

# MISSING IMMIGRANTS IN THE RHETORIC OF SANCTUARY

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The idea of sanctuary for undocumented immigrants started among activists and was soon adopted by governments. In this process, the idea changed. This Article follows sanctuary’s changing moral content by studying the reasons that states and localities give when they adopt “sanctuary” policies limiting their cooperation with federal immigration enforcement. One might expect policymakers’ statements to imply concern for the well-being of noncitizens, particularly those who face deportation. We might even expect sanctuaries’ rhetoric to imply that undocumented people should be welcomed as members of the communities in which they reside. In fact, many jurisdictions carefully avoid saying either of those things. This Article examines the implications of these unexpected silences.

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## INTRODUCTION

What does it mean to be a sanctuary? Although the term is commonly used to describe localities and states that resist immigration enforcement, “sanctuary” has no legally recognized definition.<sup>1</sup> This leaves plenty of room for a complex web of meaning and significance to grow in the American moral and cultural imagination. Some of the complexities raised

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1. See Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1218–23 (2019) (surveying definitions offered by government officials and advocates).

by sanctuary are legal ones.<sup>2</sup> For example, sanctuary policies implicate longstanding uncertainties about the distribution of power between federal and sub-federal actors.<sup>3</sup> But behind these legal questions lie important,

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2. Key scholarship on the law of sanctuary includes Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703 (2018), and the compilation of sanctuary policies prepared as an appendix to that article, which is available online at <http://libguides.law.du.edu/c.php?g=705342&p=5009807> [<https://perma.cc/9PLF-BKX6>]. Many of the policies cited in this Article can be found there. See also Linda Bosniak, *Protection: Sanctuary and the Contested Ethics of Presence in the United States*, in DEEPENING DIVIDES: HOW TERRITORIAL BORDERS AND SOCIAL BOUNDARIES DELINEATE OUR WORLD 189 (Didier Fassin ed., 2020); Jason A. Cade, *Sanctuaries As Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. 433 (2018); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016); Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245 (2016); Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313 (2015); Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837 (2019); Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, CARDOZO L. REV. DE NOVO 119 (2017), <http://cardozolawreview.com/wp-content/uploads/2018/07/HONG.38.symposium.pdf> [<https://perma.cc/J5UF-5PC5>]; Kit Johnson, *The Mythology of Sanctuary Cities*, 28 S. CAL. INTERDISC. L.J. 589 (2019); Michael Kagan, *What We Talk About When We Talk About Sanctuary Cities*, 52 U.C. DAVIS L. REV. 391 (2018); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006); Christine Kwon & Marissa Roy, *Local Action, National Impact: Standing Up for Sanctuary Cities*, 127 YALE L.J.F. 715 (2018), [https://www.yalelawjournal.org/pdf/KwonRoy\\_mtozyv98.pdf](https://www.yalelawjournal.org/pdf/KwonRoy_mtozyv98.pdf) [<https://perma.cc/N3GN-5PAF>]; Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539 (2017); Nelson Lund, *The Constitutionality of Immigration Sanctuaries and Anti-Sanctuaries: Originalism, Current Doctrine, and a Second-Best Alternative*, 21 U. PA. J. CONST. L. 991 (2019); Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435 (2018); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006); Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125 (2019); Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

3. See, e.g., Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); see also Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012); Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1 (2019); Trevor George Gardner, *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, 46 FLA. ST. U. L. REV. 527 (2019); PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* (2015); Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683 (2009); Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837 (2019); Peter Margulies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement*, 75 WASH. & LEE L.

understudied moral questions about what values justify (or don't justify) sanctuary policies.<sup>4</sup> This Article looks at the rhetoric with which those moral questions are confronted.

Opponents paint sanctuary jurisdictions as lawless rebels against federal power,<sup>5</sup> and proponents of sanctuary see moral necessity in resistance to unjust immigration laws and practices.<sup>6</sup> The debate is

REV. 1507 (2018); Rick Su, *The Promise and Peril of Cities and Immigration Policy*, 7 HARV. L. & POL'Y REV. 299 (2013); Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247 (2019); Rose Cuison Villazor, "Sanctuary" Cities and Local Citizenship, 37 FORDHAM URB. L.J. 573 (2010); Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 U.C. DAVIS L. REV. 549 (2018).

4. See Villazor & Gulasekaram, *supra* note 1, at 1218–23 (discussing advocates' morally positive characterizations of sanctuary and opponents' use of the term as a pejorative).

5. See *Fact Sheet: Donald J. Trump and Attorney General Sessions Stand Up Against Lawless Sanctuary Cities*, THE WHITE HOUSE (Aug. 16, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/fact-sheet-donald-j-trump-attorney-general-sessions-stand-lawless-sanctuary-cities/> [<https://perma.cc/CVW5-TGMW>]; see also Harry G. Hutchison, *Taking on California's Lawless Agenda*, ACLJ (Mar. 12, 2018), <https://aclj.org/constitution/taking-on-californias-lawless-agenda> [<https://perma.cc/R3ZL-PWQA>] (quoting then-Attorney General Jeff Sessions as saying, "California . . . is using every power it has—powers it doesn't have—to frustrate federal law enforcement. So you can be sure I'm going use every power I have to stop them."). Sometimes the same voices that condemn sanctuaries as lawless rebels against federal power are the same voices that protest the removal of monuments to actual lawless rebels against federal power. See Jeff Sessions (@jeffsessions), TWITTER (June 12, 2020, 6:47 PM), <https://twitter.com/jeffsessions/status/1271574937879314442> [<https://perma.cc/JQF8-FGG2>] ("[Doug Jones's] vote to remove from all military facilities and installations the names of every soldier who fought for the Confederacy betrays the character and decency of every soldier who fought for the South in that bloody and monumental war . . .").

6. Histories of sanctuary, which illustrate the deep moral convictions that motivated various waves of sanctuary movements, include IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES 9–10 (1985) (history of sanctuaries leading up to, and including, the Sanctuary Movement of the 1980s); LOREN COLLINGWOOD & BENJAMIN GONZALEZ O'BRIEN, SANCTUARY CITIES: THE POLITICS OF REFUGE (2019) (focusing on post-Trump sanctuary policies and backlash); HILARY CUNNINGHAM, GOD AND CAESAR AT THE RIO GRANDE: SANCTUARY AND THE POLITICS OF RELIGION (1995) (history of the 1980s Sanctuary Movement); RENNY GOLDEN & MICHAEL MCCONNELL, SANCTUARY: THE NEW UNDERGROUND RAILROAD (1986) (history of the 1980s Sanctuary Movement by two activists in the movement); Peter Mancina, *In the Spirit of Sanctuary: Sanctuary-City Policy Advocacy and the Production of Sanctuary-Power in San Francisco, California* (August 2016) (Ph.D. dissertation, Vanderbilt University), <https://ir.vanderbilt.edu/bitstream/handle/1803/12924/Mancina.pdf.pdf?sequence=1&isAllowed=y> [<https://perma.cc/NFF7-RZ9T>] (detailed history of the city of San Francisco's sanctuary policies); LINDA RABBEN, SANCTUARY & ASYLUM: A SOCIAL AND POLITICAL HISTORY 31 (2016) (global history of sanctuary); Jennifer Suzanne Ridgley, *Cities of Refuge: Citizenship, Legality and Exception in U.S. Sanctuary Cities* (2010) (Ph.D. dissertation, University of Toronto), [https://tspace.library.utoronto.ca/bitstream/1807/32948/3/ridgley\\_jennifer\\_s\\_2010june\\_P](https://tspace.library.utoronto.ca/bitstream/1807/32948/3/ridgley_jennifer_s_2010june_P)

inescapably a moral one. For activists, the moral necessity of sanctuary policies arises from the human needs of undocumented people and a moral vision of inclusive communities. But as local and state governments adopt sanctuary policies, the moral rhetoric used to discuss sanctuary is transformed. Activists and policymakers do not speak the same moral language when they speak about sanctuary. Or so this Article will argue.

#### A. *An Interview on Fox News*

Shortly after Donald Trump's election, New York City Councilmember Rafael Salamanca Jr. appeared on Fox News to explain why he supported the city's sanctuary policy.<sup>7</sup> He said that he, as a policymaker, had a responsibility for the well-being of the undocumented people in his district: "We want to defend our constituents, whether they're documented or undocumented." Tucker Carlson, the host, retorted: "I wonder if you have a responsibility to other people in this country, like, say, the middle class in New York. . . . Where's the concern for them?"<sup>8</sup> Salamanca did not back away from his position that the undocumented people in his community deserved his concern.<sup>9</sup>

Salamanca also connected his stance on sanctuary with his understanding of his community, the South Bronx: "Me being an elected official in the South Bronx, where I have a high population of individuals who are documented or undocumented, it's my responsibility to protect them all."<sup>10</sup> Claims about the identity of a community are not unusual in the sanctuary context; Chicago Mayor Lori Lightfoot likewise invoked her community when explaining why she would stand by that city's sanctuary policy: "[W]e're gonna stand strong because *that's who we are*."<sup>11</sup>

The communities that Salamanca and Lightfoot serve, like all communities, have unique histories, cultures, and identities. Part of their identity is the way their residents relate to immigration-enforcement authorities and the way those residents (both documented and undocumented) relate to each other.<sup>12</sup> Another part of a community's

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hD\_thesis.pdf [https://perma.cc/XU8A-7LZP] (covering multiple sanctuary movements); GRACE YUKICH, *ONE FAMILY UNDER GOD: IMMIGRATION POLITICS AND PROGRESSIVE RELIGION IN AMERICA* (2013) (study of the New Sanctuary Movement).

7. *Tucker Carlson Tonight* (Fox News television broadcast Nov. 16, 2016) (video on file with author).

8. *Id.*

9. *Id.*

10. *Id.*

11. Fran Spielman, *Amid Threat of Immigration Sweeps, Lightfoot Moves to Reassure, Inform Immigrants*, CHI. SUN-TIMES (July 10, 2019) (emphasis added), <https://chicago.suntimes.com/news/2019/7/10/20689301/ice-immigration-raids-chicago-undocumented-trump-sanctuary-lightfoot-police> [https://perma.cc/6HYE-C7KB].

12. See, e.g., Christina Goldbaum, *It Was a Sanctuary for Immigrants in the Bronx. Then One of Its Owners Was Arrested*, N.Y. TIMES (Jan. 18, 2019),

identity is its inclusiveness or the borders of its membership: who counts as a member of the community and who is deemed an outsider.

### *B. Two Claims*

From Salamanca's interview and Lightfoot's comments, we can distill two moral claims: first, the claim that undocumented people are a proper object of policymakers' concern; and second, the claim that the identity of a community can give its policymakers reason to be inclusive and to express that inclusiveness through sanctuary policies by welcoming undocumented people as members of a community. The claim that undocumented people count, and the claim that our communities' identities give us reasons to treat them as members, are closely related, but they are different claims. One might, for example, think that undocumented immigrants are worthy of policymakers' concern while still not thinking they are members of the community or having any particular thought about community identity whatsoever.

The idea that undocumented people count and the idea that our communities' identities give us reasons to care about them are both moral ideas—not ideas that relate to any particular religious or philosophical system, but simply ideas that draw on our beliefs about what is right and wrong or good and bad, and what we owe to each other as human beings.<sup>13</sup> In other words, claims about who counts, and who is included as a member of our community, are moral claims in the sense that they are claims about what matters and who matters.

Another way of describing claims of this kind is to say that they are claims about values. One is a claim about *who* has value: Salamanca insisted on talking about undocumented people as if their interests, their well-being, is morally relevant.<sup>14</sup> The other is a claim about the values by which a community defines itself and chooses to embrace. Saying “that’s who we are” is a way of saying that the identity of our communities has a moral force that justifies, or even requires, treating people in a certain way. Debates about who has value, and how communities define themselves, are central to debates about sanctuary. The rhetoric used by policymakers to justify their support for a sanctuary policy can speak volumes about not only the meaning of sanctuary, but about what those policymakers value,

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<https://www.nytimes.com/2019/01/18/nyregion/la-morada-nypd-immigration.html> [https://perma.cc/6V9G-Y75L].

13. See *Moral*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1468 (2002). For a discussion of a narrower understanding of “morality” (the kind I want to avoid), see BERNARD WILLIAMS, *Morality, the Peculiar Institution*, in *ETHICS AND THE LIMITS OF PHILOSOPHY* 174 (2006). See generally THOMAS SCANLON, *WHAT WE OWE TO EACH OTHER* 106 (1998) (discussing the scope of “morality” and related terms).

14. Tucker Carlson *Tonight*, *supra* note 7 and accompanying text.

whom they value, and what moral situation they think they see when they look at the world around them.

One might expect sanctuary jurisdictions to speak openly about moral issues like undocumented people's moral standing and community identity. But many sanctuary jurisdictions do not. This Article explores how they shy away from these claims. It examines the moral rhetoric used by sanctuary cities, towns, counties, and states to explain the reasons for adopting their sanctuary policies. It looks at the value claims that are conspicuously absent from the rhetoric; it also looks at the value claims that are present. It seeks to answer, what values do sanctuaries invoke to justify their policies?

### *C. Whose Well-Being Counts?*

Part II explores the question of undocumented people's moral standing by asking who is intended to benefit from sanctuary policies. Sanctuary policymakers often claim that their policies will improve people's well-being in various ways. For example, many sanctuary policymakers point out that sanctuary policies make witnesses feel comfortable cooperating with police and thereby promote public safety.<sup>15</sup> Others observe that sanctuary policies, by making immigrants feel welcome in a community, help increase immigration and therefore the economic prosperity that immigrants bring with them.<sup>16</sup> Each of these claims is a claim based on the moral value of well-being: sanctuary policies will make constituents better off in some way. But who is included among the constituents whose well-being policymakers are promoting? One might expect that sanctuary policies would be designed to benefit undocumented immigrants.<sup>17</sup> Yet many sanctuary policies say no such thing.

As Part II explains, many sanctuary policies announce that they will promote well-being but leave ambiguous whether that includes the well-being of undocumented people. Even some policies that express concern for immigrants do not make clear whether undocumented people are included in those very policies. For example, an executive order in New York State says that "access to State services is critical to the vitality and well-being of immigrant communities and their continued integration into the State's economic, civic, and cultural life."<sup>18</sup> Does the phrase "immigrant communities" here include undocumented members of those communities? This is a nuanced question, and more than a semantic one. Resolving this textual ambiguity would mean answering whether the

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15. See *infra* notes 177–185 and accompanying text.

16. See *infra* notes 195–199 and accompanying text.

17. Part I.C gives specific reasons one might assume this.

18. N.Y. Exec. Order No. 170 (Sept. 15, 2017).

undocumented people within those communities have moral standing in the eyes of policymakers.

These ambiguities leave open a harsh possibility: that when sanctuary policies help undocumented people, they do so only because helping undocumented people brings benefits to the rest of “us.” Along these lines, an executive order in Washington State announces the state’s commitment to inclusion, but the text of the order mentions undocumented immigrants only in one place: the paragraph that itemizes their contributions to the State’s economic prosperity.<sup>19</sup> The failure to mention undocumented immigrants as beneficiaries of the policy, while touting their contributions, suggests a transactional vision in which undocumented people’s well-being matters only to the extent it helps promote the interests of others, as Part II argues.

#### *D. Who Is Included in Community Identity?*

Part III looks at the ways that community identity and inclusiveness figure in governmental sanctuary discourse. There are necessary differences between activists’ ideas about sanctuary and governments’ ideas on those same subjects. For example, traditional ideas of sacred space as the basis of sanctuary are unavailable to governments in the United States because they cannot declare their territory sacred.<sup>20</sup>

Still, community identity figures importantly in governmental sanctuary rhetoric. Policymakers commonly invoke the identity of their communities as a reason for their sanctuary policies with claims like “this is who we are.” They associate the special identity of their community with ideals of inclusiveness: claiming to be a “welcoming city” or a “global city,” some policymakers cite histories of immigration and diversity as a reason to welcome noncitizens.<sup>21</sup>

But inclusiveness is a matter of degree. Where previous scholarship has often interpreted any assertion of inclusiveness as the equivalent of offering undocumented people social and political membership in a given community,<sup>22</sup> this Article explains that welcoming is not necessarily the equivalent of offering membership. Many sanctuary policies, like those related to Immigrations and Customs Enforcement (ICE) detention, carry

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19. “[U]ndocumented immigrants comprised approximately 4.9 percent of the state’s workforce in 2012 and paid \$301.9 million in state and local taxes. If all undocumented immigrants were removed from the state, the state would lose \$14.5 billion in economic activity, \$6.4 billion in gross revenue, and approximately 71,197 jobs . . . .” Wash. Exec. Order No. 17-01 (Feb. 23, 2017).

20. Congress can make no law respecting an establishment of religion and neither can the states. U.S. CONST. amend. I; *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947) (recognizing that states are bound by the prohibitions of the First Amendment).

21. See *infra* notes 271–276 and accompanying text.

22. See *infra* notes 289–290 and accompanying text.

no implication of community membership because they are directed at all detainees, regardless of what communities those detainees are members of.

Other policies fail to make clear, at least in the rhetoric offered to justify them, whether the inclusiveness they embrace extends to the undocumented. Some policies conspicuously omit mention of the undocumented.<sup>23</sup> Others mention the undocumented only in the context of acknowledging their economic and social contributions to local communities,<sup>24</sup> which risks an implication that membership is conditional on such contributions.

### *E. Rhetoric, Meanings, and Values*

The focus of this Article is rhetoric, the language that policymakers use to articulate the reasons for their policies in the hopes of persuading others to support them.<sup>25</sup> Rhetoric matters for two reasons. One is that rhetoric has direct consequences: anti-immigrant rhetoric, for example, can inspire discrimination, mistreatment, and even hate crimes.<sup>26</sup> But we can also pay attention to the meaning of the law itself, apart from its consequences. In legal theory, for example, “expressivist” approaches seek to evaluate the way a given law reflects attitudes about the value of human beings, rather than evaluating the consequences the law causes.<sup>27</sup>

Cass Sunstein gives the example of *Brown v. Board of Education*<sup>28</sup> and debates over the social meaning of segregation; crucially at stake in that case was the fact that segregation laws expressed views about the

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23. For discussion of such a policy, see *infra* notes 298–301 and accompanying text.

24. See *supra* note 19 and accompanying text.

25. Cf. Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2008–09 (2002). Jennifer Mercieca usefully defines rhetoric as “attempts to influence others through symbols.” JENNIFER R. MERCECA, *FOUNDING FICTIONS* 3 (2010). Narratives, a common focus of law-and-literature scholars, are an aspect of rhetoric. See generally ROBERT COVER, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE, AND THE LAW* 95, 95–96 (Martha Minow, Michael Ryan & Austin Sarat eds., 1992) (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”).

26. See Kevin R. Johnson & Joanna E. Cuevas Ingram, *Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate over Immigration Reform*, 91 N.C. L. REV. 1613, 1627, 1655 (2013). Joseph Raz argues that the moral persuasiveness of policymakers’ rhetoric is what determines whether our government is legitimate, that is, worthy of our trust and loyalty. Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 778–79 (1989).

27. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504, 1510–11 (2000).

28. 347 U.S. 483, 494 (1954).

inferiority of people of color.<sup>29</sup> The Court itself framed this as a question of the impact on schoolchildren: “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>30</sup> But the only reason it could have this effect is that segregation *meant* inferiority. That itself is what scholars study when they study the expressive content of legal rhetoric. As Mary Ann Glendon writes, “law, in addition to all the other things it does, tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going.”<sup>31</sup>

As Richard Albert writes, one of the principal things that the law expresses is moral values.<sup>32</sup> Legal documents sometimes make explicit moral claims and sometimes implicitly embrace moral values.<sup>33</sup> As a result, you can learn about a society’s values by studying its laws. The expressive content of policymakers’ rhetoric and the content of the laws themselves shape the way we view each other and the moral norms by which we govern our communities.

