup>117</sup> Further, ICE arrested more than 28,000 “non-criminal immigration violators” between January 22, 2017 and September 2, 2017; the fastest-growing immigration-arrest category during this period was of individuals facing no criminal charges.<sup>118</sup> Since President Trump took office, ICE has focused its enforcement actions on “sanctuary” cities,<sup>119</sup> so these enforcement changes are especially concerning for undocumented immigrants in cities with such policies, like Los Angeles, San Francisco, and Chicago.<sup>120</sup>

Some scholars have identified President Trump’s internal enforcement agenda as a self-deportation regime. Self-deportation policies, such as those that bar undocumented immigrants from accessing public benefits, housing, education, and employment opportunities,<sup>121</sup> are designed to generate such intense fear and anxiety in immigrant communities that they decide to leave the United States.<sup>122</sup> Firmly rooted in the history of U.S. immigration enforcement, self-deportation policies not only cause undocumented immigrants to leave the United States voluntarily because they feel unwelcome and unsafe, but also make these populations more hesitant to report crimes, travel, attend school, and generally participate in public life.<sup>123</sup>

At the very least, the new self-deportation regime is generating enough fear among students to negatively affect their college experiences. Individuals are scared that their family and friends, or they themselves, could be picked up by ICE

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117. *By the Numbers FY 2017*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/topics/fy2017> [<https://perma.cc/A42S-Y549>].

118. Nick Miroff, *Deportations Slow Under Trump Despite Increase in Arrests by ICE*, WASH. POST (Sept. 28, 2017), [https://www.washingtonpost.com/world/national-security/deportations-fall-under-trump-despite-increase-in-arrests-by-ice/2017/09/28/1648d4ee-a3ba-11e7-8c37-e1d99ad6aa22\\_story.html?utm\\_term=.240459c531ea](https://www.washingtonpost.com/world/national-security/deportations-fall-under-trump-despite-increase-in-arrests-by-ice/2017/09/28/1648d4ee-a3ba-11e7-8c37-e1d99ad6aa22_story.html?utm_term=.240459c531ea) [<https://perma.cc/96LS-JBNP>].

119. Eric Westervelt, *ICE Raids Target Sanctuary Cities*, NPR: MORNING EDITION (Sept. 29, 2017, 5:02 AM), <https://www.npr.org/2017/09/29/554424186/ice-raids-target-sanctuary-cities>.

120. *See id.*

121. *See* Motomura, *supra* note 69, at 69–76.

122. *See* Adam Serwer, “Self-Deportation”: *It’s a Real Thing, and It Isn’t Pretty*, MOTHER JONES (Jan. 24, 2012, 3:59 AM), <https://www.motherjones.com/politics/2012/01/romneys-self-deportation-just-another-term-alabama-style-immigration-enforcement> [<https://perma.cc/L7CL-BEJR>] (criticizing self-deportation as “a cleaner, less cruel-sounding” endorsement of policies designed to coerce undocumented immigrants to leave); Alene Tchekmedyan, *‘You’re Just There, Trapped’: Why One Mexican Woman Decided to ‘Self-Deport,’ Long Before Trump*, L.A. TIMES (May 29, 2017, 4:00 AM), <http://www.latimes.com/world/mexico-americas/la-fg-self-deportation-tijuana-2017-story.html> [<https://perma.cc/N5RT-HDX4>].

123. *See* Tchekmedyan, *supra* note 122 (describing the fear and anxiety Paula Flores Colorado felt prior to “self-deporting” to Mexico and quoting Flores as saying “It’s like you’re living a happy life . . . . But at the same time, you’re not able to get out of that bubble. You’re just there, trapped.”).

and deported;<sup>124</sup> they are also concerned about losing the ability to work if DACA is officially rescinded, and generally anxious about whether they belong in the education system.<sup>125</sup> Even if changes in policy do not directly affect students, the indirect emotional and psychological effects—heightened senses of vulnerability, anxiety, and distress—are serious. To fulfill their obligations to students impacted by changing policies, colleges and universities must offer enhanced protections and affirmative services that seek to mitigate these harms.

## B. Potential Campus Enforcement and Its Effects on Students

In 2011 ICE, the entity responsible for immigration enforcement in the U.S. interior, issued a memorandum entitled *Enforcement Actions at or Focused on Sensitive Locations* (Sensitive Locations Memorandum), which discourages ICE enforcement in “sensitive locations,” including college and university campuses.<sup>126</sup> Enforcement activities include arrests, interviews, searches, and “for purpose of immigration enforcement only, surveillance.”<sup>127</sup> This memo permits ICE to be at “sensitive locations” for nonenforcement purposes, such as “obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, or participating in official functions or community meetings.”<sup>128</sup>

124. Although no study has documented the effects of changes in immigration enforcement on postsecondary students, for a description of how changes in immigration enforcement have impacted students in elementary and secondary school, see Patricia Gándara & Jongyeon (Joy) Ee, *U.S. Immigration Enforcement Policy and Its Impact on Teaching and Learning in the Nation's Schools* (Civil Rights Project, UCLA, Working Paper, 2018), <https://www.civilrightsproject.ucla.edu/research/k-12-education/immigration-immigrant-students/u.s.-immigration-enforcement-policy-and-its-impact-on-teaching-and-learning-in-the-nations-schools>.

125. Katherine Mangan, *Undocumented Students' Fears Escalate After a DACA Recipient's Arrest*, CHRON. HIGHER EDUC. (Feb. 16, 2017), <https://www.chronicle.com/article/Undocumented-Students-Fears/239214> [<https://perma.cc/ZYE5-ANGY>].

126. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft to Field Office Dirs, Special Agents in Charge, Chief Counsel (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> [<https://perma.cc/3SRY-CCNV>] [hereinafter *Sensitive Locations Memorandum*]. The memo includes some exceptions to the nonenforcement policy. Enforcement action at sensitive locations is only allowed if “(a) exigent circumstances exist, (b) other law enforcement actions have led officers to a sensitive location . . . or (c) prior approval is obtained.” *Id.*

127. *Id.*

128. *Id.* The Student and Exchange Visitor Program (SEVP) is a long-running DHS program that administers the Student Exchange and Visitor Information System (SEVIS). *Student and Exchange Visitor Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/sevis> [<https://perma.cc/FF5W-PXR3>] (last updated Nov. 14, 2018). SEVP manages information

Some who question the necessity of increased on-campus protections for undocumented students point to the Sensitive Locations Memorandum as evidence that fear of on-campus enforcement is exaggerated.<sup>129</sup> But, a recent spike in immigration enforcement in courthouses, which are not designated “sensitive locations,” but where ICE has historically avoided conducting enforcement activities, indicates that traditionally arrest-free locations are no longer safe under President Trump.<sup>130</sup> The administration’s courthouse arrest policy permits ICE to target specific individuals in courthouses and explains that courthouses are secure and practical locations for enforcement activity “because many individuals appearing in courthouses for one matter are wanted for unrelated criminal or civil violations.”<sup>131</sup> Many, including judges and legislators, have criticized the arrests for discouraging even domestic violence victims and civil litigants from appearing for court dates.<sup>132</sup>

ICE enforcement on campus would have similarly chilling effects on student behavior by, for example, deterring students from enrolling in and attending universities. Students and their families have become increasingly concerned about submitting personal information on college and financial aid applications because they worry that ICE could either access this information directly or demand it from

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regarding nonimmigrant students studying temporarily in the United States and serves as a “bridge” between the U.S. government and schools. *Id.*

129. Gomez, *supra* note 104 (quoting Jessica Vaughan, director of policy studies at the Center for Immigration Studies, a nonprofit that promotes reduced immigration to the United States, as saying, “(ICE) is not going to be walking through the library dragging people out or grabbing people in the dining hall . . . . That’s why I think this sanctuary campus movement is a little bit on the hysterical side”).
130. See Yesenia Amaro, *ICE Agents Make Another Arrest at Fresno Courthouse*, FRESNO BEE (Aug. 17, 2018, 6:31 PM), <https://www.fresnobee.com/latest-news/article216921555.html> [<https://perma.cc/QMG4-UCCW>]. Although courthouse arrests occurred under President Obama, the current administration has increased enforcement in courthouses as a way to target individuals in “sanctuary jurisdictions,” where, they argue, it is harder to apprehend individuals even after they have been taken into custody by state or local law enforcement. See Brittney Mejia & Jazmine Ulloa, *ICE Arrests in Courtrooms Escalate Feud Between California and Trump Administration Over Immigration Policy*, L.A. TIMES (Aug. 29, 2018, 5:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-ice-courtroom-arrest-20180829-story.html> [<https://perma.cc/62KA-Q6ZD>].
131. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, DIR. NUM. 11072.1, CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES (Jan. 10, 2018).
132. Madison Park, *Judge on ICE Arrests: ‘Courthouses Should Not Be Used as Bait’*, CNN (Mar. 17, 2017), <https://www.cnn.com/2017/03/17/us/immigration-ice-courthouse-arrests/index.html> [<https://perma.cc/M3U6-7ZEC>]; see *Joint Statement on ICE Activities at Multnomah County Courthouses*, MULTNOMAH COUNTY (Jan. 28, 2017), <https://multco.us/multnomah-county/news/joint-statement-ice-activities-multnomah-county-courthouses> [<https://perma.cc/G2WG-TRJL>].



the school.<sup>133</sup> Moreover, despite assurances that ICE's Sensitive Locations Memorandum protects them from on-campus enforcement, many students understand the memorandum as a "temporary assurance," but not more.<sup>134</sup> Indeed, President Trump could rescind this memorandum at any time, and universities should not rely on it as a guarantee of protection for students.

