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**Article**

**Sanctuary Networks**

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## INTRODUCTION

Resistance to the Trump Administration's immigration enforcement policies in the form of sanctuary has increased and spread.<sup>1</sup> Consider the following examples during President Trump's first year in office. Immediately after he issued an executive order seeking to punish "sanctuary cities,"<sup>2</sup> the city of San Francisco immediately filed a lawsuit challenging its constitutionality.<sup>3</sup> Other "sanctuary cities" reaffirmed their policies<sup>4</sup> or codified their policies into law,<sup>5</sup> and still others issued statements and resolutions that did not adopt the "sanctuary" label yet provided protections for undocumented immigrants.<sup>6</sup> Many religious leaders and communities opened their churches to shelter undocumented immigrants who were facing removal orders from Immigration and Customs Enforcement (ICE).<sup>7</sup> Indeed, churches offering "sanctuary" to immigrants who are subject to deportation jumped from 400 to 800.<sup>8</sup>

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1. The term "sanctuary" has not been well-defined. We discuss in Part I, *infra* what we mean in this Article when we use the term "sanctuary." See *infra* Part I. See also Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703 (2018), for a more detailed discussion of the current meaning of "sanctuary cities."

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

3. See Complaint for Declaratory and Injunctive Relief, County of Santa Clara v. Trump, 275 F. Supp. 3d 1196 (N.D. Cal. 2017) (No. 4:17-cv-00485-DMR), 2017 WL 412999. Santa Clara County similarly filed a complaint. Complaint for Declaratory and Injunctive Relief, *Santa Clara*, 275 F. Supp. 3d 1196 (No. 5:17-cv-00574).

4. See, e.g., Chi. City Council Res. SR2017-44 (Ill. 2017), <https://chicago.legistar.com/LegislationDetail.aspx?ID=2945212&GUID=69A303F3-95FD-4581-8FC3-8D09910F82A7&Options=Advanced&Search=&FullText=1>; Peter Hegarty, *Alameda: City Leaders Reaffirm Commitment to Sanctuary Policy*, E. BAY TIMES (Jan. 26, 2017), <https://www.eastbaytimes.com/2017/01/26/alameda-city-leaders-reaffirm-commitment-to-sanctuary-policy>.

5. See, e.g., N.Y.C., N.Y., ADMIN. CODE tit. 10, ch. 1, § 10-178 (2017), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3022098&GUID=D0BFA473-FA7C-4FA6-83C4-216E9706EE7A>.

6. Christopher Yee, *Like El Monte, Monterey Park Adopts Rules Without 'Sanctuary City' Name*, PASADENA STAR NEWS (Feb. 16, 2017), <https://www.pasadenastarnews.com/2017/02/16/like-el-monte-monterey-park-adopts-rules-without-sanctuary-city-name> (noting that the resolution initially proposed to declare Monterey Park a "sanctuary city," but when it passed, the resolution instead announced that the city would be "dedicated to preserving the rights of all persons within its jurisdiction").

7. Gabriella Borter, *More Churches Are Offering Sanctuary for Immigrants Under Trump*, HUFFPOST (Aug. 1, 2017), [https://www.huffingtonpost.com/entry/trump-sanctuary-churches\\_us\\_5980e03ce4b09d24e993a167](https://www.huffingtonpost.com/entry/trump-sanctuary-churches_us_5980e03ce4b09d24e993a167).

8. *Id.*

Notably, new forms of sanctuary also emerged. In different parts of the country, immigrants' rights advocates formed "rapid response networks" that seek to, among other things, enable U.S. citizens to show up at homes and businesses during ICE raids to bear witness, document events, and get information about where the immigrant will be detained.<sup>9</sup> Some individuals turned to social media to warn immigrants about potential ICE raids in certain neighborhoods.<sup>10</sup> In Austin, Texas, community members set up a "Sanctuary in the Streets Initiative," in which a U.S. citizen would serve as a "physical barrier" between ICE agents and an undocumented immigrant whose property is about to be raided.<sup>11</sup> Several universities declared themselves "sanctuary campuses"<sup>12</sup> or issued policies that aim to protect their undocumented students.<sup>13</sup> Employers and large companies too have joined the resistance. Restaurant owners, for example, have refused to allow ICE agents to enter their restaurants without a warrant.<sup>14</sup> Microsoft announced that it would challenge the removal of any of its employees who have Deferred Action for

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9. See, e.g., Kate Morrissey, *Organized Resistance Is Forming to Trump's Immigration Crackdown*, SAN DIEGO UNION-TRIB. (Mar. 1, 2017), <http://www.sandiegouniontribune.com/news/immigration/sd-me-deportation-resistance-20170301-story.html>; *NYC #ResistTrump Rapid Response Team*, ACTION NETWORK, <https://actionnetwork.org/forms/nyc-resisttrump-rapid-response-team> (last visited Nov. 11, 2018); *Rapid Response Network*, OAKLAND COMMUNITY ORG., <http://www.oaklandcommunity.org/rapid-response-network> (last visited Nov. 11, 2018).

10. Patrick Howell O' Neill, *'Raid Alerts' Wants to Warn Undocumented Immigrants with an App*, MOTHERBOARD (Feb. 18, 2017), [https://motherboard.vice.com/en\\_us/article/xy7yzn/raid-alerts-wants-to-warn-undocumented-immigrants-with-an-app](https://motherboard.vice.com/en_us/article/xy7yzn/raid-alerts-wants-to-warn-undocumented-immigrants-with-an-app). It should be noted, however, that many have criticized the use of social media platforms such as Facebook to post warnings about immigration authorities, contending that doing so stokes fear in certain neighborhoods. See, e.g., *False Stories About ICE Sweeps & Checkpoints Spark Fear in New York's Immigrant Communities*, CBS N.Y. (Feb. 23, 2017), <http://newyork.cbslocal.com/2017/02/23/bogus-ice-reports>.

11. See Tom Dart, *How Immigration Activists Prepare to Fight Deportations Under Donald Trump*, GUARDIAN (Jan. 15, 2017), <https://www.theguardian.com/us-news/2017/jan/15/donald-trump-deportation-us-immigration-texas>.

12. See Kathleen Megan, *Wesleyan Declares Itself a Sanctuary Campus for Undocumented Immigrants*, HARTFORD COURANT (Nov. 23, 2016), <http://www.courant.com/education/hc-college--trump-sanctuary-1123-20161122-story.html>.

13. Julia Preston, *Campuses Wary of Offering 'Sanctuary' to Undocumented Students*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/education/edlife/sanctuary-for-undocumented-students.html>.

14. Jessica Haynes, *Ann Arbor Restaurant Refused Kitchen Entry to ICE Agents, Owner Says*, MLIVE (Aug. 11, 2017), [https://www.mlive.com/business/ann-arbor/index.ssf/2017/08/ann\\_arbor\\_restaurant\\_refused\\_k.html](https://www.mlive.com/business/ann-arbor/index.ssf/2017/08/ann_arbor_restaurant_refused_k.html).

Childhood Arrivals (DACA) from being removed from the country.<sup>15</sup> Airbnb proclaimed that it would provide free housing to refugees who were banned or displaced as a result of the travel ban.<sup>16</sup>

As the foregoing examples demonstrate, from self-declared sanctuary campuses to #resistICE<sup>17</sup> to workplace sanctuary, novel forms of sanctuary have surfaced. Despite the growth and development of new and expanded forms of sanctuary, discussion of the term “sanctuary” remains obsessed with state and local rights.<sup>18</sup> When the term is invoked by a city or state,<sup>19</sup> or derided by the current administration,<sup>20</sup> they refer to governmental entities and agencies declining to participate in

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15. Todd Haselton, *Microsoft to Trump: You're Going to Have to Go Through Us to Deport Dreamers Who Work Here*, CNBC (Sept. 6, 2017), <https://www.cnbc.com/2017/09/05/microsoft-response-to-daca-will-defend-dreamers-in-court.html>.

16. Amy B. Wang, *Airbnb Offers Free Housing to Refugees and Others in Limbo After Trump's Executive Order*, WASH. POST (Jan. 29, 2017), [https://www.washingtonpost.com/news/the-intersect/wp/2017/01/29/airbnb-offers-free-housing-to-refugees-and-others-in-limbo-after-trumps-executive-order/?noredirect=on&utm\\_term=.a45faedef2f](https://www.washingtonpost.com/news/the-intersect/wp/2017/01/29/airbnb-offers-free-housing-to-refugees-and-others-in-limbo-after-trumps-executive-order/?noredirect=on&utm_term=.a45faedef2f).

17. Compiling Twitter Posts Using the Hashtag “resistICE,” TWITTER, <https://twitter.com/hashtag/resistice> (last visited Nov. 11, 2018).

18. See, e.g., Erin Mower Adams, *Noncitizen Youth in the Juvenile Justice System: The Serious Consequences of Failed Confidentiality by ICE Referral*, 2017 BYU L. REV. 385, 408–09 (2017) (discussing how sanctuary jurisdictions' juvenile detention policies clash with federal detention policies); see also, e.g., *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). See generally Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, 2017 CARDOZO L. REV. DE NOVO 119 (2017) (discussing the effects of the Trump Administration's immigration enforcement policies on state and local jurisdictions); Christine Kwon & Marissa Roy, *Local Action, National Impact: Standing Up for Sanctuary Cities*, 127 YALE L.J.F. 715 (2018) (arguing that cities and local jurisdictions can be strong actors to resist the Trump Administration's immigration policies); Lasch et al., *supra* note 1 (discussing tension between local sanctuary policies and Trump Administration's order to withhold funds from state and local jurisdictions).

19. Bradley Zint, *Glendale Police Vow Not to Enforce Federal Immigration Laws*, L.A. TIMES (Apr. 1, 2017), <http://www.latimes.com/local/lanow/la-me-glendale-police-20170401-story.html> (announcing the Glendale City Council's resolution affirming police officers will “not enforce federal immigration laws”).

20. Elise Foley & Marina Fang, *White House, Trump Attack Judicial Branch Again by Misconstruing 'Sanctuary City' Ruling*, HUFFPOST (Apr. 26, 2017), [https://www.huffpost.com/entry/trump-attacks-court-immigration-sanctuary-cities\\_us\\_590098e7e4b0af6d718a2d99](https://www.huffpost.com/entry/trump-attacks-court-immigration-sanctuary-cities_us_590098e7e4b0af6d718a2d99) (criticizing sanctuaries as “cities . . . engaged in the dangerous and unlawful nullification of Federal law in an attempt to erase our borders”).

federal immigration enforcement.<sup>21</sup> The legal battle over sanctuaries thus continues to be framed as a federalism contest, with the Tenth Amendment shielding state and local authorities from conscription into federal enforcement efforts.<sup>22</sup> This justification depends heavily on the right of states to control their own affairs as independent, constitutional actors who maintain authority over community safety and residential policing.<sup>23</sup>

To be clear, similar to other legal scholars, we too have examined sanctuary along federalism grounds.<sup>24</sup> Tenth Amendment concerns remain a critical issue in the legal debate about the validity of sanctuary cities. Yet, focusing only on sovereignty and federalism issues is myopic. It elides the multiple ways that public and private actors have offered sanctuary today, exerting governance and authority over noncitizens and competing with the federal government's enforcement scheme. Further, in light of increased immigration enforcement that is certain to persist under the current administration, conventional and innovative forms of sanctuary are likely to continue. To fully appreciate the legal issues surrounding the provision of sanctuary today, we

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21. *Id.*; Zint, *supra* note 19.

22. See *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”); *New York v. United States*, 505 U.S. 144, 157 (1992) (“[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”).

23. Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 251 (2012) (arguing that local policy makers and law enforcement officials in sanctuary jurisdictions make “thoughtful and deliberate public safety decisions, taking great pains to do the right thing for the entire community. Th[e]se decisions are critical to principles of inclusion in our ever-growing diverse communities”).

24. We ourselves have in the past focused our legal and policy analysis on sanctuary along federalism principles. See, e.g., PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* (2015) (positing “that immigration federalism is rooted in a political process that connects federal and subfederal actors”); Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies and Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1685 (2009) (exploring “doctrinal and theoretical challenges confronting San Francisco’s non-cooperation ordinance, and similar subfederal issues”); Rose Cuison Villazor, “Sanctuary” *Cities and Local Citizenship*, 37 FORDHAM URB. L.J. 573, 576 (2010) (exploring how “sanctuary laws illustrate the tension between national and local citizenship”). Our point in this Article is to suggest that legal analysis of sanctuary actions today should be broader and not limited to the Tenth Amendment framework in light of the multiple, interrelated and overlapping legal issues that have thus far been ignored in legal scholarship.

need to move beyond federalism analysis and explore the ways that the sanctuary movement and actions have evolved into a distributed network of public and private actors.

This Article is the first to comprehensively describe and theorize the innovative and expanded forms of sanctuary today.<sup>25</sup> Adopting network governance theories developed by political theorists and sociologists,<sup>26</sup> this Article introduces a new framework<sup>27</sup> that we coin “sanctuary networks” to argue that current public and private sanctuaries are best understood as part of a broader system of legal resistance to the federal enforcement regime. Ultimately, we contend that each type of sanctuary examined here has an independent, normative value and legal justification, but the ability of each to protect undocumented immigrants is limited. Viewed in isolation, the ability of these sanctuaries to achieve their specific goals may be constrained by legal principles that govern public and private entities. Examined together, however, these public and private groups are forming a system that collaborates, formally in some contexts and informally in others, to collectively challenge the federal government’s claimed monopoly on setting immigration policy.

Reframing sanctuary as part of a larger network forces a rethinking of governance in immigration law and policy. This novel form of legal resistance has several doctrinal, normative and policy implications for immigration law. First, on a doctrinal level,

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25. This Article focuses primarily on the provision of sanctuary to immigrants. Although we explore “anti-sanctuary” in this Article where relevant, we provide a deeper analysis of such policies in a companion article, Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *State Anti-Sanctuary & Immigration Localism*, 119 COLUM. L. REV. (forthcoming 2019).

26. See R.A.W. RHODES, UNDERSTANDING GOVERNANCE: POLICY NETWORKS, GOVERNANCE, REFLEXIVITY AND ACCOUNTABILITY (1997); R.A.W. Rhodes, *Policy Networks: A British Perspective*, 2 J. THEORETICAL POL. 293 (1990) (discussing problems with policy networks, British contributions, and future lines of development); see also *infra* Part III (discussing network analysis and applying it to sanctuary policies).

27. Reliance on social science disciplines, including political science and sociology, has long been used in legal scholarship to develop frameworks that offer in-depth and robust descriptive, normative, and prescriptive explanations of the development of law. See, e.g., Robert M. Hayden, *Social Theory and Legal Practice: Intuition, Discourse, and Legal Scholarship*, 83 NW. U. L. REV. 461 (1989) (discussing the use of social science in legal scholarship); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981) (arguing that doctrinal analysis, rather than positive analysis of the law through social sciences, should remain the core of legal scholarship); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996) (discussing the value of a new synthesis of discourse for legal scholarship which incorporates ideas from different fields).

the anti-commandeering and state sovereignty variants of federalism cease to be the sole point of legal discourse. Instead, network analysis allows for focus on the statutory interconnectedness and practical relationships among various institutions, agencies and actors. In other words, borrowing from Dean Heather Gerken, one of the nation's leading experts on progressive federalism theories, our framework examines "federalism all the way down" by exploring the interactions among other actors that participate in government and policymaking<sup>28</sup> and, in so doing, reveals the strengths and limits of legal justifications animating traditional and new forms of sanctuary. We show that the legal discourse on sanctuary networks relies on several underappreciated doctrinal sources other than the Tenth Amendment, including the First Amendment, Fourth Amendment, property law, privacy law, and religious freedom laws.<sup>29</sup>

Second, viewing sanctuary through this new theoretical lens reveals the broader normative goals of various public and private actors seeking to help undocumented immigrants and their families. By enacting or articulating "laws," "policies," "standards," or "mission statements," these public and private sanctuaries are not just using their authority to reject federal immigration policy. They are also instantiating an alternative paradigm that competes with the federal government's vision of how undocumented immigrants ought to be treated.<sup>30</sup> As immigration legal scholar Hiroshi Motomura notes, the norm in these areas of overlapping sanctuaries is that unlawful status shapes the beginning of the conversation about appropriate enforcement responses, instead of ending it.<sup>31</sup> By actually implementing a sanctuary policy—by "dissenting by deciding" in Gerken's formulation<sup>32</sup>—these multiple points of sanctuary allow their specific constituencies, as well as broader local, state, and national ones, to weigh competing conceptions of rule of law, moral legitimacy, public

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28. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

29. See *infra* Part II.

30. See, for example, JOHN RAWLS, *POLITICAL LIBERALISM* (1993), for a discussion of norm-creating power.

31. HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 21 (2014).

32. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1747–51 (2005) ("Dissenting by deciding occurs when would-be dissenters—individuals who hold a minority view within the polity as a whole—enjoy a local majority on a decisionmaking body and can thus dictate the outcome."); see also Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1293–94 (2009) ("The opportunity to dissent by deciding gives uncooperative federalism an advantage over the political safeguards model.").

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safety outcomes, and social justice embodied by the administration's approach that contrast with the sanctuaries' approach.

Finally, we argue that these multi-faceted sanctuaries are all participating in calibrating national immigration policy. Those invested in immigration law and policy, particularly on the federal level, but as well as state and local level, must account for these various points of resistance, by either accommodating them or expending political capital to overcome them. As such, recognizing the emergent sanctuary networks provides a broader and more accurate rendering of the costs of a hyper-enforcement-minded federal regime. Ultimately, these decentralized inputs will dynamically influence and alter federal and state level lawmaking on immigration. In short, we show how the adoption of the "sanctuary" label or implementing immigrant-protective policies have enabled these public and private entities to transform themselves into important legal and political actors, leveraging the real power they possess as nodes of governance over immigration enforcement.

This Article proceeds in four parts. Part I sets the stage by explaining what we mean in this Article when we use the term "sanctuary." As we emphasize, although there is no consistent meaning of the term "sanctuary," we deploy a definition that focuses on public and private efforts that range from disentangling local institutions from participating in immigration enforcement to those that shield against federal enforcement tactics. Using this broad working definition of sanctuary, Part II maps out the different categories of sanctuary that exist today. Here, we describe each type of sanctuary, detailing the scope of protection each might provide an undocumented immigrant. In addition, we discuss and assess the legal justification for each to analyze their strengths and weaknesses and examine common legal challenges that they have encountered.

Part III examines the different types of sanctuary in relation to each other. Using network analysis as a theoretical frame, we demonstrate that the legal potency of any type of sanctuary depends on contextual and relational factors. Even in traditional and long-standing sanctuary cities, emerging forms of local and private sanctuary are necessary compliments to help actualize the full potential of a resistant, governance network. Moreover, even in a "dissenting" role, where a private or local sanctuary is located in a decidedly anti-sanctuary state, these local and hyper-local expressions remain critical sites of resistance and norm-creation.

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Finally, Part IV explores the normative and policy implications of this decentralized framework for understanding sanctuaries and governance over immigration enforcement. We argue that this trend is a positive one that destabilizes the federal government's monopoly over setting the enforcement regime, and allows for greater democratization in negotiating the terms of national immigration policy.

Ultimately, this project helps reorient our theoretical and legal approach to sanctuaries. By contextualizing and emphasizing other sanctuary providers alongside state and local governments, we carve out conceptual space for the myriad institutions and networks, whether private or public, that govern the lives of undocumented noncitizens. This reorientation is critical in a regulatory sphere characterized by complexity and interdependence between multiple levels of government and the institutions of everyday life, like workplaces, schools, and religious organizations.

### I. DEFINING "SANCTUARY"

There is no precise definition of the term "sanctuary."<sup>33</sup> Indeed, no legal definition of "sanctuary" in the immigration law context exists, leaving its meaning contested among those who have a stake in immigration law enforcement and policy. Accordingly, the term "sanctuary" is fraught with various legal, social and political tensions, and establishing a fixed definition is beyond the scope of this Article.<sup>34</sup> For purposes of this Article, we offer a working definition that allows us to include the various public and private immigrant-friendly and protective actions, policies and practices that we map in Part II. In addition, it sets up our theoretical and normative discussions in Parts III and IV that demonstrate the underappreciated myriad of entities that participate in governing the lives of noncitizens, and by extension, calibrating national immigration policy.

Here, we use the term "sanctuary" to refer to a range of policies and programs adopted by public and private entities or or-

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33. What Is a Sanctuary?, GOOGLE, <http://google.com> (search "What is a sanctuary?") (revealing various articles after "What is a sanctuary?," including "Sanctuary City" by Wikipedia and a Biblical definition of the term "sanctuary").

34. We do not wade into the debate on what sanctuary should be. We also do not seek to resolve whether the term "sanctuary" is an ideal or useful term for public and private individuals and groups to use.

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ganizations that decline or limit voluntary participation in federal immigration enforcement practices or seek to shield noncitizens from federal enforcement efforts. We emphasize that the sanctuaries we include within this definition are all, in our view, acting within reasonable interpretations of current constitutional principles and statutory law. That is, although these sanctuaries might border on outright civil disobedience, we contend in Part II that they all rest on colorable legal justifications.

Based on these criteria, we would include within our definition of sanctuary those public and private policies that have openly adopted the “sanctuary” label and have expressed that they would not cooperate with the federal government in enforcing immigration law unless required to do so by law. But we also include those policies and actions that might not have the “sanctuary” moniker but nevertheless have the effect of limiting involvement with federal immigration enforcement or aim to establish a safe haven for immigrants.<sup>35</sup> Our criteria are broad enough to encompass any number of efforts to resist federal enforcement efforts by public and private entities, and all the ways in which law enforcement agencies might disentangle themselves from federal immigration authorities. Especially for the latter, our definition contemplates entities that might justify their actions based on community-focused policing efforts or fiscal and manpower conservation, rather than on an expressly immigration-based agenda.

So that readers have a sense of how our usage of the term comports with other legally or politically relevant definitions, we briefly explain the respective positions of the current administration and immigrant advocates on this definitional issue. Our usage of the term includes the various policies and institutions identified by both the federal government and advocates. Unlike the federal government, however, we believe sanctuaries are acting within the bounds of statutory and constitutional law. And, unlike some advocates, we are not including institutions engaged in outright civil disobedience or defiance of applicable law without legal justification.