In immigration law, rhetoric shapes norms that determine our society’s willingness to welcome noncitizens and decisions about how we treat them.<sup>34</sup> Trevor Gardner offers the example of narratives about immigrants and security, observing that states and localities can provide “alternative security narratives”—stories about the way immigration affects security that substitute a narrative about how sanctuary policies make the public safer for prevailing narratives about immigrants’ supposed threat to national security.<sup>35</sup> And Michael Blake observes that, if immigration policies explicitly prefer one racial group to another, “this statement undermines the ability of citizens with the disfavored racial identity to see themselves as full participants in the project of self-rule.”<sup>36</sup>

29. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996); *see also* Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225, 228–29 (2013) (arguing that constitutional amendment provisions like Article V of the U.S. Constitution express commitment to values).

30. *Brown*, 347 U.S. at 494.

31. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 8 (1987).

32. *See* Albert, *supra* note 29, at 236.

33. *See id.* at 239–44.

34. *See* Cade, *supra* note 2, at 496–98. Two particularly inspiring analyses of the expressive meaning of immigration law are LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006), and HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006).

35. *See* Gardner, *supra* note 2, at 333.

36. Michael Blake, *Discretionary Immigration*, 30 PHIL. TOPICS 273, 284 (2002).

Racist immigration policies directed at Asian people, for example, devalue and insult Asian-American citizens, too. Such policies are morally offensive not only because of their awful consequences but also because of their expressive meaning and the odious moral value system implicit therein.

The goal of this Article is to study the moral rhetoric of sanctuary governments.<sup>37</sup> Rather than seeking to catalog that rhetoric exhaustively, my goal is to convey a sense of some of the major claims most commonly made in sanctuary rhetoric and to then analyze the values underlying those claims.<sup>38</sup>

There are more moral considerations invoked in sanctuary policies than this Article will consider. One very important category of moral idea that it will not consider is ideas about government and the structure of government. Considerations of local sovereignty, for example, are frequently raised in sanctuary rhetoric.<sup>39</sup> So are ideas about protecting rights, such as Fourth Amendment rights and the rights to equal protection and due process.<sup>40</sup> So, too, with legal concerns about government powers as an influence on sanctuary rhetoric: it is possible, for example, that fear of federal preemption prompts sanctuaries to avoid certain kinds of rhetoric,<sup>41</sup> and that this may be a reason for the rhetorical tendencies I document in this Article. All of these ideas deserve separate consideration. For now, the goal is to ask who is supposed to benefit from sanctuary policies (Part II) and what kind of community identity those policies forge (Part III). But first, some necessary background.

## I. SANCTUARY AND MORAL RHETORIC

To understand the main claim of this Article—that certain moral claims are conspicuously missing from some policymakers’ rhetoric around sanctuary—some background will be necessary. The following discussion will introduce (a) the history of sanctuary as an idea, with an emphasis on the moral and political ideas that accompanied it; (b) the major categories of contemporary local-government policies to which the word sanctuary is today often attached; and (c) some fundamental moral

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37. I’ve reviewed about 200 sanctuary policies for this section of the Article, including policies adopted by states, large cities, counties, rural towns, and police departments.

38. I focus primarily on the language of the policies themselves. *See* Lasch, Chan, Eagly, Haynes, Lai, McCormick & Stumpf, *supra* note 2, at 1752–53 (using a similar methodology). A focus on written policies does result in the omission of “informal sanctuary cities,” which do not in practice cooperate with ICE but have no formal policy on cooperation. *See* COLLINGWOOD & GONZALEZ O’BRIEN, *supra* note 6, at 6.

39. *See supra* note 3 and accompanying text.

40. U.S. CONST. amends. IV, V, XIV.

41. *See supra* notes 2–3 and accompanying text.

claims that we might expect, given sanctuary's history, to see in sanctuary discourse (and thus why we might be surprised to find them missing).

### A. A Brief Moral History of Sanctuary

The concept of sanctuary has a long history. According to the anthropologist Linda Rabben, “[a]lmost every major religious tradition includes concepts and rules governing sanctuary.”<sup>42</sup> She identifies ideas about sanctuary in Ancient Egyptian, Greek, and Roman cultures, as well as in the books of Numbers and Deuteronomy in the Old Testament, and in many other cultures worldwide, from the Igbo people of Nigeria to the Kafir people of India to multiple Native American societies.<sup>43</sup> The medieval Christian church had a long and complicated series of legal disputes with civil authorities about the scope of the sanctuary that it offered to those fleeing law enforcement.<sup>44</sup> All of these practices involved the concept of a sacred space where people could seek refuge from the enforcement of laws.

Historical Christian traditions of sanctuary influenced contemporary sanctuary movements. One pastor said in a 1982 sermon: “This is the time and we are the people to reinvolve the ancient law of sanctuary, to say to the government, ‘you shall go this far and no further.’”<sup>45</sup> In the United States, a major predecessor to contemporary sanctuary movements was the Underground Railroad, a network of abolitionists who helped slaves escape to freedom (which usually meant Canada).<sup>46</sup> The Underground Railroad as a whole was not institutionally associated with a specific church in the way that medieval sanctuary practices were, but religious activists—especially Quakers—played a major role in its operation.<sup>47</sup> The movement was explicitly illegal: the Fugitive Slave Act required law enforcement officials everywhere to help arrest fugitive slaves and made anyone who aided a runaway slave by providing food or shelter subject to six months’ imprisonment and a fine of a thousand dollars.<sup>48</sup> While it does not appear that the word “sanctuary” played an important role in the Underground Railroad, the movement inspired later sanctuary movements to a significant degree.<sup>49</sup>

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42. RABBen, *supra* note 6, at 31.

43. *Id.* at 31–36.

44. *Id.* at 39–54.

45. Rev. David Chevrier, Pastor of the Wellington Avenue United Church of Christ, Chicago, Illinois, July 24, 1982, *quoted in* BAU, *supra* note 6, at 9.

46. RABBen, *supra* note 6, at 67–78.

47. *Id.* at 67–76.

48. Fugitive Slave Act, Pub. L. No. 30-60, 9 Stat. 462 (1850).

49. For example, the title of a book by organizers of the 1980s Sanctuary Movement is *Sanctuary: The New Underground Railroad*. GOLDEN & MCCONNELL, *supra* note 6. *See also* RABBen, *supra* note 6, at 134 (“The sanctuary activists self-consciously

Another important predecessor to contemporary sanctuaries is the movement to protect conscientious objectors to the Vietnam War.<sup>50</sup> That movement was launched in a speech at Arlington Street Church in Boston, where William Sloane Coffin, Jr., then Chaplain of Yale University, invoked ancient and medieval sanctuary practices in explaining why “[c]losely associated with these more sacred places has been the belief that there a man should find some sanctuary from the forces of a hostile world.”<sup>51</sup> The next day, the Berkeley City Council voted to provide sanctuary to “any person who is unwilling to participate in military action.”<sup>52</sup> This is the first known twentieth-century example of a government body offering sanctuary in the United States.<sup>53</sup>

The immediate predecessor to contemporary immigration sanctuaries is the Sanctuary Movement of the 1980s.<sup>54</sup> This movement was a response to the refugees who fled violence in Central America.<sup>55</sup> Organizers gave these refugees shelter in churches in Arizona, Los Angeles, Chicago, and elsewhere.<sup>56</sup> The Immigration and Naturalization Service (INS) did not raid churches, which gave those churches a unique ability to protect refugees.<sup>57</sup> The movement was self-consciously religious,<sup>58</sup> based on Christian conceptions of sacred space, and fortified by opposition to United States foreign policy in Central America and the idea that unjust laws require resistance.<sup>59</sup> Churches, not municipalities, were the primary sanctuaries around which the movement revolved.<sup>60</sup>

Well before the Trump Administration took office, however, municipalities had begun to declare themselves sanctuaries in response to what is now called the New Sanctuary Movement.<sup>61</sup> By 2016, a study by the Immigrant Legal Resource Center counted at least 633 counties with “sanctuary” policies, referring in this case to counties that limited cooperation with detainer requests.<sup>62</sup> Five states, too, had adopted

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modeled themselves after precursors such as the conductors of the Underground Railroad.”).

50. RABBEN, *supra* note 6, at 135; *see also* Ridgely, *supra* note 6, at 35–40, 55–77.

51. Ridgely, *supra* note 6, at 35.

52. BAU, *supra* note 6, at 168.

53. RABBEN, *supra* note 6, 135.

54. On the lawfulness of this movement, see Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168, 168–70 (1983).

55. RABBEN, *supra* note 6, at 132–41.

56. *Id.* *See generally* CUNNINGHAM, *supra* note 6.

57. *See* CUNNINGHAM, *supra* note 6, at 29.

58. *See id.* at 35.

59. *See id. passim.*

60. *See id. passim.*

61. *See* Mancina, *supra* note 6, at 34–35.

62. Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017),

sanctuary policies.<sup>63</sup> In the years that followed Trump’s inauguration, a flood of new jurisdictions identified themselves as sanctuaries.<sup>64</sup>

### *B. What Do Sanctuary Policies Do?*

The word “sanctuary” has no legal definition; it can refer to a diverse array of state and local policies on immigration enforcement.<sup>65</sup> Hiroshi Motomura usefully defines sanctuary as “laws, policies, or other actions by governments and by nongovernmental actors that have the effect of insulating immigrants from immigration law enforcement.”<sup>66</sup> Huyen Pham refers to them as “non-cooperation laws,” which is a more accurate descriptor than “sanctuary.”<sup>67</sup>

Although this Article focuses on governmental sanctuaries and their rhetoric, the importance of non-governmental sanctuary actors should not be underestimated. As Rose Cuison Villazor and Pratheepan Gulasekaram write, governmental sanctuary policies are only one part of a network of sanctuary policies whose most important effects are realized together; governments adopt some policies, while campuses, churches, employers, and other private actors adopt their own policies, and together the policies form a system that challenges federal immigration enforcement.<sup>68</sup>

This Article looks at how the moral rhetoric of sanctuary changes as it moves from one part of the network to another, from activists to government. It focuses on what happens to the idea of sanctuary in rhetoric

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<https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html>  
[<https://perma.cc/K936-ZNRU>].

63. *Id.*

64. See Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 145 (2019) (documenting the wave of new sanctuary enactments after Trump’s election). The policies collected by Lasch and his coauthors include eighty-nine policies enacted between the November 2016 election and the end of July 2017. See Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding “Sanctuary Cities”—Online Appendix* (Aug. 31, 2020), <http://libguides.law.du.edu/c.php?g=705342&p=5009807> [<https://perma.cc/AT32-ALKP>]; see also ABIGAIL FISHER WILLIAMSON, *WELCOMING NEW AMERICANS? LOCAL GOVERNMENTS AND IMMIGRANT INCORPORATION* 275 (2018) (sampling sixty-six cities with sanctuary policies in effect, close to two-thirds had enacted or affirmed their policies since Trump’s election).

65. For a broader definition, see Kagan, *supra* note 2, at 393–94 (defining sanctuary policies to include policies that “make state and local services accessible to immigrants”; policies that “provide direct legal defense for immigrants who are targeted for deportation”; and policies that “preserve community trust in local police by keeping the police separate from immigration authorities”). Pham includes anti-discrimination policies. See Pham, *supra* note 2, at 1389.

66. Motomura, *supra* note 2, at 437.

67. Pham, *supra* note 2, at 1374.

68. Villazor & Gulasekaram, *supra* note 1, at 1210–14.

by government actors; discussion of activists' conception of sanctuary is offered primarily for contrast. Thus, it is government sanctuary policies that this section will define, although some of the policies outlined below (like policies against information-sharing) are also common among non-governmental sanctuary actors.<sup>69</sup> Accordingly, using Motomura's definition of sanctuary, there are at least six kinds of policy that insulate immigrants from immigration law enforcement.<sup>70</sup>

### 1. POLICIES AGAINST RESOURCE-SHARING

The first kind of policy is one that prohibits the use of sub-federal resources (personnel, time, and so on) to support federal enforcement activities. Policies of this kind include prohibitions on 287(g) agreements, under which the federal government deputizes local law-enforcement agents as agents of ICE.<sup>71</sup> Indeed, many sanctuary policies prohibit 287(g) agreements.<sup>72</sup>

Beyond 287(g) agreements, sanctuary policies tend to prohibit lending law-enforcement resources or support to federal immigration enforcement.<sup>73</sup> Jurisdictions can refrain from other forms of resource-sharing, like riding along with ICE officers, conducting joint investigations, or sharing investigative information. The New York City Code, for example, says that "No city resources, including, but not limited to, time spent by employees, officers, contractors, or subcontractors while on duty, or the use of city property, shall be utilized for immigration enforcement."<sup>74</sup>

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69. Thus, Villazor and Gulasekaram adopt an expansive definition of sanctuary that explicitly includes non-governmental policies. *See id.* at 1218.

70. Motomura, *supra* note 2, at 437; *see infra* Sections I.B.1–6.

71. *Fact Sheet: Delegation of Immigration Authority Section 287(g)*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/287g> (Feb. 17, 2021); *see* Immigration and Nationality Act § 287(g), Pub. L. No. 104–208, 110 Stat. 3009 (1996) (codified as 8 U.S.C. § 1357(g)).

72. For example, Mecklenburg County, North Carolina, withdrew from its 287(g) agreement after the election of a new sheriff. *See* David Graham, *The Sheriff Who's Defying ICE*, ATLANTIC (July 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/new-sheriff-town/593116/> [https://perma.cc/QE37-EUFP]. New Jersey had conflict between a state policy against 287(g) agreements and sheriffs who attempted to enter into those agreements despite the policy. *See* S.P. Sullivan, *Murphy AG Warns N.J. Sheriffs: Don't Go Behind My Back To Work with ICE*, N.J. ADVANCE (July 8, 2019), <https://www.nj.com/politics/2019/07/murphy-ag-warns-nj-sheriffs-dont-go-behind-my-back-to-work-with-ice.html> [https://perma.cc/4UYP-TN9B].

73. *See, e.g.*, King County, Wa., Ordinance 18,665 (Mar. 8, 2018).

74. N.Y.C. ADMIN CODE § 10-178(c) (2018). It also prohibits 287(g)-type arrangements: "No agency shall subject its officers or employees to the direction and supervision of the secretary of homeland security primarily in furtherance of immigration enforcement." *Id.* § 10-178(b); *see also* Bernalillo County, N.M., Admin. Res. AR 2017–

Some localities have gone further and actively attempted to undermine federal enforcement. For example, in February 2018, Oakland’s Mayor made a public announcement warning noncitizens of a planned ICE sweep.<sup>75</sup> It is unclear what impact this had: Attorney General Sessions accused the mayor of being responsible for “800 wanted criminals that are now at large in that community,” prompting ICE’s local spokesperson to resign, accusing Sessions and agency officials of lying about the impact of the mayor’s statement.<sup>76</sup> But direct interference with federal enforcement is unusual. Perhaps slightly more common are policies that aim to provide notification to people who might be targeted for investigation (as opposed to detention) by ICE.<sup>77</sup>

These attempts to actively subvert federal enforcement make clear by contrast how “sanctuary” jurisdictions are often better described as non-cooperating or neutral jurisdictions: most simply choose not to volunteer their resources rather than actively working to undermine federal enforcement.

## 2. POLICIES ON DETENTION

Another element common to most sanctuary policies is refraining from detaining people in service of federal immigration enforcement. In some cases, a noncitizen in local custody is the subject of a federal criminal warrant—i.e., one issued by a judge upon a showing of probable cause to believe that the noncitizen in question has engaged in criminal conduct. Every jurisdiction honors criminal warrants, as they must.<sup>78</sup> But

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22 § 2(E) (Mar. 14, 2017), <https://www.bernco.gov/uploads/files/CountyManager/Immigrant-Friendly%20County%20Resolution.pdf> [<https://perma.cc/W55V-HK54>] (“No county monies, resources, or personnel shall be used to enforce federal civil immigration laws or to investigate, question, detect, or apprehend persons on the basis of immigration status unless otherwise required by law to do so.”).

75. Hamed Aleaziz, *ICE Confirms 150-Plus Arrests in California Sweep, Slams Schaaf’s Early Warning*, S.F. CHRON., <https://www.sfchronicle.com/bayarea/article/Reports-of-California-immigration-sweep-are-true-12714833.php> [<https://perma.cc/6B9D-J468>] (Feb. 28, 2018).

76. Meagan Flynn & Avi Selk, *ICE Spokesman Resigns, Citing Fabrications by Agency Chief, Sessions About California Immigrant Arrests*, WASH. POST (Mar. 13, 2018, 8:03 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/03/13/ice-spokesman-resigns-over-false-statements-by-top-officials-about-calif-immigrant-arrests/> [<https://perma.cc/82S6-VXK3>].

77. See, e.g., CAL. GOV’T CODE § 7285.1–.2; CAL. LAB. CODE § 1019.2 (providing that employers must alert employees before inspection, cannot consent to raids, and cannot report information to federal authorities beyond what is required).

78. Memorandum from John Morton, Director of U.S. Dep’t of Homeland Sec., Civ. Immigr. Enf’t: Guidance on Use of Detainers in the Fed., State, Loc. & Tribal Crim. Just. Sys. (Dec. 21, 2012), <https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf> [<https://perma.cc/WS74-2RLW>] [hereinafter *Detainer Policy*].

being present in the United States without authorization is not, by itself, a crime.<sup>79</sup> Therefore, most of the allegedly unauthorized immigrants whom ICE might seek to detain are not subject to criminal warrants. Instead, ICE asks localities to detain them by issuing a document called a “detainer.”<sup>80</sup>

When a state or locality has incarcerated a noncitizen for non-immigration-related reasons, and ICE becomes aware that the noncitizen is in custody, ICE may issue a detainer.<sup>81</sup> The detainer indicates that there is probable cause to believe that the noncitizen is “removable” (i.e., deportable).<sup>82</sup> Detainers request that the state or locality “maintain custody of the alien for a period not to exceed 48 hours beyond the time when he/she would otherwise have been released from [state or local] custody to allow DHS to assume custody.”<sup>83</sup> The detainer form also requests that the locality give DHS notice before releasing the detainee.<sup>84</sup>

Detainers are not a guarantee of deportation; in Texas, for example, one study showed that only 15% of detainers end up leading to deportation.<sup>85</sup> Detainers can, however, have other serious consequences. For example, as Kate Evans explains, detainers can make people ineligible for diversion programs in which criminal charges are dismissed once the inmate completes a rehabilitation program.<sup>86</sup>

Detainers are requests, not commands, so there is nothing unlawful about declining to comply with them.<sup>87</sup> Most “sanctuary” policies include a provision stating that the jurisdiction will not honor detainers.<sup>88</sup> There is, however, a wide variety of approaches to how a jurisdiction can respond to detainers, including compliance only on certain conditions.<sup>89</sup>

Some policies against detainer compliance are not intended to make communities more welcoming for immigrants; some jurisdictions decline

79. *Arizona v. United States*, 567 U.S. 387, 407 (2012).

80. See Detainer Policy, *supra* note 78; 8 C.F.R. § 287.7(a) (2011); Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 BROOKLYN L. REV. 1085, 1090 (2019).

81. Evans, *supra* note 80, at 1089.

82. *Id.* at 1095.

83. *Department of Homeland Security Immigration Detainer – Notice of Action*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> [<https://perma.cc/WZ4C-6XZE>] (last visited Mar. 16, 2021) (Form I-247A). The detainer form also requests that the locality give DHS notice before releasing the detainee. *Id.* See *infra* notes 106–109 and accompanying text for a discussion of information-sharing.

84. See *infra* Section I.B.3.

85. For statistics on the number of detainers leading to deportation, see Gus Bova, *Myth-Busting Immigration Detainers: They're Optional, Costly and Rarely Lead to Deportation*, TEX. OBSERVER (Feb. 7, 2017), <https://www.texasobserver.org/immigration-sanctuary-cities/> [<https://perma.cc/8NDG-KY6C>].

