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# What We Talk About When We Talk About Sanctuary Cities

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## INTRODUCTION

Let me begin this Essay first by making a provocative assertion. Then, I will follow it by being a bit defensive.

This is my provocative assertion: When immigrant rights advocates ask their local, state and university leaders to become “sanctuary cities,” “sanctuary states,” “sanctuary campuses,” and so on, they carelessly hurt immigrants in places like Nevada, Texas, and Arizona. And there are a lot of immigrants in those states. People who mean to help immigrants are hurting them.

Here is the defensive part: When I say that advocates of “sanctuary” are hurting immigrants, I am criticizing myself as much as anyone else. In particular, I signed a letter to my own university asking that it declare itself to be a “sanctuary campus.”<sup>1</sup> Moreover, I am personally likely to support most of the specific policies associated with

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\* Copyright © 2018 Michael Kagan. Joyce Mack Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law. This article is based on the author’s remarks at the UC Davis Law Review’s Volume 51 Symposium “Immigration Law & Resistance: Ensuring a Nation of Immigrants.”

<sup>1</sup> See Carrie Kaufman, *Will UNLV Become a Sanctuary Campus?*, KNPR NEV. RADIO (Dec. 1, 2016), <https://knpr.org/knpr/2016-12/will-unlv-become-sanctuary-campus>.

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immigrant sanctuary campaigns. My criticism is not about specific policies. It is about the rhetoric and the labeling.

My central point is that calls for official “sanctuary” are rhetorical malpractice by immigrant advocates. These calls mislead both supporters and opponents, and ultimately reduce the political support for pro-immigrant policies at the local and state level. On the one hand, pro-sanctuary movements are rhetorically misleading because the label fails to accurately describe the actual policies that are usually included under the sanctuary umbrella. On the other hand, the sanctuary label is counterproductive because it turns off potentially persuadable voters, and makes a ripe target for demagoguery that is hostile to immigrants’ interests.

These issues are critically important now, as I write this Essay in January 2018, because the Republican Party made fighting “sanctuary cities” a central part of its anti-immigrant policies in the first year of the Trump Administration.<sup>2</sup> In 2017, Republican candidates loosely aligned with Trump echoed this line of attack in off-year elections.<sup>3</sup> Despite disappointing electoral results for Republicans, all signs indicate that “sanctuary” policies will be a prominent issue in 2018 congressional elections. This is certainly the case in my home state of Nevada, where leading Republican candidates for governor, lieutenant governor, attorney general, and U.S. Senate made opposition to “sanctuary” a central issue in their campaigns.<sup>4</sup> Nevada Republicans have also used purported efforts to make Nevada a “sanctuary state” a justification for seeking special recall elections against several Democratic state senators.<sup>5</sup> I take it as a given that these are forms of “dog-whistle politics,” in which appeals to voters’ racial anxieties are

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<sup>2</sup> See, e.g., Tal Kopan, *Trump Administration Again Pressures Sanctuary Cities*, CNN (July 25, 2017, 8:38 PM), <https://www.cnn.com/2017/07/25/politics/trump-admin-sanctuary-cities/index.html>.

<sup>3</sup> See Laura Meckler, *Debate over Sanctuary Cities Gets a Test Run in Virginia Governor’s Race*, WALL ST. J. (Oct. 29, 2017, 7:00 AM), <https://www.wsj.com/articles/debate-over-sanctuary-cities-gets-a-test-run-in-virginia-governors-race-1509274801>; *Sanctuary City Issue Propels Gillespie in Virginia Governor’s Race, Offering Window Into 2018*, FOX NEWS (Oct. 30, 2017), <http://www.foxnews.com/politics/2017/10/30/sanctuary-city-issue-propels-gillespie-in-virginia-governors-race-offering-window-into-2018>.

<sup>4</sup> See Megan Messerly, *‘Sanctuary Cities’ Shaping Up to be Focal Point of 2018 Campaign Cycle*, NEV. INDEP. (Aug. 20, 2017, 2:05 AM), <https://thenevadaindependent.com/article/sanctuary-cities-shaping-up-to-be-focal-point-of-2018-campaign-cycle>.

<sup>5</sup> See Sam Levine, *Nevada GOP is Trying to Use Recalls to Overturn Last Year’s Election Results*, HUFFINGTON POST (Oct. 31, 2017, 4:25 PM), [https://www.huffingtonpost.com/entry/nevada-gop-recall-elections\\_us\\_59f8b778e4b046017faf3f25](https://www.huffingtonpost.com/entry/nevada-gop-recall-elections_us_59f8b778e4b046017faf3f25).

coded within a less overtly offensive argument.<sup>6</sup> However, my central point is that sanctuary campaigns have also been a form of coded political rhetoric on the left, in that they tend to signify more than they deliver, which facilitates mobilization and enthusiasm from immigrant supporters. But this comes at a cost, precisely because it makes the dog-whistle on the right much louder. In effect, the political left validates the rhetoric of the political right.

