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WHAT IS A “SANCTUARY”?

*Rose Cuison Villazor**

The word “sanctuary” has recently received significant attention in the political arena and is likely to receive further examination as calls for stricter enforcement of immigration law continue. But what precisely is a sanctuary, particularly in the context of today’s immigration issues?

In this Article, I initiate possible approaches to developing an answer. First, I argue that a starting point for defining the contemporary meaning of sanctuary is an examination of its public and private dimensions. Laws, resolutions, and policies that have created what I refer to here as “public sanctuaries” must be differentiated from programs and services that are provided within “private sanctuaries.” Both types of sanctuaries have different goals and, importantly, they implicate distinct legal issues. Second, determining what constitutes a sanctuary requires an analysis of its discursive deployment, particularly the shift in its utilization from a primarily morally-based posturing in the 1980s to its more critical characterization today. Closer analysis of the defensive discourse of the word sanctuary would not only lead to a more robust understanding of sanctuary’s meaning today, but would also raise normative legal and policy questions that attend to immigrants’ rights. Specifically, given the social and political costs associated with the term sanctuary, it may well be time to reconsider its rhetorical utility in creating safe havens for immigrants.

INTRODUCTION

AS we get closer to the 2008 presidential election, immigration—particularly issues concerning the rights and privileges of undocumented immigrants—remains an important issue among voters and political leaders alike.¹ For months during the campaign pro-

* Assistant Professor of Law, SMU Dedman School of Law. This Article expands on legal and public policy issues discussed during my presentation entitled “Providing Sanctuary to Immigrant Families” at the SMU Law Symposium “Immigrants and Immigration Reform: Civil Rights in the 21st Century,” Oct. 19, 2007 and at the AALS Annual Meeting, Section on Women in Legal Education, “Program on Gender and Class: Voices from the Collective,” Jan. 3, 2008. I benefited from comments I received from participants of both conferences. For their insightful suggestions on earlier drafts of this Article, I am grateful to Laura Appleman, Kevin Johnson, Michael A. Olivas, Huyen Pham, and Rodney Villazor. Special thanks to Bill Bridge and Anthony Colangelo for helpful conversations about the arguments pursued in this Article. Finally, I thank Amy Banks, Ayse Guner, and Michelle Vincent Parker for their excellent research assistance and the editors of the SMU Law Review for their editorial assistance.

1. See Adam Nagourney, *Polls Find Voters Weighing Issues vs. Electability*, N.Y. TIMES, Nov. 14, 2007, at A1 (reporting that a poll conducted in Iowa shows that 86% of

cess, presidential candidates for both the Republican and Democratic parties have grappled with questions of whether undocumented immigrants should be allowed to obtain driver's licenses, benefit from in-state tuition, and access health care services.²

One of the primary immigration issues that generated significant controversy, particularly among Republican candidates, related to the word *sanctuary*. For example, the first question raised at the November 28, 2007 Republican presidential debate focused on whether New York City was a "sanctuary city."³ The questioner implied that as a sanctuary city, New York City aided and abetted "illegal aliens."⁴ In response, Rudy Giuliani not only denied that New York City was a sanctuary city but also accused one of his opponents, Mitt Romney, of having a "sanctuary mansion" because he employed undocumented immigrants at his home.⁵ As this exchange illustrates, the word *sanctuary* has a pejorative meaning today. Indeed, from a political perspective, utilizing the word *sanctuary* has served to show that a candidate is "soft" on immigration enforcement.⁶ As one journalist observed, *sanctuary* "has been wielded [by Republican presidential candidates] . . . as a billy club against one another."⁷

Amidst the intensified focus on sanctuaries, an important and often overlooked question has been asked in various contexts: What precisely is a sanctuary?⁸ When first deployed in the immigration context in the

Republicans and 59% of Democrats noted that immigration is a serious problem in the country). More recent surveys of likely voters have shown that immigration remains an issue, although it trails behind other matters such as the economy and the war in Iraq. See, e.g., Rasmussen Reports, *Toplines, Voting Issues*, Jan. 23–24, 2008, available at http://www.rasmussenreports.com/public_content/politics/election_20082/pt_survey_toplines/toplines_voting_issues_january_23_24_2008 (reporting that only 8% of likely voters polled reported that immigration is the most important issue in this presidential election).

2. See, e.g., Republican Party Presidential Debate, St. Petersburg, Florida, Nov. 28, 2007, available at <http://www.cnn.com/2007/POLITICS/11/28/debate.transcript> (discussing contentious immigration-related issues including privileges that should be available to undocumented immigrants) [hereinafter Republican Party Nov. 28 Debate]; Democratic Party Presidential Debate, Las Vegas, Nevada, Nov. 15, 2007, available at <http://www.nytimes.com/2007/11/15/us/politics/15debate-transcript.html> (same); Democratic Party Presidential Debate, Philadelphia, Pennsylvania, Oct. 30, 2007, available at <http://www.nytimes.com/2007/10/30/us/politics/30debate-transcript.html?pagewanted=all> (same).

3. See Republican Party Nov. 28 Debate, *supra* note 2 (question by audience member).

4. See *id.*

5. See *id.* (statement of Rudy Giuliani). Both Mr. Giuliani and Mr. Romney have since withdrawn their presidential candidacies. See Elisabeth Bumiller & David Kirkpatrick, *Romney Is Out, McCain Emerges As G.O.P. Choice*, N.Y. TIMES, Feb. 8, 2008, at A1; Elisabeth Bumiller, *Edwards Is Out, Giuliani Quits and Backs McCain*, N.Y. TIMES, Jan. 31, 2008, at A1.

6. See Lisa Anderson, *'Sanctuary Cities' Draw Fire, No Light*, CHIC. TRIB., Dec. 12, 2007, at 6 (reporting that Mitt Romney's deployment of "sanctuary city" against Rudy Giuliani was "shorthand for being soft on illegal immigrants"); Susan Carroll, *Is Houston a Sanctuary for Illegal Immigrants?*, HOUSTON CHRON., Dec. 23, 2007, at A1 (stating that the term *sanctuary* "has become a kind of political hand grenade, lobbed around in the GOP presidential debates to make opponents appear soft on illegal immigration").

7. Michael Luo, *A Closer Look at the 'Sanctuary City' Argument*, N.Y. TIMES, Nov. 27, 2006, at A26.

8. See Carroll, *supra* note 6, at A1 (posing the question "what is a sanctuary?"); Luo, *supra* note 7, at A26 (stating that the "issue is, what exactly constitutes a 'sanctuary'");

1980s, the term sanctuary primarily referred to efforts by churches and cities to provide various forms of assistance to asylum applicants from Central America.⁹ Importantly, the use of the word sanctuary conveyed a sense of moral and ethical obligation that churches and, to some extent, the local governments aimed to evoke.¹⁰ Today, the term sanctuary generally still refers to public and private safe spaces for unauthorized immigrants because sanctuary policies, for the most part, are still implemented by local governments and private groups such as churches.¹¹ But the characterization and understanding of sanctuary today has changed. To be more precise, in the more than twenty years since sanctuary policies initially entered the borders of immigration enforcement, a more negative connotation has co-opted sanctuary's arguably more positive orientation. Similar to the word "amnesty," sanctuary has acquired a tainted meaning.¹²

Politicians distancing themselves from sanctuary cities,¹³ local governments and citizens actively opposing the establishment of sanctuary cities,¹⁴ and numerous statements made in the media by groups who are against what they view as sanctuary policies highlight the negative aura that enfolds sanctuaries today. In recently defeating a resolution that would have labeled Evanston, Illinois a "sanctuary city," for example, a group called The Illinois Citizen Security Network Organizations argued that they needed to "protect . . . the physical and financial security of our citizens [and needed] to take actions that stop these magnets from drawing people into this country illegally."¹⁵ The Federation for American Immigration Reform ("FAIR"), which describes itself as a group interested in "improv[ing] border security [and] stop[ping] illegal immigration,"¹⁶

MSNBC Live-AM, (Dec. 18, 2007), 2007 WLNR 25003874 (noting that political candidates have exaggerated "what is a sanctuary city, which is a term that's been tossed around").

9. See *infra* Part I, and accompanying notes (discussing the sanctuary movement in the 1980s).

10. See IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* 20 (1985) (providing a quote from Jim Corbett, one of the prominent leaders of the sanctuary movement of the 1980s, in which he explained that "the declaration of sanctuary is a different kind of civil disobedience that is intended to do justice").

11. See *infra* Parts II and III and accompanying notes (examining contemporary sanctuary efforts in both public and private settings).