ICE's presence on or near college campuses, even for nonenforcement purposes, can spark fear and panic among students.<sup>135</sup> In January 2018, a Customs and Border Protection (CBP)<sup>136</sup> vehicle parked near UC Berkeley spread alarm across campus until an email to students clarified that the officers had been invited to speak at a university event.<sup>137</sup> This fear has even led to false immigration officer sightings on college campuses, which also generate anxiety.<sup>138</sup> In May 2017, an independent contractor from the U.S. Office of Personnel Management was on Cornell's campus conducting a background check related to a CBP job application.<sup>139</sup> Rumors circulated across campus that the visitor was an ICE

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133. Joy Resmovits, *After Educators Assuaged Fears, More Students Applied for Aid Under the California Dream Act This Year*, L.A. TIMES (Mar. 6, 2018, 3:40 PM), <http://www.latimes.com/local/education/la-me-edu-california-dream-act-applications-20180306-story.html> [<https://perma.cc/U4RU-G634>]. These concerns are not unfounded. ICE has long had access to some student information through the SEVP program. See *Student and Exchange Visitor Program*, *supra* note 128.

134. See, e.g., Gomez, *supra* note 104 ("[T]emporary assurances don't make up for the harsh, anti-immigrant rhetoric . . . from Trump during the presidential campaign.").

135. See, e.g., *Border Patrol Vehicle Spotted Near UC Berkeley Causes Alarm Among Community Members*, DAILY CALIFORNIAN (Jan. 26, 2018), <http://www.dailycal.org/2018/01/26/border-patrol-vehicle-spotted-near-uc-berkeley-causes-alarm-among-community-members> [<https://perma.cc/9XNA-3DNK>]. These sightings also affect elementary-age children and their parents. Anxiety spread at an Austin, Texas elementary school after a parent saw an ICE vehicle within blocks of the school, and fear of ICE following parents after dropping their kids off at school has caused many parents to send their children to school via bus. Roque Planas & Jessica Carro, *This Is What Trump's Immigration Crackdown Is Doing to School Kids*, HUFFINGTON POST (Feb. 27, 2017, 6:33 PM), [https://www.huffingtonpost.com/entry/elementary-school-kids-terrified-by-immigration-arrests\\_us\\_58a76321e4b07602ad548e14](https://www.huffingtonpost.com/entry/elementary-school-kids-terrified-by-immigration-arrests_us_58a76321e4b07602ad548e14) [<https://perma.cc/BEC7-5KX3>].

136. Customs and Border Protection (CBP) is the DHS entity responsible for immigration enforcement, including screening entrants to the United States, at international borders. See *About CBP*, U.S. CUSTOMS & BORDER PROTECTION (Nov. 21, 2016), <https://www.cbp.gov/about> [<https://perma.cc/5UCR-NQ7R>]. Border Patrol is the part of CBP that seeks to prevent unlawful entries along and near international borders. See *Border Patrol Overview*, U.S. CUSTOMS & BORDER PROT. (Apr. 26, 2018), <https://www.cbp.gov/border-security/along-us-borders/overview> [<https://perma.cc/D3XA-EG6A>].

137. DAILY CALIFORNIAN, *supra* note 135.

138. Nicholas Bogel-Burroughs, *Immigration Enforcement Not on Campus, Cornell Confirms After Hours of Fear*, CORNELL DAILY SUN (May 9, 2017), <http://cornellsun.com/2017/05/09/immigration-enforcement-not-on-campus-cornell-confirms-after-hours-of-fear> [<https://perma.cc/LJF2-4RY5>].

139. *Id.*

officer.<sup>140</sup> Communication efforts by campus groups and university administrators quickly dispelled the rumors.<sup>141</sup>

Student fears of enforcement on campus are also tied to immigration sweeps and raids in their communities. For example, the UC Berkeley incident described above came “amid threats of immigration sweeps in the San Francisco Bay Area.”<sup>142</sup> Just before the incident, the *San Francisco Chronicle* reported that ICE was aiming to arrest more than 1500 undocumented immigrants in Northern California cities.<sup>143</sup> The Cornell incident, also described above, occurred soon after ICE officials had arrested a local Ithaca resident.<sup>144</sup>

Since Trump’s presidency began, ICE and CBP have also arrested university students. In January 2018, CBP arrested twenty-year-old Berkeley student Luis Mora, who had overstayed his visa, and detained him for more than two weeks after he drove through a Border Patrol checkpoint between Jamul and Delzura, in southeast San Diego County.<sup>145</sup> The government placed Mora in immigration proceedings and detained him in Otay Mesa, California.<sup>146</sup> Mora’s arrest made other undocumented college students question their safety and security,<sup>147</sup> and his case illustrated the extent to which President Trump’s shift in immigration priorities could affect these students. Under President Obama, Mora would likely not have been arrested or detained because he did not fit within any of the administration’s priorities.<sup>148</sup> But, owing to President Trump’s internal enforcement policies, which essentially eliminate immigration enforcement officers’ ability to exercise discretion in who they detain, Mora was both arrested

140. *Id.*

141. *Id.*

142. DAILY CALIFORNIAN *supra* note 135.

143. Hamad Aleaziz, *Fed Plan Massive Northern California Immigration Sweep to Strike Against Sanctuary Laws*, S.F. CHRON. (Jan. 16, 2018), <https://www.sfchronicle.com/bayarea/article/Feds-planning-massive-Northern-California-12502689.php> [<https://perma.cc/2RDL-SX42>].

144. Bogel-Burroughs, *supra* note 138.

145. Kate Morrissey, *Berkeley Student to Be Released From Immigration Detention*, SAN DIEGO UNION TRIB. (Jan. 17, 2018, 10:20 AM), <http://www.sandiegouniontribune.com/news/immigration/sd-me-berkeley-bond-20180117-story.html> [<https://perma.cc/9JZJ-824R>].

146. Susan Svrluga, *‘In My Heart It Is Home’: UC-Berkeley Student Detained by Border Patrol*, WASH. POST (Jan. 17, 2018), [https://www.washingtonpost.com/news/grade-point/wp/2018/01/17/in-my-heart-it-is-home-uc-berkeley-student-detained-by-border-control/?utm\\_term=.f2621706da15](https://www.washingtonpost.com/news/grade-point/wp/2018/01/17/in-my-heart-it-is-home-uc-berkeley-student-detained-by-border-control/?utm_term=.f2621706da15) [<https://perma.cc/67TN-R8PK>]. Perna Lal, an immigration lawyer with UC Berkeley’s Undocumented Student Program, worked to obtain Mora’s release on bond. Morrissey, *supra* note 145. As of this writing, Mora’s immigration case is still pending.

147. Svrluga, *supra* note 146 (quoting UC Berkeley student Valeria Suarez as saying, “A lot of students are wondering how dangerous the situation is”).

148. See *Priorities Memorandum*, *supra* note 109.

and placed in immigration detention. Other students like Mora, who lack status but have no criminal history, could also be affected by this policy shift.<sup>149</sup>

### C. Attempts to Rescind DACA

Trump voiced his plan to rescind DACA at several points during his campaign.<sup>150</sup> Though in early 2017 he walked back those comments and announced his intent to “work something out that’s going to make people happy and proud,”<sup>151</sup> President Trump attempted to terminate the program after a group of states threatened to sue the administration over DACA.<sup>152</sup> On September 5, 2017, a DHS memorandum announced an immediate end to first-time applications, but gave a small portion of DACA recipients a one-month window to submit renewals.<sup>153</sup> As part of his DACA rescission announcement, President Trump gave Congress a March 5, 2018 deadline to pass legislation to extend the program,<sup>154</sup> but this period lapsed without new legislation.<sup>155</sup>

Preliminary injunctions against the rescission have opened the door to DACA renewal applications and to applications from individuals who previously had DACA,<sup>156</sup> and U.S. Citizenship and Immigration Services, the DHS branch

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149. Mora did not have DACA status, so individuals with DACA might be less vulnerable to arrest and detention, but individuals with DACA status have also been arrested and detained since Trump came into office. See Mangan, *supra* note 125.