86. Evans, *supra* note 80, at 1101.

87. See *Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014).

88. See, e.g., King County, Wa., Ordinance 18,665 (Mar. 8, 2018).

89. See Chen, *supra* note 2, at 35–42.

to honor detainees simply because it may be unlawful to honor them.<sup>90</sup> There is a significant legal question, to say the least, about whether it is lawful for a state or locality to hold a noncitizen in custody beyond the time when there is an independent reason to detain them. It is generally a violation of the Fourth Amendment to hold someone in custody without probable cause to believe they have committed a crime,<sup>91</sup> and immigration detainees offer reason to believe only that the person has engaged in a civil offense. Thus, multiple courts have found it unlawful to comply with detainees.<sup>92</sup> The Third Circuit has allowed a person mistakenly held pursuant to an ICE detainer to sue the county for money damages.<sup>93</sup> Because of these precedents, the New York State Sheriffs' Association advised sheriffs in 2014 not to comply with detainees, although they were certainly not endorsing "sanctuary."<sup>94</sup>

It is important not to overstate the reach of policies against detainer compliance. Many jurisdictions that generally decline to comply with detainees *will* comply with them for certain kinds of criminal convictions. For example, New York City (a prominent "sanctuary") has a policy of complying with detainees for noncitizens convicted of "one of 170 serious crimes within the last five years—including arson, homicide, rape or robbery—and in cases in which a judge has signed a detainer request."<sup>95</sup>

It is also important to recognize that whether or not jurisdictions limit their willingness to detain people themselves, they may still be responsible for decisions that indirectly, if predictably, lead to deportation. Although many jurisdictions refer to themselves as "sanctuaries" because they do not *directly* turn over noncitizens to ICE, states and localities take many other actions that can lead to deportation. One large category of decisions that can lead to deportation is decisions about criminal sentencing and

90. See, e.g., Jeremy Redman, *Clayton County Sheriff's Office Stops Complying with ICE Detainers*, ATLANTA J.-CONST. (Nov. 20, 2014), <https://www.ajc.com/news/state-regional-govt--politics/clayton-county-sheriff-office-stops-complying-with-ice-detainers/WhF7a0ukHxoWmmFinVfsjO/> [<https://perma.cc/J4DE-UXEZ>] (describing the Clayton County, Georgia, sheriff's office policy on detainees).

91. U.S. CONST. amend. IV.

92. See, e.g., *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 535–36 (App. Div. 2018); *Lunn v. Commonwealth*, 477 Mass. 517, 526–27 (2017).

93. *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014); see also *Mercado v. Dallas Cnty.*, 229 F. Supp. 3d 501 (N.D. Tex. 2017). For a compilation of authorities, see Christine M. G. Davis, Annotation, *Immigration Detainers or Holds Issued Pursuant to 8 C.F.R. § 287.7*, 10 A.L.R. Fed. 3d art. 1 (2016).

94. Kirk Semple, *New York State Sheriffs Shying Away From Immigration Detention*, N.Y. TIMES (July 30, 2014), <https://www.nytimes.com/2014/07/31/nyregion/new-york-state-sheriffs-shying-away-from-immigration-detention-.html> [<https://perma.cc/U2AB-EYLL>].

95. Liz Robbins, *In a 'Sanctuary City,' Immigrants Are Still at Risk*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/nyregion/sanctuary-cities-immigrants-ice.html> [<https://perma.cc/8UKZ-8YRZ>]; see N.Y.C. COUNCIL, Intro. No. 487-A, § 1 (N.Y. 2014) (codified as N.Y.C. Admin. Code § 14-154(b) (2019)).

prosecution, as well as the underlying criminalization of conduct, because criminal convictions can be a basis for deportation.<sup>96</sup> Thus, some jurisdictions adopt fair-punishment policies that, although they do not directly involve interactions between sub-federal officials and ICE, nonetheless prevent deportations.<sup>97</sup>

As noted below, whenever a noncitizen is arrested and fingerprinted, ICE receives the information. And when local authorities criminally prosecute a noncitizen, their conviction can often lead to deportation.<sup>98</sup> A large number of crimes can result in noncitizens being removable or inadmissible.<sup>99</sup> Indeed, the risk of deportation resulting from criminal conviction is so significant that the Supreme Court has found criminal defense attorneys obligated to know, and advise their clients of, the potential immigration consequences of a guilty plea.<sup>100</sup> Thus, prosecutors' decisions about what charges to file can result in noncitizens being deported—even those with legal status. Some prosecutors have adopted policies of trying to charge defendants in a way that minimizes immigration consequences.<sup>101</sup>

Nor are detainers the only way in which the federal government can cause someone in custody of a locality to be detained for immigration-enforcement purposes. As the Southern Poverty Law Center has documented, dozens of sheriffs in Florida have signed agreements with ICE, known as “Basic Ordering Agreements,” which attempt to avoid some of the legal problems with detainers discussed above.<sup>102</sup> So there are many ways in which the designation of any given jurisdiction as a “sanctuary” may oversimplify a very complicated story.

### 3. INFORMATION-SHARING POLICIES

Many sanctuary policies limit the extent to which states and localities will share information about noncitizens with federal authorities. Because there are many ways in which states and localities might share information

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96. Robbins, *supra* note 95.

97. See Eagly, *supra* note 2, at 304.

98. Shakeer Rahman & Robin Steinberg, *Sanctuary Cities in Name Only*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/opinion/sanctuary-cities-in-name-only.html> [<https://perma.cc/NW9D-UMVG>].

99. *Id.*

100. *Padilla v. Kentucky*, 559 U.S. 356, 365–67 (2010).

101. See Corinne Ramey, *Some Prosecutors Offer Plea Deals to Avoid Deportation of Noncitizens*, WALL ST. J. (July 7, 2017), <https://www.wsj.com/articles/some-prosecutors-offer-plea-deals-to-avoid-deportation-of-noncitizens-1499419802> [<https://perma.cc/GA78-W7XE>].

102. See *Basic Ordering Agreement Toolkit*, S. POVERTY L. CTR. (May 22, 2020), <https://www.splcenter.org/read-and-download-all-signed-boas> [<https://perma.cc/JR8S-E8AA>].

with federal immigration authorities—some direct and some indirect—there are many kinds of policies against information-sharing.

Some jurisdictions have “don’t ask” policies under which government officials are not to inquire about anyone’s immigration status. A Hoboken executive order, for example, says, “Municipal agents and employees are not permitted to maintain and/or share confidential personal information, including contact information, information about citizenship or immigration status, national origin” and other factors.<sup>103</sup>

Other provisions take a “don’t tell” approach. Hoboken, for example, also says, “No municipal agent, employee or agency may ask any individual or request information from any individual about the citizenship or immigration status of any person unless such inquiry or investigation is required by state law, regulation, or directive, or by federal law or regulation.”<sup>104</sup> Other “don’t tell” policies are expressed more tepidly, like Oberlin, Ohio’s: “it shall be the general practice of the City of Oberlin not to inquire about the immigration status of crime victims, witnesses, or others who call or approach City staff seeking assistance.”<sup>105</sup>

Another form of information-sharing is responding to ICE’s requests for notification before a detainee is released. Immigration detainers, discussed above, request not only that localities hold noncitizens in custody, but also that they “[n]otify DHS as early as practicable (at least 48 hours, if possible) before the alien is released from [state or local] custody.”<sup>106</sup> Again, this is a request, not an order—the federal government lacks the power to compel localities to share information.<sup>107</sup> Many of the jurisdictions that call themselves “sanctuaries” do not comply with requests for advance notice of release. The federal government has indicated that it has attempted to require, as a condition of grants that many localities receive, that localities certify that they honor requests for

103. See, e.g., Hoboken, N.J. Exec. Order No. 1, at 6 (Jan. 1, 2018) (“Municipal agents and employees are not permitted to maintain and/or share confidential personal information, including contact information, information about citizenship or immigration status, national origin, race, ethnicity, language proficiency, religion, sexual orientation, gender identity, disability, housing status, financial status, marital status, status as a victim of domestic violence, criminal history, release date from incarceration or confinement in a jail, or status as a veteran; except where otherwise permitted by 8 U.S.C. 1373 or 8 U.S.C. 1644 or required by state law, regulation, or directive, or by federal law or regulation.”).

104. *Id.*

105. Oberlin, Ohio, Res. R17-04 CMS (Apr. 5, 2017), <https://www.cityofoberlin.com/wp-content/uploads/2017/05/R17-04.pdf> [<https://perma.cc/GT8V-X9H3>].

106. *Department of Homeland Security Immigration Detainer - Notice of Action*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> [<https://perma.cc/4AGW-P25R>] (last visited Mar. 16, 2021) (Form I-247A).

107. See *Printz v. United States*, 521 U.S. 898, 935 (1997); *Murphy v. Nat’l Collegiate Athletic Assoc.*, 138 S. Ct. 1461, 1485 (2018).

advance notice of release.<sup>108</sup> At this writing, the circuits are split over the lawfulness of these conditions and litigation over this attempt is ongoing.<sup>109</sup>

Some policies do not refuse access to information but, instead, just make access more difficult. For example, it is apparently not unusual for ICE to ask to see jail records.<sup>110</sup> Some jurisdictions require ICE agents to obtain a sheriff's approval before seeing jail records or allow ICE to see some jail records but not others.<sup>111</sup>

Policies against information-sharing are limited in their effectiveness by other channels of information-sharing. When localities submit fingerprints to the Federal Bureau of Investigation (FBI) to check a person's criminal history, those fingerprints are automatically shared with the Department of Homeland Security (DHS) to check against its immigration records. And localities cannot ask the FBI to refrain from sharing the fingerprints with DHS.<sup>112</sup> Thus, every jurisdiction of which I'm aware effectively shares noncitizens' fingerprints with ICE whenever those fingerprints are taken.

Surveillance databases, too, can represent a form of indirect information-sharing with ICE. Many localities use a company called Vigilant Solutions, which operates license-plate databases that compile information about cars' whereabouts from traffic cameras and other scanners.<sup>113</sup> Participating localities upload license-plate data from traffic cameras; Vigilant can then check its database to see where a given license plate was last seen.<sup>114</sup> Although several of the jurisdictions that participate in the system are "sanctuaries," Vigilant shares its database with ICE,

108. See U.S. DEP'T OF JUST., STATE CRIMINAL ALIEN ASSISTANCE PROGRAM: FY 2017 PROGRAM REQUIREMENTS AND APPLICATION INSTRUCTIONS 7 (2017), [https://www.bja.gov/Funding/17SCAAP\\_Program\\_Requirements.pdf](https://www.bja.gov/Funding/17SCAAP_Program_Requirements.pdf) [<https://perma.cc/683S-34XG>].

109. See *id.*; *New York v. U.S. Dep't of Just.*, 951 F.3d 84, 123–24 (2d Cir. 2020), *reh'g en banc denied*; *New York v. U.S. Dep't of Just.*, 964 F.3d 150 (July 13, 2020) (upholding grant conditions); *City of Providence v. Barr*, 954 F.3d 23, 45 (1st Cir. 2020) (finding grant conditions unlawful); *City of Chicago v. Barr*, 961 F.3d 882, 931 (7th Cir. 2019) (finding grand conditions unlawful); *City of Los Angeles v. Barr*, 941 F.3d 931, 934 (9th Cir. 2019) (finding grant conditions unlawful).

110. U.S. DEP'T OF JUST., *supra* note 108, at 8.

111. See, e.g., U.S. DEP'T OF JUST., AUDIT REP. 07-07, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 10 (2007), <https://oig.justice.gov/reports/OJP/a0707/final.pdf> [<https://perma.cc/UR94-MGA8>].

112. Fingerprints are shared as part of the Secure Communities program. See *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T (Feb. 9, 2021), <https://www.ice.gov/secure-communities> [<https://perma.cc/6WZG-X2PT>].

113. April Glaser, *Sanctuary Cities Are Handing ICE a Map*, SLATE (Mar. 13, 2018), <https://slate.com/technology/2018/03/how-ice-may-be-able-to-access-license-plate-data-from-sanctuary-cities-and-use-it-for-arrests.html> [<https://perma.cc/3N7S-K3BY>].

114. *Id.*

which means participating municipalities are indirectly granting ICE access to their traffic cameras and other surveillance data.<sup>115</sup>

There are a wide variety of state and local databases that contain information about immigration status.<sup>116</sup> This means that restrictions on some kinds of information sharing leave open significant alternative channels for ICE. For example, some police departments maintain lists of suspected gang members and share these lists with ICE.<sup>117</sup> These lists can provide federal authorities with information about suspected immigration violations.

Another way in which information can be shared, sometimes unwittingly, is through benefits databases. According to the U.S. Government Accountability Office (GAO), federal authorities have used various databases to locate undocumented immigrants, including “[p]ublic and private databases that record information concerning benefits” and “department of motor vehicle records.”<sup>118</sup> Indeed, ICE agents told the GAO that there was no need to ask non-immigrants to voluntarily provide their address data because ICE could already find that data through such records.<sup>119</sup>

For some programs, federal access to state databases is automatic. For example, student visas are managed by universities through a system called SEVIS, which is designed to ensure that information about noncitizen students is instantly communicated to federal authorities.<sup>120</sup> In this context, even “sanctuary” campuses share information about students with immigration enforcement authorities.

Under the Tenth Amendment, the federal government cannot compel states to share information.<sup>121</sup> However, a federal statute, 8 U.S.C. § 1373, says that states and localities “may not prohibit, or in any way restrict, any government entity or official from sending” immigration information to

115. *Id.*

116. See Albert Fox Cahn, *Surveillance By Sanctuary Cities Is Helping ICE Track Undocumented Immigrants*, NBC NEWS (July 9, 2019), <https://www.nbcnews.com/think/opinion/surveillance-sanctuary-cities-helping-ice-track-undocumented-immigrants-ncna1027981> [<https://perma.cc/9LTC-8FUE>].

117. Maria Ines Zamudio, *Federal Immigration Agencies Used Chicago Gang Database Thousands Of Times*, NPR (Apr. 12, 2019), <https://www.npr.org/local/309/2019/04/12/712788497/federal-immigration-agencies-used-chicago-gang-database-thousands-of-times> [<https://perma.cc/875V-4MG5>].

118. U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-204, ALIEN REGISTRATION: USEFULNESS OF A NONIMMIGRANT ALIEN ANNUAL ADDRESS REPORTING REQUIREMENT IS QUESTIONABLE 3 (2005), <https://www.gao.gov/assets/250/245208.pdf> [<https://perma.cc/6U9U-NREA>].

119. *Id.* at 10.

120. See *Student and Exchange Visitor Program*, U.S. IMMIGR. & CUSTOMS ENF'T (July 28, 2020), <https://www.ice.gov/sevis> [<https://perma.cc/TL4Z-7HMD>].

121. See *Printz v. United States*, 521 U.S. 898, 935 (1997); *Murphy v. Nat'l Collegiate Athletic Assoc.*, 138 S. Ct. 1461, 1485 (2018).

ICE.<sup>122</sup> Nor can states and localities prohibiting maintaining immigration status information.<sup>123</sup> Although Section 1373 purports to prohibit at least some “don’t tell” policies, it does not purport to bar “don’t ask” policies, so localities are free to prohibit their employees from *inquiring* about immigration status.

#### 4. LIMITING ACCESS TO SUB-FEDERAL FACILITIES

Another kind of policy that is sometimes adopted by “sanctuary” jurisdictions is a policy that limits the extent to which immigration authorities can access property or facilities owned by the local government.<sup>124</sup> Significant numbers of arrests happen on public sites. For example, seventy-two percent of ICE arrests in Colorado between October 2016 and May 2017 occurred at courthouses and probation offices.<sup>125</sup> ICE used to have offices at Rikers Island, a site of similarly high arrest rates,<sup>126</sup> but the New York City Council passed a law to change that.<sup>127</sup>

The most high-profile controversy over ICE access to sites controlled by state and local government involves courthouses. Controversy has erupted over ICE’s practice of making arrests in or near state courthouses

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122. See LAURENCE BENENSON, LAW ENFORCEMENT IMMIGRATION TASK FORCE, *A PATH TO PUBLIC SAFETY: BACKGROUND ON 8 U.S.C. § 1373*, at 2 (2017), <https://leitf.org/wp-content/uploads/2017/09/Path-to-Public-Safety-Background-on-8-U.S.C.-1373.pdf> [<https://perma.cc/KXA9-U2CA>].

123. The statute prohibiting state bans on information-sharing is 8 U.S.C. § 1373. An almost-identical prohibition appears in 8 U.S.C. § 1644.

124. See, e.g., Hoboken, N.J., Exec. Order 1 § 3(E) (Jan. 1, 2018) (No municipal employee may “[p]ermit ICE/CBP/USCIS officers, agents, or representatives access to municipal facilities, property, equipment, or databases absent a valid and properly issued judicial criminal warrant specifying the information or individuals sought. Any attempts or requests for access to such facilities, property, equipment, or databases shall be immediately sent to the agency chief that controls the appropriate facility, property, database or equipment pertinent. No permission to access any such facility, property, equipment, or database shall be provided without the express, written approval of the appropriate agency chief. Should the appropriate agency chief approve access, such access shall be limited in scope and time to the parameters and targets prescribed in the valid and properly issued judicial criminal warrant.”).

125. Tory Johnson, *Immigration Arrests at Courthouses Are Under Fire from State Officials*, IMMIGR. IMPACT (Sept. 28, 2017), <http://immigrationimpact.com/2017/09/28/immigration-arrests-at-courthouses-fire-state-officials/#.YD109ZNKgnU> [<https://perma.cc/9S8V-LHQW>].

126. See *This Valentine’s Day, Celebrate Best Breakup Ever: ICE out of Rikers*, IMMIGRANT DEF. PROJECT (Feb. 14, 2015), <https://www.immigrantdefenseproject.org/valentines-day-celebrate-best-breakup-ever-ice-rikers/> [<https://perma.cc/MA82-PTSJ>].

127. See *Practice Advisory: 2014 NYC Detainer Law*, IMMIGRANT DEF. PROJECT, <https://www.immigrantdefenseproject.org/new-york-city-passes-groundbreaking-detainer-reform-law/> [<https://perma.cc/63DF-9TM6>] (last visited Mar. 5, 2021).

and State officials have called for the practice to end.<sup>128</sup> Nonetheless, the New York State Court system adopted rules stating that “[a]rrests by agents of U.S. Immigration and Customs Enforcement may be executed inside a New York State courthouse only pursuant to a judicial warrant or judicial order authorizing the arrest.”<sup>129</sup> The legal foundation for this policy has yet to be challenged in court.<sup>130</sup>

Other kinds of government-controlled sites include jails, prisons, and probation offices.<sup>131</sup> Some jurisdictions allow ICE agents to enter their jails or prisons freely,<sup>132</sup> while others require the agents to get prior authorization from the sheriff or some other official,<sup>133</sup> and still other jurisdictions refuse to allow ICE agents into jails unless they produce a criminal warrant.<sup>134</sup>

## 5. SUPPORTING NONCITIZENS IN REMOVAL

Another policy sometimes adopted by “sanctuary” jurisdictions is one that affirmatively supports noncitizens in removal proceedings, providing public funds for attorneys to represent them. For example, a network of cities, in partnership with the Vera Institute, participate in the “Safety and Fairness for Everyone (SAFE) Cities Network,” which provides legal counsel for people in removal proceedings.<sup>135</sup>

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128. See, e.g., Press Release, N.Y. State Off. of Att’y Gen., New York AG Eric Schneiderman & Acting Brooklyn DA Eric Gonzalez Call for ICE to End Immigr. Raids in State Cts. (Aug. 3, 2017), <https://ag.ny.gov/press-release/2017/new-york-ag-eric-schneiderman-and-acting-brooklyn-da-eric-gonzalez-call-ice-end> [<https://perma.cc/94MX-FXA7>].

129. STATE OF N.Y. UNIFIED CT. SYS., DIRECTIVE NO. 1-2019 (Apr. 17, 2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdf> [<https://perma.cc/K3NC-JAGF>]; see also Richard Gonzales, *No ICE Arrests in Courthouses Without Judicial Warrants*, N.Y. Court Directive Says, NPR (Apr. 17, 2019, 10:38 PM), <https://www.npr.org/2019/04/17/714496186/new-york-courts-tell-ice-not-to-arrest-immigrants-in-courthouses-without-warrant> [<https://perma.cc/Z4TT-N3FV>].

130. See Sarah Rogerson, *Sovereign Resistance to Federal Immigration Enforcement in State Courthouses*, 32 GEO. IMMIGR. L.J. 275, 275 (2018).