12. See David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 527 (2006-07) (discussing President George W. Bush's rhetorical move to not call his proposed immigration law reform an amnesty plan as evidence of "the apparent unpopularity of any policy that might be tagged with the amnesty label"); see also Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 233, 251-52 (2007) (describing the negative connotation of the word amnesty).

13. See *supra* note 5 and accompanying text (discussing Rudy Giuliani's commentary that New York City was not a sanctuary city when he was mayor).

14. See *infra* Part II (discussing local citizens' rejection of their city being labeled a "sanctuary city").

15. See ABCChicago, *Plan to Make Evanston "Sanctuary City" Fails to Pass*, ABC7 CHICAGO.COM, Mar. 11, 2008, <http://abclocal.go.com/wls/story?section=news/local&id=6013636>.

16. Federation for American Immigration Reform, *About Fair*, http://www.fairus.org/site/PageServer?pagename=about_aboutmain (last visited Feb. 26, 2008).

has expressed the belief that sanctuary policies “[a]ccommodat[e] those who violate our immigration law [and] encourage others to follow the same path.”¹⁷ Although some groups continue to deploy the word sanctuary in ways that may be seen to reacquire its moral and ethical sense,¹⁸ such efforts seem to have been eclipsed by those who have utilized sanctuary’s negative construction.

Overlooking the continued disparaging meaning of sanctuary would be a mistake. First, unfavorable utilization of sanctuaries has at times been used in ways that placed all laws and policies relating to the provision of assistance to immigrants in the same “sanctuary” category.¹⁹ This politically motivated disapproving use of the word sanctuary has unfairly conflated legitimate state and local policies that serve local interests²⁰ or policies that comply with the Constitution or federal laws²¹ with legislation that is intended to supersede immigration law.²² Regulation of immigration law, as the Supreme Court has held, falls under the exclusive power of the federal government.²³ The conflation has led to confusion

17. Federation for American Immigration Reform, Non-Cooperation Policies: “Sanctuary” for Illegal Immigration, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters0173 (last visited Feb. 26, 2008).

18. See The New Sanctuary Movement, New Sanctuary Movement Pledge, <http://www.newsanctuarymovement.org/pledge.htm> (last visited Feb. 26, 2008) (stating for example that they established the “The New Sanctuary Movement” in order “to respond actively and publicly to the suffering of our immigrant brothers and sisters residing in the United States”).

19. See *infra* Part I and accompanying text.

20. See Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34 (explaining that tuition benefits constitute “purely state benefits” that can be provided or withheld to undocumented college students without implicating federal immigration laws).

21. See *infra* Part II (discussing how the constitutional right to public school education and right to equal access to health care services have been mistakenly conflated with sanctuary policies).

22. See, e.g., *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518–33 (M.D. Pa., 2007) (invalidating a local ordinance prohibiting employment of and provision of leases to undocumented immigrants on the grounds that it is preempted by the federal government’s authority to regulate immigration law). See also *City of New York Exec. Order No. 124* (Aug. 1989), available at http://www.mycourts.gov/library/queensPDF_files/orders/ord/24.pdf (prohibiting government employees from providing federal immigration law officials the immigration status of certain immigrants except under limited circumstances). Implementation of this Executive Order was a critical part of a constitutional challenge filed by the City of New York against the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), which proscribed state and local government officials from prohibiting their employees from providing immigrants status of immigrants they encounter to federal authorities. See *City of New York v. United States*, 971 F. Supp. 789 (S.D.N.Y. 1997), *aff’d* 179 F.3d 29 (2d Cir. 1999) (upholding the laws). New York ultimately revised the Executive Order to be more consistent with immigration laws. Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1385–86 (2006).

23. See *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (holding that the “[p]ower to regulate immigration is unquestionably exclusively a federal power”); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (stating that Congress’s exclusive control over immigration is “as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of government”); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F.

among individuals who were fearful of being held in violation of immigration laws—even if their actions were otherwise consistent with the law.²⁴ They also confounded immigrants themselves, some of whom have chosen not to participate in a particular program out of fear of possible removal from the country.²⁵

Second, the current negative deployment of the term sanctuary obscures fundamental differences and issues among various efforts that may be described as sanctuary policies. As may be derived from statements by the Republican candidates, the term sanctuary could refer not only to public laws and policies, but also to choices made by private citizens that implicate immigration law. Thus, we can analyze sanctuaries along a private/public dichotomy and describe, on one end, of the spectrum those safe spaces that are more narrowly bound, such as the confines of a church or a private residence, and the other end of the spectrum that attends to broader and more public domains that have relatively porous borders.²⁶

In this Article, I initiate two possible approaches to extrapolating sanctuary's contemporary meanings. First, I suggest that one starting point for defining the meaning of sanctuary is examining its public and private dimensions. As discussed more fully *infra*, when the concept of sanctuary emerged prominently in the public discourse in the 1980s, it referred to two different domains—churches that provided food, shelter and other assistance to asylum seekers from El Salvador and Guatemala and state and local governments that established their localities as "safe havens" for the same group of immigrants by, among other things, not inquiring about the immigrants' citizenship status. Today, discussions about sanctuary policies have focused mainly on "sanctuary cities" and little attention has been given to forms of assistance provided by private actors. Although related, these two types of sanctuaries have different goals and raise distinct legal issues. Thus, determining sanctuary's meaning needs to take into account the differences between these two separate spheres.

Second, I contend that determining what constitutes a sanctuary requires an analysis of its discursive deployment. That is, its meaning today needs to be placed in the context from which it is being used and the

57, 57 (stating that "[p]robably no principle in immigration law is more firmly established, or of our greater antiquity, than the plenary power of the federal government to regulate immigration"). See also *infra* Part II and accompanying notes.

24. See, e.g., Anthony Faiola, *States' Immigrant Policies Diverge*, WASH. POST, Oct. 15, 2007, at A1 (discussing the passage of a law in Oklahoma that makes it a felony to transport or harbor an undocumented immigrant, which led school bus drivers and church pastors to question whether they might be held in violation of the law).

25. See, e.g., Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1480–81 (2006) (providing examples of immigrants choosing not to report crimes because they are concerned about being subject to deportation). As another example, some immigrants have taken their children out of schools because of fear of deportation, even though children, regardless of citizenship status, have a constitutional right under *Plyler v. Doe*, 457 U.S. 202 (1982), to obtain public education. See *Texas: Immigrants Pull Children From School*, N.Y. TIMES, Oct. 5, 2007, at A19.

26. See *infra* Part II.

specific message that those who employ the word are seeking to evoke. In the 1980s, the term sanctuary was used primarily to convey a morally based position during a critical period in refugee and asylum law. This morally grounded contention ultimately led to legal confrontations that were framed as conflicts between the church and state. By contrast, today, the dominant use of the word sanctuary is generally associated with the unlawful facilitation of the continued presence of unauthorized immigrants and their families in this country. Importantly, in this context, the term sanctuary has a negative connotation that is often described as illegal acts by local and state governments of federal immigration laws. Analyzing the shift in sanctuary's utilization from a largely positive one to its present day pejorative meaning today provides a more robust understanding of what constitutes a sanctuary.

Part I provides a historical background of sanctuaries and examines the efforts of churches and then subsequently, local governments, to provide sanctuaries for immigrants from El Salvador and Guatemala. Part II conducts a closer analysis of the public and private dimensions of sanctuaries and examines the distinct legal issues they raise. I build on the work of other scholars who have examined more closely what I call "public sanctuaries"²⁷ and I conduct a closer analysis of a recent example of "private sanctuaries." Part III analyzes contemporary uses of the word sanctuary and the discursive movement towards its negative conception, including attempts to equate the term sanctuary with other types of programs and services that local governments are mandated to provide to all persons regardless of citizenship status or have opted to do to further local interests. The Conclusion discusses the policy and legal implications of arguments presented here and raises several questions that ought to be explored in the future.

I. HISTORICAL BACKGROUND OF SANCTUARIES

A comprehensive understanding of the meaning of "sanctuary" policies requires a brief discussion of its etymology. The concept of providing sanctuary to those who might need it has both biblical²⁸ and non-biblical origins.²⁹ Generally, in both contexts, the provision of sanctuaries rested

27. See, e.g., Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 601 (2008) (examining sanctuary laws); Pham, *supra* note 22, at 1382 (examining sanctuary and non-cooperation laws).

28. See ANN CRITTENDEN, SANCTUARY 62 (1988) (discussing the biblical roots of sanctuary); Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 928-31 (1995) (examining the biblical foundations of sanctuaries); Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or A Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747, 749-51 (1986) (noting that the concept of sanctuary may be found in several passages of the Bible); Douglas L. Colbert, *The Motion in Limine: Trial Without Jury, A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 38-48 (1986) (providing a brief historical discussion of sanctuaries).