The Trump Administration’s statements, executive orders, and litigation position suggest at least three definitions of the

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35. Accordingly, for example, our use of sanctuary includes the City of Austin, Texas, which in 2014 declared itself a “Welcoming City” and affirmed its commitment to support the “long-term integration of immigrant communities.” Austin City Council Res. 20140320-049 (Tex. 2014), <http://www.austintexas.gov/edims/document.cfm?id=207652>.

term “sanctuary,” all of which are focused on law enforcement policies at the state and local level. The first is a general meaning that can be gleaned from President Trump’s Executive Order (E.O.) 13,768.<sup>36</sup> E.O. 13,768 aims to penalize sanctuary jurisdictions by denying them federal funds.<sup>37</sup> Stating that “sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States,”<sup>38</sup> the executive order claims that the actions of sanctuary jurisdictions have “caused immeasurable harm” to the United States.<sup>39</sup> Accordingly, E.O. 13,768 articulates that the policy of the federal government is to “[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal grants.”<sup>40</sup> In particular, the executive order warns that, “jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 [sic] (sanctuary jurisdictions) are not eligible to receive Federal funds.”<sup>41</sup> Thus, E.O. 13,768 strives to define “sanctuary jurisdictions” in general terms as places that are harming the country through their defiance of 8 U.S.C. § 1373. This broad definition recalls the political rhetoric during the presidential campaign in which then candidate Trump criticized sanctuary cities such as San Francisco, which he claimed was responsible for the death of Kate Steinle, a woman who was killed by an undocumented immigrant.<sup>42</sup> Thus, now as president, Trump demanded a

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

37. It should be noted that one of the legal issues presented in the litigation over Executive Order 13,768 is whether the President and the Executive Branch has the power to defund sanctuary jurisdictions. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 507 (N.D. Cal. 2017). The federal government’s “power of the purse” resides in Congress’s Spending Power, not the Executive Branch. See Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1386–92 (1988) (discussing Congress’s appropriation power and the limitations imposed on the Executive Branch’s spending authority).

38. Exec. Order No. 13,768, 82 Fed. Reg. at 8799.

39. *Id.*

40. *Id.* As more fully explained in Part II, 8 U.S.C. § 1373 encourages federal, state, and local government entities to cooperate with federal immigration laws by prohibiting such entities from preventing their employees from voluntarily reporting an individual’s immigration status to immigration authorities. See *infra* Part II.

41. Exec. Order No. 13,768, 82 Fed. Reg. at 8801.

42. Chris Nguyen, *Kate Steinle’s Family Speaks After Mention by Donald Trump at RNC*, ABC7 NEWS (July 22, 2016), <https://abc7news.com/news/exclusive-kate-steinles-family-speaks-after-mention-by-trump-at-rnc/1439363> (asking “where was sanctuary for Kate Steinle?”).

“crackdown on sanctuary cities.”<sup>43</sup> ICE authorities have called such cities “un-American” for “harboring criminal illegal immigrants.”<sup>44</sup>

Ensuing litigation over the executive order, however, forced the administration to consider a more specific definition of sanctuary jurisdiction. E.O. 13,768 gives Attorney General Jeff Sessions power to determine which entities would be considered sanctuary jurisdictions.<sup>45</sup> In a memo clarifying the scope of the executive order,<sup>46</sup> Attorney General Sessions explained that the mandates of E.O. 13,768 refer only to those jurisdictions that receive grants from the Department of Justice (DOJ) or Department of Homeland Security (DHS) through law enforcement programs to which the jurisdictions have applied.<sup>47</sup> In other words, E.O. 13,768 applies only to those entities that were required, as a condition of receiving federal funds for their programs, to confirm that they are following or adhering to 8 U.S.C. § 1373. Failure to do so would render those entities “sanctuary jurisdictions.” From a definitional point of view, the terms “sanctuary” and “sanctuary jurisdictions” are those states and cities that receive federal funds from DOJ or DHS and refused to comply with 8 U.S.C. § 1373. It is, in other words, a narrower meaning of “sanctuary.” It is worth noting, however, that E.O. 13,768 does not define specifically what constitutes noncompliance with 8 U.S.C. § 1373.<sup>48</sup> (Indeed, as we discuss *infra* in Part II, the constitutionality of 8 U.S.C. § 1373 is itself legally contested.)<sup>49</sup>

The federal administration’s third and most specific definition of sanctuary city refers to jurisdictions that do not honor civil detainer requests by ICE officials.<sup>50</sup> ICE civil detainees are

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43. Tal Kopan, *Trump Administration Again Pressures Sanctuary Cities*, CNN (July 25, 2017), <https://www.cnn.com/2017/07/25/politics/trump-admin-sanctuary-cities/index.html>.

44. Paul Bedard, *ICE Chief Lists Worst Sanctuary Cities: Chicago, NYC, San Francisco, Philadelphia*, WASH. EXAMINER (July 24, 2017), <https://www.washingtonexaminer.com/ice-chief-lists-worst-sanctuary-cities-chicago-nyc-san-francisco-philadelphia>.

45. Exec. Order No. 13,768, 82 Fed. Reg. at 8801.

46. Memorandum from the Office of the Attorney Gen. to All Dep’t Grant-Making Components (May 22, 2017), <https://assets.documentcloud.org/documents/3728675/Implementation-of-Executive-Order-13768.pdf>.

47. *Id.*

48. Exec. Order No. 13,768, 82 Fed. Reg. at 8801.

49. *See infra* Part II.

50. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 510–11 (N.D. Cal. 2017) (discussing civil detainees).

requests that the federal government makes to state or local authorities requesting that those officers hold a noncitizen in their custody.<sup>51</sup> Upon learning that a local law enforcement agency has potentially removable noncitizens in custody, ICE officers might then request that the state or local entity hold the noncitizens in jail for up to forty-eight hours after their scheduled release from the local jail to give ICE time to determine whether or not to take the noncitizens into custody.<sup>52</sup> The current administration considers entities that refuse to honor detainer requests as sanctuary jurisdictions, and has identified them through the publication of lists of nonfederal jurisdictions that decline detainer requests.<sup>53</sup> Among the jurisdictions that were included in the list were those that require the federal government to obtain a warrant before they would agree to hold a noncitizen in custody after the noncitizen is required to be released under state or local law.<sup>54</sup>

Similar to the two aforementioned definitions of “sanctuary,” this third meaning also comes from a law enforcement perspective that descriptively and normatively adopts a top-down approach to immigration law enforcement. That is, all three present conceptions of “sanctuary” and “sanctuary jurisdictions” as entities that violate laws and policies that are designed to encourage coordinated federal, state and local efforts in enforcing immigration law. We agree with the Trump Administration’s notion that municipal and local law enforcement agency policies that limit notification, cooperation, and detention of noncitizens are sanctuaries, but disagree with the DOJ’s position that such policies violate any federal laws.

Unsurprisingly, the definition and meaning of sanctuary offered by immigrant advocates contrasts with the federal administration’s. Advocates adopt the term, but praise it for its positive connotations. For some advocates, “sanctuary cities” are those

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51. *Immigration Detainers: An Overview*, AM. IMMIGR. COUNCIL (Mar. 21, 2017), <https://www.americanimmigrationcouncil.org/research/immigration-detainers-overview>.

52. *Id.*

53. U.S. IMMIGRATION & CUSTOMS ENF’T, ENFORCEMENT AND REMOVAL OPERATIONS: WEEKLY DECLINED DETAINER OUTCOME REPORT FOR RECORDED DECLINED DETAINERS FEB 4–FEB 10, 2017, at 1 (2017), [https://www.ice.gov/doclib/ddor/ddor2017\\_02-04to02-10.pdf](https://www.ice.gov/doclib/ddor/ddor2017_02-04to02-10.pdf).

54. *See id.* at 8–23 (listing policies from jurisdictions ranging from local entities and cities to counties and states).

cities that provide a “safe harbor for undocumented immigrants,”<sup>55</sup> “actions that make cities safer” because local law enforcement officers have the trust of the community,<sup>56</sup> and cities that are a “safe haven for immigrants” or offer a “protective shield” that stand in the way of “federal efforts to pinpoint and deport people.”<sup>57</sup> Importantly, they ascribe these characteristics to the same set of policies identified and targeted by the federal administration; namely, those that limit communication and participation with federal immigration officials, or that decline detainer requests.

Immigrant advocates, however, have been willing to more liberally ascribe the term sanctuary to a broader set of institutions beyond state and local governments or law enforcement agencies. Thus, they have described the provision of sanctuary in the context of churches, mosques, and synagogues that “provided space for people who are in fear of being deported”<sup>58</sup> or a “home” to those who are about to be removed.<sup>59</sup> Universities too have declared themselves as “sanctuary campuses” and expressed their support for undocumented students, particularly those who are recipients of the DACA<sup>60</sup> program and their families.<sup>61</sup> Others have used the “sanctuary framework” to encourage

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55. *What Is a Sanctuary City? And What Happens Now?*, CBS NEWS (Jan. 25, 2017), <https://www.cbsnews.com/news/what-is-a-sanctuary-city-and-what-happens-now>.

56. Gabe Ortiz, *What Is a ‘Sanctuary City’ Exactly? An Immigrant Rights Group Explains*, DAILY KOS (Apr. 28, 2017), <https://www.dailykos.com/stories/2017/4/28/1657149/-What-is-a-sanctuary-city-exactly-An-immigrant-rights-group-explains>.

57. Amanda Sakuma & Jérôme Sessini, *No Safe Place*, MSNBC, <http://www.msnbc.com/specials/migrant-crisis/sanctuary-cities> (last visited Nov. 11, 2018).

58. Doug Stewart, *What Is a Sanctuary Church and Is It Legal?*, FOX 61 (July 21, 2017), <http://fox61.com/2017/07/20/what-is-a-sanctuary-church-and-is-it-legal>.

59. *Churches Offer Sanctuary to Immigrants Who Could Face Deportation*, CBS NEWS (Dec. 9, 2016), <https://www.cbsnews.com/news/donald-trump-undocumented-immigrants-deportation-churches-sanctuary>; Sigal Samuel, *Mosques Want to Offer Sanctuary, but Will Anyone Accept?*, ATLANTIC (Feb. 10, 2017), <https://www.theatlantic.com/politics/archive/2017/02/mosques-want-to-provide-sanctuary-but-will-anyone-accept-the-offer/516366>.

60. See Preston, *supra* note 13.

61. Rosanna Xia, *What Does It Mean to Be a ‘Sanctuary Campus?’ Two College Presidents Weigh In*, L.A. TIMES (Mar. 24, 2017), <http://www.latimes.com/local/education/la-essential-education-updates-southern-pitzer-panel-sanctuary-campus-1490381837-htmstory.html>.

employers to not discriminate or retaliate against their employees based on their employees' immigration status.<sup>62</sup>

The political and legal posturing against sanctuary has led to an ongoing and robust debate amongst advocates about whether the term helps or harms the goals of those who are interested in supporting immigrants. Some cities and universities have a positive conception of the term, openly adopting its use to mean the provision of a safe haven for undocumented immigrants.<sup>63</sup> Wesleyan University, for example, within a few weeks after the November 2016 election, declared itself a "sanctuary campus."<sup>64</sup> Others have shown less support for the use of the term and have chosen to not use the word at all or employed a different word.<sup>65</sup> For instance, the City of Chicago, Illinois adopted a "Welcoming City Ordinance," which prohibits agencies from inquiring and releasing information about a person's immigration status.<sup>66</sup> This "don't ask, don't tell" policy is similar to the policies of other cities, such as San Francisco's, that openly calls its ordinance a "sanctuary ordinance."<sup>67</sup> In short, even

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62. David Bacon, *Fighting for the Sanctuary Workplace*, U.S. SOLIDARITY ECON. NETWORK (June 27, 2017), <https://ussen.org/2017/06/27/fighting-for-the-sanctuary-workplace>.

63. *E.g.*, Portland City Council Res. 37,277 (Or. 2017), <http://efiles.portlandoregon.gov/Record/10774926> (declaring "the City of Portland a Welcoming City, Sanctuary City, and an Inclusive City for all"); City Coll. of S.F. Res. 161215-IX-346 (Cal. 2016), <http://www.ccsf.edu/BOT/2016/December/346r.pdf> ("City College of San Francisco joins the City and County of San Francisco in affirming its sanctuary status for all people of San Francisco."); *see also* Michael S. Roth, *Wesleyan University a Sanctuary Campus*, WESLEYAN U. (Nov. 20, 2016), <http://roth.blogs.wesleyan.edu/2016/11/20/wesleyan-university-a-sanctuary-campus> (declaring Wesleyan University a sanctuary campus).

64. *See* Roth, *supra* note 63; *see also* Chris Lydgate, *Kroger Declares Reed a Sanctuary College*, REED MAG. (Nov. 18, 2016), [https://www.reed.edu/reed\\_magazine/sallyportal/posts/2016/sanctuary-college.html](https://www.reed.edu/reed_magazine/sallyportal/posts/2016/sanctuary-college.html) (declaring Reed College a sanctuary college); Wim Wiewel, *Portland State Is a Sanctuary City*, PORTLAND ST. U., <https://www.pdx.edu/insidepsu/portland-state-is-a-sanctuary-university> (last visited Nov. 11, 2018) (declaring Portland State University a sanctuary campus).

65. *See, e.g.*, Preston, *supra* note 13 (noting that Janet Napolitano, President of the University of California, does not mention the word "sanctuary" when describing what the school system could offer its DACA students if Donald Trump cancelled the program because "[s]anctuary is such a vague term").

66. CHI., ILL., MUN. CODE § 2-173 (2012), <https://www.cityofchicago.org/content/dam/city/depts/mayor/Office%20of%20New%20Americans/PDFs/WelcomeCityOrdinance.pdf> (adopting a "Welcoming City Ordinance" prohibiting agencies from requesting and disclosing immigration statuses unless required by law).

67. *Sanctuary City Ordinance*, OFF. CIVIC ENGAGEMENT & IMMIGR. AFF., <http://sf.gov/oceia/sanctuary-city-ordinance-0> (last visited Nov. 11, 2018); *see*

amongst advocates, some believe the term should not apply outside the religious context, others believe it promises too much to undocumented persons, and still others find it instrumentally and politically disadvantageous. We note the existence of these important debates, but cabin those questions for our purposes here. For this Article, we adopt the term because of its consistent use in popular discourse and its ability to evoke—for detractors and supporters—ideas and questions about the appropriate level of federal immigration enforcement.

As with the federal government's definition, our criterion for this Article contemplates all the ways in which the advocates have also chosen to define sanctuary, including the myriad of public and private institutions and organizations that might be described as sanctuaries. As we will show in Part II, however, our conception might encompass community movements and employer policies that have not yet been specifically considered by enforcement officials or advocates as falling under the sanctuary rubric. We note further that our use of the term "sanctuary" does not necessarily suggest a highly protective policy. However, using the term might have psychological benefits for certain constituencies who believe it to have talismanic power.<sup>68</sup>

Finally, it is equally important for us to specify what we do *not* mean as sanctuary. As we noted, we do not here include those institutions or entities engaged in outright defiance of the law with no apparent legal justification. In addition, we made the deliberate choice of disregarding those jurisdictions that have conferred rights to undocumented immigrants that are conventionally given only to U.S. citizens or authorized immigrants. Such rights might include the right to vote in local school board elections,<sup>69</sup> the right to obtain a driver's license,<sup>70</sup> the right to

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also S.F., CAL., ADMIN. CODE §§ 12H.1–.6 (2016) (declaring the city a "City and County of Refuge").

68. See Omar Martinez et al., *Evaluating the Impact of Immigration Policies on Health Status Among Undocumented Immigrants: A Systematic Review*, 17 J. IMMIGR. MINOR HEALTH 947, 965 (2015) (examining the mental health impact of being undocumented and residing in immigrant friendly jurisdictions versus those places that express anti-immigrant sentiments).

69. S.F., CAL., CHARTER art. XIII, § 13.111 (2017).

70. See, e.g., CAL. VEH. CODE § 12801.9 (West 2017) (permitting an undocumented resident to obtain a driver's license with proof of identity in California); HAW. REV. STAT. § 286-104.5 (2017) (requiring proof of residency in Hawaii); 625 ILL. COMP. STAT. 5/6-105.1 (2017) (requiring proof of residency for at least one year in Illinois).

obtain in-state tuition,<sup>71</sup> or the right to work (such as a lawyer).<sup>72</sup> Further, we excluded those jurisdictions that confer municipal ID cards<sup>73</sup> and library cards<sup>74</sup> to their residents regardless of immigration status. These policies may arguably be described as broader examples of sanctuaries, and as a practical matter, jurisdictions with such policies are likely also to maintain one or more of the sanctuary policies that would meet our definition. However, we see such efforts as more about “rights-building” as opposed to those actions that are intended to or have the effect of defying or not cooperating with federal immigration enforcement. In comparison to “rights-building,” our definition of sanctuary includes those policies, which express opposition, or otherwise undermine, the enforcement regime and policy vision instantiated by the federal executive department.

## II. SANCTUARY EVERYWHERE

To say that the election of Donald Trump to the U.S. presidency has had a significant impact on immigrants and immigration policy would be an understatement. Within days of his presidency, Donald Trump issued three executive orders that

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71. See, e.g., MINN. STAT. § 135A.043 (2017) (requiring three years of in-state high school education and graduation, registration with the selective service system, and a demonstration that the student has begun to seek documented status, if available to the student, for in-state college tuition in Minnesota); N.J. STAT. ANN. § 18A:62-4 (West 2017) (creating a presumption that a person who has resided in the state for at least twelve months is eligible for resident tuition in New Jersey); OR. REV. STAT. § 352.287 (2017) (containing different requirements depending on where the student completed high school education and requiring a demonstration of intent to seek lawful status in Oregon).

72. See, e.g., *In re Garcia*, 315 P.3d 117 (Cal. 2014) (granting undocumented applicant admission to State Bar); *In re Vargas*, 10 N.Y.S.3d 579, 597 (App. Div. 2015) (“[U]ndocumented immigrants who have been granted DACA relief . . . may be admitted to the practice of law provided that they otherwise . . . meet the standards for admission . . .”).

73. E.g., N.Y.C., N.Y., ADMIN. CODE tit. 3, sec. 1, ch. 1, sub-ch. 1, § 3-115(d)(1)(vi) (2018) (permitting foreign nationals to obtain city identification card with proof of identity in New York City, which can be in the form of a photo identification card issued by another country); S.F., CAL., ADMIN CODE ch. 95, § 95.2(c)(1)(A)(i) (2017).

74. E.g., Stephanie M. Gomes, *Building TRUST in Our Communities: States Encourage Their Residents to Speak Up in the Wake of the Federal Government’s Silence*, 33 QUINNIPIAC L. REV. 715, 735–38 (2015) (describing how the city of New Haven, Connecticut permits undocumented residents to obtain a city-issued identification card that can be used at city libraries and parks, and can be used as a debit card).

implemented his campaign promises regarding immigrants,<sup>75</sup> including banning Muslims from entering the United States,<sup>76</sup> defunding sanctuary cities,<sup>77</sup> building a wall between the United States and Mexico,<sup>78</sup> and removing undocumented immigrants.<sup>79</sup> Since Donald Trump became president, arrests of immigrants, including those who have not committed any crimes, have increased.<sup>80</sup> His administration eliminated all removal priorities,<sup>81</sup> including those that centered on noncitizens with criminal histories that were issued under the Obama Administration.<sup>82</sup> In

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75. See Aidan Quigley, *All of Trump's Major Executive Actions so Far*, POLITICO (Mar. 8, 2017), <http://www.politico.com/agenda/story/2017/01/all-trump-executive-actions-000288> (reporting on all of President Trump's executive orders from January 20, 2017 through April 27, 2017, including those that most impact immigrants: Executive Orders (E.O.) 13,767, 13,768, and 13,780).

76. See Greg Sargent, Opinion, *Is This a 'Muslim Ban'? Look at the History – and at Trump's Own Words*, WASH. POST (Jan. 31, 2017), [https://www.washingtonpost.com/blogs/plum-line/wp/2017/01/31/is-this-a-muslim-ban-look-at-the-history-and-at-trumps-own-words/?noredirect=on&utm\\_term=.134f19dca04c](https://www.washingtonpost.com/blogs/plum-line/wp/2017/01/31/is-this-a-muslim-ban-look-at-the-history-and-at-trumps-own-words/?noredirect=on&utm_term=.134f19dca04c) (responding to President Trump's E.O. 13,769 and quoting his 2015 campaign call for a “total and complete shutdown of Muslims entering the United States”).

77. See Erin Durkin, *Here's How Trump's Plan to Defund Sanctuary Cities Could Play Out*, N.Y. DAILY NEWS (Nov. 23, 2016), <http://www.nydailynews.com/news/politics/trump-plan-defund-sanctuary-cities-play-article-1.2885423> (quoting President Trump's statement on sanctuary cities: “Cities that refuse to cooperate with federal authorities will not receive taxpayer dollars”).

78. Fred Imbert, *Donald Trump: Mexico Going to Pay for Wall*, CNBC (Oct. 28, 2015), <https://www.cnn.com/2015/10/28/donald-trump-mexico-going-to-pay-for-wall.html> (“We're going to do a wall . . . Mexico's going to pay for [it] . . .”).

79. Alexandra Jaffe, *Donald Trump: Undocumented Immigrants 'Have to Go'*, NBC NEWS (Aug. 16, 2015), <http://www.nbcnews.com/meet-the-press/donald-trump-undocumented-immigrants-have-go-n410501> (“They have to go. [W]e either have a country, or we don't have a country.”).

80. See Maria Sacchetti, *ICE Immigration Arrests of Noncriminals Double Under Trump*, WASH. POST (Apr. 16, 2017), [https://www.washingtonpost.com/local/immigration-arrests-of-noncriminals-double-under-trump/2017/04/16/98a2f1e2-2096-11e7-be2a-3a1fb24d4671\\_story.html?utm\\_term=.41fe23c6ee1a](https://www.washingtonpost.com/local/immigration-arrests-of-noncriminals-double-under-trump/2017/04/16/98a2f1e2-2096-11e7-be2a-3a1fb24d4671_story.html?utm_term=.41fe23c6ee1a) (reporting that immigration arrests have gone up 32.6% in the first weeks of the Trump Administration).

81. Anna O. Law, *This Is How Trump's Deportations Differ from Obama's*, WASH. POST (May 3, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/03/this-is-how-trumps-deportations-differ-from-obamas/?utm\\_term=.211bd6340b51](https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/03/this-is-how-trumps-deportations-differ-from-obamas/?utm_term=.211bd6340b51).

82. See Muzaffar Chishti et al., *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), <http://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not> (noting that the Department of Homeland Security's immigration priority revisions made noncitizens with criminal records a top enforcement target).

September 2017, President Trump rescinded the DACA program, which benefitted 800,000 “Dreamers.”<sup>83</sup> Further, ICE had been making arrests in places that it previously did not traditionally arrest immigrants, including courthouses<sup>84</sup> and hospitals.<sup>85</sup> ICE has also been targeting undocumented parents of immigrants and U.S. citizen children.<sup>86</sup> Through these various actions and policies, the current administration appears to be effectuating Trump’s promise to remove “probably 2 million” or more undocumented immigrants once he is in office.<sup>87</sup>

Immigrant advocates have reacted to the heightened enforcement of immigration law in various ways designed to resist such policies. Chief among these has been to push for the adoption or expansion of sanctuary policies. As we discuss below, the number of cities that became sanctuary cities or reiterated their sanctuary policies has increased. And, other traditional and historical sources of religious sanctuary have announced their places of worship as sanctuaries. Notably, however, new forms of sanctuaries have also emerged.

