

WHITE PAPER

BOSTON'S SANCTUARY CITY PROTECTIONS: A Philosophical Perspective

By Serena Parekh and Martha F. Davis

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Introduction

On January 25, 2017, President Donald Trump signed an Executive Order purporting to deny federal funding to “sanctuary cities,” i.e., local jurisdictions that choose not to cooperate with federal efforts to enforce immigration restrictions.² That same day, Boston’s Mayor Marty Walsh held a press conference at City Hall. Proclaiming that “[w]e are a city and a nation built on immigrant contributions,” Walsh underscored the importance of residents’ safety to building a community’s resilience and strength. He asserted that Boston would not expend police resources to support “misguided federal actions.”³ As legal authority, the Mayor and other city officials cited Boston’s Trust Act, passed unanimously by the City Council and signed by Mayor Walsh in 2014, which prohibits Boston police from detaining anyone based on their immigration status absent a criminal warrant.⁴

¹ Professor Serena Parekh (Philosophy) and Professor Martha F. Davis (Law) are members of the Northeastern University faculty. This White Paper was prepared with the support of a seed grant from the Northeastern University Global Resilience Institute, for which we are grateful. The authors thank Mitchell Kosht for preparing the comparison chart below and for his significant research assistance. Thanks are also due to Anna Annino, Maxwell Dismukes, Gary Howell-Walton, and Elizabeth Ennen for their contributions to this paper, and to participants in the December 2017 Sanctuary Cities Workshop at Northeastern University, who offered many insightful comments in the issues addressed in the White Paper. The other members of the seed grant project have offered insights and support; they are Carlos Cuevas, Berna Turam, Betul Eksi, Alissa Lincoln, and Amy Farrell. Professor Parekh is an affiliate of, and Professor Davis is co-director of, Northeastern Law School’s Program on Human Rights and the Global Economy. The views expressed here are solely attributable to the authors.

² Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 27, 2017). The relevant provision, § 9(a) reads: “the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.” *Id.* at 8801. The statutory provision referenced, 8 U.S.C. § 1373, 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, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” 8 U.S.C. § 1373 (2017).

³ Martin Walsh, *Full Speech on Immigration Orders, Sanctuary Cities*, JAMAICA PLAIN NEWS (Jan. 25, 2017) <http://www.jamaicaplainnews.com/2017/01/25/read-mayor-walshs-full-speech-on-immigration-orders-sanctuary-cities/23180>

⁴ Boston Trust Act, BOS., MASS. MUN. CODE ch. 11-1.9 (2014).

The legal issues raised by the Administration’s Executive Order targeting sanctuary cities are being addressed in six federal lawsuits pending in courts around the country.⁵ Constitutional concerns raised to date include assertions that the Executive Order violates both the doctrine of separation of powers and principles of anti-commandeering by enlisting local government actors in implementing federal policies.

Rather than re-brief the issues before the courts, this White Paper examines this controversy through the lens of philosophy, drawing on principles of human rights to consider what is at stake when the federal government seeks to confront and dismantle “safe communities.” To ground the discussion, we focus our analysis on Boston’s self-identified status as a sanctuary city. Notably, sanctuary city is not a legally defined term, but simply denotes a community that seeks to provide some sense of safety, or sanctuary, to otherwise law abiding undocumented immigrant residents.⁶ The terms “safe communities” and “cities of refuge” are also used to refer to such local jurisdictions.⁷

This White Paper proceeds in four parts. First, following this introduction, we set out the underlying principles of federalism relevant to this controversy. Second, we review Boston’s Sanctuary City policy, comparing its provisions to other sanctuary proposals, including a proposed Massachusetts state law. Third, grounded in philosophy, we examine why non-citizen residents within a territory have rights and the scope of those rights. Finally, we conclude that these philosophical and legal perspectives point in the same direction, indicating that safe community policies are necessary components of a legitimate State and should be strengthened.