131. See Eagly, *supra* note 2, at 309–12.

132. See, e.g., *id.* at 310.

133. See, e.g., Lasch, Chan, Eagly, Haynes, Lai, McCormick & Stumpf, *supra* note 2, at 1744 (discussing policies in two jurisdictions that require ICE agents to obtain criminal warrants before entering jails).

134. See, e.g., Vic Vela, *NM Jail Blocks Access for ICE, Claiming Racial Profiling*, ALBUQUERQUE J. (May 26, 2010), <https://www.corrections1.com/jail-management/articles/nm-jail-blocks-access-for-ice-claiming-racial-profiling-9NJhCUAdmVeFvAzA/> [<https://perma.cc/R6NV-7WZV>] (explaining how Santa Fe County jail refuses to allow ICE to enter the premises to interview prisoners).

135. See *SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation*, VERA INST. JUST. (Nov. 9, 2017), <https://www.vera.org/newsroom/safe-cities-network-launches-11-communities-united-to-provide-public-defense-to-immigrants-facing-deportation> [<https://perma.cc/8UFQ-N9BJ>].

## 6. DIVESTMENT

One final kind of policy that might be placed under the umbrella of “sanctuary” is policies that divest municipalities from investment in companies that are known to facilitate federal immigration enforcement. For example, the Berkeley City Council voted to divest from all companies that provide services to ICE.<sup>136</sup>

*C. Moral Claims That Justify Sanctuary*

Sanctuaries invoke many reasons for their policies. Previous scholarly work has usefully compiled the different justifications used by sanctuary jurisdictions.<sup>137</sup> This Article, by contrast, examines the moral premises shared by those justifications. Sanctuary policies and the officials who enact them offer not only claims about specific policy consequences but also moral claims. The question here is not just what benefits might flow from sanctuary policies, but what moral ideas underlie assertions about those benefits.

Given the history that preceded the institution of governmental sanctuary policies, the rhetoric that accompanies those policies is sometimes surprising. Moral claims about those policies can be grouped into three major categories: claims about well-being, claims about community, and claims about government.

This Article does not discuss claims about government in any detail; a future article may take up that thread. For now, suffice it to say that sanctuary jurisdictions often make claims that their policies will promote, or are part of, better government. For example, sanctuary policies might be said to represent a well-balanced allocation of power between federal and local governments,<sup>138</sup> or a pragmatic conservation of scarce financial resources.<sup>139</sup> Another group of claims that relates to governments is claims about rights, that is, claims that sanctuary policies protect people from government power that unduly infringes on protected areas.<sup>140</sup> And yet another group of claims that specifically criticize specific federal policies, like the Trump administration’s rescission of DACA, argues that sanctuary

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136. Alicia Kim, *Berkeley to Divest from Service Providers of US Immigration Enforcement*, DAILY CALIFORNIAN (Nov. 2, 2017), <https://www.dailycal.org/2017/11/02/berkeley-city-council-votes-divest-federal-immigration-enforcement-service-providers/> [https://perma.cc/EU7K-GMYE].

137. See, e.g., Eagly, *supra* note 2, at 250–51; Lasch, Chan, Eagly, Haynes, Lai, McCormick & Stumpf, *supra* note 2, at 1752–73; Motomura, *supra* note 2, at 445–56.

138. See Lasch, Chan, Eagly, Haynes, Lai, McCormick & Stumpf, *supra* note 2, at 1754.

139. See *id.* at 1755–56.

140. *Id.* at 1758–59.

policies can help alleviate the harms they cause.<sup>141</sup> All of these moral claims relate to sanctuaries and their role in promoting, or constituting, better government. All of them can be traced to origins in activist rhetoric, but all of them are transformed as they are taken up by government actors. But these issues are for another article. Here, I'll focus on two other categories of claims: claims about well-being and claims about community.

### 1. WELL-BEING AND UNDOCUMENTED PEOPLE'S MORAL STANDING

Most sanctuary jurisdictions justify their policies with rhetoric that appeals to the value of well-being: that is, claims that sanctuary policies will make someone better off. Sanctuary policies, these claims say, will improve the well-being of residents of a given community.

Well-being takes many forms. One is economic prosperity, and so it is an example of a claim about well-being when policymakers say that sanctuary policies will encourage immigration that brings with it economic prosperity. Safety is a form of well-being, and so it is an example of a claim about well-being when policymakers say that sanctuary policies will make potential witnesses feel more comfortable speaking to police and thus improve public safety.

Whose well-being does sanctuary promote? Central to the debate over sanctuaries is the status of undocumented people and the extent to which their interests are worthy of consideration by policymakers. As one religious commentator observed during the Sanctuary Movement of the 1980s, activists and churchgoers motivated to join the movement “care about refugees from Central America. They do not view them as illegal aliens; they see them as displaced people in need.”<sup>142</sup> Likewise, sociologist Grace Yukich describes the New Sanctuary Movement of the 2000s as driven “to treat strangers as sisters.”<sup>143</sup> Both movements were based on concern for the well-being of refugees and other people without immigration status.

The Sanctuary Movement of the 1980s was devoted, in significant part, to the humanity of the Central American refugees it sought to serve. Many of the experiences that led people to join the movement were centered around encounters with individual refugees and stories of the suffering those refugees had personally endured. This centering came across when one activist described the language used within the movement:

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141. See, e.g., *id.* at 1768–70, 1772.

142. Rev. Donald C. Cole, *Christian Perspectives on the News* (1983) (archived at Univ. Baptist Church of Seattle), *quoted in* COLLINGWOOD & GONZALEZ O'BRIEN, *supra* note 6, at 21–23.

143. YUKICH, *supra* note 6, at 2.

It is very difficult to maintain a sense of the worth of the individual when the word “refugee” replaces the word “person.” Persons are more easily seen as brothers and sisters, as equal in the sight of God. Refugees tend to become inanimate objects toward which we direct pious acts of charity, for which, we think, they should be exceedingly grateful.<sup>144</sup>

This made the idea of solidarity a central concept in the 1980s Sanctuary Movement.<sup>145</sup> Sanctuary activism was thought to unite activists with those whom they attempted to save from deportation and other harms.<sup>146</sup> As Eric Jorstad wrote, “Sanctuary is, first, an act of compassion, an expression of the fundamental Christian concern to love one’s neighbor.”<sup>147</sup> Thus, one concern frequently raised within the movement, particularly by refugees who became activists within it, was to avoid “subtle forms of paternalism and condescension.”<sup>148</sup>

A fundamental tactic of the movement was centering the experience of the refugees and asking people to imagine those experiences happening closer to home: “When people ask what they can do to help the people of Central America, our response is: What would you do if your sister were being raped, your brother killed, your father disappeared and your mother mourning daily? We do as much as we can at the deepest level of our lives.”<sup>149</sup> The implication, again, is that the undocumented people who may benefit from sanctuary are fully human and deserving of consideration and respect.

Opponents of sanctuary commonly accuse pro-immigrant policymakers of caring too much about the well-being of the undocumented, as Tucker Carlson did in the interview discussed at the beginning of this Article.<sup>150</sup> An op-ed piece in *The Hill* by the director of leading anti-immigration group the Federation for American Immigration Reform is titled, “Congress Should Represent Americans—Not Illegal

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144. Yvonne Dilling, Director of the Washington, D.C. Office of Witness for Peace, *quoted in* BAU, *supra* note 6, at 25–26; *see also* CUNNINGHAM, *supra* note 6, at 62–64 (discussing concerns about paternalism).

145. *See* GOLDEN & MCCONNELL, *supra* note 6, at 91 (referring to sanctuary groups as “Central American solidarity groups”).

146. *See* CUNNINGHAM, *supra* note 6, at 196.

147. Eric Jorstad, *Sanctuary for Refugees: A Statement on Public Policy*, 101 CHRISTIAN CENTURY 274, 275 (1984); *see also* Bau, *supra* note 6, at 13.

148. BAU, *supra* note 6, at 25.

149. “Statement of Faith,” Chicago Religious Task Force (Jan. 1985), *quoted in* CUNNINGHAM, *supra* note 6, at 100; *see id.* at 99 (noting that “the experience of the poor” was central in liberation theology).

150. *See supra* text accompanying notes 7–9.

Aliens.”<sup>151</sup> Another right-wing columnist accuses the Democratic party of choosing “to put the benefits of illegal aliens over the needs of U.S. citizens.”<sup>152</sup> Thomas Homan, the former acting director of ICE, wrote in an opinion piece for Fox News, “Sanctuary policies are bad and protect no one other than those who have disrespected our country and already intentionally violated our laws.”<sup>153</sup> The implication here is that policymakers should not protect or help undocumented people because they have “disrespected our country.” Note the “our,” which strongly implies “not theirs.”

Instead of arguing directly that undocumented people should not receive consideration from U.S. policymakers, opponents of sanctuary have concentrated on othering the undocumented by portraying them as gripped by a tendency toward grotesque violence. President Trump, in his 2020 State of the Union Address, portrayed the undocumented people affected by sanctuary policies as literal predators: “In sanctuary cities, local officials order police to release dangerous criminal aliens to prey upon the public, instead of handing them over to ICE to be safely removed.”<sup>154</sup> A document released by the White House is entitled, “Criminal Aliens Set Free By Sanctuary Cities.”<sup>155</sup> It lists “criminal aliens who were arrested then released back onto the streets by sanctuary city officials,” describing the criminal offenses each committed.<sup>156</sup> Breitbart’s articles on sanctuary cities are essentially a list of horrifying crimes

151. Ira Mehlman, *Congress Should Represent Americans—Not Illegal Aliens*, THE HILL (Nov. 30, 2017, 6:40 AM), <https://thehill.com/opinion/immigration/362375-congress-should-represent-americans-not-illegal-aliens> [<https://perma.cc/7UPV-JNTR>].

152. Russ Sloan, *From the Right: Democrats Champion Illegal Migrants over U.S. Citizens*, DAILY COM. (July 14, 2019, 2:01 AM), <https://www.dailycommercial.com/news/20190714/from-right-democrats-champion-illegal-migrants-over-us-citizens> [<https://perma.cc/E8KU-QW8A>]; see also Andrew R. Arthur, *Maryland to Consider Raft of Sanctuary Bills This Week*, CTR. FOR IMMIGR. STUD. (Feb. 25, 2020), <https://cis.org/Arthur/Maryland-Consider-Raft-Sanctuary-Bills-Week> [<https://perma.cc/3JF9-CGZV>] (arguing that discrimination laws should not include immigration status as a protected ground because “[t]he idea of ‘discrimination’ on the basis of ‘immigration status’, however, cheapens the concept (and abhorrent nature) of discrimination”).

153. Thomas Homan, *Here’s the Truth About Sanctuary Cities*, FOX NEWS (June 17, 2019), <https://www.foxnews.com/opinion/thomas-homan-ice-illegal-immigrants-border-crisis-sanctuary-cities> [<https://perma.cc/JKM9-D2M5>].

154. Donald Trump, President, State of the Union (Feb. 4, 2020), in *Full Transcript: Trump’s State of the Union Address*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/state-of-union-transcript.html> [<https://perma.cc/CUB4-P774>]; see Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 167 (2016).

155. *Criminal Aliens Set Free by Sanctuary Cities*, THE WHITE HOUSE (Feb. 13, 2018), <https://trumpwhitehouse.archives.gov/articles/criminal-aliens-set-free-sanctuary-cities/> [<https://perma.cc/TQS9-QW7G>].

156. *Id.*

purportedly committed by undocumented people.<sup>157</sup> And a columnist in the conservative, pro-Trump *National Review* refers to “the human carnage wrought by illegal-alien hoodlums in fugitive cities” and proposes that sanctuary cities be renamed “fugitive cities.”<sup>158</sup> While writing this Article, I pulled up the Fox News website to look for articles on sanctuary cities, and the most recent article referred, in its title, to “Latest Sanctuary City Horror Crime.”<sup>159</sup> And Ken Cuccinelli, then-acting director of U.S. Citizenship and Immigration Services, was reportedly a founding member of a group that described undocumented immigrants as “foreign invaders” responsible for “serious infectious diseases, drug running, gang violence, human trafficking, [and] terrorism.”<sup>160</sup>

Reinforcing the idea that undocumented people are undesirable objects, President Trump in April 2019 threatened to send undocumented people from detention to sanctuary cities, as if this would constitute some kind of punishment for those cities.<sup>161</sup> “We’ll bring them to sanctuary city areas and let that particular area take care of it, whether it’s a state or whatever it might be,” he said. “We’ll give them more people. We can give them a lot. We can give them an unlimited supply, and let’s see if they’re so happy. They say, ‘We have open arms.’”<sup>162</sup> Trump apparently viewed undocumented people as so repugnant that the threat of their very presence would deter sanctuary cities from their course.

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157. Pulling up the tag “sanctuary city” on Breitbart on May 3, 2020, produced the following list of article titles: *Twice-Deported MS-13 Illegal Alien Allegedly Raped Semiconscious Woman*; *New York Sanctuary Law Freed Illegal Alien Charged with Child Sex Abuse*; *Bill De Blasio’s NYC: Illegal Alien Accused of Child Rape Freed into U.S.*; *Illegal Alien Acquitted for Kate Steinle’s Murder Deemed Mentally Ill, Unfit to Stand Trial for Gun Charges*; *ICE: Sanctuary California Hiding Details on Accused Illegal Alien Child Abusers*; *Watch—Angel Granddaughter: My Grandmother’s Murder “Could Have Been Avoided” If Not for Sanctuary Law*. See *Sanctuary City*, BREITBART, <https://www.breitbart.com/tag/sanctuary-city/>.

158. Deroy Murdock, *Fugitive Cities Have Harbored 10,000 Criminal-Alien Recidivists*, NAT’L REV. (Mar. 9, 2018, 3:58 PM), <https://www.nationalreview.com/2018/03/fugitive-cities-have-harbored-10000-criminal-alien-recidivists/> [https://perma.cc/TLS3-FS55].

159. Adam Shaw, *ICE Chief Scorches Chicago Mayor for Glib Response to Latest Sanctuary City Horror Crime*, FOX NEWS (Mar. 13, 2020), <https://www.foxnews.com/politics/ice-chief-chicago-mayor-sanctuary-city> [https://perma.cc/F5HK-445B].

160. Andrew Kaczynski, *Trump Official Has Talked About Undocumented Immigrants as “Invaders” Since at Least 2007*, CNN POLS. (Aug. 17, 2019, 9:00 AM), <https://www.cnn.com/2019/08/17/politics/kfile-ken-cuccinelli-immigration-invasion-rhetoric/index.html> [https://perma.cc/3A83-45JA].

161. Jessica Taylor & Sasha Ingber, *Trump Threatens to Send Detained Immigrants to “Sanctuary Cities” as Retaliation*, NPR (Apr. 12, 2019, 1:18 PM), <https://www.npr.org/2019/04/12/712760676/trump-threatens-to-send-detained-immigrants-to-sanctuary-cities> [https://perma.cc/RL9U-4VE7].

162. *Id.*

These portrayals of undocumented people as criminals, and sanctuary cities as havens for criminals, are empirically misguided; sanctuary cities are generally safer than non-sanctuary cities.<sup>163</sup> They also deliberately make use of the availability heuristic<sup>164</sup> to create a false impression—while opponents of sanctuary try to create an impression of inhuman monsters hungering for blood, most undocumented people in detention have not committed a violent crime.<sup>165</sup> But these are the terms on which opponents of sanctuary engage with advocates' claims about well-being.

## 2. COMMUNITY, INCLUSIVENESS, AND SACRED SPACE

Supporters of sanctuary also make claims about community, claims that sanctuary policies will make a community better in some way. The improvement might be a moral one: for example, sanctuary policies might make a community more just, more inclusive, more diverse, more welcoming, or more equal. These are moral improvements, not improvements in well-being. The word I want to use from moral philosophy is “virtuous,” although I’m sensitive to the awkwardness of that word.<sup>166</sup> The idea here is that adopting sanctuary policies will make a

163. See Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017, 1:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/> [https://perma.cc/KSH7-DPVY]; see also Tanvi Misra, *Sanctuary Cities Are Safer and More Productive*, BLOOMBERG CITY LAB (Jan. 26, 2017, 4:25 PM), <https://www.citylab.com/equity/2017/01/sanctuary-cities-are-safer-and-more-productive/514508/> [https://perma.cc/UE82-296R].

164. See Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 103–04 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

165. See TRAC Reps., *ICE Focus Shifts Away from Detaining Serious Criminals*, TRAC IMMIGR. (June 25, 2019), <https://trac.syr.edu/immigration/reports/564/> [https://perma.cc/5Y46-YEZ2].

166. Many contemporary definitions of virtue focus on the relationship between virtues and intrinsic value. See, e.g., JULIA ANNAS, *INTELLIGENT VIRTUE* 103 (2011) (“Broadly, virtue is a successful commitment to goodness . . . .”); ROBERT MERRIHEW ADAMS, *A THEORY OF VIRTUE: EXCELLENCE IN BEING FOR THE GOOD* 6 (2006) (defining virtue as “persisting excellence in being for the good”); LINDA TRINKAUS ZAGZEBSKI, *VIRTUES OF THE MIND: AN INQUIRY INTO THE NATURE OF VIRTUE AND THE ETHICAL FOUNDATIONS OF KNOWLEDGE* 137 (1999) (defining a virtue as “a deep and enduring acquired excellence of a person, involving a characteristic motivation to produce a certain desired end and reliable success in bringing about that end”).

Other definitions stress the more Aristotelian idea that virtues are dispositions to respond to a certain kind of situation in an ethically admirable way. See, e.g., Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in *MIDWEST STUDIES IN PHILOSOPHY VOLUME XIII ETHICAL THEORY: CHARACTER AND VIRTUE* 32, 35 (Peter A. French, Theodore E. Uehling, Jr. & Howard K. Wettstein eds., 1988) (arguing that a virtue is being disposed to choose and respond well within a given sphere of human experience);

community more morally admirable because it is more just, or more compassionate, or—and this is the idea I’ll focus on—more inclusive. Of course, making a community morally better may cause improvements in well-being: there is good reason to think that diversity brings prosperity. But increasing the well-being of people in a community is different from making that community a more admirable one.<sup>167</sup>

Note that claims about community include claims about who constitutes part of that community. Not everyone who passes through a community is a member of it. Indeed, not everyone who lives in a community is necessarily a member of it—think of ambassadors, for example. When activists or policymakers argue that someone has been wrongfully excluded from community membership, they are making a moral claim that the community *should* treat certain people as members. Perhaps the most important kind of claim about community is a claim that all residents of a community, including the undocumented, should be counted as members of that community.

When we say that immigrants or anyone else should be counted as full members of a community, we are making a claim about the identity of that community. Likewise, as Pratheepan Gulasekaram has written, sub-federal policies that are designed to deny residency, public benefits, and employment to undocumented immigrants can be understood as aimed at “cultural exclusion” of those immigrants.<sup>168</sup> They “attempt to exclude outsiders to preserve their culture, including their racial, religious, and linguistic hegemony, and their shared heritage.”<sup>169</sup> In other words, the goal of those laws is to preserve a certain vision of a given community.

The difference between well-being claims and inclusion claims is subtle, but important: it is possible to care about someone’s well-being without treating them as a member of one’s community. We can care both about the well-being of outsiders and strangers.

The next Part of the Article will look at the values that sanctuary jurisdictions affirm when they create their policies, to see whether the

ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 13 (1999) (A virtue is “something that makes its possessor good; a virtuous person is a morally good, excellent, or admirable person who acts and reacts well, rightly, as she should—she gets things right.”); CHRISTINE SWANTON, VIRTUE ETHICS: A PLURALISTIC VIEW 1, 20 (2003) (defining virtue as “a disposition to respond to or acknowledge, in an excellent (or good enough) way, items in the field of a virtue (whether those items are people, objects, situations, inner states, or actions)”); *id.* at 20 (defining the “*field* of a virtue” as “those items which are the sphere(s) of concern of the virtue”); *id.* at 21 (“[A] virtue is a disposition to respond well to ‘the demands of the world.’”). On Aristotelian conceptions of virtue, see SARAH BROADIE, ETHICS WITH ARISTOTLE ch. 2 (1991).

