
The New Sanctuary and Anti-Sanctuary Movements

Rose Cuison Villazor^{†*} and Pratheepan Gulasekaram^{**}

TABLE OF CONTENTS

INTRODUCTION	549
I. SANCTUARY EVERYWHERE	553
II. ANTI-SANCTUARY	560
III. TOWARDS NEW THEORETICAL FRAMEWORKS	566
CONCLUSION.....	569

INTRODUCTION

“You’re going to have to go through us to deport Dreamers who work here,”¹ announced Brad Smith, the President of Microsoft,² moments after President Trump rescinded the Deferred Action for Childhood Arrivals (“DACA”) program.³ Acknowledging that

[†] Copyright © 2018 Rose Cuison Villazor and Pratheepan Gulasekaram. This article is based on remarks at the UC Davis Law Review’s Volume 51 Symposium “Immigration Law & Resistance: Ensuring a Nation of Immigrants.”

^{*} Professor of Law and Chancellor’s Social Justice Scholar, Rutgers University School of Law.

^{**} Professor of Law, Santa Clara University School of Law. We thank the participants of the UC Davis Law Review Symposium, “Immigration Law & Resistance: Ensuring a Nation of Immigrants” for comments and feedback to this Essay. This Essay introduces some concepts that we explore further in our forthcoming work, *Sanctuary Networks*, which will be published by the *Minnesota Law Review*, as well as our current work-in-progress, *State Anti-Sanctuary & Immigration Localism*, which we co-author with Rick Su. All our errors are our own.

¹ Todd Haselton, *Microsoft to Trump: You’re Going to Have to Go Through Us to Deport Dreamers Who Work Here*, CNBC (Sept. 5, 2017, 2:34 PM), <https://www.cnbc.com/2017/09/05/microsoft-response-to-daca-will-defend-dreamers-in-court.html>.

² *Id.*

³ Memorandum from Elaine C. Duke, Acting Sec’y of the U.S. Dep’t of Homeland Sec., to James W. McCamen, Acting Dir. of U.S. Citizenship and Immigration Servs. et al., on Rescission of Deferred Action for Childhood Arrivals (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

Microsoft has thirty-nine workers who have received deferred action through DACA, Mr. Smith stated that the company would “exercise its legal rights properly to help protect [its] employees.”⁴ In vowing to protect the Dreamers,⁵ Microsoft has joined other employers that, prior to the President’s decision to rescind DACA, offered to create a safe haven for their workers. These employers include restaurant owners who are establishing “sanctuary workplaces” for their employees.⁶ In addition to prohibiting harassment of restaurant workers on the basis of immigration status and declaring their businesses as “sanctuary restaurants,”⁷ these employers would require federal immigration officers to produce a judicial warrant before being allowed to enter their restaurants.⁸ By vowing to protect immigrant workers and use their legal rights to resist federal immigration enforcement, these employers have essentially joined the sanctuary movement.

The term sanctuary has traditionally referred either to private humanitarian work by religious organizations or to non-cooperation policies by “sanctuary cities.”⁹ But as these recent actions of employers demonstrate, the meaning of the word “sanctuary” is evolving.

Indeed, since President Trump’s election, other novel types of “sanctuary” have emerged. Universities and school districts have adopted the sanctuary moniker to create policies designed to preserve the privacy of their undocumented students.¹⁰ Private individuals,

⁴ Haselton, *supra* note 1.

⁵ The “Dreamers” refer to individuals who would have benefitted from a proposed legislation, the Development, Relief, and Education for Alien Minors Act of 2011 (“DREAM Act of 2011”), that was intended to provide lawful permanent residency to immigrants who were unlawfully brought to the United States when they were children. *See* S. 952, 112th Cong. (as introduced in the Senate, May 11, 2011). Since 2001, different iterations of the DREAM Act have been proposed in Congress. *See, e.g.*, Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001). The bipartisan bill failed to pass Congress. *See* Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 82, 85-89 (2013) (discussing legislative history of DREAM Act of 2011).

⁶ Joshua Sabatini, *San Francisco Restaurant Owners Offer Employees Sanctuary Workplace*, S.F. EXAMINER (Mar. 10, 2017, 1:00 AM), <http://www.sfexaminer.com/san-francisco-restaurant-owners-offer-employees-sanctuary-workplace/>.

⁷ *Id.*

⁸ *See id.*

⁹ *See* Rose Cuison Villazor, *What is a “Sanctuary?”*, 61 SMU L. REV. 133, 148-51 (2008); Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. (forthcoming 2018) (manuscript at Part II) (explaining the traditional public and private conceptions of sanctuary).

¹⁰ *See, e.g.*, Kathleen Megan, *Wesleyan Declares Itself a Sanctuary Campus for*

neighborhoods, and communities have engaged in various acts to support those immigrants who are being targeted for removal or detention¹¹ or, at the very least, to highlight the treatment they receive from the Immigration and Customs Enforcement (“ICE”).¹² Social media has also become sites of resistance as public officials and private individuals have issued warnings about potential ICE raids.¹³ Advocates have criticized ICE for making arrests at courthouses¹⁴ and hospitals,¹⁵ and called for common carriers, such as Greyhound, to limit the ability of ICE to board their buses without a warrant.¹⁶ No doubt, what constitutes sanctuary today has progressed beyond its conventional public and private definitions.

While the sanctuary movement is spreading, a counter movement is also expanding. Specifically, states and cities have passed or proposed legislation that seeks to punish sanctuary cities and sanctuary campuses. The most well-known of these is Texas SB 4, which was passed in May 2017.¹⁷ Texas SB 4 requires localities and campuses to

Undocumented Immigrants, HARTFORD COURANT (Nov. 23, 2016, 6:00 AM), <http://www.courant.com/education/hc-college—trump-sanctuary-1123-20161122-story.html>.

¹¹ See, e.g., 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>.

¹² See, e.g., *SF Rapid Response Network*, SFILEN, <http://sfilen.org/resources/sf-rapid-response-network/> (last visited Jun. 30, 2018).

¹³ Jacob Steinblatt & Ethan Harfenist, *Facebook Groups Warn Immigrants About ICE Raids, Checkpoints*, VOCATIV (Feb. 22, 2017, 4:00 PM), <http://www.vocativ.com/404788/facebook-groups-warn-immigrants-ice-raids/index.html>.