150. See Gregory Krieg, *Trump’s Many Shifting Positions on DACA, From the Campaign to Right Now*, CNN (Jan. 25, 2018, 2:55 PM), <https://www.cnn.com/2018/01/25/politics/donald-trump-positions-daca/index.html> [<https://perma.cc/5H6M-9F4Z>].

151. *Id.*

152. Ted Hesson, *Texas AG Leads Push to End DACA*, POLITICO (June 29, 2017, 7:27 PM), <https://www.politico.com/story/2017/06/29/texas-attorney-general-end-daca-dreamers-240121> [<https://perma.cc/YBG7-Q7S4>].

153. Memorandum from Elaine C. Duke, Acting Sec’y, Dep’t of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship and Immigration Services, et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/2LUB-9ZNF>].

154. Dara Lind, *March 5 Is Supposed to Be the DACA “Deadline.” Here’s What That Means for Immigrants*, Vox (Mar. 5, 2018, 10:31 AM), <https://www.vox.com/policy-and-politics/2018/2/16/17015818/daca-deadline-trump-dreamers-march-5> [<https://perma.cc/YT8Z-4HSC>].

155. *Id.*

156. *Regents of Univ. of Cal. v. Dep’t Homeland Sec.*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018), *aff’d*, 908 F.3d 476 (9th Cir. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 409 (E.D.N.Y. 2018), *appeal filed*, No. 18-1985 (2d Cir. July 5, 2018). Judge John Bates of the U.S. District Court for the District of Columbia granted an order to reinstate DACA in its entirety and allow eligible individuals to submit new applications. *NAACP v. Trump*, 298 F. Supp. 3d 209, 245–46 (D.D.C. 2018). But, the order also granted the Administration ninety days to issue a new memorandum clarifying its reasoning for terminating the program. *Id.* at 245.

that adjudicates DACA applications, is currently accepting applications.<sup>157</sup> Any individual who would otherwise be eligible, but did not file an initial application before September 5, 2017, however, is ineligible to apply. Only about half of the individuals who qualified for DACA applied for and received it, leaving the half who never received DACA unable to apply.<sup>158</sup> Moreover, DACA applicants need to be at least fifteen years old to apply,<sup>159</sup> so there is also a large population of individuals who will become “of DACA age,” but remain ineligible for relief because of the recent rescission. The future of DACA remains uncertain. In November 2018, the government lost its appeal to the Ninth Circuit in *Regents of the University of California v. Department of Homeland Security*.<sup>160</sup> Prior to judgment in that case the government filed for certiorari before the U.S. Supreme Court.<sup>161</sup> If the Supreme Court grants certiorari, and upholds the Trump administration’s rescission of DACA, this will result in hundreds of thousands of individuals losing work authorization and protection from deportation.

DACA allowed recipients to buy homes, pursue degrees, start families, and pursue other investments,<sup>162</sup> but with DACA’s protections potentially ending, students are forced to contemplate futures without the security that work authorization and relief from removal that DACA provided. Some students have questioned whether they would be able to afford to continue with school and whether the investment in their education would be worthwhile without the guarantee of work authorization following graduation.<sup>163</sup> Some younger, high school age students have confused DACA eligibility with qualification for state-

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157. *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> [<https://perma.cc/29VR-3TXV>].

158. Lind, *supra* note 154.

159. Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/5Z9D-WMV6>].

160. 908 F.3d 476 (9th Cir. 2018).

161. Petition for Writ of Certiorari Before Judgment, Dep’t of Homeland Sec. v. Regents of Univ. of California, No. 18-587 (Nov. 5, 2018).

162. See Maria Sacchetti, Patricia Sullivan & Ed O’Keefe, *DACA Injunction Adds to Limbo for ‘Dreamers’ as Trump Crackdown, Hill Talks Continue*, WASH. POST (Jan. 10, 2018), [https://www.washingtonpost.com/local/immigration/daca-injunction-what-a-federal-judges-ruling-means-for-dreamers/2018/01/10/ecb5d492-f60c-11e7-a9e3-ab18ce41436a\\_story.html?utm\\_term=.fd98584665a3](https://www.washingtonpost.com/local/immigration/daca-injunction-what-a-federal-judges-ruling-means-for-dreamers/2018/01/10/ecb5d492-f60c-11e7-a9e3-ab18ce41436a_story.html?utm_term=.fd98584665a3) [<https://perma.cc/LH7S-EBF5>].

163. *Id.* Denia Perez, a student at Quinnipiac University School of Law, stated that she would clean houses or work as a nanny if she loses her work authorization. Caitlin Dickerson, *For DACA Recipients, Losing Protection and Work Permits Is Just the Start*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/us/daca-losses-immigration.html>.

administered financial aid.<sup>164</sup> This confusion could discourage students from applying to college because they incorrectly believe that without DACA, they are not eligible for financial aid. Thus, younger students who were never eligible to apply for DACA because of their age may be discouraged from applying to college at all.<sup>165</sup> Although the future of DACA is uncertain now, the impact of full cancellation is predictable, and partial rescission has already begun affecting young undocumented immigrants. Colleges and universities should prepare to address the impact of DACA's cancellation.

### III. UNIVERSITY RESPONSE TO CHANGES IN POLICY AND ENFORCEMENT PRIORITIES

Because of their special relationship with students, universities are both legally able and morally obligated to address the effects of changing immigration enforcement policies on students. Here, the policies universities can adopt fall into two overlapping dimensions: enforcement and integration.<sup>166</sup> Generally, enforcement, or anti-enforcement measures, limit the university's assistance of ICE.<sup>167</sup> Integration measures integrate undocumented students into the campus community and may have intangible benefits, including "a feeling of local belonging, optimism about the future, and a sense of well-being."<sup>168</sup> Importantly, anti-enforcement measures may have tangible and intangible integration effects, and integration measures may reduce the likelihood of enforcement.<sup>169</sup>

In adopting a range of policies, universities may not be able to offer complete protection from immigration enforcement, but by implementing even sanctuary measures that slightly reduce the potential of arrest or removal and make students feel safe and welcome, colleges and universities can fulfill their obligation to their students in light of policy changes that both make students anxious and scared and put them at heightened risk of immigration enforcement.

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164. Joy Resmovits, *Applications for College Aid Through the California Dream Act Are Down Again*, L.A. TIMES (Feb. 13, 2018, 5:00 AM), <http://www.latimes.com/local/education/la-me-ca-dream-act-20180213-story.html> [<https://perma.cc/53ET-WZE7>].

165. See generally Abrego, *Incorporation Patterns*, *supra* note 39.

166. See Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435 (2018).

167. *Id.*

168. *Id.* at 440.

169. *Id.*

### A. Rapid Response Protocol

To respond to increases in immigration enforcement and to student concerns regarding enforcement on campus, universities should develop rapid response protocols that they can engage when a student is detained by immigration authorities. These protocols may be especially important for universities near the U.S.-Mexico border, where the government recently detained several students.<sup>170</sup>

Many communities have already implemented rapid response protocols and networks to respond to enforcement activity.<sup>171</sup> Generally, these networks attend to the needs, legal and otherwise, of individuals who are arrested or detained by immigration authorities.<sup>172</sup> Networks typically include human rights organizations, legal service providers, and community leaders.<sup>173</sup>

On campus, response protocols should build on existing campus resources to create a network of responders who ensure that a student's needs are met if they come into contact with immigration officials. University legal service providers can represent students who are detained, and campuses without immigrant legal services can find community partners willing to accept detention and removal cases.<sup>174</sup> Universities are also uniquely equipped to assist students with financial and other issues that arise when students are detained. For example, colleges and universities can provide emergency funding to a detained student who needs to pay rent<sup>175</sup> or other expenses. The rapid response team can contact a student's professors regarding attendance. University community members can also garner public support for students, which may help pressure authorities into releasing the student, or make a meaningful difference in securing a detained student's release on

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170. In 2018, two students from southern California universities were detained following interactions with immigration officers at or near the U.S.-Mexico border. See Kate Morrissey, *UCSD Dreamer Detained After Accidentally Going to Mexico*, SAN DIEGO UNION TRIB. (Jan. 11, 2018, 4:35 PM), <http://www.sandiegouniontribune.com/news/immigration/sd-me-ucsd-dreamer-20180111-story.html> [<https://perma.cc/SDR3-FNB3>]; Svrluga, *supra* note 146.