⁵ Much of the legal fight has centered in four related cases heard by Judge William H. Orrick in the Northern District of California: *City of San Francisco v. Sessions et. al.*, 3:17-cv-00485 (N.D. Cal. filed Jan. 31, 2017); *Cty. of Santa Clara v. Trump et. al.*, 3:17-cv-00574 (N.D. Cal. filed Feb. 3, 2017); *Cty. of Richmond v Trump et. al.*, 3:17-cv-01535 (N.D. Cal. filed Mar. 21, 2017); *Cal. v. Sessions et al.*, 3:17-cv-04701 (N.D. Cal. filed Aug. 14, 2017). On April 25th, 2017, Judge Orrick issued a nationwide preliminary injunction against the enforcement of §9(a) on five separate constitutional grounds, holding that enforcement: 1) violated separation of powers principles; 2) violated the spending clause; 3) violated the Tenth Amendment’s protection of federalism; 4) was void for vagueness under the Fifth Amendment; and 5) violated the Due Process Clause of the Fifth Amendment. *Cty. of Santa Clara v. Trump*, 250 F. Supp.3d 497 (N.D. Cal. 2017), *reconsideration denied*, No. 17-CV-00485, 2017 WL 3086064 (N.D. Cal. July 20, 2017). More than 110 parties participated as *amicus curiae* in the case. On November 20, 2017, the court entered summary judgment against the federal government, and made the nationwide injunction permanent. *Ord. Granting Motion for Summary Judgment, Cty. Of Santa Clara v. Trump*, No. 3:17-cv-00574 (N.D. Cal. Nov. 20, 2017). The Trump Administration filed for appeal to the Ninth Circuit Court of Appeals on December 14, 2017. *Defendants’ Notice of Appeal, Cty. of Santa Clara v. Trump et. al.*, 3:17-cv-00574 (N.D. Cal. Dec. 14, 2017). In Massachusetts, the City of Chelsea and the City of Lawrence filed suit together on grounds substantially similar to the California suits. *City of Chelsea v. Trump*, 1:17-cv-10214 (D. Mass. filed Feb. 8, 2017). That case has been stayed in light of the national injunction. *City of Seattle v Trump et al.*, 2:17-cv-00497-BAT (W.D. Wash. Mar. 29, 2017). followed a similar course.

⁶ Trump’s Executive Order attempts to define “Sanctuary Jurisdictions” as “jurisdictions that willfully refuse to comply with 8 U.S.C. 1373” or “which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.” 82 Fed. Reg. at 8801 *supra* note 2. This definition does not correspond with general usage, see Inez Friedman-Boyce et. al., *Sanctuary Cities: Distinguishing Rhetoric from Reality*, 61 SUM. BOS. B.J. 8, 8-9 (2017), and was found to be so deficient that it played an important role in § 9(a) of the executive order being declared void for vagueness. *Cty. of Santa Clara*, 250 F. Supp. 3d at 535.

⁷ Friedman-Boyce et al., *supra* note 6, at 8-9.

I. Background on Federalism

The debate over sanctuary city policies implicates core principles of federalism, the United States' system of shared authority between the national and subnational governments. Under this scheme, the federal government is granted some exclusive areas of authority (for example, over copyright or bankruptcy), states retain exclusive power over other areas (such as zoning), and some powers are exercised by both.⁸ Cities and counties derive their powers from the states, and are subject to varying levels of control from one state to another.⁹ For example, regulation of water rates is a local, not a state, function because power over that process has typically been delegated by states to local governments. According to Supreme Court Justice Kennedy's approving account, "the federal balance is [an] essential part of our constitutional structure and plays [a] vital . . . role in securing freedom."¹⁰

Yet while shared governance increases the national resilience by allowing for some flexibility in governance, it comes with inherent tensions. The lines between the jurisdictional responsibilities of national versus local governments are seldom clear-cut and must be constantly renegotiated through political discourse or judicial intervention. Even in elementary education, a quintessential arena of local control, subnational governments do not operate with complete autonomy. The national government may enforce constitutional equal protection standards in local school districts, and federal education laws may use financial carrots to secure local adherence to federal testing and standards requirements.¹¹ The current conflict between federal immigration enforcement and local efforts to promote sanctuary cities reflects a similar back and forth over federal versus local boundaries.

Immigration regulation has its own unique history and status. On the one hand, for more than a century, the U.S. Supreme Court has deemed immigration regulation to be an inherently and exclusively federal activity, concerned with the protection of the nation's sovereign borders.¹² Local governments have been prohibited from adopting policies such as additional taxes for immigrants¹³ or restrictions on immigrants' access to benefits¹⁴ that might be viewed as stealth efforts to deter immigration.¹⁵ Local governments' forbearance from imposing special

⁸ See generally DANIEL A. FABER, CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 879 (5th ed. 2013). In this paper, we use the lower case state when we are referring to one or more of the United States, and capitalize when we are referring to the broader philosophical concept of "the State."