29. See Bezdek, *supra* note 28, at 931-33 (explaining sanctuary's origins in English common law); Carro, *supra* note 28, at 751-67 (discussing the historical treatment of sanctuaries among the Greeks, Romans, and Anglo-Saxon societies).

primarily with churches, which offered places of refuge for those accused of crimes and were susceptible to revengeful attacks by their victims.³⁰ The occurrence of retaliatory attacks on accused persons coincided with the lack of legal protection afforded to them during those historical periods.³¹ Over time, sanctuaries declined in importance, since states increasingly provided legal rights to the accused.³²

In the U.S., churches and other religiously affiliated groups offered a form of sanctuary to different groups at different points in history. Sanctuaries were provided to slaves in the Nineteenth century, Jews escaping the Holocaust, civil rights workers fleeing mob violence in the South in the 1950s and 1960s, and those who resisted the draft for the Vietnam War.³³ Then, in the 1980s, the concept of sanctuary played an important role to immigrants from El Salvador and Guatemala who were forced to leave their countries because of violence and civil war.³⁴

A. SANCTUARY MOVEMENT OF THE 1980s

In 1980, the United States enacted the Refugee Act,³⁵ which allowed for the discretionary granting of asylum to refugees who were able to meet the statutory definition.³⁶ Thousands of immigrants from El Salvador and Guatemala who escaped political, social and civil strife applied for political asylum.³⁷ Their applications, however, were routinely re-

30. Carro, *supra* note 28, at 749.

31. *See id.* at 756–58.

32. *See id.* at 767.

33. *See* CRITTENDEN, *supra* note 28, at 62–63 (examining various ways in which groups benefited from sanctuary from churches); Colbert, *supra* note 28, at 41–43 (explaining the provision of sanctuaries in the U.S. history); Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 122–23 (1993) (noting that the concept of sanctuary in the United States dates back to “at least the Underground Railroad which carried slaves to freedom before the Civil War”). One commentator noted that the term sanctuary was officially invoked in the U.S. when draft evaders sought refuge in churches and schools across the country. *See* CRITTENDEN, *supra* note 28, at 63.

34. *See* CRITTENDEN, *supra* note 28, at xvi (explaining that an estimated 500,000 to 750,000 Central Americans arrived in the U.S. between 1980 and 1983).

35. *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended at 8 U.S.C. §§ 1157–59 (2000)).

36. *See* 8 U.S.C. § 1101(a)(42) (2000) (explaining that a refugee is “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .”); Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT’L L. 1, 1–2 (1987).

37. *See* CRITTENDEN, *supra* note 28, at 21.

jected,³⁸ which subjected them to deportation to their home countries.³⁹ Many individuals and groups in the U.S. protested the denial of such claims in light of continued violence and killings perpetrated against civilians by the governments of these two countries. Critically, those who criticized the rejection of the Central American asylum applications argued that the U.S. was in part responsible for the immigrants' plight, because of the involvement and support that the U.S. offered to their governments.⁴⁰

Citing what they saw as the wrongful denial of these Central Americans' claims for asylum,⁴¹ churches and other private individuals established a network of people who were determined to offer assistance to those immigrants denied asylum. Specifically, in 1982, a number of churches declared themselves "sanctuaries" in an effort to offer refuge to immigrants from El Salvador and Guatemala,⁴² initiating what commentators have referred to as the Central American Sanctuary Movement.⁴³ Rhetoric conveyed the moral duty to provide assistance to the asylum applicants.⁴⁴ Using themes that evoked images of the Underground Railroad during the Civil War and Jews escaping Nazi persecution,⁴⁵ the sanctuary movement aimed to encourage non-violent and church-based responses to suffering that they believed was caused by the United States government.⁴⁶ In this framework, the immigrants from El Salvador and Guatemala were victims whose needs for assistance cannot be ignored.

Although the leaders of the movement recognized that they risked violating immigration laws, they nevertheless believed that the current immi-

38. *See id.* at 21 (providing a chart that illustrates that between June 1983 and September 1986, only 528 out of 19,207 applications from El Salvador were approved, yielding an approval rate of 2.6% and during that same period, only 6 out of 234 applications from Honduras were approved, resulting in an approval rate of 2.5%). Many applications were rejected because that their asylum claim was based on a "generalized climate of terror" rather than the required showing of "specific threats" to one's lives. *See id.* *See also* Colbert, *supra* note 28, at 37 (explaining that the United States government rejected the political asylum claims of immigrants from El Salvador and Guatemala because their claims were not grounded upon a well-founded fear of persecution but rather on civil strife).

39. *See* Colbert, *supra* note 28, at 37.

40. *See id.* at 24-34 (discussing various reports issued by international bodies regarding the brutal killings and violence faced by thousands of civilians in El Salvador and Guatemala from their military governments and different forms of support provided to these governments by the United States).

41. *See* Pham, *supra* note 22, at 1382 (explaining that the churches and other private groups formed the sanctuary movement because they "believed that Guatemalans, Salvadorans . . . were wrongly denied asylum to further American foreign policy objectives").

42. *See* Colbert, *supra* note 28, at 24-38 (explaining the historical development of the sanctuary movement in the United States on behalf of Central American immigrants).

43. *See id.*

44. *See* HILARY CUNNINGHAM, *GOD AND CAESAR AT THE RIO GRANDE, SANCTUARY AND THE POLITICS OF RELIGION* 25 (1995) (stating that those involved with the sanctuary movement on behalf of Central Americans refugees believed them to have the similar plight of Jews escaping Nazi persecution and thus, the participants of the movement could not "look the other way").

45. *See* BAU, *supra* note 10, at 20-21 (explaining that the sanctuary movement is similar to helping slaves escape the South and Jews from the Holocaust).

46. *See id.* at 20.

gration policy of denying Central American asylum claims were "illegal and immoral."⁴⁷ Until the policy was changed, they argued that they "will not cease to extend the sanctuary of the church to undocumented people from Central America." Those engaged with this movement offered a range of assistance, including the provision of shelter, food, and clothing.⁴⁸ Others provided legal services through representation during deportation hearings.⁴⁹ Some transported or smuggled immigrants from one place to another.⁵⁰ Although many recognized the potential legal consequences of their action, they believed that their efforts embodied the necessary moral responses to the particular situation at stake.⁵¹

The morally-based arguments of the sanctuary movement ultimately met head-on the rule-of-law principle that the federal government sought to employ. At the height of sanctuary movement, an estimated 20,000 to 30,000 church members⁵² and more than 100 churches and synagogues participated in the sanctuary movement,⁵³ making the conflict between the church and state inevitable. Although the federal government initially treated the sanctuary movement of the 1980s with minimal resistance,⁵⁴ it eventually prosecuted individuals who were involved with the network. Between 1984 and 1985, the federal government prosecuted several individuals involved with the sanctuary movement under various provisions of section 274 of the Immigration and Nationality Act ("INA"), including the anti-alien harboring proscription.⁵⁵ Cases brought against these defendants subsequently led to convictions, although some were acquitted.⁵⁶ Interestingly, despite their convictions, the defendants continued to receive tremendous support from the public, including forty-seven members of Congress, who argued for leniency.⁵⁷

47. See CRITTENDEN, *supra* note 28, at 74 (quoting the declaration of sanctuary issued by sanctuary leaders and submitted to the Attorney General of the U.S.).

48. See BAU, *supra* note 10, at 12 (explaining services that churches provided).

49. See *id.*

50. See Loken & Babino, *supra* note 33, at 129–32 (noting that in addition to the provision of shelter and transportation, another type of activity included the act of smuggling undocumented immigrants into the country). However, as the authors noted, very few people who were part of the sanctuary movement engaged in smuggling. See *id.* at 132.

51. See BAU, *supra* note 10, at 20–21 (explaining that the sanctuary movement was "an act of civil disobedience" that was intended to do "justice").

52. See Charles Austin, *More Churches Join in Offering Sanctuary for Latin Refugees*, N.Y. TIMES, at A18 (Sept. 21, 1983).

53. See Colbert, *supra* note 28, at 44.

54. See Pham, *supra* note 22, at 1384 (stating that the "federal reaction to the sanctuary laws and the sanctuary movement as a whole was rather muted").

55. 8 U.S.C. § 1324 (2000); see BAU, *supra* note 10, at 75–123.