171. See *Rapid Response Networks: California Local Rapid Response Hotlines*, READY CAL., <https://ready-california.org/print-resources/rapid-response-networks> [<https://perma.cc/RR5U-QGBT>] (last visited Aug. 31, 2018).

172. *Id.*

173. *Id.*

174. Luis Mora, the UC Berkeley student, described *supra* notes 145–149, was released from immigration custody due to the work of an attorney at the East Bay Community Law Center, a nonprofit that offers free immigration legal services to UC Berkeley students. Morrissey, *supra* note 145. See also *Legal Support at Cal*, UNDOCUMENTED STUDENT PROGRAM, U.C. BERKELEY, <https://undocu.berkeley.edu/legal-support-overview> [<https://perma.cc/Q6BU-RP9S>] (last visited Aug. 31, 2018).

175. See Kinery, *supra* note 80.

bond.<sup>176</sup> In these ways, developing a rapid response protocol can serve as an ex-post anti-enforcement policy.

But rapid response protocols may also be viewed as integration policies. The mere fact that a university has a plan in place may provide a sense of security to undocumented students by assuring them that the university will support them if they are immigration enforcement targets. Moreover, by publishing response protocols, universities make official their commitment to serving undocumented students' needs. This support can help mitigate feelings of isolation and distress students feel as a result of the Trump administration's affirmative immigration enforcement and self-deportation policies.

## **B. Responding to ICE Activity on Campus**

Universities should address student concerns regarding ICE presence on campus by developing protocols for denouncing and challenging ICE activity on campus. Many universities have already done so. For example, UC instructs campus employees to ask for identifying information from any officer who requests student information or access to campus, along with a copy of any warrant or subpoena if an officer requests access to university housing.<sup>177</sup> The policy also directs employees to consult with campus counsel before giving the officer access to student information or allowing the officer on campus, and it directs any community member who sees an ICE officer on campus to call campus police.<sup>178</sup> This type of protocol may help curb immigration enforcement activity on campus, but to more fully protect students, universities should provide trainings to employees on their protocols and publicize this information to students, staff, and administrators, so that all community members are prepared to respond to ICE presence on campus and requests for student information. Publicizing this information, again, may serve overlapping functions. Preventing or limiting immigration enforcement on campus is an anti-enforcement measure. But it is also a powerful integration measure. Providing students with information regarding the legal limits of officers' ability to conduct immigration enforcement

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176. After Customs and Border Patrol detained Orr Yakobi, an Israeli citizen and DACA recipient, Yakobi's friends posted a petition online, calling for his release, the UCSD chancellor sent a support letter to ICE on Yakobi's behalf, and Yakobi's attorney recruited San Diego County politicians to help. Morrissey, *supra* note 170.

177. See *FAQs for Employees About Possible Federal Immigration Enforcement Actions on University Property*, UCLA: NEWSROOM (Mar. 20, 2017), <http://newsroom.ucla.edu/stories/faqs-for-employees-about-possible-federal-immigration-enforcement-actions-on-university-property> [<https://perma.cc/7F57-APKD>].

178. *Id.*

on campus and informing students of the ways the school actively limits such enforcement conveys a message: that the university takes protection of its undocumented students seriously. In this respect, protocols enhance students' sense of wellbeing and belonging and integrate students more fully into the university community.

Some colleges and universities have gone further than developing protocols that address ICE access to campus and have announced more complete bans of ICE. For example, Columbia University's president announced that the university would not "allow immigration officials on . . . campus[] without a warrant . . ." <sup>179</sup> The student-university relationship provides some backing for these policies, and arguments against immigration enforcement on campus closely track those that have been made against ICE activity in courthouses. <sup>180</sup> Moreover, courts have recognized the right of the university to regulate those who enter its premises as a means of achieving the goal of maintaining a safe and secure campus. <sup>181</sup> Immigration enforcement is disruptive to campus life, and the possibility of enforcement on campus deters undocumented students from participating fully in campus life, or from enrolling in the university in the first place. The mere possibility of enforcement, then, disrupts the university's relationship with its students and its commitment to equity and diversity. Regulating ICE access to campus may be more difficult for public colleges and universities, but even if effectiveness of university policies varies, they may help students feel more comfortable and secure on campus.

On the other hand, universities that publicly announce bans of ICE from campus may run the risk of becoming targets for increased enforcement. The Trump administration has already shown its willingness to target "sanctuary" jurisdictions for publicly defiant policies; declaring campus an ICE-free zone may run the dual risk of falsely making students feel more secure and tempting targeted enforcement activity. This is not to say that universities should not publicly oppose ICE activity on campus. Universities should make clear that they view such enforcement activity as disruptive to student life and to the mission of the university, but administrators should engage in a risk-benefit calculation when deciding whether a ban on ICE effectively serves student needs and safety.

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179. Holmes, *supra* note 23.

180. See Angela Hart, *Speaking Out Against Immigration Raids Is Her Duty, California Justice Says*, SACRAMENTO BEE (Aug. 22, 2017, 2:27 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article168714487.html> [<https://perma.cc/9RPY-7SDG>].

181. See *Souders v. Lucero*, 196 F.3d 1040, 1044 (9th Cir. 1999); Cuison Villazor & Gulasekaram, *supra* note 13, at 28.



A more effective way to protect students from on-campus enforcement may be information campaigns on the protections of the Fourth Amendment.<sup>182</sup> By arming students with knowledge regarding their Fourth Amendment rights, such as when they have a recognized reasonable expectation of privacy and when officers must procure a warrant to conduct a search,<sup>183</sup> universities can enhance the protections that their students are able to provide themselves.

### C. Restricting Campus Police Entanglement With Immigration Enforcement

Universities should also adopt policies that limit entanglement of their campus police departments with federal immigration enforcement. Students have expressed concern that campus police departments could “become [extensions] of immigration authorities”<sup>184</sup> by proactively asking students about their immigration status, arresting them, and transferring them to ICE custody. Some universities have enacted policies preventing campus police from acting as extension of ICE. For example, some prohibit campus law enforcement from honoring detainer requests issued by federal immigration officials.<sup>185</sup> An ICE detainer is a request by ICE that a local law enforcement entity delay a noncitizen’s release for up to forty-eight hours so ICE can transfer them directly to immigration custody.<sup>186</sup> ICE issues detainers for individuals who have been arrested when there is probable cause to believe the individual is removable from the United States.<sup>187</sup>

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182. Natasha Newman, *A Place to Call Home: Defining the Legal Significance of the Sanctuary Campus Movement*, 8 COLUM. J. RACE & L. 122, 172 (2017).

183. For a more complete discussion of students’ Fourth Amendment rights on college campuses, see Bryan R. Lemmons, *Public Education and Student Privacy: Application of the Fourth Amendment to Dormitories at Public Colleges and Universities*, 2012 B.Y.U. EDUC. & L.J. 31.

184. Derek Quizon, *Post-Election Fears of Deportation Continue at UVa*, DAILY PROGRESS (Nov. 19, 2016), [http://www.dailyprogress.com/news/local/post-election-fears-of-deportation-continue-at-uva/article\\_35938ec6-aeb9-11e6-94e7-27ca4f31afc0.html](http://www.dailyprogress.com/news/local/post-election-fears-of-deportation-continue-at-uva/article_35938ec6-aeb9-11e6-94e7-27ca4f31afc0.html) [https://perma.cc/L9WC-HENL]. At the University of Virginia, fears regarding campus police entanglement with immigration authorities arose after a campus police officer shouted Trump’s campaign slogan “Make America Great Again!” into a vehicle public address system. *Id.* The officer later resigned. *Id.*

185. See, e.g., POLICY MANUAL FOR THE CALIFORNIA STATE UNIVERSITY POLICE DEPARTMENT, SAN LUIS OBISPO § 428.2, CAL. STATE UNIV. POLICE DEP’T (2017), [https://afd.calpoly.edu/police/docs/immigration\\_status.pdf](https://afd.calpoly.edu/police/docs/immigration_status.pdf) [https://perma.cc/R7TY-9MZZ] (noting that the campus police department will not honor ICE immigration hold requests, enter into agreements with “state or local law enforcement agencies, ICE, or any other federal agency for the enforcement of federal immigration law,” or arrest anyone solely on the basis of immigration status).