⁹ See generally, MCQUILLIN THE LAW OF MUNICIPAL CORPORATIONS, § 4:3 General rule as to legislative control (3d ed. 2017). For an in-depth, State by State comparison, see Hal Wolman et al., *Comparing Local Government Autonomy Across States*, in THE PROPERTY TAX AND LOCAL AUTONOMY 69-114 (Michael E. Bell, eds. 2010)

¹⁰ *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J. concurring).

¹¹ See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 741-46 (1974).

¹² See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 604-06 (1889) ("The Chinese Exclusion Case").

¹³ *Smith v. Turner*, 48 U.S. 283 (1849) ("The Passenger Cases").

¹⁴ *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁵ However, the Supreme Court held that efforts by states to directly criminalize certain behaviors by undocumented immigrants are preempted by the "extensive and complex" immigration laws of the federal government. *Arizona v. United States*, 567 U.S. 387, 395 (2012).

penalties has been viewed by courts as immigration-neutral – and therefore, consistent with the principles of federalism that maintain immigration restrictions as a federal prerogative.

On the other hand, it is clear that the federal government’s immigration enforcement agenda might be enhanced if state and local law enforcement were to actively join the federal effort. Federal immigration enforcement is concerned not only with control at the border, but also with identification of undocumented immigrants within America’s interior, in cities and towns nationwide. Particularly in those settings, local law enforcement could serve as an extension of federal enforcement efforts. Such cooperation would be permitted, as the Supreme Court has held that “the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.”¹⁶ Further, Section 287(g) of the Immigration and Nationality Act explicitly allows a willing State or local law enforcement entity to enter into a partnership with the federal Immigration Control and Enforcement agency (ICE) in order to exercise delegated authority for immigration enforcement.¹⁷

But can states and local governments be **required** to cooperate with federal immigration enforcement priorities when, as Boston has asserted, such cooperation would undermine local community-building and law enforcement priorities and initiatives?

In the context of immigration enforcement, the primary point of connection between local law enforcement agencies and ICE is the federal Secure Communities Program.¹⁸ This program requires that when local police submit fingerprint information of an arrested individual to the Federal Bureau of Investigation (FBI) as part of general cooperation between law enforcement agencies, the FBI will pass that information to ICE.¹⁹ ICE then may issue a detainer request asking that local law enforcement hold the person for up to 48 hours while federal removal proceedings are initiated. Refusal to honor detainer requests and other efforts to re-direct local resources for federal immigration enforcement efforts, are key points of controversy between the Trump Administration and sanctuary jurisdictions such as Boston.²⁰

¹⁶ Plyler v. Doe, 457 U.S. 202, 225-26 (1982) (citing De Canas v. Bica, 424 U.S. 351 (1976)).

¹⁷ Immigration and Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, <https://www.ice.gov/287g> (last visited Dec. 22, 2017).

¹⁸ Immigration and Customs Enforcement, *Secure Communities*, <https://www.ice.gov/secure-communities> (last visited July 19th, 2017).

¹⁹ *Id.*

²⁰ For a history of the federal enforcement program current through 2016, as well as local resistance to it, see Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016). In Massachusetts the conflict is further defined by a 2017 ruling of the Massachusetts Supreme Judicial Court which held that: 1) holding a detainee beyond their original sentence constitutes a warrantless arrest; 2) no federal statute grants authority to state officers to make such an arrest; 3) no legal authority exists for such an arrest under state common law; 4) there is no Massachusetts statute authorizing such an arrest; and therefore 5) honoring federal detainer requests is unlawful. *Lunn v. Commonwealth*, 477 Mass. 517 (2017).

The federal government has argued that it can draft even resistant local governments into immigration enforcement campaigns through principles of supremacy or preemption, and that it can punish uncooperative jurisdictions by cutting off federal law enforcement funds. Sanctuary jurisdictions counter that immigration enforcement is a federal responsibility and that their local resources cannot be coopted to serve federal ends. This is a classic federalism controversy. Ironically, recent federal immigration raids targeting sanctuary communities – apparently intended to convince these jurisdictions to cooperate with ICE – demonstrate that the federal government can mount effective immigration enforcement without local cooperation.²¹

II. Boston’s Sanctuary City Policy in Context

The Boston Trust Act, cited by Mayor Walsh and others as the lynchpin of Boston’s sanctuary city status, has a single operative provision: it requires local law enforcement to ignore ICE detainer requests unless they are accompanied by a judicially obtained criminal warrant.