56. For a synopsis of the cases brought against those involved with the sanctuary movement, see BAU, *supra* note 10, at 75–123. As detailed in this book, some of the cases led to convictions and others resulted in acquittals. See *id.* The case that drew the most significant attention was the prosecution of several sanctuary participants in Tucson, Arizona, including those who first started the movement. See CUNNINGHAM, *supra* note 44, at 55–59. Of the eleven defendants, eight were convicted and three obtained acquittals from various charges including conspiracy, harboring undocumented immigrants and aiding and abetting unauthorized immigrants. See *id.* at 59.

57. See CUNNINGHAM, *supra* note 44, at 60. The convicted defendants eventually had their sentences suspended. See *id.* at 61.

In brief, the genesis of the sanctuary movement was the provision of assistance to immigrants from Central America whose rejected asylum applications meant deportation to countries where they were likely to experience significant suffering if not fatal consequences. Those involved with the sanctuary movement believed that establishing a safe haven for these immigrants constituted moral and ethical obligation that they could not ignore.⁵⁸

B. STATE AND LOCAL GOVERNMENTAL RESPONSES

In due course, what originally began with churches as proactive efforts to provide shelter and food to immigrants led to state and local governmental efforts to assure immigrants that they too will be safe within their borders. A number of states and cities bolstered the efforts of the sanctuary movement by passing laws that declared that their public places will also serve as sanctuaries.⁵⁹ Similar to statements by church leaders involved with the sanctuary movement, these laws were expressly tied to particular political positions taken against the federal government's immigration policy at the time. Specifically, many of them criticized the United States' rejection of the Central Americans' political asylum claims.⁶⁰

The sanctuary laws differed in at least two respects. They not only broadened the scope of assistance available to the Central American immigrants but they also sought to accomplish broader policy goals that benefitted all residents within the localities in which they were passed. Some policies prohibited the conditioning of governmental services on the asylum applicants' immigration status.⁶¹ Among the most important and controversial safeguards provided were assurance that government employees, mainly police officers, would neither ask nor report their immigration status to the federal government—a type of “don't ask, don't

58. Eventually, the sanctuary movement died down with the enactment of amendments to the INA that enabled asylum seekers from El Salvador and Guatemala to become eligible for special refugee status. In 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, 2193-2201 (1997) (“NACAR”), which enabled some immigrants from El Salvador and Guatemala to apply for cancellation of their removal.

59. See Pham, *supra* note 22, at 1382. States that passed these sanctuary laws included New York and Massachusetts and cities included New York City and Seattle. See *id.* at 1383. In all, about twenty-three cities and four states had enacted a sanctuary law in the 1980s. See *id.* See also Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 311-16 (1989) (examining various types of city and state sanctuary laws). It should be noted there had been sanctuary policies that existed prior to those enacted by local governments in response to the plight of asylum-seekers from El Salvador and Guatemala. See Kittrie, *supra* note 25, at 1469 (stating that a policy by the Los Angeles Police Department issued in November 1979 regarding the treatment of persons suspected as undocumented immigrants constituted the first state or local immigration law sanctuary policy in the country). The sanctuary laws adopted in the 1980s thus built on these earlier policies.

60. See Carro, *supra* note 28, at 309 (explaining, for example, that some declarations included the low approval rate of asylum applications from Central America).

61. See *id.* at 308-10

tell" policy. These policies were believed to facilitate public safety by encouraging all residents, regardless of immigration status, to report crimes to the police.⁶² Over time, some of these sanctuary laws developed from specific protection for Central Americans to more general protections for all immigrants.⁶³

In comparison to the way that the federal government ultimately responded to those involved in the private sanctuary movement, its reaction to these sanctuary laws was minimal. Eventually, the federal government responded to these sanctuary laws by amending the INA in 1996 to prohibit state and local governments from proscribing their employees to voluntarily choose to assist the federal government in enforcing immigration law.⁶⁴ In so doing, the federal government reasserted its plenary authority to regulate and enforce immigration law. Critically, it foreshadowed the underlying tension that emerged several years later when public sanctuaries fell within a contentious debate between federal and state/local enforcement of immigration laws.

In sum, the sanctuary movement of the 1980s produced at least two types of sanctuaries. Efforts by churches and other individuals precipitated private sanctuaries and the states and cities established public sanctuaries. Understanding the difference between public and private sanctuaries clarifies their particular goals and their limitations which ultimately leads to a deeper comprehension of what makes a place a sanctuary.

II. DEFINING SANCTUARY'S CONTEMPORARY MEANING

Twenty years after the sanctuary movement on behalf of Central American immigrants began, the term sanctuary is once again playing an important and controversial role in immigration law. The space that it occupies, however, is very different in a number of ways. The tragic events of September 11, 2001, and the significant population of unauthorized immigrants, currently estimated approximately between 11.5 to 12 million,⁶⁵ have substantially changed the terrain of immigration law and policy.⁶⁶ Calls to close off the borders and prevent another terrorist attack have propelled the federal government to undertake various initiatives, including seeking the assistance of state and local governments in implementing immigration laws and expediting the removal of deportable

62. See Kittrie, *supra* note 25, at 1480-81.

63. See Rodriguez, *supra* note 27, at 601 (detailing the expansion of sanctuary policies, initially limited to immigrants from El Salvador and Guatemala, to all immigrants).

64. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009 (1996).

65. JEFFREY S. PASSELL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 1-6 (Mar. 7, 2006), <http://pewhispanic.org/files/reports/61.pdf>.

66. See Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1376 (2007) (discussing the changes to immigration law effected by the terrorist attacks on September 11, 2001).

noncitizens.⁶⁷ Among the consequences of these new approaches are the “successful” deportations of noncitizens.⁶⁸

The combination of these different factors precipitated strong and critical reactions from public and private citizens. Similar to the 1980s sanctuary movement, both public and private forms of sanctuaries were created to provide refuge to immigrants who have become vulnerable to deportation. A number of churches and other private institutions have established a new loose network of churches that offer sanctuary to undocumented immigrants. Additionally, several local governments either have revised or passed new “sanctuary laws” to create safe spaces in the public domain for unauthorized immigrants.

A. THE NEW SANCTUARY MOVEMENT

Today, the U.S. is experiencing a resurgent religious-based sanctuary movement, in large part precipitated by a Mexican national who took refuge in a church in Chicago in August 2006. Elvira Arellano sought sanctuary from a church after an immigration judge ordered her removal in August.⁶⁹ Ms. Arellano, who has an 8-year-old U.S. citizen son, decided to defy the deportation order and sought sanctuary in the church in order to protest the effect of deportation on immigrant families.⁷⁰

Inspired by Ms. Arellano’s story, a coalition of churches and individuals formed an organizational network with the overall goal of keeping immigrant families together.⁷¹ Similar to churches in the 1980s, today’s sanctuary churches and private organizations formed a network to provide shelter and other services to undocumented immigrants. This group describes itself as “religious leaders across a broad spectrum of denominations from ten states [who] are coming together to begin a New Sanctuary Movement to accompany and protect immigrant families who are facing the violation of their human rights in the form of hatred, work-

67. *E.g.*, John Ashcroft, Att’y General, U.S. Dep’t of Justice, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), available at <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>. For a critique of the initiatives undertaken by the federal government since September 11, 2001, see Johnson & Trujillo, *supra* note 66, at 1377–87.

68. *See, e.g.*, Julia Preston, *U.S. to Speed Deportation of Criminals Behind Bars*, N.Y. TIMES, Jan. 15, 2008, at A12 (reporting that in 2007, immigration officials deported almost 277,000 immigrants to their home countries).

69. Gretchen Ruethling, *Chicago Woman’s Stand Stirs Immigration Debate*, N.Y. TIMES, Aug. 19, 2006, at A10.

70. *See id.*

71. *See* James Barron, *Churches to Offer Sanctuary*, N.Y. TIMES, May 9, 2007, at B1 (reporting on the New Sanctuary Movement and intent to provide sanctuary to immigrants who face deportation). *See also* The New Sanctuary Movement, *supra* note 18 (criticizing deportation laws for leading to the separation of children from their parents and perpetuating the exploitation of immigrant workers). By contrast, as previously noted, one of the primary goals of the Central American Sanctuary movement was the country’s systematic rejection of asylum claims of those from El Salvador and Guatemala. *See supra* Part I and accompanying notes.

place discrimination and unjust deportation."⁷²

By declaring their churches sanctuaries, those involved with the New Sanctuary Movement have sent the message that despite immigration law's mandates, they will aim to protect undocumented immigrants. Importantly, their actions are reminiscent of the church versus state conflict that emerged in the earlier sanctuary movement. Like their 1980s counterpart, the new sanctuary movement is concerned with deportation of people whom the movement believes are entitled to stay in the U.S. It differs, however, in that the current one emphasizes the importance of protecting the integrity of the family. As the New Sanctuary Movement noted on its website, "[W]e [have] witness[ed] the violation of [family unity] under current immigration policy, particularly in the separation of children from their parents due to unjust deportations."⁷³

Indeed, the harsh effects of deportation laws on immigrant families are well established in the media,⁷⁴ empirical studies,⁷⁵ and recent scholarship.⁷⁶ Of particular significance is how deportation has led to the separation of parents from their children, specifically those who are U.S. citizens.⁷⁷ Officially, the United States has an immigration policy that favors family unity. In practice, however, family members—both those seeking entry⁷⁸ and those hoping to remain in the United States—often

72. New Sanctuary Movement Home Page, <http://www.newsanctuarymovement.org> (last visited Feb. 29, 2008).

73. New Sanctuary Movement Home Page, <http://www.newsanctuarymovement.org> (stating that "[W]e are deeply grieved by the violence done to families through immigration raids") (last visited Feb. 29, 2008).