In this Essay I will first set out assumptions I make about the semantics and politics of “sanctuary” debates. These assumptions include setting out the kind of actual policies that are usually under consideration when people invoke the sanctuary label, and a way of understanding voters who may be persuaded to oppose immigrants’ interests. With this as a background, I summarize what both supporters and opponents seem to be talking about when they invoke the sanctuary label — which in both cases is usually an exaggerated conception of the actual policies that a local or state government may adopt. I then explain why these exaggerated conceptions position pro-immigrant policies as if they are in opposition to rule of law.

#### I. SOME ASSUMPTIONS

My argument is built on a few assumptions that I should state explicitly.

##### A. *One Label, Many Policies*

When people talk about sanctuary policies, I assume that they are talking broadly about one of three kinds of measures.<sup>7</sup> One form consists of policies and practices designed to make state and local services accessible to immigrants, for instance offering in-state tuition for higher education. Another form consists of using local or state resources to provide direct legal defense for immigrants who are targeted for deportation.<sup>8</sup> The third consists of policies which aim to

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<sup>6</sup> See Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 N.E. J. CRIM. & CIV. CONFINEMENT 159, 162 (2016).

<sup>7</sup> For a more detailed taxonomy of “sanctuary” policies, see Christopher N. Lasch et al., *Understanding ‘Sanctuary Cities,’* 58 B.C. L. REV. 1704, 1736-1751 (2018).

<sup>8</sup> See, e.g., Dakota Smith, *Los Angeles Creates \$10M Legal Defense Fund for Immigrants*, GOVERNING (Dec. 20, 2016), <http://www.governing.com/topics/public-justice-safety/tns-los-angeles-immigrant-legal-defense-fund.html>; Casey Tolan, *As Trump Threatens Deportations, Bay Area Funding Immigrants’ Legal Defense*, MERCURY NEWS (May 8, 2017, 7:00 PM), <https://www.mercurynews.com/2017/05/08/california-bay-area-immigrant-legal-defense-deportation/>.

preserve community trust in local police by keeping the police separate from immigration authorities.<sup>9</sup> It is this last variety that has attracted the most controversy precisely because it prevents federal authorities from using local law enforcement to make their own search for deportable non-citizens more efficient.

At the outset, it is important to note that “sanctuary cities” barely has a legal definition, and to the degree there is any legal definition of it, it bears little connection to the surrounding rhetoric. Until 2017, the federal government had not issued any definition of a sanctuary jurisdiction at all. In his first week in office, President Trump issued an executive order alleging that “sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States.”<sup>10</sup> The order directed the Department of Justice (“DOJ”) and the Department of Homeland Security (“DHS”) to withhold law enforcement grants from so-called sanctuary jurisdictions. However, the only definition of “sanctuary jurisdictions” provided was contained in a provision of the Immigration and Nationality Act, 8 U.S.C. 1373. This provision only states that state and local governments “may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the [DHS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”<sup>11</sup> This provision stops far short of requiring active involvement with immigration enforcement. It also does not require compliance with Immigration and Customs Enforcement (“ICE”) detainers. The President alleged that refusal by some police departments to detain people when requested to do so by DHS threatened public safety.<sup>12</sup> Yet the minimal information-sharing requirements of section 1373 are the only criteria that DOJ has attempted to impose, and even this modest requirement has been tied up in litigation.<sup>13</sup> The salient point about

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<sup>9</sup> See generally Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 281-85 (2016).

<sup>10</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 30, 2017).

<sup>11</sup> 8 U.S.C. § 1373 (2018).

<sup>12</sup> See Exec. Order, 82 Fed. Reg. at 8801 (“To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.”).

<sup>13</sup> Press Release, Dep’t of Justice, 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->

the Trump administration's approach to sanctuary issues is that there has been a wide gap between grandiose rhetoric and the actual policy. In his Essay for this Symposium, Hiroshi Motomura makes an analogous observation that the arguments about sanctuary policies that are most potent in legal settings are quite different from the arguments that may be most important to generating public and political support.<sup>14</sup>