In this Part, we discuss these multiple types of sanctuaries. We detail the different categories of sanctuary, beginning with the more conventional types—churches and cities—and discuss how they have expanded and then analyze new types of sanctuary that have emerged in more recent memory. In our discussion, we point out and assess the types of protection that each sanctuary is able to provide to undocumented immigrants. These types may include “welcoming” measures (such as the designation of a site as “inclusive”), “non-immigration law enforcement” policies

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83. Rachel Martin, *Trump Rescinds DACA, Calls on Congress to Replace It*, NPR (Sept. 6, 2017), <https://www.npr.org/2017/09/06/548819221/trump-administration-rescinds-daca-calls-on-congress-to-replace-it>.

84. James Queally, *ICE Agents Make Arrests at Courthouses, Sparking Backlash from Attorneys and State Supreme Court*, L.A. TIMES (Mar. 16, 2017), <http://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html>.

85. Barbara Demick, *Federal Agents in Texas Move Hospitalized Salvadoran Woman Awaiting Emergency Surgery to a Detention Facility*, L.A. TIMES (Feb. 23, 2017), <http://www.latimes.com/nation/la-na-hospital-seizure-20170223-story.html>.

86. Caitlin Dickerson, *Trump Administration Targets Parents in New Immigration Crackdown*, N.Y. TIMES (July 1, 2017), <https://www.nytimes.com/2017/07/01/us/trump-arrest-undocumented-immigrants.html>.

87. Bill Chappel, *Donald Trump Says He’ll Deport 2–3 Million People Once in Office*, NPR (Nov. 13, 2016), <http://www.npr.org/sections/thetwo-way/2016/11/13/501921177/donald-trump-says-hell-deport-2-3-million-people-once-in-office>.

(i.e., refusing to use resources, public or private, to enforce immigration law), “don’t ask” policies (such as refusing to inquire about a person’s immigration status or participating in E-verify), “don’t tell” policies (i.e., refusing to disclose known information), humanitarian acts (such as the provision of shelter and food), private property rights assertions (such as refusing entry to law enforcement officers without an administrative or judicial warrant), and “forewarning” actions (such as notifying undocumented immigrants about a raid). As we explain, the various categories of sanctuary have adopted one or more of each of these types of protective measures.

Crucially, each sanctuary’s ability to provide a safe haven is contingent on legal boundaries. Each of them has independent legal grounds for supporting and providing assistance to immigrants. These multiple legal sources demonstrate the need to go beyond a Tenth Amendment analysis because contemporary sanctuary involves more complex and varied concerns than just structural power allocations between federal and state governments. The key, as we discuss in Parts III and IV, is how these traditional and emerging sanctuaries perform collectively and in relation to one another.

#### A. CHURCH SANCTUARIES

Arguably the most established understanding of the term “sanctuary” is its affiliation with a religious organization. That perhaps should be unexpected given that the oldest usage of the term appears in the Bible.<sup>88</sup> As used there, it refers to “cities of refuge, of asylum” that existed “for the narrow purpose of providing a mechanism for the adjudication of claims of involuntary manslaughter.”<sup>89</sup> In the United States, the contemporary use of a religious entity’s use of the term “sanctuary” originated in the 1980s and shares similar goals of providing refuge to individuals who were seeking a safe haven.<sup>90</sup> Escaping civil war, killings,

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88. Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747, 749 (1986) (noting the concept of sanctuary is rooted in the Bible and developed in the Greco-Roman societies before being adopted in Anglo-Saxon culture).

89. *LaCroix v. Junior*, Nos. F17–376, F17–1770, 2017 WL 837477, at \*2 n.3 (Fla. Cir. Ct. Mar. 3, 2017).

90. To be clear, in the United States, individuals and groups have offered sanctuary to various groups historically, including slaves in the Nineteenth century, Jews seeking to escape the Holocaust, civil rights advocates who sought protection from mob violence in the 1950s and 1960s, and those who resisted

and both social and civil unrest, an estimated one million individuals from El Salvador and Guatemala entered the United States between 1981 and 1990.<sup>91</sup> The federal government, however, routinely denied their asylum applications, stating that they were “economic migrants” and not eligible for political asylum.<sup>92</sup> Accordingly, the federal government processed them for deportation.<sup>93</sup>

Believing that the asylum applicants would be killed if they were sent back to their home countries, members of Christian churches and synagogues borrowed the biblical concept of “sanctuary”<sup>94</sup> and began what became known as the Sanctuary Movement.<sup>95</sup> Located at different parts of the country, there were an estimated 20,000 to 30,000 church members and more than 100 churches and synagogues that joined the movement.<sup>96</sup> Through this collective movement, members provided a range of assistance and protection including shelter, clothing and other forms of support, such as legal services.<sup>97</sup> Other members also assisted Central Americans to enter the United States and helped them avoid detection and deportation.<sup>98</sup>

In seeking to provide safe havens to the Central American immigrants, the Sanctuary Movement had both moral and legal grounds. First, members of the movement believed that it was immoral and unconscionable to return the immigrants to their home countries.<sup>99</sup> To them, sending the immigrants back to their

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the draft. Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133 (2008). Other examples of sanctuary include universities welcoming Japanese Americans as students despite them having been subject to incarceration or internment under E.O. 9066. IMMIGRATION RESPONSE INITIATIVE, HARVARD LAW SCH., SANCTUARY CAMPUS: FREQUENTLY ASKED QUESTIONS 27 (2017), <https://today.law.harvard.edu/wp-content/uploads/2017/02/Sanctuary-Campus-Toolkit.pdf>.

91. Villazor, *supra* note 90, at 139–40; Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL’Y INST. (Apr. 1, 2006), <http://www.migrationpolicy.org/print/4621#.WMLVTU1-vcs>.

92. *See* Gzesh, *supra* note 91 (noting approval rates for Salvadoran and Guatemalan asylum cases was under three percent in 1984).

93. *Id.*

94. *See id.* (noting local congregations endorsed the concept and practice of sanctuary).

95. Kathleen L. Villarruel, *The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values*, 60 S. CAL. L. REV. 1429, 1433 (1987).

96. Villazor, *supra* note 90, at 141.

97. Villarruel, *supra* note 95, at 1433.

98. *Id.*

99. Pamela Begaj, Note, *An Analysis of Historical and Legal Sanctuary and*

home countries was tantamount to issuing the asylum applicants death sentences.<sup>100</sup> But their claims went beyond what they saw as their moral obligation. Members of the Sanctuary Movement also argued that their actions were lawful exercises of their religious beliefs.<sup>101</sup> Grounding this argument on the First Amendment, the Sanctuary Movement members contended that their sanctuary work constituted their religious expressions.<sup>102</sup> That is, they believed that the First Amendment provided legal support for their humanitarian actions.<sup>103</sup>

Although the federal government was at first dismissive of the Sanctuary Movement,<sup>104</sup> it eventually prosecuted those involved with the movement<sup>105</sup> under section 274 of the Immigration and Nationality Act (INA), which prohibits the unlawful “bringing in and harboring [of] certain aliens.”<sup>106</sup> The prosecution of these sanctuary advocates illustrated competing legal interpretations regarding the provision of a safe haven for the Central American refugees. Whereas the Sanctuary Movement participants saw their actions as religious expressions, the government viewed the provision of sanctuary as “alien smuggling.”<sup>107</sup>

Ultimately, the government prevailed, revealing the limits of the Sanctuary Movement’s legal positions. In the notable prosecution of John Fife, one of the key founders of the Sanctuary Movement, and other members of the movement, the court found

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*a Cohesive Approach to the Current Movement*, 42 J. MARSHALL L. REV. 135, 137–39, 142, 146 n.60 (2008).

100. See *id.* at 143 n.45 (describing the atrocities from which the immigrants were fleeing).

101. Cf. *id.* at 143 (noting church workers, motivated by religious beliefs, declared their grounds as public sanctuaries in defiance of federal immigration law).

102. See Villarruel, *supra* note 95, at 1430 (noting members felt sincere religious beliefs motivated their acts).

103. See Begaj, *supra* note 99, at 154 (stating interpretations of the Free Exercise Clause, and highlighting individuals practicing their sincere religious beliefs).

104. See Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizens Interpretation*, 62 TENN. L. REV. 899, 902 (1995) (noting the government dismissed the Movement as irrelevant piety).

105. See Sophie H. Pirie, *The Origins of a Political Trial: The Sanctuary Movement and Political Justice*, 2 YALE J.L. & HUMAN. 381, 383 (1990) (noting federal agencies undertook undercover investigations that led to criminal indictments).

106. Immigration and Nationality Act, Pub. L. No. 414–477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1324 (2012)).

107. Villarruel, *supra* note 95, at 1431.

them guilty.<sup>108</sup> Among other things, Fife and the other sanctuary workers—whom the court recognized as operating a “modern-day underground railroad”—were convicted of aiding and abetting the unlawful entry of immigrants to the United States.<sup>109</sup> As the prosecution and conviction of the Sanctuary Movement members made evident, the ability of a church to provide a safe haven is circumscribed by the INA.

The prosecution of the Sanctuary Movement members did little to deter other churches and groups from assisting immigrants, however. Through the years, churches continued to provide shelter, food, and other resources to immigrants who lacked authorization to remain in the United States.<sup>110</sup> Indeed, the number of churches that have declared themselves sanctuaries increased in the last few years and certainly since November 2016.<sup>111</sup> In 2014, there were thirteen churches that provided sanctuary to undocumented families.<sup>112</sup> Today, there are over 800 churches and temples nationwide that have pledged that they would welcome undocumented immigrants and confer them with sanctuary.<sup>113</sup> In addition, mosques have also been sites of safe havens.<sup>114</sup>

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108. *United States v. Aguilar*, 883 F.2d 662, 666 n.1 (9th Cir. 1989). However, none of the participants ended up serving prison time but were rather placed on probation. See 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-1980s-political-asylum.html> (stating that John Fife was convicted but did not serve time in jail). Further, litigation a few years later, including a class-action lawsuit on behalf of the Central American migrants, led to a settlement finding the federal government was indeed biased against the applicants and ordered reconsideration of the asylum applications of the class members. See *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991); see also *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (affirming district court findings that the Immigration and Naturalization Service violated the rights of El Salvadoran and Guatemalan asylum applications).

109. *Aguilar*, 883 F.2d at 666 n.1.

110. See generally Begaj, *supra* note 99 (comparing the Sanctuary Movement of the 1980s with the “New Sanctuary Movement” of the early 2000s).

111. Elizabeth Evans & Yonat Shimron, *‘Sanctuary Churches’ Vow to Shield Immigrants from Trump Crackdown*, RELIGION NEWS SERV. (Nov. 18, 2016), <http://religionnews.com/2016/11/18/sanctuary-churches-vow-to-shield-immigrants-from-trump-crackdown>.

112. *Id.*

113. Ashley Archibald, *Mosques, Churches, Synagogues and Temples Rekindle the Sanctuary Movement to Protect Refugees and Immigrants from Deportation*, REAL CHANGE NEWS (June 21, 2017), <http://www.realchangenews.org/2017/06/21/mosques-churches-synagogues-and-temples-rekindle-sanctuary-movement-protect-refugees-and>.

114. *E.g., id.*

As the number of undocumented immigrants and families increased and the federal government ramped up deportation programs, the goals of churches to provide safe spaces to undocumented immigrants have shifted toward keeping families together in the United States. In particular, many immigrants who obtained sanctuary in churches were those who sought to avoid deportation so that they may continue to be with their U.S. citizen children.<sup>115</sup>

The reasons for providing safe havens continue to be grounded on religious and moral grounds. Consider the story of Jeanette Vizguerra, the first undocumented immigrant to seek sanctuary after the election of President Trump.<sup>116</sup> When Vizguerra failed to obtain a stay of removal from ICE, she sought refuge from a church in Colorado to avoid being removed from the United States.<sup>117</sup> In providing sanctuary to her, the pastor of the church explained that “as a people of faith,” doing so was “sacred, faithful work.”<sup>118</sup> Indeed, the provision of sanctuary as based on Judeo-Christian beliefs continues to dominate much of the narrative deployed today among church members providing safe havens to undocumented immigrants. Citing the Book of Matthew, for example, a pastor in a Philadelphia church that declared itself a sanctuary stated a month after the election that, “Jesus said that we are to provide hospitality to the stranger.”<sup>119</sup> Thus, similar to the churches involved with the Sanctuary Movement of the 1980s, religious groups offering sanctuary have invoked biblical and theological grounds. As Reverend John Fife said earlier this year, “sometimes . . . you cannot love both God and the civil authority.”<sup>120</sup>

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115. Cf. *Children of Illegal Immigrants*, PBS (May 26, 2006), <http://www.pbs.org/wnet/religionandethics/2006/05/26/may-26-2006-children-of-illegal-immigrants/18834> (noting the thousands of families facing the familial struggles associated with the threat of deportation).

116. Time Magazine later named Jeanette Vizguerra as one of Time’s most influential people. Jesse Paul, *Mom Living in Denver Church for Sanctuary Among TIME’s 100 Most Influential People*, DENV. POST (Apr. 20, 2017), <http://www.denverpost.com/2017/04/20/jeanette-vizguerra-sanctuary-time-magazine>.

117. Joel Rose, *Sanctuary Churches Brace for Clash With Trump Administration*, NPR (Feb. 16, 2017), <http://www.npr.org/2017/02/16/515510996/colorado-church-offers-immigrant-sanctuary-from-deportation>.

118. *Id.*

119. Laurie Goodstein, *Houses of Worship Poised to Serve as Trump-Era Immigrant Sanctuaries*, N.Y. TIMES (Dec. 27, 2016), <https://www.nytimes.com/2016/12/27/us/houses-of-worship-poised-to-serve-as-trump-era-immigrant-sanctuaries.html>.

120. Haberman, *supra* note 108.

Yet, as in the past, many religious groups today maintain that their actions constitute lawful exercise of their religious beliefs. In addition to the First Amendment, religious leaders today have also grounded their support in the Religious Freedom and Restoration Act (RFRA).<sup>121</sup> Passed in 1993, RFRA prohibits the government from “substantially burden[ing] a person’s exercise of religion”<sup>122</sup> unless it “demonstrates that application of the burden to the person is in furtherance of a compelling government interest” and “is the least restrictive means of furthering that compelling government interest.”<sup>123</sup> Thus, religious leaders contend that providing sanctuary constitutes the exercise of their religious beliefs protected by RFRA.<sup>124</sup>

In addition to asserting the right to practice their religion, some church leaders have also relied on their rights as private property owners to protect the people seeking sanctuary in their buildings. Churches and other religious buildings constitute private property<sup>125</sup> and are accorded the same right to exclude given to all private property owners under the common law. As such, the Fourth Amendment’s warrant requirement<sup>126</sup> applies to searches of a church as it would to any other private property. Church leaders have demonstrated their understanding of the power of private property and the Fourth Amendment in providing sanctuary. For instance, Cardinal Blase Cupich of Chicago explained to priests that they should always demand to see a

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121. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb to 2000bb-4 (2012).

122. *Id.* § 2000bb-1(a).

123. *Id.* § 2000bb-1(b)(1) to (2).

124. *See, e.g.*, Motion to Dismiss Counts 2 and 3, *United States v. Warren*, No. CR-18-00223-001-TUC-RCC (BPV), 2018 WL 4403753 (D. Ariz. Sept. 17, 2018), 2018 WL 4057307 (arguing that RFRA protects the defendant from being prosecuted for harboring unauthorized immigrants). *But see Warren*, No. CR-18-00223-001-TUC-RCC (BPV), 2018 WL 4403753, at \*4–5 (denying the defendant’s motion to dismiss because the underlying facts relied on were in dispute). *See generally* Thomas Scott-Railton, Note, *A Legal Sanctuary: How the Religious Freedom Restoration Act (RFRA) Could Protect Sanctuary Churches*, 128 *YALE L.J.* (forthcoming 2018) (providing a comprehensive analysis of a church and other faith-based group’s reliance on RFRA to offer sanctuary to immigrants).

125. *See Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 573 (2d. Cir. 2002) (recognizing that the church is private property); *see also Youngblood v. Florida*, No. 3:01-CV-1449-J-16, 2006 WL 288248, at \*5 (M.D. Fla. Feb. 6, 2006) (assuming church property is private).

126. U.S. CONST. amend. IV (protecting persons from unreasonable searches and seizures).

judicially signed warrant and refuse entry to immigration authorizes without one.<sup>127</sup>

Aware of the strong protections that the Fourth Amendment provides to a person's home,<sup>128</sup> some churches have even purchased houses to provide a safe haven for immigrants.<sup>129</sup> For example, a church in Los Angeles has renovated and built homes that members stated would be specifically provided for undocumented immigrant families.<sup>130</sup> Placing the families there achieves a number of goals: the church was able to provide housing for the families and, by putting them in private property, the families residing there may require a warrant before immigration authorities may enter.<sup>131</sup> As one of the members explained, they have "incorporate[ed] private homes, which offer a higher level of constitutional protection than houses of worship and an ability to make it harder for federal agents to find undocumented immigrants."<sup>132</sup>

Most interestingly, to further bolster their legal argument for providing sanctuary, some churches assert that, unlike their predecessors, they are not hiding undocumented immigrants from detection as prohibited by INA section 274 which prohibits "harboring" of unlawfully present persons.<sup>133</sup> Church leaders have explained that they are not concealing the immigrants because they have publicly announced that undocumented immigrants have sought refuge in their churches.<sup>134</sup> ICE is thus aware where the immigrants may be found and may enter the church's property as long as ICE has warrants to arrest the undocumented immigrants.

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127. See Manya Brachear Pashman, *Cupich to Priests: No Entry for Immigration Agents Without Warrants*, CHI. TRIB. (Mar. 1, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-cardinal-cupich-immigration-directive-20170301-story.html> (explaining a church's policy to ask for a warrant before immigration authorities may enter the church).

128. See U.S. CONST. amend. IV (stating the right of persons to secure their houses against unreasonable searches).

129. Kyung Lah et al., *An Underground Network Readies Homes to Hide Undocumented Immigrants*, CNN (Feb. 26, 2017), <http://www.cnn.com/2017/02/23/us/california-immigrant-safe-houses/index.html>.

130. *Id.*

131. *Id.*

132. *Id.*

133. Immigration and Nationality Act, Pub. L. No. 414-477, § 274, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1324 (2012)).

134. Sarah Quezada, *How Churches Can Give Sanctuary and Still Support the Law*, CHRISTIANITY TODAY (Mar. 17, 2017), <http://www.christianitytoday.com/women/2017/march/how-churches-can-give-sanctuary-to-immigrants-and-still-sup.html>.

Thus far, none of the churches that have offered sanctuary have faced legal challenges from the Trump Administration. A policy issued under the Obama Administration<sup>135</sup> treats churches, like schools and hospitals, as “sensitive locations” in which ICE would not enforce immigration law.<sup>136</sup>

As the foregoing account details, churches as sites of sanctuary began in the 1980s with the assertion of a moral calling to assist Central American immigrants from being deported to their home countries. But their actions were also grounded, albeit unsuccessfully, on what they viewed as their First Amendment rights. Moreover, today, religious sanctuary actions have relied on new legal grounds, including RFRA and property rights.

## B. SANCTUARY CITIES

In today’s political climate, the term “sanctuary” is more often associated with its other traditional meaning—“sanctuary cities.” As noted earlier, discussion about “sanctuary cities” has centered on federalism issues. It is helpful to note, however, that “sanctuary cities” arose at around the same time that individuals and groups formed the Sanctuary Movement of the 1980s, demonstrating the roots of a collaborative public and private sanctuary movement. The City of Davis, California, for example, passed a resolution on March 5, 1986 “affirming the support of the City of Davis for efforts to provide sanctuary to refugees fleeing persecution in El Salvador and Guatemala.”<sup>137</sup> Additionally, the Davis resolution stated that “no agency or employee of the City of Davis shall officially assist with investigations or arrest

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135. Memorandum from John Morton, Dir. of U.S. Immigration & Customs Enf’t to Field Office Dirs., Special Agents in Charge, and Chief Counsel of U.S. Immigration & Customs Enf’t (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

136. The Trump Administration asserts that the sensitive locations policy remains in effect. *See FAQ on Sensitive Locations and Courthouse Arrests*, U.S. DEPT’HOMELAND SECURITY, <https://www.ice.gov/ero/enforcement/sensitive-loc> (last visited Nov. 11, 2018) (explaining that sensitive locations include churches, schools, and medical facilities, and stating “yes” to the question “Does ICE’s sensitive locations policy remain in effect?”). However, there have been reports of immigration officers going to medical facilities to arrest undocumented immigrants. John Burnett, *Border Patrol Arrests Parents While Infant Awaits Serious Operation*, NPR (Sept. 20, 2017), <https://www.npr.org/2017/09/20/552339976/border-patrol-arrests-parents-while-infant-awaits-serious-operation>.

137. Davis City Council Res. No. 5407, Series 1986 (Cal. 1986), <http://documents.cityofdavis.org/Media/Default/Documents/PDF/CMO/Sanctuary-City/Resolution-5407-Establishing-Davis-as-a-Sanctuary-City.pdf>.

procedures” relating to alleged violations of immigration law by Central American refugees.<sup>138</sup> Other cities enacted more specific policies that limited local involvement with immigration enforcement, particularly with respect to sharing information about the noncitizen’s status with federal officials. For instance, in 1989, the Mayor of New York City passed Executive Order 124, which limited their employees from “transmit[ing] information respecting any alien to federal immigration authorities” unless required by law, consented to by the noncitizen, or the noncitizen was involved in a criminal activity.<sup>139</sup>

There are various types of sanctuary city policies. While there are those that are more symbolic and seek to create a welcoming city, others are more proactive by establishing protocols designed to maintain the confidentiality of an individual’s undocumented status and ensure open communication between residents and public employees, especially law enforcement officers.<sup>140</sup> Regardless of their articulated purpose, the sanctuary policies issued in these jurisdictions were grounded in their assertion that local police powers delegated to them by the state allow them to protect the public’s general welfare through such enactments.<sup>141</sup> At the end of 2008, sanctuary policies restricting local authorities from immigration enforcement existed in four states and nearly seventy cities and counties.<sup>142</sup> By the end of 2013, California, Colorado, Connecticut, and several localities

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138. *Id.*

139. N.Y.C., N.Y., EXEC. ORDER NO. 124, CITY POLICY CONCERNING ALIENS (1989), [http://www.nyc.gov/html/records/pdf/executive\\_orders/1989EO124.PDF](http://www.nyc.gov/html/records/pdf/executive_orders/1989EO124.PDF).