While this is an important protection, there are other legislative models that would provide greater protection for immigrants. The ACLU of Massachusetts has published a model Trust Act which has eight operative provisions.²² Similarly, the Center for Popular Democracy (CPD) produced a model sanctuary jurisdiction ordinance with thirteen operative sections.²³ The following table compares these models to both the Boston Trust Act and the MA Safe Communities Act, which is currently pending before the Massachusetts legislature.

²¹ Miriam Jordan, *Immigration Agents Arrest Hundreds in Sweep of Sanctuary Cities*, N.Y. TIMES (Sept. 28, 2017) <https://www.nytimes.com/2017/09/28/us/ice-arrests-sanctuary-cities.html>.

²² AM. CIV. LIB. UNION OF MASS., SAMPLE SANCTUARY POLICY (July 19, 2017) <https://aclum.org/wp-content/uploads/2017/03/Model-Sanctuary-City-Language.doc>.

²³ CTR. FOR POPULAR DEMOCRACY, PROTECTING IMMIGRANT COMMUNITIES: MUNICIPAL POL’Y TO CONFRONT MASS DEPORTATION AND CRIMINALIZATION 37-45 (2017) https://populardemocracy.org/sites/default/files/Sanctuary-Cities-Toolkit_web.pdf

Policy	Boston Trust Act (passed 2014)	MA Safe Communities (proposed)	Recommended by
Prohibits 287(g)	No	Yes	ACLUM, CPD
Prohibits immigration status inquiry	No	Yes	ACLUM, CPD
General Non-discrimination	No	Yes	ACLUM, CPD
Prohibits ICE Holds without proper warrant	Yes	Yes	ACLUM, CPD
Prohibits ICE Alerts or other Notifications	No	Yes	ACLUM
Generally prohibits ICE access to jails and records	No	Yes ²⁴	ACLUM, CPD
Prohibits use of local personnel and equipment	No	Yes	ACLUM, CPD
Requires disclosure of any contact with ICE to detainee	No	Yes	ACLUM, CPD
Requires detainee consent for interview with ICE, makes provision for attorney presence and translator	No	Yes	CPD
Requires consideration of U visa for detainee	No	No	ACLUM, CPD
Prohibits ICE Detention Contract	No	Specifically allows, if paid	CPD
Prohibits consideration of ICE detainer in bail hearing	No	Yes	
Prohibits transportation to ICE facility	No	Yes	
Requires consideration of immigration consequences by prosecutors in use of discretion	No	No	CPD
Establishes private right of action for biased police profiling	No	No	CPD
Requires translation for general municipal services	No	No	CPD

²⁴ There is an exception for those serving “serious violent felonies” defined as those for which there is no district court jurisdiction pursuant to chapter 218, section 26 (listing all the crimes for which the district court does have jurisdiction by cross reference).

As this table reveals, Boston's Trust Act provides an important protection, but fails to address the many other ways in which federal action might affect the safety and sanctuary of local immigrant residents – particularly if the federal government continues to target its enforcement efforts at sanctuary cities.

III. A Philosophical Defense of Sanctuary Policies

One of the reasons sanctuary policies are so controversial is that they reveal a genuine tension in liberal democracies.

On the one hand, most agree that democratic States have a moral and legal right to control immigration; deciding who should be allowed to be a member of a State goes to the core of democratic self-determination. It follows that States have a right enforce their immigration policies, including by deporting people who are in the country without authorization.

On the other hand, liberal democratic States have strong obligations – both moral and legal – to respect, protect, and fulfill the basic human rights of all people on their territory, regardless of their legal status. In the view of some, the enforcement of certain immigration policies violates this requirement and implies that States should adopt some form of sanctuary policies.

We do not dispute the right of States to create immigration policies, but argue that immigration policies and their enforcement must be consistent with the government's obligation to protect the human rights of all residents. In order to fulfill their human rights obligations, States have to create the conditions that allow people to realize their human rights – for example, by creating the conditions that allow people to trust the police, feel confident in the judiciary, and feel safe reporting crimes. Sanctuary policies, in creating a firewall between police and immigration, create the conditions that are necessary for upholding human rights. Sanctuary policies should be understood as policies that moderate, but do not dispute, the sovereign right of States to control their borders, and are required so that States can ensure that the human rights of all residents can be realized. As such, cities and states which adopt sanctuary policies are doing what justice requires.

