

ARTICLES

SANCTUARY WITHOUT RESISTANCE

by
Ava Ayers*

Activist movements that embrace the idea of sanctuary for noncitizens are rich with narratives of resistance. These narratives vary; some sanctuary advocates pursue resistance only to specific federal immigration policies, while others offer more radical critiques that challenge the very legitimacy of U.S. immigration law. But when local and state governments adopt sanctuary policies, the idea of resistance is often altogether lost.

Local and state governments who adopt policies of noncooperation with federal immigration enforcement sometimes offer narratives in which the values that motivate sanctuary policies involve not resistance to injustice, but public safety, economic development, and other more traditional local-government goals. In these narratives, local governments are not resisting cruel federal policies; they are simply minding their own business. This Article examines the abandonment of resistance narratives from an expressivist and law-and-humanities perspective, arguing that much is lost when sanctuaries fail to include resistance in their own narratives.

* Associate Professor of Law, Albany Law School. She/her/hers. Formerly known as Andrew Ayers. If you want to cite previous work I published under that name, I'd be grateful if you'd use "Ava Ayers," "A. Ayers," or no first name in the citation.

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INTRODUCTION

The story of immigration sanctuaries, as it is often told, is the story of a resistance movement.¹ “*Organized Resistance Is Forming to Trump’s Immigration Crackdown*,”² read one typical headline the week after Donald Trump’s election.³

¹ For an overview and collection of sanctuary policies, see 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 through May 2018 prepared as an appendix to that article, which is available online at <http://libguides.law.du.edu/c.php?g=705342&p=5009807>. See generally 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); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Rick Su, *The Promise and Peril of Cities and Immigration Policy*, 7 HARV. L. & POL’Y REV. 299 (2013); Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 U.C. DAVIS L. REV. 549 (2018).

² Kate Morrissey, *Organized Resistance Is Forming to Trump’s Immigration Crackdown*, SAN DIEGO TRIB. (Mar. 1, 2017, 1:00 PM), <https://www.sandiegouniontribune.com/news/immigration/sd-me-deportation-resistance-20170301-story.html>.

³ See *infra* Section I.E for more narratives of this kind.

Scholars, too, describe sanctuary policies as a form of “local resistance to federal immigration enforcement.”⁴

Critics of sanctuary policies likewise describe them as a form of local resistance: resistance not only to specific federal policies but to the rule of law itself.⁵ “Lawless cities,” two senators called them in 2020.⁶ “Donald J. Trump and Attorney General Sessions Stand Up Against Lawless Sanctuary Cities,” said the title of a document the Trump White House daringly called a “fact sheet.”⁷ A group of senators, in a press release promoting the “Stop Dangerous Sanctuary Cities Act,” which received more than 50 votes in the Senate, said that sanctuary cities “choose to ignore the rule of law.”⁸

Journalists during the Trump administration sometimes described sanctuaries as resisting the specific policies of that administration.⁹ While this description is doubtless more accurate than Trumpist claims that sanctuaries threaten the rule of law, it also carries unfortunate implications. If sanctuaries are merely resisting Trump, then once Trump leaves office the need for sanctuary goes with him. But it would be misleading to imply that other administrations don’t also pose a threat to the safety and well-being of noncitizens.¹⁰ While the Biden administration has

⁴ Lasch et al., *supra* note 1, at 1710; *see also* Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 16 (2018).

⁵ *See* Kit Johnson, *The Mythology of Sanctuary Cities*, 28 S. CAL. INTERDISC. L.J. 589, 600 (2019) (discussing examples of U.S. officials calling sanctuaries “lawless,” including President Donald Trump, the Secretary of Homeland Security, and the U.S. Attorney General).

⁶ Press Release, Thom Tillis, Sen. (N.C.), Sen. Tillis, Rep. Budd Reintroduce the Justice for Victims of Sanctuary Cities Act (Jan. 27, 2021), <https://www.tillis.senate.gov/2021/1/sen-tillis-rep-budd-reintroduce-the-justice-for-victims-of-sanctuary-cities-act>.

⁷ *Fact Sheet: Donald J. Trump and Attorney General Sessions Stand Up Against Lawless Sanctuary Cities*, WHITE HOUSE (Aug. 16, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/fact-sheet-donald-j-trump-attorney-general-sessions-stand-lawless-sanctuary-cities>.

⁸ Press Release, Tom Cotton, Sen. (Ark.), Cotton Introduces Bill to End Dangerous Sanctuary City Policies (May 23, 2019), <https://www.cotton.senate.gov/news/press-releases/cotton-introduces-bill-to-end-dangerous-sanctuary-city-policies>; *States That Have Banned Sanctuary Cities*, AM. POLICE OFFICERS ALL. (Sept. 2, 2021), <https://americanpoliceofficersalliance.com/states-who-have-banned-sanctuary-cities> (“[T]he good news is that some states in the Union still value the rule of law.”).

⁹ *See, e.g.*, Tessa Stuart, *How Sanctuary Cities Are Plotting to Resist Trump*, ROLLING STONE (Dec. 1, 2016), <https://www.rollingstone.com/politics/politics-features/how-sanctuary-cities-are-plotting-to-resist-trump-113081>.

¹⁰ Many sanctuary cities have recognized this, rejecting a plea from the Biden administration to end their sanctuary policies in light of the change in administrations. *See* Kery Murakami, *The Biden Administration’s Plea to ‘Sanctuary’ Cities Gets a Cool Reception*, ROUTE FIFTY (Feb. 8, 2022), <https://www.route-fifty.com/public-safety/2022/02/sanctuary-cities-debate-grinds/361768>.

changed (or tried to change) many immigration policies for the better,¹¹ the need for sanctuary has hardly gone away.

Under Biden, ICE arrested fewer people than under Trump, but “fewer people” nonetheless meant about 74,000 people arrested in the interior of the United States during fiscal year 2021.¹² U.S. Customs and Border Protection detained 1.7 million people at the border that year, the highest number ever recorded.¹³ “ICE detained an average of nearly 22,600 people daily in FY 2022—down from a high of 50,200 in FY 2019,”¹⁴ but still representing an enormous impact on the lives of those people. When Biden took office, about 15,000 people were in immigration detention, a historically low number that was presumably due to COVID-19; under Biden, the number rose as high as 29,000.¹⁵ Asylum-seekers were waiting an average of four years to receive a decision.¹⁶ Children were still separated from their families.¹⁷

“Do not just show up at the border. Stay where you are and apply legally from there,” Biden warned would-be asylum seekers in January 2023,¹⁸ announcing a plan to create a rebuttable presumption of asylum ineligibility for those who had not applied for asylum in a third country on their way to the United States.¹⁹ The

¹¹ These included attempts to codify DACA (Deferred Action for Childhood Arrivals) and to end brutal Trump policies like the Migrant Protection Protocols, known as “Remain in Mexico,” and expulsions under Title 42, all three of which have been stalled by Republican challenges in court. See Muzaffar Chishti & Kathleen Bush-Joseph, *Biden at the Two-Year Mark: Significant Immigration Actions Eclipsed by Record Border Numbers*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/article/biden-two-years-immigration-record> (Feb. 2, 2023). The Migrant Protection Protocols, at least, are being wound down following the Supreme Court’s decision in *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022), which upheld their termination. On the status of the wind-down, see *Featured Issue: Migrant Protection Protocols (MPP)*, AM. IMMIGR. LAWS. ASS’N (Oct. 7, 2022), <https://www.aila.org/advo-media/issues/all/port-courts>.

¹² Nick Miroff & Maria Sacchetti, *ICE Report Shows Sharp Drop in Deportations, Immigration Arrests Under Biden*, WASH. POST (Mar. 11, 2022), <https://www.washingtonpost.com/national-security/2022/03/11/ice-report-deportations-arrests>. This was down from an average of 148,000 annually from 2017 through 2019. *Id.*

¹³ *Id.*

¹⁴ Chishti & Bush-Joseph, *supra* note 11.

¹⁵ Maria Sacchetti, *ICE Holds Growing Numbers of Immigrants at Private Facilities Despite Biden Campaign Promise to End Practice*, WASH. POST (Dec. 2, 2021), <https://www.washingtonpost.com/national-security/2021/12/01/ice-country-jails-migrants>.

¹⁶ Chishti & Bush-Joseph, *supra* note 14.

¹⁷ Anna-Catherine Brigida & John Washington, *Biden Is Still Separating Immigrant Kids from Their Families*, TEX. OBSERVER (Nov. 21, 2022, 8:00 AM), <https://www.texasobserver.org/the-biden-administration-is-still-separating-kids-from-their-families>.

¹⁸ Myah Ward, *Biden Announces New Program to Curb Illegal Migration as He Prepares for Visit to Border*, POLITICO, <https://www.politico.com/news/2023/01/05/biden-border-plan-illegal-crossings-00076519> (Jan. 5, 2023, 4:51 PM).

¹⁹ Press Release, U.S. Dep’t Homeland Sec., DHS Continues to Prepare for End of Title 42;

same rebuttable presumption would apply to those who entered the United States without permission.²⁰ It was a startling embrace of one of Trump’s crueler policies, effectively rendering meaningless the statutory guarantee of a right to apply for asylum regardless of where else one had applied or how one had entered the country.²¹ The Trump administration had promulgated a similar rule, which Justice Sonia Sotomayor noted “topples decades of settled asylum practices and affects some of the most vulnerable people in the Western Hemisphere.”²²

Sanctuary policies don’t solve these problems, or even address them directly. Local governments can’t protect asylum-seekers who present themselves at the border. Sanctuary policies, rather, tend to deal with local governments’ own involvement in the immigration system, from providing information about noncitizens to federal authorities, to detaining those noncitizens at federal behest.²³ But that doesn’t mean sanctuary policies can’t influence federal policies or at least express concern about them. We might understand sanctuary policies as expressing resistance to federal immigration cruelty generally, not just the parts of it that local governments can influence. Indeed, the earliest sanctuary resolutions condemned U.S. foreign policy in Latin America.²⁴ So sanctuary policies can condemn more than they regulate. By voicing moral objections to cruel federal policies, sanctuaries can at least expressively participate in resistance to those policies.

But a look at the policies adopted by sanctuary cities themselves sometimes tells a story in which we find few hints of resistance to federal policy.²⁵ Instead, those policies tell a story about how sanctuary policies serve local needs, like the need to ensure that noncitizens trust police enough to share information with them, or the need to build a flourishing economy, to which immigrants contribute so much.²⁶

Announces New Border Enforcement Measures and Additional Safe and Orderly Processes (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

²⁰ *Id.*

²¹ See 8 U.S.C. § 1158 (“Any [noncitizen] physically present in the United States or who arrives in the United States . . . may apply for asylum . . .”). The statute does provide for exceptions for those who are resettled in a safe third country but says nothing about those who *applied* in a third country. *Id.*

²² *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 5 (2019) (Sotomayor, J., dissenting from order granting stay).

²³ See *infra* Section I.C.

²⁴ See, e.g., San Jose, Cal., City Council Res. Concerning U.S. Immigration/Naturalization Service Enforcement Policies (Apr. 24, 1984), https://libguides.law.du.edu/ld.php?content_id=39098735 (“denounc[ing] the recent raid by the U.S. Immigration/Naturalization (INS) Service as selectively discriminatory, inhumane, callous, and an unwarranted disruption of the business community; direct[ing] to the extent legally possible that the Police Department withhold any assistance to INS in carrying out these raids”).

²⁵ See *infra* Part III.

²⁶ See Ava Ayers, *Missing Immigrants in the Rhetoric of Sanctuary*, 2021 WIS. L. REV. 473,

This Article will describe a number of examples of sanctuaries who, when formalizing their resistance to federal immigration policy, chose to describe what they were doing in ways that avoid acknowledging any federal injustice.

If it seems only natural that states and localities should shy away from taking on the federal government, we should observe that there is nothing inevitable about local policies muting their commitment to resistance. For example, right-wing activists loudly embraced the language of resistance when they adopted sanctuary narratives for so-called “Second Amendment sanctuaries,” a movement to protect gun rights from perceived threats of federal regulation.²⁷ Local policymakers who joined that movement have criticized proposed gun-control legislation and, in some cases, declared that no governmental resources or personnel will be used to enforce state or federal gun laws.²⁸ The text of these policies are full of explicit resistance rhetoric.

The state of Missouri, for example, passed a law declaring that it has the same power as the federal government to interpret the Constitution.²⁹ Although recognizing that “the several states have granted supremacy to laws and treaties made under the powers granted in the Constitution of the United States,” Missouri insists that “such supremacy does not extend to . . . actions that collect data or restrict or prohibit the manufacture, ownership, or use of firearms, firearm accessories, or ammunition exclusively within the borders of Missouri.”³⁰ The Act then specifically lists a variety of categories of federal laws that “shall be invalid to this state.”³¹ And it creates civil remedies against anyone who tries to enforce such laws.³²

Gun sanctuaries like Missouri explicitly embrace nullification of federal law. While they leave themselves some wiggle room by not addressing whether federal laws that currently exist are subject to nullification, they are nonetheless adopting a clear and explicit resistance stance.³³ Nor is this extreme form of resistance rhetoric

504–21 (2021) (identifying and analyzing sanctuary policies that focus on local needs).

²⁷ See RICK SU, AM. CONST. SOC’Y, THE RISE OF SECOND AMENDMENT SANCTUARIES 1 (2021), <https://www.acslaw.org/wp-content/uploads/2021/03/The-Rise-of-Second-Amendment-Sanctuaries.pdf>.

²⁸ See *id.*

²⁹ See Second Amendment Preservation Act, H.Bs. 85 & 310 § 1.410(5), 101st Gen. Assemb., Reg. Sess. (Mo. 2021) (“If the federal government, created by a compact among the states, were the exclusive or final judge of the extent of the powers granted to it by the states through the Constitution of the United States, the federal government’s discretion, and not the Constitution of the United States, would necessarily become the measure of those powers. To the contrary, as in all other cases of compacts among powers having no common judge, each party has an equal right to judge for itself as to whether infractions of the compact have occurred, as well as to determine the mode and measure of redress.”). *But see* U.S. CONST. art. VI, cl. 2.

³⁰ Second Amendment Preservation Act § 1.410(5).

³¹ *Id.* § 1.430.

³² *Id.* § 1.460(1).

³³ Even gun sanctuaries that avoid a nullification stance by expressing their concern in terms

unusual. According to one gun-advocacy group, 62.5% of all U.S. counties were covered by a Second Amendment sanctuary policy by 2021.³⁴

The vehemence of right-wing resistance rhetoric is useful for understanding immigration sanctuary narratives because it shows that there is nothing inevitable about localities shying away from the language of resistance. The erasure of resistance in immigration sanctuary policies, then, is all the more a mystery.

In an earlier article, I analyzed a different puzzling omission in sanctuary policies: they often express no concern for the well-being of noncitizens.³⁵ Sanctuary is often perceived as a pro-immigrant movement, but the rhetoric of government sanctuary policies often fails to express any sentiment treating noncitizens as members of their communities, or even concern about the well-being of noncitizens.³⁶ I argued that this was a significant omission, in part because it speaks ill of the potential for our governments to take account of noncitizens' well-being. If sanctuary policies won't acknowledge that noncitizens' well-being matters, who will?

This Article turns to another important omission in some sanctuary policies: the omission of rhetoric criticizing the federal government's immigration policies. Part I of the Article explores the sanctuary-as-resistance narrative that is so prevalent in journalists' descriptions of the sanctuary movement, in opponents' description of the movement, and in the stories some sanctuaries tell about themselves. The narrative of sanctuary as resistance is deeply consistent with the history of the concept of sanctuary, which was embraced by churches and activists long before it became any government's policy.

