

A PLACE TO CALL HOME: DEFINING THE LEGAL SIGNIFICANCE OF THE SANCTUARY CAMPUS MOVEMENT

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The sanctuary campus movement ignited following the election of Donald Trump as the 45th president of the United States. The movement has given rise to questions about the protections available to undocumented immigrants in the United States, with specific emphasis placed on the vulnerability of undocumented students. The movement joins a list of sanctuary initiatives, such as the sanctuary city movement of the 1980s, which was plagued by negative rhetoric that taints the political discourse surrounding sanctuary campuses. Despite the humanitarian nature of the sanctuary campus movement, its legal impact on undocumented students remains uncertain while politicians and right-wing conservatives oppose it as a violation of federal law. This Note analyzes the legal barriers currently facing the sanctuary campus movement, examines current immigration and privacy laws affecting the movement, and discusses ways sanctuary campuses can fill in the gaps left by such laws in order to improve protections for undocumented students.

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I. INTRODUCTION

In November 2016, thousands of people showed their support for undocumented immigrants² through participation in a number of demonstrations and rallies that would come to be known as the “sanctuary campus” movement.³ Under this movement, students and their supporters have urged their respective institutions of higher education to enact policies to protect undocumented students from deportation. These requests include a commitment by these institutions to refuse to cooperate with demands for immigration status information for purposes of immigration enforcement, designate safe locations on campus, and bar immigration officials from freely accessing campuses. The sanctuary campus movement has also reignited the debate about “sanctuary cities,” localities defined by their level of cooperation with federal immigration enforcement, a debate that initially gained traction after the death of California resident Kathryn Steinle.⁴

² In this note the terms “undocumented immigrant” or “undocumented students” will be used to refer to those individuals who entered the country without legal authorization (commonly referred to as “entrants without inspection” (“EWI”s)). See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 Sup. Ct. Rev. 47 (providing a thorough analysis of the varying levels of immigrant identification and community integration). The term will also be used to refer to those who initially had documented entry into the United States, “admitted nonimmigrants,” but then violated the limitations of such entry (e.g., overstaying a visa). *Id.* at 95.

³ See *infra* Part II B and accompanying text (discussing the sanctuary campus movement as a response to Trump immigration policies).

⁴ See *infra* note 83. The negative discourse surrounding sanctuary cities added to the tense atmosphere in the country surrounding immigration after the terrorist attacks on September 11, 2001. Investigations revealed the participation of several individuals with immigrant visas, prompting intense discussion about immigration reform. In order to combat terrorism, several measures were taken by the federal government including the drafting and revision of multiple statutes. Many of the programs implemented reflected some level of racial profiling and specifically targeted the immigrant population. For a discussion on racial profiling after September 11th see TANYA E. COKE, *Racial Profiling*

Like the sanctuary city movement, the sanctuary campus movement has caused controversy between people across the political spectrum.⁵ As a part of his campaign platform, President Trump presented himself as a tough-on-crime candidate, wholly against the presence of undocumented immigrants in the United States. During his campaign Trump vowed to defund “sanctuary cities”⁶ and attempted to follow through on this threat by signing an executive order five days after his inauguration. This order caused much confusion and litigation, and has since been deemed unconstitutional by a federal court.⁷

This Note will explore the sanctuary campus movement and its potential to influence the relationship between institutions of higher education and undocumented students. To understand the emergence of the movement, first it is necessary to analyze the “sanctuary city” designation and the constitutional implications of defunding such cities, with a particular focus on the potential coercive use of Congress’s spending power and violation of the anti-commandeering principle as expressed in several Supreme

Post-9/11: Old Story New Debate, in *LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM* 91–111 (Cynthia Brown ed., 2003). See also Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002).

⁵ While many students were rallying to have their colleges declared as sanctuary campuses, many others spoke out against the movement as an affront to federal law. Government officials also spoke out against the movement; several pledging to defund any colleges designated themselves as sanctuaries; see, e.g., John Binder, *Vanderbilt Students Demand ‘Sanctuary Campus’*, BREITBART (Nov. 28, 2016), <http://www.breitbart.com/texas/2016/11/28/vanderbilt-students-demand-sanctuary-campus/>; *College Students Call for Sanctuary Campuses*, CBN NEWS (Nov. 17, 2016), <http://www1.cbn.com/cbnnews/us/2016/november/college-students-call-for-sanctuary-campuses>.

⁶ The threat to do away with so-called “sanctuary cities” is not a new one and the threat to repeal federal funding to these cities has been previously suggested. Several bills have been proposed in the House to defund these cities, some as recent as 2015. See, e.g., H.R. 3002, 114th Cong. §2 (1st Sess. 2015); H.R. 3073, 114th Cong. §2 (1st Sess. 2015).