¹⁴ See, e.g., Nicole Brown & Rajvi Desai, *ICE Should Be Banned from Courthouses, Immigration Advocates Say*, AM N.Y. (Dec. 7, 2017, 8:01 PM), <https://www.amny.com/news/ice-agents-courthouse-arrest-1.15310785>; Shannon Dooling, *Advocates Ask SJC to Block Immigration Arrests at Mass. Courthouses*, WBUR NEWS (Mar. 15, 2018), <http://www.wbur.org/news/2018/03/15/blocking-arrests-at-courthouses>. In March 2017, the Chief Justice of the California Supreme Court sent a letter to U.S. Attorney General Jeff Sessions requesting federal immigration agents to not make arrests in California courthouses. See Tani Cantil-Sakauye, Chief Justice, Cal. Supreme Court, Letter to Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice (Mar. 16, 2017), <https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses>.

¹⁵ David M. Perry, *ICE Keeps Raiding Hospitals and Mistreating Disabled Children*, PAC. STANDARD (Jan. 15, 2018), <https://psmag.com/social-justice/ice-keeps-raiding-hospitals-and-harming-disabled-children>.

¹⁶ *ACLU Urges Greyhound to Stop Letting Federal Agents on Board to Conduct Immigration Sweeps*, NBC NEWS (Mar. 23, 2018, 3:36 AM), <https://www.nbclosangeles.com/news/local/ACLU-Urges-Greyhound-to-Stop-Letting-Federal-Agents-on-Board-to-Conduct-Immigration-Sweeps-477722453.html>.

¹⁷ S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017).

cooperate with ICE in sharing information about noncitizens, and assisting in their detention and transfer into federal custody.¹⁸ Other states, like Georgia and Mississippi, more specifically target campus sanctuary policies.¹⁹ Meanwhile, Florida is considering legislation similar to TX SB 4.²⁰ Notably, these state anti-sanctuary laws have found common cause with some cities located in the “sanctuary state” of California.²¹ California acquired that name after it passed the California Values Act, also known as SB 54, which prohibits the use of state and city funds to enforce certain provisions of federal immigration law.²² The City of Huntington Beach filed a lawsuit against the state, contending that California SB 54 violates the local government’s power to control its own municipal affairs.²³ Other cities in California, like Los Alamitos and Santa Clarita, have similarly expressed their opposition to the state’s sanctuary law.²⁴

But, it is not just local governments that have expressed support for federal immigration enforcement and bucked the sanctuary trend. Private actors have joined the effort as well. For example, Motel 6 allegedly reported the names of customers to ICE.²⁵ Many employees stated that their employers have threatened to have them deported.²⁶ The emergence of these anti-sanctuary laws, policies, and actions

¹⁸ *Id.*

¹⁹ H.B. 37, 2017-2018 Leg., Reg. Sess. (Ga. 2017); S.B. 2710, 2017 Reg. Sess. (Miss. 2017).

²⁰ Olivia Tallet, *Immigrants in Florida, Facing a Texas SB-4 “Anti-Sanctuary” Environment, Activist Say*, CHRON (Feb. 19, 2018, 11:27 AM), <https://www.chron.com/news/houston-texas/article/A-coalition-issues-a-travel-advisory-against-12614757.php>.

²¹ Jazmine Ulloa, *Legislature Declares California Will Be A ‘Sanctuary State,’* L.A. TIMES (Sept. 16, 2017, 1:50 AM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-lawmakers-take-final-action-1505534909-htmstory.html>.

²² S.B. 54, 2017-2018 Leg., Reg. Sess. (Cal. 2017).

²³ Complaint at 3, *City of Huntington Beach v. State of California*, No. 2018-80002876-CV (Cal. Apr. 5, 2018), https://www.huntingtonbeachca.gov/government/elected_officials/city_attorney/city-of-huntington-beach-vs-state-of-california-ref-sb54.pdf.

²⁴ Roxana Kopetman, *Orange, Newport Beach Join Other Orange County Cities Opposing California Sanctuary Law*, OC REG. (Apr. 11, 2018, 10:42 AM), <https://www.oregister.com/2018/04/11/orange-newport-beach-join-other-orange-county-cities-opposing-california-sanctuary-law/>.

²⁵ Doreen McCallister, *Motel 6 Gave Guest Information to Immigration Agents, Lawsuit Says*, NPR (Jan. 4, 2018, 6:36 AM), <https://www.npr.org/sections/thetwo-way/2018/01/04/575567251/motel-6-gave-guest-information-to-immigration-agents-lawsuit-says>.

²⁶ Andrew Khouri, *More Workers Say Their Bosses Are Threatening to Have Them Deported*, L.A. TIMES (Jan. 2, 2018, 7:00 AM), <http://www.latimes.com/business/la-fi-immigration-retaliation-20180102-story.html>.

demonstrates the increasing efforts by state, city, and private actors to support federal immigration enforcement.

What do these two trends — the expansion of sanctuary in sites and scope of protection provided to immigrants and increasing of public and private anti-sanctuary expressions — that developed after Donald Trump’s election to the Presidency suggest about immigration law? This Essay sketches our initial answers to this question that we will explore more in-depth in our forthcoming work.²⁷ Ultimately, this Essay argues that these developments call for a rethinking of how we descriptively, doctrinally, and theoretically understand governance in immigration law. Specifically, we contend that traditional doctrinal and normative conceptions about governance on immigration law place too much emphasis on the federal government’s plenary role and power over immigration law. This conventional approach overlooks the important roles that non-federal stakeholders — states, cities, individuals, and other private actors — play in immigration law governance that are occurring on the ground. Ignoring the role of these stakeholders is curious given that the federal immigration statutory and administrative regulatory scheme relies on the participation of state, local, and private individuals. Thus, greater attention must be paid to these emerging trends in sanctuary and anti-sanctuary movements, and how they are changing how governance over immigration is and should be conducted.

In Part I, we briefly provide examples of novel sanctuary policies and the laws they rely upon to support their acts of legal resistance to federal immigration enforcement. Next, Part II discusses recent anti-sanctuary laws and how expressions of state and local sovereignty have formed the basis of both limiting sanctuary policies and supporting federal immigration enforcement. Finally, in Part III, we contend that these developments point to the need to develop a new theory in immigration law — one that takes into account the roles, influence, and power of various non-federal stakeholders in the governance of immigration law.

I. SANCTUARY EVERYWHERE

The legal and political discourse on “sanctuary” has long been obsessed with state and local rights.²⁸ Typically, when the term is

²⁷ Villazor & Gulasekaram, *supra* note 9, at 6-9; Pratheepan Gulasekaram, Rick Su, & Rose Cuison Villazor, *State Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. (forthcoming Apr. 2019).