We make this argument in two steps. First, we show that a legitimate State must protect the human rights of *all* residents, not merely citizens. Second, we argue that a requirement of the basic function of States is that they separate immigration enforcement from other governmental institutions that fulfill and protect human rights, such as police, schools, courts, and hospitals. Why? Individuals, legal or illegal, cannot claim their basic human rights to security, education, basic medical care, and fair treatment if they fear deportation. If individuals are structurally prevented from claiming their basic human rights, they are effectively denied them; it is not merely that immigration enforcement *deters* people from claiming their human rights.

Sanctuary policies ought to be understood as “moral constraints” upon the ways in which “a democratic state may exercise its authority” regarding immigration.²⁵

a. Non-citizen Residents and Human Rights

In this section, we attempt to show that the logic of human rights implies that States have obligations to protect the human rights of all people on a territory, regardless of citizenship status or country of origin. Two distinctions are important. First, there is a distinction between human rights – what must be guaranteed to all people in order for them to lead a minimally decent life (freedom from torture, arbitrary detention, security, freedom of movement, basic education and health care) – and social goods, which may be important to people but are not considered as fundamental (advanced education, unemployment insurance). Most agree the first set of goods – basic human rights – are the most important set of goods that governments must ensure.

The second distinction has to do with the groups of individuals that governments are required to protect – citizen and non-citizen residents. Most agree that it is legitimate for States to distinguish between these two groups, but that governments still have obligations to non-citizen residents, which include groups like tourists and students on temporary visas, as well as unauthorized immigrants. What we suggest below is that legitimate democratic States must protect the basic human rights of all residents and States cannot put in place any policies that do not respect and protect human rights, or undermine an individual’s ability to fulfill their human rights. This principle is rooted in philosophy as well as international law. This is why sanctuary policies are so important: the cooperation between ICE and other public services such as police (as well as hospitals, courts, and schools) undermine the ability of residents to claim their basic human rights, such as the right to security. Sanctuary policies can be seen as essential to avoiding this outcome. The main claim we argue for is that without sanctuary policies – a firm divide between police and immigration enforcement – States cannot adequately protect the human rights of non-citizen residents, which is a requirement for a government to exercise legitimate political authority.

The idea that States gain their legitimacy through the protection of the “natural” or human rights of their members originates with the philosopher John Locke in the 17th century in his *Two Treatises of Government*.²⁶ He theorized that in a state of nature – a state in which human beings did not yet live in formal political communities with governmental authority – people had inborn “natural rights” and “natural law” governed people’s interactions. People’s natural rights were to life, liberty and property, and natural law implied that no one ought to take away their natural rights. Though the state of nature was initially peaceful, Locke argued that the inability of people to determine how to enforce natural law when it was violated would lead to chaos and insecurity. As a result, he argued that people would choose to give up their freedom to do what they wanted for the sake of security. The “social contract” is established between individuals and a government, where individuals agree to limit their freedom and follow the rules that are

²⁵ JOSEPH CARENS, *THE ETHICS OF IMMIGRATION* 130 (2013).

²⁶ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1689)

imposed on them and in exchange, the State agrees to protect their “natural rights” to life (security), liberty and property. This is the foundation of the State and the justification of political authority. Locke even goes so far to say that if a government deliberately fails to protect our natural rights we are justified in rebelling – even violently if necessary.

One idea that endures from Locke’s work is that because States have the right to punish people living in their jurisdiction, they also have obligations to protect them. The exercise of authority triggers obligations. When the State is able to exercise coercion over you, that power creates obligations on the part of the State to protect your “natural” or human rights (as they have come to be called). This is true regardless of whether you are a citizen or a tourist or an unauthorized immigrant – if the State can legitimately put you in jail for breaking the law, it is also responsible for protecting your human rights. The influence of Locke today can be seen in the widely-accepted idea that a legitimate State must protect the natural or human rights – including the right to security – of all residents on its territory.²⁷

The idea that a legitimate State must protect the natural or basic human rights of its residents remains an accepted doctrine today. To support this, we draw on the philosopher John Rawls. In the *Law of Peoples*, Rawls argues that we cannot justify intervening in the affairs of another State, even one that may be illiberal, if the government in question sufficiently protects certain basic human rights.²⁸ Because the violation of human rights is “equally condemned by both reasonable liberal peoples and decent hierarchical peoples”²⁹ (that is, non-liberal, hierarchical societies that still treat their people decently), we may conclude that the protection of human rights is what distinguishes legitimate State sovereignty from an illegitimate or outlaw State in need of reform. Rawls conceives of human rights very narrowly to include the right to life, security, liberty, property and equal treatment under the law.³⁰