186. See *Immigration Detainer—Notice of Action*, U.S. DEP’T HOMELAND SEC. (Mar. 2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> [https://perma.cc/4ZQK-FQCB].

187. *Detainer Policy*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/detainer-policy> [https://perma.cc/QFY4-BE9S] (last updated Mar. 29, 2017).

Some colleges also prohibit officers from inquiring into citizenship or immigration status. For example, the University of Illinois does not allow officers to inquire about an individual's immigration status and instructs officers only to detain someone based on suspicion of a criminal violation, not based on suspicion of any civil immigration violation.<sup>188</sup> Courts have found that these policies "regulate the circumstances in which officers may inquire into citizenship and immigration status, not whether they can maintain or voluntarily share that information with federal authorities."<sup>189</sup> Even if campus law enforcement does not detain students or inquire into their immigration status, an arrest by campus police can have severe consequences for an undocumented student.<sup>190</sup> An arrest may trigger removal proceedings or a ground of removability. To some extent, whether or not DHS initiates immigration proceedings against a student subsequent to an arrest may depend on whether the state or city where the university is located has noncompliance policies for detainer requests.

All colleges and universities should publicize their campus's policies on detaining and arresting students and should educate students on the relevant policies of their jurisdiction. Universities should also educate students on the potential immigration consequences of interactions with law enforcement and undocumented students. Further, training campus policies on the risks of arresting students may also improve safety for undocumented students. Training that is sensitive to differences in immigration status could result in officers making fewer student arrests, thus lowering the risk that a student will face adverse immigration consequences because of an interaction she has with campus police.

Policies that limit campus law enforcement discretion to request information promote on-campus safety and security by engendering trust in campus police.<sup>191</sup>

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188. See, e.g., Patrick Wade, *UIPD Clarifies Role in Immigration Enforcement*, University of Illinois, Urbana Champaign Police Department (Feb. 2, 2017, 11:00 AM), <https://blogs.illinois.edu/view/6221/458495> [<https://perma.cc/A9N9-UZVQ>] ("[O]fficers do not inquire about anyone's immigration status. Additionally, UIPD does not arrest anyone solely based on their immigration status and does not act on detainers issued by [ICE]."); Memorandum from Charles F. Robinson, General Counsel & Vice President, Regents of the Univ. of Cal. (Mar. 20, 2017), <https://www.ucdavis.edu/news/faq-federal-immigration-enforcement-actions-university-property> [<https://perma.cc/W8VA-QJML>] [hereinafter U.C. FAQ on Immigration Enforcement].

189. Lasch et al., *supra* note 13, at 1746 n.164.

190. For a discussion on campus police's rise as law enforcement, see Melinda D. Anderson, *The Rise of Law Enforcement on College Campuses*, ATLANTIC (Sept. 28, 2015), <https://www.theatlantic.com/education/archive/2015/09/college-campus-policing/407659> [<https://perma.cc/Y2W5-6MRK>].

191. See Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 604 (2008) (noting that anti-information-sharing provisions adopted by cities reflect

Jurisdictions with anti-information sharing policies are generally safer than those without,<sup>192</sup> and policies that permit local law enforcement to work with federal immigration authorities “have a chilling effect on both legal and illegal aliens reporting criminal activity or assisting in criminal investigations.”<sup>193</sup> Moreover, policies and protocols that limit campus law enforcement may help insulate undocumented students from removal and is an important step toward mitigating the effects of changes in federal immigration enforcement.

#### D. Protecting Confidential Student Information

University administrators have access to a large bank of private information about their students. Although some schools do not collect information regarding immigration status, they maintain records containing students’ social security numbers, contact information, and home addresses.<sup>194</sup> Recognizing this, undocumented students and students with undocumented family members are concerned that the federal government could force schools to give them this private information and then use it to locate and arrest them, or their family members, for civil immigration violations.<sup>195</sup>

Some campuses have adopted confidentiality policies and do not require students to provide them with their immigration status, which helps ensure that undocumented student information remains private.<sup>196</sup> Even universities with

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“the determination that ensuring effective delivery of services requires promoting trust in the government generally”).

192. Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. AM. PROGRESS (Jan. 26, 2017, 1:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy> [https://perma.cc/TP7R-BWSM].

193. *Id.*

194. See Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 219, 198 (2016). The UC system, for example, requests, but does not require, that students provide their social security number, birth country, country of permanent residence, immigration status, and parent or guardian’s legal residence status. *How to Apply: About Applying Online*, U.C.: ADMISSIONS, <http://admission.universityofcalifornia.edu/how-to-apply/apply-online> [https://perma.cc/BR8G-CQPB] (last visited April 28, 2018). Students who are undocumented may select “No Selection” instead of indicating their birth country. *Id.*

195. See Emily von Hoffmann, *Does ICE Pressure Schools for Info?*, ATLANTIC (Apr. 11, 2016), <https://www.theatlantic.com/education/archive/2016/04/does-ice-pressure-schools-for-student-info/477600> [https://perma.cc/FJ5B-AWU9].

196. See, e.g., NE. U. POLICY ON CONFIDENTIALITY OF UNIVERSITY INFORMATION (rev. ed. 2018), [https://www.northeastern.edu/policies/pdfs/Policy\\_on\\_Confidentiality\\_of\\_University\\_Record\\_s\\_and\\_Information.pdf](https://www.northeastern.edu/policies/pdfs/Policy_on_Confidentiality_of_University_Record_s_and_Information.pdf) [https://perma.cc/5G7W-WGVb].

policies in place, however, do not necessarily provide trainings to staff or faculty and only inform students about privacy policies online.<sup>197</sup>

Schools should develop protocols and train staff members on how to handle requests for student information, emphasizing the seriousness and consequences of disclosing student information to law enforcement. For most colleges and universities, best practices for handling requests for student information likely include directing the staff member involved to refer any request to university counsel to ensure that each request is taken seriously and only complied with if legally necessary. Colleges and universities should also more actively communicate with students regarding privacy concerns to make sure that students both know their right to opt out of information disclosure and are aware that their information is protected from arbitrary disclosure to immigration enforcement officials.

## **E. Providing Affirmative Services and Support**

In addition to limiting and responding to enforcement activity, colleges and universities should also take affirmative steps to make sure that undocumented students feel welcome and supported on campus. By expressing support of undocumented students and providing services that meet their unique needs and concerns, colleges and universities can ensure they are living out their special relationship to students and commitment to promoting equity and diversity on campus.

### **1. Conveying Messages of Support**

Messages of support constitute an important part of the sanctuary that universities should offer to students. In the wake of immigration policy changes, many universities have come out in support of undocumented students. The day the Trump administration rescinded DACA, UC President Janet Napolitano called on Congress to create a permanent solution for DACA recipients and denounced the decision to cancel the program.<sup>198</sup> Later, Penn State President Eric Barron announced that the university supported a “permanent legislative solution” for

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197. See U.C. FAQ on Immigration Enforcement, *supra* note 188

198. Press Release, Janet Napolitano, U.C. President, UC President Napolitano Denounces Decision to End DACA Program, Calls on Congress to Make Protections Permanent (Sept. 5, 2017), <https://www.universityofcalifornia.edu/press-room/uc-president-napolitano-statement-decision-end-daca-program> [<https://perma.cc/L3JC-GFVE>]. Notably, Janet Napolitano was Secretary of Homeland Security under President Obama and issued the memorandum that initiated the DACA program in 2012.

DACA.<sup>199</sup> The UC and Princeton University also challenged DACA's rescission in court.<sup>200</sup> By publicly indicating support, colleges and universities affirm their dedication to educating and protecting undocumented students.

## 2. Providing Legal Services

Legal resources are some of the most important affirmative services universities can offer their students. Universities or colleges with a large number of undocumented students should hire immigration attorneys dedicated to serving students and their families. On-campus legal services allow students to explore and apply for permanent forms of immigration relief.<sup>201</sup> Importantly, providing access to attorneys also lets students discuss the potential effects of immigration policy changes with a trusted campus community member. Providing students with easily accessible legal services is the "quintessential form of safe haven"<sup>202</sup> and an important way in which the university fulfills its obligation to students.<sup>203</sup>

Existing university legal services may provide models for other universities. The UC Office of the President created the UC Immigrant Legal Services Center in 2015 to offer free legal assistance to students and their families on a wide array of immigration matters.<sup>204</sup> The center employs immigration attorneys on four UC campuses.<sup>205</sup> Other options are available for universities with smaller numbers of undocumented students. For example, these schools can partner with local community colleges or high schools to provide legal services to students and family members. Universities with associated law schools can follow Harvard's model by offering legal services to their undocumented students services through law school clinical programs.<sup>206</sup>

199. *Penn State Reaffirms Support as DACA Future Remains Unknown*, PENN STATE (Feb. 22, 2018), <https://news.psu.edu/story/507028/2018/02/22/administration/penn-state-reaffirms-support-daca-future-remains-unknown> [https://perma.cc/5JBR-HYZ2].