²⁸ Ilya Somin, Opinion, *Federalism, the Constitution, and Sanctuary Cities*, WASH. POST

invoked by a city²⁹ or derided by the current Administration,³⁰ they refer to jurisdictions declining to participate in federal immigration enforcement.³¹ The “sanctuary city’s” refusal to cooperate generates questions focused on federalism principles and whether the Tenth Amendment prohibits the federal government from conscripting state and local governments into doing their work for them.³² This legal posture relies primarily on the constitutional authority of states and local governments to govern their internal matters including those that deal with the safety and general welfare of their residents.³³ Defending state and municipal sanctuary policies thus conjures the structural power allocation contests inherent in a federalist system, with emphasis on the hard lines that separate federal and sub-federal sovereigns.

The predominance of this sanctuary conception is striking, given that providing sanctuary for immigrants is rooted in a rich history of non-governmental opposition to federal immigration policies.³⁴ It

(Nov. 25, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/26/federalism-the-constitution-and-sanctuary-cities/?utm_term=.08a2082d3ca6 (noting that the “fight over sanctuary cities is an example of how federalism and constitutional limitations on federal power can sometimes protect vulnerable minorities — in this case undocumented immigrants”); see *County of Santa Clara v. Trump*, No. 3:17-CV-574-WHO (N.D. Cal. Nov. 20, 2017); *City & County of San Francisco v. Trump*, No. 3:17-CV-485-WHO (N.D. Cal. Nov. 20, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

²⁹ Bradley Zint, *Glendale Police Vow Not to Enforce Federal Immigration Laws*, L.A. TIMES (Apr. 1, 2017, 8:35 AM), <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”).

³⁰ Elise Foley & Marina Fang, *White House, Trump Attack Judicial Branch Again by Misconstruing ‘Sanctuary City’ Ruling*, HUFF POST (Apr. 26, 2017, 10:57 AM), http://www.huffingtonpost.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”).

³¹ See Villazor & Gulasekaram, *supra* note 9, at 16-37 (explaining the conventional meaning of sanctuary city).

³² *Printz v. United States*, 521 U.S. 898, 925 (1997); *New York v. United States*, 505 U.S. 144, 157 (1992).

³³ See Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 UC 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” in “do[ing] the right thing for the entire community. Th[e]se decisions are critical to principles of inclusion in our ever-growing diverse communities.”).

³⁴ See *infra* Part II.A (discussing the history of the use of sanctuary in the United States).

emerged from religious organizations' desire to provide refuge and places of physical sanctuary to Central American migrants in the 1980s.³⁵ Obviously, this prior conception of sanctuary was not based in sovereignty or structural power allocations. As non-constitutional actors, these original sanctuaries did not invoke federalism as the basis of their defiance. Instead, they focused on the moral force of their religious motivation, and their rights grounded in the First Amendment, private property law, and criminal law.³⁶

Upon closer examination, however, even this dichotomous understanding of sanctuary — the concept of providing some form of protection or refuge for undocumented immigrants in either public or private forms — fails to capture our current reality. Since the 2016 election and subsequent crackdown on immigration, resistance to federal immigration efforts has proliferated.³⁷ The traditional manifestations of sanctuary remain loci of refuge but they have expanded and become more robust.

Consider New York City, which has long-been known as a sanctuary city.³⁸ In October 2017, the city bolstered its policies by passing a law that prohibits all city employees from asking individuals about their immigration status, a policy that previously applied only to law enforcement officers.³⁹ Additionally, New York City has refused all

³⁵ To be sure, the concept of providing refuge in the United States to immigrants can be traced further back in history. For instance, the Catholic Church sought to provide a safe haven to Cuban refugees in the 1960s. The Cuban Children's Exodus, PEDROPAN.ORG, <http://www.pedropan.org/category/history> (last visited July 30, 2017). Europe's destruction following World War II allowed 200,000 displaced Europeans to enter the United States. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009.

³⁶ See *infra* Part II.

³⁷ See *infra* Part II.

³⁸ New York City has been known as a "sanctuary city" since it adopted a policy in 1989 of prohibiting police officers from disclosing information about a person's immigration status to federal officials. See *City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999) (discussing New York City Mayor's Executive Order 124 that restricted police officers from disclosing a person's immigration information to federal officers unless the person gave consent or criminal activity was involved). In 2003, New York City adopted a new confidentiality law, under Executive Order 34, which prohibited both city officers and employees from inquiring about an immigrant's status unless required by law (or to investigate criminal activity) from 2003 forward. Exec. Order No. 34, §§ 3-4 (N.Y. 2003), <https://www1.nyc.gov/assets/immigrants/downloads/pdf/eo-34.pdf>. Interestingly, Executive Order 34 § 4(b) states that "[p]olice officers and peace officers, including members of the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity." *Id.* § 4(b).

³⁹ N.Y.C., N.Y., ADMIN. CODE § 10-178 (2017), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3022098&GUID=D0BFA473-FA7C-4FA6-83C4->

detainer requests from ICE, which has drawn the ire of the federal government.⁴⁰

More broadly, California became the first “sanctuary state” with the passage of SB 54, the California Values Act,⁴¹ which limits state and local law enforcement officers’ ability to communicate with federal immigration authorities about a person’s immigration status.⁴² Effective as of January 1, 2018, SB 54 also prevents law enforcement officials from asking about a person’s immigration status and detaining them for violating immigration law.⁴³ Another California law, AB 450,⁴⁴ demonstrates the merger of public and private sanctuary in the context of employment. AB 450 attempted to extend sanctuary protections in the workplace by barring employers from cooperating with ICE unless ICE has a judicial warrant.⁴⁵

Lastly, churches and their members have also extended their sanctuary assistance beyond their rectories, synagogues, and mosques. Some church members have purchased and renovated houses to “shelter hundreds, possibly thousands” of undocumented immigrants in California fearing deportation.⁴⁶ Other church members have decided to host immigrants in their own homes and are willing to challenge ICE agents seeking access to their homes.⁴⁷

But other types of action, some public and some private, have gained important roles in the movement to resist harsh federal enforcement efforts. This Essay notes at least three emerging examples. The first includes universities that have declared themselves “sanctuary

216E9706EE7A.

⁴⁰ Liz Robbins, *De Blasio Defends New York Policies on Immigration*, N.Y. TIMES (June 28, 2017), <https://www.nytimes.com/2017/06/28/nyregion/bill-de-blasio-defends-new-york-policies-on-immigration.html>.