74. See, e.g., Julia Preston, *Case of Mother Torn from Baby Reflects Immigration Quandary*, N.Y. TIMES, Nov. 17, 2007, at A1 (reporting on the separation of a nine-month old child from her mother who was placed in jail awaiting deportation).

75. See RANDOLPH CAPPS ET AL., URBAN INSTITUTE, *PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN* (Oct. 31, 2007), <http://www.urban.org/url.cfm?ID=411566>.

76. See Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J.C.R. & C.L. 195, 195–96 (2007); David Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1165–66 (2006); David Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 48 (2005); David Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002).

77. See THE URBAN INSTITUTE, *PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN* (2007), available at <http://www.urban.org/url.cfm?ID=411566> (discussing the effects of deportation and raids on U.S. citizen children); Julia Preston, *Immigration Quandary: A Mother Torn from her Baby*, N.Y. TIMES, Nov. 17, 2007, at A1 (reporting on the separation of a nine-month old child from her mother who was placed in jail awaiting deportation).

78. For example, there continue to be long delays in family-based immigration to the U.S. Based on the April 2008 Visa Bulletin from the U.S. Department of State, which announces the availability of various immigrant visas, there is a six-year delay in processing applications filed by most U.S. citizen petitioners on behalf of their sons or daughters and, curiously, a five-year delay on the processing of applications filed by most legal permanent residents on behalf of their children under twenty-one years old, and an almost eight year delay for applications of U.S. citizens filed on behalf of their sons and daughters over the age of twenty-one years old. See U.S. Dep't of State, *Visa Bulletin for April 2008* (March 17, 2008), available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4177.html. Oddly, a citizen whose beneficiary is from the Philippines would have to wait more than fifteen

face the reality of years of separation from each other.

As sanctuaries, these churches provide shelter (lodging) and other aid such as legal, medical, or material, to undocumented immigrants. The movement's website states that to participate and become a sanctuary, the church or its members must agree to host an immigrant family who meets a number of criteria.⁷⁹ Included in this list of criteria is the requirement that the family is under an order of deportation and that the family includes U.S. citizen children.⁸⁰ The immigrant family will be allowed to use the congregation as its mailing address and will be able to spend time as needed at the site.⁸¹

These actions, of course, have important legal consequences. Because individuals participating in the New Sanctuary Movement are providing "safe havens" for undocumented immigrants, they may find themselves in direct violation of the INA's mandate against the harboring of unauthorized immigrants. As previously noted, section 274 of the INA (8 U.S.C. § 1324) proscribes harboring, concealing, or providing shelter to undocumented immigrants.⁸² A person found in violation of 8 U.S.C. § 1324 could be charged with a criminal offense, and if found guilty, the offense provides punishment by imprisonment and fine.⁸³

Interestingly, the New Sanctuary Movement argues that their actions do not violate immigration laws because they are not concealing the identity of the families to whom they are providing shelter and assistance.⁸⁴ That is, participants have clearly expressed their position that they will provide the identity of the immigrant families they are hosting to the public.⁸⁵ In other words, the organization's defense is that they are not purposely keeping silent about the presence of the undocumented families and thus, the sheltering of the immigrants bars a conviction under 8 U.S.C. § 1324.⁸⁶ In making this argument, the New Sanctuary Movement is interpreting the INA's anti-harboring provision to only prohibit "un-

years for her petition on behalf of an over twenty-one year old son or daughter to be processed, while a Filipino/a legal permanent resident who filed a petition on behalf of similarly aged beneficiaries need only wait five years. *See id.*

79. *See* New Sanctuary Movement, *Prophetic Hospitality: Strategy for a New Movement*, <http://www.newsanctuarymovement.org/hospitality.htm> (last visited Feb. 29, 2008).

80. *See id.*

81. *See id.*

82. 8 U.S.C. § 1324(a)(1)(A)(iii) (2000) (proscribing any person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law" from concealing, harboring, or shielding "from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation").

83. 8 U.S.C. § 1324(b) provides for imprisonment of anywhere from 5 or fewer years, but if the person causes serious bodily injury, then up to 20 years.

84. *See* New Sanctuary Movement, *Legal Justification for the Legal Status of Sanctuary Communities*, http://www.newsanctuarymovement.org/graphics/documents/LEGAL_JUSTIFICATION_FOR_LEGAL_STATUS_CONGREGATIONS.pdf (last visited Feb. 29, 2008).

85. New Sanctuary Movement, *An Invitation to Join the New Sanctuary Movement*, <http://www.newsanctuarymovement.org/invitation.htm> (last visited Feb. 29, 2008).

86. *See id.*

named, undocumented people."⁸⁷ On the one hand, the argument relies on a textual reading of the statute. The text of section 1324(a)(1)(A)(iii) proscribes concealing, harboring, or shielding from detection.⁸⁸ Thus, if in fact the New Sanctuary Movement is not hiding undocumented immigrants from the federal government, they arguably have a textual basis for their position. On the other hand, the intent of the law is to proscribe harboring, which plausibly makes irrelevant whether their actions are undetectable or transparent to the federal government. Under this view, their conduct violates the purpose of the law.

The New Sanctuary Movement, which emerged within the last two years, seeks to re-establish the successful network of churches and private citizens in the 1980s in providing places that are safe from removal from this country. Also invoking obligations grounded on morality and ethics, this new movement seeks to minimize what its participants see as the disintegration of immigrant families. Importantly, it remains to be seen whether this new movement will also become entangled in the church versus state conflict that dominated the earlier sanctuary movement.

Ultimately, the question becomes whether churches affiliated with the New Sanctuary Movement may be considered absolute safe havens for undocumented immigrants. The answer to this question is best addressed by referring to section 287 of the INA (8 U.S.C. § 1357), which provides that immigration officers and employees have the authority to "arrest any alien in the United States."⁸⁹ Thus, immigration enforcement agents may elect to go to a church and arrest an undocumented immigrant seeking sanctuary there. Although Ms. Arrellano herself was not arrested and deported from the country until after she left the confines of the church,⁹⁰ the decision to not arrest Ms. Arrellano while she was still inside the church was an option that the federal government exercised.

B. SANCTUARY LAWS AND POLICIES

Today, sanctuary laws or policies encompass a variety of forms.⁹¹ In

87. See Michael Gutierrez, *We're Not Breaking the Law*, CAL. CATHOLIC DAILY, Sept. 2, 2007, <http://www.calcatholic.com/news/newsArticle.aspx?id=0e995d0c-da0e-448e-b684-b6d4ca8febea> (Michael Gutierrez, Pastor, St. Anne's Church and Shrine in Santa Monica, stating that "we are not breaking the law because we are revealing the names and identities of those in sanctuary").

88. See 8 U.S.C. § 1324(a)(1)(A)(iii) (2000).

89. 8 U.S.C. § 1357(a) (2000).

90. See N.C. Aizenman & Spencer S. Hsu, *Activist's Arrest Highlights Key Immigrant Issue*, WASH. POST, Aug. 21, 2007, at A05 (reporting that Ms. Arrellano was arrested in Los Angeles outside of another church).