140. Police chiefs in particular have framed their support for sanctuary policies along community safety goals. Chuck Wexler, *Police Chiefs Across the Country Support Sanctuary Cities Because They Keep Crime Down*, L.A. TIMES (Mar. 6, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-wexler-sanctuary-cities-immigration-crime-20170306-story.html>.

141. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926) (discussing the state delegation of police powers to local governments).

142. Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 568 (2009) (citing the National Immigration Law Center’s December 2008 report on local sanctuary laws).

passed laws limiting police assistance with immigration enforcement.<sup>143</sup> A year later, Rhode Island and over 300 counties and cities joined the movement.<sup>144</sup>

These acts of legal resistance in which “sanctuary cities” actively engaged did not go unnoticed. In 1996, Congress enacted legislation intended to address local noncooperation policies and encourage state and local governments to participate in federal immigration enforcement.<sup>145</sup> Subsequently codified as 8 U.S.C. § 1373, this law prevents state and local governments from issuing “gag-orders” to their officers regarding communication with federal authorities about immigration and citizenship information.<sup>146</sup> Specifically, 8 U.S.C. § 1373 reads in relevant part:

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the [federal immigration enforcement agency] information regarding the . . . immigration status . . . of any individual.<sup>147</sup>

No doubt, despite the language of 8 U.S.C. § 1373 suggesting its terms are not compulsory, the statute seeks to impose limits on sanctuary cities. As such, the statute implicitly recognizes the power of cities to operate their own governments without being subject to federal commandeering actions. Indeed, soon after the passage of 8 U.S.C. § 1373, New York City, which was seeking to maintain its sanctuary city policy, challenged the constitutionality of the law on Tenth Amendment grounds but ultimately

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143. NAT'L IMMIGRATION LAW CTR., IMMIGRANT-INCLUSIVE STATE AND LOCAL POLICIES MOVE AHEAD IN 2014–15, at 19 (2015), <https://www.nilc.org/wp-content/uploads/2016/02/pro-immigrant-policies-move-ahead-2015-12.pdf>.

144. *Id.*

145. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 434, 110 Stat. 2105, 2275 (codified at 8 U.S.C. § 1642 (2012)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-707 (codified at 8 U.S.C. § 1373 (2012)); see also H.R. REP. NO. 104-725, at 383 (1996) (Conf. Rep.) (stating that the “conferees intend to give State and local officials the authority to communicate with the [Immigration and Naturalization Services] regarding the presence, whereabouts, or activities of” undocumented immigrants); S. REP. NO. 104-249, at 19–20 (1996) (“The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with . . . the Federal regulation of immigration . . .”).

146. Martin Kaste, *As Trump Moves Forward on Immigration Plan, ‘Sanctuary Cities’ Push Back*, NPR (Jan. 27, 2017), <http://www.npr.org/2017/01/27/512047222/as-trump-moves-forward-on-immigration-plan-sanctuary-cities-push-back>.

147. 8 U.S.C. § 1373(a).

failed.<sup>148</sup> In *New York City v. United States*, the Court of Appeals for the Second Circuit explained that Congress has not “compelled state and local governments to enact or administer any federal regulatory program.”<sup>149</sup> As such, Congress did not violate the Tenth Amendment when it enacted legislation limiting state and local governments from forbidding all voluntary cooperation by state or local government employees with specific federal programs, including immigration enforcement.<sup>150</sup> At the same time, however, the court noted that 8 U.S.C. § 1373 does not “affirmatively conscript[ ] states, localities, or their employees into the federal government’s service.”<sup>151</sup>

The tension between the scope of the federal government’s immigration powers and power of a city to wield its police powers is at the heart of the Tenth Amendment debates. Ultimately, courts would need to resolve the scope of 8 U.S.C. § 1373 to determine whether it violates the anti-commandeering principle that the Supreme Court has found to be part of the Tenth Amendment.<sup>152</sup> Indeed, sanctuary cities such as Chicago and Philadelphia have challenged the constitutionality of 8 U.S.C. § 1373 on precisely these grounds.<sup>153</sup>

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148. *City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999) (explaining New York City’s contention that Congress is “forbid[ding] state and local government entities from controlling the use of information regarding the immigration status of individuals obtained in the course of their official business” in violation of the city’s Tenth Amendment rights).

149. *Id.* at 35.

150. *Id.*

151. *Id.* It should be noted that the constitutionality of 8 U.S.C. § 1373 is itself contested. *City & County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018) (challenging the constitutionality of 8 U.S.C. § 1373); *Complaint for Declaratory and Injunctive Relief, County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017) (No. 4:17-cv-00485-DMR), 2017 WL 412999. Further, although the U.S. Court of Appeals for the Second Circuit upheld the constitutionality of 8 U.S.C. § 1373, *City of New York*, 179 F.3d 29, commentators have argued that the court erred in reaching its conclusion. Vikram David Amar & Michael Schaps, *How Strong Is San Francisco’s “Sanctuary City” Lawsuit Against the Trump Administration?*, JUSTIA: VERDICT (Feb. 10, 2017), <https://verdict.justia.com/2017/02/10/strong-san-franciscos-sanctuary-city-lawsuit-trump-administration>.

152. *Printz v. United States*, 521 U.S. 898, 923–25 (1997) (holding that the Tenth Amendment prevents the federal government from commandeering the states).

153. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (granting in part and denying part, Chicago’s motion for preliminary injunction against the Attorney General’s attempt to deny certain Department of Justice (DOJ) administered funds to the city). In his order, Judge Leinenweber specifically addressed the constitutionality of 8 U.S.C. § 1373. He suggested that the governing case law does not render the statute obviously unconstitutional, but

Seeking to punish sanctuary cities that continue to defy 8 U.S.C. § 1373, President Trump issued E.O. 13,768 to withdraw federal funds that sanctuary cities receive from the federal government.<sup>154</sup> However, as explained in Part I, E.O. 13,768 failed to define what constitutes a sanctuary jurisdiction or what a violation of 8 U.S.C. § 1373 means. The vagueness of the language of E.O. 13,768 and potential loss of federal funds prompted Santa Clara County and the City of San Francisco to file a lawsuit against President Trump days after he issued the executive order.<sup>155</sup> The amount of money they stood to lose was far from insignificant: in 2015–16, Santa Clara County received \$1.7 billion, which is approximately “35% of the County’s total revenues.”<sup>156</sup> San Francisco receives \$1.2 billion, which is about 12% of its \$9.6 billion annual budget.<sup>157</sup> Eventually, the court in *County of Santa Clara v. Trump* enjoined the enforcement of E.O. 13,768 finding it facially problematic because the order was too broadly written.<sup>158</sup>

Notably, sanctuary cities have gone beyond noncooperation policies. Many cities have engaged their police powers to take on more defensive stances. For example, some cities refuse to honor detainer requests from the federal government.<sup>159</sup> After the November 2016 election, many city leaders reaffirmed this policy.<sup>160</sup> Thus far, there are over 600 county jurisdictions that have

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noted that, depending on a higher court’s interpretation of the law’s practical impact, it could be found so. *Id.* at 948–49. The case is still being litigated.

154. See Erwin Chemerinsky, *The Constitutionality of Withholding Federal Funds from Sanctuary Cities*, L.A. LAW., Apr. 2017, at 60, 60, <https://www.lacba.org/docs/default-source/lal-back-issues/2017-issues/april-2017.pdf>.

155. Complaint for Declaratory and Injunctive Relief, *Santa Clara*, 275 F. Supp. 3d 1196 (No. 17-cv-00574), 2017 WL 412999; see also *Santa Clara*, 275 F. Supp. 3d 1196, *aff’d in part, rev’d in part, remanded sub nom by City & County of San Francisco*, 897 F.3d 1225; Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

156. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 512 (N.D. Cal. 2017).

157. *Id.* at 513.

158. See *id.* at 540 (enjoining section 9(a) of the Executive Order, but leaving intact the Government’s lawful ability to enforce existing federal grant conditions and designate localities as “sanctuary jurisdiction[s]”). This order was affirmed on appeal, though the injunction was limited to California until the district court could develop a sufficient record to justify a nationwide injunction *City & County of San Francisco*, 897 F.3d at 1245.

159. See Exec. Order No. 13,768, 82 Fed. Reg. at 8801; U.S. IMMIGRATION & CUSTOMS ENF’T, *supra* note 53, at 4–23.

160. Many cities appeared on a “non-cooperation jurisdictions” list that the federal government released. See U.S. IMMIGRATION & CUSTOMS ENF’T, *supra* note 53, at 4–23.

non-detainer policies, asserting that they are not required to honor detainer requests.<sup>161</sup> The argument thus far has prevailed. As the court in *County of Santa Clara* noted, courts have held that it is a violation of the Fourth Amendment to hold a noncitizen beyond the scheduled release because “civil detainer requests are often not supported by an individualized determination of probable cause that a crime has been committed.”<sup>162</sup> Indeed, in a July 2017 decision, the Massachusetts Supreme Judicial Court held that state and local authorities do not have authority under the common law to detain a noncitizen after release from jail.<sup>163</sup>

Still another new way that cities have legally resisted federal immigration enforcement is the establishment of policies that provide free legal assistance to undocumented immigrants and children in removal hearings.<sup>164</sup> Among these are Austin, Boston, Chicago, Los Angeles, New York, San Francisco, and Washington, D.C.<sup>165</sup> The provision of legal services may perhaps be a quintessential form of safe haven. Although noncitizens have the right to a lawyer in removal hearings, the government does not provide legal services.<sup>166</sup> Noncitizens must find and pay for their own lawyers and most immigrants are unrepresented

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161. Jasmine C. Lee et al., *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), <http://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html>.

162. *Santa Clara*, 250 F. Supp. 3d at 510.

163. *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1160 (Mass. 2017).

164. Teresa Wiltz, *Amid Immigration Crackdown, Cities Step in with Free Legal Aid*, HUFFPOST (Nov. 9, 2017), [https://www.huffingtonpost.com/entry/amid-immigration-crackdown-cities-step-in-with-free\\_us\\_5a046701e4b055de8d096af0](https://www.huffingtonpost.com/entry/amid-immigration-crackdown-cities-step-in-with-free_us_5a046701e4b055de8d096af0).

165. Maura Ewing, *Should Taxpayers Sponsor Attorneys for Undocumented Immigrants?*, ATLANTIC (May 4, 2017), <https://www.theatlantic.com/politics/archive/2017/05/should-taxpayers-sponsor-attorneys-for-undocumented-immigrants/525162>; Wiltz, *supra* note 164. Last year, eleven local jurisdictions joined the Safety and Fairness for Everyone (SAFE) Cities Network, “a multi-jurisdiction network dedicated to providing publicly-funded representation for people facing deportation.” *SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation*, VERA INST. JUST. (Nov. 9, 2017), <https://www.vera.org/newsroom/press-releases/safe-cities-network-launches-11-communities-united-to-provide-public-defense-to-immigrants-facing-deportation>. Those communities include Atlanta; Austin; Baltimore; Chicago; Columbus; Dane County, Wisconsin; Oakland and Alameda County, California; Prince George’s County, Maryland; Sacramento; San Antonio; and Santa Ana, California. *Id.*

166. 8 U.S.C. § 1362 (2012) (providing that noncitizens are entitled to a lawyer during removal hearings but at their own expense).

in removal hearings.<sup>167</sup> A sanctuary city's provision of legal services provides the necessary form of legal resistance to the power of the federal government to remove a noncitizen. The mere presence of legal counsel dramatically alters the prospects for noncitizens in removal proceedings.<sup>168</sup> Notably, this form of legal defiance is now statewide in New York<sup>169</sup> and California<sup>170</sup> and advocates in other states are pushing their states to pass similar legislation.<sup>171</sup>

Crucially, it is not only cities that have expanded the measures taken to protect and support immigrants through non-cooperation policies, refusal to honor detainers, and provisions of legal aid to immigrants in removal hearings. California, has become a "sanctuary state" with the passage of Senate Bill (S.B.) 54.<sup>172</sup> This law limits state and local law enforcement officers from communicating with federal immigration authorities about a person's immigration status.<sup>173</sup> Effective on January 1, 2018, S.B. 54 also prevents law enforcement officials from asking about a person's immigration status and detaining them for violating immigration law.<sup>174</sup>

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167. *E.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2015) (finding that only thirty-seven percent of immigrants had counsel in removal cases decided on the merits between 2007 and 2012).

168. Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2289 (2012) (discussing how the provision of legal services to immigrants decreases their chances of being removed from the United States).

169. *Governor Cuomo Announces Passage of the FY 2018 State Budget*, GOVERNOR ANDREW M. CUOMO (Apr. 10, 2017), <https://www.governor.ny.gov/news/governor-cuomo-announces-passage-fy-2018-state-budget> (provisioning \$10 million to establish the Liberty Defense Project, which will help provide immigrants with representation).

170. Katy Murphy, *California Budget Deal Includes Deportation Defense Funds for Undocumented Immigrants*, MERCURY NEWS (June 17, 2017), <https://www.mercurynews.com/2017/06/16/california-budget-deal-includes-deportation-defense-for-undocumented-immigrants> (announcing legislative approval of a \$45 million budget to provide undocumented individuals with immigration services and removal defense).

171. *E.g.*, Ted Sherman, *Groups Push N.J. to Provide Legal Assistance to Those Facing Deportation*, NJ.COM (Jan. 29, 2018), [http://www.nj.com/news/index.ssf/2018/01/advocates\\_push\\_nj\\_to\\_provide\\_legal\\_assistance\\_to\\_t.html](http://www.nj.com/news/index.ssf/2018/01/advocates_push_nj_to_provide_legal_assistance_to_t.html).

172. S.B. 54, ch. 495, 2017 Cal. Stat. 3733 (codified at CAL. GOV'T CODE §§ 7282–7284.12 (West 2018)); *see also* Natalie Delgadillo, *California Is Now an Official 'Sanctuary State.' Will Others Follow?*, GOVERNING (Sept. 18, 2017) (noting that, while Oregon has been a sanctuary state for thirty years, this law will make California "the nation's strictest 'sanctuary state'").

173. S.B. 54, ch. 495, sec. 3, 2017 Cal. Stat. 3733, 3738–40 (codified at CAL. GOV'T CODE § 7284.6).

174. *Id.*

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In sum, as they did in the 1980s, sanctuary cities today continue to provide safe havens to undocumented immigrants. The scope of protection has evolved, however, from prohibiting law enforcement officers from communicating information about a person's immigration status with federal officers to broader forms of protections, including refusing to honor detainer requests and providing free legal assistance to immigrants to directly challenge their removal from the United States. Notably, "sanctuary cities" have led to broader public sanctuaries, including at least one sanctuary state.

### C. NEW SANCTUARIES

The term sanctuary has been mainly understood along these traditional religious and law enforcement-focused dimensions. However, sanctuary today has expanded beyond traditional forms. As this Section explains, immigrants' rights advocates have developed innovative ways of seeking to protect immigrants and their families. While new sanctuary sites have emerged—schools, workplaces, neighborhoods, and communities—pioneering methods in the form of technology and social networks have also developed. Importantly, these novel types of sanctuary have their own distinct and underexplored legal foundations adding to the web of legal sources that support defiance of federal immigration enforcement.

#### 1. Sanctuary Campuses and School Districts

Almost immediately after the November 2016 election, a number of universities declared themselves "sanctuary campuses" or issued policies that offer protection and support for DACA and other undocumented students.<sup>175</sup> Thus far, students, faculty and advocates in more than 200 universities have pushed for such noncooperation policies and, to date, more than 75 universities have adopted them.<sup>176</sup> Yet, what constitutes a "sanctuary campus" has varied. Some universities have openly embraced the "sanctuary campus" moniker. In announcing itself a sanctuary campus, for example, Wesleyan University stated that "[w]e would not cooperate with any efforts to round up people,

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175. For an informal list of "sanctuary campuses," see Xavier Maciel, *Sanctuary Campus Petitions*, GOOGLE SHEETS, [https://docs.google.com/spreadsheets/d/1fHOHRFxzo\\_Pp85rR\\_58ug4rMv9WODPDmRLK0dP2FT-k/edit#gid=0](https://docs.google.com/spreadsheets/d/1fHOHRFxzo_Pp85rR_58ug4rMv9WODPDmRLK0dP2FT-k/edit#gid=0) (last visited Nov. 11, 2018).

176. *See id.*

unless we were forced to.”<sup>177</sup> Other universities, such as the University of California, have chosen not to adopt the “sanctuary campus” label but have issued policies that essentially provide the same type of support.<sup>178</sup> Some, such as Columbia University, have pushed further and have announced that they will not allow immigration officials to enter their campuses without a warrant or share the undocumented students’ information with immigration officials unless they are required to do so by a subpoena or a court order or authorized by the student.<sup>179</sup> These examples reveal the spectrum of “sanctuary” policies among these campuses.<sup>180</sup>

Sanctuary campuses and their desire to protect undocumented students raise legal questions that are distinguishable from traditional public and private sanctuaries. To be sure, they implicate issues that concern both public and private dimensions. Because they provide housing to students, both public and private universities may be subject to the anti-harboring provision of the INA.<sup>181</sup> Further, public universities, as employees of a state or a city, may be bound by the restrictions of 8 U.S.C. § 1373.<sup>182</sup> Yet, at least two points about universities prompt distinct legal issues. First, universities, whether public or private, are institutions that occupy physical spaces and are tasked with educating and protecting students. As such, courts have afforded them with discretion to regulate who may enter their premises in order to achieve their goals. Drawing on cases in which courts have upheld a university’s right to exclude under the common law of property, universities may opt to exercise their rights and

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177. See Megan, *supra* note 12.

178. See Preston, *supra* note 13.

179. See Aaron Holmes, *University to Provide Sanctuary, Financial Support for Undocumented Students*, COLUM. SPECTATOR (Nov. 22, 2016), <http://columbiaspectator.com/news/2016/11/21/university-provide-sanctuary-financial-support-undocumented-students>.

180. Sanctuary zones in school entrances are related to sanctuary campuses. The goal of sanctuary zones is to help students feel safe and welcomed in their schools. See Mina Bloom, *Logan Square Schools Are Now “Sanctuary Zones,” Declares Neighborhood Group*, DNAINFO (Feb. 20, 2017), <https://www.dnainfo.com/chicago/20170217/logan-square/logan-square-neighborhood-association-cps-schools-sanctuary-zones>.

181. See 8 U.S.C. § 1324(a)(1)(A)(iii) (2012).

182. See *id.* § 1373(a) (2012) (“[A] Federal, State, or local government entity may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”).

exclude ICE from campus, or at least certain parts of the campuses.<sup>183</sup>

Second, universities are bound by federal privacy laws that serve to further protect the rights of students. Specifically, the Federal Education Rights and Privacy Act (FERPA) prohibits both public and private universities from revealing confidential student information to any third-party.<sup>184</sup> Information that may not be disclosed (assuming the university obtained such information) arguably includes immigration status. Importantly, violations of these privacy laws can result in withdrawal of federal funds from universities.<sup>185</sup> Apart from the concern over raids or enforcement activities on campus, the primary concern for undocumented students (or other potentially removable noncitizens) is the security of their personal information that may be in the hands of university staff and in university databases.

Universities are generally not obligated to collect information about a student's undocumented status.<sup>186</sup> Indeed, universities—whether public or private—are not prevented from enrolling undocumented students under federal law.<sup>187</sup> Conversely, they are not obligated to admit undocumented students either.<sup>188</sup> In the wake of this legal latitude, some states have passed laws determining that institutions of higher learning can

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183. See *Souders v. Lucero*, 196 F.3d 1040, 1046 (9th Cir. 1999) (holding that the university constitutionally fulfilled its duty to protect students on campus by excluding an alumnus for stalking behavior); *Albright v. Univ. of Toledo*, No. 01AP-130, 2001 WL 1084461, at \*5 (Ohio Ct. App. Sept. 18, 2001) (approaching the university's ability to exclude people from a property interest perspective); see also IMMIGRATION RESPONSE INITIATIVE, *supra* note 90 at 26.

184. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2012).

185. *Id.* § 1234c(a)(1) (2012) (allowing the Secretary of Education to withhold funding for FERPA violations); see also *United States v. Miami Univ.*, 294 F.3d 797, 818–19 (6th Cir. 2002) (affirming the district court's discretionary injunction against a university for violating FERPA as opposed to damages or withholding of federal funding).

186. See Office for Civil Rights, *Information on the Rights of All Children to Enroll in School: Questions and Answers for States, School Districts and Parents*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/qa-2011101.html> (last modified Sept. 25, 2018) (warning educators that, in order to comply with all state and federal laws, they must be careful not to “discourage [ ] the enrollment of undocumented children, such as [by] asking for immigration papers or social security numbers”).

187. See *id.*

188. See Matt Vasilogambros, *The Folly of Under-educating the Undocumented*, ATLANTIC (Mar. 16, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-folly-of-under-educating-the-undocumented/473877>.

admit undocumented students, and going further, that public institutions can offer them in-state tuition rates under some circumstances.<sup>189</sup>

In other words, a university is in a unique position to provide protection for undocumented students in ways that differ from, and are arguably stronger than, sanctuary cities or churches and other private groups. Like “sanctuary cities,” however, this new form of sanctuary has garnered criticism from lawmakers. By early December 2016, lawmakers introduced a bill in Congress entitled “No Funding for Sanctuary Campuses Act,” which would deny funding to a university that the federal government determines to be a “sanctuary campus.”<sup>190</sup> State legislators have responded as well. In Alabama, for example, the House of Representatives passed a bill that would allow the state’s attorney general to pull state funds from sanctuary campuses.<sup>191</sup> In addition, certain colleges in Georgia are forbidden from maintaining noncooperation policies.<sup>192</sup>

On a related scale, several public school districts around the country have also issued “sanctuary schools” resolutions that, like the sanctuary campuses discussed above, are designed to provide safe spaces for their undocumented students.<sup>193</sup> The resolutions typically also bar ICE agents from campus unless they have a warrant to arrest a particular student.<sup>194</sup> Among the reasons provided by some school districts regarding the issuance of such resolutions include their constitutional obligation to educate all students, regardless of immigration status,<sup>195</sup> a legal basis that is distinguishable from the sources supporting sanctuary

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189. See Stephen L. Nelson et al., *Reduced Tuition Benefits for Undocumented Immigrant Students: The Implications of a Piecemeal Approach to Policymaking*, 53 SANTA CLARA L. REV. 897, 911 (2013) (discussing how twelve states granted in-state tuition benefits to undocumented students in 2013, namely California, Connecticut, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, Texas, Utah, and Washington).

190. No Funding for Sanctuary Campuses Act, H.R. 483, 115th Cong. (2017).

191. Bryan Lyman, *Alabama House Approves ‘Sanctuary Campus’ Bill*, MONTGOMERY ADVERTISER (Feb. 14, 2017), <http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/02/14/alabama-house-approves-sanctuary-campus-bill/97929404>.