⁴¹ See S.B. 54, 2017-2018 Leg., Reg. Sess. (Cal. 2017) (codified at CAL. GOV’T CODE § 7284.6 (2018)).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ A.B. 450, 2017-2018 Leg., Reg. Sess. (Cal. 2017) (the warrant requirements are codified at CAL. GOV’T CODE §§ 7285.1(a), 7285.2(a)(1) (2018)). Important to note, however, that AB 450 has been temporarily enjoined by a district court on the basis that the federal government is likely to prevail on the claim that the California law violates the intergovernmental immunities doctrine. Order Re: The United States of America’s Motion for Preliminary Injunction, *United States v. California*, No. 2:18-CV-490-JAM-KJN (E.D. Cal. July 5, 2018).

⁴⁵ A.B. 450, 2017-2018 Leg., Reg. Sess. (Cal. 2017).

⁴⁶ Kyung Lah, Alberto Moya & Mallory Simon, *Underground Network Readies Homes to Hide Undocumented Immigrants*, CNN (Feb. 26, 2017, 8:46 PM), <http://www.cnn.com/2017/02/23/us/california-immigrant-safe-houses/index.html>.

⁴⁷ *Id.*

campuses.”⁴⁸ Wesleyan University, for instance, explained that they “would not cooperate with any efforts to round up people, unless . . . forced to.”⁴⁹ This includes not sharing their students’ information with ICE, unless the agency provides a warrant. Others chose not to adopt the sanctuary label but instead issued policies⁵⁰ that support their undocumented students⁵¹ and those who have temporary authorized status under DACA. Among these is the University of California, which has provided resources for DACA and other undocumented students and vowed not to cooperate with immigration enforcement.⁵² Others, such as Columbia University, instantiated a policy that require ICE to provide a warrant before entering their campus.⁵³

The moves these universities have made demonstrate the unique and privileged position that they occupy in their ability to protect their students. At the outset, their decision to not disclose their students’ information, except when ICE presents a warrant, is grounded on the Federal Education Rights and Privacy Act (“FERPA”).⁵⁴ Additionally, because universities exist for the purpose of educating students, they have the expected obligation of ensuring a safe educational environment for all of their students. Lastly, universities are not required to obtain information about their students’ immigration status. This means that universities would not have the relevant information that ICE would want to acquire to find an undocumented student. In other words, the type of protection that sanctuary campuses offer draws upon legal frameworks different than those relied upon by sanctuary churches and cities.

A second example of a new form of sanctuary that emerged after the election of President Trump may be found in the workplace. To begin,

⁴⁸ See, e.g., Megan, *supra* note 10.

⁴⁹ *Id.*

⁵⁰ See 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>.

⁵¹ See Aaron Holmes, *University to Provide Sanctuary, Financial Support for Undocumented Students*, COLUM. SPECTATOR (Nov. 22, 2016, 7:54 PM), <http://columbiaspectator.com/news/2016/11/21/university-provide-sanctuary-financial-support-undocumented-students>.

⁵² Press Release, Janet Napolitano, President, Univ. of Cal., *UC President Napolitano Denounces Decision to End DACA Program, Calls on Congress to Make Protections Permanent* (Sept. 5, 2017), <https://www.universityofcalifornia.edu/press-room/uc-president-napolitano-statement-decision-end-daca-program>.

⁵³ See Holmes, *supra* note 51.

⁵⁴ Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g (2018).

several restaurants have banded together to form a group, Restaurant Opportunity Centers United (“ROCU”), and adopted policies that seek to assist their employees and members. These policies include protecting workers against harassment based on the worker’s immigration status and collaborating with other organizations to help workers who have been detained by ICE.⁵⁵ ROCU also promotes putting up signs in their establishments that refer to them as “sanctuary restaurants” and stating that there is a seat at the table for everyone.⁵⁶ This movement has gained support in some cities, including Oakland and Emeryville, both of which are in California.⁵⁷ Both cities enacted resolutions encouraging employers and other businesses to create a “sanctuary workplace” and to prevent harassment of workers based on their immigration or refugee status. To be sure, federal immigration law prohibits employers from hiring unauthorized workers.⁵⁸ However, these “sanctuary workplaces” seem to focus more on preventing hostile work environments in which employees get targeted, at times wrongly, by co-workers or customers because of their perceived undocumented status.

In some contexts, employees have asked their employers to maintain the confidentiality of their information which is typically provided on I-9 forms.⁵⁹ The law requires employers to obtain information from employees about their authorization to work but some workers contend that employers are not obligated to disclose that information to ICE agents during an immigration raid unless the agents possess a

⁵⁵ ‘Sanctuary Restaurants’ Movement Launches to Promote Hate and Discrimination Free Workplaces, RESTAURANT OPPORTUNITY CTRS. UNITED (Jan. 4, 2016), <http://rocunited.org/2017/01/sanctuary-restaurants-movement-launches-promote-hate-discrimination-free-workplaces/> (explaining that ROCU’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”).

⁵⁶ *Id.*

⁵⁷ Riley McDermid, *Oakland Passes Resolution Asking Businesses to Create Sanctuary Workplaces*, S.F. BUS. TIMES (Apr. 19, 2017, 12:56 PM), <https://www.bizjournals.com/sanfrancisco/news/2017/04/19/oakland-immigration-sanctuary-workplaces.html>.

⁵⁸ Immigration and Nationality Act § 274A (codified as amended at 8 U.S.C. § 1324a (2018)).

⁵⁹ See Tim Goulet, *We Are a Sanctuary Union*, SOCIALIST WORKER (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 source was found on the Teamsters website at *This Week’s Teamster News for June 24-30*, INT’L BROTHERHOOD TEAMSTERS (June 30, 2017) <https://teamster.org/blog/2017/06/weeks-teamster-news-june-24-30>.

warrant.⁶⁰ Relatedly, some employers, seeking to further protect their workers, have asserted that ICE agents may not enter the workplace unless they possess a judicially signed warrant.⁶¹ This positioning is grounded on both the common law property right to exclude and Fourth Amendment rights.

A third burgeoning example is what this Essay calls “social media sanctuary.” Individuals and groups have used Twitter, Facebook, and text messages to warn immigrants and communities about potential ICE raids.⁶² For example, on February 27, 2018, Oakland Mayor Libby Schaff tweeted about impending ICE raids in the Bay Area.⁶³ Mayor Schaff received significant criticism from the Trump administration, which claimed that hundreds of targeted immigrants remained undetected as a result.⁶⁴

The effectiveness of social media sanctuary, however, is uncertain. On the one hand, social media sanctuary offers swift and effective means of frustrating immigration law enforcement. Additionally, there seem to be few legal limits on the transmission of such information. On the other hand, many social media warnings have turned out to be unreliable and are thus criticized for stoking fears among immigrant communities.⁶⁵ Nevertheless, social media sanctuary has the potential to place robust limitations on immigration law enforcement. Indeed, developers are working to create an app that would alert immigrants about “crowdsourced” and confirmed information about ICE raids.⁶⁶

In sum, analysis through only a governmental⁶⁷ or religious⁶⁸ lens presents an incomplete picture because it ignores all the other ways

⁶⁰ David Bacon, *Fighting for the Sanctuary Workplace: Unions Mobilize to Protect Undocumented Workers*, Truthout (June 24, 2017), <http://www.truth-out.org/news/item/40964-fighting-for-the-sanctuary-workplace-unions-mobilize-to-protect-undocumented-workers>.