200. *Regents of Univ. of Cal. v. U.S. Dep't Homeland Sec.*, 279 F. Supp. 3d 1011, 1026 (N.D. Cal. 2018); *NAACP v. Trump*, 298 F. Supp. 3d 209, 222 (D.D.C. 2018).

201. See Zaidée Stavely, *Undocumented UC Students May Find Paths to Citizenship with New Legal Aid*, KQED (June 9, 2015), <https://www.kqed.org/news/10543566/undocumented-uc-students-may-find-paths-to-citizenship-with-new-legal-aid> [https://perma.cc/2T5U-XLSE] (quoting UC President Janet Napolitano as saying "All we are doing is recognizing they are a special population . . . . So if these students are going to be part of the UC family, and they are . . . why not also do what we can to provide legal services?").

202. Cuisson Villazor & Gulasekaram, *supra* note 13, at 26.

203. See Stavely, *supra* note 201.

204. *Id.*

205. See *About Us*, U.C. IMMIGRANT LEGAL SERVS. CTR., <https://law.ucdavis.edu/ucimm/about-us.html> [https://perma.cc/ML78-9P4Z] (last visited Nov. 13, 2018).

206. See *Campus Services and Resources*, HARV. U., <https://diversity.college.harvard.edu/campus-services-and-resources> [https://perma.cc/YDL2-3DRC] (last visited Aug. 31, 2018).

### 3. Financial Aid and Professional Development Opportunities

Universities should establish enhanced financial aid and professional development opportunities for undocumented students. Since President Trump announced DACA's rescission, some colleges and universities have pledged to offer undocumented immigrants increased financial support.<sup>207</sup> Universities have offered to cover DACA renewal costs and to pay for costs associated with other immigration benefits or legal representation.<sup>208</sup> Some universities have also created scholarships for students with expired work authorization.<sup>209</sup> These financial assistance programs solve some of students' immediate financial concerns, thereby mitigating one serious effect of DACA's potential rescission.<sup>210</sup>

Some universities have coupled increased financial support with professional development opportunities for students without work authorization. Working while enrolled in school can have significant benefits for students as they enter the job market because employers increasingly expect workers to have relevant experience and specific skills,<sup>211</sup> and earnings from on- and off-campus jobs help students afford college.<sup>212</sup> Without work authorization, students are not able to keep traditional on-campus jobs, and many have difficulty finding internships or postgraduation work related to their field of study.<sup>213</sup>

Recognizing these problems, several UC campuses, including Santa Barbara, San Diego, and Santa Cruz, have established internship programs with a scholarship component for undocumented immigrant students. UC Santa Cruz's Professional Career Development Program matches students with a year-long internship in an on-campus department related to their professional interests and provides a \$3600 scholarship.<sup>214</sup> The program orients students before the internship's start and matches students with a mentor, with whom they meet

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207. See Oliver, *supra* note 23.

208. *DACA Update: Enhanced Resources*, BROWN U.: OFFICE OF THE PROVOST (Feb. 16, 2018), <https://www.brown.edu/about/administration/provost/communications/daca-update-enhanced-resources> [https://perma.cc/J7DF-FTTL].

209. Toni Airaksinen, *Brown Promises 'Tuition-Free' Master's for Students*, CAMPUS REFORM (Mar. 23, 2018, 10:48 AM), <https://www.campusreform.org/?ID=10681> [https://perma.cc/43 L5-HW26].

210. See Sacchetti, Sullivan & O'Keefe, *supra* note 162.

211. ANTHONY P. CARNEVALE ET AL., GEORGETOWN U.: CTR. ON EDUC. & WORKFORCE, *LEARNING WHILE EARNING: THE NEW NORMAL* 15 (2015).

212. *Id.* at 11.

213. See *supra* Part I.

214. *Professional Career Development Program (PCDP)*, U.C. SANTA CRUZ, [https://eop.ucsc.edu/undocumented\\_student\\_services/professional-career-development-program-pcdp.html](https://eop.ucsc.edu/undocumented_student_services/professional-career-development-program-pcdp.html) [https://perma.cc/QDB4-XCGM] (last visited Sept. 21, 2018).

regularly to discuss professional goals, internship progress, and ways to advance their personal and professional goals outside of the internship.<sup>215</sup>

Offering undocumented immigrant students increased financial assistance and career support in the wake of policy changes that make universities less accessible is crucial to the university's commitment to advancing equity on campus. Universities are uniquely positioned to offer protections to undocumented students, but if students are priced out of education, they will not be able to access these resources. Thus, without programs that recognize the special challenges that undocumented students face in paying for college, universities fail in their mission to provide equal educational opportunities to all students.

#### IV. UNIVERSITY DEFENSES AGAINST ANTISANCTUARY LEGISLATION AND POLICIES

Some of President Trump's policy changes have made university administrators hesitant to comply with student demands set forth in "sanctuary campus" petitions.<sup>216</sup> After some colleges and universities began creating sanctuary programs and policies in fall 2016, President Trump released an executive order pledging to punish "sanctuary jurisdictions"<sup>217</sup> during his first week in office. His threats to withhold funding from these jurisdictions elicited concern among college and university administrators, who feared their campuses might be punished for enacting sanctuary policies.<sup>218</sup>

Despite Section 1373 of Title XIII, which prohibits restrictions on information sharing with DHS, the Tenth Amendment and the university's unique nature provide defenses against threats to withhold funds, some of which are not available to sanctuary cities.

##### A. Section 1373 and Its Limits

Threats to withhold funding from sanctuary jurisdictions did not begin with Trump. The modern antisantuary movement developed momentum in 2015, when Kate Steinle died after being shot by Jose Ines Garcia Zarate, an undocumented immigrant. The San Francisco Sheriff's Department had released Garcia Zarate three months before the shooting despite receiving a detainer request

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215. *Id.*

216. *See* Goodyear, *supra* note 10.

217. Exec. Order No. 13,768, *supra* note 30.

218. *See* Deruy, *supra* note 28.

from federal immigration officials.<sup>219</sup> Following the shooting and ensuing public outrage at the policy that seemingly allowed for Garcia Zarate's release, the U.S. Department of Justice (DOJ), then under President Obama, announced its plan to "deny certain law enforcement grants to jurisdictions that violated § 1373."<sup>220</sup>

Under Title XIII, Section 1373 of the U.S. Code, no federal, state, or local government entity can restrict any other government entity or official from sharing information "regarding the citizenship or immigration status, lawful or unlawful, of any individual" with DHS.<sup>221</sup> The statute is intended to empower State and local officials to communicate with federal immigration authorities regarding undocumented immigrants and to prohibit States from enacting laws that proscribe this communication.<sup>222</sup> This provision also binds public colleges and universities as state actors.

States and localities began challenging Section 1373's constitutionality soon after Congress enacted it in 1996. In *City of New York v. United States*,<sup>223</sup> one of the most significant early challenges to the law, New York City filed an action alleging that Section 1373 violated the Tenth Amendment, which grants the states all powers not expressly delegated to the federal government by the Constitution.<sup>224</sup> In 1989, Edward Koch, the city's mayor, issued an executive order prohibiting city officers and employees from "transmitting information regarding the immigration status of any individual to federal immigration authorities" with limited exceptions.<sup>225</sup> The city claimed that Section 1373 violated the Tenth Amendment because it directly forbade state and local government entities from controlling the use of immigration information in official business.<sup>226</sup> This effort to control the state's workforce, the city argued, was not within Congress's power to regulate

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219. Holly Yan & Dan Simon, *Undocumented Immigrant Acquitted in Kate Steinle Death*, CNN (Dec. 1, 2017, 2:21 AM), <https://www.cnn.com/2017/11/30/us/kate-steinle-murder-trial-verdict/index.html> [https://perma.cc/YC8K-LZ64]. Jose Ines Garcia Zarate claimed that Steinle's death was accidental and that the bullet that killed her ricocheted off the ground after he mistakenly fired the gun. *Id.* A jury acquitted Zarate of murder, involuntary manslaughter, and assault with a deadly weapon in December 2017. *Id.*

220. Letter from Peter J. Kadzik, Asst. Att'y Gen. to Representative John A. Culberson (July 7, 2016), [https://culberson.house.gov/uploadedfiles/2016-7-7\\_section\\_1373\\_-\\_doj\\_letter\\_to\\_culberson.pdf](https://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-_doj_letter_to_culberson.pdf) [https://perma.cc/MW4D-V6XL].