Comprehending the desire by many local law enforcement agencies to separate themselves from federal immigration enforcement requires a nuanced understanding of federalism with respect to immigration policy. There is little controversy that setting national immigration policy is an exclusively federal role.<sup>15</sup> Certainly, the federal government may not commandeer local resources to carry out federal policy, and to a significant extent, all so-called sanctuary policies do is state that local police resources will remain under local control.<sup>16</sup> There are cogent arguments that crime-focused immigration enforcement will only work if federal priorities are in sync with local priorities.<sup>17</sup> Chief among these is concern that immigrant populations are prone to being fearful of all police because of their fear of deportation. When a local population is afraid to call 911 — or afraid that immigration enforcement encourages racial profiling by police — it makes sense for local police to visibly separate themselves from immigration enforcement.<sup>18</sup>

Disentangling local policing from immigration can be accomplished by erecting a rigid bar against cooperation with federal immigration authorities, but such a policy can also be implemented so as to give police more finely calibrated tools and thus more options for dealing with relatively minor situations that they face in the communities that they protect. Police officers face constant dilemmas about whether to arrest suspects in borderline cases. This decision is made easier for police if they can arrest a suspect on probable cause, but retain the discretion to later take a more lenient approach. This might happen if an officer takes a suspect back to the station, but then she, her commander, or a prosecutor decides not to pursue charges. The

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sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

<sup>14</sup> Hiroshi Motomura, *Arguing About Sanctuary*, 52 UC DAVIS L. REV. 435, 460 (2018).

<sup>15</sup> See *Arizona v. United States*, 567 U.S. 387, 394 (2012).

<sup>16</sup> See Lasch et al., *supra* note 7, at 1744.

<sup>17</sup> See Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 761-65 (2017).

<sup>18</sup> See Lasch et al., *supra* note 7, at 1748-52.

advantages of having such options are obvious. They give police more tools to resolve dangerous situations without disproportionate consequences, and to calibrate their responses to the complexity of the situations they confront after having more time to assess the facts.

The discretion that police and prosecutors normally enjoy is complicated by the fact that arrests often have serious collateral consequences, even in the absence of a criminal conviction.<sup>19</sup> If a minor arrest can set into motion a major consequence like deportation, police lose some of their ability to calibrate their policing strategies to the situations they see on the frontlines. They also lose the advantage of taking time to make higher stakes decisions, if the most important choice is the first one — to arrest, or not to arrest. This can impair their ability to deal with lower level crimes, in particular.

This is complicated terrain for local police to navigate, and there are many ways that they try to do so. At the extremes, a local police department might decide to cooperate with ICE never or always — the purest “sanctuary” or “anti-sanctuary” approaches. But there is considerable room in the middle. A local police department could decide to cooperate with ICE *sometimes*, when it makes sense in an individual case. We might call this a local control approach, because it would emphasize keeping as much discretion as possible in the hands of local police rather than ICE, without ruling out some level of cooperation. But, nothing in the typical rhetoric for or against “sanctuary” addresses this possibility.<sup>20</sup>

Given the wide variety of policies that are categorized under the rhetorical label of sanctuary, there are many different arguments for them. But since immigration enforcement is in the main a federal function, any arguments for local policies should be focused on things over which local and state governments actually have control. Many advocates of sanctuary policies know this, and push tailored arguments accordingly. Most policies are aimed at distancing states and localities from federal authorities, but do nothing to actually protect someone targeted by ICE. They could be described at most as policies of non-cooperation, and many mayors and more sophisticated advocates talk about them in these terms.<sup>21</sup>

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<sup>19</sup> See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810-15 (2015).

<sup>20</sup> Cf. Motomura, *supra* note 14, at 18 (observing that sanctuary policies can be a way for localities to inject more prosecutorial discretion into federal immigration enforcement).

<sup>21</sup> See, e.g., Laura Italiano, *New York to Remain a ‘Sanctuary City’ for Immigrants: de Blasio*, N.Y. POST (Nov. 19, 2016, 6:01 AM), <http://nypost.com/2016/11/19/new-york->

But, as Jason Cade has observed, advocates of sanctuary policies often portray sanctuary policies as direct ways to challenge federal policies that they deeply oppose.<sup>22</sup> For example, petitions have asked universities and campuses to find ways to “protect” students from deportation.<sup>23</sup> Advocates have called for municipal sanctuary declarations as an “act of resistance.”<sup>24</sup> Typically, when one finds such rhetoric from proponents, it is noticeably vague. It is not typically made clear how a local policy would actually resist ICE, or actively protect anyone from Donald Trump, except through litigation or providing an attorney. To a great extent, that is because these measures are designed to send a message of defiance and dissent, which is entirely consistent with non-cooperation, but not closely tailored to what the policies can realistically accomplish. For example, the advocacy organization United We Dream described a pro-immigrant demonstration in May 2017 by saying that marchers “made their voices heard . . . to oppose Trump’s mass deportation agenda and fight for sanctuary for all.”<sup>25</sup> Such rhetoric is hardly noteworthy in the activist context. But it can be misleading when it becomes connected with official policies implemented by municipal governments.