Part II of the Article then explores the phenomenon of sanctuary without resistance: sanctuary policies that tell a story about local needs without mentioning the injustice of federal policies. After reviewing several examples of specific policies,

of resisting federal encroachment on Second Amendment rights may also take radical positions about the limits of federal power. South Dakota, for example, passed a bill in 2010 that purports to exempt all firearms manufactured in the state from federal regulation by declaring them not to have traveled in interstate commerce:

Any firearm, firearm accessory, or ammunition that is manufactured commercially or privately in South Dakota and that remains within the borders of South Dakota is not subject to federal law or federal regulation, including registration, under the authority of Congress to regulate interstate commerce. It is declared by the Legislature that those items have not traveled in interstate commerce.

S.B. 89, 2010 Legis. Assemb., 85th Sess. (S.D. 2010); *see also* S.B. 11, 2010 Leg., Gen. Sess. (Utah 2010) (similarly declaring guns manufactured in the state beyond the scope of federal regulation).

³⁴ *See* Noah Davis, *1,965 American Counties Are Now Second Amendment Sanctuaries*, SANCTUARYCOUNTIES.COM (Sept. 29, 2021), <https://sanctuarycounties.com/2021/09/29/1965-american-counties-are-now-second-amendment-sanctuaries>.

³⁵ Ayers, *supra* note 26.

³⁶ *Cf.* Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963) ("Anyone who lives inside the United States can never be considered an outsider anywhere in this country.").

I explore the possibility that sanctuaries avoid resistance rhetoric for fear of preemption or federal retaliation, concluding that neither of these gives a convincing explanation: it makes no difference to preemption law why localities adopt the policies they do; and federal retaliation, as the Trump administration demonstrated, would come regardless of whether sanctuaries used resistance rhetoric to justify their policies. Part III identifies five problems with these minding-our-business narratives, most of which boil down to the idea that injustices should be condemned.



*Sanctuary Knocker at Durham Cathedral in Durham, England.*³⁷

³⁷ Amourgirl1, Photograph of Sanctuary Knocker at Durham Cathedral, in *File:Durham Cathedral 4.jpg*, WIKIMEDIA COMMONS (Aug. 10, 2020), https://commons.wikimedia.org/wiki/File:Durham_Cathedral_4.jpg. For background, see *Sanctuary Knocker*, ATLAS OBSCURA, <https://www.atlasobscura.com/places/sanctuary-knocker> (last visited Apr. 16, 2024) (“[T]his [Sanctuary Knocker] is a meticulously-rendered duplicate. The original lies inside the church Any person who had been accused of a heinous crime, such as murder in self-defense or escaping a jail sentence, could use the knocker to be given sanctuary within the cathedral for 37 days. Once inside, asylum-seekers were to use their time to reconcile, prove their innocence, or plan their escape. In the meantime, at the abbey’s expense, they would be given a safe haven until their eventual departure or handed over to the proper authorities. Those who had been granted sanctuary were given special black robes to wear, with a cross of St. Cuthbert’s Cross stitched onto the left shoulder. The right of sanctuary was abolished by an act of parliament towards the beginning of the 17th century.”).

I. SANCTUARY AS RESISTANCE

For every jurisdiction that adopts a sanctuary policy, there are multiple overlapping narratives about what that policy means.

A. *Resistance in the Sanctuary Movement*

The history of immigration sanctuaries begins with proud and unambiguous calls for resistance to unjust federal policies.³⁸ Religious activists in the early 1980s who created a network to help provide aid to Central American refugees considered their work “a conscientious community practice to uphold human rights law even when the government persists in violating such law.”³⁹ It was the government’s unlawfulness that prompted the activists’ resistance. Barbara Bezdek, after interviewing participants in the movement, found it too simplistic to say that these activists understood their conduct as “unlawful”;⁴⁰ rather, they were “enacting a way for society to comply with human rights laws although the Government persisted in violating them.”⁴¹ The activists saw deportations of refugees as violations of international law.⁴² And, as Bezdek writes, “Many people thought that if the United States were financing the planes that bombed Salvadorans and their children, the citizens of the United States had an absolute moral obligation to help the victims escape.”⁴³ But they were also helping satisfy a legal obligation: because the activists understood U.S. policies to violate human-rights laws, the sanctuary movement’s resistance was a way of restoring the rule of law.⁴⁴ This understanding situates the early sanctuary movement firmly in the tradition of narratives of resistance.

³⁸ Histories of sanctuary include IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* (1985) (history of sanctuaries leading up to and including the Sanctuary Movement of the 1980s); 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 Fransico, California* (Aug. 2016) (Ph.D. dissertation, Vanderbilt University), <https://ir.vanderbilt.edu/bitstream/handle/1803/12924/Mancina.pdf.pdf>; LINDA RABBEN, *SANCTUARY & ASYLUM: A SOCIAL AND POLITICAL HISTORY* (2016) (global history of sanctuary); Jennifer Suzanne Ridgely, *Cities of Refuge: Citizenship, Legality and Exception in U.S. Sanctuary Cities* (2010) (Ph.D. dissertation, University of Toronto), <http://hdl.handle.net/1807/32948> (covering multiple sanctuary movements).

³⁹ Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 904 (1995).

⁴⁰ *Id.* at 913.

⁴¹ *Id.* at 911.

⁴² *Id.* at 938.

⁴³ *Id.* at 937.

⁴⁴ *Id.* at 911.

The philosopher Candice Delmas usefully identifies “resistance” as a blanket term referring to a broad range of activities that “express opposition, and perhaps refusal to conform, to a dominant system of values, norms, rules, and practices,” which can include legal practices.⁴⁵ Daniel Farbman uses the phrase “resistance lawyering” to mean “regular, direct service practice within a procedural and substantive legal regime that [the lawyer] considers unjust and illegitimate.”⁴⁶ Both of these definitions share the idea that something about the system is unjust, illegitimate, or otherwise deserving of moral condemnation.

Delmas notes that resisters “may or may not recognize the system’s legitimacy,”⁴⁷ and this seems an important distinction: even in a system one generally finds morally acceptable, one can resist specific injustices. In other words, some resisters resist their regime, and others resist only certain policies or practices. That said, it seems wrong to refer to acts as “resistance” unless the practices they resist are at least fairly widespread. Opposing a single government action by a single government actor seems not to qualify as “resistance” unless it is part of a broader injustice of some kind.

Resistance can take many forms, including public communication that criticizes existing norms or practices; alerting others to wrongs; asserting rights; demanding recognition; protecting oneself or others; promoting values like dignity and equality; pressuring for change; asserting solidarity or forming connections with like-minded or similarly harmed people; refusing to participate in wrongs; or punishing wrongdoers.⁴⁸ Noncompliance and other forms of principled inaction can also be forms of resistance. Daniel Morales compares unauthorized migration itself to workers’ disruptive noncompliance as a way of exercising power.⁴⁹

Sometimes resistance is “civil,” and sometimes it isn’t. Forms of resistance can include lawbreaking with or without civility, “civil disobedience,”⁵⁰ and lawfully or unlawfully choosing not to participate in the work the institution whose work

⁴⁵ CANDICE DELMAS, A DUTY TO RESIST: WHEN DISOBEDIENCE SHOULD BE UNCIVIL 40 (2018).

⁴⁶ Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1880 (2019).

⁴⁷ DELMAS, *supra* note 45, at 40.

⁴⁸ This list is distilled from Delmas’s list. *Id.* at 40.

⁴⁹ See Daniel I. Morales, “*Illegal*” Migration Is Speech, 92 IND. L.J. 735, 743–44 (2017); see also James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 953 (1997) (“Disruptive noncompliance is the quintessential form of subordinated group power. Lacking the informational, organizational, and financial resources to compete with elites in the representative political process, subordinate groups exercise direct power by withholding cooperation from existing institutions.”).

⁵⁰ Rawls defines civil disobedience as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the laws or policies of the government.” JOHN RAWLS, A THEORY OF JUSTICE 364 (1971).

one is resisting.⁵¹ Lawful dissent, principled disobedience (whether “civil” or otherwise), and revolution are all points along a spectrum of resistance.⁵²

Resistance narratives, like all narratives, imply a system of values within which the protagonist’s goals make sense. Narratives illuminate values by putting them in conflict and watching how the protagonists respond. Farbman’s narratives of lawyers resisting the Fugitive Slave Law of 1850 invoke values like equality, anti-racism, and freedom, which those lawyers shared.⁵³ The conflict in these narratives is the protagonists’ struggle against a law that represents “one of the most appalling moral atrocities in American political and legal history.”⁵⁴ But, fascinatingly, Farbman finds that lawyers largely did not challenge the legitimacy of the legal system itself: “Even if delay and confusion were never intended in good faith with the legal system and only intended to obstruct, they were still accomplished within the boundaries of legitimate legal practice.”⁵⁵

Farbman’s narratives illustrate how the concept of resistance has meaning only when considered together with a constellation of other concepts. These necessarily include justice and injustice, because “resistance” isn’t resistance without something the protagonist considers an injustice. Another idea necessarily implicated in resistance narratives is what we might think of as the agency of people and institutions in society. If a government is unjust, this triggers certain permissions or obligations: people can (or should, or must) resist unjust policies.⁵⁶ So when we look at sanctuary narratives that portray sanctuary as resistance, we should ask what injustice prompts that resistance and what values make it intelligible as injustice.

B. *The Elements of Narrative*

Before exploring what happened to sanctuary narratives when government actors adopted them, it’s worth explaining what “narrative” means in this context.

⁵¹ See ROBERT COVER, *Nomos and Narrative*, in NARRATIVE, VIOLENCE, AND THE LAW 95, 99–100 (Martha Minow, Michael Ryan & Austin Sarat eds., 1993) (“There is a difference between sleeping late on Sunday and refusing the sacraments, between having a snack and desecrating the fast of Yom Kippur, between banking a check and refusing to pay your income tax. In each case an act signifies something new and powerful when we understand that the act is in reference to a norm. It is this characteristic of certain lawbreaking that gives rise to special claims for civil disobedients.”).

⁵² See DELMAS, *supra* note 45, at 40–41. Her book is an extended argument that uncivil disobedience is sometimes morally justified and indeed sometimes morally required.

⁵³ See generally Farbman, *supra* note 46.

⁵⁴ *Id.* at 1884.

⁵⁵ *Id.* at 1927.

⁵⁶ See DELMAS, *supra* note 45.

Narratives are a hot topic. The Kresge Foundation, one of the largest foundations in the country,⁵⁷ announced in 2022 a partnership with ten other foundations to fund “narrative change” in areas including racial justice and health equity.⁵⁸ It was part of a growing trend of philanthropic funding for narrative change.⁵⁹ Activists and advocates working in this field look to change the themes and ideas that appear in mass media, mass culture, and organizations and its adjacent arts and cultures.⁶⁰ Indeed, “[o]rganizations that engage in organizing and advocacy increasingly have in-house experts on narrative.”⁶¹

Advocates in the immigration field, too, talk about the importance of narrative change.⁶² The advocacy group Define American, which focuses on portrayals of immigrants in popular culture, has released reports with names like “Change the Narrative, Change the World.”⁶³ Indeed, journalists have described the goals of sanctuary activists as including “narrative change.”⁶⁴

But as the Convergence Partnership observed, “there is a diversity of opinion about what narrative is and how to shift it.”⁶⁵ As this Section will explain, there is likewise a diversity of opinion among scholars,⁶⁶ and so I will try to be clear about what I mean by “narrative” and why narrative matters.

⁵⁷ *Top-Paid Nonprofit CEOs by Category*, CRAIN’S DETROIT BUS., July 23, 2018, at 10, https://issuu.com/craisdetroit/docs/cdb_20180723 (describing Kresge as “the largest local foundation in the region and one of the largest in the country, with a \$3.8 billion endowment”).

⁵⁸ See MIK MOORE & RINKU SEN, CONVERGENCE P’SHP, *FUNDING NARRATIVE CHANGE* (2022), <https://kresge.org/resource/funding-narrative-change-an-assessment-and-framework>.

⁵⁹ Molly de Aguiar & Mandy Van Deven, *Narrative Change Trend Brings New Money to Journalism*, NIEMANLAB, <https://www.niemanlab.org/2022/12/narrative-change-trend-brings-new-money-to-journalism> (last visited Apr. 16, 2024).

⁶⁰ MOORE & SEN, *supra* note 58, at 22; *id.* at 6 (defining “narrative” as “themes and ideas that permeate collections of stories”).

⁶¹ *Id.* at 9.

⁶² See, e.g., Press Release, Am. Immigr. Council, American Immigration Council Hosts New American Fellows Showcase in Brooklyn to Highlight Immigrant Voices and Advocacy (Sept. 7, 2022), <https://www.americanimmigrationcouncil.org/news/council-hosts-new-american-fellows-showcase> (“The New American Fellows program allows local artists to highlight the contributions of immigrants in arts and culture to create positive narrative change and spark dialogue around important issues.”).

⁶³ See SARAH E. LOWE, CHARLENE JOY JIMENEZ, D.J. REED & DULCE VALENCIA, DEFINE AM., *CHANGE THE NARRATIVE, CHANGE THE WORLD 2022* (2022), <https://defineamerican.com/research/change-the-narrative-change-the-world-2022>.

⁶⁴ See, e.g., *Love Thy Neighbor: U.S. Sanctuary Churches Protect Migrants Under Trump*, RAPPLER (Mar. 10, 2018, 4:51 PM), <https://www.rappler.com/world/us-canada/197864-us-sanctuary-churches-protect-migrants-trump>.

⁶⁵ MOORE & SEN, *supra* note 58, at 1.

⁶⁶ See MONIKA FLUDERNIK, AN INTRODUCTION TO NARRATOLOGY 2 (Patricia Häusler-Greenfield & Monika Fludernik trans., Routledge 2009) (2006) (noting the multiple meanings of “narrative” in popular discourse); *id.* at 4–6 (discussing various scholarly definitions).

One baseline definition of “narrative” is “the representation of an event or series of events.”⁶⁷ This definition includes elements found in texts like novels and news articles, as well as conversations, TV shows, and political rallies—all of which commonly feature descriptions or stories about events. Texts might contain both narrative and non-narrative material. For example, novels sometimes contain reflections on the meaning of the events they portray, memoirs may include commentary on a historical period, and long poems might contain both narrative and lyrical segments.⁶⁸

Narratives can be explicit, like stories that begin “Once upon a time . . . ,” or implicit, like the speech that Shakespeare’s Marc Antony gives after Julius Caesar’s death.⁶⁹ Antony’s speech purports to be an elegy memorializing a fallen leader, but in fact contains an implicit narrative in which a great man who loved and strengthened his people is falsely accused of “ambition” by dishonorable men who betray him.⁷⁰ There are implicit narratives in legal texts too.⁷¹

⁶⁷ H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 12 (3d ed. 2021) (emphasis omitted); see Bezdek, *supra* note 39, at 907 (“To speak of narrative ordinarily implies three essential elements: a story about an event, a narrator who tells it, and the audience to whom it is told.”).

Another thing I don’t mean: the story of the facts of a case. David Luban usefully distinguishes the “local narrative” comprised of the facts of an individual case from the “political narrative” that comprises the meaning of a string of precedents or a legislative history. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2152 (1989).

⁶⁸ ABBOTT, *supra* note 67, at 13.

⁶⁹ WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2, l. 72–106.