167. See A. Ayers, *The Half-Virtuous Integrity of Atticus Finch*, 86 MISS. L.J. 33, 35 (2016) (distinguishing virtue and well-being).

168. Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441, 1446 (2009).

169. *Id.* at 1446.

claims discussed in this section are indeed missing from those policies. It will do so with the hope that whatever values sanctuaries choose to affirm can serve to solidify communities committed to those values, but also a willingness to criticize what is left out.

## II. WELL-BEING, BUT WHOSE WELL-BEING?

This Part of the Article explores the values that sanctuary states and municipalities invoke to explain the policies they adopt. My hope is that by cataloging the reasons for these policies, we can expose them to discussion and criticism. As the discussion proceeds, I will look for evidence of the claims discussed above: undocumented people’s moral standing and community identity. And I will also ask, if sanctuaries choose not to endorse these moral claims, what claims replace them?

### A. *Well-Being in Sanctuary Rhetoric*

One value that is commonly invoked by sanctuaries is one that we might expect to find invoked anywhere a government adopts a policy: the well-being of those to whom the government is responsible. Arguments about well-being claim that a policy will cause some people to be better off than they were.<sup>170</sup> For example, the California Values Act, a major piece of sanctuary litigation that the U.S. Department of Justice has challenged in federal court, invokes, among other values, the “well-being . . . of the people of California.”<sup>171</sup>

Well-being can include a wide range of things that make people better off. For example, consider this wide-ranging list from Santa Ana’s sanctuary ordinance, which says it aims at

fostering a relationship of trust, respect, and open communication between City officials and residents is essential to the City’s mission of delivering efficient public services in partnership with our community which ensures public safety, a

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170. In philosophy, basic theories of well-being include well-being as pleasure (hedonism), well-being as the satisfaction of desire, and well-being as the achievement of certain objective criteria (“objective-list” theories). See ROGER CRISP, WELL-BEING, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2017), <https://plato.stanford.edu/entries/well-being> [<https://perma.cc/9KBD-EGWV>]. On the ethical significance of well-being, see Raffaele Rodogno, *On the Importance of Well-Being*, 11 ETHICAL THEORY & MORAL PRAC. 197, 199 (2008); THOMAS SCANLON, WHAT WE OWE TO EACH OTHER 108–11 (1998); JOSEPH RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 303–11 (1999).

171. CAL. GOV’T CODE § 7284.2(f) (2018).

prosperous economic environment, opportunities for our youth, and a high quality of life for residents.<sup>172</sup>

This list includes some things that have clear specific meanings, like “prosperous economic environment,” and other things that are more vague, like “a high quality of life for residents.”<sup>173</sup> This Part will aim, then, to distill the specific forms of well-being that sanctuary policies typically invoke. In particular, I’ll focus on three forms of well-being: public safety, economic prosperity, and family unity.

This Part talks about each claim in turn, with an eye toward asking whose well-being any given policy is talking about. Consider the 1983 sanctuary resolution passed by Madison, Wisconsin, one of the very first in the nation, which begins: “Whereas, over one-half million victims of violence and terror in El Salvador and Guatemala are seeking places of temporary refuge.”<sup>174</sup> This is an unambiguous indication that the policy is motivated by harms suffered by specific people. Other policies have been far less clear.

## 1. PUBLIC SAFETY

One form of well-being is public safety. Perhaps the simplest argument to support the idea that sanctuary policies promote public safety is the argument that police time is finite, and police who spend time enforcing immigration laws could make more effective use of their time protecting the public in more meaningful ways. The city of Chicago makes that claim on its website explaining its sanctuary policy: “enforcing immigration law would take away needed resources and time from the Chicago Police Department.”<sup>175</sup>

Another kind of public safety to which immigrants contribute is national security. A 2017 executive order by the governor of Washington makes this point:

[C]urrently 65,000 immigrants serve in our nation’s armed forces and since 2002 greater than 100,000 immigrants have become naturalized citizens following honorable service to our nation. Many of these immigrants are Washingtonians. Their

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172. Santa Ana, Cal., Res. No. 2016-086 (Dec. 6, 2016).

173. *Id.*

174. Madison, Wis., Res. No. 39,105 (June 7, 1983).

175. *Frequently Asked Questions — Sanctuary Cities*, CITY OF CHICAGO, <https://www.chicago.gov/content/dam/city/depts/mayor/Office%20of%20New%20Americans/PDFs/SanctuaryCitiesFAQs.pdf> [<https://perma.cc/TR4W-J69H>] (last visited Mar. 16, 2021).

personal sacrifice and contribution to our nation's security should be recognized by all Americans.<sup>176</sup>

Far more frequently asserted in sanctuary policies, however, is a different claim about public safety: the claim that those policies will facilitate better policing, and thus public safety, by ensuring that witnesses feel comfortable speaking to local or state law-enforcement officials without fearing that they or their loved ones could suffer immigration consequences for doing so.<sup>177</sup> NYPD Commissioner James P. O'Neill said, in a press release discussing New York City's law against cooperation with ICE, "Our work can only be done if every New Yorker has trust in the police and is willing to work with us in our collective efforts to ensure the safety of every neighborhood and every block of this great city."<sup>178</sup> "Public safety for all of our residents must come first," said Brooklyn Borough President Eric L. Adams in the same press release.<sup>179</sup>

Fleshing out this idea, the California Values Act invokes "the public safety of the people of California"<sup>180</sup> and explains that one of its goals is "to ensure effective policing."<sup>181</sup> The Act aims to build "[a] relationship of trust between California's immigrant community and state and local agencies," which "is central to the public safety of the people of California."<sup>182</sup> "This trust is threatened when state and local agencies are entangled with federal immigration enforcement" because "immigrant community members fear approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school, to the detriment of public safety and the well-being of all Californians."<sup>183</sup>

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176. Wash. Exec. Order 17-01 (2017).

177. Motomura characterizes this as "[t]he typical rationale" for sanctuary policies. HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 82 (2014). Interestingly, not all sanctuary policies embrace it. Atlanta's 2017 sanctuary resolution, for example, does not. Atlanta, Ga., Res. No. 17-R-4256 (Sept. 5, 2017).

178. Press Release, N.Y.C. Off. of the Mayor, De Blasio Admin. Announces Citywide Guidance & NYPD Protocol to Codify Restrictions on Assistance with Fed. Immigr. Enf't (Jan. 31, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/075-18/de-blasio-administration-citywide-guidance-nypd-protocol-codify-restrictions-on> [<https://perma.cc/K6K7-XTJG>]; see also N.Y.C. COUNCIL, COMM. ON IMMIGR., REP. ON INT. NOS. 486 & 487, at 3 (2014) ("Further, the fear of deportation due to cooperation between City agencies and ICE negatively affects community policing, and the willingness of immigrant crime victims and immigrant witnesses to report crimes.").

179. Press Release, N.Y.C. Off. of the Mayor, *supra* note 178.

180. CAL. GOV'T CODE § 7284.2(b) (2018).

181. *Id.* § 7284.2(f).

182. *Id.* § 7284.2(b).

183. *Id.* § 7284.2(c); see also *Comments on S.B. 54 Before the S. Rules Comm.*, 2017 Leg., 6 (Cal. 2017) (comment of Sen. Kevin de León) ("When local police enforce immigration laws, they rapidly lose the trust of the undocumented community. Crimes go

Philadelphia's sanctuary policy asserts the same idea: "Research has shown, and most law enforcement leaders believe, that trust between officers and immigrant communities is essential to reducing crime and helping victims."<sup>184</sup> To this idea, Santa Ana's ordinance adds the thought that "the conflation of federal civil immigration law enforcement and local criminal law enforcement experienced in other communities has resulted in considerable erosion of public safety by creating social distance between law enforcement officers and the community."<sup>185</sup>

A clause in a resolution passed by the city of Tuskegee, Alabama, makes clear that although it will treat people fairly, it does so only because fairness improves public safety, not because fairness is intrinsically valuable: "the City of Tuskegee, as a matter of public safety, treats all individuals fairly and with respect."<sup>186</sup>

Of course, opponents of sanctuary also invoke public safety. Opponents of sanctuary policies portray them as "a substantial threat to law and order, and to the personal safety of American citizens."<sup>187</sup> Anti-sanctuary activists and government officials focus their arguments predominantly, and ferociously, on the "carnage and lawlessness" that they claim will follow the adoption of sanctuary policies.<sup>188</sup> Their theory is that when sanctuary jurisdictions decline to comply with detainers, deportable people who complete their criminal sentences will, upon release, evade capture by ICE and then commit more crimes. Johnson provides a useful survey of anti-sanctuary ads against Democratic political candidates, in which opponents portrayed sanctuary cities as pro-crime in ads run in states that have no sanctuaries.<sup>189</sup> Indeed, Annie Lai and Christopher Lasch argue that sanctuary debates and litigation are all about "the Administration's broader attempts to frame immigration as a public safety threat."<sup>190</sup>

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unreported for fear of deportation. The perpetrators roam free to strike again. Our communities become less—not more—safe.”).

184. Stephanie Waters, *City of Philadelphia Action Guide: Immigration Policies*, CITY PHILA. (Jan. 8, 2018), <https://www.phila.gov/2018-01-08-immigration-policies/> [<https://perma.cc/W4NR-R9MC>]. This article links to Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/> [<https://perma.cc/S4N4-GZJ6>].

185. Santa Ana, Cal., Res. No. 2016-086 (Dec. 6, 2016).

186. Tuskegee, Ala., Res. 2015-61 (May 26, 2015).

187. Johnson, *supra* note 2, at 589.

188. Andrew R. Arthur, *Maryland to Consider Raft of Sanctuary Bills This Week*, CTR. FOR IMMIGR. STUD. (Feb. 25, 2020), <https://cis.org/Arthur/Maryland-Consider-Raft-Sanctuary-Bills-Week> [<https://perma.cc/2V3Q-4P8Q>].

189. Johnson, *supra* note 2, at 594–99. See *id.* at 602 and 606–09 for more rhetoric about sanctuaries' supposed promotion of criminality.

190. Lai & Lasch, *supra* note 2, at 564; see *id.* at 549.

So advocates and opponents both cite public safety as a reason for their views on sanctuary. Advocates of sanctuary have the stronger empirical case; empirical research suggests that sanctuary policies do not increase crime.<sup>191</sup> Most of the people deported after the use of a detainer are not violent criminals, and empirical evidence does not show detainers to be an effective tool of crime control.<sup>192</sup> Moreover, studies show that Latinx people, for example, are indeed much less likely to share information with police because of fear of immigration consequences for themselves or others.<sup>193</sup> But the value to which advocates and opponents of sanctuary appeal is the same—public safety, a form of well-being.

Whose public safety and well-being are we talking about, though? Many sanctuary policies, like the ones quoted above, invoke “public safety” without saying who is included in the “public,” and specifically without saying whether undocumented people, or immigrants generally, are part of the “public” who will benefit. However, Los Angeles Police Department Special Order 40, which pledges that “undocumented alien status in itself is not a matter for police action,” says: “Police service will be readily available to all persons, including the undocumented alien, to ensure a safe and tranquil environment. Participation and involvement of the undocumented alien community in police activities will increase the Department’s ability to protect and to serve the entire community.”<sup>194</sup> This is an unambiguous statement that undocumented people are intended beneficiaries of the policy. It makes the absence of such statements in other sanctuary policies all the more conspicuous.

## 2. ECONOMIC WELL-BEING

Public safety through better law enforcement is not the only form of well-being that sanctuaries claim to promote. Another common claim is that sanctuary policies lead to economic prosperity. Atlanta’s sanctuary policy, for example, notes that one of its benefits is to “further immigrants’

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191. See COLLINGWOOD & GONZALEZ O’BRIEN, *supra* note 6, at 15 (“Our results show that sanctuary policies have no effect on crime rates, that declining to honor ICE-detainer requests does not necessarily increase or decrease crime rates, and that enacting a statewide sanctuary law almost surely reduces the likelihood that undocumented immigrants will call 911.”).

192. See Chen, *supra* note 2, at 32–33.

193. *Hearing on Int. 0486-2014 and Int. 0487-2014 Before the New York City Council Comm. on Immigr.* (Oct. 15, 2014) (testimony of Nisha Agarwal, Comm’n, N.Y.C. Mayor’s Off. Immigrant Affs. (citing NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (May 2013), [https://www.policylink.org/sites/default/files/INSECURE\\_COMMUNITIES\\_REPORT\\_FINAL.PDF](https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF) [<https://perma.cc/F9J6-FE8F>])).

194. OFFICE OF THE CHIEF OF POLICE, SPECIAL ORDER NO. 40 (1979), [http://assets.lapdonline.org/assets/pdf/SO\\_40.pdf](http://assets.lapdonline.org/assets/pdf/SO_40.pdf) [<https://perma.cc/YMV4-HUDL>].

role in building our local economy.”<sup>195</sup> Washington State’s sanctuary law is known as the Keep Washington Working Act,<sup>196</sup> and its formal title was “An act relating to establishing a statewide policy supporting Washington state’s economy and immigrants’ role in the workplace.”<sup>197</sup> A legislative committee report that summarizes testimony in favor of the bill includes sentences like these:

“We rely on the drive and ambition of immigrants to support our economy.”

“We want to create a positive business environment, and keep Washington a great place to be an entrepreneur.”

“One third of Microsoft employees are working here on a visa, but this measure is not just about tech workers. The medical sector, agriculture, and the hospitality industry all depend on immigrants to maintain a stable workforce.”<sup>198</sup>

Likewise, the resolution that made Boise, Idaho, a “Welcoming City” (a resolution that had no substantive effect on the city’s cooperation with immigration authorities) affirmed that “foreign-born Boise residents are a vital part of our community, bringing fresh perspectives and new ideas, starting businesses, and contributing to the vibrant diverse community that we all value.”<sup>199</sup>

Claims about sanctuaries’ effect on economic prosperity are empirical claims, and there is good empirical support for them. According to a study by political scientist Tom C. Wong, sanctuary counties have higher median household incomes, lower poverty rates, lower rates of reliance on public assistance, and lower unemployment than non-sanctuary cities.<sup>200</sup> Wong’s report does not make clear whether sanctuary

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195. Atlanta, Ga., Res. No. 17-R-4256 (Sept. 5, 2017).

196. See *Keep Washington Working*, WASH. STATE DEP’T COM. <https://www.commerce.wa.gov/growing-the-economy/keep-washington-working/> [https://perma.cc/CV8G-9PTG] (last visited Mar. 6, 2021).

197. See S.B. 5497, 2019 Reg. Sess. (Wash. 2019).

198. Wash. Rep., S.B. 5497 (Feb. 18, 2019).

199. Boise, Idaho, Res. No. RES-71-17 (Jan. 31, 2017), [http://boisecityid.iqm2.com/Citizens/Detail\\_LegiFile.aspx?MeetingID=2311&ID=7403](http://boisecityid.iqm2.com/Citizens/Detail_LegiFile.aspx?MeetingID=2311&ID=7403) [https://perma.cc/WNK5-KRPU].

200. TOM K. WONG, THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY (Jan. 26, 2017), <https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf> [https://perma.cc/929W-BLCC].

policies cause these economic effects, but it compared so many counties that a clear correlation emerges.<sup>201</sup>

To be sure, opponents of sanctuary likewise invoke economic consequences. For example, in legislative debates over Georgia's pre-Trump anti-sanctuary law, opponents denied that immigration (and particularly unauthorized immigration) might bring economic prosperity.<sup>202</sup> They claimed that unauthorized immigration had caused a "tremendous economic burden that is placed on our citizens" through "burdens on Georgia schools, law enforcement communities, and healthcare infrastructure."<sup>203</sup> But the better economic data show that undocumented people contribute significantly to the communities in which they live.<sup>204</sup>

The webpage where Philadelphia explains its sanctuary policies has a section titled, "Why immigrants are important to Philadelphia." I reproduce three paragraphs here to show the effect they work together to create:

The economic impact of Philadelphia's immigrant population helps the City grow revenue and create jobs. From 2000 – 2013, immigrants were responsible for 96% of the Main Street neighborhood business growth. Since 2000, immigrants are responsible for 75% of the workforce growth. Of the nearly one billion dollars in earnings generated by small business owners in Philadelphia, immigrant entrepreneurs are responsible for \$295 million of those earnings.

Immigrants have played a significant role in Philadelphia's population growth in recent years. Immigrants helped reverse fifty years of population loss, strengthening our city. In some Philadelphia neighborhoods, the influx of immigrants has prevented destabilizing blight, improved public schools, and helped spur growth in neighborhood commercial corridors.

More undocumented immigrants live in Philadelphia than in any of the largest Northeast American cities, except New York City. And many Philadelphia families live in mixed-status

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201. Wong's dataset included 2,492 counties, 608 of which had been identified by ICE as sanctuary jurisdictions based on their refusal to accept detainees. *See id.* at 4.

202. *Review of Selected 2011 Georgia Legislation: Illegal Immigration Reform and Enforcement Act of 2011*, 28 GA. ST. U. L. REV. 51, 58 (2011).

203. *Id.* at 54.

204. Cesar Maximiliano Estrada, *How Immigrants Positively Affect the Business Community and the U.S. Economy*, CTR. FOR AM. PROGRESS (June 22, 2016, 9:00 AM), <https://www.americanprogress.org/issues/immigration/news/2016/06/22/140124/how-immigrants-positively-affect-the-business-community-and-the-u-s-economy/> [<https://perma.cc/ZE8L-GWKN>].

households, which means that some family members are documented, but their parents or siblings may not be.<sup>205</sup>

Notice that the first two paragraphs focus on the empirically measurable contributions immigrants make—workforce growth, economic activity, and population growth that leads to less blight and better schools—while the third paragraph simply asserts the existence of undocumented people. It points out that they are numerous in the context of a discussion of reasons to adopt a sanctuary policy. To me, this seems a powerful way of endorsing the moral standing of undocumented people: to list their existence as a reason to adopt a policy.

### 3. FAMILY UNITY

Another form of well-being that sanctuary policies sometimes emphasize is family unity. Sanctuary activists have urged that sanctuaries help keep families together by preventing family members from being deported.<sup>206</sup> And governmental actors sometimes embrace family unity as a goal of sanctuary policies. For example, when New York’s Commissioner of Immigrant Affairs testified in favor of a sanctuary bill, she began by saying, “These bills advance several important interests of the City. The first is family unity. The proposed legislation will help bring stability to our communities by keeping families together.”<sup>207</sup>

I see family unity as a form of well-being, like public safety and economic prosperity. But it is not one that the immigration system always recognizes.<sup>208</sup> On the one hand, family unity is a central goal of

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205. Waters, *supra* note 184.

206. John Washington, *Another Way to Keep Families Together: Join the New Sanctuary Movement*, THE NATION (June 28, 2018), <https://www.thenation.com/article/archive/another-way-keep-families-together-join-new-sanctuary-movement/> [https://perma.cc/64G4-SZ63]; *see also* The Philadelphia Family Unity Network, PA. IMMIGR. & CITIZENSHIP COAL., <http://paimmigrant.org/philadelphia-family-unity-network/> [https://perma.cc/9FED-PTLQ] (last visited Mar. 6, 2021); CATH. LEGAL IMMIGR. NETWORK, INC., CLINIC SANCTUARY CITIES TOOLKIT (2016), <https://cliniclegal.org/file-download/download/public/1379> [https://perma.cc/CK3J-AAQX] (“Separating local policing from immigration enforcement promotes family unity and human dignity: Detainers are often issued for individuals with minor or no criminal convictions. As a result, hardworking members of our community are deported and thousands of children are separated from their parents. When families are broken apart, communities are also destroyed. In order to promote strong families and communities, local law enforcement must disentangle itself from ICE.”).

207. *Hearing on Int. 0486-2014 and Int. 0487-2014 Before the New York City Council Comm. on Immigr.* (Oct. 15, 2014) (testimony of Nisha Agarwal, Comm’n, N.Y.C. Mayor’s Off. Immigrant Affs.).