221. 8 U.S.C. § 1373(a) (2018). Specifically, Section 1373 prohibits laws that would restrict (1) sending information to, requesting or receiving information from DHS regarding immigration status; (2) maintaining such information; and (3) exchanging this information with any other government entity. *Id.* § 1373(b).

222. H.R. Rep. No. 104-469, at 277 (1996).

223. 179 F.3d 29 (2d Cir. 1999).

224. *Id.*

225. *Id.* at 31.

226. *Id.* at 33.



immigration. Thus, because the executive order's confidentiality guarantee did not regulate immigration, Congress unconstitutionally abrogated the locality's authority to obtain information essential "to the provision of municipal services and to the reporting of crimes" from undocumented immigrants who might otherwise be reluctant to share information.<sup>227</sup>

The Second Circuit rejected the city's facial challenge to Section 1373, reasoning that Congress had neither "compelled state and local governments to enact or administer any federal regulatory program" nor conscripted them into the federal government's service.<sup>228</sup> Moreover, the court reasoned, "states do not retain under the Tenth Amendment the untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs."<sup>229</sup> Because the city's executive order limited the disclosure of immigration information to federal immigration officials, Section 1373 constitutionally nullified the order.<sup>230</sup> But, the court left open the possibility that interpreting Section 1373 to bar "generalized confidentiality policies" that are "necessary to the performance of legitimate municipal functions" might violate the Tenth Amendment.<sup>231</sup>

Since *New York*, many jurisdictions have adopted generalized confidentiality policies that protect immigration-related information that individuals may provide to state or local authorities from disclosure.<sup>232</sup> For example, Santa Ana, California's City Council passed such a measure in 2017. The ordinance broadly prohibits city employees, including law enforcement, from requesting, maintaining, or disclosing "sensitive information" about any individual and defines sensitive information to include "citizenship or immigration status; status as a recipient of public assistance; sexual orientation; biological sex or gender identity; or disability."<sup>233</sup>

Section 1373 has been limited in other important ways, including limiting ICE detainers' force. Municipalities and states challenged these detainer requests' legality, and in 2014, the Third Circuit found that compliance with detainer requests could leave law enforcement agencies vulnerable to Fourth Amendment claims from individuals held without probable cause.<sup>234</sup> Later decisions clarified that compliance with detainer requests is not mandatory.<sup>235</sup>

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227. *Id.*

228. *Id.* at 35.

229. *Id.*

230. *Id.* at 37.

231. *Id.* See also Lasch et al., *supra* note 13, at 1747.

232. Lasch et al., *supra* note 13, at 1748.

233. SANTA ANA, CAL., ORDINANCE No. NS-2908 § 3 (2017), [http://libguides.law.du.edu/ld.php?content\\_id=34432113](http://libguides.law.du.edu/ld.php?content_id=34432113) [<https://perma.cc/42U6-LKPZ>].

234. See *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014) (holding that detainer requests are voluntary and therefore the county could be liable for the plaintiff's unlawful detention under the Fourth Amendment). For a more detailed explanation of legal challenges to detainer-based

Despite Section 1373's limitations, Section 9(a) of President Trump's executive order appeared to broaden this law's scope by defining sanctuary jurisdictions as those that do not comply with Section 1373,<sup>236</sup> without explicitly describing "compliance" and threatening to withhold federal grants from all such jurisdictions.<sup>237</sup> This lack of clarity caused concern that the administration would revoke federal funding merely because it "branded" a jurisdiction as a sanctuary jurisdiction.<sup>238</sup>

A number of jurisdictions challenged the constitutionality of Section 9(a), and in April 2017, in *County of Santa Clara v. Trump*,<sup>239</sup> District Court Judge William Orrick granted a preliminary injunction blocking Section 9(a)'s implementation.<sup>240</sup> The court found the order violated the separation of powers doctrine by delegating to the attorney general the power to place new conditions on federal funding, a power reserved for Congress.<sup>241</sup> The court also held that, even if the president had the spending power, the order would be unconstitutional under the Tenth Amendment because the order's conditions were ambiguous, there was no nexus between the funds at issue and the condition (Section 1373 compliance), and the order was coercive.<sup>242</sup>

In an effort to remedy Section 9(a)'s constitutional issues, the attorney general clarified that the executive would only withhold federal grants for criminal justice initiatives administered by the Department of Justice or the Department of Homeland Security.<sup>243</sup> On July 25, 2017, Attorney General Jeff Sessions issued a memorandum clarifying what policies the administration viewed as compliant with Section 1373; to receive grants for criminal justice initiatives administered by the DOJ or DHS, recipients must "comply with federal law, allow federal immigration access to detention facilities, and provide 48 hours notice before they

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enforcement, see Lasch et al., *supra* note 13, at 1730–33; Juliet P. Stumpf, *D(E)volving Discretion: Lessons From the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1279–81 (2015).

235. See Lasch et al., *supra* note 13, at 1732, n.146 (listing cases).

236. "[J]urisdictions that willfully refuse to comply with [U.S. Code Section 1373] (sanctuary jurisdictions) are not eligible to receive Federal grants . . ." Exec. Order No. 13,768, *supra* note 30.

237. *Id.*

238. *Trump's Sanctuary City Threat Triggers Confusion, Changes*, VOA NEWS (Aug. 15, 2017, 3:05 PM), <https://www.voanews.com/a/donald-trump-sanctuary-cities-confusion-changes/3986809.html> [<https://perma.cc/EF5U-LU6H>].

239. 250 F. Supp. 3d 497 (N.D. Cal. 2017).

240. *Id.* at 540.

241. *Id.* at 531.

242. *Id.* at 532.

243. Memorandum from Office of the Att'y Gen. to All Dep't Grant-Making Components, Implementation of Exec. Order 13,768 (May 22, 2017), <https://www.justice.gov/opa/press-release/file/968146/download> [<https://perma.cc/XPB9-J496>].

release an illegal alien wanted by federal authorities.”<sup>244</sup> This memorandum, then, does not apply to the bulk of funding that public colleges or universities receive, which comes from the Departments of Education and Health and Human Services.<sup>245</sup>

Even still, Chicago successfully challenged these conditions’ constitutionality in *City of Chicago v. Sessions*,<sup>246</sup> and a permanent injunction has blocked enforcement of Sessions’ memorandum in Chicago.<sup>247</sup> At issue was Chicago’s “Welcoming City Ordinance,” which prohibits city officials from requesting or disclosing information related to immigration status and detaining individuals based on immigration status or an immigration detainer if the detainer is only based on a civil immigration violation. The Seventh Circuit has so far sustained Chicago’s challenge to Section 9(a) and, like the court in *County of Santa Clara v. Trump*,<sup>248</sup> has found that the choice of whether or not local law enforcement aids in immigration enforcement was not left to the executive branch, but was rightly entrusted to state and local authorities.<sup>249</sup> In a subsequent decision in *Chicago v. Sessions*, the district court declined to follow the Second Circuit’s decision in *New York* and held that Section 1373 itself was unconstitutional because it violated Tenth Amendment principles of state sovereignty, requiring “local policymakers to stand aside and allow the federal government to conscript the time and cooperation of local employees.”<sup>250</sup> In short, although President Trump has attempted to expand the reach of Section 1373, his administration’s attempts to use the provision to strip funding from entities with sanctuary policies have been largely unsuccessful. First, drawing on the court’s statement regarding confidentiality policies in *City of New York*, state and local governments have strong arguments that their “sanctuary” policies do not actually violate Section 1337’s strictures.

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244. *Attorney General Sessions Announced Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs*, DEP’T JUST. (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> [<https://perma.cc/SQSR-MFNR>].

245. *See Federal and State Funding of Higher Education*, PEW CHARITABLE TRUSTS, June 2015 (noting federal funding sources for higher education).

246. 888 F.3d 272 (7th Cir. 2018), *reh’g en banc granted*, 2018 WL 4268817 (7th Cir. June 4, 2018), *reh’g vacated*, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (denying rehearing en banc but staying the district court’s injunction as to its nationwide scope).

247. *City of Chicago v. Sessions*, No. 1:17-cv-07250 (N.D. Ill. July 27, 2018).