⁷⁰ *Id.*

⁷¹ The approach this Article takes is inspired by many insightful analyses of the role that narratives play in law, including Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”?: *Assimilation and the Mexican-American Experience*, 10 LA RAZA L.J. 173, 85 CALIF. L. REV. 1259 (1997); Catherine Powell & Camille Gear Rich, “*The ‘Welfare Queen’ Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*,” 108 GEO. L.J. (SPECIAL EDITION) 105 (2020); HIROSHI MOTOMURA, *AMERICANS IN WAITING* (2006) (on narratives of immigration); JENNIFER R. MERCIIECA, *FOUNDING FICTIONS* (2010) (a “rhetorical history” of narratives of American politics and government); JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 243 (abr. ed. 1985) (“[A] fundamental distinction can be drawn between the mind that tells a story and the mind that gives reasons”); AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1995) (on narratives of law in the power struggles between divorce lawyers and their clients); GREG GRANDIN, *THE END OF THE MYTH* (2019) (on the narrative of the frontier in U.S. history). See generally COVER, *supra* note 51, at 95–96 (“No set of legal institutions . . . exists apart from the narratives that locate it and give it meaning.”); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991); Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630 (1992).

Most narratives, implicit or explicit, contain more than the core element of “somebody telling somebody else on some occasion and for some purpose(s) that something happened.”⁷² Narratives generally happen over time; they are formed by “a succession of events that appear as links in a chain.”⁷³ This is part of the way that narratives have cultural force; by structuring events in a chain, they imply *causation*. They thus purport to explain the way things are around us. Monika Fludernik gives the example of narratives about why Minnesota has a strong ethnic German community; “expulsion and resettlement in the age of the Counter-Reformation” form part of the narrative that answers that question,⁷⁴ and in this way narrative can help define the identity of that community. This explanatory, community-defining power can be seen in narratives like those told by the historian authors of *The 1619 Project*, who re-center, in narratives of how the United States came to be the way it is, chattel slavery, the agency of the Black Americans who resisted it, the institutions that defended it, and the still-present structural racism that it embedded in U.S. society.⁷⁵

Another way narratives have force is through their *characters*. Virtually all narratives feature characters who experience the events they describe.⁷⁶ The characters in narratives need not all be human; some can be groups or institutions or even

⁷² Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 576 (2018) (quoting James Phelan, *Narratives in Contest; Or, Another Twist in the Narrative Turn*, 123 PUBL’NS MOD. LANGUAGE ASS’N AM. 166, 167 (2008)); see also FLUDERNIK, *supra* note 66, at 6 (defining narrative as “a representation of a possible world in a linguistic and/or visual medium, at whose centre there are one or several protagonists of an anthropomorphic nature who are existentially anchored in a temporal and spatial sense and who (mostly) perform goal-directed actions (action and plot structure)”).

Some definitions of “narrative” distinguish it from “story,” seeing “narrative” as the overarching form into which many smaller stories may be incorporated. See Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 148 (1997) (“The narrative consists of the cumulative effects of these separate stories as their aggregate meaning comes to light.”).

⁷³ ABBOTT, *supra* note 67, at 4.

⁷⁴ FLUDERNIK, *supra* note 66, at 2.

⁷⁵ See *THE 1619 PROJECT: A NEW ORIGIN STORY* (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein eds., 2021).

⁷⁶ FLUDERNIK, *supra* note 66, at 2. I say “virtually” all narratives have characters because I suppose it’s possible to imagine an astronomical or geological narrative that doesn’t. But even in those, the universe, the stars, or the rocks tend to become characters. Someone with a sufficiently unsentimental mind might experience “the wind blew a rock off a cliff” as a narrative without a character, but for me it’s awfully hard not to feel bad for that rock, which implies I’ve anthropomorphized it into a character despite having so little material to work with.

impersonal forces.⁷⁷ But narratives generally center one or more characters by making them protagonists, the characters whom the narrative primarily follows.⁷⁸ They may also have antagonists, the characters who oppose the protagonists' goals and values and create obstacles for them.

Centering a character affirms a certain degree of value in that character; the character may not be a good person, but a narrative that invites you to pay attention to a character affirms that that character is worth paying attention to. For this reason, decisions about what kind of character to center are political choices. This is why there is so much controversy about, for example, the extremely limited extent to which transgender people are represented in popular culture: in a culture that already questions the extent to which trans people's experience deserves attention, the absence of narratives that centers trans protagonists can serve to affirm that degradation.⁷⁹ Conversely, the widespread popularity of narratives that center the experience of police can devalue the worth of community members who experience police violence.⁸⁰ If a culture's popular narratives do not deem those community members worth centering, then its narratives are reinforcing an exclusion that is immensely harmful.

Most narratives also feature *conflict*. The protagonists are faced with a challenge (and often an adversary), which they aim to overcome. Conflicts are an important part of the way narratives communicate with readers about what matters because a conflict is only intelligible if the protagonists have *goals*; a conflict is understood in terms of those goals as something that threatens to interfere with them.

In order for the protagonists' goals to be intelligible, the narrative must *imply the existence of a value system* within which the protagonists' goals are formed. When we see what people strive for, we learn what they care about. For example, when we read about Thurgood Marshall struggling for justice and against racism,⁸¹ the text serves not only as a recounting of events but also as an affirmation of the value of justice and the evil of racism. Even a very minimal story about a swimmer

⁷⁷ Stephen Paskey, *The Law Is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM'N & RHETORIC: JALWD 51, 63 (2014) (noting that "the main 'character' may be an inanimate object or idea").

⁷⁸ See FLUDERNIK, *supra* note 66, at 6 ("It is the experience of these protagonists that narratives focus on . . .").

⁷⁹ See generally RACHEL CARROLL, *TRANSGENDER AND THE LITERARY IMAGINATION* (2018).

⁸⁰ See Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685, 705 (2022) (discussing "copaganda"); Constance Grady, *How 70 Years of Cop Shows Taught Us to Valorize the Police*, VOX, <https://www.vox.com/culture/22375412/police-show-procedurals-hollywood-history-dragnet-keystone-cops-brooklyn-nine-nine-wire-blue-bloods> (Apr. 12, 2021, 10:45 AM).

⁸¹ See, e.g., GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* (2012).

trying to stay alive in shark-infested waters⁸² implies, at a minimum, that the swimmer values their own life, and that a person who values their own life is worth paying attention to. Many such stories may even invite the viewer to infer something about whose fault it is that the swimmer has ended up in those waters and whether the swimmer sees that situation as their own responsibility or blames that situation on specific institutions, groups, or people.⁸³ The swimmer will believe, or not believe, that someone has violated a duty of care, and from this belief we will make inferences about what the swimmer values.

Consider the first municipal sanctuary action, a resolution from the city of Madison, Wisconsin:

WHEREAS, over one-half million victims of violence and terror in El Salvador and Guatemala are seeking places of temporary refuge, and

WHEREAS, the present policy of our federal government does not consider these men, women, and children to be political refugees and, [sic]

WHEREAS, churches throughout the United States have offered sanctuary to these refugees, and here in Madison St. Francis House, with the endorsement and support of several local congregations of various denominations, has opened its doors as a place of sanctuary for refugees from El Salvador and Guatemala,

NOW THEREFORE BE IT RESOLVED that the City of Madison commends St. Francis House and its associate congregations for their compassion and moral courage in providing sanctuary to refugees from El Salvador and Guatemala.⁸⁴

This was a nonbinding resolution, so whatever value it had was in the language it used and the ideas it expressed. Considering those ideas as a narrative, we can say that each of the *whereas* clauses introduces an event and a character. The first clause introduces “victims” and their decision to seek refuge. The second clause introduces “our federal government,” which denies them refugee status. And the third clause introduces churches and congregations, which open their doors as a place of sanctuary. In the final clause, the city itself becomes a character, and even if its only action is to “commend,” it is allied with the victims and the churches.

The resolution, like most narratives, has a conflict: between the federal government’s refusal to grant refugee status to the “victims of violence and terror” and the needs of those victims. It seems fair to say that the victims and the churches are the protagonists, and the federal government is the antagonist. Earlier, I said that conflicts make sense to the extent we can understand the protagonists’ goals, and

⁸² See, e.g., *THE SHALLOWS* (Columbia Pictures 2016).

⁸³ I don’t know if *THE SHALLOWS* has such a message because I haven’t seen it. It looks scary.

⁸⁴ Madison, Wis., Res. 39,105 (June 7, 1983), https://libguides.law.du.edu/ld.php?content_id=35160342.

the goals of the victims and the churches are clear enough. The federal government, though, remains as ominously silent as Iago.⁸⁵

Putting together the characters, the conflict, the protagonists and antagonists in that conflict, and the goals they pursue, a value system emerges: the goals of the protagonists are intelligible because we understand them as part of a value system in which “compassion and moral courage” are important virtues, “terror and violence” are grave threats, and the needs of victims deserve to be given priority.

This narrative has all of the elements of resistance in it: a government acting wrongly, and people affected by that government’s action taking steps to mitigate the harm it caused and to express their disagreement with unjust policies in doing so. And in this case, the nonbinding resolution led to more meaningful action two years later when Madison adopted policies of noncooperation with the federal government.⁸⁶ It was one of many policies that would be adopted under the name “sanctuary.”

C. *What Sanctuaries Became When Governments Declared Sanctuary*

As the sanctuary movement gained more success, local and state governments began to declare themselves immigration sanctuaries.⁸⁷ The term “sanctuary” has no legal definition; it can refer to a diverse array of state and local policies on immigration enforcement.⁸⁸ Although the word “sanctuary” exists more in narrative space than in legal space, we can still identify a cluster of policies generally associated with the term.

⁸⁵ “Demand me nothing. What you know, you know. / From this time forth, I never will speak word.” WILLIAM SHAKESPEARE, *OTHELLO* act 5, sc. 2, l. 302–03 (Burton Raffel ed., Yale Univ. Press 2005) (1622). This line prompted Coleridge’s famous descriptor “motiveless Malignity.” SAMUEL T. COLERIDGE, *A Portion of Lecture 5, in COLERIDGE: LECTURES ON SHAKESPEARE* (1811–1819) 162, 165 (Adam Roberts ed., 2016). As A.C. Bradley argued, Iago is not motiveless, A.C. BRADLEY, *SHAKESPEAREAN TRAGEDY* 209, 224–25 (2d ed. 1905), but his final silence is still supremely creepy.

⁸⁶ See Madison, Wis., Res. 41,075 (amended) (Mar. 5, 1985), https://libguides.law.du.edu/ld.php?content_id=39166270; see also Pat Schneider, *Madison Faith Communities Have Driven ‘Sanctuary Movement’ for Decades*, CAP. TIMES (Feb. 1, 2017), https://captimes.com/news/local/education/university/madison-faith-communities-have-driven-sanctuary-movement-for-decades/article_7fee71c1-1c3a-5789-9506-305722e5aa4c.html.

⁸⁷ See Lasch et al., *supra* note 1, at 1709–10.

⁸⁸ For a broader definition, see Michael Kagan, *What We Talk About When We Talk About Sanctuary Cities*, 52 U.C. DAVIS L. REV. 391, 393–94 (2018) (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”); Huyen Pham, *The Constitutional Right not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1389 (2006) (including anti-discrimination policies under the umbrella of sanctuary policies).

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.”⁸⁹ This Article focuses on the governmental, and not the nongovernmental, actions that insulate immigrants from immigration law enforcement.⁹⁰ Huyen Pham refers to these as “non-cooperation laws,” which is a more accurate descriptor for most local actions than “sanctuary” because those actions tend to involve declining to participate in federal enforcement, rather than sheltering anyone from it.⁹¹

There are at least six kinds of policies that fit these descriptions.⁹² First, there are policies that prohibit the use of sub-federal resources (personnel, time, and so on) to support federal enforcement activities. Policies of this kind include prohibitions on so-called “287(g)” agreements, under which the federal government deputizes local law-enforcement agents as agents of ICE.⁹³ Many sanctuary policies prohibit 287(g) agreements.⁹⁴ Policies can also go beyond prohibitions on 287(g) agreements and prohibit lending law-enforcement resources or any support to federal immigration enforcement.⁹⁵

⁸⁹ Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 437 (2018).

⁹⁰ This is not to say that non-government sanctuaries are unimportant; on the contrary, 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. Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1210–11 (2019).

⁹¹ Pham, *supra* note 88, at 1374. As Motomura notes, some “sanctuary” actions do involve affirmative interference with or obstruction of federal enforcement. Motomura, *supra* note 89, at 437–38. But these are much rarer than non-cooperation policies.

⁹² The six kinds of policies presented here and discussed in the next six paragraphs were first presented in Ayers, *supra* note 26. I have omitted quotation marks when citing myself, but please note that some of the text is taken verbatim from my prior work and should be cited accordingly.

⁹³ *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFT, <https://www.ice.gov/identify-and-arrest/287g> (last visited Apr. 14, 2024); see *Illegal Immigr. Reform and Immigrant Resp. Act of 1996*, Pub. L. No. 104-208, § 287(g)(1), 110 Stat. 3009-546, 563 (1996) (codified as amended at 8 U.S.C. § 1357(g)(1)).

⁹⁴ For example, Mecklenburg County, North Carolina, withdrew from its 287(g) agreement after the election of a new sheriff. See David A. Graham, *The Sheriff Who’s Defying ICE*, ATLANTIC (July 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/new-sheriff-town/593116>. 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*, NJ.COM, <https://www.nj.com/politics/2019/07/murphy-ag-warns-nj-sheriffs-dont-go-behind-my-back-to-work-with-ice.html> (July 9, 2019, 4:57 PM).

⁹⁵ See, e.g., Seattle, Wash., City Council Res. 31730 (Feb. 2, 2017) (enacted).

Second, sanctuary jurisdictions often refrain from detaining people in service of federal immigration enforcement. These jurisdictions generally decline to comply with “detainers,” the document by which ICE asks localities to detain noncitizens.⁹⁶ Detainers are requests, not commands, so there is nothing unlawful about declining to comply with them.⁹⁷ Most “sanctuary” policies include a provision stating that the jurisdiction will not honor detainers in at least some cases.⁹⁸ Some jurisdictions comply only on certain conditions.⁹⁹ Notably, some jurisdictions decline to honor detainers simply because it may be unlawful to do so; a detainer is based on ICE’s finding that there is probable cause to believe a noncitizen is removable, but removability is not a crime, and so many courts have found that a detainer does not provide a constitutionally sufficient basis for detention.¹⁰⁰

The third kind of sanctuary policy is a policy that limit information-sharing with the federal government.¹⁰¹ There are many ways in which states and localities can share information with federal immigration authorities, and so 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, or what might be called “don’t maintain” provisions under which information about immigration status is not to be recorded in official documents or databases, ensuring that it cannot be found by immigration officials.¹⁰² Other provisions take a “don’t tell” approach, under which local employees can’t share information with federal authorities.¹⁰³ Importantly, locally held information

⁹⁶ See, e.g., Santa Clara Cnty. Bd. of Supervisors, Res. 2011-504 (Cal. 2011); 8 C.F.R. § 287.7(a) (2011); Kate Evans, *Immigration Detainers, Local Discretion, and State Law’s Historical Constraints*, 84 BROOK. L. REV. 1085, 1090 (2019).

⁹⁷ See *Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014).

⁹⁸ See, e.g., Seattle, Wash., City Council Res. 31730.

⁹⁹ See, e.g., Santa Clara Cnty. Bd. of Supervisors, Res. 2011-504.

¹⁰⁰ See, e.g., Jeremy Redmon, *Clayton County Sheriff’s Office Stops Complying with ICE Detainers*, ATLANTA J.-CONST. (Nov. 19, 2014), <https://www.ajc.com/news/state—regional-govt—politics/clayton-county-sheriff-office-stops-complying-with-ice-detainers/WhF7a0ukHxoWmmFinVfsjO>. Detainers are not the only policy question that affects the detention of noncitizens. For more on detention-related policies, see Ayers, *supra* note 26, at 490–91.

¹⁰¹ See generally Ayers, *supra* note 26, at 491–95.