91. The National Immigration Law Center ("NILC"), which describes itself as an organization that "protect[s] and promote[s] the rights and opportunities of low-income immigrants and their family members," provides a chart on its website that lists the states and cities that have laws and policies that places limitations on the ability of state and local governments to enforce immigrant laws. See National Immigration Law Center, *Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities*, Oct. 2007, http://www.nilc.org/immlawpolicy/LocalLaw/locallaw_limiting_tbl_2007-10-11.pdf. The chart is helpful in providing comprehensive information about a variety of laws and resolutions, which range from policies that discour-

this section, I examine what is arguably a narrow definition of “sanctuary:” those laws or policies that limit government employees, particularly local police officers, from inquiring or disseminating information about the immigration status of immigrants whom they encounter.⁹² Localities have traditionally adopted these policies for a number of reasons, including the promotion of the general welfare and safety of all residents in their jurisdictions, including unauthorized immigrants.⁹³ Local police departments, for example, have adopted “non-cooperation” or “don’t ask, don’t tell” policies to further public safety concerns.⁹⁴ With the threat of deportation taken out of the picture during police and immigrant encounters, police officers have stated that immigrants are more willing to report crimes in which they have been the victim or that they have witnessed.⁹⁵ Accordingly, although these narrow public sanctuary laws aim to provide a measure of protection for unauthorized residents, they are done in the context of accomplishing broader concerns.

To be sure, although “non-cooperation” or “don’t ask, don’t tell” laws and policies are now typically equated with sanctuary policies, it should be noted that these policies come in different forms,⁹⁶ which further lead to the confusion about the sanctuary’s precise meaning. For example, New York City, New York and Takoma Park, Maryland both have “non-cooperation” policies. New York City’s policy, however, is what has been described as a form of “don’t ask, do tell” policy.⁹⁷ The city’s current policy does not require government workers to ask about an individual’s

age cooperating with federal immigration officers, to actively prohibiting government employees from inquiring about a person’s immigration status and divulging such information to immigration officers.

A list of “sanctuary laws” is also available on the webpages of a number of organizations that have a restrictionist approach to immigration law. *See, e.g.*, Ohio Jobs & Justice PAC (“OJJJAC”), Sanctuary Cities USA, Mar. 17, 2008, <http://www.ojjpac.org/sanctuary.asp>. OJJJAC describes itself as a “non-partisan educational civil rights and advocacy organization” that has undertaken an advocacy initiative of examining the “effects of illegal immigration on the civil rights of Americans.” *See id.* Most of its data was obtained from a report issued by the Congressional Research Service report conducted in 2006, which listed more than 30 cities as jurisdictions that have adopted a sanctuary policy. *See* CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT (Aug. 14, 2006).

92. *See* Rodriguez, *supra* note 27, at 600–02; Kittrie, *supra* note 25, at 1466–75; Pham, *supra* note 22, at 1375–76.

93. *See* Rodriguez, *supra* note 27, at 604–05; Kittrie, *supra* note 25, at 1475–80; Pham, *supra* note 22, at 1375.

94. *See* Pham, *supra* note 22, at 1477 (stating that “[t]he predominant reason local officials give for sanctuary policies has been the desire to encourage unauthorized aliens to report crimes to which they are victims or witnesses”).

95. *See id.*

96. *See* Pham, *supra* note 22, at 1389–91 (explaining that post-9/11 non-cooperation laws had four basic provisions: non-discrimination based on citizenship status, non-enforcement of immigration laws, non-enforcement of civil immigration laws, and non-inquiry of citizenship status).

97. *See* Rodriguez, *supra* note 27, at 602–04 (discussing Mayor Bloomberg’s decision to repeal New York City’s 1989 sanctuary policy and replaced it with a policy that the mayor thought was consistent with federal law). The 1989 sanctuary policy prohibited city employees from providing a person’s immigration information to the federal government. *See* City of N.Y. Exec. Order No. 124, *supra* note 22.

immigration status but allows them to voluntarily provide such information to the federal government if they become aware of that information.⁹⁸ The city subsequently limited the application of this policy to certain circumstances by creating a presumption against the disclosure of information unless required by federal law and where there is illegal activity involved.⁹⁹ Takoma Park, Maryland, however, has what may be viewed as a typical “don’t ask, don’t tell policy.” Passed in 1985, the city’s policy forbids police and other city employees from inquiring about the immigration status of any resident and from assisting federal authorities in immigration enforcement.¹⁰⁰ Although local police officers recently sought to limit the policy in some instances,¹⁰¹ the city council voted to maintain its current policy.¹⁰²

Irrespective of the contours of these various policies, they do have shared overriding legal implication. The fact that some sanctuary laws might function to prohibit a government employee from reporting the immigration status of a noncitizen may conflict with the preemption doctrine because as already explained, immigration law has long been held to be the exclusive domain of the federal government.¹⁰³ Unauthorized¹⁰⁴ state and local laws that infringe on immigration law enforcement—even before the 1980s sanctuary movement began—had been deemed to be preempted by the federal government’s authority to regulate immigration law.¹⁰⁵ As previously discussed, Congress amended the INA in 1996 to

98. See Rodriguez, *supra* note 27, at 602 (examining New York City’s sanctuary policy).

99. See Rodriguez, *supra* note 27, at 603 (explaining that Mayor Bloomberg issued Executive Order 41 to limit the ability of government employees to obtain confidential information from individuals, including their immigration status).

100. See Pham, *supra* note 22, at 1383 (discussing Takoma Park, Maryland’s sanctuary policy).

101. See Steve Hendrix, *Takoma Park Stays Immigrant ‘Sanctuary’*, WASH. POST, Oct. 30, 2007, at B1 (reporting that Takoma Park’s chief of police sought to “loosen the restrictions” on the city’s sanctuary policy when they encounter immigrants who had been convicted of violent felonies and deported after having served their sentences).

102. See *id.*

103. Olivas, *supra* note 20, at 34 (maintaining that state and local laws that seek to regulate immigration are inconsistent under the doctrine of preemption). See also Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001). But see Rodriguez, *supra* note 27, at (610-620) (proposing the development of doctrinal approaches that would enable a type of “power sharing” over immigration law between the federal, state and local governments).

104. I emphasize “unauthorized” because there are state and local programs that are intended to enforce immigration law but these are done with the explicit approval of the federal government. See Olivas, *supra* note 20, at 51 (noting that a number of Memoranda of Understanding (“MOU”) have been entered between local and state law enforcement agencies and the federal government).

105. See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976); *Galvan v. Press*, 347 U.S. 822, 831 (1954). Recently, a number of scholars have questioned the continuing vitality of the principle of the federal government’s exclusive jurisdiction of immigration law. See Rodriguez, *supra* note 27, at 45–58 (contending that it no longer makes sense to exclude state and local governments from immigration regulation and suggesting a federal-state-local immigration governance); Schuck, *supra* note 23, at 67 (arguing for the delegation of some federal immigration powers to the states); Peter Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT’L L. 121 (1994).

proscribe state and local governments from prohibiting their employees from voluntarily reporting the immigration status of immigrants they encounter.¹⁰⁶ Thus, if local government workers are constrained by their city's "sanctuary law" from choosing to provide immigration information to federal authorities, the policy restricts the cities' ability to cooperate with the federal government and is arguably pre-empted.¹⁰⁷

Setting aside the constitutional question at issue in these sanctuary laws, an important question that might be asked is how effective are sanctuary laws in preventing the deportation of unauthorized immigrants? That is, of course, a question that is difficult to answer on various accounts. Perhaps the critical point to keep in mind is that these sanctuary laws are without authority to stop federal government authorities from enforcing federal immigration laws in their jurisdictions. In that sense, sanctuary laws and policies and sanctuary cities, as Professor David Abraham noted in an interview, "are mostly symbolic."¹⁰⁸

In sum, one way of defining what constitutes a sanctuary focuses on disaggregating its public and private dimensions. Doing so sharpens our understanding of sanctuary's contemporary meaning because, as discussed above, these two types of sanctuaries have distinct goals and have different legal implications. Recognizing these two separate public and private domains could lead to deeper examination of the limits of their scope, particularly when examined from the broad enforcement powers currently enjoyed by the federal government.¹⁰⁹

Yet, describing sanctuaries along this divisible public/private scheme does not provide a complete definition of what makes a particular place a sanctuary. In particular, to understand sanctuary's current meaning, it is necessary to examine its rhetorical deployment in different contexts. As I explain in the next Part, the way in which the term has been used demonstrates the negative posturing of sanctuary in today's immigration context.

III. RHETORICAL USE OF SANCTUARY

In recognizing sanctuary's public and private dimensions that emerged during the sanctuary movement as discussed in Part I and examined in the context of today's immigration field in Part II, it has become notably clear that at minimum, we can define sanctuary based on who is conferring the safe haven, what assistance they have been able to provide, and

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

107. See Pham, *supra* note 22, at 1393.

108. See Deborah Horan, *Probes of Legal Status a No-no?*, CHI. TRIB., Jan. 11, 2008, at 1 (quoting Professor David Abraham).