This gap between actual policies and rhetoric has clear origins in linguistics and history. Sanctuary as we think of it now in immigration politics was a movement of civil disobedience in the 1980s in which religious institutions sheltered Central American refugees.<sup>26</sup> There was

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to-remain-a-sanctuary-city-for-immigrants-de-blasio/; Jason Williams & Dan Horn, *Cincinnati Now a ‘Sanctuary City.’ What’s That Mean?*, CINCINNATI.COM (Jan. 30, 2017, 1:59 PM), <http://www.cincinnati.com/story/news/politics/2017/01/30/cranley-announce-cincinnati-sanctuary-city/97240174/>.

<sup>22</sup> Jason A. Cade, *Immigration Equity’s Last Stand: Sanctuaries and Legitimacy in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3053609](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3053609).

<sup>23</sup> Elizabeth Redden, *Can a Campus Be a Sanctuary?*, INSIDE HIGHER ED (Nov. 15, 2016), <https://www.insidehighered.com/news/2016/11/15/growing-movement-calls-universities-limit-their-cooperation-federal-immigration>.

<sup>24</sup> Aaron Yarmuth, *Make Louisville a Sanctuary City Now!*, LEO WKLY. (Jan. 31, 2017), <https://www.leoweekly.com/2017/01/make-louisville-sanctuary-city-now/>.

<sup>25</sup> Press Release, United We Dream, On May Day, People of Conscience Rose Up to Oppose Trump’s Deportation Agenda and Fight for #SanctuaryForAll (May 2, 2017), <https://unitedwedream.org/press-releases/on-may-day-people-of-conscience-rose-up-to-oppose-trumps-deportation-agenda-and-fight-for-sanctuaryforall/> [<https://web.archive.org/web/20170904041808/https://unitedwedream.org/press-releases/on-may-day-people-of-conscience-rose-up-to-oppose-trumps-deportation-agenda-and-fight-for-sanctuaryforall/>].

<sup>26</sup> See generally Sophie H. Pirie, *The Origins of a Political Trial: The Sanctuary Movement and Political Justice*, 2 YALE J.L. & HUMAN. 381 (1990).

no legal or official component: activists simply organized safe houses and dared federal agents to storm a church in order to arrest and deport a family who had fled for their lives.<sup>27</sup> We can also look to more ancient legal origins. Biblical law permitted temporary sanctuary from private acts of vengeance after a possible accidental homicide, in order to allow investigation of the facts.<sup>28</sup> In Ancient Greece, temples offered sanctuary to criminals, even those guilty of serious crimes, a practice continued by the early Christian Church.<sup>29</sup> The closest legal parallel we have to that today might be diplomatic institutions: religious institutions no longer have this formal authority.<sup>30</sup> But there is a symbolic connection in terms of their moral authority to demand mercy and protection for those targeted by the State.

Cities and states cannot engage in civil disobedience, and they cannot shelter anyone from the reach of federal law enforcement. Nevertheless, the older civil disobedience conception of sanctuary gradually slipped into being a loose rhetorical descriptor for official municipal policies.<sup>31</sup> This slippage set the stage for the gaps between policy and rhetoric that we see today. Originally, sanctuary was an act of defiance against law enforcement.<sup>32</sup> It is a logical tool for political movements that believe the legal system is systemically unjust. In this way, it is an obvious reference point for activists today who see American immigration law as cruel, discriminatory, and arbitrary. But because it is a tool of defiance, sanctuary rhetoric lends itself to grandiose claims of resistance, rather than a granular discussion of community policing policies.

### B. *Types of Opposition*

Another group of assumptions that I am making concerns public opinion. My intuition is that American voters who express surface-

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<sup>27</sup> See *id.* at 382-83 (describing the early activities of the Sanctuary Movement).

<sup>28</sup> See Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 323-24 (2003).

<sup>29</sup> *Id.* at 324.

<sup>30</sup> See Daniel Engber, *Can Criminals Hide in a Church?*, SLATE (Aug. 16, 2006, 6:15 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2006/08/can\\_criminals\\_hide\\_in\\_church.html](http://www.slate.com/articles/news_and_politics/explainer/2006/08/can_criminals_hide_in_church.html).

<sup>31</sup> See Abou Farman, *In Defense of Sanctuary*, BAFFLER (Apr. 6, 2017), <https://thebaffler.com/latest/in-defense-of-sanctuary-farman> (“The terms of the original movement — started in the eighties to shelter Latin American refugees, and broken up by the FBI — were redefined in 2007. . . . Cities and counties did not invent sanctuary, they adopted it.”).