⁶¹ See Haselton, *supra* note 1.

⁶² See Nicholas Kulish et al., *Reports of Raids Have Immigrants Bracing for Enforcement Surge*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/us/immigration-raids-enforcement.html>.

⁶³ Amy Held, *Oakland Mayor Stands by ‘Fair Warning’ of Impending ICE Operation*, NPR (Mar. 1, 2018, 5:36 PM), <https://www.npr.org/sections/thetwo-way/2018/03/01/589948064/oakland-mayor-stands-by-fair-warning-of-impending-ice-operation>.

⁶⁴ See *id.*

⁶⁵ See Kulish et al., *supra* note 62.

⁶⁶ See Patrick Howell O’Neill, *‘Raid Alerts’ Wants to Warn Undocumented Immigrants with an App*, VICE (Feb. 18, 2017, 7:00 AM), https://motherboard.vice.com/en_us/article/xy7yzn/raid-alerts-wants-to-warn-undocumented-immigrants-with-an-app.

⁶⁷ See, e.g., Barbara E. Armacost, *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1202 (2016) (arguing that sanctuary cities and policies reinforce

that individuals and entities provide sanctuary to immigrants today. It also eclipses the ways in which the federal, state, and local governments and individuals have challenged these sanctuary policies that support immigrants. Perhaps more importantly, it obscures how a myriad of public and private institutions and entities, in practice, exert governance and authority over noncitizens.

II. ANTI-SANCTUARY

Not surprisingly, the expansion of sanctuary across local governments and private actors has galvanized responses from several quarters. Thus far, much of the media and scholarly attention to this anti-sanctuary trend has focused on federal efforts to crack down on sanctuary efforts. Accordingly, much has been written about the Department of Justice's ("DOJ") recent attempts to force cooperation from localities that have chosen not to participate in immigration enforcement.⁶⁹ Those federal efforts, however, are under significant litigation pressure as localities across the country have challenged, and

federalism); Hing, *supra* note 33, at 278 (analyzing litigation between state actors and federal law); Huyen Pham, *Problems Facing the First Generation of Local Immigration Laws*, 36 HOFSTRA L. REV. 1303, 1304 (2008) (focusing on obstacles for public entities implementing anti-immigrant policies); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 778-79 (2008) (showing how federal laws shift the burden of immigration enforcement onto private parties like employers); Rose Cuison Villazor, "Sanctuary Cities" and Local Citizenship, 37 FORDHAM URB. L.J. 573, 577-78 (2010) (detailing public tensions between San Francisco's Mayor, Board of Supervisors, citizen ideologies, and federal immigration policies); Villazor, *supra* note 9 (defining "sanctuary" with its public and private dimensions).

⁶⁸ See, e.g., Armacost, *supra* note 67 (sanctuary cities and policies reinforce principles of federalism); Kristina M. Campbell, *Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 86 (2012) (quoting religious leader opposed to Oklahoma state law that banned providing sanctuary: "[T]he question of immigration is not simply a social, political, or an economic issue; it is also a moral issue because it impacts on the well-being of millions of our neighbors"); Kara L. Wild, *The New Sanctuary Movement: When Moral Mission Means Breaking the Law, and the Consequences for Churches and Illegal Immigrants*, 50 SANTA CLARA L. REV. 981, 983 (2010) (discussing how a church's humanitarian mission to provide aid clashes with federal immigration policy).

⁶⁹ See Taj Kopan, *DOJ Ramps Up Sanctuary Cities Battle as Court Deals It Another Blow*, CNN POL. (Nov. 15, 2017, 3:02 PM), <https://www.cnn.com/2017/11/15/politics/sanctuary-cities-trump-administration-fight/index.html>; Kevin Alex Pappas, *DOJ Threatens to Subpoena Sanctuary Cities — Prompting Mayors to Boycott Trump Meeting*, FOX NEWS (Jan. 24, 2018), <http://www.foxnews.com/politics/2018/01/24/doj-threatens-to-subpoena-23-jurisdictions-over-sanctuary-city-policies.html>; Kathryn Watson, *DOJ Cracking Down on Sanctuary City Funding*, CBS NEWS (July 25, 2017, 6:36 PM), <https://www.cbsnews.com/news/doj-cracking-down-on-sanctuary-city-funding/>.

largely succeeded in stalling, the Attorney General's anti-sanctuary campaign.⁷⁰ But while those federal efforts have hit legal roadblocks, an incipient anti-sanctuary movement has emerged. Like the sanctuary expansion, this anti-sanctuary trend has proliferated in state and local governments and looks to be gaining favor with enforcement-minded private actors as well. Below, we sketch out the basics of these policies.

Recent federal anti-sanctuary efforts have largely focused on administrative actions intended to financially punish jurisdictions that decline to share information with, or detain noncitizens for, federal immigration authorities. President Trump's Executive Order 13768, "Enhancing Public Safety in the Interior of the United States" explicitly laid out the President's intention to punish sanctuary jurisdictions.⁷¹ Despite several legislative attempts over the past several years, Congress has thus far been unable to pass any legislation, including those initiated in the first few months of the Trump Presidency, which tamps down on sanctuary policies.⁷² In this legislative void, the Attorney General took up the President's call and initiated a DOJ led effort to force compliance from states and localities that resisted cooperation with ICE. The Attorney General's anti-sanctuary campaign has attempted to defund localities in hopes of coercing their participation. Specifically, the DOJ has threatened to pull several federal law enforcement funds from jurisdictions that fail to cooperate with ICE.⁷³ In response, jurisdictions across the country including the Bay Area, Chicago, and Philadelphia sued the federal government, arguing that the DOJ's heavy-handed approach violated administrative law constraints, federalism principles, and separation of powers limitations on the executive branch.⁷⁴ In large part, these

⁷⁰ See *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017); *County of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, (N.D. Cal. 2017); see also Kopan, *supra* note 69.

⁷¹ Exec. Order No. 13, 768, 82 Fed. Reg. 8,799 § 9(a)-(c) (Jan. 30, 2017).