¹⁰² See, e.g., Ravinder S. Bhalla, Mayor of Hoboken, N.J., Exec. Order No. 1, § 7 (Jan. 1, 2018) [hereinafter Hoboken Exec. Order No. 1] (“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.”).

¹⁰³ Hoboken also says, “No municipal agent, employee or agency may ask any individual or

about immigration status can flow to the federal government through a large number of shared databases, including the criminal databases through which all fingerprints are run.¹⁰⁴ The “sanctuary” label is therefore always, to some extent, misleading: every jurisdiction shares at least some information with federal immigration authorities.

The fourth 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.¹⁰⁵ These include jails and courthouses.¹⁰⁶

A fifth kind of policy 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.¹⁰⁷

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.” *Id.* § 4.

The “don’t tell” provisions have been the subject of litigation because of a federal statute, 8 U.S.C. § 1373, which says that states and localities “may not prohibit, or in any way restrict, any government entity or official from sending” immigration information to ICE. *See also* LAURENCE BENENSON, L. ENFT IMMIGR. 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>. An almost-identical prohibition appears in 8 U.S.C. § 1644. Section 1373 also bars laws that prohibit maintaining immigration status information. § 1373(b). But the Tenth Amendment bars the federal government from compelling states to share or maintain information. *See* *Printz v. United States*, 521 U.S. 898, 935 (1997); *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1485 (2018). And so, the enforceability of § 1373 has been the subject of litigation.

¹⁰⁴ Ayers, *supra* note 26, at 493–95.

¹⁰⁵ *See, e.g.*, Hoboken Executive Order No. 1, *supra* note 102, § 3(E). (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.”).

¹⁰⁶ Ayers, *supra* note 26, at 495.

¹⁰⁷ Press Release, Vera Inst., SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation (Nov. 9, 2017), <https://www.vera.org/newsroom/safe-cities-network-launches-11-communities-united-to-provide-public-defense-to-immigrants-facing-deportation>.

A sixth way that localities can decline cooperation with federal immigration enforcement is through 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.¹⁰⁸

Each of these six kinds of policies can be more or less effective in preventing the removal of individual noncitizens. They also have an expressive aspect: they serve to communicate, to anyone who is paying attention, the view of a particular community on moral and political questions that inhere in debates about immigration, including the justice or injustice of federal immigration policy, the moral value of noncitizens, and the extent to which noncitizens should be considered members of the communities in which they reside. This expressive aspect of the policies can be a form of resistance. Communities that adopt an admittedly limited policy of protecting noncitizens against federal immigration enforcement can use that policy to express their moral condemnation of federal policies. Or not.

As the idea of sanctuary became an official policy in some cities, policy-makers and official texts sometimes used a very different narrative to explain what was happening: not a narrative of resistance but a narrative about promoting the well-being of the community's noncitizen residents.¹⁰⁹ In this narrative, the community is the protagonist, and the conflict is a minimal one, in which noncitizens are looking for a place to be, and the protagonists (the people of the community) pursue a goal of welcoming them. As I argued in an earlier article, however, many sanctuaries center the members of the community who hold citizenship, rather than the noncitizens, in these narratives, and surprisingly do not express concern for the well-being of their noncitizen residents; instead, they tell a story about wanting to promote economic development and public safety—a story that manages to almost entirely leave out the noncitizens most affected by the policy.¹¹⁰

To understand contemporary narratives of sanctuary and what's missing from them, it's important to begin by understanding the original sanctuary narrative, which centers the community's goal of resisting unjust federal policies.

D. *Government Resistance*

It might seem strange to think of a government entity as the protagonist of a resistance narrative, but in fact there's a long history here. Daniel Farbman explores the history of municipal resistance in America in early town meetings convened in violation of the 1774 Massachusetts Government Act, by which Parliament

¹⁰⁸ 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>.

¹⁰⁹ See, e.g., Santa Ana, Cal., Res. 2016-086 (Dec. 6, 2016).

¹¹⁰ Ayers, *supra* note 26, at 519.

forbade towns from convening meetings without royal permission, and forbade the discussion of anything but local business at those meetings.¹¹¹ Towns in New England not only convened in violation of the law but passed resolutions condemning it and declaring their intention to defy it.¹¹² And, Farbman explains, towns then became “bastions of resistance,” devoting their attention to national and revolutionary affairs.¹¹³

And sometimes governments today condemn government policies. When New York State legalized recreational marijuana in 2021, the sponsor’s memorandum¹¹⁴ condemned New York’s prior practice in strong terms.¹¹⁵ “New York’s marihuana policies are broken, unjust, and outdated,” it said. “Marihuana prohibition has thrust thousands of New Yorkers into the criminal justice system for non-violent offenses, denying many the fundamental right to participate in the democratic process of voting and inhibiting otherwise law-abiding citizens’ ability to access housing, student loans, employment opportunities, and other vital services.”¹¹⁶ Moreover, the prior regime “led to costly overuse of law enforcement resources and in some instances discriminatory police practices that have perpetuated systematic racism and discrimination increasing the prison population with non-violent offenders.”¹¹⁷ The sponsor’s memo gave statistics to back this up, pointing to racially disparate arrest rates for marijuana use and saying, “[O]ne of the largest drivers of racial disparity in criminalization and incarceration rates is the inequity of how the law is applied in marihuana arrests.”¹¹⁸

Notably, though, the memo shies away from criticizing *federal* marijuana laws. To the extent this can be characterized as “resistance,” the state government is the protagonist, resisting an unjust law, and the only antagonist is the earlier legislature that adopted misguided policies. No doubt is cast on the legitimacy of any government, even if the sponsor’s memo accuses earlier policymakers of widespread racism and other forms of injustice. This is peculiar, since the federal government too criminalizes marijuana use. We’ll see a similar shying away in sanctuary policies.

Another example of government resistance comes from state and local governments opposed to abortion rights. A draft bill introduced in Louisiana, the “Abolition of Abortion in Louisiana Act of 2022,” purports to “[t]reat as void and of no

¹¹¹ Daniel Farbman, “*An Outrage upon Our Feelings*”: *The Role of Local Governments in Resistance Movements*, 42 CARDOZO L. REV. 2097, 2111 (2021).

¹¹² *Id.*

¹¹³ *Id.* at 2112.

¹¹⁴ In New York, a memorandum is the only real piece of legislative history typically produced when a bill is enacted.

¹¹⁵ Sponsor’s Memo, S.B. S854A, 2021–2022 Reg. Sess. (N.Y. 2021) (enacted).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

effect any and all federal statutes, regulations, treaties, orders, and court rulings which would deprive an unborn child of the right to life or prohibit the equal protection of such right.”¹¹⁹ It says, “This state and its political subdivisions, and agents thereof, may disregard any part or whole of any federal court decision which purports to enjoin or void any provision of this Section.”¹²⁰ It even goes on to say, “[A]ny judge of this state who purports to enjoin, stay, overrule, or void any provision of this Section shall be subject to impeachment or removal.”¹²¹ The bill was not enacted.¹²² But its promise to ignore—nullify—federal law is a remarkable example of governmental resistance rhetoric.

E. *Narratives of Sanctuary as Resistance*

Scholars have often, and with good reason, described sanctuary policies as a form of resistance to unjust federal immigration policies.¹²³ Jennifer J. Lee writes, “We live in times of resistance, with ‘sanctuary cities’ that refuse to cooperate with federal immigration enforcement.”¹²⁴ Barbara Armacost uses the phrase “sanctuary/resistance regimes” to describe localities that decline cooperation with federal immigration enforcement.¹²⁵ Similarly, Annie Lai and Christopher Lasch described sanctuary policies as “cimmigration resistance.”¹²⁶ In another article, Lasch described sanctuary policies as “rendition resistance,” comparing sanctuary policies to antebellum resistance to the rendition of fugitive slaves and to rendition of criminal suspects.¹²⁷

Journalists use similar language. After Trump’s election, when his first actions in office made clear that his administration would be every bit as extremist and

¹¹⁹ Abolition of Abortion in Louisiana Act of 2022, H.B. 813, 2022 Leg., Reg. Sess. (La. 2022).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Jessica Kutz, *Pushback on Louisiana’s Scuttled Abortion Bill Reveals a Limit on How Far Anti-Abortion Groups Are Willing to Go*, THE 19TH (May 13, 2022, 10:11 AM), <https://19thnews.org/2022/05/louisiana-law-anti-abortion-group-limits>.

¹²³ See, e.g., Ming Hsu Chen, *Sanctuary Networks and Integrative Enforcement*, 75 WASH. & LEE L. REV. 1361, 1362, 1368–1370 (2018).

¹²⁴ Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1617 (2018).

¹²⁵ Barbara E. Armacost, “Sanctuary” Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1202 (2016) (discussing “sanctuary/resistance regimes”). Other writers have criticized sanctuaries for not fully committing to resistance. See Austin Rose, Note, *Citation, Not Deportation: Broadening Sanctuary Policy Through Abolitionist Alternatives*, 35 GEO. IMMIGR. L.J. 905, 912–14 (2021).

¹²⁶ Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 543 (2017) (internal quotation marks omitted).

¹²⁷ Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149 (2013).

authoritarian as his campaign suggested, journalists reported on a wave of activism and resistance across the country.¹²⁸ “*Organized Resistance Is Forming to Trump’s Immigration Crackdown*,” read one headline.¹²⁹

As scholars like Annie Lai and Hiroshi Motomura have observed, these narratives have limits and disadvantages. One is the way resistance narratives portray sanctuaries as *against* Trump rather than *for* immigrants, or human dignity or other values. Lai highlights this when she uses the term sanctuary in a way that goes “beyond the traditional notion of disentangling local law enforcement from the federal immigration enforcement machinery” to include “local welcoming policies, policies designed to ensure equal access to local benefits, and to send a message to immigrants that they’re valued members of a local community.”¹³⁰ Motomura observes that the term “sanctuary” can make it too easy for the act of taking a pro-immigrant position to “be cast merely as a resistance movement. I think it stands for something much more affirmative than that. It stands for, among other things, non-discriminatory policing and accountability in enforcement.”¹³¹

Resistance narratives also tend to minimize the long history of sanctuary policies as a strategy for protecting noncitizens not just from the unusually harsh Trump policies but from the underlying cruelty of the immigration system that predated and outlasted him.¹³² Many journalists grouped sanctuary policies together with the wide variety of other actions states and localities took to resist Trump administration policies. The Hartford Courant described sanctuaries as part of “the burgeoning, blue state resistance to the Trump agenda.”¹³³ A writer in the San Francisco Chronicle called California Attorney General Xavier Becerra the “right leader for the California resistance” because of his court challenges to potential sanctions on sanctuary cities, as well as Trump’s Muslim ban, curtailment of subsidies under the Affordable Care Act, and attempts to undercut California’s clean-air rules.¹³⁴ “California Strikes a Bold Pose as Vanguard of the Resistance,” announced a New

¹²⁸ Yamiche Alcindor, *Liberal Activists Join Forces Against a Common Foe: Trump*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/us/politics/protesters-resist-trump.html>.

¹²⁹ Morrissey, *supra* note 2.

¹³⁰ Annie Lai, Co-Dir., U.C. Immigrant Rts. Clinic, Address, *Symposium, Immigration Politics: Shifting Norms, Policies & Practices*, in 52 LOY. L.A. L. REV. 371, 390 (2019).

¹³¹ Hiroshi Motomura, Professor, UCLA, Address, *Symposium, Immigration Politics: Shifting Norms, Policies & Practices*, in 52 LOY. L.A. L. REV. 371, 400 (2019).

¹³² See, for example, the Seattle policies discussed in Section II.A.3, *infra*, which predate the Trump administration.

¹³³ Daniela Altimari, *Jepsen Will Help Lead Legal Challenges to Trump Policies*, HARTFORD COURANT, <https://www.courant.com/2017/01/29/jepsen-will-help-lead-legal-challenges-to-trump-policies> (Dec. 12, 2018, 2:55 PM).

¹³⁴ John Diaz, Opinion, *State Attorney General: Leader of the California Resistance*, S.F. CHRON., <https://www.sfchronicle.com/opinion/diaz/article/State-attorney-general-leader-of-the-California-11243773.php> (June 24, 2017, 8:21 AM).

York Times headline, reporting on a raft of policies including sanctuary policies.¹³⁵ And in the Los Angeles Times, another writer called California “the nation’s preeminent center of resistance to the Trump administration”—again, in part because of its state and local sanctuary laws.¹³⁶

Another disadvantage of resistance narratives, perhaps, is that those who support harsher immigration policies seem very fond of them. Attorney General Barr announced a barrage of lawsuits against sanctuary cities by saying, “Today is a significant escalation in the federal government’s efforts to confront the resistance of sanctuary cities.”¹³⁷ Journalists used the same terms: “Trump is hammering California for its sanctuary policies in his latest push to resist the ‘resistance’ to his presidency.”¹³⁸

Trump himself tended to describe sanctuaries not only as resistance, but as *lawless* resistance.¹³⁹ Warnings about lawless sanctuary cities formed an important part of Trump’s anti-immigrant campaign rhetoric, along with warnings about migrant caravans and promises of a border wall.¹⁴⁰ In January 2017, just a few weeks after taking office, Trump issued an executive order that stated, “Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States.”¹⁴¹ Later, even as Trump’s relationship with Attorney General Jeff Sessions frayed over Sessions’s recusal from the investigation of Russian election interference, the two came together to issue a statement condemning “lawless sanctuary cities.”¹⁴² Indeed, as political scientists have noted,

¹³⁵ Adam Nagourney, *California Strikes a Bold Pose as Vanguard of the Resistance*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/us/california-strikes-a-bold-pose-as-vanguard-of-the-resistance.html>.

¹³⁶ Peter Schrag, *Op-Ed: In the Epic Trump vs. California Battle, California Is Ahead*, L.A. TIMES (Feb. 1, 2019, 3:15 AM), <https://www.latimes.com/opinion/op-ed/la-oe-schrag-california-resistance-20190201-story.html>.

¹³⁷ Stephen Dinan, *DOJ Unleashes Legal Assault on Sanctuary Cities*, WASH. TIMES (Feb. 11, 2020).

¹³⁸ Mark Sherman, *Sanctuary Cities Could Get Boost from Sports Betting Ruling*, ST. LOUIS POST-DISPATCH, May 17, 2018, at A8.

¹³⁹ “Lawless” is not a good description even of the activists who provide shelter to undocumented noncitizens. See Villazor & Gulasekaram, *supra* note 90, at 1262 (“[B]y openly declaring their intentions and providing shelter, they offer a competing interpretation of federal law: one intended not as an act of civil disobedience but rather as fidelity to, in their view, a more compassionate and just interpretation of the law than the one offered by federal authorities.”); *cf.* Bezdek, *supra* note 39, at 970–71 (discussing whether Sanctuary Movement activists in the 1980s understood themselves as engaging in civil disobedience).

¹⁴⁰ Jeremy W. Peters & Julie Hirschfeld Davis, *With Migrant Caravan, Trump Stokes a Familiar Fire: Immigration*, N.Y. TIMES (Oct. 20, 2018), <https://www.nytimes.com/2018/10/20/us/politics/trump-migrant-caravan-midterm.html>.

¹⁴¹ Exec. Order No. 13,768, 3 C.F.R. 231 § 1 (2018).