208. *See* Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power versus Aliens’ Rights*, 41 VILL. L. REV. 725, 730 (1996) (discussing the “apparent

immigration law.<sup>209</sup> This is reflected in the fact that family connections are one of the two major bases for green-card eligibility (the other being labor); the majority of visas issued each year are based on family connections,<sup>210</sup> and “family relationships are integral to immigration law design.”<sup>211</sup>

On the other hand, family separation has also long been a feature of the immigration system. The Trump Administration adopted a policy of criminally prosecuting every adult immigrant apprehended by Customs and Border Patrol (CBP), which meant separating them from their children.<sup>212</sup> Thousands of children were separated from their parents.<sup>213</sup> This was not the first such program: family separation of one kind or another has been a feature of the immigration system for much of its history.<sup>214</sup> Under the Trump Administration, it has been accompanied by a powerful narrative campaign to characterize immigrant families as intruders, parasites, or animals.<sup>215</sup> But public outcry against the “Zero Tolerance” policy that caused so many family separations in the early Trump years suggests that family unity is a value with powerful appeal.<sup>216</sup>

If indeed we do value family unity, why? And how do we value it? Many people treat family unity not as a goal in itself, but as a way of promoting other goals.<sup>217</sup> Those who criticize the current system, Kerry Abrams observes, “often speak in the language of fairness, efficiency, and national interests. Family immigration, they claim, steals spots from the

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inconsistency between the fundamental right of family unity and the restrictions placed on this right within existing and proposed family immigration policies”).

209. See Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. U. L. REV. 287, 317–18 (2020).

210. Jens Manuel Krogstad & Ana Gonzalez-Barrera, *Key Facts About U.S. Immigration Policies and Proposed Changes*, PEW RSCH. CTR. FACT TANK (May 17, 2019), <https://www.pewresearch.org/fact-tank/2019/05/17/key-facts-about-u-s-immigration-policies-and-proposed-changes/> [https://perma.cc/S8P9-GH3H] (“Today, family-based immigration—referred to by some as ‘chain migration’—is the most common way people gain green cards, in recent years accounting for about two-thirds of the more than 1 million people who receive them annually.”).

211. Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. REV. 1, 2 (2014).

212. See Olivares, *supra* note 209, at 294.

213. *Q&A: Trump Administration’s “Zero-Tolerance” Immigration Policy*, HUMAN RTS. WATCH (Aug. 16, 2018, 8:00 AM), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy#> [https://perma.cc/6DQU-37DV].

214. See Olivares, *supra* note 209, at 299–300.

215. *Id.* at 308–11.

216. *Id.* at 297–98.

217. Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 7–8 (2013) (quoting *Hearing on the Role of Family-Based Immigration in the U.S. Immigration System before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary*, 110th Cong., 1st Sess. (2007) (testimony of Bill Ong Hing)).

immigrants we most want—those who possess desirable skills and those who would bring diversity to US culture because immigration from their home country is underrepresented.”<sup>218</sup> In other words, we do not promote family unity for its own sake.

Following the thread of Abrams’s argument provides some insight into the ways in which family unity might be treated as an instrument to achieve other benefits rather than a good in itself. Adding to the literature, Abrams identifies other possible rationales for privileging family unification.<sup>219</sup> In each case, she identifies a way in which reunifying immigrant families promotes other values. One is economic prosperity. Bringing family members to the United States is good for the economy in numerous ways. First, it might serve to bring needed low-skill labor because labor visas are typically based on higher-level skills.<sup>220</sup> Second, family members perform unpaid labor like childcare and housework, which contributes enormous value to the economy even though it is rarely recognized in formal measures of economic output.<sup>221</sup>

Another possible goal is to promote marriage or to perpetuate discrimination in marriage. By privileging marriage-based immigration, Congress can help keep marriage more central in American culture, where it is on the decline.<sup>222</sup> By declining to recognize same-sex marriages as a basis for immigration, Congress attempted to fight back against increasing acceptance of those relationships.<sup>223</sup>

Another reason for family unity is *integration*: the idea that family unification results in more integration of immigrants into our society.<sup>224</sup> If you are traveling to be with a U.S. citizen, that citizen will help you integrate into society, the reasoning goes.<sup>225</sup> This idea is illustrated by the provisions of the Immigration and Nationality Act (INA) that grant citizens’ spouses naturalization after only three years rather than the usual five and also by the “immediate relative” visas that let certain family members bypass quotas.<sup>226</sup>

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218. *Id.* at 8–9. Abrams explores the ways in which people justify prioritizing family immigration. When scholars support family-based immigration, she writes, the claim they make “is emphatically *not* that family-based immigration brings economic benefits to the country; to the contrary, family-based immigration is understood as ‘the soft side’ of immigration while employment-based immigration is ‘more about being tough and strategic.’” *Id.* at 8.

219. *Id.* at 27.

220. *Id.* at 20.

221. *Id.* at 22–23.

222. *Id.* at 24.

223. *Id.* at 24–25.

224. *Id.* at 16–17.

225. *Id.*

226. *Id.* at 17; *see* Immigration and Nationality Act § 319(a), 8 U.S.C. § 1430(a); Immigration and Nationality Act § 201, 8 U.S.C. § 1151(b).

Abrams develops an alternate version of the integration rationale, which points out that when an immigrant brings their family with them when they come to this country, it is easier for them to settle and establish a life here if their family is with them.<sup>227</sup> As Abrams notes, this idea is reflected in the “following to join” provisions of the INA.<sup>228</sup>

All of this prompts the question of why we want to promote integration. There are two very different faces of this rationale. One is the idea that integration is good for immigrants’ well-being.<sup>229</sup> If an immigrant is to thrive in America, it will help if they learn the language, internalize values and culture that are common in our society, and learn to move naturally through life here. This kind of integration, we might think, is good for the citizens in the society too, in that more integrated immigrant populations mean a better economy, easier and more rewarding social intercourse, and a culture enriched by diversity, new ideas, and new traditions.

The darker face of the integration rationale is the xenophobic one.<sup>230</sup> One of the core features of the “Latino threat” narrative elucidated by Leo R. Chavez is the idea that Latino immigrants who do not assimilate into U.S. culture (whatever that is) form a sort of invading army bent on “reconquista” (re-conquest) of the southwestern United States.<sup>231</sup> To this racist idea that immigrant enclaves threaten American identity or sovereignty is added the idea that Latino birth rates and population increase represent a further threat.<sup>232</sup> This last idea, in particular, makes Latina fertility and family unification a threat to the well-being of citizens. Thus, for racists and xenophobes, there is a contradiction inherent in the idea of family unity: on the one hand, family unification can help make sure that immigrants assimilate, rendering them less “threatening,” while on the other hand, family unification contributes to the “threatening” increase in Latino population. For opponents of immigration, family unity is therefore something of a doomed proposition, and the only satisfactory answer is less immigration.

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227. Abrams, *supra* note 217, at 17.

228. *Id.*; see Immigration and Nationality Act § 203(d), 8 U.S.C. § 1153(d).

229. Abrams, *supra* note 217, at 16–17 (describing integration as a rationale for immigration policy because integration promotes development of national ties that enhance the likelihood that immigrants will both contribute to their new country’s economy and achieve individual economic self-sufficiency).

230. See generally Shelley Wilcox, *Culture, National Identity, and Admission to Citizenship*, 30 SOC. THEORY & PRAC. 559 (2004) (critiquing the argument that insufficient integration of immigrants into receiving societies threatens preservation of the dominant culture and norms).

231. LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION*, 24 (2d ed. 2013).

232. *Id.* at 73–111.

To that end, the Trump Administration has targeted family unification. One proposal would have reduced the number of family-based visas so drastically that they would represent one-third of all visas instead of the current two-thirds.<sup>233</sup> And the phrase “chain migration,” referring to the way someone who moves to the United States to be with their family may themselves become the family member whom future immigrants immigrate to be with, has become an epithet.<sup>234</sup>

The possibility that campaigns against “chain migration” illustrates is that family unity can be valued not for its own sake but because of other effects it has. If we value family unity only because it leads to economic prosperity or integration, we are not valuing it for its own sake. This, to me, seems like the most obvious and important rationale for family unity: it is, simply, good. Family unity needs no further rationale; it is a form of well-being. When you are forcibly separated from your family, you are less well-off than when you are able to be with your family. “Families belong together,” the political slogan that accompanied the movement against family separation in the early Trump years,<sup>235</sup> is both correct and complete.

That is not to say that there is any harm in pointing out family unity’s further benefits. This is the line that Commissioner Agarwal walked when she said, “Reducing the disruption of families caused by the federal immigration enforcement system will not only protect children, but will also protect the City’s finances and services by preventing family members of deportees from being deprived of their parents’ and spouses’ support and income.”<sup>236</sup> Family unity is good and also has good effects.

As always, the question of “good for whom?” comes up. If we are talking about family unity as an intrinsic good, it is almost exclusively noncitizens who can receive that benefit from sanctuary policies. To be sure, there are instances where ICE mistakenly arrests a citizen.<sup>237</sup> But the

233. Krogstad & Gonzalez-Barrera, *supra* note 210; see Seung Min Kim, Josh Dawsey & David Nakamura, *Trump’s Plan to Overhaul Legal Immigration Draws Cool Reception*, WASH. POST (May 16, 2019, 7:48 PM), [https://www.washingtonpost.com/politics/white-house-says-daca-protections-too-divisive-to-be-included-in-trump-immigration-plan/2019/05/16/5ee50606-77e3-11e9-b3f5-5673edf2d127\\_story.html](https://www.washingtonpost.com/politics/white-house-says-daca-protections-too-divisive-to-be-included-in-trump-immigration-plan/2019/05/16/5ee50606-77e3-11e9-b3f5-5673edf2d127_story.html) [<https://perma.cc/K7P5-NTA5>].

234. See Dara Lind, *What “Chain Migration” Really Means—and Why Donald Trump Hates It So Much*, VOX (Jan. 30. 2018, 12:48 PM), <https://www.vox.com/policy-and-politics/2017/12/29/16504272/chain-migration-family-how-trump-end> [<https://perma.cc/A4Q2-4VP5>]; see also Olivares, *supra* note 209, at 311.

235. *About Us*, FAMILIES BELONG TOGETHER, <https://www.familiesbelongtogether.org/about/> [<https://perma.cc/6MK4-46LS>].

236. *Hearing on Int. 0486-2014 and Int. 0487-2014 Before the New York City Council Comm. on Immigr.* (Oct. 15, 2014) (testimony of Nisha Agarwal, Comm’n, N.Y.C. Mayor’s Off. Immigrant Affs.).

237. See, e.g., Paige St. John & Joel Rubin, *ICE Held an American Man in Custody for 1,273 Days. He’s Not the Only One Who Had to Prove His Citizenship*, L.A.

main victims of family separation are noncitizens. Thus, to justify sanctuary by invoking family unity as an intrinsic good, a government would have to unambiguously support the idea that noncitizens, and undocumented people in particular, are proper beneficiaries of government policy. This, it seems, is difficult to do.

*B. Does the Well-Being of Undocumented People Count?*

Well-being is a commonly invoked value in sanctuary policies, but whose well-being matters? For Aristotle, “The common good at which all true forms of government aim is the common good of all members of the political community; that is, of all ‘citizens.’”<sup>238</sup> Promoting the good of all members of the community sounds very inclusive. But Aristotle’s definition of who counts as a citizen was problematically narrow, excluding slaves and probably women, among others.<sup>239</sup> As Kit Johnson observes, well-being can be conceived narrowly, to include only people within the United States, or globally, to include people all over the world.<sup>240</sup> The rhetoric these municipalities use often falls short of explicitly acknowledging that the well-being of undocumented people should count.

1. COUNTING UNDOCUMENTED PEOPLE AS WORTHY OF POLICYMAKERS’ CONCERN

It is not hard for a determined policymaker to make clear that undocumented people are included among the intended beneficiaries of a policy. In New Mexico, for example, Bernalillo County adopted a policy that says it “will treat all persons with respect and dignity, regardless of immigration status.”<sup>241</sup> It then says that “all persons who live within the County shall have full access to all county services with respect and dignity . . . regardless of their race . . . or immigration status.”<sup>242</sup>

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TIMES (Apr. 27, 2018, 5:00 AM), <https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html> [<https://perma.cc/8NV4-5FFG>].

238. Donald Morrison, *Aristotle’s Definition of Citizenship: A Problem and Some Solutions*, 16 HIST. OF PHIL. Q. 143, 143 (1999).

239. See *id.* at 148 (noting that Aristotle did refer to female citizens but appears to have intended this as a description of then-current practice in other states, not as a description of the understanding of citizenship he himself was promoting).

240. Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211, 1238 (2015).

241. Bernalillo Cnty., N.M., Admin. Res. AR 2017-22 § 2(D) (Mar. 14, 2017), <https://www.bernco.gov/uploads/files/CountyManager/Immigrant-Friendly%20County%20Resolution.pdf> [<https://perma.cc/JSM2-4T3H>].

242. *Id.* § 3.

Similarly, Commissioner Agarwal in New York began legislative testimony in support of a sanctuary bill by focusing on the deportable people it would affect and referring to them as “New Yorkers”:

These two bills will prevent some two to three thousand New Yorkers per year from being held in City custody beyond the time when the criminal justice system says they should be released, solely for the purpose of helping federal immigration officials take custody of them so they can be placed in detention and deportation proceedings. These are individuals—lawful permanent residents and visa holders as well as undocumented immigrants—who pose no significant threat to public safety. To the contrary, the vast majority of these immigrants have family and community ties to this City and call it home. [The sanctuary bills] will treat these immigrant New Yorkers equally to all others in our criminal justice system who, when they are released by judge or jury, are allowed to return home to their families and jobs.<sup>243</sup>

By contrast, jurisdictions sometimes use language that explicitly *excludes* the undocumented. For example, Binghamton, New York, passed a resolution titled, “A Resolution Affirming the City of Binghamton’s Support for *Legal* Immigrants and Refugees.”<sup>244</sup> Those who are not “legal,” it seems, do not have Binghamton’s support.

One way of alluding to undocumented people without naming them is to refer to “all residents,” and this is a common way sanctuary policies refer to those they are intended to benefit. For example:

The City of Boise is committed to being a Welcoming City and creating a community where all of our residents feel welcomed, safe, and able to fully participate in, and contribute to, our city’s economic and social life. We urge all residents of Boise to do

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243. *Hearing on Int. 0486-2014 and Int. 0487-2014 Before the New York City Council Comm. on Immigr.* (Oct. 15, 2014) (testimony of Nisha Agarwal, Comm’r, N.Y.C. Mayor’s Off. Immigrant Affs.).

244. Binghamton, N.Y., Res. R17-31 (Feb. 22, 2017), (emphasis added), <http://binghamton-ny.gov/> [<https://perma.cc/5VEU-C74H>] (search “R17-31,” select result “City Council Business Meeting,” then select item “Perm R17-31”). The text of the resolution itself seems to extend its scope further, saying, “Binghamton shall serve *all* residents and make city services accessible to all, and city agencies and law enforcement *cannot withhold services based on . . . immigration status.*” *Id.* (emphasis added). I’m assuming that “immigration status” here includes “lack of immigration status,” although perhaps that could be contested.

their part in reaching out and welcoming all those who live in and visit our great City.<sup>245</sup>

Madison, Wisconsin, similarly announces that “all residents deserve to feel safe, secure, and protected within the City.”<sup>246</sup> And Dane County, Wisconsin, says it intends “to promote the utilization of its services by all of its residents who are entitled to and in need of them.”<sup>247</sup> It then seems to include undocumented people again without naming them: “[I]ndividuals should know that they may seek and obtain the assistance of county agencies regardless of personal or private attributes, without negative consequences to their personal lives.”<sup>248</sup> Undocumented people are certainly “individuals,” and the phrase, “regardless of personal or private attributes” could perhaps refer to lack of status. But they are hardly bold ways of doing so.

Phrases like “[a]ll residents”<sup>249</sup> seem to include undocumented people; undocumented people, in other words, are within the *scope* of these policies. But that does not mean that affirming support for them is the *goal* of the policies. If a policymaker wanted to make a point of supporting undocumented people, alluding to them indirectly is not the way to do it.

Compare Lansing’s Executive Order: the city “celebrate[s] diversity and provide[s] equal protection for all residents, immigrant and refugee, documented and undocumented.”<sup>250</sup> If affirming the value of undocumented people and their moral standing in the eyes of policymakers is the goal, it is easy enough to refer to them explicitly. It is striking, then, that many sanctuary policies do not do so. It leaves a question, at least, about whether the policymakers have the well-being of undocumented people in mind when they invoke values like public safety and economic prosperity.

245. Boise, Idaho, Res. RES-71-17 (Jan. 31, 2017), [http://boisecityid.iqm2.com/Citizens/Detail\\_LegiFile.aspx?MeetingID=2311&ID=7403](http://boisecityid.iqm2.com/Citizens/Detail_LegiFile.aspx?MeetingID=2311&ID=7403) [https://perma.cc/5CCP-98JT].

246. Madison, Wis., Res. RES-17-00125 (Feb. 7, 2017), <https://madison.legistar.com/ViewReport.ashx?M=R&N=Text&GID=205&ID=2708053&GUID=B23FBF63-5B46-4BF8-AD56-FDE3720130EA&Title=Legislation+Text> [https://perma.cc/G2NC-ALTN].

247. Dane Cnty., Wis., Res. 65, 04-05 (Sept. 23, 2004).

248. *Id.*

249. Madison, Wis., Res. RES-17-00125 (Feb. 7, 2017), <https://madison.legistar.com/ViewReport.ashx?M=R&N=Text&GID=205&ID=2708053&GUID=B23FBF63-5B46-4BF8-AD56-FDE3720130EA&Title=Legislation+Text> [https://perma.cc/3MDV-96CS].

250. Lansing, Mich., Exec. Order No. 2017-01 (Apr. 3, 2017), <https://www.lansingmi.gov/DocumentCenter/View/3484/EXECUTIVE-ORDER-2017-01-PDF?bidId=> [https://perma.cc/83AF-8YTE].

## 2. INSTRUMENTALIZING THE UNDOCUMENTED

The danger about arguments from well-being is that, if they are not accompanied by statements that recognize undocumented people's moral standing, they tend to *instrumentalize* undocumented people. By this, I mean that they see undocumented people as a means to an end: something that helps members of the community achieve goals like public safety or economic prosperity. Any benefits to the undocumented people themselves are not the desired goal of the policy, but a collateral effect. The fear is that policies benefit undocumented people *only in order to benefit others*.

The danger in discussions of "contributions to the community" is the transactional implication. Consider the policy of Binghamton, New York, for example, which says, "Binghamton benefits tremendously from the large number of diverse immigrants, refugees, and foreign students who greatly contribute to the development of a culturally and economically diverse and enriched community."<sup>251</sup> Is this a collateral benefit of the policy or the reason for its adoption? This is not just a semantic question; it is the question of whether undocumented people have any moral standing in the eyes of Binghamton's policymakers.

To illustrate the distinction, imagine a policy that said, "We must protect our children from violent crime because children are key drivers of economic well-being." This statement seems creepy (to me)<sup>252</sup> because it values children instrumentally, and we should value our children intrinsically, that is, for their own sake. Likewise, if a certain group of people is routinely treated as instrumental, and never treated as an end in themselves, then that group has been dehumanized. I'm using Kantian language here,<sup>253</sup> but one needn't be a Kantian to endorse the idea that respect means not treating people as mere instruments to achieve one's goals.

To be sure, there are times when it is highly appropriate in policy discussions to note that policies benefitting one group of people will have further benefits for another. For example, it seems to me not at all creepy to say, "We should protect our children from violent crime because they deserve nothing less, and furthermore, fear of crimes against children has

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251. Binghamton, N.Y., Res. R17-31 (Feb. 22, 2017), (emphasis added), <http://binghamton-ny.gov/> [<https://perma.cc/5VEU-C74H>] (search "R17-31," select result "City Council Business Meeting," then select item "Perm R17-31").

252. When I say this policy seems creepy "to me," I'm trying to avoid the habit of some scholars in the humanities who tend to say things "seem" one way or another without saying to whom they seem that way. Still, I do hope that readers will agree with me.