⁷² See, e.g., H.R. 824, 115th Cong. (2017) (preventing funding for infrastructure and transportation in sanctuary cities); S. 87, 115th Cong. (2017) (allowing state and local law enforcement to assist federal officials even if the state or local government passed sanctuary laws); H.R. 83, 115th Cong. (2017) (blocking federal funding from going to sanctuary cities).

⁷³ See Kopan, *supra* note 69; Pappas, *supra* note 69; Watson, *supra* note 69.

⁷⁴ See, e.g., *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087 (C.D. Cal. 2018); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 271 (E.D. Pa. 2018); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017); *County of Santa Clara*, 267 F. Supp. 3d 1201.

localities have been victorious, thus putting much of the Attorney General's crusade on hold for the time being.⁷⁵

The legal hurdles confronting the federal administration in its efforts provide important context for the emerging trend we seek to identify. While the administration's anti-sanctuary policies have stalled in federal court, individual states initiated their own anti-sanctuary efforts. As Part I notes, in the immediate aftermath of the Trump election, several colleges and universities across the country declared themselves to be sanctuary campuses.⁷⁶ In response, states like Alabama and Georgia enacted policies that undermined the ability of campuses in those states to adopt such policies.⁷⁷ And, contemporaneously, other states began to consider more comprehensive statewide legislation. The most notable of these is Texas's SB 4, which passed in May 2017.⁷⁸ Texas anti-sanctuary law took shape in response to the sanctuary trend identified in Part I. On November 8, 2016, the same day Trump was elected President, Sally Hernandez won election as the Sheriff for Travis County, Texas, which houses the relatively liberal state-capitol city of Austin.⁷⁹ Sheriff Hernandez promptly announced her opposition to involving her department in immigration enforcement activities and promised to adopt non-cooperation policies.⁸⁰ Texas's Republican-controlled state legislature and Governor's office responded swiftly and punitively. First, they threatened to remove state funding to Travis County. Second, within a few months, they drafted and passed SB 4.⁸¹ The law

⁷⁵ See cases cited *supra* note 74.

⁷⁶ *Supra* Part I.

⁷⁷ David Funke, *Here's Where the Sanctuary Campus Movement Stands*, USA TODAY C. (Dec. 19, 2016, 3:10 PM), <http://college.usatoday.com/2016/12/19/heres-where-the-sanctuary-campus-movement-stands/>; Bryan Lyman, *Alabama House Approves 'Sanctuary Campus' Bill*, MONTGOMERY ADVERTISER (Feb. 14, 2017, 9:46 PM), <https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/02/14/alabama-house-approves-sanctuary-campus-bill/97929404/>.

⁷⁸ The most notable of these is Texas's SB 4, which passed in May 2017. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017).

⁷⁹ Will Clark, *Travis County Elects Hernandez as New Sheriff*, DAILY TEXAN (Nov. 9, 2016, 2:01 AM), <http://dailytexanonline.com/2016/11/09/travis-county-elects-hernandez-as-new-sheriff>.

⁸⁰ Andy Jechow, *Sheriff May Include Additional Charges in ICE Detainer Policy*, KXAN (Feb. 17, 2017, 9:51 AM), <http://www.kxan.com/news/local/austin/sheriff-may-include-additional-charges-in-ice-detainer-policy/995097946>; Jay Root, *Austin Poised to Become First True 'Sanctuary City' in Texas*, TEX. TRIB. (Aug. 31, 2016, 12:00 AM), <https://www.texastribune.org/2016/08/31/austin-poised-become-first-sanctuary-city-texas/>.

⁸¹ Julian Aguilar, *Texas Senate Approves Anti-'Sanctuary' Legislation, Sending Bill to*

applies to all law enforcement officers and campus police officers in the state, and essentially compels their participation in immigration enforcement and cooperation with ICE.⁸² Specifically, it requires localities to comply with immigration detainer or hold requests from ICE, and bans localities from adopting, enforcing, or endorsing policies that “materially limit” cooperation with federal immigration authorities or communication with the same.⁸³ Thus, localities and law enforcement divisions are prohibited from preventing inquiry into immigration status, preventing information exchange with ICE, preventing immigration officers from entering jails, and preventing other forms of assistance or cooperation. To ensure compliance, SB 4 includes a harsh enforcement scheme. SB 4 allows citizens to bring complaints for any violation of SB 4 and threatens officials with civil and criminal penalties, as well as removal from office, if they violate that state law.⁸⁴

Soon after its enactment, several Texas cities and sheriffs sued the state law. In *City of Cenizo v. Texas*, the district court enjoined several provisions of SB 4 and prevented it from going into effect.⁸⁵ The district court primarily based its decision on the vagueness and First Amendment defects inherent in the law’s prohibitions on “endorsing” sanctuary policies and disclarity as to the meaning of “materially limit.”⁸⁶ More recently, however, the Fifth Circuit Court of Appeals reversed portions of the district court’s opinion and limited the injunction in important ways.⁸⁷ Critically, the circuit court reversed the injunction on the detainer provision, thus requiring that all localities in the state comply with detainer requests from federal immigration authorities. In addition, although the Fifth Circuit agreed that the words “endorse” and “materially limit” need further clarification, it limited the district court’s injunction to the provisions — or specific parts of provisions — affected by those terms.

House, TEX. TRIB. (Feb. 7, 2017, 7:00 PM), <https://www.texastribune.org/2017/02/07/texas-senate-tentatively-approves-anti-sanctuary-city-legislation/>; Julianne Hing, *Texas’s SB 4 is the Most Dramatic State Crackdown Yet on Sanctuary Cities*, NATION (June 1, 2017), <https://www.thenation.com/article/texas-sb-4-dramatic-state-crackdown-yet-sanctuary-cities/>.

⁸² *Id.*

⁸³ Tex. S.B. 4.

⁸⁴ See, e.g., *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017), *aff’d in part, vacated in part*, 890 F.3d 164 (5th Cir. 2018).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *City of El Cenizo v. Texas*, 890 F.3d 164, 173 (5th Cir. 2018).