192. GA. CODE ANN. § 20-3-10 (2018).

193. See Ray Sanchez, *US Public Schools Take Steps to Protect Undocumented Students*, CNN (Feb. 24, 2017), <https://www.cnn.com/2017/02/23/us/public-schools-immigration-crackdown/index.html> (discussing school districts in various cities that issued resolutions to support their undocumented students).

194. See *id.*

195. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (affirming the Fourteenth

universities. That is, the presence of ICE agents on campus may arguably deprive undocumented students an education out of fear that going to school would lead to arrest and removal from the United States.

## 2. Sanctuary Workplaces

Another innovation in the sanctuary movement is the provision of safe havens in the workplace. Efforts conducted by a group, Restaurant Opportunity Centers United (ROCU), exemplify this nascent part of the sanctuary movement. ROCU, along with supporters, including other restaurants, have signed policies that are designed to support and provide resources to their workers.<sup>196</sup> These workplace sanctuary policies include prohibiting harassment of an individual based on immigrant or refugee status, displaying prominently a “SANCTUARY RESTAURANTS: A Place At the Table for Everyone” sign in the establishment, and working with a peer network to assist workers that may be targeted by the administration.<sup>197</sup> These private policies have been encouraged and supported by some municipalities. For instance, at least two cities in California—Oakland and Emeryville—have passed resolutions asking businesses to establish “sanctuary workplaces” that promote an environment free from harassment on the basis of immigration status.<sup>198</sup>

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Amendment’s Equal Protection Clause protecting undocumented children’s right to guaranteed K-12 education).

196. *‘Sanctuary Restaurants’ Movement Launches to Promote Hate and Discrimination Free Workplaces*, RESTAURANT OPPORTUNITY CENTERS UNITED (Jan. 4, 2017), <http://rocunited.org/2017/01/sanctuary-restaurants-movement-launches-promote-hate-discrimination-free-workplaces> (explaining that the Sanctuary Restaurant Movement’s main purpose is to “offer[ ] support and resources to restaurant workers, employers and consumers impacted by hostile policies and actions, including immigrants, Muslims, LGBTQI people and others”).

197. *Id.* There are currently 387 restaurants nationwide that have affirmed the principles of sanctuary workplace policies. *See Sanctuary Restaurants*, SANCTUARY RESTAURANTS, <http://sanctuaryrestaurants.org> (last visited Nov. 11, 2018); *see also* Joshua Sabatini, *San Francisco Restaurant Owners Offer Employees Sanctuary Workplace*, S.F. EXAMINER (Mar. 10, 2017), <http://www.sfexaminer.com/san-francisco-restaurant-owners-offer-employees-sanctuary-workplace> (explaining that the Golden Gate Restaurant Association, which represents about 1000 restaurants in San Francisco, which in turn represents approximately 60,000 workers, has agreed to implement the anti-harassment components of the Sanctuary Restaurant Movement principles and other support policies).

198. Riley McDermid, *Oakland Passes Resolution Asking Businesses to Create Sanctuary Workplaces*, S.F. BUS. TIMES (Apr. 19, 2017), <https://www>

Other employers have adopted more proactive and protective actions on behalf of their employees. In particular, those involved with the sanctuary restaurants movement have expressed that they will refuse entry to immigration law enforcement officers.<sup>199</sup> For example, when ICE officers showed up in a café in Ann Arbor, Michigan, to look for an individual, the owner of the café refused to allow the ICE agents to walk through the kitchen.<sup>200</sup> As private property owners, restaurant owners have the right under the Fourth Amendment to demand to see a judicial or administrative warrant before ICE may constitutionally enter the property.<sup>201</sup> The right of restaurant owners to refuse entry is particularly helpful in the workplace in light of reports of incidents of ICE agents showing up at restaurants to arrest workers.<sup>202</sup> Notably, a newly enacted California law, A.B. 450,<sup>203</sup> demonstrates the extent to which sanctuary workplaces, which are primarily located in the private contexts, have merged with public sanctuaries. A.B. 450 extends sanctuary protections in the workplace by barring employers from certain forms of cooperation with ICE unless ICE has a judicial warrant and requiring notice to employees of ICE enforcement activities.<sup>204</sup>

Workers and unions have also called for the protection of their members' information, urging their employers not to share them with immigration authorities unless required by law, such as I-9 requirements.<sup>205</sup> Employers are required to verify that

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.bizjournals.com/sanfrancisco/news/2017/04/19/oakland-immigration-sanctuary-workplaces.html.

199. Haynes, *supra* note 14.

200. *Id.*

201. U.S. CONST. amend. IV; *Kentucky v. King*, 563 U.S. 452, 459 (2011).

202. *ICE Agents Eat Breakfast, Compliment Chef, then Arrest 3 Workers at Michigan Restaurant*, CHI. TRIB. (May 26, 2017), <http://www.chicagotribune.com/news/nationworld/midwest/ct-michigan-restaurant-immigration-arrests-20170525-story.html>.

203. A.B. 450, ch. 492, 2017 Cal. Stat. 3723 (codified at CAL. GOV'T CODE § 7285.1–.3 (West 2017) and CAL. LAB. CODE §§ 90.2 and 1019.2 (West 2017)). Note, however, that A.B. 450—specifically its provisions requiring employers to withhold consent to Immigration and Customs Enforcement (ICE) searches without a judicial warrant—has been preliminary enjoined by a district court on the grounds that the state law violates the intergovernmental immunities doctrine. See *United States v. California*, 314 F. Supp. 3d 1077, 1096 (E.D. Cal. 2018).

204. See A.B. 450, ch. 492, 2017 Cal. Stat. 3723, 3724–26.

205. Tim Goulet, *We Are a Sanctuary Union*, SOCIALISTWORKER.ORG (June 28, 2017), <https://socialistworker.org/2017/06/28/we-are-a-sanctuary-union>. To provide verification for this article and sanctuary resolution, a link to this

their employees have authorization to work.<sup>206</sup> Using I-9 forms, employers ask their workers to submit documents such as their passport or Social Security number as evidence of employment authorization.<sup>207</sup> Employers may also voluntarily participate in E-Verify, which is an internet-based program that allows those who use it to compare documents submitted to employers through the I-9 process with information available with DHS.<sup>208</sup> In the event of an ICE raid, employees and unions have asked employers to demand to see a warrant before they may turn over any of their employees' documents.<sup>209</sup>

Other unions have also provided workshops and trainings for their members regarding what to do when there is a raid.<sup>210</sup> Indeed, some unions are pushing employers to contact them in case of a raid so that the unions can inform their employees.<sup>211</sup> Lastly, the foregoing workplace protective measures, grounded on private property and Fourth Amendment rights, have not been limited in the restaurant industry. As explained above, multi-billion dollar companies like Microsoft have also promised to offer protections for their workers, particularly after the President rescinded DACA.<sup>212</sup> Of course, it is not quite clear what this statement means, given that it would be unlawful under federal law to employ an unauthorized worker.<sup>213</sup>

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source was found on the Teamsters website at *This Week's Teamster News for June 24-30*, TEAMSTERS (June 30, 2017), <https://teamster.org/blog/2017/06/weeks-teamster-news-june-24-30>.

206. *Information for Employers and Employees*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/working-united-states/information-employers-employees/information-employers-and-employees> (last visited Nov. 11, 2017) (stating that employers must verify an individual's authorization to work).

207. *Form I-9 Acceptable Documents*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/i-9-central/acceptable-documents/list-documents/form-i-9-acceptable-documents> (last updated June 18, 2018) (listing that passports establish identity and employment authorization, whereas Social Security cards or numbers only establish employment authorization).

208. *Verifying New & Existing Employees on Form I-9*, E-VERIFY, <https://www.uscis.gov/e-verify/federal-contractors/verifying-new-existing-employees-form-i-9> (last updated Apr. 10, 2018) ("Employees must have a Social Security number (SSN) to be verified using E-Verify.").

209. Bacon, *supra* note 62.

210. *Id.*

211. *Id.*

212. Haselton, *supra* note 15.

213. See 8 U.S.C. § 1324a (2012) (prohibiting employers from knowingly hiring undocumented workers).

In sum, like campuses, workplaces have emerged as sanctuary sites that seek to not only create welcoming environments for immigrants but also pose challenges to the federal government's immigration enforcement actions. That is, regardless of the intent of public and private actors, these sanctuary campus and sanctuary workplace policies, as we have discussed, present obstacles to ICE and other law enforcement officers.

### 3. Rapid Response Networks

An increasing number of individuals and organizations in communities are pooling their resources to help immigrants who may be subject to or are undergoing raids. Many communities are creating networks—known as “rapid response networks”—that dispatch assistance to individuals that are subject to enforcement raids. For example, the San Diego Rapid Response Network, which is a collaboration between the ACLU of San Diego and Imperial Counties, San Diego Organizing Project, Employee Rights Center, and others, provides a twenty-four-hour hotline that anyone subject to a raid can call for help.<sup>214</sup> The service dispatches volunteers to collect information about the raid, fill out incident forms for legal aid, and direct individuals to social and mental health support.<sup>215</sup> Additional rapid response networks have been established in San Francisco,<sup>216</sup> Los Angeles,<sup>217</sup> and Santa Clara County, California.<sup>218</sup> These organizations offer “sanctuary” by showing up at an immigrant's dwelling during a raid and documenting the raids and arrests.<sup>219</sup> Thus, exercising their First Amendment rights, these advocates recognize that they may not be able to stop the arrests, but they can help the immigrants by documenting the ICE agents' behaviors.

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214. Lisa Deaderick, *For ACLU Executive Director, Immigrant Rights Are Civil Rights*, SAN DIEGO UNION-TRIB. (Jan. 20, 2018), <http://www.sandiegouniontribune.com/lifestyle/people/sd-me-one-chavezpeterson-20180119-story.html>.

215. *Id.*

216. *Rapid Response Networks*, READY CAL., <http://ready-california.org/print-resources/rapid-response-networks> (last visited Nov. 11, 2018).

217. *Id.*

218. *Rapid Response Network in Santa Clara County*, PACT, <https://www.pactsj.org/santa-clara-county-rapid-response-network> (last visited Nov. 11, 2018).

219. *See* Deaderick, *supra* note 214.

Other advocates involved with these rapid response networks offer legal assistance by finding lawyers who could represent the detained noncitizen.<sup>220</sup> Similarly, the New Sanctuary Coalition of New York City is comprised of local “congregations, organizations, and individuals” that provide advocacy and support for immigrants.<sup>221</sup> Members of the coalition also accompany individuals before immigration court proceedings and at ICE check-ins.<sup>222</sup>

#### 4. Social Network and Technology Sanctuaries

One clear example of how sanctuary has multiplied is demonstrated in the use of technology to inform immigrants about potential ICE raids. One developer created a service, called RedadAlertas (Raid Alerts), which sends text messages to subscribers to warn them that a raid is taking place near their location.<sup>223</sup> Similar to the driving application Waze, which enables drivers and passengers to send information about traffic patterns and warn others about the presence of police cars on the road and highways,<sup>224</sup> this application offers news that would enable immigrants and their families to learn about law enforcement activity in their neighborhoods.<sup>225</sup> Importantly, such activity—openly warning about the presence of law enforcement officers—is lawfully protected activity.<sup>226</sup>

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220. *See id.*

221. *About Us*, NEW SANCTUARY COALITION N.Y.C., <http://www.newsanctuarynyc.org/about-us> (last visited Nov. 11, 2018).

222. *Accompaniment Program*, NEW SANCTUARY COALITION N.Y.C., <http://www.newsanctuarynyc.org/accompaniment-program-2> (last visited Nov. 11, 2018).

223. Charlie Sorrel, *This App Warns Undocumented Immigrants When Raids Are Coming*, FAST COMPANY (Feb. 22, 2017), <https://www.fastcompany.com/3068357/this-app-warns-undocumented-immigrants-when-raids-are-coming>. Another developer created Notifica, an application that sends private notifications to one’s selected contacts in case they are detained in an ICE raid. *See* Issie Lapowsky, *A Portable Panic Button for Immigrants Swept Up in Raids*, WIRED (Mar. 10, 2017), <https://www.wired.com/2017/03/portable-panic-button-immigrants-swept-raids>.

224. *See* Main Page, WAZE, <https://www.waze.com> (last visited Oct. 8, 2018) (describing Waze as “the world’s largest community-based traffic and navigation app”).

225. *See* Sorrel, *supra* note 223.

226. *See* U.S. CONST. amend. I; *cf.* *Elli v. City of Ellisville*, 997 F. Supp. 2d 980, 983–84 (E.D. Mo. 2014) (ordering a preliminary injunction to stop the Ellisville police from detaining and citing drivers that warn other drivers of oncoming speed traps). *But see* *United States v. Bucher*, 375 F. 3d 929, 930, 934 (9th Cir. 2004) (affirming an interference conviction for a man that warned another that a national park ranger was about to arrest him, but noting that some

Others have created groups on Facebook to regularly share the location of immigration checkpoints and arrests<sup>227</sup> while other individuals have used their own Facebook<sup>228</sup> or Twitter<sup>229</sup> accounts to notify immigrants about potential raids. Sending notices through social networks in order to help immigrants avoid raids and potential detention is arguably a protected act under the First Amendment.<sup>230</sup> In *Packingham v. North Carolina*, the Supreme Court struck down a North Carolina statute that banned convicted sex offenders from using social networks.<sup>231</sup> A person's decision to send notices about immigrant raids through social networks is a plausible extension of rights protected in *Packingham*.<sup>232</sup>

### III. SANCTUARY NETWORKS

While Part II of this Article details the variety and legal boundaries of the individual types of sanctuaries, Part III tries to understand them in context. In this Part, we argue that a new framework is necessary to address the multiple and expanded sources of sanctuary that we previously discussed. In particular,

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"reasonable human conduct" surrounding conduct of officials may be permissible); Eugene Volokh, *Warning Lawbreaking Friends and Family That the Police Are Watching Might Indeed Be Illegal*, WASH. POST: VOLOKH CONSPIRACY (Feb. 5, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/05/warning-lawbreaking-friends-and-family-that-the-police-are-watching-might-indeed-be-illegal/?utm\\_term=.8f5b8fdeb22f](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/05/warning-lawbreaking-friends-and-family-that-the-police-are-watching-might-indeed-be-illegal/?utm_term=.8f5b8fdeb22f) ("[T]here's no general legal right to warn people that the police are coming . . . and it may well be a crime (such as obstruction of justice or interfering with law enforcement)."). For a general discussion of "crime-facilitating speech," which may include warning others about police, see Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

227. Jacob Steinblatt & Ethan Harfenist, *Facebook Groups Warn Immigrants About ICE Raids, Checkpoints*, VOCATIV (Feb. 22, 2017), <http://www.vocativ.com/404788/facebook-groups-warn-immigrants-ice-raids/index.html>.

228. See Louisa Moller, *State Rep. Defends Facebook Post Warning Immigrants of Rumored ICE Raids*, CBS BOS. (Mar. 28, 2017), <http://boston.cbslocal.com/2017/03/28/state-rep-facebook-post-warning-immigrants-rumored-ice-raids>.

229. Audrey McNamara, *Social Media Reports of an ICE Raid on Alcatraz Avenue Prove False*, DAILY CALIFORNIAN (Nov. 17, 2017), <http://www.dailylocal.org/2017/11/17/social-media-reports-ice-raid-prove-false>.

230. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737–38 (2017) (holding that bans on social media, even those imposed on convicted sex offenders, violate the First Amendment).

231. See *id.*

232. Of course, one's use of social network platforms can be regulated by the networks themselves, which could limit the ability of an individual to engage in advocacy through social media. See, e.g., *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last updated Apr. 19, 2018).

we introduce “sanctuary networks” as a conceptual framework to emphasize the power of networks comprised of both state and non-state actors to meaningfully influence policy areas.<sup>233</sup>

The power that these myriad sanctuaries assert as government agencies, religious institutions, school and university campuses, and private groups showcases the decentralized and distributed nature of immigration enforcement. As stakeholders in the project of immigration regulation, the sanctuary policies generated by these varied institutions function as negotiations and contestations with the federal government’s current enforcement regime. The ubiquity and multi-institutional nature of our reimagined sanctuaries provides opportunities for networked responses to federal programs and for thinking about longer-term processes of defining immigration policy.

#### A. NETWORK GOVERNANCE IN IMMIGRATION

Emerging theories of governance argue that descriptively, governmental entities—and especially a single level of government—do not hold a monopoly over the regulation of a subject area, or the proliferation of the social norms that govern that field. Instead, several types of actors, ranging from legislatures, government agencies, corporations, foundations, non-governmental organizations, and other more informal associations, exercise authority over particular fields in loosely connected networks.<sup>234</sup> In essence, network governance theory suggests that governance has morphed into this decentralized distributed system primarily because social and regulatory systems have become highly complex and interdependent, with statutory frameworks and enforcement schemes incorporating multiple

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233. See generally Scott Burris et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1 (2008) [hereinafter *Changes in Governance*] (analyzing various governance theories to provide a guide for rational and fair social change); Scott Burris et al., *Nodal Governance*, 30 AUSTL. J. LEG. PHIL. 30 (2005) [hereinafter *Nodal Governance*] (examining two case studies wherein governmental and non-governmental actors worked together to effect significant policy changes); Rhodes, *supra* note 26 (reviewing British governance theories to conclude that policy networks are especially effective in advanced industrial societies).

234. See *Changes in Governance*, *supra* note 233, at 12–19; *Nodal Governance*, *supra* note 233, at 31; see also Robert B. Ahdieh, *The Role of Groups in Norm Transformation: A Dramatic Sketch, in Three Parts*, 6 CHI. J. INT’L L. 231, 232–34 (2005) (arguing that legal scholars and economists are biased towards state actors and have paid inadequate attention to the role of other market participants in social ordering and norm-creation).

agencies, levels of government, and even private actors.<sup>235</sup> The upshot of this theory of governance is that traditionally unheralded and ignored institutions and groups have the potential to influence policy and change social norms by exercising authority over their area of control or their constituents, and coordinating that exercise with others who might control other aspects of the regulatory space.<sup>236</sup>

Immigration enforcement, in particular, appears to fit snugly into this theoretical framework. The federal immigration enforcement scheme already enmeshes multiple levels of government, as state crimes and local prosecutions become the basis for immigration consequences.<sup>237</sup> And, local law enforcement and government agency cooperation in the form of information exchange and facilities-usage has become critical to actualizing federal enforcement possibilities.<sup>238</sup> Finally, in many instances, the federal government itself has created the conditions for extensive public and private institutional involvement in federal

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235. See generally *Changes in Governance*, *supra* note 233 (discussing the emergence and development of network governance theory).

236. *Id.* at 20 (stating that non-commercial non-governmental organizations (NGOs) are able to influence governance “through their capacity to mobilize and shape public opinion through the publication of reports and access to the world’s media”); *Nodal Governance*, *supra* note 233, at 39 (discussing the ability of nodes to influence each other generally).

237. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 435, 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1227 (2012)) (expanding the list of deportable crimes to include any crime for which a sentence of one year or longer may be imposed); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 350, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1227) (making domestic violence and other state crimes a basis for deportation); Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration’s Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149, 151 n.3 (2016) (discussing the “dramatic expansion of the immigration consequences of crimes, the increasing criminalization of immigration law violations, the growing use of immigration detention and other harsh enforcement techniques, and the growing involvement of state and local police in enforcing federal immigration laws”).

238. Maureen A. Sweeney, *Shadow Immigration Enforcement and Its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227, 234–35 (2014) (discussing how local communities facilitate immigration enforcement by sharing information and by detaining and transferring individuals); see also, e.g., David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 220 (2012) (noting the popularity of the Secure Communities program, a program which automatically forwards local arrestee information to Immigration and Customs Enforcement).

immigration enforcement.<sup>239</sup> For instance, federal law specifically incorporates private parties' and non-governmental institutions' participation in particular aspects of immigration regulation, such as employment prohibitions and refugee resettlement.<sup>240</sup> In other situations, the federal government's need for information or lack of familiarity with on-the-ground circumstances makes institutions like universities potentially valuable enforcement partners.<sup>241</sup> Moreover even if particular institutions and groups are not explicitly contemplated in the background legal framework, federal officials' anger with—and proposed crackdowns on—the sanctuary policies of such institutions strongly suggest that those policies have real effect on the popularity, efficacy, speed, or cost of federal immigration enforcement.<sup>242</sup>

Of course, places of worship or universities (whether public or private) or community organizations do not typically administer federal programs,<sup>243</sup> and are not institutions in which all attendees might participate or elect leaders. While these private organizations are not the typical places where citizens might engage the democratic process or participate in democratic institutions, it is clear that community residents are using those institutions to articulate dissenting views on immigration. In a real

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239. See generally Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009) (discussing the outsourcing of workplace enforcement of unauthorized work to private employers through the I-9 system).

240. *Id.*

241. See, e.g., Emily Van Hoffman, *Does ICE Pressure Schools for Student Info?*, ATLANTIC (Apr. 11, 2016), <https://www.theatlantic.com/education/archive/2016/04/does-ice-pressure-schools-for-student-info/477600>.

242. See, e.g., *UNM Sanctuary Campus: Resources and Info for the Effort to Make UNM a Sanctuary Campus*, UNM SANCTUARY CAMPUS, <http://www.unmsanctuarycampus.org> (last visited Nov. 11, 2018) (cataloging university members' efforts to protest federal immigration enforcement).

243. One notable exception in the immigration field is refugee resettlement. See 8 U.S.C. § 1522 (2012). In that area, the Office of Refugee Resettlement and State Department rely on the participation of several NGOs, even religiously-based ones, to aid in resettling refugees in the United States. These NGOs are funded by the U.S. government for that purpose, and their relationship to the federal government is statutorily enshrined. *Id.* § 1522(a)(4) (granting funds directly to agencies which can "best perform the services" and denying states the right to review or approve both the decision to grant funds along with the terms associated therewith); see also Nayla Rush, *'Private' Refugee Resettlement Agencies Mostly Funded by the Government*, CTR. FOR IMMIGR. STUD. (Aug. 10, 2018), <https://cis.org/Rush/Private-Refugee-Resettlement-Agencies-Mostly-Funded-Government> (listing nine NGOs receiving resettlement funds). Without their help, the federal government currently has no governmentally-run resettlement process that works in the actual communities where refugees might be sent.

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and practical sense, noncitizens, their proxies, and interested citizens can exercise voice and control in local institutions and groups that heed their input as residents, constituents, or stakeholders, regardless of immigration status.