<sup>32</sup> See Engber, *supra* note 30.



level opinions that are hostile to immigrants are, broadly speaking, motivated by two or three distinct impulses. One is a resistance to demographic diversity and change, and a correspondent animosity toward foreigners, especially those who are non-white and non-English speaking. However, it seems to me that this broad group might be further divided. There are probably some voters who perceive the United States as a primarily white nation, feel that this identity is under threat because of demographic changes, and will thus oppose any non-white immigration. A recent tweet from Iowa Representative Steve King might be a reasonably succinct articulation of this ideology. Quoting in part from Hungarian Prime Minister Victor Orban, Representative King wrote: “Diversity is not our strength. . . . ‘Mixing cultures will not lead to a higher quality of life but a lower one.’”<sup>33</sup> Not long ago, we might have loosely called this xenophobia, but since the political rise of Donald Trump we might now call proponents of this view white nationalists.

The white nationalist voter might be usefully distinguished from others who do not always oppose immigrants or demographic change, but who may become resistant if they sense that the change is too rapid, unregulated, or out of control. This type of voter has been recently highlighted by New York Times columnist Thomas B. Edsall, among others.<sup>34</sup> Relying on commentary by political scientists, pollsters and political professionals, along with demographic data, Edsall wrote, “communities that are close to 100 percent white will react intensely to a modest increase in foreign-born residents, while highly diverse communities will shrug it off.”<sup>35</sup> The basic thesis here is that many Americans do not inherently resist high levels of immigration or high levels of racial and ethnic diversity. However, many Americans will intensely resist rapid demographic changes in their communities. It is the rate of change, not the actual size of the immigrant population, that matters for these voters. This effect seems to be especially acute when it introduces a new ethnic group (e.g., Latino immigrants) to a community where they previously were unknown.<sup>36</sup> We might loosely call these demographic control voters, in that it is not impossible to imagine them accepting immigration to

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<sup>33</sup> Steve King (@SteveKingIA), TWITTER (Dec. 8, 2017, 5:00 AM), <https://twitter.com/SteveKingIA/status/939117527375990790>.

<sup>34</sup> See Thomas B. Edsall, *How Immigration Foiled Hillary*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/opinion/clinton-trump-immigration.html>.

<sup>35</sup> *Id.*

<sup>36</sup> See Benjamin J. Newman, *Acculturating Contexts and Anglo Opposition to Immigration in the United States*, 57 AM. J. POL. SCI. 1, 1 (2012).

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some extent, but they are only likely to do so if the immigration appears to be controlled and relatively slow.

The third impulse that might lead to anti-immigrant sentiment is belief in rule of law. This type of voter would have no particular resistance to demographic diversity and could theoretically support high levels of immigration, but would have strong objections to illegal immigration. A person motivated by concern for rule of law will be deeply uncomfortable and at least initially hostile to the fact that millions of immigrants are in the United States unlawfully, even if he or she is not viscerally bothered by racial, ethnic or linguistic diversity. President George W. Bush offered a well-known articulation of this orientation in 2006 in an Oval Office speech advocating comprehensive immigration reform:

We're a nation of laws, and we must enforce our laws. We're also a nation of immigrants, and we must uphold that tradition, which has strengthened our country in so many ways. These are not contradictory goals. America can be a lawful society and a welcoming society at the same time. We will fix the problems created by illegal immigration, and we will deliver a system that is secure, orderly, and fair.<sup>37</sup>

This inclination could clearly overlap with many demographic control voters because it relates to a desire for orderliness and regulation. But it grows from a different seed, in that a rule of law voter might be entirely comfortable with a rapidly changing, dynamic society. But she is likely to insist that all immigration be lawful, and will be troubled if it seems (accurately or not) that immigration is “out of control.” Such voters are potentially vulnerable to misunderstandings about why some immigrants are undocumented while others are able to come legally. Such a voter could favor stricter enforcement of immigration laws, even as she may be open to relaxing restrictive law. While she is hostile to the concept of “immigration outside the law,” to borrow Professor Hiroshi Motomura’s phrase, she is not inherently hostile to immigrants.<sup>38</sup>

The white nationalist, demographic control, and the rule of law impulses can coexist to varying degrees in an individual, and one can be a mask for the other. It is extremely easy for a person who is actually resistant to any non-white immigration to claim that his

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<sup>37</sup> President George W. Bush, *Bush’s Speech on Immigration* (May 15, 2016), <https://www.nytimes.com/2006/05/15/washington/15text-bush.html>.