SB 4's ultimate legal fate is not yet clear, as the case is only in the preliminary injunction stage, and other appeals — including to the Supreme Court — may still be in play. Regardless, what is striking so far has been the nature of the claims brought by litigants and the relative strength of the state's legal position. First, in this local versus state battle, many of the constitutional claims localities have advanced against federal anti-sanctuary policies simply have no purchase. Unlike the state versus federal context, localities litigating against the state cannot invoke the U.S. Constitution's Tenth Amendment, and its attendant anti-commandeering and anti-coercion principles. In many ways, the state's authority to enact and enforce its anti-sanctuary law is more complete. To be sure, localities still raised constitutional claims in the form of preemption arguments and Fourth Amendment based claims; but as a matter of structural power allocation, their municipal power claims have failed to carry the day against the state's decision to outlaw sanctuary policies.⁸⁸

Seemingly inspired by Texas's enactment and buoyed by the apparent strengths of the state's legal defense of its law, similar proposals have now found their way to legislative committees and floor votes in other states. Recently, Iowa began serious consideration of SB 4-type laws.⁸⁹ Florida also attempted to pass a comprehensive anti-sanctuary law, which ultimately did not pass the state legislature.⁹⁰ It is clear that an incipient trend is underway in receptive, enforcement-minded jurisdictions. Accordingly, the emergence of state anti-sanctuary laws has opened a new legal front in the battle against local sanctuaries. This trend allows enforcement-minded officials a more legally sound basis for their campaign against sanctuary localities and institutions. Because states can avoid the constitutional pitfalls that have thus stalled like-minded federal efforts and because states traditionally have enjoyed plenary control over localities, this state-level trend has significant ramifications for local discretion to engage in sanctuary policymaking. And, as we noted, some of the anti-sanctuary state laws target institutions like

⁸⁸ For more in-depth analysis of Texas SB 4 and other state anti-sanctuary laws, see Gulasekaram, Su & Villazor, *supra* note 27, at 30-45.

⁸⁹ Brianne Pfannenstiel, *Anti-Sanctuary City Bill Targeting Cities, Universities Advances in Iowa House*, DES MOINES REG. (Feb. 2, 2017, 6:43 PM), <https://www.desmoinesregister.com/story/news/politics/2017/02/02/anti-sanctuary-city-bill-targeting-cities-universities-advances-iowa-house/97398108/>.

⁹⁰ Dara Kam, *Florida House Ready to Pass 'Sanctuary City' Ban That Advocates Are Calling Anti-Immigrant*, ORLANDO WKLY. (Jan. 12, 2018, 10:57 AM), <https://www.orlandoweekly.com/Blogs/archives/2018/01/12/florida-house-ready-to-pass-sanctuary-city-ban-that-advocates-are-calling-anti-immigrant>.

universities,⁹¹ thus going after some of the vanguards of the new sanctuary movement outlined in Part I.

Accompanying this state level movement is a more recent municipal trend. Of course, some localities have long chosen to participate in federal enforcement efforts, signing 287(g) agreements or otherwise using local personnel and resources to help identify and transfer noncitizens to ICE custody.⁹² But more recently, localities — especially those in California — have taken on a slightly different posture. In light of California’s SB 54, some municipalities and sheriff’s departments have articulated and enacted counter policies in defiance of the state sanctuary law. Sheriff’s departments in Orange County, southern California, and Contra Costa County, northern California, have modified their policies to avoid SB 54’s proscription on informing ICE of release dates for noncitizens.⁹³ Doing so has facilitated communication between those sheriff’s offices and federal immigration officers. More directly and defiantly, cities like Los Alamitos, Santa Clarita, and Huntington Beach have concluded that SB 54 is unlawful. On that basis, those cities have either sued the state directly to enjoin the law or have sided with the federal government in its suit against three California laws intended to protect noncitizens from federal enforcement, including SB 54.⁹⁴

And, just as the new sanctuary movement has begun expanding to nongovernmental actors and institutions, apparently the anti-sanctuary movement has as well. Although the rise of vocal and conspicuous private anti-sanctuary actors has thus far not equaled their counterparts in the sanctuary movement, it nevertheless bears

⁹¹ See, e.g., Kayla Goggin, *Anti-Sanctuary Campus Bill Spikes Opponents’ Wrath*, CT. HOUSE NEWS (Mar. 9, 2017), <https://www.courthousenews.com/anti-sanctuary-campus-bill-inspires-opponents-wrath/>; Pfannenstiel, *supra* note 89.

⁹² *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (June 12, 2018), <https://www.ice.gov/287g> (listing all counties that signed 287(g) agreements).

⁹³ See Cindy Carcamo, *Orange County Supervisors Vote to Fight California ‘Sanctuary’ Laws*, L.A. TIMES (Mar. 27, 2018, 8:45 PM), <http://www.latimes.com/local/lanow/la-me-oc-sanctuary-20180327-story.html>.

⁹⁴ Nina Agrawal, *Santa Clarita Opposes California’s ‘Sanctuary’ Law, the First City in L.A. County to Do So*, L.A. TIMES (May 9, 2018, 7:45 AM), <http://www.latimes.com/local/lanow/la-me-ln-santa-clarita-sanctuary-20180508-story.html>; Cindy Carcamo et al., *Los Alamitos Wants Nothing to do With California’s ‘Sanctuary State’ Laws: Will it Start a New Resistance?*, L.A. TIMES (Mar. 19, 2018, 11:15 PM), <http://www.latimes.com/local/lanow/la-me-sanctuary-state-flight-20180319-story.html>; *Huntington Beach Votes to Sue Over Sanctuary State Status*, CBS L.A. (Apr. 2, 2018, 11:18 PM), <http://losangeles.cbslocal.com/2018/04/02/huntington-beach-sanctuary-city-status/>.

noting. Recently, the Motel 6 corporation⁹⁵ was sued by the state of Washington for disclosing customer information to ICE.⁹⁶ In addition, Greyhound Bus Lines recently rebuffed attempts by the ACLU and other advocates to stop their practice of voluntarily allowing ICE agents to board their buses in search of noncitizens.⁹⁷

In sum, both the anti-sanctuary movement and sanctuary movement are evolving and expanding. Away from the media glare attending the federal administration's anti-sanctuary crackdown, states, cities, and other private actors are joining the effort to aid the federal government's immigration enforcement regime. In Part III below, we offer some preliminary thoughts on the implications of these rival and rising trends.

III. TOWARDS NEW THEORETICAL FRAMEWORKS

The emergence of new sanctuary and anti-sanctuary sites pushes us to adopt new theoretical and doctrinal frames to understand this phenomenon and the normative implications for immigration enforcement. Emerging sanctuaries are both private and public, are often devoid of sovereignty, and may or may not exert control over a physical location. Recently passed state and local "anti-sanctuary" laws demonstrate the ways in which subfederal entities seek to participate more fully in federal immigration enforcement. Ultimately, these new sanctuaries and anti-sanctuaries challenge and expand prior conceptual and legal frameworks used to evaluate the limitations and possibilities of sanctuaries as points of resistance to federal enforcement regimes. A full examination of this change requires further research and more sustained treatment, which we conduct elsewhere.⁹⁸ Nevertheless, we briefly sketch some preliminary thoughts here.⁹⁹

⁹⁵ Perhaps coincidentally, Motel 6 corporate headquarters are located in Texas. *Contact Us*, G6 HOSP., <http://www.g6hospitality.com/contact-us> (last visited Sept. 29, 2018).