Given this explicit or implicit incorporation into the immigration enforcement regime, it is apparent that a variety of public and private actors possess the opportunity to leverage their sphere of influence over the unlawfully present population who might inhabit, use, depend upon, or be members of, each of those atomized institutions and groups. By serving as physical shelter and protection, disseminating vital information, asserting constitutional rights on behalf of immigrants, and using media to present competing visions of the rule of law and human interest, these institutions too, are points of governance, with some authority over, and responsibility for, the relevant population.<sup>244</sup>

The implicit interdependence between, and incorporation of, these myriad institutions involved in immigration enforcement facilitates our goal in the remainder of Part III: to illustrate the potency of these variegated nodes of immigration governance. In Section B, we argue that the robustness of the protection and integration available in a community to a vulnerable noncitizen is based on the strength of the network of sanctuary sites within that community. Undoubtedly, our claim about the robustness of a sanctuary network leaves open the possibility the nodes in the enforcement system might reinforce and amplify federal goals. Indeed, such is the case in states or municipalities that have taken decidedly anti-sanctuary stances. In such instances, local agencies' and private organizations' immigrant-protective policies become more isolated and exert comparatively less influence over the governance network. Yet, in Section C, we argue that these dissenting or isolated sanctuaries remain important actors in a system of distributed, nodal governance, despite their inability to compliment and coordinate with reinforcing state or local governmental policies.

#### B. COLLABORATIVE SANCTUARY

Based on our mapping exercise in Part II, our most basic point is that the impact and effectiveness of sanctuary policies is

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244. Clifford Shearing & Jennifer Wood, *Nodal Governance, Democracy, and the New 'Denizens'*, 30 J.L. & SOC'Y 400, 406–08 (2003) (using the concept of “denizen” to capture the idea of those who may not possess membership in the nation-state, but are nevertheless subject to the governance of several state and non-state actors in a given regulatory domain).

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invariably contextual. Even when cities or large law enforcement agencies conspicuously refuse to cooperate with federal authorities, however, their ability to protect noncitizens within their jurisdiction is limited. Ultimately, to fully actualize the notion of a protective community, law-enforcement noncooperation policies must be paired with other government agencies, and non-governmental efforts to provide sanctuary to noncitizens. This networked effect of several nodes in a system working together produces a geographic area in which immigration enforcement policy in practice can be markedly different than that which the federal administration seeks to achieve.

Clearly, not all parts of a governance system have the same power or influence, and some parts may have more coercive tools than the others.<sup>245</sup> Our federalist system of dual sovereigns permits the federal government to use its agents to enforce federal law, even when those actions occur in states and localities unfriendly to such actions.<sup>246</sup> But, the fact that the federal government may override sanctuary policies through punitive federal laws, criminal sanctions, or defunding threats, does not diminish our argument that multiple institutions are participating in—and sometimes controlling—immigration enforcement. More to the point, our fundamental premise here operates in the shadow of the reality that no individual sanctuary policy is foolproof, but that working in conjunction, these sites of governance might amplify their overall effect to achieve something close to a viable, alternate immigration policy.

Even a robust citywide sanctuary can, at most, limit the city's role in enforcement.<sup>247</sup> Therefore, other forms of sanctuary are critical to maximizing the level of protection and inclusion offered to undocumented persons and their families. Indeed, the primary, unintended benefit of state and local noncooperation policies might be the ability of such a governmental policy to beget complementary responses from special purpose institutions and non-governmental organizations. If those institutions and organizations know their sanctuary practices—for example, insisting on judicial warrants before cooperating with ICE agents—would reflect local government positions, it might make it more likely that such institutions conspicuously articulate

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245. See *infra* Part III.C.

246. See generally John Kincaid, *The Eclipse of Dual Federalism by One-Way Cooperative Federalism*, 49 ARIZ. ST. L.J. 1061 (2017).

247. See CHI., ILL., MUN. CODE § 2-173 (2012); *Sanctuary City Ordinance*, *supra* note 67.

their policies. Thus, the city or police department noncooperation policy might have cascading effects, even if the attitude of such local officials has no legal bearing on an institution's ability to maintain or articulate such a standard.

This dynamic might also work in reverse, with multiple institutions in a jurisdiction emboldening local officials to act similarly. Recently passed laws in California provide ready examples of this reciprocal relationship.<sup>248</sup> As discussed *supra*, the California Values Act limits state and local officials from cooperating with and aiding federal immigration officials.<sup>249</sup> The law expressly includes state university systems, reflecting the vocal and firm stance of students and administrators at those institutions.<sup>250</sup> When passed, A.B. 450, the Immigrant Worker Protection Act, prohibited any employers within the state from allowing immigration authorities access to nonpublic areas of the business, or to employee records without a judicial warrant or subpoena, and required employers to give notice to their employees of ICE audits that check for unauthorized employment.<sup>251</sup> Although A.B. 450 has since been enjoined, it should be noted that prior to this statewide policy, business associations, individual employers, and labor unions as pockets of private employers within the state had already adopted aspects of this policy.<sup>252</sup> As such, A.B. 450 represents one of the few instances of a governmental sanctuary policy that regulates private actors and operates outside of the law enforcement context, and a prime example of the dynamic relationship between private actors and state authorities in sanctuary policymaking.<sup>253</sup>

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248. See *supra* Part II.B.

249. S.B. 54, ch. 495, 2017 Cal. Stat. 3733 (codified at CAL. GOV'T CODE §§ 7282–7284.12 (West 2018)).

250. *Id.*

251. A.B. 450, ch. 492, 2017 Cal. Stat. 3723 (codified at CAL. GOV'T CODE § 7285.1–.3 (West 2017) and CAL. LAB. CODE §§ 90.2 and 1019.2 (West 2017)). Note, however, that the provision of A.B. 450 prohibiting employers from consenting to ICE searches without a judicial warrant has been preliminary enjoined by a district court on the basis that it likely violates the intergovernmental immunities doctrine. See *generally* United States v. California, 314 F. Supp. 3d 1077 (E.D. Cal. 2018).

252. See, e.g., *Sanctuary Restaurants*, *supra* note 197.

253. The bill was proposed in direct response to the threat of increased immigration raids at workplaces under the Trump Administration. Press Release, David Chiu, Assemblymember, As Trump Ramps Up Action to Rip Immigrant Families Apart, Asm. Chiu, SEIU, and California Labor Federation Gives Workers New Protections Against Worksite Raids (Mar. 24, 2017), <https://a17.asmdc.org/press-releases/trump-ramps-action-rip-immigrant-families-apart-asm>

Actualizing these reciprocal knock-on effects is crucial to the project of network governance that seeks to recalibrate the federal immigration enforcement regime. To more fully insulate vulnerable noncitizens from federal hyper-enforcement, sanctuary must extend into as many of the physical spaces and associations noncitizens inhabit on a regular basis. It is in this space where school districts, universities and colleges, places of worship, workplaces, and individual networks might fill in the gaps for large swathes of the undocumented population who may not themselves be the object of law enforcement activity. Taken together, they raise the cost and stakes of federal enforcement efforts within a jurisdiction to a degree that might be untenable, rendering immigration enforcement in that jurisdiction effectively dictated by the policy vision of this decentralized and distributed band of governors.

Several communities in California provide ready examples of the potential of this nested and loosely connected sanctuary system.<sup>254</sup> At the state level, California policy attempts to reduce the state's role in aiding federal immigration authorities to a significant extent.<sup>255</sup> Sentences for certain state crimes have been modified to avoid triggering immediate immigration consequences.<sup>256</sup> The state's TRUST Act enacted in 2013 establishes a statewide minimum for the types of detainer requests to which any law enforcement agency within the state can respond.<sup>257</sup> Combined with the recent implementation of the California Values Act, these policies mitigate the aid that state and local law enforcement or agencies might provide to the federal government. In doing so, they serve an important role in reducing the

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-chiu-seiu-and-california-labor. The California Labor Federation and SEIU California co-sponsored the bill, and organizations such as the California Immigrant Policy Center, United Farm Workers, and Worksafe supported the bill. *Employment Regulation: Immigration Worksite Enforcement Actions: Hearing on A.B. 450 Before the S. Comm. on Labor & Indus. Relations*, 2017–2018 Leg., Reg. Sess. 8–9 (Cal. 2017).

254. See, e.g., *Sanctuary City Ordinance*, *supra* note 67.

255. S.B. 54, 2017 Cal. Stat. 3733 (codified at CAL. GOV'T CODE §§ 7282–7284.12 (West 2018)).

256. Press Release, Sen. Ricardo Lara, Lara Bill Will Retroactively Correct Discrepancy in Federal and State Misdemeanor Sentencing Laws (Mar. 30, 2016), <http://sd33.senate.ca.gov/news/2016-03-30-lara-bill-will-retroactively-correct-discrepancy-federal-and-state-misdemeanor>. The statutory provision is codified at CAL. PENAL CODE § 18.5 (West 2017).

257. See A.B. 4, § 2, 2013 Cal. Stat. 4650 (codified at CAL. GOV'T CODE § 7282.5) (stating that the individual must have been convicted of a misdemeanor or felony).

chances of any individual within that community becoming the target of indiscriminate federal removal operations.

Despite the importance of these statewide policies in articulating a statewide norm and providing a floor for enforcement efforts, much of the sanctuary provided by the state could be undone or severely compromised by local policies and community practices that aid amplify or facilitate federal enforcement within specific localities and counties. Importantly then, the TRUST Act allows discretion for localities to create their own detainer response restrictions that are narrower than the statewide standards.<sup>258</sup> Counties such as San Francisco and Santa Clara have done just that, articulating even broader detainer-resistance ordinances as part of their respective sanctuary laws.<sup>259</sup> In addition, several counties in the state—including the immigrant-heavy municipalities of San Francisco, Santa Clara, Los Angeles, and Alameda—include other noncooperation policies such as “don’t ask, don’t tell” protocols for their law enforcement officers.<sup>260</sup> These local efforts complement the statewide effort, doubling the legal constraints that local law officers and officials might face when deciding whether to cooperate with federal enforcement efforts.

Of course, a critical limitation on many of these state and local efforts is that their impact is necessarily limited to those who come into contact with law enforcement agencies as arrestees, witnesses, and victims. By definition, they cannot change the prospects for the large majority of noncitizens who may never come into contact with law enforcement officers as part of a criminal investigation, or in the official course of law enforcement activity. Moreover, it is possible that this type of

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258. *Id.*

259. S.F., CAL., ADMIN. CODE §§ 12H.1–6 (2016); Santa Clara County, Cal., Res. No. 2011-504 (Oct. 18, 2011), [https://www.ilrc.org/sites/default/files/resources/santa\\_clara\\_ordinance.pdf](https://www.ilrc.org/sites/default/files/resources/santa_clara_ordinance.pdf).

260. *See, e.g.*, S.F., CAL., ADMIN. CODE § 12H.2(c)–(d); ALAMEDA CTY. SHERIFF’S OFFICE, GEN. ORDER NO. 1.24, ICE ENFORCEMENT, ARRESTS, DETENTION, REMOVAL, AND REQUEST FOR NOTIFICATIONS 1 (2015) [http://www.acgov.org/board/bos\\_calendar/documents/DocsAgendaReg\\_9\\_10\\_15/PUBLIC%20PROTECTION/Regular%20Calendar/ACSO%20General%20Order%201%2024\\_ICE%20enforcement%20arrests%20removal.pdf](http://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_9_10_15/PUBLIC%20PROTECTION/Regular%20Calendar/ACSO%20General%20Order%201%2024_ICE%20enforcement%20arrests%20removal.pdf) (“The Alameda County Sheriff’s Office will equally enforce laws and serve the public without consideration of immigration status.”); Robert Salonga, ‘Not Our Role’: Santa Clara County Cops Reaffirm They Won’t Be Deportation Force, MERCURY NEWS (Mar. 14, 2017), <https://mercurynews.com/2017/03/14/santa-clara-county-law-enforcement-reaffirms-immigrant-protections> (quoting Santa Clara County District Attorney Jeff Rosen that “[j]ustice does not ask victims for their immigration papers, and neither do we”).

resistance might be overcome through federal conditional spending policies that induce local conscription into immigration enforcement.<sup>261</sup>

Enter the network of local institutions and private actors in the sanctuary network. A particularly immigrant-friendly California jurisdiction like Santa Clara County may have several forms of sanctuary nesting within it. The county's detainer policy reinforces the TRUST Act and the California Values Act, utilizing local discretion to make both more muscular than the statewide standard.<sup>262</sup> In addition, the county is home to school districts for primary and secondary education, as well as state and private higher education campuses. Several of these units have enacted sanctuary policies, either by express adoption of the term, or in action and policy that mirror sanctuary protections without utilizing the specific label.<sup>263</sup> For many of the students who may never come into contact with law enforcement, campus provides an additional haven during their daily lives. Private institutions, like Santa Clara University, can provide even stronger assurance of noncooperation, by maximizing their control over the private property that comprises its campus.

Beyond vulnerable noncitizen students, the county is also home to one of the largest immigrant labor forces in the nation, ranging from high tech Silicon Valley workers to agricultural, restaurant, and construction workforces.<sup>264</sup> As discussed *supra*, some employers have taken sanctuary-like stances by assuring their employees—consistent with their constitutional and property rights—that they will respond to information, record, or

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261. Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL'Y REV. 87, 120 (2016) (exploring Congress's conditional spending powers).

262. See Mercury News Editorial Bd., Editorial, 'Sanctuary' and Public Safety Can Be Compatible, MERCURY NEWS (Mar. 20, 2017), <https://www.mercurynews.com/2017/03/20/editorial-sanctuary-and-public-safety-can-be-compatible-goals> (quoting Santa Clara County District Attorney Jeff Rosen, who stated that "maintaining trust between residents and police 'can be a matter of life and death' in solving and preventing crime").

263. See, e.g., San José Unified Sch. Dist., Res. 2017-02-09-01 (Cal. 2017), [https://web.sjusd.org/docs/board\\_education/Resolution-Supporting-Immigrant-Students-and-Families-ENG.pdf](https://web.sjusd.org/docs/board_education/Resolution-Supporting-Immigrant-Students-and-Families-ENG.pdf) (resolving to aid immigrant families and impede immigration enforcement, without labeling district as a sanctuary); Santa Clara Unified Sch. Dist., Res. 16-46 (Cal. 2016) (creating "safe zones" for students and their families threatened with immigration enforcement, rather than sanctuaries).

264. *Economy at a Glance: San Jose–Sunnyvale–Santa Clara, CA*, U.S. BUREAU LAB. STAT. (Sept. 21, 2018), [https://www.bls.gov/eag/eag.ca\\_sanjose\\_msa.htm](https://www.bls.gov/eag/eag.ca_sanjose_msa.htm).

search requests only pursuant to subpoenas, warrants, or court orders.<sup>265</sup> An employer from Michigan recently illustrated the power of this simple and lawful insistence on proper documentation. Amidst a slew of immigration raids in the area, one Ann Arbor restaurant refused entry to ICE agents.<sup>266</sup> As ICE routinely solicits enforcement aid without such court-issued documents,<sup>267</sup> even a momentary refusal can provide significant notice to noncitizens affiliated with the employer.

Beyond schools and workplaces, networks of private individuals and religious organizations have promised physical and emotional sanctuary to noncitizens within the community. In the wake of federal enforcement efforts, private individuals and networks of private individuals have devised systems to protect their fellow community members.<sup>268</sup> Informal groups can prepare with text alert systems to advise of any raids or enforcement efforts.<sup>269</sup> Going one step further, Los Angeles is home to several private homeowners who have made known that their homes could be used for shelter and protection.<sup>270</sup>

Finally, places of worship in the area have announced that they would harbor members of their congregation seeking refuge from enforcement.<sup>271</sup> In doing so, they join the nationwide group of religious institutions that have opted to shelter those who might be the target of enforcement actions. Although they are not immune from criminal or other laws of general applicability,

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265. See, e.g., Sabatini, *supra* note 197. Notably, employers have taken critical positions against President Trump's E.O. 13,780, often referred to as the "Muslim-ban," which we believe helps to promote an inclusionary environment in the workplace. See, e.g., Matt Drange, *Facebook, Google, Apple Lead U.S. Business Charge Against Trump Travel Ban*, FORBES (Feb. 3, 2017), <https://www.forbes.com/sites/mattdrange/2017/02/03/silicon-valley-giants-joins-forces-again-to-oppose-donald-trumps-immigration-orders/#3a2b8c7a20c4>.

266. Haynes, *supra* note 14.

267. *Without Warrants, Immigration Agents Often Pose as Police Officers*, NPR (Feb. 21, 2017), <http://www.npr.org/2017/02/21/516488396/without-warrants-immigration-agents-often-pose-as-police-officers>.

268. Morrissey, *supra* note 9.

269. Sorrel, *supra* note 223.

270. Lah et al., *supra* note 129.

271. Devin Fehely, *San Jose Catholic Churches May Serve as Sanctuaries for Immigrants Under Trump*, CBS S.F. (Jan. 10, 2017), <http://sanfrancisco.cbslocal.com/2017/01/10/san-jose-catholic-churches-may-serve-as-sanctuaries-for-immigrants-under-trump>; Tatiana Sanchez, *In Trump Era, Bay Area Churches Offer Sanctuary to Undocumented Immigrants*, MERCURY NEWS (Feb. 17, 2017), <https://www.mercurynews.com/2017/02/05/in-trump-era-bay-area-churches-offer-sanctuary-to-undocumented-immigrants>.

the special status of religion in the American constitutional order imbues their resistance with legal and moral heft.<sup>272</sup> Moreover, by openly declaring their intentions and providing shelter, they offer a competing interpretation of federal law: one intended not as an act of civil disobedience, but rather as fidelity to, in their view, a more compassionate and just interpretation of the law than the one offered by federal authorities.<sup>273</sup> In addition, in some areas, the “church” has become a movable point of resistance untethered from a particular physical location.<sup>274</sup> The “Sanctuary in the Street” movement brings congregation members to enforcement loci, challenging enforcement agents to physically bypass them in order to effectuate removal.<sup>275</sup>

Given these multiple sanctuary institutions and sites, it is unlikely that an undocumented individual living in these California communities would be a target for local law enforcement actions solely based on immigration status. If they did come into contact with law enforcement, it is unlikely in many cases that their immigration status would be advertised to federal authorities, or that local authorities would facilitate their transfer to federal custody. Meanwhile, that person would be able to obtain a driver’s license and move about freely, and while in the community might find some measure of insulation in their (or their family’s) educational institution or workplace.<sup>276</sup> In the event of an ICE raid, they might be able to receive advance warning through informal information-sharing networks, and could likely access advocacy organizations and religious institutions

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272. See *Engel v. Vitale*, 370 U.S. 421, 429–30 (1962) (“The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people’s religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.”).

273. See Bezdek, *supra* note 104, at 912–15 (discussing how sanctuary participants engage in a normative process to interpret immigration law based on conceptions of morality).

274. See Harry Bruinius, *New Twist for Deportation Opponents: Sanctuary in the Streets*, CHRISTIAN SCI. MONITOR (Mar. 17, 2017), <https://www.csmonitor.com/USA/Politics/2017/0317/New-twist-for-deportation-opponents-sanctuary-in-the-streets>.

275. *Id.*

276. A.B. 60, ch. 524, 2013 Cal. Stat. 4307 (codified at CAL. VEH. CODE § 12801.9 (West 2017)) (requiring the California Department of Motor Vehicles to issue an original driver’s license to a person unable to prove lawful presence in the United States if he or she satisfies all other qualifications).

that would be willing to provide them legal defense and physical shelter.<sup>277</sup>

Undoubtedly, this web of overlapping and multi-faceted sanctuary sites exists in its most robust form in select few places, where public and private institutions exercise their authority in like-minded ways. But even in such places, maximal benefits and efficiencies are gained only through coordinated activity within the network.<sup>278</sup> Thus, the next step in more effective immigration governance in places with multiple forms of sanctuary is coordination between private and public institutions. The leveraged power of these variegated sights has potential to counter the significant governance authority and coercive force of the federal immigration regime.

While some cities and states have created offices for immigrant integration and the like,<sup>279</sup> it is not clear how much coordination they facilitate between sanctuary providers. Moreover, coordination might be difficult in the case of sanctuaries, where institutions and agencies might have extremely varied reasons for their policies. Some law enforcement agencies may be wary of the “pro-immigrant” bent of sanctuary policies, preferring to justify their stances on the use of local resources or federalism principles.<sup>280</sup> Some universities and employers might similarly be concerned about federal response and couch their resistance in more general policies with regards to information-sharing and

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277. For a small glimpse of the practical effect of these enmeshed protective networks, see Tatiana Sanchez, *Santa Clara University Students Walk Out in Solidarity with Undocumented Immigrants*, MERCURY NEWS (Nov. 18, 2016), <https://mercurynews.com/2016/11/17/santa-clara-university-students-walk-out-in-solidarity-with-undocumented-immigrants> (discussing rally held at Santa Clara University, a Jesuit private university, calling for sanctuary policy).

278. J. Kenneth Benson, *The Interorganizational Network as a Political Economy*, 20 ADMIN. SCI. Q. 229, 235–36 (1975) (arguing that interorganizational networks are equilibrated when work coordinated between multiple organizations is “geared into each other with a maximum of effectiveness and efficiency”).

279. MANUEL PASTOR ET AL., USC CTR. FOR THE STUDY OF IMMIGRANT INTEGRATION, OPENING MINDS, OPENING DOORS, OPENING COMMUNITIES: CITIES LEADING FOR IMMIGRANT INTEGRATION 5, [http://dornsife.usc.edu/assets/sites/731/docs/USC\\_ASCOA\\_WelcomingUSC\\_Report\\_WEB.PDF](http://dornsife.usc.edu/assets/sites/731/docs/USC_ASCOA_WelcomingUSC_Report_WEB.PDF) (stating that there were at least twenty-six cities with integration offices in 2015).

280. See, e.g., Tom Jackman, *Police Chiefs’ Immigration Task Force Outlines Opposition to Trump Policy*, WASH. POST (Mar. 1, 2017), [https://www.washingtonpost.com/news/true-crime/wp/2017/03/01/police-chiefs-immigration-task-force-outlines-opposition-to-trump-policy/?utm\\_term=.f2658a19630b](https://www.washingtonpost.com/news/true-crime/wp/2017/03/01/police-chiefs-immigration-task-force-outlines-opposition-to-trump-policy/?utm_term=.f2658a19630b) (describing the police chiefs’ letter as being opposed to heightened immigration policies because they “can best serve [their] communities by leaving the enforcement of immigration laws to the federal government”).

access. As such, some of the institutions and organizations comprising the overlapping and complementary sanctuaries might resist any formalized coordination and association with other sanctuary sites.

Currently there are incipient signs of cooperation and coordination in some places. In Denver, church officials worked with elected officials to help secure relief for an undocumented immigrant.<sup>281</sup> New York City's 2017 budget created a public-private partnership so that undocumented immigrants could receive legal defense against removal prosecutions.<sup>282</sup> Similar cooperation between non-profits, educational institutions, and government officials is taking place in Connecticut.<sup>283</sup> These instances provide models for greater coordination among governance points in the immigration enforcement network, amplifying the ability to control resources, share information, and overcome restraints that might constrain any one, isolated institution.