¹⁴² Stephen Dinan & Andrea Noble, *Jeff Sessions Compares Miami-Dade, ‘Sanctuary’ Chicago*

“President Trump’s political narratives and legal threats to defund cities have been effective precisely because they situate sanctuary policies as a resistance to federal law without guiding principles.”¹⁴³

Of course, sanctuary policies are not lawless. When the Trump administration tried to block a federal grant to the city of Philadelphia because of its sanctuary policies, the city won a lawsuit and kept the grant on track.¹⁴⁴ Nonetheless, Attorney General Jeff Sessions attacked the city’s mayor, Jim Kenney: “He is celebrating keeping criminals in Philadelphia that by law should be deported.” Cities like Philadelphia, he said, “send a message to criminals: ‘Stay here, and we will protect you.’ That directly attracts more criminals.”¹⁴⁵ Similarly, Republican Senator Pat Toomey said that sanctuary policies are:

a defining issue because there are elements of the immigration debate where reasonable people can disagree. But I’m sorry, I don’t see how reasonable people can come to the conclusion that we should all be endangered by allowing violent criminals to roam our streets. . . . That’s just crazy! . . . If Democrats want to continue to defend the proposition that violent criminals should be turned loose on our streets, as long as they got here illegally, good luck with that.¹⁴⁶

Along similar lines, Karl Rove compared sanctuary cities to antebellum Southern nullification efforts aimed at protecting slavery.¹⁴⁷ The comparison was stupid. But it reflects a deep conviction among conservatives that the “resistance” they perceived in sanctuary cities was not merely a policy choice but a brand of lawlessness.¹⁴⁸

The accusations of lawlessness, however rhetorically effective, were misguided. Chris Lasch, responding to conservatives’ allegations of sanctuaries’ lawlessness and the absurd comparison of sanctuaries to the slaveholding South: “[W]hile sanctuary policies can express disagreement with federal policy, this does not make

Homicide Rates, WASH. TIMES (Aug. 17, 2017).

¹⁴³ Allan Colbern, Melanie Amoroso-Pohl & Courtney Gutiérrez, *Contextualizing Sanctuary Policy Development in the United States: Conceptual and Constitutional Underpinnings, 1979 to 2018*, 46 FORDHAM URB. L.J. 489, 491–92 (2019).

¹⁴⁴ *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018), *affd in part*, 916 F.3d 276 (3rd Cir. 2019).

¹⁴⁵ David Gambacorta & Kavitha Surana, *City vs. Feds; While the Two Sides Spar on Immigrants, Some Cooperation Goes on, Leaving the Undocumented Unsure Where They Stand*, PHILA. INQUIRER, Oct. 21, 2018, at A1.

¹⁴⁶ *America’s Newsroom: Sen. Pat Toomey Reintroduces ‘Stop Dangerous Sanctuary Cities Act’* (Fox News television broadcast June 12, 2019), <https://www.foxnews.com/video/6047425730001>.

¹⁴⁷ See Karl Rove, Commentary, *Trump and the 21st-Century Nullifiers*, WALL ST. J. (Feb. 8, 2017, 6:41 PM), <https://www.wsj.com/articles/trump-and-the-21st-century-nullifiers-1486597277>.

¹⁴⁸ Lorraine Marie A. Simonis, *Sanctuary Cities: A Study in Modern Nullification?*, 8 BRIT. J. AM. LEGAL STUD. 37, 41 (2019).

antebellum nullification their historical progenitor.”¹⁴⁹ Instead, Lasch found a better comparison “between sanctuary cities and those northern communities that resisted fugitive slave recapture. . . . Sanctuary cities’ resistance to immigrant rendition, like northern resistance to slave rendition, takes place in that part of the law that is reserved for local action and upon which the federal government cannot intrude.”¹⁵⁰

Nonetheless, the media picked up the lawless-resistance narrative. “*Sanctuary Cities: Outlaws or Symbols?*” wondered a headline in the Orange County Register.¹⁵¹ When a federal trial judge ruled against the Trump administration’s attempt to block funding to sanctuary jurisdictions,¹⁵² a headline in the right-wing Washington Times read, “*Sanctuary Cities Ruling a Despicable Sign of Lawless Times.*”¹⁵³

These narratives of lawless resistance are exaggerated, but narratives of lawful resistance can be found in public statements by officials in sanctuary jurisdictions. In Chicago, for example, Mayor Lori Lightfoot said, “We are not cooperating with ICE, and we don’t appreciate the ICE raids in our city—and I’m going to push back. . . . This is a city that stands shoulder to shoulder with immigrant and refugee communities.”¹⁵⁴ At another time, she said, “If ICE is complaining, then they should do their job better, and they shouldn’t do things that are traumatizing young children.”¹⁵⁵ The sheer number of sanctuary policies adopted after Trump’s election¹⁵⁶ demonstrates that sanctuaries are indeed part of a reaction to Trump. But

¹⁴⁹ Christopher N. Lasch, *Resistance to Fugitive Slave Act Gives Sanctuary Cities a Model*, CHARLESTON GAZETTE-MAIL, https://www.wvgazette.com/opinion/christopher-n-lasch-resistance-to-fugitive-slave-act-gives-sanctuary-cities-a-model/article_61173112-822d-5fbc-8580-a4153fc52689.html (Nov. 21, 2017).

¹⁵⁰ *Id.*

¹⁵¹ Grace Wyler, *Sanctuary Cities: Outlaws or Symbols?*, ORANGE CNTY. REG. (Dec. 17, 2016).

¹⁵² *City & Cnty. of S.F. v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017), *aff’d*, 897 F.3d 1225 (9th Cir. 2018).

¹⁵³ Cheryl K. Chumley, Opinion, *Sanctuary Cities Ruling a Despicable Sign of Lawless Times*, WASH. TIMES (Apr. 26, 2017), <https://www.washingtontimes.com/news/2017/apr/26/sanctuary-cities-ruling-despicable-sign-lawless-ti>.

¹⁵⁴ Mark LeBien & Michael Puente, *Chicago’s Top Immigration Official, Mayor Lori Lightfoot Spar over Sanctuary City Status*, WBEZ CHI. (Sept. 26, 2019, 11:44 AM), <https://www.wbez.org/stories/ice-names-top-enforcement-official-for-chicago-midwest/ca2caf8b-12e0-4601-aed8-5ffc734d66c9>.

¹⁵⁵ *Mayor Lori Lightfoot Defends Chicago’s Sanctuary City Law, After Previously Deported Convict Charged with Sexually Assaulting Toddler*, CBS NEWS CHI. (Feb. 28, 2020, 4:20 PM), <https://www.cbsnews.com/chicago/news/mayor-lori-lightfoot-sanctuary-city-welcoming-city-deported-convicted-felon-chrisopher-puente-sexual-assault-ice-immigration-customs-enforcement>.

¹⁵⁶ The policies collected by Lasch and co-authors show a surge in new policies after Trump’s election, beginning with Wichita City Police Dept. Policy 514 adopted on November 10, 2016.

reaction to Trump and resistance to Trump are not the same thing, and for a significant number of sanctuaries, unlike Chicago, resistance is not part of the story that public officials tell.

II. SANCTUARY AS MINDING OUR OWN BUSINESS

A. *Minding-Our-Business Narratives*

Alongside the sanctuaries-as-resistance narrative is another story, in which neither injustice nor resistance play any role. This narrative can be found in many of the primary texts creating and affirming sanctuary policies. It abandons the idea of localities as the protagonists in a conflict with the federal government over unjust federal policies, and thereby abandons the affirmation of justice implicit in any conflict over unjust policies.

To be sure, in the wake of Trump's election, some jurisdictions adopted sanctuary policies while openly criticizing federal immigration policy. Not long after Trump took office, Madison, Wisconsin, adopted a sanctuary resolution criticizing each of the three executive orders Trump had issued as "contrary to the values of openness and inclusion of the City of Madison."¹⁵⁷ Notably, this resolution condemns only Trump's executive actions—not the underlying statutes and policies that, in the view of many, make U.S. immigration law deeply unjust.¹⁵⁸ And other localities didn't go even that far. They avoided both criticism of immigration law and criticism of the Trump administration's approach to enforcing it. In other words, they avoid resistance narratives in favor of another kind of story. In these alternative narratives, sanctuaries are not standing up to injustice; they are instead simply going about the ordinary business of government, allocating resources, promoting community prosperity, making law enforcement effective, and so on. I'll call these "minding-our-business narratives."

1. *California 2017*

The California Values Act¹⁵⁹ was one of the highest-profile sanctuary bills passed after Trump took office. Journalists described it as "effectively creating the country's first sanctuary state,"¹⁶⁰ and it drew a high-profile lawsuit from the Trump

Between Trump's election (November 2016) and the end of his first six months in office (June 2017), states and municipalities adopted 87 new sanctuary policies. See Lasch, *supra* note 1, app. (policies sorted by date).

¹⁵⁷ Madison, Wis., Res. 17-00125 (Feb. 7, 2017).

¹⁵⁸ See, e.g., Linus Chan, *Unjust Deserts: How the Modern Immigration System Lacks Moral Credibility*, 16 OHIO ST. J. CRIM. L. 103 (2018).

¹⁵⁹ California Values Act, S.B. 54, ch. 495, 2017 Leg., Reg. Sess., 2017 Cal. Stat. 3733 (codified at CAL. GOV'T CODE § 7284 (West 2023)).

¹⁶⁰ David Noriega, *California Is on Its Way to Becoming the Nation's First Sanctuary State*, VICE NEWS (Mar. 2, 2017, 6:55 AM), <https://www.vice.com/en/article/595v5a/california-is-on->

administration.¹⁶¹ The Act was effective; a study in 2019 found that in its first five months, the law “led to a 41% decrease in ICE arrests at local jails.”¹⁶² Nonetheless, after the Act, California continued turning over an estimated 3,000 people to ICE each year.¹⁶³

The Act has a “findings” section that gives several justifications for what it does.¹⁶⁴ The first is to affirm the value of noncitizens: “Immigrants are valuable and essential members of the California community.”¹⁶⁵ Second, it argues that trust between government and community members is important for public safety, and says that local entanglement with federal immigration enforcement threatens that trust and deters noncitizens from approaching police or seeking services.¹⁶⁶ The Act next points out that it will save money (“[e]ntangling state and local agencies with federal immigration enforcement programs diverts already limited resources”) and argues that subfederal cooperation with immigration enforcement “blurs the lines of accountability between local, state, and federal governments.”¹⁶⁷ It then notes that subfederal cooperation “raises constitutional concerns” under the Fourth Amendment, as well as concerns about denial of equal access to education.¹⁶⁸

So where is the rhetoric of resistance?¹⁶⁹ As discussed in Section II.B below, there is some resistance rhetoric in the legislative history. But the Act itself says nothing about the harshness of federal immigration policies or the specific acts of the Trump administration. The legislative history reveals that Trump’s policies were of concern to the drafters. A five-paragraph statement by the author of the bill, which is repeated throughout the legislative history documents and serves as the

its-way-to-becoming-the-nations-first-sanctuary-state.

¹⁶¹ See *United States v. California*, 921 F.3d 865 (9th Cir. 2019).

¹⁶² Peter Mancina & Angela Chan, *Turning the Golden State into a Sanctuary State: A Report on the Impact and Implementation of the California Values Act (SB 54)*, UNIV. OF OXFORD: FAC. OF L. BLOGS (Mar. 28, 2019), <http://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/03/turning-golden>.

¹⁶³ Nuala Bishari, Opinion, *A Problematic Clause in a California Law Is Targeting Immigrants for Deportation*, S.F. Chron. (Aug. 24, 2022), <https://www.sfchronicle.com/opinion/article/California-immigration-law-deportation-17393596.php>.

¹⁶⁴ CAL. GOV’T CODE § 7284.2 (West 2023).

¹⁶⁵ *Id.* § 7284.2(a).

¹⁶⁶ *Id.* § 7284.2(b) (“A relationship of trust between California’s immigrant community and state and local agencies is central to the public safety of the people of California.”); *id.* § 7284.2(c) (“This trust is threatened when state and local agencies are entangled with federal immigration enforcement . . .”).

¹⁶⁷ *Id.* § 7284.2(d).

¹⁶⁸ *Id.* § 7284.2(e).

¹⁶⁹ The resistance rhetoric is missing in subsection (f) as well: “This chapter seeks to ensure effective policing, to protect the safety, well-being, and constitutional rights of the people of California, and to direct the state’s limited resources to matters of greatest concern to state and local governments.” *Id.* § 7284.2(f).

primary summary of its intent, notes the Trump administration's "mass deportation strategy" but seems careful to express concerns only about the "great cost to California both financially and otherwise."¹⁷⁰ I quote it here at length to illustrate the scope of what it does and doesn't condemn:

The President's Executive Orders and the accompanying Department of Homeland Security memorandums outline a mass deportation strategy that will encompass a broad category of immigrants. These documents describe the federal government's plan to use local law enforcement as 'force multipliers' of immigration agents, relying heavily on police to help them deport the greatest number of people possible. Aggressive federal immigration enforcement strategies are already underway. ICE arrests in courthouses and outside of schools are alarming new trends that have had chilling effects in the immigrant community. Under the Trump administration, deportations have increased 40 percent, including 10,800 non-criminals whose only violation was to enter the country.

When local police enforce immigration laws, they rapidly lose the trust of the undocumented community. Crimes go unreported for fear of deportation. The perpetrators roam free to strike again. Our communities become less – not more – safe.

A report by the University of Illinois published in 2013 found that '70 percent of undocumented immigrants reported they are less likely to contact law enforcement authorities if they were victims of a crime.' Furthermore, according to the Los Angeles Times, Los Angeles Chief of Police Charlie Beck has stated that "sexual assault reports have dropped 25% among the city's Latino population since the beginning of 2017 compared with the same period last year, adding that reports of domestic violence have fallen by 10%. Similar decreases were not seen in reports of those crimes by other ethnic groups."

California is familiar with the harmful effects of entangling local law enforcement agencies with immigration enforcement. Prior to its termination, the discredited 'Secure Communities' program (S-Comm) operated in California as an indiscriminate mass deportation program at great cost to California both financially and otherwise. According to a report prepared by Justice Strategies in 2012, when the Secure Communities program was still active, California taxpayers spent an estimated \$65 million annually to detain people for ICE.

Senate Bill 54, the California Values Act, will prevent state and local law enforcement agencies from acting as agents of Immigration and Customs Enforcement. Instead, it will keep them focused on community policing, rather

¹⁷⁰ KEVIN DE LEÓN, S. RULES COMM., OFF. OF S. FLOOR ANALYSES, S.B. 54, 2017 LEG., REG. SESS., at 6–7 (Cal. 2017).

than rounding up hardworking, honest immigrants who in many instances assist police in solving crimes rather than committing them.¹⁷¹

This language strongly conveys the impression that Trump's policies are excessively harsh but expresses direct concern about only three things: their "chilling effect" on noncitizens who will be less willing to seek services or cooperate with police; the cost to taxpayers; and the possibility that local police will be unable to focus on their jobs if charged with immigration-related responsibilities. These are important concerns, but nowhere in this statement does California directly assert that Trump's policies are unjust, or even that they are unwise when all costs and benefits at the national level are taken into account.

Legislative leaders were more comfortable using resistance rhetoric in statements outside the legislative process. "We will not allow our state resources to be used to further Trump's anti-immigrant agenda," said Assemblymember Miguel Santiago (D-Los Angeles), a principal co-author, after reports of local law enforcement noncompliance.¹⁷²

But local legislators generally tied concerns about immigration enforcement to local issues: "Senate Bill 54 protects our local law enforcement and the resources that they need to keep our communities safe," said Senator Kevin de León, sponsor of the Values Act.¹⁷³ He mentioned "the president's deportation forces"—perhaps a phrase only a resistance figure would use—but in the context of concerns that "our local law enforcement officers are under threat of being commandeered to the president's deportation forces."¹⁷⁴ De León remarkably expressed the goal of the bill as protecting *police*, rather than noncitizens: "Senate Bill 54 will protect local police against federal overreach."¹⁷⁵

Ordinarily, there would be nothing remarkable about local legislators describing a bill in terms of its impact on local communities. But sanctuary bills are so widely understood as a response to federal policy the absence of those concerns in rhetoric is striking. The conflict in the California Values Act's narrative is not that noncitizens might be harmed; it is rather that local police resources might be wasted. If the conflict in a narrative reveals the protagonists' values, it is striking that the

¹⁷¹ *Id.*

¹⁷² Press Release, Cal. State Assembly Democratic Caucus, Authors of the California Values Act, Advocates and Local Leaders Stand in Support of Enforcing Law (Jan. 27, 2020), <https://a54.asmdc.org/press-releases/20200127-authors-california-values-act-advocates-and-local-leaders-stand-support>.