253. Except for the word "creepy." See generally Samuel Kerstein, *Treating Persons as Means*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 13, 2019), <https://plato.stanford.edu/entries/persons-means/> [<https://perma.cc/P2S8-JQGS>].

a terrible effect on the economy.” The children here are not absent from the conversation; their well-being is fully considered.

Sometimes policies benefit people indirectly, and there is nothing wrong with noting that. For example, leaders of the legal profession commonly argue that lawyers should receive certain benefits so that their clients can receive the benefit of better representation. For example, lawyers receive a special protection against being forced to testify in court on certain topics (those that are deemed privileged), and the rationale for this is not that policymakers want to help lawyers thrive, but that they want to protect clients by giving them a safe space in which to discuss important problems.<sup>254</sup> Lawyers are given a benefit only to benefit others. This is not a case of problematically instrumentalizing lawyers, though, because this example of instrumentalization is not contributing to the ongoing dehumanization of lawyers as a group. There seems little risk, in other words, that anyone will actually perceive lawyers as mere objects. But for undocumented people and for other noncitizens, particularly Latinx noncitizens, the stakes are very different.<sup>255</sup>

Dehumanization and exploitation of immigrants is a reality in the United States.<sup>256</sup> And it has been for a long time: as Daniel Kanstroom writes about early-1900s immigration policy, “the desire was for laborers, not immigrants.”<sup>257</sup> Mexican noncitizens, in particular, have been exploited—which is another way of saying, treated merely as props to achieve others’ goals.<sup>258</sup> And it is this reality that has motivated many activists to urge the adoption of sanctuary policies. Moreover, undocumented people are the direct objects of sanctuary policies, the people most affected by them. Thus, when a sanctuary policy refers to the benefits it will have for others—but not the undocumented people to whom it directly applies—the omission is a more conspicuous one. Omissions of

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254. See Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061–62 (1978).

255. See MAE NGAI, *IMPOSSIBLE SUBJECTS* 62 (2004) (“In this story, aliens were not only subjects—that is, the smugglers—they were also the objects, the human goods illegally trafficked across the border.”).

256. See generally CHAVEZ, *supra* note 231 (exploring how damaging myths about Latinx people are sublimated into media portrayal of migrants from Latin America and, in turn, immigration policymaking); Natalie Cisneros, “*Alien*” *Sexuality: Race, Maternity, and Citizenship*, 28 HYPATIA 290 (2013) (on dehumanization of noncitizen women).

257. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 156 (2007). Kanstroom also writes, “Deep patterns of historical conflict and ideas of racial supremacy fed an instrumentalist view of Mexican immigrants that was quite different from the nation of immigrants ethos that welcome some other groups.” *Id.*

258. See generally JOHN WEBER, *FROM SOUTH TEXAS TO THE NATION: THE EXPLOITATION OF MEXICAN LABOR IN THE TWENTIETH CENTURY* (2015) (discussing how Mexicans and Mexican Americans contributed heavily to the economic development of South Texas yet experienced exploitative labor practices and political and social exclusion).

this kind risk reinforcing the idea that undocumented people's interests do not deserve to be considered by policymakers or by anyone else. A history of subordination can make omissions more glaring.

Against this history, some texts are more easily read as instrumentalizing undocumented people. Washington State's 2017 executive order, for example, mentions undocumented people in only one paragraph:

[U]ndocumented immigrants comprised approximately 4.9 percent of the state's workforce in 2012 and paid \$301.9 million in state and local taxes. If all undocumented immigrants were removed from the state, the state would lose \$14.5 billion in economic activity, \$6.4 billion in gross revenue, and approximately 71,197 jobs.<sup>259</sup>

Elsewhere, the order repeatedly affirms the value of "immigrants."<sup>260</sup> Why name the undocumented in one part of the order but not the others? Behind the scenes, there might have been a perfectly innocuous explanation; perhaps someone was aware of those statistics on undocumented people's contribution and simply wanted to make sure they were acknowledged. But as drafted, there is a troubling implication that undocumented people should only be named—that is, directly acknowledged as subjects of concern and attention from policymakers—when they are contributing to the economy.

### 3. WHY WOULD SANCTUARIES NOT RECOGNIZE UNDOCUMENTED PEOPLE?

To be sure, there are political reasons why policymakers might want to avoid controversial claims about the moral status of the undocumented. As Cass Sunstein observed, compromises in democratic politics are often possible through "incompletely theorized agreements."<sup>261</sup> If there are multiple reasons to support a single policy, then different groups can be persuaded to support the policy even if there's no consensus on the reasons for the policy. Some rationales that are invoked on behalf of sanctuary cities might appeal to people regardless of their views on immigration; economic prosperity, for example, appeals to people across the political spectrum, whereas undermining the Trump Administration's enforcement

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259. See Wash. Exec. Order 17-01 (Feb. 23, 2017), [https://www.governor.wa.gov/sites/default/files/exe\\_order/eo\\_17-01.pdf](https://www.governor.wa.gov/sites/default/files/exe_order/eo_17-01.pdf) [<https://perma.cc/ZRU7-QSN3>].

260. *Id.*

261. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

priorities does not. A policymaker has good reason to embrace the more broadly appealing rationale.

Moreover, a sub-federal government might reasonably fear retaliation from the federal government. The Trump Administration moved to deny grant funding to sanctuary cities,<sup>262</sup> for example, and anti-immigrant advocacy organizations targeted sanctuary cities in general<sup>263</sup> and vocal critics of the President's immigration policies in particular.<sup>264</sup> It may just be easier to avoid controversial positions whenever possible.

Not everyone in the United States agrees that undocumented people deserve to have their rights or well-being considered by policymakers. Some people would regard it as very controversial to hear a policymaker say, "Another good reason for this town to adopt a sanctuary policy is that undocumented immigrants would be able to live healthier, safer, more rewarding lives." A statement like this implicitly recognizes undocumented people's moral standing. It treats them as human beings worthy of respect. It thus raises the ire of two overlapping groups: people who are biased toward the undocumented—that is, people whose racism or xenophobia leads them to dehumanize those without immigration status—and those who believe that even if undocumented people are fully human, their unauthorized status means that policymakers should never take any action designed to benefit them. Either way, the statement is controversial, particularly in a political climate where openly racist and xenophobic statements are increasingly common in political discourse.

Any policymaker who faces political conflict has to consider tradeoffs, both substantive and rhetorical. When one's constituency is divided about the moral standing of the undocumented, it must be tempting to stay silent on that question. But in rhetoric about the undocumented, it is difficult to occupy a neutral position. Discourse about the benefits of sanctuary inevitably includes mention of noncitizens, which forces policymakers to adopt a rhetorical stance toward them. And given the background political discourse about immigrants, policymakers' rhetoric may take on negative implications unless policymakers take clear steps to avoid them.

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262. *Trump Says He Will Block U.S. Funds to 'Sanctuary' Jurisdictions*, REUTERS (Mar. 5, 2020, 8:39 AM), <https://www.reuters.com/article/us-usa-immigration-sanctuary/trump-says-he-will-block-u-s-funds-to-sanctuary-jurisdictions-idUSKBN20S1V0> [<https://perma.cc/L26A-FAM7>].

263. Zachary Mueller, *Anti-Immigrant Hate Groups Have Spent Millions on Digital Ads. They're Indistinguishable from GOP Candidates' Ads*, AMERICA'S VOICE (Oct. 16, 2019), <https://americasvoice.org/blog/hate-group-gop-ads/> [<https://perma.cc/T6PN-8X5X>].

264. *See, e.g., Adeel Hassan, Police May Seek Hate-Crime Charge in Attack on Latino Mayor*, N.Y. TIMES (July 24, 2018), <https://www.nytimes.com/2018/07/24/us/jimmy-matta-attack-sanctuary-city.html> [<https://perma.cc/QT8U-QNLT>].

Immigrants, in general, are often instrumentalized in U.S. political discourse. So, when a policymaker describes a policy's benefits for the well-being of "people," many members of the audience will assume that immigrants are not included. If a policymaker then goes on to say that immigrants bring with them economic benefits, there is a natural implication that the immigrants are bringing benefits *to us*.

Political discourse naturally assumes a "we," an audience to whom the policymakers' appeal is directed. Immigrants in general, and undocumented people in particular, are often not part of that "we." If policymakers want to avoid commodifying, transactionalizing, or instrumentalizing undocumented people, any mention of the good things they bring to "our" society should be accompanied by recognition of them as part of "our" society. Otherwise, the background assumptions may do their work, and the immigrants' moral standing will be recognized only to the extent they can offer "us" something in return.

### III. INCLUSIVE COMMUNITIES AND THEIR LIMITS

The previous Part of this Article discussed how moral claims about well-being change during the transition from activist rhetoric to governmental rhetoric. This Part discusses how the same movement from activism to government transforms a different kind of moral claim: claims about how sanctuary policies implicate the collective sense of who "we" are,<sup>265</sup> or what I will refer to as "community identity."

Members of every community have a sense of what makes that community the community that it is. A community's identity is defined by its history, geography, demographics, culture, the industries that dominate its economy, and the stories people tell each other about it.<sup>266</sup> Values are a

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265. Of Linda Bosniak's four definitions of citizenship, one is the sense of belonging in a community. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* 18–20 (2006); see Villazor, *supra* note 3, at 580 (discussing Bosniak). It's that "way in which people experience themselves in collective terms" that I'm interested in here, although I call it "membership" to avoid confusion with formal legal citizenship. BOSNIAK, *supra*, at 20; see also Eric Foner, *Who Is an American? The Imagined Community in American History*, 41 *THE CENTENNIAL REV.* 425 (1997) (discussing American national identity as it relates to controversies over immigration and membership). Foner writes:

Rather than being permanently fixed, national identities are inherently unstable, subject to continuing efforts to draw and redraw their imagined borders. Like democracy, freedom, equality, and other 'keywords' of our political language, 'American' is what philosophers call an 'essentially contested concept'—one that by its very nature is subject to multiple and conflicting interpretations.

*Id.* at 426.

266. See Keith Hirokawa, *Environmental Law from the Inside: Local Perspective, Local Potential*, 47 *ENV'T L. REP.* 11048, 11049 (2017) ("[C]ommunity identity is personal, experienced, and always in an ecological context." (footnote omitted)); Frederick

key part of community identity: “we” are defined by what matters to us, what we stand for, and what principles we live by.<sup>267</sup>

Community identity is not only value-laden but also contested; thus, Americans debate whether policies or actions they disagree with are “un-American.”<sup>268</sup> As Eric Foner writes, “‘American’ is what philosophers call an ‘essentially contested concept’—one that by its very nature is subject to multiple and conflicting interpretations.”<sup>269</sup> The same is true, to varying extents, of “New Yorker” and other more local identities.

Linda Bosniak writes that recent sanctuary activists, much more than their predecessors in the 1980s Sanctuary Movement, incorporate ideas of community identity into their moral arguments. Thus, calls for “protecting one’s own de facto community members, or the vulnerable in general” are “often coupled with a call to shelter people who are ‘Americans in all but name.’”<sup>270</sup>

### A. Inlusiveness in Sanctuary Rhetoric

This Article focuses on an aspect of community identity that is particularly relevant to immigration, which I’ll refer to as “inlusiveness.” I intend this word to cover a lot: values like respect, equality, and hospitality, which affect the way a community treats people on its margins, as well as social and political judgments about who counts as a member. Inlusiveness is about who a community includes within its social borders, but it is also about what values the community adopts in its relations with people on its margins. Because inlusiveness is an aspect of our values—

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Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1514–17 (1986); Sarah Song, *Why Does the State Have the Right to Control Immigration?*, 57 NOMOS 3, 16–17 (2017) (discussing claims about the relationship between territory and national identity); JOAN DIDION, *AFTER HENRY* 100 (1993) (“The extent to which certain places dominate the California imagination is apprehended, even by Californians, only dimly. Deriving not only from the landscape but from the claiming of it, from the romance of emigration, the radical abandonment of established attachments, this imagination remains obdurately symbolic, tending to locate lessons in what the rest of the country perceives only as scenery. . . . Both the community of and the coastline at Carmel have a symbolic meaning lost to the contemporary visitor, a lingering allusion to freedom, freedom as craft, the ‘bohemian’ pantheism of the early twentieth century.”).

267. Cf. Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2382 (1999) (“[T]he ways in which the criminal trial jury may function as an expression of community identity. I argue that the way in which we go about performing certain difficult societal tasks says something about what we stand for, what kind of people we are, and what sort of community we want to be.”).

268. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6 (2006) (defining “nation” as an “imagined political community”); see also Rodríguez, *supra* note 3, at 573 (“[F]ederalism serves as a crucial mechanism for shaping and managing national identity . . . the process of forging such identity is not a top-down, but a bottom-up process.”).

269. See Foner, *supra* note 265, at 426.

270. Bosniak, *supra* note 2, at 200.

and values help define communities—it is also an aspect of a community’s identity.

#### 1. COMMUNITY IDENTITY AS A REASON FOR INCLUSIVENESS IN SANCTUARY RHETORIC

Policymakers often invoke their communities’ identities in the discourse around sanctuaries. Villazor writes that during San Francisco’s debates over its sanctuary policy, speakers frequently mentioned San Francisco’s image as a liberal enclave and invoked the legacy of Harvey Milk.<sup>271</sup> At an implicit level, too, community identity is often an animating idea in debates over sanctuary; Gulasekaram argues that the purpose of restrictionist local laws is to close off local communities to migrants,<sup>272</sup> that is, to redefine the identity of the community by limiting its membership.

On the other side of the debate, policymakers often justify sanctuary policy with aspirational statements about the kind of community they represent. “The City of Chelsea respects all persons regardless of race, class, ethnicity or legal status,”<sup>273</sup> says one such policy. Santa Ana’s policy talks about its “commitment to equal, respectful, and dignified treatment of all people.”<sup>274</sup> Baltimore’s Mayor expressed the idea of inclusiveness this way: “We are a welcoming city. We want everyone here. We want to be able to provide opportunities and jobs and careers for folks.”<sup>275</sup>

A city’s inclusiveness can be a function of other aspects of its identity, such as its cosmopolitanism. A representative of the New York City Mayor’s Office testified in support of the bill limiting detainers by invoking “this administration’s commitment to ensuring that New York remains a global city and one that continues to welcome immigrants.”<sup>276</sup> The phrase “global city” suggests cosmopolitanism, diversity, a bustling economy, direct flights to lots of destinations, and no doubt many other

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271. Villazor, *supra* note 3, at 597.

272. Gulasekaram, *supra* note 168.

273. Chelsea, Mass., Res. (June 4, 2007), [http://bostonmayday.org/chelsea\\_resolution.html](http://bostonmayday.org/chelsea_resolution.html) [<https://perma.cc/67SQ-7XJH>].

274. Santa Ana, Cal., Res. No. 2016-086 (Dec. 6, 2016).

275. Jayne Miller, *Mayor: Baltimore ‘Welcoming’ City for Immigrants, Not ‘Sanctuary’*, WBALTV (Jan. 25, 2017, 5:24 PM), <https://www.wbalv.com/article/mayor-baltimore-welcoming-city-for-immigrants-not-sanctuary/8639210> [<https://perma.cc/Y58T-FFMM>].

276. *Hearing on Int. 0486-214 and 0487-214 Before the N.Y.C. Council Comm. On Immigration* (Oct. 15, 2014) (testimony of Maya Wiley, Counsel to the Mayor, City of New York), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=3294329&GUID=4D2C92A1-D272-4EBD-A87B-F3B4B8B41C3D> [<https://perma.cc/479J-8GUX>].

things depending on who hears it.<sup>277</sup> Using this phrase draws on a rich sense of identity that informs how New Yorkers think about themselves and also connects the sanctuary policy to that sense of identity.

New York is not the only city that might call itself “global,” and pro-immigrant policies do often flow from community identities of this kind. Cristina Rodríguez notes that cities that identify themselves as a “global city” may have a special relationship to immigrants because those cities are international financial hubs, “points of convergence for transnational elites,” and depend on low-skilled immigrant labor in various sectors.<sup>278</sup> Global cities “have become focal points for immigrant diasporas of various types and from around the world.”<sup>279</sup> The fact that global cities often have pro-immigrant policies is a natural consequence of the strong role that immigrants play in the life and culture of those cities; thus, the rhetorical invocation of the city’s identity as a reason for sanctuary matches a real fact about how the city developed the attitudes that led to the policy.

The differing ways that communities relate to immigrants are part of each community’s identity. Rodríguez usefully distinguishes Illinois, which “has absorbed waves of immigration throughout its history and . . . has a self-conscious immigrant identity,” from North Carolina, which does not have a long history of immigration but which now has a fast-growing Latino population (much of which is due to immigration); and both of those states from Iowa, a state whose population is declining and for which immigrants represent “a possible means of invigorating its population.”<sup>280</sup> In each case, the meaning that the inhabitants of a state give to their membership in its political community is defined by the very different roles immigrants play in that state’s life. State or local measures that target undocumented immigrants, or immigrants more generally, reflect not only policy views on immigration but also “a desire for a different kind of control—a control over cultural evolution.”<sup>281</sup> Immigration thus takes on different meanings depending on the identity of the receiving community.

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277. It also has a theoretical echo. *See* Rodríguez, *supra* note 2, at 577, (citing SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS* 315 (2006)); *see also* Su, *supra* note 3, at 310 n.47 (citing M. Mark Amen, Kevin Archer & M. Martin Bosman, *Thinking Through Global Cities*, in *RELOCATING GLOBAL CITIES: FROM THE CENTER TO THE MARGINS* 1, 1–6 (M. Mark Amen, Kevin Archer & M. Martin Bosman eds., 2006)).

278. Rodríguez, *supra* note 2, at 577.

279. *Id.*

280. *Id.* at 582.

281. *Id.* at 594. Rodríguez argues that allowing states and localities to adopt different policies on immigration serves the ultimate goal of effectively integrating immigrants, even if some of those policies are restrictionist, because the process of integrating immigrants depends on “permitting discussion over these issues to unfold.” *Id.* at 595. State and local lawmaking is part of that process. *Id.* at 594–95.

## 2. DEGREES OF INCLUSIVENESS AND MEMBERSHIP

Inclusiveness, too, differs from community to community because inclusiveness is a matter of degree. One can be included in some aspects of community life but not others. Here are five attitudes toward the undocumented that represent five very different levels of inclusiveness:

Believing that undocumented people should, in theory, be deported, but recognizing that many will not be and that in the meantime, they do in fact live in the community, and also understanding that the local economy depends on them;

Believing that undocumented people should, in theory, be deported, but nonetheless caring about their well-being and thus thinking that families should not be separated, detention should be avoided whenever possible, and discretion should be exercised to the fullest;

Not wanting undocumented people in the community to be deported, and recognizing their right to certain basic things, like emergency healthcare and an education for their children, but also wanting to deny them the full range of public benefits to which citizens are entitled;

Not wanting undocumented people to be deported, and believing that they *should* receive the full range of public benefits to which citizens are entitled, but not believing they should vote or hold public office;

Believing that there is no moral difference between undocumented people and citizens, and that there should be no social or legal difference either.

All of these attitudes might perhaps be called “inclusiveness,” but the first attitude fits uneasily under that term—it is more like grudging acceptance than real inclusiveness. The second attitude (no deportation, only basic rights) is “inclusive” in that it includes undocumented people within the sphere of human beings who are worthy of concern. But it is a form of inclusiveness that carries no implication of membership. This attitude says, “We will not let you die here, but we will deport you if we can find a humane enough way.”

The third attitude (no deportation, basic rights but few public benefits) is probably an acceptance of membership, but it is clearly a second-class membership. The fourth (benefits but no voting or public office) is definitely membership, but not membership on fully equal terms.

This attitude treats undocumented people the way women were treated for most of American history—as inferior members. Only the fifth attitude above is an inclusiveness that offers undocumented people membership *as equals*, and I have seen no sanctuary policy that endorses this kind of membership—fully equal membership—for undocumented people.