248. 250 F. Supp. 3d 497, 532 (N.D. Cal. 2017) (issuing permanent injunction in Chicago but staying its application nationwide pending review by the Seventh Circuit).

249. *City of Chicago*, 888 F.3d 272. Similarly, in *City and County of San Francisco v. Trump*, the Ninth Circuit held that the executive branch’s attempts to withhold federal grants from sanctuary cities and counties was unconstitutional because they violated the separation of powers doctrine. 897 F.3d 1225, 1235 (9th Cir. 2018).

250. *City of Chicago*, 321 F. Supp. 3d at 873.

Second, courts have consistently found that the President's attempts to defund sanctuary jurisdictions violate the Spending Clause.

Neither the executive branch nor Congress has taken any official steps to defund "sanctuary campuses." Moreover, even without the preliminary injunctions blocking Section 9(a) and Sessions' funding conditions, Sessions clarified that the federal government will only withhold "federal grants administered by the Department of Justice or the Department of Homeland Security."<sup>251</sup> Thus, in order to be deemed a "sanctuary," an entity must receive federal funds from DOJ or DHS and refuse to comply with Section 1373.<sup>252</sup> Because they do not constrict communications regarding the narrow set of information to which Section 1373 explicitly refers, universities can adopt such policies without running afoul of federal law.

Moreover, although the attorney general could alter the definition of "sanctuary" embraced in his memorandum, the success of constitutional challenges to Section 9(a) indicates that courts would also enjoin efforts to withhold funding from universities. New conditions on public colleges and universities' federal funding would likely violate the separation of powers doctrine. Even if Congress authorized withholding funds from sanctuary universities, as has been proposed by Congressman Duncan Hunter,<sup>253</sup> advocates would successfully contest the legislation as well because it would fail the Tenth Amendment's anticommandeering strictures.

## B. Defenses Against Federal Attempts to Force Information Sharing

For colleges and universities, the cases discussed above, including *City of Chicago v. Sessions*, vindicate an important right against forced information sharing; that the executive branch may not condition federal funding on cooperation with immigration enforcement means that universities can protect student information and limit information gathering related to immigration status. More generally, *City of Chicago v. Sessions* along with *New York* indicate that universities may adopt generalized confidentiality policies that prohibit student information gathering and disclosure.

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251. Memorandum from Office of the Att'y Gen., *supra* note 243.

252. Cuison Villazor & Gulasekaram, *supra* note 13, at 10 ("It is, in other words, a narrower meaning of 'sanctuary.'").

253. Relatedly, Congressman Duncan Hunter has proposed legislation in the U.S. House of Representatives that would condition Title IV education funding on college and university compliance with Section 1373. See No Funding for Sanctuary Campuses Act, H.R. 483, 115th Cong. (2017).

The Family Educational Rights and Privacy Act (FERPA) provides an additional layer of protection against executive branch attempts to force information sharing.<sup>254</sup> FERPA is “an important counterweight to the myth surrounding antisancuary provisions that there can be no restrictions on a [school’s] ability to share immigration status information with federal immigration authorities.”<sup>255</sup> Moreover, the law bolsters the idea that schools have a special relationship with their students. Congress codified the trust inherent to the student-university relationship in FERPA, giving students a unique confidentiality guarantee that is not present in the relationship between a city or state and its de facto residents.

In general, FERPA mandates that schools must receive written permission from the parent or student before releasing any information from the student’s education record. FERPA also imposes financial penalties on schools who violate these restrictions.<sup>256</sup> There are, however, exceptions to the general privacy guarantee.<sup>257</sup> Notably, schools may disclose some “directory information,” such as students’ names, telephone numbers, addresses, and dates or places of birth, without permission.<sup>258</sup> Some of this information, such as birthplace, could be relevant to a student’s immigration status. Even sharing “directory information,” however, requires notice to the student, and students can prevent the school from disclosing such information.<sup>259</sup> Additionally, under FERPA, schools must comply with court orders, such as subpoenas or judicially issued warrants, requesting student information.<sup>260</sup> These exceptions are not insignificant. Undocumented students take risks even when they necessarily expose their information to school authorities, and universities should enact data policies that address some of the vulnerabilities that remain despite FERPA’s protections. Universities can and should strengthen this trust by addressing the ways in which students remain vulnerable under FERPA. FERPA, combined with holdings on generalized confidentiality policies, should empower universities to adopt more stringent protocols for keeping student and applicant information safe.

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254. See 20 U.S.C. § 1232g (2018).

255. McCormick, *supra* note 194, at 214.

256. 20 U.S.C. § 1232g(b). The Department of Education may withhold federal funding for violations of the Family Educational Rights and Privacy Act (FERPA). *Id.* § 1232g(a).

257. See *id.* § 1232g(b).

258. *Id.* § 1232g(a)(5).

259. *Id.* § 1232g(a)(5)(B) (“Any educational agency or institutional making public directory information shall give public notice of the categories of information which it has designated . . . and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent’s prior consent.”).

260. *Id.* § 1232g(b)(1)(J).

### C. Defending Restrictions on Campus Police Entanglement With Immigration Enforcement

Universities can also constitutionally adopt policies that restrict campus police entanglement with immigration enforcement. First, it is well-established that the federal government cannot require that state and local authorities comply with immigration detainer requests,<sup>261</sup> and many states and localities have adopted policies limited compliance with detainer requests. For example, some jurisdictions require that the request only be honored when issued for individuals with certain criminal convictions and others provide that the detainer only be honored when accompanied by a judicial warrant.<sup>262</sup> The example of these jurisdictions should empower universities to adopt their own policies that limit campus police's ability to comply with detainer requests. Many schools already have such policies, which represent an important first step in addressing the ways in which interaction with campus law enforcement can trigger immigration consequences.

Universities can also constitutionally adopt policies that prohibit officers from inquiring about immigration status and direct officers to only detain individuals based on suspicion of a criminal violation, not an immigration violation. Such policies "regulate the circumstances in which officers may inquire into citizenship and immigration status, not whether they can maintain or voluntarily share that information with federal authorities."<sup>263</sup> Because they do not constrict communication regarding the narrow set of information to which Section 1373 explicitly refers, universities can adopt such policies without running afoul of federal law.

As discussed above, universities may also be able to enact policies that otherwise limit immigration enforcement on campus.<sup>264</sup> Because of their special relationship with students and based on *Plyler's* recognition of the school as a space for advancing equity and equality, universities have strong arguments for policies that prohibit on-campus enforcement. But the reach of these policies may be limited, for example, if an ICE officer presents a judicial warrant for a student's arrest. In these situations, the university may risk criminal penalties by refusing to grant the officer access to campus, potentially under the anti-harboring provisions

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261. See *Galarca v. Szalczyck*, 745 F.3d 634, 645 (3d Cir. 2017); *Mercado v. Dall County*, 229 F. Supp. 3d 501, 514–15 (N.D. Tex. 2017).

262. Lasch et al., *supra* note 13, at 1741.

263. *Id.* at 1746 n.221.

264. See *supra*, Subparts III.A–C.

of the INA.<sup>265</sup> In sum, policies prohibiting access to campus may not be the most effective means of protecting undocumented students; instead, universities should concentrate on disentangling campus law enforcement from federal immigration authorities, and on educating campus law enforcement on police practices that make policing less likely to trigger adverse immigration consequences for students.

### CONCLUSION

Because of their special relationship with students, universities have a unique capacity and duty to address the challenges undocumented students face under changing federal immigration enforcement policies. *Plyler v. Doe*, though legally limited to elementary and secondary education, imagines schools as entities that protect their students, and in doing so, advance equity and equality in society. Since that case, legislation, both at the federal and state levels, has enhanced and cemented the protective nature of the university towards undocumented students. The Trump administration's rapid, restrictive changes in immigration policy require that universities mitigate the harmful effects of these changes in every way possible to preserve this relationship.

Providing the services and implementing the policies suggested in this Comment will require coordination between university faculty, staff, students, administrators, and community members,<sup>266</sup> and individual campuses should implement policies and practices that fit their student needs. In doing so, colleges and universities both protect their students from immigration enforcement, but also send a message to current and potential students: that they deserve protection, and that they are welcome, on campus and off.

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265. See 8 U.S.C. § 1324(a)(1)(A)(iii) (2018).

266. See OFFICE OF THE CHANCELLOR, UCLA, CHANCELLOR'S ADVISORY COUNCIL ON IMMIGRATION POLICY RECOMMENDATIONS TO THE CHANCELLOR 1 (2017), <https://ucla.app.box.com/s/zemwjwqxvy08fvoku65g1eca4baus5xd> [<https://perma.cc/G5FK-34ZP>].