¹⁷³ Antonie Boessenkool, *Eric Holder, LAPD Chief Say 'Sanctuary State' Bill Will Restore Trust Between Immigrants, Police*, L.A. DAILY NEWS, <https://www.dailynews.com/2017/06/19/eric-holder-lapd-chief-say-sanctuary-state-bill-will-restore-trust-between-immigrants-police> (Sept. 14, 2017, 1:17 PM).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

value here is not protecting noncitizens from harm, or protecting the local government from being coopted into an unjust federal scheme, but rather protecting the police from unnecessary work.

2. *Santa Clara County 2010*

Lasch's article *Rendition Resistance* uses as a case study Santa Clara County, which in 2010 passed a resolution Lasch describes as "resistance to immigration rendition."¹⁷⁶ And "resistance" is surely a fair descriptor of the policy, which aimed to prevent noncitizens from being deported.

Santa Clara's resolution itself, however, shies away from saying federal immigration policies are unjust. It cites in its *whereas* clauses the diversity of Santa Clara's population; the importance of trust "between County employees and County residents"; the need for people to feel comfortable reporting crimes; the fact that immigration enforcement is a federal responsibility; and the concern that anti-immigration laws at the state level "like Arizona's SB 1070 erode the relationship of trust between immigrant communities and local governments, subject individuals to racial profiling, discourage crime victims and witnesses from coming forward . . . and make people afraid to seek . . . services."¹⁷⁷ Conspicuously missing is any condemnation of, or even comment on, federal immigration policy.

This is not to say Lasch was wrong about Santa Clara's policy representing resistance. On the contrary, I'm arguing that policies like Santa Clara's are indeed part of a resistance movement, even if that is not all they are. My question is why they are sometimes so reluctant to say so.

3. *Seattle 2014*

Seattle has passed numerous local resolutions and ordinances that support its noncitizen communities. Some of those texts criticize federal policy, and others don't.

In February 2017, Seattle adopted a Welcoming Cities resolution that criticized the Trump administration: "[T]he level of anti-immigrant and anti-refugee rhetoric during the 2016 Presidential campaign, racist hate speech toward immigrant and refugee communities, and anti-immigrant and anti-refugee policies proposed by the current Presidential Administration is alarming"¹⁷⁸

But the Seattle-area policy that most deserves the name "sanctuary" gives reasons for its adoption that have little to do with the injustice of federal immigration policies. In 2014, King County adopted an ordinance barring compliance with

¹⁷⁶ Lasch, *supra* note 127, at 163 (discussing Santa Clara Cnty. Bd. of Supervisors, Res. 2010-316 (Cal. 2010)); *see also* Santa Clara Cnty. Bd. of Supervisors, Res. 2011-504 (Cal. 2011) (adding Board Policy Manual § 3.54(C), Civil Immigration Detainer Requests setting conditions for compliance with detainers).

¹⁷⁷ Santa Clara Cnty. Bd. of Supervisors, Res. 2010-316 (Cal. 2010)

¹⁷⁸ Seattle, Wash., City Council Res. 31730 (Feb. 2, 2017) (enacted) ("affirming the City of Seattle as a Welcoming City").

immigration detainees.¹⁷⁹ That ordinance cited several reasons: “The enforcement of civil immigration laws has traditionally been, and continues to be, the responsibility primarily of the federal government”; concerns about residents feeling safe; ensuring that all residents have equal access to city services and benefits; and concerns that honoring detainees results in “distrust of local law enforcement, dislocation of families, the loss of jobs and housing, economic loss to families and the community, and harm to children.”¹⁸⁰ It also noted the risk of liability for municipalities that hold noncitizens with no more justification than a civil detainee.¹⁸¹ Conspicuously absent from this list is any criticism of federal immigration policies themselves.

The three county council sessions in which the council debated the anti-detainer ordinance focused almost exclusively on two concerns: the risk that the county would be held liable for unconstitutional detention if it complied with detainers; and the “unfunded mandate” that detainers represent because the federal government does not reimburse municipalities for the cost of holding people on detainees.¹⁸²

One might wonder whether King County has adopted a conscious strategy of avoiding criticism of federal policy. Or perhaps the council that includes a city that tends to vote for Democrats simply wanted to avoid criticizing the then-Democratic presidential administration. But there is evidence to the contrary in a staff report on the 2014 detainer ordinance.¹⁸³ That staff report noted that the proposed anti-detainer ordinance would strengthen one passed in 2013, the prior year, which allowed compliance with detainers in cases where ICE provided documentation of violent crime.¹⁸⁴ That earlier ordinance, according to the 2014 staff report, was a “consequence” of public testimony

from various individuals, organizations, and immigrant advocates in King County who recounted instances where the county’s unrestricted honoring of detainees had resulted in distrust of local law enforcement, dislocation of families, the loss of jobs and housing, economic loss to families and the community, and harm to children. Further, many testified through public input and the submission of written testimony that there are costs to the community,

¹⁷⁹ King Cnty., Wash., Ordinance 17886 (Sept. 2, 2014).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See CCTV: Committee of the Whole (King County Council July 23, 2014), <https://king.granicus.com/player/clip/4859>; CCTV: Committee of the Whole (King County Council Aug. 20, 2014), <https://king.granicus.com/player/clip/4874>; CCTV: Metropolitan King County Council (King County Council Sept. 2, 2014), <https://king.granicus.com/player/clip/4885>.

¹⁸³ *Revised Staff Report on Ordinance 17886*, KING COUNTY (Aug. 20, 2014), <https://mkkclegisearch.kingcounty.gov/View.ashx?M=F&ID=3230080&GUID=226E07D7-97F7-4A95-B198-C9C517896F6F>.

¹⁸⁴ *Id.* (referring to King Cnty., Wash., Ordinance 17706 (Dec. 2, 2013)).

both in dollars and human suffering when families become broken and dependent when the family breadwinner is detained or deported. Individuals also testified that the threat of deportation for the immigrant community deters persons from reporting domestic violence or other types of witnessed crime. Further, many noted that children who are English-speaking United States citizens of an undocumented parent are uniquely vulnerable to the impacts of the exercise of federal detainers.¹⁸⁵

This passage describing the “human suffering” and other “costs” caused by deportations, among other things, makes very clear that the King County Council was well aware of the harms caused by federal policy and perfectly capable of articulating them when it chose to, even during the Obama administration. But a member of the public who attended the three legislative debates on the 2014 anti-detainer bill would have heard a very different story: one in which the county simply wanted to avoid liability and the expense of detaining people on the federal government’s behalf.

Councilmembers, too, showed their ability to criticize federal immigration policies. During the debate over the 2013 anti-detainer ordinance, the sponsor of that ordinance said, “I don’t see any value or important purpose in keep in jail 28 to 30 additional days folks who were picked up for some low-level misdemeanor or traffic infraction. . . . It becomes a civil-rights issue to me.”¹⁸⁶ And councilmember Jane Hague, who would preside over discussions of the 2014 bill,¹⁸⁷

announced her support for the ordinance at an assembly organized by Sound Alliance, a Tukwila-based faith and labor coalition, where the audience heard testimony from those affected by ICE deportations — young children separated from parents without warning, deportations following minor traffic violations and a woman who called to report domestic violence, only to be arrested and transferred to the Tacoma Northwest Detention Center.¹⁸⁸

But someone watching the legislative debates would never have known that family separations and other unjust deportation policies motivated the end of detainer compliance in Seattle.

¹⁸⁵ *Revised Staff Report on Ordinance 17886*, *supra* note 183, at 4.

¹⁸⁶ Lornet Turnbull, *County Council May Restrict Holds on Jailed Immigrants*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/county-council-may-restrict-holds-on-jailed-immigrants> (Apr. 12, 2013, 10:07 PM) (quoting council president Larry Gossett).

¹⁸⁷ CCTV: Committee of the Whole (King County Council Aug. 20, 2014), <https://king.granicus.com/player/clip/4874>.

¹⁸⁸ Rianna Hidalgo, *King County’ Proposal to Hold Only Violent Criminals, and Felons for Federal Immigration Authorities*, REAL CHANGE NEWS (June 19, 2013), <https://www.realchangenews.org/news/2013/06/19/king-county-proposal-hold-only-violent-criminals-and-felons-federal-immigration>.

In 2017, Seattle adopted a resolution that built on the earlier sanctuary policy, affirming that Seattle was a “Welcoming City.”¹⁸⁹ The text of this resolution was more assertive, expressing concerns about “racist hate speech toward immigrant and refugee communities, and anti-immigrant and anti-refugee policies proposed by the current Presidential Administration.”¹⁹⁰ But it didn’t actually do much. The resolution instructed city employees to defer to the county’s policy against compliance with detainees.¹⁹¹ But that was already how things worked: the city doesn’t maintain a jail, so if a city police officer decided to arrest a non-citizen with no more justification than a detainee, there would be nowhere to put them.¹⁹² The “Welcoming Cities” resolution was a reaffirmation of sanctuary but not an enactment of it. As such, it expressed some criticism—although notably only of the Administration’s “proposed” policies, not the numerous policies that had already, by 2017, been enacted.¹⁹³

The city of Seattle, too, has taken many pro-immigrant actions without mentioning any larger critique of federal policy.¹⁹⁴ Shortly after Trump’s election,

¹⁸⁹ Seattle, Wash., City Council Res. 31730 (Feb. 2, 2017) (enacted) (“affirming the City of Seattle as a Welcoming City”).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (“City employees will defer detainee requests from the U.S. Department of Homeland Security’s Immigration and Customs Enforcement (ICE) to King County. Because jails are in King County’s jurisdiction and enforcing civil federal immigration violations are in the purview of the U.S. Department of Homeland Security, City department directors are hereby directed to comply with the City’s practice to defer to King County on all ICE detainee requests. King County Ordinance 17886 passed in 2014 clarifies that the County will only honor ICE detainee requests that are accompanied by a criminal warrant issued by a federal judge or magistrate. Because City employees do not have legal authority to arrest or detain individuals for civil immigration violations, nor to execute administrative warrants related to civil immigration law violations, City of Seattle employees are hereby directed, unless provided with a criminal warrant issued by a federal judge or magistrate, to not detain or arrest any individual based upon an administrative or civil immigration warrant for a violation of federal civil immigration law, including administrative and civil immigration warrants entered in the National Crime Information Center database.”).

¹⁹² *Frequently Asked Questions About Local City-Level Immigration Policies*, CITY OF SEATTLE: OFF. OF IMMIGRANT & REFUGEE AFFS., <https://www.seattle.gov/iandaffairs/issues-and-policies/seattle-immigration-policy-faq> (last visited Apr. 15, 2024).

¹⁹³ Seattle, Wash., City Council Res. 31730.

¹⁹⁴ Seattle has passed several other resolutions and ordinances supporting immigrant communities without voicing any criticism of federal policy. *See* Seattle, Wash., Res. 30355 (July 10, 2001) (recognizing and asserting support for Seattle’s immigrant community, with no specific commitments or criticism of federal policy); Seattle, Wash., Res. 30796 (Oct. 3, 2005) (resolving to assess options to improve services to immigrant and refugee communities, with no criticism of federal policy); Seattle, Wash., Ordinance 121063 (Feb. 7, 2003) (barring inquiries into immigration status; not criticizing federal policies and asserting that “this ordinance is not intended to interfere with the enforcement of laws”); Seattle, Wash., Ordinance 123822 (Feb. 15, 2012) (creating an Office of Immigrant and Refugee Affairs and renaming the Immigrant and Refugee Advisory Board to the Seattle Immigrant and Refugee Commission; voicing no criticism

the city passed a resolution noting increases in “incidents of hate” against racial and ethnic groups, as well as an increase in calls to a hotline for trans people in crisis, and that “Ku Klux Klan members are reportedly engaged in ongoing recruitment activities and have recently held a public event celebrating President-elect Trump’s victory.”¹⁹⁵ The resolution further noted the city’s longstanding support for its immigrant communities and urged the president-elect to withdraw cabinet nominations of “individuals connected to advancing hate.”¹⁹⁶ It also called on President Trump “to publicly denounce recent incidents of Islamophobia, racism, sexism, homophobia, transphobia, xenophobia, and violence.”¹⁹⁷

But none of this actually says that federal immigration policy is unjust or even flawed. And in an FAQ currently visible on Seattle’s website,¹⁹⁸ the question “Why not be more cooperative with federal immigration agents?” is answered with “The City does not have jurisdiction over deportations.”¹⁹⁹ Similarly, when the mayor of Seattle defended its sanctuary policy to the *New York Times*, she said

that when she was the top federal prosecutor in the area, the office focused on fighting crime including human trafficking, gun violence and homegrown terrorism, suggesting that those were higher priorities than helping facilitate deportations. She said Seattle would continue to work with other local governments and federal officials on those issues.²⁰⁰

This sounds more like “we’re too busy” than “we resist.” Contrast that with the language used by Seattle City Councilmember Kshama Sawant to explain her proposal that Seattle pass legislation making it a “sanctuary city” for those seeking abortions after *Dobbs*:

Today we face the single biggest attack on women, queer and pregnant people, and reproductive rights in most of our lifetimes, and this right-wing Supreme Court has also given every indication that they plan to carry out draconian attacks on LGBTQ rights.²⁰¹

of federal policy).

¹⁹⁵ Seattle, Wash., Res. 31724 (Dec. 16, 2016) (“reaffirming Seattle’s values of inclusion, respect, and justice, and the City’s commitment toward actions to reinforce these values”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Admittedly, the city of Seattle and King County are different municipal entities.

¹⁹⁹ Off. of Immigrant & Refugee Affs., *supra* note 192.

²⁰⁰ Katie Benner, *Justice Dept. Sues over Sanctuary Laws in California, N.J. and Seattle*, N.Y. TIMES (Feb. 10, 2020), <https://www.nytimes.com/2020/02/10/us/politics/justice-department-sanctuary-law.html>.

²⁰¹ Sarah Grace Taylor, *Council Member Seeks to Make Seattle an Abortion Sanctuary City*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/politics/councilmember-seeks-to-make-seattle-an-abortion-sanctuary-city> (June 26, 2022, 1:04 PM).

This is the language of resistance, with the protagonist identified as “we,” the challenge being the attack on the rights of women, queer, and pregnant people, and the antagonist being the Supreme Court. So resistance rhetoric was on legislators’ minds but didn’t make it into the policy itself.

4. *Chicago 2012*

Conspicuous avoidance of resistance rhetoric can also be found in Chicago’s “Welcoming City Ordinance,” which in its original form declined cooperation with immigration detainees except in cases of criminal warrants, felony convictions, or pending felony charges.²⁰² The ordinance contains a statement of its purpose and intent, and nowhere does that statement mention federal policies, much less resistance to them.²⁰³

Instead, it invokes “the City’s limited resources; the complexity of immigration laws; [and] the clear need to foster the trust of and cooperation from the public, including members of our immigrant communities.”²⁰⁴ And the phrase “Welcoming City” seems carefully designed to avoid the use of the term “sanctuary,” which appears nowhere in the legislation.