109. More broadly, acknowledging the public/private dichotomy of sanctuaries is useful in analyzing and critiquing current federal government policies and practices that have ignored the boundaries between public places, where federal immigration law enforcement employees typically enjoy great regulatory and enforcement powers, and private spaces, particularly one's home, where the power of the federal government to implement immigration laws should be balanced against other concerns such as the right to property and right to privacy.

the limits placed on their actions by the preemption doctrine and the federal government's broad immigration regulatory power. Yet, it is not all too simple to analyze sanctuary's meaning only along this public/private dichotomy. In further divining what constitutes a sanctuary, I suggest exploring its discursive use in at least two contexts. The first attends to what I call "sanctuarizing," or the process of ascribing the term "sanctuary" to governmental policies that cater to immigrants, even if such policies are distinguishable from "non-cooperation" policies. The second refers to heated and contentious debates among political leaders and residents when faced with the question of whether their locality should be considered a "sanctuary city." Both considerations display the rhetorical deployment of sanctuary's tainted meaning and, importantly, influence the definition of what constitutes a sanctuary today.

A. SANCTUARIZING LEGAL OBLIGATIONS AND OTHER GOVERNMENTAL ACTIONS

As scholars have recently commented, states and local governments have struggled with a range of public policy issues that implicate undocumented immigrants, including the provision of drivers' licenses,¹¹⁰ in-state tuition,¹¹¹ the ability to rent property,¹¹² and employment.¹¹³ In some of these jurisdictions, immigrants' rights advocates have prevailed, resulting in the ability of immigrants to acquire some form of identification

110. See Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 216–19 (2004) (stating that many states have experienced political controversies about whether to allow undocumented immigrants to hold driver's licenses). For example, in September 2007, New York State initially decided to issue drivers' licenses to undocumented immigrants, only to reverse the policy after political pressure. Nina Bernstein, *Spitzer Grants Illegal Immigrants Easier Access to Driver's Licenses*, N.Y. TIMES, Sept. 22, 2007, at B1; Danny Hakim, *Spitzer Tries New Tact on Immigrants' Licenses: A Multi-Tiered System*, N.Y. TIMES, Oct. 28, 2007, at A27.

111. See Olivas, *supra* note 20, at 44 (providing a chart that lists the states that were considering the issue of whether to provide undocumented students with residency tuition status). Some of these states were considering repealing existing statutes that confer residency tuition status to undocumented immigrants. See *id.* As of the Fall of 2007, the states that allow undocumented students to have in-state tuition status are California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington. See *id.*; see also Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008).

112. See Rodriguez, *supra* note 44, at 592–93 (discussing landlord enforcement of immigration laws). See also City of Farmers Branch, Tex., Ordinance 2903 (Jan. 8, 2007), enforcement enjoined by Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757 (N.D. Tex. 2007); City of Hazleton, Pa., Ordinance 2006-13 (2006), declared unconstitutional by Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007); City of Escondido, Cal., Ordinance 2006-38R (2006) (City of Escondido agreed to a permanent injunction, barring the City from enforcing the ordinance after a lawsuit). See Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006)).

113. For example, the State of Arizona recently enacted legislation that prohibits employers from intentionally or knowingly employing undocumented immigrants. See Ariz. Rev. Stat. Ann. § 23-212 (2005). The constitutionality of the law was recently upheld. Ariz. Contractors Ass'n v. Candelaria, No. CV07-02496-PHX-NVW, 2008 WL 343082 (D. Ariz. Feb. 7, 2008) (upholding the statute's constitutionality and dismissing challenge that the IRCA preempted it).

cards,¹¹⁴ in-state tuition,¹¹⁵ and secure rental property.¹¹⁶ Should these benefits and privileges be considered types of public sanctuaries as well? Recent events demonstrate the need to be aware of the underlying issues that emerge when local governmental policy decisions are ascribed with the “sanctuary label.”

Consider New Haven, Connecticut’s decision to issue municipal identification (ID) cards to its residents who lack valid authorization status.¹¹⁷ New Haven decided in June 2007 to issue IDs to all its residents, regardless of immigration status.¹¹⁸ An underlying purpose of the municipal ID cards was the need to enable unauthorized immigrants gain better access to city services,¹¹⁹ minimize their vulnerability to being the target of crimes,¹²⁰ and bring them “out of the shadows.”¹²¹ These purposes reflect the recognition that the program benefits the community as a whole by reducing crimes. In so doing, New Haven has treated unauthorized immigrants with (local) membership rights and thus, access to a range of benefits and privileges that are available to all of its citizens.

That this access to benefits and privileges would lead to the perception that the ID program has created a safe space, and consequently, a sanctuary, for immigrants is of course understandable.¹²² Yet, even though New Haven has been dubbed a sanctuary city, it is important to recognize that the community does not afford an instant shield against the federal immigration authorities. Indeed, two days after the municipal ID program went into effect, the Immigration and Customs Enforcement (“ICE”) arrested 32 immigrants who did not have valid status.¹²³ Immigrants’ rights activists have argued that these arrests were done in retaliation for the ID program.¹²⁴ Nevertheless, the arrests are poignant examples of the vulnerability of immigrants despite residing in a self-labeled “sanctuary city.”

The use of the term sanctuary to describe legitimate and non-immigration regulatory policies has been particularly evident in governmental actions that ought to be distinguished from non-cooperation policies: the

114. See Jennifer Medina, *New Haven Approves Program to Issue Illegal Immigrants IDs*, N.Y. TIMES, June 5, 2007, at B6.

115. TEX. EDUC. CODE ANN. §§ 54.052 (Vernon 2006).

116. CAL. CIV. CODE § 1940.3 (Supp. 2007).

117. See Medina, *supra* note 115.

118. See *id.* Aside from the fact that the card will be used for identification purposes, the card may also be used to pay for parking meters and food in various restaurants). See *id.*

119. See *id.*

120. See *id.* (noting that immigrants have reported that they have been robbed in the past but because they feared the possibility of deportation, they decided not to report the crimes to the police).

121. See Michele Wucker, *A Safe Haven in New Haven*, N.Y. TIMES, Apr. 15, 2007, at 14CN.

122. Indeed, New Haven’s police department is prevented from inquiring about the immigration status of its residents. See *id.*

123. See Nina Bernstein, *Promise of ID Cards is Followed by Peril of Arrest for Illegal Immigrants*, N.Y. TIMES, July 13, 2007, at B1.

124. See *id.*

provision of public education and emergency health care services. That is, it must be recognized that these two governmental services are not only programs available to all residents but, importantly, their provision is required by the Constitution and other federal laws.

The right to public education regardless of citizenship has long been held a constitutional right.¹²⁵ Yet, in some discussions, it has been unfairly equated with sanctuaries. In one of the Republican presidential candidate debates, for example, Rudy Giuliani explained that while mayor of New York City, he "*allowed* children of illegal immigrants to go to school."¹²⁶ Although he made this comment in the context of explaining that New York City was not a "sanctuary city," he explained that as mayor, he needed to undertake a number of measures that he believed to be necessary for the welfare of New York City. The statement, albeit subtle, was misleading because it conveyed the message that undocumented children do not have the right to an education when in fact they do. The provision of health care services to undocumented immigrants has also been cited as an example of a sanctuary policy.¹²⁷ Yet, ensuring that immigrants have access to health care such as in the context of emergency services is required by the Emergency Medical Treatment and Active Labor Act ("EMTALA"), which provides any individual with an emergency medical condition that right to medical services.¹²⁸

Far from merely assisting undocumented immigrants, state and local governments are mandated by both the Constitution and federal laws to provide public education and emergency health care services to individuals regardless of immigration status. Put in a different way, ensuring that schools do not bar undocumented immigrant children or children of undocumented immigrants from exercising their constitutional right to public education does not make a city a "sanctuary city." The same can be said of cities that provide emergency medical health care services to patients without appropriate immigration status.

The failure to distinguish these governmental obligations from the political utilization of "sanctuary cities" would be a mistake and could lead to unfortunate results. Indeed, parents have reportedly taken their children from public schools out of fear that they or their children will be subject to deportation from the country.¹²⁹ Those entitled to emergency care have been reported to forego hospitals because of the threat of being

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

126. See *Republican Presidential Candidates Participate in a Debate Sponsored by Fox News*, Jan. 10, 2008 (transcript at 2008 WLNR 580862) (emphasis added).

127. See Fred Thompson, *Get Tough on "Sanctuary Cities,"* THE STAR-LEDGER (Newark), Oct. 24, 2007, at 9 (reporting Republican presidential candidate Fred Thompson's criticism of "sanctuary cities," which were described as places that allowed unauthorized immigrants to enroll their children in school or obtain hospital services).

128. 42 U.S.C. § 1395dd(b) (2003) (stating that a patient with an emergency medical condition may not be transferred or discharged without the hospital first stabilizing her condition).