While it is clear that philosophers generally accept the idea that that States must protect the human rights of all residents regardless of citizenship, this is also a principle that is rooted in international law. The International Convention on Civil and Political Rights, signed and ratified by the U.S., provides in article 2(1) that each State party: “undertakes to respect and to ensure *to all individuals within its territory* and subject to its jurisdiction the rights recognized in the present Covenant” (italics added).³¹ Upholding of these rights also requires that States support

²⁷ Note that for Locke while States are justified in punishing people who violate the law, this would not undermine the premise behind sanctuary cities. Sanctuary communities say nothing about whether or not an immigrant can be jailed, tried or put in prison pursuant to legitimate laws. Yet in many cases, immigrants who are not found guilty or have paid their fines are still held by ICE and subject to removal.

²⁸ JOHN RAWLS, *THE LAW OF PEOPLES* (1997).

²⁹ *Id.* at 79.

³⁰ Of course, Rawls assumes that all residents of a given State will be members since his view is based on “peoples” rather than citizens. But there is no reason to believe that the violation of these basic rights would be acceptable if they affected residents who are not members of a State.

³¹ International Covenant on Civil and Political Rights, art. 2(1), adopted Dec. 19, 1966, S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)[hereinafter ICCPR]. That most rights in the convention must be upheld for all residents is further supported by the idea that the Covenant makes two explicit exceptions. It permits State parties to draw distinctions between citizens and non-citizens with respect to two categories of

the view that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”³² The U.N. Human Rights Committee has explained that: “the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”³³

International human rights law also provides specific guidelines for non-citizens. In 1985, the United Nations adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live.³⁴ The Declaration was designed to ensure that the fundamental human rights provided in the ICCPR and the International Covenant on Economic, Social and Cultural Rights would also be guaranteed to non-citizens.³⁵ Articles 5 – 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live provides that non-citizens (referred to as “aliens” in the Declaration) must receive the same treatment as nationals of the country in which they live with regard to the following rights relevant to Sanctuary communities:

The right to life and security of the person, including freedom from arbitrary arrest or detention³⁶

Protection against arbitrary or unlawful interference with privacy, family, home or correspondence³⁷

Equality before the courts, including the free assistance of an interpreter³⁸

rights: political rights explicitly guaranteed to citizens and freedom of movement. Article 25 establishes that “every citizen” shall have the right to participate in public affairs, to vote and hold office, and to have access to public service. Article 12 (1) holds that “the right to liberty of movement and freedom to choose [one’s] residence” only to persons who are “lawfully within the territory of a State”—that is, apparently permitting restrictions on the movement of undocumented migrants, but not their access to other basic rights.

³² *Id.* at Art. 26.

³³ U.N. High Comm’r for Refugees, The Rights of Non-Citizens, U.N. Doc. HR/Pub/06/11, U.N. Sales No. E.07.XIV.2 (2006).

³⁴ Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, annex, Supp. (No. 53), U.N. Doc. A/40/53 (Dec. 13, 1985)[hereinafter Declaration].

³⁵ While the Declaration does not name these instruments specifically, the seventh paragraph of the preamble articulating the purpose of the document states: “Recognizing that the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live.” *Id.* Many of the rights enumerated in the declaration map to those articulated in the ICCPR and International Covenant on Economic, Social and Cultural Rights.

³⁶ Declaration, *supra* note 34, at art. 5(1)(a). Corresponding to ICCPR, *supra* note 31, at art. 6(1) and art. 9(1).

³⁷ Declaration, *supra* note 34, at art. 5(1)(b). Corresponding to ICCPR, *supra* note 31, at art. 17(1).

³⁸ Declaration, *supra* note 34, at art. 5(1)(c). Corresponding to ICCPR, *supra* note 31, at art. 14(1,3).

Further, additional *rights*³⁹ *must be granted to aliens so long as they do not interfere with national security, public safety, public order, public health or morals or the rights and freedoms of others.*

The full scope of these rights was further articulated by the international human rights experts who compiled the Boston Principles in 2010.⁴⁰ According to these principles, which reflect an analysis of the protections provided under international human rights law:

All persons subject to the jurisdiction of the United States of America, including noncitizens, have, in full equality, the same rights and fundamental freedoms under international human rights law and international humanitarian law.⁴¹

In sum, in order for a State to uphold the social contract -- that is, legitimately exercise political authority -- it must protect the basic human rights of all residents. What precisely these basic rights are is a matter of some debate, but there is universal agreement that security and equal treatment before the law must be included.