<sup>38</sup> See HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 4 (2014).

opposition is really only to illegal immigration. It is not easy to objectively prove when this is happening. But for present purposes, all that is important is the theoretical understanding that different voters are likely to be motivated more by one impulse than another, regardless of what they say. I should note also that this theory of the American electorate vis-à-vis immigration is hardly unique. Most efforts at comprehensive immigration reform in recent decades have been based around similar theories, and aimed to persuade rule of law voters to back immigration reform. When voters are motivated primarily by white nationalism, they are probably un-persuadable by anyone hoping to build support for a more open, diverse, and welcoming country.

By contrast, a voter concerned primarily about rule of law is persuadable. In fact, as a lawyer and law professor, I am generally glad that many Americans are committed to rule of law, even if many are confused or misinformed about the deficiencies and cruelty of our immigration laws. Likewise, a demographic control voter might be persuadable, if they can be reassured that immigration is not occurring in a chaotic manner.

When I criticize the use of the sanctuary label, I am not concerned with white nationalists, since my assumption is that they are a lost cause from an electoral standpoint. I simply hope that, on their own, they remain a minority. My concern is with the rule of law voters and the demographic control voters. My argument is that many of the actual policies pursued under the banner of sanctuary could win support of these voters, or at least some of them, because they are actually aimed at strengthening law enforcement, reinforcing local control, and managing the changes that immigration brings to communities. But the sanctuary label turns them away, for reasons I will expand on below. The sanctuary label thus hurts immigrants by giving white nationalists allies who could have been induced to support pro-immigration policies. There only need to be a few of these voters to make a pivotal difference in how a close statewide election turns out, when elections are decided at the margins.

To be clear, I assume that people who readily identify as pro-immigrant are not homogeneous, either. In particular, I suspect that any poll of such voters would find a wide variety of answers to two key questions. First, to what extent should the United States regulate entry at all (i.e., should anyone be inadmissible)? Second, among immigrants already here, who (if anyone) should be deported? This second question is extremely important to so-called “sanctuary” policies, as I will explain shortly.

## II. WHAT OPPONENTS MEAN BY SANCTUARY

Opposing sanctuary cities has become a central issue for many Republican candidates heading into the 2018 midterm elections. In Nevada, which voted narrowly for Hillary Clinton in 2016, Republican state senate minority leader Michael Roberson has made it his central issue.<sup>39</sup> This mirrors the rhetoric and official acts of U.S. Attorney General Jeff Sessions.<sup>40</sup> For anyone who cares about the actual policy, these efforts are easily critiqued as being empty rhetoric with heavy racial overtones. Sometimes, if one looks for actual concrete policies, it is not clear if the opponents and proponents even disagree. For example, Nevada Attorney General and Republican frontrunner for governor Adam Laxalt has campaigned against sanctuary cities and has said that he wants police to be able to turn “violent offenders” over to ICE.<sup>41</sup> He has repeatedly linked “dangerous” sanctuary policies<sup>42</sup> to the State of California (e.g., “the threat California’s sanctuary cities pose to Nevada is VERY real”).<sup>43</sup> And yet, the California Trust Act and the San Francisco sanctuary ordinance actually permit cooperation with ICE with regard to violent criminals.<sup>44</sup>

When Republican politicians rail against sanctuary cities, three things seem to be happening. First, the potency of sanctuary policies is

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<sup>39</sup> See Ben Botkin, *Roberson Leads Charge for Amendment Banning Sanctuary Cities*, LAS VEGAS REV.-J. (May 6, 2017, 11:53 PM), <https://www.reviewjournal.com/news/2017-legislature/roberson-leads-charge-for-amendment-banning-sanctuary-cities/>.

<sup>40</sup> Yvonne Gonzalez, *Sessions Coming to Las Vegas to Discuss Sanctuary Cities, Crime*, LAS VEGAS SUN (July 7, 2017, 2:57 PM), <https://lasvegassun.com/news/2017/jul/07/sessions-coming-to-las-vegas-to-discuss-sanctuary/>.

<sup>41</sup> Press Release, Office of Nev. Att’y Gen. Adam Paul Laxalt, Attorney General Laxalt Files Friend of the Court Brief to Protect Nevada by Supporting Prohibition on Sanctuary City Policies (June 16, 2017), [http://ag.nv.gov/News/PR/2017/Attorney\\_General\\_Laxalt\\_Files\\_Friend\\_of\\_the\\_Court\\_Brief\\_to\\_Protect\\_Nevada\\_by\\_Supporting\\_Prohibition\\_on\\_Sanctuary\\_City\\_Policies/](http://ag.nv.gov/News/PR/2017/Attorney_General_Laxalt_Files_Friend_of_the_Court_Brief_to_Protect_Nevada_by_Supporting_Prohibition_on_Sanctuary_City_Policies/).