129. See *Texas: Immigrants Pull Children from School*, *supra* note 25.

removed from this country.¹³⁰

These examples, along with the New Haven municipal ID controversy, illustrate some of the troubling consequences of “sanctuarizing” governmental programs or legal obligations that apply to all persons within a particular jurisdiction. More broadly, the way in which the term sanctuary was deployed in these contexts highlights sanctuary’s nuanced and negative connotation in contemporary period.

B. TO BE OR NOT BE A SANCTUARY CITY

Perhaps the most illuminating way of divining what constitutes a sanctuary is an examination of the ways in which several localities have resisted and fought being labeled a “sanctuary city.” Recent proposed legislation or recommendations that would prohibit local cities from being labeled a “sanctuary city”¹³¹ have led to some of the most contentious and divisive debates experienced in those jurisdictions. It is in these heated discussions and events surrounding these proposals that we can measure the negativity surrounding the use of this word.

For example, in February 2008 in Mount Rainier, Maryland, the city council considered a proposal that would have declared the city a “sanctuary city.”¹³² The label would actually have been consistent with their practice because the city police officers are already proscribed from inquiring about a person’s immigration status.¹³³ Yet, consideration of the measure brought “dozens of angry speakers” from the city and other parts of Maryland.¹³⁴ The city council ultimately tabled the resolution.¹³⁵ Indeed, the resolution became an opportunity for a new organization that “opposes illegal immigration” to gain exposure and support for their group.¹³⁶

Recently, another city considering a similar resolution also faced the same obstacles. As discussed *supra*, Evanston, Illinois also sought to pass a resolution that would have declared the area a “sanctuary city.”¹³⁷ At

130. Telephone Interview with Adam Gurvitch, Health Policy Director, New York Immigration Coalition (Mar. 26, 2008) (explaining that it is common among many immigrants to avoid going to hospitals because of fear of possible deportation).

131. See, e.g., H.B. 367, 2008 Gen. Assem., Reg. Sess. (Va. 2008) (proposing to amend the Code of Virginia by prohibiting localities from adopting policies that would “protect[] undocumented immigrants”); Pamela Constable, *Anti-Immigrant Effort Takes Hold in Md.*, WASH. POST., Feb. 23, 2008, at B1 (reporting Taneytown, Maryland’s resolution that would declare that the town is not a sanctuary city); Erin Stock, *Panel Releases Recommendations for Illegal Immigrant Crackdown*, BIRMINGHAM NEWS (AL), Feb. 13, 2008, at 1 (reporting on a state commission recommendation that would prohibit “so-called ‘sanctuary cities’ in Alabama”).

132. See Constable, *supra* note 131.

133. See *id.*

134. See *id.*

135. See *id.* (explaining that the council member who introduced the resolution noted that it was probably not going to pass, stating that “it’s pretty much dead”).

136. See *id.* (describing Help Save Maryland as a “fledgling chapter” of a movement against “illegal immigration” that recently acquired support from a number of individuals, including an African American activist, driven in part by controversial issues).

137. See Deborah Horan, *Probes of Legal Status a No-no*, CHI. TRIB., Jan. 11, 2008, at 1.

the time, city employees did not inquire about the immigration status of persons and thus, the council members thought that the resolution would have been "largely symbolic."¹³⁸ Yet, the resolution failed.¹³⁹ Its critics applauded the defeat, stating that adoption of the resolution would have made Evanston a magnet that would have drawn "people into this country illegally."¹⁴⁰

In both examples, despite the underlying policy already in place, the resolutions failed to pass. Arguably, the ascription of the label "sanctuary city" led to their demise. Counter-productively, the term sanctuary functioned to paint the city as a site that was (or, according to those against the resolutions, should be) unwelcoming of immigrants. Once dominantly used to convey moral and ethical obligations to include immigrants to the political, legal and social terrains of the U.S., the term today operates to signal strong opposition and rejection to the presence and inclusion of unauthorized immigrants in the country. Moreover, the resolutions created opportunities for anti-immigrant groups to use sanctuary as a discursive rallying call and enabled them to gain momentum for their restrictionist movements.

The foregoing examples raise strategic and policy questions about the continued use of the term sanctuary in creating safe spaces for immigrants and their families. Its underlying tendency to generate an acrimonious and divisive environment calls into question its ongoing utility. In Taneytown, Maryland, for example, a town with a population of only 6,700 people, a proposal to adopt a resolution declaring that the town is "not a sanctuary city for illegal aliens" engendered bitter and angry emotional and social responses.¹⁴¹ Those who favored the resolution supported its strong stance that Taneytown should not "welcome individuals who are not in the United States illegally."¹⁴² Those who opposed the measure countered that the resolution was an "attempt to inflame and divide the city."¹⁴³ Although the measure failed, its message of exclusion

138. *See id.* (explaining that the resolution also had a political bent in that it called for the passage of comprehensive immigration reform legislation).

139. *See Plan to Make Evanston "Sanctuary City" Fails to Pass, supra* note 15. On March 3, 2008, another resolution was introduced which would have called for "humane and just treatment of immigrants and their families." Evanston, Ill., Res. No. 22-R-08 (Mar. 4, 2008), available at http://www.cityofevanston.org/_pdf/r3.pdf. This resolution included a provision that would have adopted an official city policy of not inquiring about the immigration status of its residents. *See id.* at 3. This resolution ultimately passed without this provision. *See* Deborah Horan, *Controversy Roils Evanston, "Sanctuary City" Measure Reworked*, CHI. TRIB., Mar. 15, 2008, at 15 (reporting that some parts of the resolution were removed and that what was ultimately passed was a non-binding resolution that called on the city to "re-affirm its commitment to the 'humane' treatment of immigrants").

140. *Id.*

141. *See* Constable, *supra* note 130.

142. *See id.* The sponsor of the bill, Paul Chamberlain, recognized that the town did not have a problem with "illegal immigrants," but he pointed to overcrowding, gangs, and trash in other places that other communities attributed to "an influx of impoverished and often undocumented Mexicans and Central Americans." *See id.*

143. *See id.* The Taneytown City Council ultimately failed to enact the resolution. *See id.*

was abundantly made clear.

It is becoming apparent that the negative connotation of the label “sanctuary city” has co-opted its earlier, more positive understanding. Consequently, towns and cities are rejecting any association with the label. Houston, Texas, for example, has generally been recognized as a sanctuary city,¹⁴⁴ yet its mayor and police officers maintain strongly that it is not a sanctuary city.¹⁴⁵ Indeed, the truth might lie in between because although the city does not always ask for immigration information, it does inquire about the immigration status of some noncitizens they encounter, particularly those who commit Class B misdemeanors or more serious crimes.¹⁴⁶ Moreover, the City of Houston has a policy of notifying the ICE of noncitizens with outstanding warrants or those who have been previously deported.¹⁴⁷ Thus, while Houston seems to have a hybrid sanctuary policy, it rejects the label “sanctuary city,” demonstrating as the other cities have any association with the label.

CONCLUSION

This Article provided heuristic approaches for addressing a not-so-simple question—what constitutes a sanctuary? As made evident in this Article, the term sanctuary has multivalent meanings. We can begin our analysis by examining the different types of sanctuaries, such as public and private efforts to construct safe spaces for immigrants. Understanding their differences provides groundwork for future analysis on the overall effectiveness of these efforts. Moreover, the public/private distinctions provide important insight on examining the federal government’s broad enforcement powers in both public and, increasingly, private domains.

Yet we also need to explore further its pejorative meaning. Sanctuary is arguably the new “amnesty” of our time. Accordingly, perhaps the question we ought to be asking is not “what is a sanctuary” but rather “why sanctuary?” That is, what strategies may localities engage in to more effectively address the needs of immigrants and their families?

144. For example, it is listed in the Congressional Research Service report as a sanctuary city. See CONG. RESEARCH SERV., *supra* note 91, at 26 n.85.

145. See Carroll, *supra* note 6 (reporting the efforts of the Houston Mayor Bill White to change the image of Houston as a sanctuary city by enforcing tougher policy on undocumented immigrants).

146. See *id.* (stating that this policy change came after a Houston Police Officer was shot allegedly by an undocumented immigrant with a criminal record).

147. See Carroll, *supra* note 6. Interestingly, Houston police officers have refused to enter into a formal agreement with the federal government that would have provided them with federal training on how to enforce immigration laws. See James Pinkerton, *Police Chief Defends His Immigration Law Stance*, HOUS. CHRON., Feb. 1, 2008, at A1 (reporting that the Houston chief of police did not want the local police “to be immigration officers”).

Essays