At the time the ordinance was adopted in 2012, a press release from Mayor Rahm Emanuel’s office stressed “efforts to make Chicago the most immigrant-friendly city in the country.”²⁰⁵ Representative Luis Gutierrez said, “enlisting police

²⁰² The ordinance was first passed in 2012. See Chi., Ill., CODE ch. 2-173 (2012).

²⁰³ The “purpose and intent” section was part of the original 2012 ordinance and has not been modified since. It states:

The vitality of the City of Chicago (the “City”), one of the most ethnically, racially and religiously diverse cities in the world, where one-out-of-five of the City’s residents is an immigrant, has been built on the strength of its immigrant communities. The City Council finds that the cooperation of all persons, both documented citizens and those without documentation status, is essential to achieve the City’s goals of protecting life and property, preventing crime and resolving problems. The City Council further finds that assistance from a person, whether documented or not, who is a victim of, or a witness to, a crime is important to promoting the safety of all its residents. The cooperation of the City’s immigrant communities is essential to prevent and solve crimes and maintain public order, safety and security in the entire City. One of the City’s most important goals is to enhance the City’s relationship with the immigrant communities.

Due to the City’s limited resources; the complexity of immigration laws; the clear need to foster the trust of and cooperation from the public, including members of our immigrant communities; and to effectuate the City’s goals, the City Council finds that there is a need to clarify the communications and enforcement relationship between the City and the federal government. The purpose of this chapter is to establish the City’s procedures concerning immigration status and enforcement of federal civil immigration laws.

§ 2-173-005.

²⁰⁴ *Id.*

²⁰⁵ Press Release, Off. of the Mayor, City of Chi., Ill., *Mayor Emanuel Introduces Welcoming City Ordinance* (July 10, 2012), https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2012/july_2012/mayor_emanuel_introduceswelcomingcityordinance.html.

and local governments in enforcing federal civil law undermines public safety, wastes precious and scarce law enforcement resources, and weakens the bonds of trust between police and the communities they serve and protect.”²⁰⁶ This rhetoric stresses local benefits, not federal injustices.

Only in passing did the press release say that the ordinance would “prevent law abiding Chicagoans from being unfairly detained and deported.”²⁰⁷ This might be an indirect criticism of federal policies—does it dare to imply that in the absence of a welcoming-city ordinance, “law-abiding Chicagoans” could be unfairly deported? Towards the end, the press release quotes the head of an advocacy group saying the city “depends on the vibrancy and economic stability that the immigrant community brings to the city,” and deep in the middle of the long sentence that follows, one finds an oblique reference to unjust enforcement:

Making sure that our city’s law enforcement resources are focused on serious crimes that harm immigrants and natives alike, and that immigrants and their families are not subjected to racial profiling, will strengthen the relationship between Chicago Police and immigrant communities and make our entire city safer.²⁰⁸

The reference to “racial profiling” is all but buried, and the reader has to guess who might be conducting the profiling in question and whether the mayor, whose press release this is, agrees with the advocate whose quote was allowed into the press release. Federal injustice is subtext, not text.

5. *Atlanta 2017*

Santa Clara, Seattle, and Chicago offer narratives in which the protagonist is the city, but the challenge or conflict is not injustice, and therefore the goal is not justice. Rather, the goal is efficient local government that maximizes the use of resources, or the goal is the need to ensure public safety and the threat is that local enforcement of immigration law makes witnesses unlikely to come forward, or the goal is economic prosperity.

Some cities criticize federal executive actions but not federal statutes. In 2017, Atlanta passed a resolution that dares to criticize federal policy—but focuses almost exclusively on the rescission of DACA.²⁰⁹ “[W]hile DACA can never take the place of comprehensive immigration reform,” the resolution says, “it provides an important stop-gap measure for supporting a rising generation of diverse young people who love this country and are faithfully working to improve it.”²¹⁰ The resolution does indicate some awareness of harsh immigration practices: “[T]he end of

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* (quoting Lawrence Benito, CEO, Ill. Coal. for Immigrant & Refugee Rts.).

²⁰⁹ Atlanta, Ga., Res. 17-R-4256 (Sept. 5, 2017).

²¹⁰ *Id.*

DACA will result in over 800,000 people nationally and 28,000 in Georgia, many of whom are immigrant youth, becoming vulnerable to aggressive raids, deadly detention centers and life-altering deportations that already affect immigrants not benefiting from the program.”²¹¹ So why doesn’t the resolution criticize the federal government for subjecting other noncitizens to those raids, detention centers, and deportations? And what does DACA have to do with the resolution’s substance, which is its refusal to honor detainees? One of the requirements for DACA is that applicants “[h]ave not been convicted of a felony, significant misdemeanor . . . or 3 or more other misdemeanors,”²¹² so most DACA beneficiaries will never be the subject of a detainee. DACA seems to stand in here for the broader injustices of Trump immigration policies, as if the resolution were shying away from expressing the true scale of those injustices.

Moreover, criticizing the rescission of DACA—as other sanctuary resolutions do—is criticizing only a small part of what’s wrong with the U.S. immigration system. It’s a criticism directed only at executive action, not at the immigration statutes that the executive implements. And it does nothing to question the fundamental legitimacy of closed borders. Contrary to the narrative that sanctuaries are lawless, the criticism in resolutions like Atlanta’s seems designed to avoid even questioning the policy merits of U.S. immigration statutes, much less their legitimacy.

6. *New York 2014*

Narrow, limited condemnations of federal injustices, like Atlanta’s, are not the only approach municipalities take. There’s little question that resistance really does drive sanctuary policies, and some sanctuary policies reflect this. New York City Council Speaker Melissa Mark-Viverito explained her support for two sanctuary bills by saying:

We are a city that respects the constitutional rights and dignity of all our residents. We also have no reason to expend scarce resources assisting in enforcing broken immigration laws. These bills are simple, they’re about keeping hard-working families united, they’re about keeping New Yorkers safe and secure and they’re about simple fairness.

If obstructionists in Congress insist on delaying any federal action on fair and just immigration reform, it falls to municipal governments to pick up the slack; that’s what we’ve been doing here in New York City and it’s what we continue to do today with these two bills.²¹³

²¹¹ *Id.*

²¹² *Consideration of Deferred Action for Childhood Arrivals (DACA): Guidelines*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/DACA> (Apr. 8, 2024).

²¹³ Transcript at 40, N.Y.C. City Council Stated Meeting (Oct. 22, 2014) (discussing Proposed Introductory Bill Nos. 486-A & 487-A (codified as N.Y.C. Local Laws 58 & 59 (2014))).

The language about cities having “no reason to expend scarce resources assisting in enforcing broken immigration laws” nicely combines a minding-our-business narrative with a resistance narrative: federal law is broken, and it’s not localities’ business to help enforce them. Both ideas are certainly true.

The committee report on the same bill further connected New York’s experience to the injustice of federal immigration policies, saying that federal actions “have resulted in the deportation of countless New Yorkers who pose no threat to public safety, many of whom have lived in the City for years, built families, work and pay taxes.”²¹⁴ This language not only directly calls out the senseless harm of federal deportations but also announces that noncitizens facing deportation are valued members of the community. Calling them “New Yorkers” is deeply meaningful here, because doing so flies in the face of the moral view that grounds federal deportation: the idea that noncitizens in general and the undocumented in particular are not part of “our” communities. If undocumented people in New York are New Yorkers, then deporting them is necessarily questionable as a matter of justice. So why don’t more sanctuaries say so?

B. Do Minding-Our-Business Narratives Protect Against Federal Retaliation?

Perhaps the most obvious reason why sanctuaries might shy away from resistance narratives is to avoid antagonizing the federal government. But, as Pratheepan Gulasekaram, Rick Su, and Rose Cuison Villazor observed, “[F]ederal attempts to shut down sanctuary cities have largely been ineffective, as they have either lacked congressional support or been rejected by federal and state courts.”²¹⁵ When the Trump administration attacked sanctuary cities, through the courts and otherwise, its attacks did not rest on the rhetoric used by sanctuaries and revealed little reason to think resistance rhetoric would make a difference.

The Trump administration’s Department of Justice sued California in an attempt to enjoin the California Values Act, which, as described above, limits law enforcement’s “discretion to cooperate with immigration authorities.”²¹⁶ The Act prohibits state and local law enforcement from “[i]nquiring into an individual’s immigration status”; “[d]etaining an individual on the basis of a hold request”; “[p]roviding information regarding a person’s release date or” other “personal information, . . . [such as] the individual’s home address or work address”; and “[a]ssisting immigration authorities” in certain activities.²¹⁷ Agencies can “[t]ransfer an individual to immigration authorities [if] authorized by a judicial warrant or judicial

²¹⁴ GOV’T AFFS. DIV., N.Y.C. CITY COUNCIL, REP. TO COMM. ON IMMIGR. ON PROPOSED INTRODUCTORY BILL NOS. 486-A & 487-A, at 3 (Oct. 20, 2014).

²¹⁵ Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 842 (2019).

²¹⁶ CAL. GOV’T CODE § 7282.5(a).

²¹⁷ *Id.* § 7284.6(a)(1).

probable cause determination,” or if the person has been convicted of certain specific crimes.²¹⁸ And sharing personal information is allowed “if the individual has been convicted of an enumerated crime, or if the information is available to the public.”²¹⁹

Trump’s DOJ argued that the Values Act was preempted by federal law.²²⁰ The court applied a familiar preemption analysis, focusing on conflict preemption, under which state laws are preempted if they conflict with federal law in the sense of either making compliance with both laws impossible (impossibility preemption) or where the challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (obstacle preemption).²²¹

DOJ argued that California’s law conflicts with 8 U.S.C. § 1373, which provides that “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [DHS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”²²² In fact, as the Ninth Circuit observed, the Values Act does not conflict with this provision, because it “expressly *permits* the sharing of such information, and so does not appear to conflict with § 1373.”²²³ A carveout in the Values Act says, “This section does not prohibit or restrict any government entity or official from sending to, or receiving from, federal immigration authorities, information *regarding the citizenship or immigration status*, lawful or unlawful, of an individual . . . pursuant to Section[] 1373.”²²⁴ The Values Act does prohibit sharing *other* information about noncitizens, including personal information and release dates, but Section 1373 doesn’t cover that information.²²⁵

And California’s statute did not conflict with any other immigration-enforcement provisions in federal law because “the various statutory provisions to which the United States points direct *federal* activities, not those of state or local governments.”²²⁶ Nor did California’s statute present an obstacle because “refusing to help is not the same as impeding.”²²⁷

²¹⁸ *Id.* § 7284.6(a)(4).

²¹⁹ *United States v. California*, 921 F.3d 865, 876 (9th Cir. 2019); §§ 7282.5(a), 7284.6(a)(1)(C)–(D).

²²⁰ Brief for Appellant at 2, *United States v. California*, 921 F.3d 865 (9th Cir. 2019) (No. 18-16496).

²²¹ *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see United States v. California*, 921 F.3d 865, 878–81 (9th Cir. 2019).

²²² 8 U.S.C. § 1373(a).

²²³ *United States v. California*, 921 F.3d at 891.

²²⁴ GOV’T § 7284.6(e) (emphases added).

²²⁵ *United States v. California*, 921 F.3d at 892 (citing 18 U.S.C. § 1373(a)–(c)).

²²⁶ *Id.* at 887.

²²⁷ *Id.* at 888.

Would it have made a difference if California's law had been accompanied by resistance rhetoric? It's hard to see how; in none of the legal analysis described above did the intentions of California's legislature play any role. Preemption analysis focuses on the intent of Congress, not the intent of the state or locality; thus, the inquiry is "informed by examining the federal statute as a whole and identifying its purpose and intended effects."²²⁸

And in fact there was some resistance rhetoric in the California law's legislative history. The Senate report on the bill says this:

The President's Executive Orders and the accompanying Department of Homeland Security memorandums outline a mass deportation strategy that will encompass a broad category of immigrants. These documents describe the federal government's plan to use local law enforcement as 'force multipliers' of immigration agents, relying heavily on police to help them deport the greatest number of people possible. Aggressive federal immigration enforcement strategies are already underway. ICE arrests in courthouses and outside of schools are alarming new trends that have had chilling effects in the immigrant community. Under the Trump administration, deportations have increased 40 percent, including 10,800 non-criminals whose only violation was to enter the country.

When local police enforce immigration laws, they rapidly lose the trust of the undocumented community. Crimes go unreported for fear of deportation. The perpetrators roam free to strike again. Our communities become less – not more – safe.²²⁹

This narrative contains elements of resistance, although they seem to evaporate as it goes along. It begins with an account of a "mass deportation strategy" and "chilling effects" in the immigrant community. The language clearly implies excessive enforcement (the word "mass"), and enforcement tactics are described as "alarming." But the memo quickly connects this back to traditional local and state concerns: ensuring cooperative witnesses among immigrant communities. Federal injustice is noted but made relevant to local goals—public safety—that are not directly related to justice for noncitizens. Still, the implication that federal enforcement strategies are unjust is fairly clear—and nothing suggests this played a role in the courts' preemption analyses.

Even if resistance rhetoric doesn't help the federal government prove preemption, it might increase the danger that an anti-sanctuary federal government might deny federal grant funding. Candidate Trump promised to "cancel all federal

²²⁸ *Id.* at 879 (quoting *United States v. Arizona*, 641 F.3d 339, 345 (9th Cir. 2011), *aff'd in part, rev'd in part*, 567 U.S. 387 (2012)).

²²⁹ KEVIN DE LEÓN, S. RULES COMM., OFF. OF S. FLOOR ANALYSES, S.B. 54, 2017-2018 REGULAR SESS., at 6–7 (Cal. 2017).

funding to Sanctuary Cities.”²³⁰ Once in office, Trump issued an executive order directing the Attorney General and the Department of Homeland Security to ensure that sanctuary jurisdictions are not eligible to receive federal grants except as deemed necessary for law enforcement purposes.²³¹ But courts enjoined that executive order, finding that Trump violated the separation of powers by trying to deny funding without congressional authorization.²³²

Trump’s administration then attempted to impose anti-sanctuary conditions on municipalities’ receipt of funding under the Edward Byrne Memorial Justice Assistance Grant Program, known as “Byrne JAG,”²³³ a significant source of funding for local law enforcement that disburses more than \$80 million per year.²³⁴ Those conditions included one that required advance notice to federal authorities of the release date of noncitizens in state or local custody and one that required federal agents be allowed into jails and prisons to meet with noncitizens.²³⁵ A third condition required jurisdictions to certify that their laws and policies comply with 8 U.S.C. § 1373.²³⁶

The legal question these conditions present is whether they comply with the requirement that Congress “speak unambiguously in imposing conditions on federal grant money.”²³⁷ Courts divided on the lawfulness of these requirements.²³⁸

²³⁰ See Amita Kelly & Barbara Sprunt, *Here Is What Donald Trump Wants to Do in His First 100 Days*, NPR (Nov. 9, 2016, 3:45 PM), <https://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days>.

²³¹ Exec. Order No. 13,768, 82 Fed. Reg. 8799 § 9(a) (Jan. 25, 2017).

²³² See *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018) (vacating nationwide injunction but upholding injunction as to California).

²³³ See 34 U.S.C. §§ 10151–59; *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753, 757 (9th Cir. 2020).

²³⁴ See *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, DEP’T OF JUST.: BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/program/jag/overview> (Oct. 16, 2023) (describing Byrne JAG as “the leading source of federal justice funding to state and local jurisdictions”); see also *San Francisco v. Barr*, 965 F.3d at 758.

²³⁵ See *City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018).

²³⁶ *San Francisco v. Barr*, 965 F.3d at 758.

²³⁷ *New York v. U.S. Dep’t of Just.*, 951 F.3d 84, 109 (2d Cir. 2020).

²³⁸ Compare *id.* at 102, 123 (upholding the conditions), with *San Francisco v. Barr*, 965 F.3d at 761 (finding that sanctuary laws do not prevent compliance with § 1373 so DOJ cannot withhold funding pursuant to the conditions).