<sup>42</sup> Adam Paul Laxalt (@AdamLaxalt), TWITTER (Dec. 27, 2017, 9:48 AM), <https://twitter.com/AdamLaxalt/status/946075419522019328>.

<sup>43</sup> Adam Paul Laxalt (@AdamLaxalt), TWITTER (Jan. 3, 2018, 5:36 PM), <https://twitter.com/AdamLaxalt/status/948729694412836864>.

<sup>44</sup> See Jazmine Ulloa, *California Lawmakers Approve Landmark ‘Sanctuary State’ Bill to Expand Protections for Immigrants*, L.A. TIMES (Sept. 16, 2017, 1:55 PM), <http://www.latimes.com/politics/la-pol-ca-california-sanctuary-state-bill-20170916-story.html> (“[A]mendments to the bill made this week would allow federal immigration authorities to keep working with state corrections officials and to continue entering county jails to question immigrants. The legislation would also permit police and sheriffs to share information and transfer people to immigration authorities if they have been convicted of one or more crimes from a list of 800 outlined in a previous law . . .”).

puffed up, so that it appears that dangerous immigrants will be given some form of immunity from federal law enforcement. The supposed sanctuary that leading Republicans oppose bears quite a bit of resemblance to medieval church sanctuary, and perhaps also to the desires of proponents of sanctuary who actually want cities and campuses to actively protect people from ICE. It has much less connection to the actual ordinances and statutes that city councils, mayors, and state legislatures have enacted. Second, there is a racist dog whistle. From Donald Trump to Jeff Sessions, there has been a concerted effort to connect immigrants<sup>45</sup> with crime — Mexican rapists, Salvadoran gang members, and so on. This is a direct appeal to xenophobia. Third, railing against sanctuary cities is a way of seeming to defend rule of law, and to portray the other side as proponents of lawlessness and chaos. It is this last strategic effect that should most concern defenders of immigrants.

### III. SANCTUARY V. RULE OF LAW

The trouble with the sanctuary terminology is the word begs a question — sanctuary from what? The most obvious answer is federal immigration law enforcement. Moreover, the word suggests actual protection — seeking sanctuary in a church, for example. It implies a power that states, localities, and colleges do not have. This sense of power is appealing to people who are quite reasonably appalled by the prospect of aggressive immigration enforcement. People want to *do something*. The call for sanctuary suggests something powerful that can be done. That is appealing. Yet by appearing to offer protection from law, any policy that can be labeled “sanctuary,” fairly or not, appears to be for that very reason a challenge to rule of law, and also to the idea that immigration should be orderly and controlled. This pushes persuadable voters away, and makes their alliance with white nationalists more likely. That is a mistake.

To the degree that actual policies matter in this rhetoric, many so-called sanctuary policies are actually about how police should treat immigrants when they are arrested (ICE detainers and so on). These are important questions, but it is not the primary terrain on which immigrant advocates should want to be fighting. It favors the Trump administration’s rhetoric aiming to portray immigrants as criminals,

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<sup>45</sup> See, e.g., Alan Gomez, *Trump Painted a Dark Picture of Immigrants, Despite the Facts*, USA TODAY (Jan. 31, 2018, 5:37 PM), <https://www.usatoday.com/story/news/politics/2018/01/31/trump-painted-dark-picture-immigrants-despite-facts/1081208001/>.

even though the data shows the contrary. While there are important policy questions concerning treatment of immigrant criminal suspects, immigrants who have committed a crime have much less public support. For immigrant rights advocates, being drawn into a debate about immigrants who have been arrested appears to be a mistake.

Polling data illustrates the point. Early in 2017, a Harvard-Harris poll found that even though seventy-seven percent of Americans supported comprehensive immigration reform, eighty percent said local authorities should cooperate with federal immigration agents.<sup>46</sup> However, this eighty percent result came in response to a very specific question: “Should cities *that arrest illegal immigrants for crimes* be required to turn them over to immigration authorities?”<sup>47</sup> This question did not use the word sanctuary, but it focused the listener’s attention on people who are arrested for “crime,” and underlines these ideas with the word “illegal.”<sup>48</sup> As Politifact noted, another opinion poll conducted around the same time found that nineteen percent favored deporting all unauthorized immigrants, while fifty-three percent favored deportations only for people guilty of “serious crimes.”<sup>49</sup>

The problem for pro-immigrant policies may not just be the fixation on crime. In 2015, a poll of Californians asked, “Do you believe that local authorities should be able to ignore a federal request to hold an illegal immigrant who has been detained?” In response, 73.5 percent said, “No.”<sup>50</sup> The active words here are “federal request,” “illegal immigrant,” and “ignore” — as in ignore a federal request to hold someone who is illegal. This data suggests that opponents of immigration are smart to focus voters’ attention on the vocabulary of legality. Sanctuary rhetoric helps them to do this, and positions pro-immigrant policies on the wrong side of this debate. It makes it seem that local governments are being asked to defy federal law, even

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<sup>46</sup> Jonathan Easley, *Poll: Americans Overwhelmingly Oppose Sanctuary Cities*, HILL (Feb. 21, 2017, 2:19 PM), <http://thehill.com/homenews/administration/320487-poll-americans-overwhelmingly-oppose-sanctuary-cities>.