It might be objected that what we set out above does not apply to people who are in a country without authorization. In virtue of the fact that they broke the law in the process of entering or overstaying and are present illegally, haven't they forfeited at least some of their human rights? One might even think that this is a bargain they made intentionally -- choosing the opportunity for economic advancement over the rights to physical security or equal treatment.

The response to this is that it misunderstands human rights and State obligations. Human rights are not the kinds of things you can forfeit at will (even terrorists, no matter how much damage they do, do not forfeit their basic human rights) and States, regardless of other policy imperatives, must still respect, protect and fulfill individuals' human rights. This inalienability is precisely what distinguishes human rights from other kinds of rights and obligations.

b. Sanctuary Policies as a Firewall

In the previous section, we argued that a legitimate government must protect the human rights of all residents on its territory. In this section, we address why sanctuary policies are necessary to do this. In brief, human rights require three things from the State: (1) the State must respect human rights, i.e., it cannot violate them; (2) the State must protect human rights, i.e., it must put in place effective means of ensuring that resident's human rights are not

³⁹ These include "(A) The right to leave the country; (b)The right to freedom of expression; (c)The right to peaceful assembly; and (d)The right to own property alone as well as in association with others, subject to domestic law" Declaration, *supra* note 34, at art. 5(2)(a-d).

⁴⁰ PROGRAM ON HUMAN RIGHTS AND THE GLOB. ECON., NORTHEASTERN U. SCH. OF LAW, THE BOSTON PRINCIPLES ON THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF NONCITIZENS (2010).

⁴¹ *Id.* Principle 4 at 8.

undermined, either by state actors or by individuals; and (3) the State must fulfill human rights, that is, it must create the conditions that allow people to realize their human rights.

It is this third category – the fulfillment of human rights – that requires States to adopt some set of sanctuary policies. Residents cannot avail themselves of the protection of their governments and claim their basic human rights if they are worried about deportation of themselves or their families. The human right to security especially seems to require that residents are confident reporting crimes to the police and believe that police will treat them with respect. In the section below, we draw on the work of two contemporary philosophers, David Miller and Joseph Carens to show that the human rights of residents require sanctuary policies. Those familiar with the work of these two philosophers will notice that their confluence on this issue is remarkable since they differ fundamentally in their approaches to political philosophy – Carens often defending the cosmopolitan perspective (the view that all human beings matter equally) and Miller the nationalist (the view that states justifiably treat their members better than non-members). Yet nonetheless, we show below that both agree with the conclusion that sanctuary policies are warranted to protect the human rights of residents.

David Miller argues that States have a morally defensible right to control immigration and determine who can live in their States according to their own values. However, even Miller -- someone strongly committed to a view of national self-determination -- holds that, “a state that claims authority to apply its laws to everyone within its territory must also protect the human rights of all those present, whether legally or not.”⁴² This is not to say that governments are required to grant undocumented individuals permission to stay or are compelled to grant them membership. States can deport undocumented immigrants (as long as they don’t do it in such a brutal way that it violates human rights). But insofar as irregular migrants are present in a State and subject to the laws of the State, the State must protect their human rights.

Miller addresses the objection raised in the previous section: by being present illegally in a country, haven’t undocumented immigrants forfeited their claim to some human rights for the sake of economic gain? In other words, haven’t they tacitly agreed that they are willing to give up some of their claims to decent treatment by the State? Miller’s answer is no, entering a country without authorization does not give States the right to treat the individuals worse than legal members. Nor have they forfeited their rights in the same way that criminals who are imprisoned have. The justification for criminalization is that those who disregard the rights of others may have their own rights suspended or forfeited. But this is certainly not the case with almost half of irregular migrants who enter the country legally but then overstay their authorization, as well as those who enter without papers. There is no sense in which their presence alone violates the human rights of legal residents; if they have committed a crime, they can be charged, tried and sentenced but their mere presence in the country does not constitute a crime or harm.⁴³ Again, for Miller, States have a moral right to control immigration and thus are

⁴²DAVID MILLER, STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION 117 (2016).

⁴³ It is worth remembering that immigrant populations in the US, both documented and undocumented, consistently have lower levels of crime than native populations. See NAZGOL GHANDNOOSH & JOSH ROVNER, THE

justified if they choose to deport undocumented migrants, but they cannot violate their human rights – such as the right to security – while they are in the country.