Our prescription, based in network governance theory, for like-minded jurisdictions and organizations, is to mimic the types of policies implemented by the public and private institutions in places like California and New York City, and increase the level of coordination between these variegated points of governance. By doing so, those with governance authority over immigration in immigrant-protective jurisdictions can collaborate to recalibrate an enforcement regime that, in their view, is unjust.

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281. See Melissa Etehad, *Denver Mother Is Granted Temporary Deportation Relief After Three Months of Sanctuary in a Church*, L.A. TIMES (May 13, 2017), <http://www.latimes.com/local/lanow/la-na-denver-mother-relief-20170512-story.html> (reporting on an undocumented woman who received a stay of removal after seeking sanctuary in a Denver church).

282. Liz Robbins & J. David Goodman, *De Blasio and Council Agree, and Disagree, on Immigrants*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/nyregion/de-blasio-and-council-agree-and-disagree-on-immigrants.html> (discussing that the city has earmarked funds for undocumented immigrant representation since 2013 despite internal debate on which immigrants will be eligible to receive support).

283. Mary O'Leary, *Undocumented Immigrant Who Took Sanctuary in Connecticut Church Granted Stay of Deportation*, REG. CITIZEN (July 26, 2017), <http://www.registercitizen.com/general-news/20170726/undocumented-immigrant-who-took-sanctuary-in-connecticut-church-granted-stay-of-deportation> (showing coordination and support between Connecticut Governor Dannel P. Malloy, Lieutenant Governor Nancy Wyman, and United States Senator Richard Blumenthal in the case of an undocumented mother).

## C. DISSENTING SANCTUARY

Section B, above, argues that a broader conception of governance over immigration enforcement might help explain how networks of private and public actors can effectively and lawfully collaborate to resist federal immigration prerogatives. But, one of the consequences of distributed and decentralized governance networks is that the central government's position might be strengthened just as much as it might be opposed. It is possible, given unified political party control or capture by policy activists, that expanding the loci of immigration enforcement governance might mean echoing and amplifying the federal enforcement regime.

The ability of a decentralized governance regime to amplify the federal government's enforcement power is evident in the states, counties, and educational systems adopting decidedly "anti-sanctuary" stances. Texas, Mississippi, and the Georgia higher education system provide ready examples.<sup>284</sup> Texas's S.B. 4 is an omnibus anti-sanctuary law that virtually compels local law enforcement agencies and localities to comply with federal immigration enforcement programs. It forces local agencies to comply with ICE detainer requests under threat of criminal and financial penalties, as well as loss of office.<sup>285</sup> And, the law includes campuses and campus safety officers in addition to police departments.<sup>286</sup> Similarly, bills in Mississippi and Georgia have targeted sanctuary policies, and specifically sanctuary campuses. Although those states' policies are more vaguely worded than Texas's, both attempt to crack down on the ability of post-secondary institutions to adopt sanctuary policies.<sup>287</sup> Georgia's S.B. 37, enacted in response to movements at Emory University and other Georgia colleges to adopt formal sanctuary policies, directly targets private institutions.<sup>288</sup> It threatens them with loss of state funding if they declare themselves sanc-

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284. H.B. 37, 2017–2018 Leg., Reg. Sess., (Ga. 2017); S.B. 2710, 2017 Leg., Reg. Sess. (Miss. 2017); S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017).

285. Tex. S.B. 4.

286. *Id.*

287. Ga. H.B. 37; Miss. S.B. 2710.

288. Jeremy Redmon, *Georgia Lawmaker Seeks to Ban "Sanctuary Policies" at Private Colleges*, ATLANTA J.-CONST. (Jan. 11, 2017), <https://www.ajc.com/news/state—regional-govt—politics/georgia-lawmaker-seeks-ban-sanctuary-policies-private-colleges/7cH6bAVO2q6nw9n08ArzJI>.

tuaries and adopt policies that materially interfere with communication or investigation about immigration status with federal authorities.<sup>289</sup>

Returning to our theoretical framework of networked governance, in these jurisdictions, two major players in the network—the federal government and the state legislature or agency—have used the levers under their control to tamp down on oppositional policy expressions at the local and hyper-local level. Moreover, as the two sovereign entities in the regulatory field, they possess monopolistic control over both hard law and the hard sanctions that come with it, including use of force and criminal liability. In addition, because state governments are not constrained by the same federalism limits as the federal government, their policies fill in the constitutional gaps where federal regulation may not be able to reach, complementing federal enforcement prerogatives and providing more complete regulatory control.<sup>290</sup> Unlike the federal government, state governments are not constrained by limitations on congressional authority to legislate, the Tenth Amendment, or other federalism limitations and, therefore, their ability to control local governments, agencies, and private actors is more robust and complete.<sup>291</sup>

These methods of coercion and norm-instantiation are undoubtedly powerful and, initially, are likely to influence behavior and attitudes in ways that other institutions in those networks might find difficult to match or counteract. In the wake of legal uncertainty about the consequences of their noncooperation or anti-detainer policies, public officials might simply err on the side of supporting enforcement-heavy policies. This seemed to be the case last year with Miami-Dade County, after President Trump issued his executive orders on interior enforcement.<sup>292</sup> Or, sheriffs, county officers, and public university administrators who previously were undecided or silent on the issue, might

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289. Ga. H.B. 37.

290. These ideas are explored in greater detail in a forthcoming article, *Anti-Sanctuary: A Turn Towards Immigration Localism*, by the co-authors of this paper and Professor Rick Su. Gulasekaram, Su & Villazor, *supra* note 25.

291. See generally KENNETH R. THOMAS, FEDERALISM, STATE SOVEREIGNTY, AND THE CONSTITUTION: BASIS AND LIMITS OF CONGRESSIONAL POWER (2013), <https://fas.org/sgp/crs/misc/RL30315.pdf> (detailing the legislative power difference between state governments and the federal government).

292. See Kurtis Lee, *Miami-Dade County Mayor Heeds Trump's Call, Effectively Ending 'Sanctuary' Status*, L.A. TIMES (Jan. 26, 2017), <http://www.latimes.com/politics/washington/la-na-trailguide-updates-miami-dade-mayor-heeds-donald-trump-s-1485482985-htmlstory.html> (stating that he did not want to jeopardize the “millions of funds” the city gets from the federal government).

be emboldened and incentivized to take enforcement-heavy stances, given the support and encouragement from their state and federal counterparts and party officials. And, private organizations might seek to use their authority to help implement the federal enforcement plan, as recently evidenced by the alleged actions of at least some locations of Motel 6, a Texas-based company, in providing information about their guests to immigration officials.<sup>293</sup>

As such, these anti-sanctuary jurisdictions illustrate the inescapable reality that distributed governance with multiple stakeholders neither means equal distribution of power, nor use of that power in opposition to the central governing authority.<sup>294</sup> Yet, just because nonfederal, non-state stakeholder institutions in jurisdictions like Texas do not have the same resources or coercive levers as the federal and state governments, does not mean they lack all power. Indeed, the very point of decentralized governance over immigration enforcement of a myriad of actors is that power over the regulatory field is diffused, to varying degrees, to many actors. Thus, even if only relatively less well-resourced and powerful institutions and organizations are left to instantiate certain policies, those “dissenting sanctuaries” willing to either bear the cost of federal and state sanctions or willing to voice loud disagreement with the federal and state policy decision can still affect the stability of the dominant policy outcome over time.

An example of such a sanctuary site in a network is Travis County, Texas. The county is home to Austin, the relatively liberal-leaning state capital in a state that is overwhelmingly red.<sup>295</sup> There, the elected sheriff instituted a policy of noncooperation with ICE.<sup>296</sup> Although Sheriff Hernandez’s policy had some local support,<sup>297</sup> it garnered immediate backlash at the state

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293. Caitlin Dickerson, *Motel 6 Gave Guestlist to Immigration Agents in Washington State, Lawsuit Says*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/us/motel-6-immigration-washington.html>.

294. *Nodal Governance*, *supra* note 233, at 39–40 (discussing how differences in resources, efficiency, and accessibility among nodes result in varied amounts of power between nodes).

295. Harold Meyerson, *Blue Cities, Red States*, L.A. TIMES (Mar. 7, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-0307-meyerson-city-state-divisions-20160307-story.html>.

296. See TRAVIS CTY. SHERIFF’S OFFICE, TRAVIS COUNTY SHERIFF’S OFFICE POLICY ON COOPERATION WITH U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (2017), <https://lrl.texas.gov/scanned/archive/2017/34066.pdf>.

297. See Cindy Flint, *TCDP Passes Resolution in Support of Sheriff Sally Hernandez’s ICE Policy*, TRAVIS CTY. DEMOCRATIC PARTY (Feb. 17, 2017),

level. Soon after the policy was instituted, the state's governor denounced her actions, and then withheld \$1.5 million in state grant funds from the county.<sup>298</sup> A few months later, with the governor's resounding approval, the legislature passed S.B. 4, the state "anti-sanctuary" law.<sup>299</sup> The sheriff's office initially maintained its noncooperation policy despite losing significant state funding and serving as the rhetorical punching bag for the state's governor and federal officials.<sup>300</sup> However, the sheriff's office ultimately agreed to comply with the law after the relevant sections of Texas S.B. 4 were declared to be constitutional.<sup>301</sup> It is not surprising that Sheriff Hernandez would back down from her prior policies considering the substantial risk of monetary and criminal liability now facing noncomplying local entities and their officials.

Consistent with our general theoretical approach, we suggest that such situations counsel for a greater understanding

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<https://www.traviscountymocrats.org/tcdp-passes-resolution-in-support-of-sheriff-sally-hernandezs-ice-policy>.

298. Patrick Svitek, *In "Sanctuary" Fight, Abbott Cuts Off Funding to Travis County*, TEX. TRIB. (Feb. 1, 2017), <https://www.texastribune.org/2017/02/01/sanctuary-fight-abbott-cuts-funding-travis-county>; Mary Tuma, *Sheriff Sally Hernandez Continues to Do "What's Right"*, AUSTIN CHRON. (July 7, 2017), <https://www.austinchronicle.com/news/2017-07-07/sheriff-sally-hernandez-continues-to-do-whats-right>.

299. See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (signed into law May 5, 2017); Patrick Svitek, *Texas Gov. Greg Abbott Signs "Sanctuary Cities" Bill into Law*, TEX. TRIB. (May 7, 2017), <https://www.texastribune.org/2017/05/07/abbott-signs-sanctuary-cities-bill>. S.B. 4 was challenged by various advocacy groups, including MALDEF and the ACLU. *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 812–13 (W.D. Tex. 2017) (granting preliminary injunction against S.B. 4), *aff'd in part, vacated in part by* 890 F.3d 164 (5th Cir. 2018). They argued that the law was unconstitutionally vague, was preempted, and violated federalism precepts. *Id.* at 760–75.

300. See Patrick Svitek, *Gov. Abbott Demands Travis County Reverse New "Sanctuary" Policy*, TEX. TRIB. (Jan. 23, 2017), <https://www.texastribune.org/2017/01/23/abbott-demands-hernandez-reverse-new-sanctuary-pol> (reporting that Governor Abbott told Sheriff Hernandez that her "reckless actions endangering the safety of Texans will provide powerful testimony for the need to strengthen Texas law").

301. *City of El Cenizo*, 890 F.3d at 176–85, 191–92 (holding that S.B. 4 was not preempted by federal immigration law and ordering the preliminary injunction to be vacated and dismissed, but affirming the district court's injunction against the provision barring local elected officials from "endorsing" a policy that materially limits enforcement of immigration laws); Stephanie Federico, *After Court Ruling, Travis County Will Comply with All ICE Detention Requests*, KUT (Sept. 25, 2017), <http://www.kut.org/post/after-court-ruling-travis-county-will-comply-all-ice-detention-requests> ("The Travis County Sheriff's Office will honor all federal immigration detainer requests following a federal court ruling that held parts of Texas' 'sanctuary cities' law can go into effect.").

and encouragement of distributed governance networks, not less. The importance of non-governmental and private sanctuaries in recalibrating immigration policy becomes relatively more important. As an example, in Travis County, a community of immigrant advocates have initiated the Austin Sanctuary Network (ASN).<sup>302</sup> ASN is a loose coalition of religious institutions, unions, non-profit organizations, and individuals who oppose the federal government's enforcement policies within Travis County.<sup>303</sup> Within the last year, ASN has grown from just a few churches to more than two-dozen multi-faith congregations.<sup>304</sup> Although billed as a "religious organization" on Facebook,<sup>305</sup> media reports suggest that ASN includes three labor unions and several non-profit groups as well.<sup>306</sup> This array of non-governmental organizations, loosely coordinated and connected both by their shared policy outlook and the populations they serve, are among the only sanctuary sites remaining when municipal dissent is quashed.

More generally, in anti-sanctuary states, the long-term goal of the multitude of municipal and non-governmental institutions in the network might be different than that of similar institutions in places like the Bay Area or New York City. Ultimately, municipal agency positions like Sheriff Hernandez's, or the work of ASN, raise the political and enforcement costs for the other sites of governance in their geographic network. The sheriff's reluctance to withdraw her noncooperation policy forced the governor, in a highly publicized move, to withhold state funds,<sup>307</sup> and then prompted the legislature to enact a law with sanctions applicable to every municipality within the state.<sup>308</sup> And, the State of Texas has been forced to defend that policy in federal court against a lawsuit brought by multiple Texan cities and local officials who oppose the statewide policy.<sup>309</sup> Thus, while these

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302. *Background*, AUSTIN SANCTUARY NETWORK, <https://austinsanctuarynetwork.org/background> (last visited Nov. 11, 2018).

303. Claudia Lauer, *Immigrants Find Sanctuary in Growing Austin Church Network*, U.S. NEWS & WORLD REP. (Mar. 25, 2017), <https://www.usnews.com/news/best-states/texas/articles/2017-03-25/immigrants-find-sanctuary-in-growing-austin-church-network>.

304. *Id.*

305. See Austin Sanctuary Network, FACEBOOK, <https://www.facebook.com/Austin-Sanctuary-Network-1739318732967795> (last visited Nov. 11, 2018).

306. Lauer, *supra* note 303.

307. Svitek, *supra* note 298.

308. Svitek, *supra* note 299.

309. See *City of El Cenizo v. Texas*, 890 F.3d 164, 173–75 (5th Cir. 2018).

state-level actions have the potential to stifle local dissent, they also necessitate the expenditure of political capital, and require the state to use its prosecutorial and legal apparatuses to ensure compliance.

Meanwhile, even if the state is willing to expend its resources to force municipal agencies to get it in line with its governance objectives, the other nodes in the immigration network can still raise the long-term political costs to state officials by using “soft” powers to undermine the moral and legal legitimacy of the state’s hard approach. Aside from the practical effect for the noncitizens in their midst, the organizations in ASN also serve the critical governance functions of norm-creation and swaying public perception. Indeed, even though federal and state authorities were successful in eradicating the Austin Sheriff Department’s noncooperation policy, these religious organizations, non-profit groups, and labor unions still retain the power to mobilize local and national media, in essence standing in for, and reaffirming, the municipality’s voice on immigration enforcement.

Finally, it is worth noting that while dissenting sanctuaries might be isolated within their state or municipality, they are not alone. Descriptively, a geography or region-centered account may not accurately portray how sub-federal immigration policy actually emerges in the first place.<sup>310</sup> More broadly, it chafes against the reality that in the past few years, much immigration federalism—including decisions to litigate against federal prerogatives—are done through trans-state and trans-local collaborations that transcend state boundaries. On the sanctuary front, there appears to be emerging a trans-local network of religious and non-profit organizations banded in common cause.<sup>311</sup> In this regard, consider the example of Jesuit universities. In response to expected federal enforcement efforts, it was the Association of Jesuit Colleges and Universities, with campuses across the coun-

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(providing an overview of S.B. 4 and the preceding litigation over its constitutionality).

310. See generally GULASEKARAM & RAMAKRISHNAN, *supra* note 24, at 75–105, 207–10 (showing through quantitative and qualitative empirical data that demographic factors and region-specific concerns do not explain the rise of sub-federal immigration laws, and that partisanship, entrepreneurship, and political factors are salient).

311. Ruth McCambridge, *Sanctuary Network Rooted in Religious Tradition Reblooms Nationwide*, NONPROFIT Q. (Mar. 27, 2017), <https://nonprofitquarterly.org/2017/03/27/sanctuary-network-nationwide-charity>.

try issuing a joint statement about the commitment of those universities to undocumented students.<sup>312</sup> Their commonality was not their geographic region or the particular demographic makeup of their campuses; rather it was their shared institutional mission and ideological focus.<sup>313</sup>

In short, institutional and even governmental positions on immigration are just as, if not more, likely to track party affiliation and ideology more than they do jurisdictional lines and region-specific policy challenges. Thus, even the dissenting sanctuary is likely not as isolated as it might appear; although it may be disconnected from the state in which it is located, it is in conversation with like-minded localities across the country, and non-governmental institutions in its own backyard.

Here we have argued that the effect of any sanctuary varies depending on context. This leads to our final and related point in Part IV: Every stakeholder institution, whether governmental, religious, private, or informal, participates in setting the actual level of immigration enforcement, leading to a decentralized, multi-jurisdictional, multi-institutional negotiation of national immigration policy.

#### IV. NETWORKED SANCTUARIES AND NATIONAL IMMIGRATION POLICY

Immigration remains one of the most divisive and contentious topics on the national agenda. It has significantly shaped the past four presidential contests,<sup>314</sup> and has played a leading, if not decisive, role in several midterm elections for federal lawmakers.<sup>315</sup> Yet, despite all this national attention and rhetorical

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312. Press Release, Presidents of the Ass'n of Jesuit Colls. & Univs., Statement of AJCU Presidents on Undocumented Students (Nov. 30, 2016), <http://www.ajcunet.edu/press-releases-blog/2016/11/30/statement-of-ajcu-presidents-november-2016>.

313. *See id.* (discussing the common mission of the Association to “embrace the entire human family, regardless of their immigration status”).

314. ASIAN AM. JUSTICE CTR. ET AL., BEHIND THE NUMBERS: POST-ELECTION SURVEY OF ASIAN AMERICAN AND PACIFIC ISLANDER VOTERS IN 2012, at 8–9 (2013), [http://www.apiavote.org/sites/apiavote/files/2012research/btn\\_final\\_singles\\_FINAL\\_0.pdf](http://www.apiavote.org/sites/apiavote/files/2012research/btn_final_singles_FINAL_0.pdf) (ranking the importance of issues to Asian American voters in the 2012 presidential election); GULASEKARAM & RAMAKRISHNAN, *supra* note 24, at 90–111; Thomas B. Edsall, *The Democrat's Immigration Problem*, N.Y. TIMES (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/opinion/the-democrats-immigration-problem.html> (noting the salience of immigration attitudes and policy positions in the 2016 election).

315. GULASEKARAM & RAMAKRISHNAN, *supra* note 24, at 90–111; *see also*, e.g., Aaron Blake, *Make No Mistake: Immigration Reform Hurt Eric Cantor*,

focus by lawmakers, there have been no major comprehensive changes to federal immigration law for over two decades. Instead, the major changes in immigration enforcement policy have been achieved through modifying enforcement practices, with the federal executive deploying resources and altering administrative agency directives to achieve a hyper-enforcement regime.<sup>316</sup>

The federal government, and in some cases, state governments, command massive resources and maintain a monopoly on coercive force and hard law. But, as we have argued, they are not the only institutions that deal with the on-the-ground realities of the communities they serve, or who have chosen to take stances in the national debate on immigration. The story we tell about the variegated sites and sources of sanctuary expands our understanding of who actually governs and defines immigration enforcement policy. This decentralized and distributed governance network over immigration enforcement has long-term practical, political, and theoretical implications.

Here, we suggest three ways in which sanctuaries are molding the national agenda on immigration, changing the terms of national immigration policy, and nudging us towards more nuanced understandings of governance and legal doctrine in immigration enforcement. These changes, we argue, are for the better. As a prescriptive matter, this Article concludes by suggesting that in immigration enforcement, the proliferation of multiple forms of sanctuary across a distributed and decentralized network of actors is a useful and desirable trend for democratizing immigration enforcement. In adopting the sanctuary label or implementing immigrant-protective policies, these public and private entities transform themselves into important political actors, leveraging the real power they possess as nodes of governance over immigration enforcement.

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WASH. POST (June 11, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/06/11/yes-immigration-reform-hurt-eric-cantor/?utm\\_term=.3371bb414493](https://www.washingtonpost.com/news/the-fix/wp/2014/06/11/yes-immigration-reform-hurt-eric-cantor/?utm_term=.3371bb414493) (discussing the role that House Majority Leader, Eric Cantor's, support for immigration reform had in his 2014 loss to Dave Brat); Seung Min Kim, *The Race Where Immigration Matters*, POLITICO (May 6, 2014), <http://www.politico.com/story/2014/05/house-race-immigration-106372> (discussing a House of Representatives race in North Carolina where the incumbent GOP member was attacked by opponents for her belief in legalizing all immigrants that were in the United States illegally).

316. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799–800 (Jan. 25, 2017) (directing executive agencies to increase their enforcement of immigration laws through all legal means).

## A. DIMINISHING THE ROLE OF THE FEDERAL GOVERNMENT

First, focusing attention on local government agencies and non-governmental institutions and organizations recalibrates the position of the federal government in immigration enforcement. The potential for governance from a multitude of sanctuaries helps us get beyond sovereignty as the sole focus of sanctuary debates. The use of sanctuary policies at the local level, and into local institutions, functions in many ways, as Dean Heather Gerken suggests, as “federalism all the way down.”<sup>317</sup> In her conception, too much attention has been focused on sovereignty as the source of interactions and friction in our federalist system of government. Relatively too little academic focus has centered on institutions and agencies devoid of sovereignty, where dissenting views can be expressed and instantiated.<sup>318</sup> As per her framework, getting beyond sovereignty allows for reconceiving the relationship between the national government and loci where people might participate in government and policymaking.<sup>319</sup> Gerken’s discussion is mostly limited to the role of special purpose public institutions—school districts, juries, zoning commissions, and the like—and their importance in federalism.<sup>320</sup> Our discussion of sanctuaries incorporates those sites of potential resistance, but also includes private institutions and organizations.

Accordingly, for our purposes, the main takeaway from Gerken’s framework is that resistance and dissent to federal policies might benefit from de-emphasizing sovereignty and separateness from the federal government. In immigration, it is clear that sovereignty can be a double-edged sword. Relying on a robust version of state sovereignty to shield state and local sanctuary policies from attack might reify the importance of sovereignty generally;<sup>321</sup> the same thick notions that form the basis of the plenary power doctrine and unconstrained federal power over immigration.<sup>322</sup> And, muscular state sovereignty arguments might help justify state anti-sanctuary laws or other

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317. See generally Gerken, *supra* note 28 (proposing a form of democracy in which local institutions are given more autonomy to govern themselves, thereby increasing the say that minority groups have in governance).