<sup>47</sup> Louis Jacobson, *Anatomy of a Statistic: Do 80 Percent of Americans Oppose Sanctuary Cities?*, POLITIFACT (Feb. 24, 2017, 2:50 PM) (emphasis added), <http://www.politifact.com/truth-o-meter/article/2017/feb/24/anatomy-statistic-do-80-percent-americans-oppose-s/>.

<sup>48</sup> *Id.* (“[T]he question being asked didn’t actually use the words ‘sanctuary cities.’ The other concerned words that the question did use — ‘arrest’ and ‘crimes.’”).

<sup>49</sup> *Id.*

<sup>50</sup> Kathleen Maclay, *IGS Poll: Californians Say Cities Should Not Be Sanctuaries*, INST. GOVERNMENTAL STUD. UC BERKELEY (Sept. 4, 2015), <https://igs.berkeley.edu/news/igs-poll-californians-say-cities-should-not-be-sanctuaries#data>.

though the law entitles localities and states to considerable autonomy on enforcement policy.

#### IV. BEYOND THE WORD

So, what can be done?

This essay is largely a lament, because we may be stuck with the unfortunate label of “sanctuary cities.” Even when politicians know not to use the sanctuary label, the media uses it anyway. Consider, for example, coverage of Governor Jerry Brown’s signing of SB 54, the California Values Act, in 2017. He did not use the term sanctuary state. The *Los Angeles Times* did, and so did many others.<sup>51</sup> Rhetorical problems like this are common in immigration. This is not like the fight over “undocumented” versus “illegal.” In that case, immigrant advocates oppose the vocabulary of their opponents. In the case of “sanctuary” policies, the right, left, and reputable media are all using the same language, but the right knows that it is in their interest.

But all is not lost. Despite the problematic terminology, some polling indicates that majorities will support sanctuary policies if they are framed in a certain way. An online poll of Floridians tested this, using the “sanctuary city” label explicitly.<sup>52</sup> But rather than focus on people who have been arrested, or on ignoring federal requests, this poll framed questions around how localities should respond to pressure from the Trump Administration. The answers were overwhelming. One question asked, “Should the federal government cut off funds to cities that provide sanctuary for illegal immigrants?” The majority said “no,” by a fifty-two to thirty-six percent margin.<sup>53</sup> Another asked, “Do you agree or disagree with Tampa becoming a Sanctuary City?” The answer was supportive of Tampa being a sanctuary, by a sixty-one to thirty-nine percent margin.<sup>54</sup> The poll defined “sanctuary city” as a place that “offers safe harbor for

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<sup>51</sup> See, e.g., Taryn Luna, *California to Become a ‘Sanctuary State’ in 2018*, SACRAMENTO BEE (Oct. 5, 2017, 11:01 AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article177212866.html>; Jazmine Ulloa, *California Becomes ‘Sanctuary State’ in Rebuke of Trump Immigration Policy*, L.A. TIMES (Oct. 5, 2017), <http://www.latimes.com/politics/la-pol-ca-brown-california-sanctuary-state-bill-20171005-story.html>.

<sup>52</sup> College of Business, *Florida Favors Sanctuary Cities, Sen. Nelson Vulnerable in 2018*, FLA. ATL. UNIV. <https://business.fau.edu/departments/economics/business-economics-polling/bepi-polls/bepi-polls-2017/florida-favors-sanctuary-cities-sen-nelson-vulnerable-in-2018.php> (last visited July 7, 2018).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

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undocumented immigrants.”<sup>55</sup> Not that these questions focused on the practical impact (“might otherwise be deported”), and did not imply defiance to federal laws. Instead, it focused on the federal government’s efforts to pressure localities (“cut off funds”).

The key is for immigrant advocates to be aware of the downside of the sanctuary label, even when the label cannot be avoided. The label is not an insurmountable obstacle, but it is a challenge which makes careful framing of issues all the more important. Most important, any strategy that hopes to win over the largest number of allies for immigrants in an electoral contest must be aware that some voters are confused about why illegal immigration happens, and do not inherently think that strict enforcement of the law is a bad thing. Such voters are potential allies for immigrants, but they are also potential allies for their opponents.

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<sup>55</sup> *Id.*