Another way of putting this is to say that equality can be offered for some purposes but not for others. When Deerfield, New Hampshire, describes the way its police should treat undocumented people, it expresses this idea: “If an officer should come into contact with a suspected undocumented person as the result of a violation of state statute or town ordinance, that person shall be treated as any other individual and availed the same rights and privileges as any other individual.”<sup>282</sup> But being treated equally by the police department does not mean one will be treated equally by the board of elections.

And undocumented people’s membership is always limited by their federal status. Rick Su points out that discourses of federal exclusivity in immigration law perpetuate an “image of immigrants as a federal population that is socially and politically outside of the local communities within which they reside.”<sup>283</sup> Federal immigration policy pushes states and localities to think of immigrants “as essentially a federal population, and thus a federal responsibility, distinct and separate from even the local communities within which they reside.”<sup>284</sup> Federal law imposes many complicated constraints on the benefits and services sub-federal governments can offer noncitizens.<sup>285</sup> In some cases, limits on the federal benefits for which noncitizens are eligible prompt localities to step in and offer special programs to provide services to those noncitizens.<sup>286</sup> Each of these legal differentiations reinforces a differentiation in community identity: noncitizens are not members in the way that citizens are; they exist in a legally circumscribed, federalized, and separate space. In a sense, they carry the border with them wherever they go.<sup>287</sup>

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282. Deerfield, N.H., Undocumented Immigrants Policy (Sept. 18, 2017), [https://libguides.law.du.edu/ld.php?content\\_id=36312248](https://libguides.law.du.edu/ld.php?content_id=36312248) [https://perma.cc/5MQ7-TAH6]; see also Dave Solomon, *Bill Would Outlaw NH's 'Sanctuary Cities,'* N.H. UNION LEADER (Jan. 25, 2019), [https://www.unionleader.com/news/crime/bill-would-outlaw-nhs-sanctuary-cities/article\\_d61f8c68-b141-571d-ab73-d45f50471310.html](https://www.unionleader.com/news/crime/bill-would-outlaw-nhs-sanctuary-cities/article_d61f8c68-b141-571d-ab73-d45f50471310.html) [https://perma.cc/97QX-PFVG].

283. Su, *supra* note 3, at 312.

284. *Id.* at 316.

285. See, e.g., 8 U.S.C. § 1621.

286. See Su, *supra* note 3, at 315–16.

287. Mae Ngai discusses the way immigrants have been viewed as “agents, or potential agents, of foreign states.” MAE M. NGAI, IMPOSSIBLE SUBJECTS 11 (2004).

*B. Do Sanctuaries Embrace Undocumented People as Community Members?*

It might seem apparent that the purpose of sanctuary policies is to treat undocumented people as members of their local communities. This is clearly the intent of many activists who advocate these policies; for example, the American Friends Service Committee describes sanctuary policies as “policies that help protect *members of our communities* from detention and deportation.”<sup>288</sup> Rose Cuison Villazor writes that sanctuary jurisdictions “have arguably constructed membership for undocumented immigrants located within their jurisdictions.”<sup>289</sup> She also says that San Francisco’s sanctuary ordinance “acknowledges undocumented immigrants as *de facto* members of the local community” and interprets debate over the policy as motivated by this implicit debate about who qualifies for membership.<sup>290</sup>

I want to interrogate the claim that sanctuary policies embrace undocumented people as members of the community. The mere act of a jurisdiction adopting a sanctuary policy should not be construed as embracing membership for undocumented people. There is a difference between policymakers caring about you (which I referred to above as moral standing<sup>291</sup>) and policymakers considering you a part of the community. Sometimes we do good things for outsiders, so the fact that sanctuaries protect undocumented people does not necessarily mean those sanctuaries are embracing the undocumented people as community members.

For Villazor, San Francisco’s “sanctuary policy, municipal ID cards and other supportive policies . . . have helped establish undocumented immigrants as local members.”<sup>292</sup> Some of these policies, however, could plausibly be offered to an outsider. A municipal ID card seems strongly symbolic of membership, but policies against cooperating with immigration authorities benefit everyone who might fall afoul of ICE, not just community members. When sanctuaries decline to incarcerate people on ICE’s behalf, they do not distinguish between local residents and nonresidents. And, indeed, when a locality decides to stop renting bed

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288. Carly Goodman & Peniel Ibe, *How to Talk About Sanctuary Cities*, AM. FRIENDS SERV. COMM. (Feb. 27, 2020) (emphasis added), <https://www.afsc.org/blogs/media-uncovered/how-to-talk-about-sanctuary-cities> [<https://perma.cc/37A4-FLV4>].

289. Villazor, *supra* note 3, at 576.

290. *Id.* at 578.

291. See *supra* Section I.C.1.

292. Villazor, *supra* note 3, at 591.

space in its jail to ICE, it is effectively refusing to incarcerate people who never have, and never will, set foot in their communities. Policies like this are clearly designed to benefit everyone, not just membership of the local community. Admittedly, they might be intended to embrace *national* membership for those undocumented people. My point is just that we should not automatically assume that is what they mean.

So, what *would* constitute an endorsement of immigrant membership? As explained above, membership is not one thing, so there is no bright line here. When we are talking about the meaning of a policy, we are either talking about its meaning to the policymakers or its meaning to the community they govern. This Article focuses on policymakers' rhetoric as evidence of what the policy means to them. So, the simplest test of whether a policymaker is endorsing undocumented membership is whether they say so. Recall the interview with Councilmember Salamanca from the beginning of this Article: "We want to defend our constituents, whether they're documented or undocumented."<sup>293</sup> If your elected officials call you a "constituent," they're embracing you as a member of the community.

On a deeper level, what makes a policy pro-membership is if it serves the goal of integration. As Hiroshi Motomura observes, sanctuary localities often adopt policies that help noncitizens more easily function as members of the community, from driver's licenses and identity cards to in-state tuition.<sup>294</sup> Jurisdictions that oppose increased immigration adopt opposing policies that make it harder for noncitizens to integrate into their communities.<sup>295</sup> Motomura sees the main purpose of sanctuary policies as the promotion of integration.<sup>296</sup> But we can always ask whether that is indeed the purpose of the policymakers who adopt those policies. We can also ask whether, assuming their purpose is to embrace undocumented people's membership, they are willing to say so.

#### 1. IF UNDOCUMENTED PEOPLE ARE COMMUNITY MEMBERS, WHY NOT SAY SO?

Much of the public discourse around San Francisco's sanctuary policy relates to whether undocumented people should be considered members of the community. One newspaper, for example, accused the city

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293. See *supra* note 7–10 and accompanying text.

294. Motomura, *supra* note 2, at 439. Motomura sees this as a form of sanctuary policy, although these policies relate only indirectly to the enforcement of immigration law. *Id.*

295. See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 73–74 (2014).

296. See *id.* at 58 ("The ultimate purpose of measures that try to remain neutral or try to neutralize immigration law enforcement is to integrate unauthorized migrants into local communities, regardless of their immigration status.").

of “putting ‘sanctuary’ for illegals ahead of the interests of its own citizens.”<sup>297</sup>

It is surprising, then, that San Francisco’s ordinance says little about undocumented people’s membership, or indeed about undocumented people at all. The ordinance’s fourteen-paragraph “Findings” section laying out the reasons for the policy, which begins by saying that the city “is home to persons of diverse racial, ethnic, and national backgrounds, including a large immigrant population,” without saying whether the “immigrant population” to which it refers includes the undocumented.<sup>298</sup> The next sentence of the ordinance does explicitly reference undocumented people: it says that the city “respects, upholds, and values equal protection and equal treatment for all of our residents, regardless of immigration status.”<sup>299</sup> But that is not an endorsement of membership: respecting undocumented people and protecting their rights is entirely consistent with considering them as strangers and outsiders. Indeed, one would hope that every city respects the legal rights of outsiders.

The findings section then says, “Fostering a relationship of trust, respect, and open communication between City employees and City residents is essential to the City’s core mission of ensuring public health, safety, and welfare, and serving the needs of everyone in the community, including immigrants.”<sup>300</sup> The ordinance, then, is designed to serve “everyone.” This seems to include the undocumented, but not in the explicit way Councilmember Salamanca did. If the main purpose of the ordinance was to embrace undocumented people as community members, one might expect it to at least name them outright.

After these three sentences, the findings section spends thirteen paragraphs explaining how declining to enforce detainers will promote public safety and an appropriate balance of powers between the federal and local governments.<sup>301</sup> These concerns, again, have little to do with undocumented people’s community membership. Nothing in the policy offers any clearer a statement about inclusion or membership.

We do not need statements as clear as Salamanca’s to communicate a message of membership. Consider Lansing’s executive order, which says the city “celebrate[s] diversity and provide[s] equal protection for all residents, immigrant and refugee, documented and undocumented.”<sup>302</sup> Later, it mentions its intent to provide “for the personal safety and dignity

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297. ‘Sanctuary’ Absurdity, TRIB LIVE (Oct. 10, 2009, 12:00 AM), <http://www.triblive.com/news/sanctuary-absurdity/> [<https://perma.cc/L9SX-YB6W>].

298. S.F., CAL., ADMIN. CODE § 12I.1 (2020).

299. *Id.*

300. *Id.*

301. *Id.*

302. Lansing, Mich., Exec. Order No. 2017-01 (Apr. 3, 2017), <https://www.lansingmi.gov/DocumentCenter/View/3484/EXECUTIVE-ORDER-2017-01-PDF?bidId=> [<https://perma.cc/WK4C-DW7E>].

of its residents and visitors.”<sup>303</sup> It is very clear that the well-being of undocumented people matters to the drafters of this policy. As for membership, the language about “all residents . . . documented and undocumented” treats those two groups as sub-categories of a single larger group, which carries a strong implication of membership. Admittedly, these distinctions are subtle and semantic, but when you are interpreting language, semantics are hard to avoid. The examples of Salamanca and Lansing throw San Francisco’s policy into greater contrast and prompt the question of why San Francisco’s policy does so little to embrace undocumented people as members.

There may, of course, be very good reasons for shying away from calling undocumented people members. Jurisdictions might, for example, fear political fallout, federal retaliation, or federal preemption. These questions are beyond the aims of this Article, which focuses on what is lost through this shying away.

## 2. CONDITIONAL INCLUSION

Part II talked about instrumentalizing immigrants—treating them as worthy of consideration only to the extent they benefit others. A parallel problem is conditional inclusion: we will welcome immigrants as members of our community but only on the condition they make certain contributions to that community.

Consider this statement about inclusiveness from the City of Santa Ana: “the City of Santa Ana welcomes, honors and respects the contributions of all of its residents, regardless of their immigration status.”<sup>304</sup> The sentence invokes inclusiveness; the city “welcomes” and “honors . . . all of its residents, regardless of their immigration status.”<sup>305</sup> But in that ellipsis is the thought that the city “respects the contributions of all of its residents.”<sup>306</sup> Why mention their contributions? Why not just say the city welcomes, honors, and respects all of its residents?

Compare Governor Jay Inslee of Washington’s executive order, which invokes inclusiveness in its title: “Reaffirming Washington’s Commitment To Tolerance, Diversity, and Inclusiveness.”<sup>307</sup> The order’s first “whereas” clause reads: “Washington has a proud history of inclusivity, tolerance, and compassion for all residents. The diversity of

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303. *Id.*

304. Santa Ana, Cal., Res. No. 2016-086 (Dec. 6, 2016).

305. *Id.*

306. *Id.*

307. Wash. Exec. Order No. 17-01 (Feb. 23, 2017), [https://www.governor.wa.gov/sites/default/files/xe\\_order/eo\\_17-01.pdf](https://www.governor.wa.gov/sites/default/files/xe_order/eo_17-01.pdf) [<https://perma.cc/R65C-93QE>].

our people and cultures is a critical part of who we are as a state.”<sup>308</sup> Washington’s executive order does not contain language like Lansing’s, affirming that it is intended to benefit all “residents and visitors.”<sup>309</sup> But, it does mention undocumented people, but only in this paragraph, which I quoted above:

[U]ndocumented immigrants comprised approximately 4.9 percent of the state’s workforce in 2012 and paid \$301.9 million in state and local taxes. If all undocumented immigrants were removed from the state, the state would lose \$14.5 billion in economic activity, \$6.4 billion in gross revenue, and approximately 71,197 jobs.<sup>310</sup>

Reading the executive order as a whole, it is easy to interpret it as instrumentalizing immigrants. Put differently, it is easy to read it as conditioning immigrants’ inclusion on their contributions.

Immigration law itself contains strong signals that inclusion is treated as something earned. It is hard to find any other meaning in the EB-5 visa program, for example, because it specifically conditions entry on economic contributions.<sup>311</sup> But opponents of immigration like the Heritage Foundation think there are nonetheless too many non-transactional bases for entry.<sup>312</sup> Thus: “immigration reform should include transitioning to a merit-based system. We should end practices like chain migration, birthright citizenship, the visa lottery, arbitrary per-country immigration caps, and any form of amnesty for those here illegally.”<sup>313</sup> The idea of “merit-based” immigration is that no one should be invited to join a political community unless they can offer that community something in return.<sup>314</sup> Opponents of sanctuary and immigration typically premise many of their arguments on the moral view that inclusion should be conditional on contributions. This is why they consider it a persuasive argument against immigration to allege that the government spends more on services provided to undocumented immigrants than it collects from them in taxes.<sup>315</sup>

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308. *Id.*

309. *See id.*

310. *Id.*

311. 8 C.F.R. § 204.6(j) (2021).

312. *What Immigration Reform Should Look Like*, HERITAGE FOUND., <https://www.heritage.org/immigration/heritage-explains/what-immigration-reform-should-look> [<https://perma.cc/FF99-E6KS>] (last visited May 10, 2020).

313. *Id.*

314. *See id.*

315. *See, e.g.*, Jason Richwine & Robert Rector, *The Fiscal Cost of Unlawful Immigrants and Amnesty to the U.S. Taxpayer*, HERITAGE FOUND. (May 6, 2013),

It would not be difficult for a drafter to avoid the implication that membership is conditioned on contributions. Along with reciting facts about the economic and cultural contributions of noncitizens, or even the undocumented, a policy could say: “All of our residents, documented and undocumented, are members of our community. We mention their contributions because those contributions deserve to be recognized, not because inclusion in our community depends on them.” For a community that wants to affirm unconditional membership, a statement of this kind would be worth considering.

Citizens are generally thought to be unconditional members of a community; even a citizen who gives nothing back is, nonetheless, a citizen.<sup>316</sup> Conditional and unconditional membership, like conditional and unconditional love, are very different things.

### *C. Community Identity as the New Sacred Space*

Recall the centrality of the idea of sacred space to past sanctuary movements. As noted above, sacrality itself is off-limits for a government institution.<sup>317</sup> Even spaces that cannot be sacred, however, can still be special. It is worth exploring whether the idea of community identity, if invested with enough meaning, can take the place of sacred space in the rhetoric of contemporary sanctuary policies.

The idea of sanctuaries as sacred spaces was importantly connected to the communities that gathered there. As Linda Cunningham writes, “U.S. church sanctuaries in the 1980s drew upon the Hebraic conception of sanctuary as a communitarian institution, advocating a religious practice that was premised more in the sanctity of a community than in the holiness of an individual’s conscience.”<sup>318</sup> The cultural frame within which these churches operated stressed “a covenantal metaphor—covenant referring to a community that has cohesion and purpose by virtue of its sacred mission as a group.”<sup>319</sup>

Ignatius Bau sees the 1980s sanctuary movement as transitioning “from holy places to communities of faith.”<sup>320</sup> The geographic spaces that churches occupy, he notes, command little reverence in American culture and enjoy little or no legal protection from enforcement of the law.<sup>321</sup> The holiness he sees in the sanctuary movement is, instead, created by the

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<https://www.heritage.org/immigration/report/the-fiscal-cost-unlawful-immigrants-and-amnesty-the-us-taxpayer> [<https://perma.cc/E7T6-9KRC>].

316. See U.S. CONST. amend. XIV, § 1 (Citizenship Clause).

317. See *supra* text accompanying note 20.

318. CUNNINGHAM, *supra* note 6, at 101.

319. *Id.* at 92.

320. BAU, *supra* note 6, at 173 (initial caps removed from quoted heading).

321. See *id.*

communities that participate in those movements: “their actions create the holiness of a sanctuary.”<sup>322</sup> Put differently, “The absence of any geographic justification for sanctuary simply shifts the emphasis away from the *place* to the *people*. Thus, the concept of sanctuary has taken on an entirely new meaning. It is the active community or the congregation, not the passive church building, that now offers sanctuary.”<sup>323</sup>

In Bau’s eyes, then, the sanctuary movement represents a transition from an understanding of sanctuary as geography to sanctuary as community. In this sense, it has potential for contemporary sanctuary jurisdictions. The actions of sanctuary cities, counties, towns, and states can give meaning to the communities they govern by acting on, and thus affirming, the values of those communities.

### CONCLUSION

Parts II and III expressed concern about the way undocumented people are sometimes left out of sanctuary rhetoric. As discussed in Part II.3, there are no doubt understandable reasons why policymakers might wish to avoid the kind of bold statement of inclusion and concern for undocumented people’s well-being that Councilmember Salamanca expressed in the interview described at the beginning of this Article.<sup>324</sup> But there are also good reasons why policymakers might wish to include undocumented people in their rhetoric. Here are three.

*First*, candor is a virtue in policymaking,<sup>325</sup> even if it is sometimes punished. For constituents (documented or undocumented) to trust the government that has power over them, they must trust the statements of their policymakers.

Sanctuary policies *are* motivated by concern for the undocumented and by a desire to include them as members of the communities whose identities are at stake. In the wake of Trump’s election, a major wave of localities and states adopted sanctuary policies,<sup>326</sup> and it was not because all of those jurisdictions suddenly realized that protecting undocumented people from immigration authorities would promote public safety or economic prosperity.

After Washington State’s executive order, which I criticized above, sanctuary-state legislation was passed, and undocumented people were not mentioned in this legislation or in the committee reports that accompanied

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322. *Id.*

323. *Id.* at 174.

324. *See supra* Section II.B.3.

325. *See* Peggy Kerns, *Creating an Ethical Legislature*, NAT’L CONF. STATE LEGISLATURES (2011), <https://www.ncsl.org/research/ethics/creating-an-ethical-legislature.aspx> [<https://perma.cc/4BMQ-GVNT>].

326. *See supra* note 64 and accompanying text.

it.<sup>327</sup> But Governor Inslee, in a public statement, said, “We will not be complicit in the Trump administration’s depraved efforts to break up hard-working immigrant and refugee families.”<sup>328</sup> If this is the belief that motivates sanctuary policies, integrity and public trust counsel in favor of being honest about them.

*Second*, localities and states cannot be laboratories of democracy if they do not discuss their real concerns. The various theories of the goods that can come from federalism all depend on ideas being allowed to circulate and percolate, and that does not happen unless the ideas emerge into the open.<sup>329</sup>

*Third*, if the interests of the undocumented cannot be openly acknowledged in sanctuary policies, then it is hard to imagine what policy could ever acknowledge them. Policy rhetoric plays a role in establishing moral norms. One of the major challenges for immigrants’ advocates has been to rebut the idea that being undocumented is a morally flawed state that renders one unworthy of concern. One powerful response to this view is simply for policymakers to affirm their own concern. Likewise, referring to undocumented people as members of a community is a powerful counter to the idea that they should be treated as commodities or conditional members.

If sanctuary policies do not say these things out loud, it is hard to imagine any other policy will.

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327. See *supra* note 19 and accompanying text; S.B. 5497, 66th Sess. (Wash. 2019); S.B. Rep. 5497, 66th Sess. (Wash. 2019).

328. Zack Budryk, *Inslee Signs Bill Making Washington a Sanctuary State*, THE HILL (May 22, 2019), <https://thehill.com/homenews/state-watch/445134-inslee-signs-bill-making-washington-a-sanctuary-state> [<https://perma.cc/EW4G-8TQW>].

329. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Jacob Alderdice, *Impeding Local Laboratories: Obstacles to Urban Policy Diffusion in Local Government Law*, 7 HARV. L. & POL’Y REV. 459, 460–62 (2013).