Joseph Carens elaborates that this requires the existence of a firewall between police and other agencies responsible for rights protection and immigration. Why? Without this strict division, individuals will be unwilling to assert their basic rights.⁴⁴ Clearly, if you are afraid that you will be arrested and deported, you will be less likely to call the police when you have experienced a crime or fear that you will be a victim of a crime. This has of course already occurred: there has been a twenty-five percent drop in reports of domestic violence within the Latino community this year with fears of an increase deportation.⁴⁵ In the view of Carens and Miller, this is an example of a State failing to provide the basic right of security to all its residents; the normative supposition here is that victims of assault and abuse ought to be treated with the same respect by the police, courts and authorities regardless of citizenship status.

What if the enforcement of immigration policy – which Miller believes States have a moral right to uphold – is inhibited by protecting the human rights of undocumented migrants? Shouldn't governments be allowed to enforce immigration policy however they see fit? Both Carens and Miller, along with the human rights community more broadly, are in agreement that human rights are so important that they must be protected, regardless of whether or not this limits the State's ability to uphold other policies, such as immigration. The interests that human rights protect are considered so fundamental that the constraints that they pose on states are considered worth-while on balance. As Carens reminds us, there are always tensions between enforcing laws and protecting the people who are thought to have violated the laws – sanctuary policies simply ensure that the human rights of undocumented immigrants can be protected.⁴⁶

Both Miller's and Carens' views are helpful to respond to the one of the most common objections to sanctuary policies. That objection is that since governments have a right – both legal and moral – to control their borders, they can create whatever policies they want to enforce this right. If, for example, the police pick someone up for a traffic violation, identify them as undocumented, share this information with the federal government, and the government deports the individual, there does not seem to be any moral or legal principle that is violated. This seems to be a case of governments at every level doing exactly what they have a right to do.

SENTENCING PROJECT, IMMIGRATION AND PUBLIC SAFETY (2017); MICHELANGELO LANDGRAVE & ALEX NOWRASTEH, CATO INSTITUTE, CRIMINAL IMMIGRANTS: THEIR NUMBERS, DEMOGRAPHICS, AND COUNTRIES OF ORIGIN (2017) (comparing incarceration rates by immigration status).

⁴⁴ Carens, *supra* note 25, at 133. He notes two other examples of firewalls that work in practice in the U.S. First, the police cannot use evidence obtained in a way that violates constitutional rights. Second, the IRS when it gathers information for the purposes of taxation cannot use this information for other governmental purposes. What if, Carens wonders, there were such a rule for undocumented migrants which said that immigration officials had to show how they acquired knowledge of the individual's status, and if they had "obtained this information through sources connected to the protections of the human rights of irregular migrants, the migrant would be entitled to stay." *Id.* Sanctuary policies, while not going as far as this proposal, would achieve a similar end.

⁴⁵ James Queally, *Latinos are reporting fewer sexual assaults amid a climate of fear in immigrant communities, LAPD says*, L.A. TIMES, Mar 21, 2017.

⁴⁶ Carens, *supra* note 25, at 134.

What we hope to have shown in this paper is that the case against sanctuary communities is philosophically weak. When they allow the sharing of local police information with federal immigration agents, subnational governments are undermining the conditions required to fulfill human rights. As we have shown, governments are required to protect the fundamental human rights of non-citizen residents; this cannot be done without a separation between police and other essential services (hospitals, schools, courts) and immigration enforcement. Undocumented immigrants are at the mercy of the communities in which they reside, and this vulnerability to government power only strengthens the claim that States have a moral obligation to uphold the basic human rights of all residents. Consequently, state and local governments are required to have sanctuary policies.

Conclusion

We have set out the strong philosophical justification for state and local sanctuary policies. But as noted earlier, “sanctuary city” has no clear definition and subnational governments have embraced a range of approaches to this issue.

So which policies precisely should be required under our philosophical analysis?

In the first part of this paper we identified a number of different sanctuary policies that have been endorsed by either the ACLU or the Center for Popular Democracy (CPD). We noted that the Boston Trust Act has only one operative provision, requiring local law enforcement to ignore ICE detainer requests unless they are accompanied by a judicially obtained criminal warrant. While this provision is crucial for fulfilling certain human rights, it is clear that Boston’s sanctuary policies should do more. While it goes beyond the scope of this White Paper to advocate for specific sanctuary policies or identify a single approach that would satisfy human rights concerns, implementation of all of the policies listed in the chart above would strengthen the ability of immigrants, documented and undocumented, to claim their human rights and should be encouraged.