⁹⁶ *Washington v. Motel 6 Operating LP*, No. C18-337-MJP, 2018 WL 2277173, at *1 (W.D. Wash. May 18, 2018).

⁹⁷ Sarah Ravani & Bob Egelko, *Greyhound Asked to Adopt Sanctuary Policy in Face of Passenger Interrogations*, S.F. CHRON. (Mar. 29, 2018, 9:49 AM), <https://www.sfchronicle.com/news/article/ACLU-asks-Greyhound-to-adopt-sanctuary-policy-in-12786158.php>.

⁹⁸ See Villazor & Gulasekaram, *supra* note 9, at 38-53; Gulasekaram, Su & Villazor, *supra* note 27, at 30-45.

⁹⁹ See sources cited *supra* note 98.

Churches and places of worship were the first to invoke the term sanctuary to signify their resistance to President Ronald Reagan's enforcement plans against Central American and Caribbean migrants.¹⁰⁰ That original use focused on sanctuary's private dimension, with churches seeking to vindicate the biblical imperative by acting as places of refuge.¹⁰¹ Legal justifications for these actions were based on property rights and the First Amendment.¹⁰² These places of worship housed immigrants inside the walls of their churches and provided physical shelter for migrants. They did so openly to avoid harboring prosecutions, but also to assert a different interpretation of the applicable law. Ultimately, however, they could not promise complete immunity from federal enforcement.¹⁰³ Yet their open resistance to the federal immigration policy proved important because it raised the cost of federal enforcement. Their stance required federal authorities to procure warrants before entering private property.¹⁰⁴ Perhaps more importantly, their status as spiritual and moral leaders in the community forced the government into the unpalatable position of proceeding with enforcement tactics at the risk of enraging the public by walking past church leaders and dragging people out of a church.

Since the mid-1980s and certainly in recent times, sanctuary discourse has only fleetingly concerned itself with private property and First Amendment rights. Instead, because most sanctuary discussions have centered on the role of states and local law enforcement agencies, legal defenses have focused almost exclusively on sovereignty and the division of authority between federal and sub-federal authorities.¹⁰⁵ Thus, legal justifications for these governmental sanctuaries invoke the Constitution's Tenth Amendment, and trade on the hard lines separating the various levels of governmental authority.¹⁰⁶

New and emerging forms of sanctuary, however, challenge this simplistic distinction between private and public sanctuaries as well as the rationale supporting them. First, some emergent forms of private sanctuary exist without control over physical space. For example, alert and response networks provide warnings and urgent action calls

¹⁰⁰ See Villazor, *supra* note 9, at 139-42.

¹⁰¹ *See id.*

¹⁰² See Villazor & Gulasekaram, *supra* note 9, at 19-22.

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at 27-30.

¹⁰⁶ *See id.*

without controlling any brick and mortar locations.¹⁰⁷ Other sanctuaries may or may not deal with undocumented persons but join the chorus as politically powerful voices in the immigration debate. For example, private employers across several sectors have staked their position in the sanctuary debate.¹⁰⁸ Second, other emergent types of sanctuary span both private and public institutions. For example, college campuses can be both public and private, and defend their position based on private property principles, statutory rights, and constitutional claims.¹⁰⁹

The anti-sanctuary movement that is taking place at the state level also forces a rethinking of legal and normative arguments that sanctuary cities in these states may deploy to support their goals of not cooperating with federal immigration authorizes. At minimum, state laws such as Texas SB 4 that mandate municipal compliance with federal immigration laws demonstrates that sanctuary cities would need to defend their policies in a legal landscape where local laws are susceptible to state preemption. More broadly, the state anti-sanctuary movement raises larger questions about how local governments may exercise independent authority and discretion in mitigating federal immigration enforcement.

In addition to challenging our traditional dichotomies and legal justifications, these new forms of sanctuary and anti-sanctuary are also shifting the focus of the national immigration debate. As we suggest, the legal struggles between federal and sub-federal governmental authorities dominate the current mode. But the emergent sanctuaries are powerful precisely because these institutions — places of worship, employers, schools — also have a significant stake in immigration enforcement and have constitutional, statutory, common law, and moral power to influence (if not dictate) certain enforcement plans. This power, when deployed collectively, creates a governance network over immigration enforcement with each sanctuary institution functioning as a node in that network.¹¹⁰ And, as both Texas's anti-sanctuary law and California's sanctuary law illustrate, states and cities also consider themselves as stakeholders in the overall immigration enforcement scheme.

Reconceived as points of authority and governance over immigration enforcement regimes, sanctuaries and anti-sanctuaries

¹⁰⁷ See O'Neill, *supra* note 66; *supra* Part I.

¹⁰⁸ See *supra* Part I.

¹⁰⁹ See *supra* Part I.

¹¹⁰ For a fuller explication of network theory and nodal governance theory applied to the sanctuary context, see Villazor & Gulasekaram, *supra* note 9, at 53-61.

take on new meaning in the immigration enforcement debate. First, as already noted, they shift the terms of the legal debate away from sovereignty and federalism to statutory considerations and pragmatic interdependence. Second, they disrupt the classic, but outdated, notion of the federal government as the sole locus of immigration authority and the central generator of enforcement norms. Finally, such a conception allows sanctuaries in all forms — private and public, and various degrees of institutional cohesiveness — to view themselves as important political actors in setting enforcement policy, specifically, and broader immigration principles, more generally.

CONCLUSION

The world of sanctuary law is evolving, but our legal and theoretical discourse surrounding it has yet to catch up. Our preliminary examination of it in this Essay identifies the ways in which nongovernmental sanctuaries, local institutions, and private groups have joined the sanctuary movement. Yet, their legal power and practical import has been undertheorized. Moreover, scholarly and media focus on sanctuaries has largely ignored the contemporaneous expansion of the other side of the immigration enforcement ledger. States, and now cities and private actors, are also enacting anti-sanctuary policies. As these are not products of the federal government, our conventional legal framework for understanding and litigating such policies are mostly ineffective or irrelevant. Overall both trends — the growth of sanctuaries and the emerging proliferation of anti-sanctuaries — require us to reconceive how governance over immigration law occurs, and what legal doctrines will set the ground rules for that governance. This Essay begins that process.