318. *Id.* at 8, 24–33.

319. *Id.* at 8.

320. *Id.* at 26–28 (labeling such institutions as special purpose institutions).

321. See David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 638–39 (2017).

322. See *Arizona v. United States*, 567 U.S. 387, 394 (2012) (“The Govern-

heavy-handed state-level enforcement schemes.<sup>323</sup> For those articulating minority or dissenting positions then, it may very well pay off in the long run to consider non-governmental forms of resistance to federal policies and enforcement programs. This is especially true if one believes that long-term changes in attitudes and policies towards immigrants are more likely to gain steam at the local and institutional level, rather than at statehouses and the White House.

Most sanctuaries—but especially those without sovereign status, like municipalities, universities, school districts, and private organizations—have no real “exit” from federal laws and schemes.<sup>324</sup> Thus, their resistance is always a direct challenge to the legitimacy and value of the current Administration’s immigration enforcement plan, rather than a claim about separate policymaking spheres. As such, it packs more normative heft than claiming that a jurisdiction is exempt from federal policies and control. Together then, these distributed sanctuary inputs move us beyond the hard dividing lines of sovereignty, and refocus the debate on the role that each of these private and public agencies and institutions might play in immigration enforcement through control over their private property or their soft power over norm-proliferation and consumer attitudes.

Of course, it remains true that at least some of the legal basis for certain types of sanctuaries—like churches and others

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ment of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (citing the Commerce Clause, the Naturalization Clause, and federal power over foreign affairs as sources of plenary authority); *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941) (citing the Supremacy Clause as justification for the federal government’s power over immigration law).

323. See *Arizona*, 567 U.S. at 402–03, 410 (arguing that Arizona could implement criminal sanctions for immigration law violations because it furthered federal goals, and that the state could arrest individuals with probable cause that he or she committed a removable offense); Defendants’ Response to Applications for Preliminary Injunction at 29–39, *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017) (No. SA-17-CV-404-OLG) (arguing that the State of Texas can enforce immigration law in collaboration with the federal government); see also Gulasekaram, Su & Villazor *supra* note 25 (documenting the rise in federal and state anti-sanctuary laws).

324. See, e.g., ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4, 15–20 (1970) (describing “exit” as a choice made by consumers to stop buying a business’s products, and discussing the impracticability of the option to exit from the political world in comparison with the option to voice one’s dissatisfaction); see also Bulman-Pozen & Gerken, *supra* note 32, at 1259 (“To borrow from Albert Hirschman, uncooperative federalism values a state’s voice options over its exit options.”).

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whose claim is based on their control over a particular space—depends on the ability to control and protect a physical area outside the reach of federal interference. Even without sovereignty then, these sanctuaries are in essence asking for a realm of separate and autonomous control. The difference between such claims and those made by states and cities asserting sovereignty, however, is that ultimately, federal and state power can likely reach into and influence those non-governmental spheres through legislation or by fulfilling legal and procedural requirements in their enforcement actions. As such, while certain non-governmental sanctuaries also rely on ideas of separate and autonomous space, much of their ability to actually operationalize and maintain that autonomy must still be achieved through negotiation and norm-proliferation.

By de-emphasizing or eliminating a sovereignty-based focus, organizations, institutions, and local governmental actors might seek to change and influence federal policymaking without having to rely solely on constitutional allocations of power and domains of authority. Sovereignty and federalism principles play almost no role in the legal defense of local institutions nor in the private forms of sanctuary that we have identified. Instead, common law and statutory protections, as well as individual liberties found in the Constitution, play a much larger role. What mostly links these multi-faceted sanctuaries—from states to localities and agencies to schools and churches—is not their claim to be the final decision maker over a jurisdiction, but rather that all of them are registering dissent against the current federal administration’s immigration policy.

#### B. IMPLEMENTING ALTERNATIVE POLICY EXAMPLES

Second, and relatedly, by enacting or articulating laws, policies, standards, or mission statements, these public and private sanctuaries are instantiating an alternative policy vision to the federal vision. To paraphrase Hiroshi Motomura’s formulation, the norm in areas of overlapping sanctuaries is that unlawful status is the beginning of the conversation, not the end.<sup>325</sup> By changing the starting point of the conversation, places with several private and public sanctuary policies in place can anchor and frame the national policy debate in ways that more abstract legislative debate amongst federal lawmakers alone cannot.

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325. See MOTOMURA, *supra* note 31, at 31.

This anchoring effect occurs in two ways. As an initial matter they allow a greater population of people, including the undocumented, to register their voice in the larger national immigration policy debate through participation in a variety of organizations and memberships. By actually articulating a sanctuary policy—by “dissenting by deciding” in Gerken’s formulation<sup>326</sup>—these multiple points of sanctuary allow their specific constituencies, as well as broader local, state, and national ones, to weigh competing conceptions of rule of law, moral legitimacy, public safety outcomes, and social justice embodied by the administration’s approach in contrast with the sanctuaries’ approach. In short, they allow national debates about immigration policy to be accessed in the institutions of everyday life, where the real-world effects of those policies will have immediate resonance.

Relatedly, by instantiating policies, both the members of the implementing jurisdiction, organization, or institution and those in other parts of the country can measure the effects of the policy. The existence of sanctuary jurisdictions has allowed researchers to test the public safety rationale proffered by the current administration for its attempted crackdown on such policies.<sup>327</sup> These analysts conclude that the existence of sanctuary policies do not create more criminality or more dangerous communities; indeed, their research confirms just the opposite.<sup>328</sup> And, unlike other situations in which a local policy might result in the ex-

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326. See Bulman-Pozen & Gerken, *supra* note 32, at 1293–94 (discussing the value of allowing state and local governments to experiment with policy formations that differ from the federal government’s); see also Gerken, *supra* note 32, at 1759–98 (differentiating decisional dissent from conventional dissent and describing how decisional dissent can give minorities more power to participate in governance).

327. See generally TOM K. WONG, CTR. FOR AM. PROGRESS & NAT’L IMMIGRATION LAW CTR., THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY (2017), <https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf> (finding that sanctuary counties have lower crime rates and stronger economies than nonsanctuary counties); Benjamin Gonzalez et al., *The Politics of Refuge: Sanctuary Cities, Crime, and Undocumented Immigration*, URB. AFF. REV. ONLINEFIRST, May 7, 2017, at 1, 12–34 (testing the claim that sanctuary cities are associated with an increase in crime rates and finding no statistically meaningful increase associated with sanctuary policies).

328. See WONG, *supra* note 327, at 1 (finding that communities with sanctuary policies have lower rates of crime and unemployment compared to communities that do not); Gonzalez et al., *supra* note 327, at 24 (finding that sanctuary policies have no discernible impact on local crime rates).

porting of externalities to other places, a sanctuary policy, if anything, should import those burdens to the enacting jurisdiction.<sup>329</sup> Yet, apart from isolated and tragic instances, sanctuary jurisdictions still remain amongst the safest places in the country.

To be clear, our argument does not rely on this particular empirical result. Adamantly, our position is not that sanctuary jurisdictions are necessarily safer than those that cooperate with federal policies. While that result comports with our perspective on the normative value of sanctuaries, our broader claim is only that these implemented policies provide a real-time comparison along the criteria which the public and public officials might evaluate competing policy visions.

### C. REVEALING THE COSTS OF IMMIGRATION ENFORCEMENT

Third, reconceptualizing sanctuaries as emergent from various public and private spaces allows a broader and more accurate rendering of the costs of overriding these types of policies. Of course, traditional sites of sanctuary already help calibrate enforcement costs. For example, because sovereignty-based defenses aim to make sanctuary sites the final decision makers for their geographic area, it is no surprise that litigation over President Trump's attempted crackdown on sanctuary cities has emphasized Tenth Amendment boundaries, relying heavily on cases like *Printz v. United States*.<sup>330</sup> In response, Congress could simply bypass state and local resistance and enforce immigration law with federal agents, resources, and facilities; or it might

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329. See Christopher Ingraham, *Trump Says Sanctuary Cities Are Hotbeds of Crime. Data Say the Opposite.*, WASH. POST (Jan. 27, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/01/27/trump-says-sanctuary-cities-are-hotbeds-of-crime-data-say-the-opposite/?noredirect=on&utm\\_term=.d1aabd2c9dfa](https://www.washingtonpost.com/news/wonk/wp/2017/01/27/trump-says-sanctuary-cities-are-hotbeds-of-crime-data-say-the-opposite/?noredirect=on&utm_term=.d1aabd2c9dfa); Michelle Ye Hee Lee, *Attorney General Jeff Sessions's Claim That 'Criminals Take Notice' of Cities with Sanctuary Policies*, WASH. POST (July 17, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/07/17/attorney-general-jeff-sessions-claim-that-criminals-take-notice-of-cities-with-sanctuary-policies/?noredirect=on&utm\\_term=.4f9489accff3](https://www.washingtonpost.com/news/fact-checker/wp/2017/07/17/attorney-general-jeff-sessions-claim-that-criminals-take-notice-of-cities-with-sanctuary-policies/?noredirect=on&utm_term=.4f9489accff3) (disputing Jeff Sessions's claim that "criminals take notice" of sanctuary city policies and increase crime rates).

330. See, e.g., Complaint for Declaratory and Injunctive Relief at 20–21, 39, *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017) (No. 3:17-cv-00485); Amicus Brief of 34 Cities and Counties in Support of County of Santa Clara's Motion for Preliminary Injunction at 5–9, *Santa Clara*, 275 F. Supp. 3d 1196 (No. 17-cv-00574-WHO); see also *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that, under the Tenth Amendment, the federal government may not force state officials to administer a federal program).

use conditional spending levers to bribe or cajole cooperation with federal authorities.

Either way, the existence of the sanctuary site forces the federal government to internalize the costs of hyper-enforcement. Direct federal enforcement requires the appropriation of funds for personnel and facilities. Meanwhile, monetary inducements and financial coercion require the federal government to put another type of price tag on the value of state and local cooperation. Additionally, because those federal penalties are likely to affect other federal and state policy goals, the federal government is, in some cases, forced to announce which policy goal it values more.<sup>331</sup> For instance, this administration's Department of Justice has responded to the existence of noncooperation policies by threatening to take away federal grants made to local law enforcement for training, facilities, personnel, and other forms of critical public safety support.<sup>332</sup> In doing so, the administration has implicitly chosen to prioritize immigration enforcement over other community safety policy goals.

In addition to laying bare the fiscal costs of federal enforcement policies or forcing the federal government to internalize those costs, sanctuary sites also nudge the federal government to calculate the long-term political costs of hyper-enforcement policies. Perhaps the most important leverage that municipalities have is the degree the federal government relies on their manpower, facilities, and information in immigration enforcement.<sup>333</sup> For public sanctuaries, whether or not sovereignty-

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331. See, e.g., Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> (requiring state and city law enforcement to cooperate and comply with federal immigration law to receive funding for essential services, including corrections, law enforcement, and drug treatment); see also U.S. DEPT OF JUSTICE, BACKGROUND ON GRANT REQUIREMENTS (2017), <https://www.justice.gov/opa/press-release/file/984346/download> (listing actions state and city authorities must follow).

332. See Sari Horwitz & Maria Sacchetti, *Attorney General Jeff Sessions Repeats Trump Threat That 'Sanctuary Cities' Could Lose Justice Department Grants*, WASH. POST (Mar. 27, 2017), [https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-repeats-trump-threat-that-sanctuary-cities-could-lose-justice-department-grants/2017/03/27/1fa38e2a-1315-11e7-9e4f-09aa75d3ec57\\_story.html?utm\\_term=.d1bccd0fd068](https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-repeats-trump-threat-that-sanctuary-cities-could-lose-justice-department-grants/2017/03/27/1fa38e2a-1315-11e7-9e4f-09aa75d3ec57_story.html?utm_term=.d1bccd0fd068).

333. NAT'L IMMIGRATION LAW CTR., HOW ICE USES LOCAL CRIMINAL JUSTICE SYSTEMS TO FUNNEL PEOPLE INTO THE DETENTION AND DEPORTATION SYSTEM (2014), <https://www.nilc.org/wp-content/uploads/2015/11/state-local>

based arguments end up shielding their policies from federal commandeering, it is likely that both the federal government and the municipal ones would prefer a mutually agreed upon and noncontentious relationship. The more the federal government forces local cooperation through mandates and commands, likely the more contentious and friction-filled that relationship will be in the long term. Because of the interconnectedness and integration required for immigration enforcement (and several other federal programs), the federal government risks losing over time by winning right now.

In our recasting and expanding the landscape of sanctuary sites and sources, these points of interconnectedness multiply. Of course, the federal government does not rely on universities, school districts, or religious institutions for immigration enforcement in the way it relies on local law enforcement agencies. But, if these institutions were wholly useless or meaningless in immigration enforcement efforts, then recent federal and state anti-sanctuary proposals and laws would be unlikely to cover them.<sup>334</sup> Instead, those policies expressly contemplate the resistance of places like universities and employers.

As such, it remains plausible that a sufficiently motivated ICE official might attempt to leverage university administrators in the same way they would attempt to conscript local law enforcement officers.<sup>335</sup> Even though universities might have some constitutional and statutory rights to resist such heavy-handed

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-enforcement-and-ice-2014-03-25.pdf; see also Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 75 U. CIN. L. REV. 1373, 1380–81 (2006) (suggesting that the federal government's immigration enforcement policies are more effective if people believe "all police, teachers, and other local government employees will cooperate in immigration enforcement").

334. See, e.g., H.B. 37, 2017–18 Leg., Reg. Sess. (Ga. 2017) (barring private postsecondary institutions from adopting any sanctuary policies); S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (prohibiting university campus police from preventing enforcement of immigration law by other officials); see also Bezdek, *supra* note 104, at 902–03, 947–48 (discussing that during the early times of church sanctuary, the federal government said they were irrelevant, only to later realize their importance and prosecute them).

335. See Gabrielle Russon, *Florida Colleges Take Middle Ground on Immigration Battle*, ORLANDO SENTINEL (Feb. 10, 2017), <http://www.orlandosentinel.com/features/education/school-zone/os-campus-sanctuary-20170207-story.html> (discussing how the federal government could respond to schools resisting immigration enforcement, including "strip[ping] schools of their right to issue I-20 forms, documentation that international students need . . . to study in the United States").

enforcement,<sup>336</sup> it seems also likely that federal officials would in many instances be able to overcome that resistance. Yet, it is also true that the federal government uses universities to implement many federal policy objectives unrelated to immigration enforcement,<sup>337</sup> which might counsel for a less antagonistic relationship over the long term, nudging the federal government to moderate its immigration enforcement priorities in service of those other federal goals. Now, with sanctuaries expanding into variegated institutions and sectors, across all states, any such federal override necessarily must overcome the expressed policy preference of high-profile institutions, places of worship, and powerful firms. It can no longer be a quiet or unnoticed exercise of federal power.

In sum, we find the democratizing potential of expanding sanctuaries to be doctrinally, theoretically, and politically desirable. For purposes of this Article, we defend that prescription with regards to immigration enforcement, but recognize the possibility of decentralized and distributed governance networks influencing many regulatory regimes. We also caution—like any claim about democratized inputs—that such networks might be used by political forces from all parts of the spectrum. Applied to immigration, that means that distributed networks might accelerate hyper-enforcement agendas just as easily as they can mitigate them. Given the historical and current reality of the federal government's enforcement policies, however, we predict that sanctuary networks are much more likely than anti-sanctuary networks.

Fundamentally, our encouragement of the phenomenon is based on the effect that taking public stances on immigration enforcement is likely to have on public and private actors who take them. By adopting noncooperation policies, sanctuary institutions have cemented their identity as political actors in the immigration field. Incorporating their authority into debates over

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336. See *supra* Part II (discussing property rights and FERPA).

337. See generally John E. Tyler III, *Advancing University Innovation: More Must Be Expected—More Must Be Done*, 10 MINN. J.L. SCI. & TECH. 143, 144–45 (2009) (discussing federal interest in universities as research facilities); *Federal & Industry Research Partnerships*, U. COLO. BOULDER, <http://www.colorado.edu/research/federal-industry-research-partnerships> (last visited Nov. 11, 2018) (providing a list of partnerships between the university and various federal agencies); *US Federal Funder Public Access Policies*, OFF. SCHOLARLY COMM., <https://osc.universityofcalifornia.edu/scholarly-publishing/policies-legislation/us-federal-funder-public-access-policies> (last updated Sept. 20, 2017) (mentioning that the National Institutes of Health is the largest federal supporter of basic research).

the proper level of federal immigration enforcement helps these organizations actualize their own civic identities and untapped power within this network. This reorientation might prove to be important going forward in galvanizing proactive (as opposed to reactive) immigration enforcement policies, and producing collaborative and complementary ties among like-minded agencies and institutions. This reorientation is especially important in the immigration field, a field dominated by the view that the federal government has “sole” or “exclusive” control over immigration policy.<sup>338</sup>

Looking to the future, the new sanctuary movement’s primary contributions to immigration politics might be its galvanization of a fresh and engaged set of political actors on enforcement policy. Some major players in the sanctuary movement, especially large, prominent jurisdictions like San Francisco and New York City, have long battled with the federal government over immigration enforcement and are likely to continue to do so into the future.<sup>339</sup> Federal lawmakers representing those areas have been sensitive to these constituent interests.<sup>340</sup> But now, as a diverse group of religious institutions are claiming to provide sanctuaries, a new crop of powerful community institutions has been galvanized.<sup>341</sup> Some are the same denominations and

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338. See *Chae Chan Ping v. United States*, 130 U.S. 581, 604–07 (1889) (describing the powers of the federal government, one of which is the power to regulate the presence of individuals from foreign nations in the United States).

339. See S.F., CAL., ORDINANCE 375–89 (1989) (amended and current version at S.F., CAL., ADMIN. CODE §§ 12H.1–.6 (2016)); *City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999) (challenging a federal statute that forced City of New York to provide information about the immigration status of aliens to federal authorities).

340. E.g., JERRY KAMMER, A TALE OF TWO SENATORS: ROB PORTMAN, CHUCK SCHUMER, AND THREE DECADES OF CONGRESSIONAL FAILURE IN IMMIGRATION ENFORCEMENT 2–3 (2013), <http://cis.org/sites/cis.org/files/kammer-two-senators.pdf> (noting that Chuck Schumer, a long-serving New York senator, was “a key broker of the Immigration Reform and Control Act of 1986” and labeling him as “the id of immigration policymaking—eager and insistent”); cf. Dan Walters, *Feinstein’s Evolving View on Immigration Reflects State’s*, S.F. EXAMINER (Apr. 3, 2017), <http://www.sfexaminer.com/feinsteins-evolving-view-immigration-reflects-states> (reporting that, when California Senator Feinstein was elected in 1994 she channeled California’s hard stance against illegal immigration but now channels California’s pro-immigrant sentiment in “vociferous opposition to Trump”).

341. See Nathan Guttman, *Synagogue and Church Unite to Offer Sanctuary to Immigrant Mom*, FORWARD (Aug. 23, 2017), <http://forward.com/fast-forward/380818/synagogue-and-church-unite-to-offer-sanctuary-to-immigrant-mom> (reporting on a Denver synagogue and Methodist church that united to offer sanctuary to undocumented family); Claudia Torrens, *Guatemalan Immigrant Seeks Sanctuary in Manhattan Church*, SEATTLE TIMES (Aug. 17, 2017), <https://>

churches that provided sanctuary in the 1980s; others, however, are places of worship from other faiths, which cater to a variety of ethnicities and races not represented in that original sanctuary push.<sup>342</sup> The same can be said of groups of high-tech and social-media-oriented individuals who have created phone applications, and joined coding campaigns and enforcement-alert networks to warn of federal enforcement efforts.<sup>343</sup> Indeed, restaurants and colleges that perhaps never thought they needed to be clear on where they stand on ICE enforcement have been forced, either by constituent request or by federal demands, to clarify their protective positions.

These individuals and organizations are likely to see themselves as political actors, specifically on the issue of immigration enforcement, in a way that may not have occurred but for the expanded sanctuary movement. Joining the sanctuary movement, even in ways that are mostly symbolic, reifies their civic identity in the eyes of those they serve and in those of federal and state officials who might oppose their stances. In the coming years, as federal officials seek funding for a border wall or greater enforcement resources, these groups are likely to maintain the vocal positions they assumed as part of the sanctuary movement.

Thus, even if the federal government can leverage, coerce, bribe or otherwise override sanctuaries and compel participation in immigration enforcement, it might be doing so at the cost of further antagonizing a now-mobilized and entrenched constituency that shares a clearly defined ideological orientation on such actions. Any short-term wins for the federal administration on undermining sanctuary may galvanize a broader network of immigration governance and multiply potential resistance nodes to the federal government's long-term enforcement plans.

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[www.seattletimes.com/nation-world/guatemalan-immigrant-seeks-sanctuary-in-manhattan-church](http://www.seattletimes.com/nation-world/guatemalan-immigrant-seeks-sanctuary-in-manhattan-church) (discussing a Guatemalan mother and her three children who found shelter in a Manhattan church); Kimberly Winston, *Ohio Mosque Is First to Join Sanctuary Movement*, RELIGION NEWS SERV. (Jan. 23, 2017), <http://religionnews.com/2017/01/23/ohio-mosque-is-first-to-join-sanctuary-movement> (discussing a Cincinnati mosque's decision to join the church sanctuary movement).

342. Samuel, *supra* note 59 (discussing the Cincinnati Clifton Mosque's attempt at becoming a sanctuary congregation).

343. See, e.g., Olivia P. Tallet, *Undocumented Immigrants Turn to Technology to Avoid Arrests*, HOUS. CHRON. (Apr. 16, 2018), <https://www.houstonchronicle.com/news/article/New-mobile-app-helps-immigrants-at-risk-12833276.php> (discussing new smartphone applications that help undocumented immigrants when they are targeted by ICE).

## CONCLUSION

This Article brings necessary attention to the variety of ways in which the label “sanctuary” has expanded. Going beyond the traditional categories of sanctuary cities, rooted in public law, and sanctuary churches, rooted in property law and free exercise rights, a myriad of institutions and organizations have chosen to adopt policies that mitigate federal enforcement efforts. These new sanctuaries, in several jurisdictions, have the ability to work together in a network to effectively recalibrate federal enforcement and provide de facto governance over immigration enforcement. More broadly, this distributed network decenters federal and state administrative officials, including the President, as the sole locus of enforcement policy. In addition, they bring to the fore the political power and governance authority of several previously ignored institutions and actors. Thus reimagined, our project emboldens such institutions and associations as critical actors in the project of norm creation and actual governance, in ways that are likely to influence immigration policymaking both now and into the future.