The First, Third, Seventh, and Ninth Circuits found that the DOJ lacked the authority to add the conditions without Congressional authorization,²³⁹ while the Second Circuit upheld the conditions.²⁴⁰

The reasoning of these decisions did not seem influenced by any considerations related to the states' or localities' intent, much less whether resistance was a factor. The Ninth Circuit, for example, found that the administration lacked the statutory authority to impose the conditions requiring notice of release and access to jails.²⁴¹ The question was congressional authorization of the grant conditions, not whether the states or localities had complied with them.

As for the conditions requiring certification of compliance with § 1373, the Ninth Circuit found that sanctuary laws in California (including state and various cities' laws) did in fact comply with that statute.²⁴² The Byrne statute requires applicants to certify that "the applicant will comply with all provisions of this part and all other applicable Federal laws,"²⁴³ and the court held that even if § 1373 was an "applicable Federal law," nothing in the sanctuary statutes conflicted with it.²⁴⁴ Section 1373 only relates to "information strictly pertaining to immigration status (i.e. what one's immigration status is)," not other information like release dates.²⁴⁵

The Second Circuit upheld DOJ's authority to impose the conditions, but in its original panel decision and the five separate opinions prompted by a call for en banc review, none of the judges seemed interested in the sanctuaries' rhetoric.²⁴⁶ "At its core," wrote Judge Raggi for the conservative panel, "this appeal presents questions of statutory construction."²⁴⁷ The statute in question was the federal statute authorizing the Byrne JAG program; its interpretation did not depend on questions of state or local legislative intent.²⁴⁸

In sum, litigation so far has not revealed reasons why a sanctuary would need to avoid resistance rhetoric to protect its policies from legal challenge by the

²³⁹ See *San Francisco v. Barr*, 965 F.3d at 761; *City of Chicago v. Barr*, 961 F.3d 882, 931 (7th Cir. 2020); *City of Providence v. Barr*, 954 F.3d 23, 45 (1st Cir. 2020); *City of Philadelphia v. Att'y Gen.*, 916 F.3d 276, 286 (3d Cir. 2019); see also *City of Los Angeles v. Barr*, 941 F.3d 931, 934 (9th Cir. 2019).

²⁴⁰ See *New York v. U.S. Dep't of Just.*, 951 F.3d at 124 (upholding the conditions).

²⁴¹ *San Francisco v. Barr*, 965 F.3d at 766.

²⁴² See *id.*

²⁴³ 34 U.S.C. § 10153(a)(5)(D).

²⁴⁴ *San Francisco v. Barr*, 965 F.3d at 766.

²⁴⁵ *Id.* at 762 (quoting *United States v. California*, 921 F.3d 865, 891 (9th Cir. 2019)) (internal quotation marks omitted).

²⁴⁶ See *New York v. U.S. Dep't of Just.*, 951 F.3d 84, 123 (2d Cir.) (upholding the conditions).

²⁴⁷ *Id.* at 90.

²⁴⁸ *Id.* at 92, 103 (discussing 34 U.S.C. §§ 10151–10158).

federal government. But that doesn't mean there are no such reasons. Other legal questions might present themselves under a future anti-sanctuary administration.²⁴⁹

And there is always the possibility of federal retaliation outside the court system. Trump officials infamously proposed transporting immigrants detained at the border by bus to sanctuary cities, apparently on the assumption that people in the sanctuary cities would see the arrival of immigrants as punishment.²⁵⁰ ICE's legal department rejected the idea,²⁵¹ but it spoke to the administration's desire to punish sanctuaries (as well as a worldview so distorted by bigotry that the mere presence of immigrants could be perceived as a harm). And anti-immigrant red-state governors would later implement this plan.²⁵²

The Trump administration also openly targeted sanctuary cities for ICE raids.²⁵³ It targeted them, too, for heightened surveillance, deploying hundreds of officers in unmarked cars to patrol sanctuary cities as part of an "enhanced arrest campaign."²⁵⁴ A federal judge in Austin reported that an ICE agent had briefed them on upcoming raids, saying that the raids were a result of the new sanctuary policy.²⁵⁵ Businesses in sanctuary jurisdictions were targeted for I-9 audits.²⁵⁶ And when New York State allowed undocumented people to obtain driver's licenses and restricted ICE's access to motor-vehicle databases, the federal government tried to

²⁴⁹ See, e.g., Ian Millhiser, *The GOP's Unconstitutional Plan to Conscript Local Police into Trump's Deportation Squads*, THINKPROGRESS (Dec. 4, 2016, 5:28 PM), <https://archive.thinkprogress.org/the-gops-unconstitutional-plan-to-conscript-local-police-into-trump-s-deportation-squads-18c782f1fafc/>.

²⁵⁰ Rachael Bade & Nick Miroff, *White House Proposed Releasing Immigrant Detainees in Sanctuary Cities, Targeting Political Foes*, WASH. POST, (Apr. 11, 2019, 11:55 PM), https://www.washingtonpost.com/immigration/white-house-proposed-releasing-immigrant-detainees-in-sanctuary-cities-targeting-political-foes/2019/04/11/72839bc8-5c68-11e9-9625-01d48d50ef75_story.html.

²⁵¹ See *id.*

²⁵² See, e.g., Kristina Cooke, Ted Hesson & Mica Rosenberg, *The Toll on Migrants of a Free Bus North from the Border*, REUTERS (Jan. 11, 2024, 11:00 AM), <https://www.reuters.com/investigates/special-report/migration-usa-bus>.

²⁵³ See Nick Miroff & Devlin Barrett, *ICE Preparing Targeted Arrests in 'Sanctuary Cities,' Amplifying President's Campaign Theme*, WASH. POST (Sept. 29, 2020, 6:37 PM), https://www.washingtonpost.com/immigration/trump-ice-raids-sanctuary-cities/2020/09/29/99aa17f0-0274-11eb-8879-7663b816bfa5_story.html.

²⁵⁴ See Caitlin Dickerson, Zolan Kanno-Youngs & Annie Correal, *'Flood the Streets': ICE Targets Sanctuary Cities with Increased Surveillance*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/05/us/ICE-BORTAC-sanctuary-cities.html>.

²⁵⁵ Lyanne A. Guarecuco, *Federal Judge: ICE Conducted Austin Raids in Retaliation Against Sheriff's New Policy*, TEX. OBSERVER, (Mar. 20, 2017, 5:56 PM), <https://www.texasobserver.org/federal-judge-ice-conducted-austin-raids-in-retaliation-against-sheriffs-new-policy>.

²⁵⁶ Walter Ewing, *ICE Targets 'Sanctuary' Jurisdictions in Worksite Investigations*, IMMIGR. IMPACT (July 25, 2018), <http://immigrationimpact.com/2018/07/25/ice-sanctuary-worksite-investigations>.

punish the state by barring New Yorkers from enrolling in programs that allow travelers to speed through airport lines and borders.²⁵⁷

So there's little question that the threat of federal retaliation was very real under Trump, and could be again in the future. But there's also little reason to think that restrained rhetoric in sanctuary policies would help protect against such retaliation. The raids and other forms of retaliation were focused on jurisdictions that failed to give the administration the information or access to prisoners that it wanted. If sanctuaries avoided resistance rhetoric to avoid federal retaliation, it didn't work.

It's understandable that sanctuaries would err on the side of caution and avoid resistance rhetoric in light of the federal government's power and its often arbitrary and forceful response to uncooperative states and localities. But there doesn't seem to be any clear benefit to avoiding resistance rhetoric. And, as the final Part argues, there are good reasons not to avoid speaking up.

III. AVOIDING JUSTICE

No one likes a difficult conversation,²⁵⁸ and conversations about injustice are often difficult. The minding-our-own-business narrative created by some sanctuary jurisdictions is a way to avoid difficult conversations about the injustice of federal immigration policies. But that's a necessary conversation if those injustices are to be overcome.

Robin West has argued that there is a long tradition among lawyers, judges, and law professors of avoiding questions about justice.²⁵⁹ The tradition dates at least from Oliver Wendell Holmes, who wrote to a friend, "I have said to my brethren many times that I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms."²⁶⁰ Later

²⁵⁷ Jesse McKinley, Zolan Kanno-Youngs & Annie Correal, *'Extortion': N.Y. Assails Trump Administration Over Traveler Programs*, N.Y. TIMES, <https://www.nytimes.com/2020/02/06/nyregion/green-light-law-global-entry.html> (Feb. 12, 2020); see also Hamed Aleaziz, *New York's Governor Says a Leaked DHS Memo on Immigrant Driving Records Is a "Smoking Gun"*, BUZZFEED NEWS, (Feb. 11, 2020, 9:44 AM), <https://www.buzzfeednews.com/article/hamedaleaziz/new-york-governor-cuomo-dhs-memo-immigrant-licenses>.

²⁵⁸ See DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* xxvii–xxxiii (10th Anniversary ed. 2010).

²⁵⁹ See ROBIN WEST, *NORMATIVE JURISPRUDENCE* 184–86 (2011); ROBIN WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 61–82 (2014) [hereinafter WEST, *TEACHING LAW*].

²⁶⁰ Michael Herz, Essay, *"Do Justice!": Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 113 (1996) (quoting Letter from Oliver Wendell Holmes to John C.H. Wu (July 1, 1929), T'EN HSIA MONTHLY (Oct. 1935), reprinted in JUSTICE HOLMES TO DOCTOR WU: AN INTIMATE CORRESPONDENCE, 1921–1932, at 53 (1947)) (discussing the reliability of sources for this and other anti-justice Holmes quotes).

movements in legal scholarship eschewed justice in favor of concepts like economic efficiency.²⁶¹ And law schools today often teach legal reasoning without any sustained or rigorous study of what makes laws just or unjust.²⁶² Among the results of this tradition, West writes, is that the legal profession and legal scholars lack a sustained account of how law achieves, or fails to achieve, justice.²⁶³

If this Article has been correct, justice is missing from public discourse as well, even in places where we might think it most likely to be found. Immigration sanctuaries, both praised and condemned as bastions of resistance, in fact sometimes find ways to avoid talking about the justice or injustice of the government policies they aim, or pretend not to aim, to undermine.

There are several problems with the minding-our-business narratives that some sanctuaries tell. I'll point to five of them.

The first reason is perhaps the simplest expressivist critique possible: when there is injustice, it's better to condemn it than to stay silent. I won't try to develop an argument here that contemporary immigration law is unjust, but it is.²⁶⁴ Minding-our-business rhetoric promotes a false sense of normality and legitimacy, if only because it suggests that things have not yet gotten so bad that local governments must speak up.

Second, the minding-our-business narrative is misleading because the justice or injustice of federal immigration policies *is* the business of state and local government. Arbitrary and unjust immigration policies affect everything about the way states and localities govern and pursue their policy goals. For example, the appropriate sphere of local government includes crime control, and if effective crime control depends on noncitizens feeling comfortable trusting law enforcement officers, then prohibiting local law enforcement from inquiring into immigration status is helpful but hardly sufficient. Many people don't make strong distinctions between branches of law enforcement; they may not be able to distinguish local police from federal agents.²⁶⁵ And they may not trust the assurances they get from local police even when they do identify them. For immigrants to trust law enforcement, law enforcement generally will have to be trustworthy, and ICE crackdowns make that impossible. No one—not immigrants or anyone else—can trust the federal government unless it is minimally just. Unjust federal immigration policies diminish trust in government generally, and so they interfere with local governments' ability to

²⁶¹ See, e.g., Stephen E. Margolis, *Two Definitions of Efficiency in Law and Economics*, 16 J. LEGAL STUD. 471, 472 (1987).

²⁶² See WEST, TEACHING LAW, *supra* note 259, at 61–82.

²⁶³ *Id.* at 191.

²⁶⁴ See, e.g., Daniel I. Morales, Commentary, *Dissent in Immigration*, 16 LAW, CULTURE, & HUMANS. 250 (2017).

²⁶⁵ I can attest to this from several years' work with Albany's civilian police review board, which routinely receives complaints about the behavior of law enforcement officers from other jurisdictions.

effectively promote public safety. Criticizing federal injustice *is* minding localities' business.

Third, minding-our-business narratives allow localities to remain neutral on some of the urgent moral questions posed by the injustice of federal immigration policies. Resistance can be targeted at specific policies or at more fundamental laws. The onset of the Biden administration prompted relief from some of Trump's senseless brutality and open bigotry, but the U.S. immigration system remains brutal and profoundly shaped by bigotry. Giving voice to resistance forces one to take a position on what one is resisting: is it the now-past atrocities of the Trump administration, or the deeper injustices that structure the U.S. immigration system? Unless one takes a position on this, one leaves open the possibility that resistance isn't needed after Trump.

This isn't just an expressivist argument. Beyond the moral importance of speaking up against injustice, it's also important to send a message to the federal government that injustice has a cost. The more unjust the government policies are, the more people will decline to comply. Admittedly, most people understood sanctuaries to be driven by resistance, even if sanctuaries themselves were sometimes unwilling to say so. But avoiding resistance talk leaves it unclear whether sanctuaries are resisting Trump or the broader injustices of immigration law. If federal policymakers understand sanctuary as merely resistance to Trump, then sanctuary will deter only Trumpian excesses, not the more fundamental wrongs inherent in the system. To be effective in communicating the costs of injustice to the federal government, sanctuaries need to make clear what triggers their resistance.

Fourth, the premise of minding-our-business narratives is exclusionary. If federal immigration injustices aren't "our" business, then the "our" must not include the noncitizens who suffer from those injustices. If all that troubles "us" about immigration injustices is the way they affect "our" ability to police "our" neighborhoods or "our" economic prosperity, then "we" do not include the undocumented. I argued in an earlier article that sanctuaries in fact often exclude the undocumented in their rhetoric;²⁶⁶ minding-our-business narratives, premised as they are on an exclusionary conception of "us," suffer the same problem.

Fifth and finally, another fairly straightforward expressivist argument: the minding-our-business narrative is troubling because it suggests that injustices aren't localities' business. But injustice is everyone's business, even if it doesn't affect them directly. Injustices affecting members of a community are the business of the local and state governments that represent that community. Noncitizens, including the undocumented, live in the communities governed by sanctuary jurisdictions and form vital parts of those communities. Remember that in narratives, protagonists'

²⁶⁶ Ayers, *supra* note 26.

goals tell us something about their value systems. If protecting members of the community against injustice isn't part of state and local governments' value system, they don't deserve the trust that government depends on.

To be sure, it might be argued that local and state governments' role does not include speaking up against perceived injustices committed by the federal government as it exercises its authority in strongly federal areas like immigration and alienage law. Local and state governments have a place in the system, and criticizing how the federal government does its job steps outside that place.

This argument might make sense as a matter of constitutional law and the actions state and local governments take, but nothing in the structure of federalism says state and local governments shouldn't speak up when the federal government acts unjustly. As Farbman's study of resistance to the Fugitive Slave Act shows, local and state governments can be an important check against federal injustice.²⁶⁷

None of this is to say that state and local governments should avoid resistance narratives if doing so helps them protect noncitizens against deportation. But, as explained above, there are reasons to be skeptical that minding-our-business narratives actually stave off preemption or federal retaliation. Unless keeping silent helps protect noncitizens, local and state governments that adopt sanctuary policies should say what's on their minds.

In the wake of *Dobbs* and the transphobic legislation that is sweeping the country, we're going to need both sanctuary policies that are effective and strong and clear voices that help crystallize, express, and spread resistance. If Trump returns to power after the 2024 election, we'll need them even more. When states and localities announce sanctuary policies, they should condemn the injustices they see.

²⁶⁷ Farbman, *supra* note 46.