⁷ *Cty. of Santa Clara v. Trump*, No. 17–cv–00574–WHO, 2017 WL 5569835, at *16 (N.D. Cal Nov. 20, 2017).

Court decisions.⁸ Using sanctuary cities as a basis for understanding the sanctuary movement, Part I of the note will assess the legal significance of the sanctuary campus movement and whether, and how, the movement can provide adequate protection to undocumented individuals. This examination will establish the humanitarian nature of the sanctuary campus movement and discuss the constitutional limitations of the Trump administration's threat to defund the cities where many of them are located. Ultimately, colleges and universities that wish to assist their undocumented students must become abreast of the limitations of the sanctuary campus movement in order to provide the best protections possible for their students.

Part II of this discussion will briefly outline the development of sanctuary cities and introduce the requirements of several immigration laws as they relate to such cities. Part III will assess how these laws affect undocumented immigrants, with a particular emphasis on provisions impacting undocumented students. By addressing the limitations set by such statutes as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereafter the "IIRIRA")⁹ and the Immigration and Nationality Act (hereafter the "INA"),¹⁰ the note will summarize the difficulties that undocumented individuals currently face. That discussion will conclude with an analysis of how the sanctuary campus movement developed on the heels of the sanctuary city movement in an effort to protect the undocumented. Finally, Part IV will propose possible solutions for addressing the limitations of the sanctuary campus movement and provide suggestions for solidifying its legal significance.

II. WHAT IS A SANCTUARY?

⁸ See *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §110 Stat. 3009 (1996).

¹⁰ Immigration and Nationality Act, Pub. L. No. 99-603, §100 Stat. 3359 (1986).

A. Understanding the Rise of Sanctuary Cities and Campuses

In 2009 the Pew Research Center published “A Portrait of Unauthorized Immigrants in the United States” which provided a detailed analysis of the undocumented immigrant population residing in the United States.¹¹

General Ages. Overall, the study indicated that most undocumented immigrants were teenagers and young adults (most men were between the ages of eighteen and thirty-nine) with nearly half the entire population composed of couples with children (defined as youth under the age of eighteen) and another thirteen percent also living with children.¹² According to this study, children made up thirteen percent of the total undocumented immigrant population and twenty-seven percent of the children of undocumented immigrants were born outside the United States.¹³

Educational Achievement and Low Wages. The study showed that twenty-nine percent of undocumented immigrants between ages twenty-five and sixty-four had less than a ninth grade education and only fifteen percent had received a bachelor’s degree or higher.¹⁴ Additionally, forty percent of undocumented immigrants ages eighteen to twenty-four had not completed high school, twenty-eight percent had finished high school but had no college experience, and only twenty-six percent had some college education or had received a degree.¹⁵ In comparison, the Pew Research Center found that documented immigrants, the children of documented immigrants, and United States

¹¹ Jeffrey S. Passel & D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISPANIC CENTER, <http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/>.

¹² *Id.* at 10–11.

¹³ *Id.*

¹⁴ *Id.* at 10.

¹⁵ *Id.* at 11–12.

citizens were much more likely to have finished high school and received some college education or a college degree (for U.S.-born citizens fifty-eight percent between the ages eighteen and twenty-four and sixty-one percent between ages twenty-five and sixty-four; for documented immigrants these numbers were sixty percent and fifty-four percent respectively).¹⁶

Poverty. The study found that around one in five undocumented immigrants (twenty-one percent) in the United States lived below the poverty line.¹⁷ In contrast, ten percent of native-born individuals and thirteen percent of documented immigrants lived in poverty.¹⁸ These figures increased when the study focused only on the number of children living in poverty, a number that was also greater for undocumented children and children born in the United States to undocumented immigrants. Due to their lack of status and educational achievement, many undocumented immigrants are forced to remain in low-skilled occupations and receive wages far below the observed median for native-born and documented immigrant households.¹⁹ The economic condition of undocumented immigrants can only be exacerbated if undocumented parents pull their children from school for fear of deportation.²⁰

The figures from the study provide an important picture of the lives of undocumented immigrants and illustrate the drastic impact that access to education could have on their lives. In September 2017, the Pew Research Center reported that President Obama's Deferred Action for

¹⁶ *Id.* at 10–12.

¹⁷ Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISPANIC CENTER, at 17, <http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/>.

¹⁸ *Id.* at 17.

¹⁹ *Id.* at 15–17.

²⁰ Ray Sanchez, *After ICE arrests, fear spreads among undocumented immigrants*, CNN (Feb. 12, 2017), <http://edition.cnn.com/2017/02/11/politics/immigration-roundups-community-fear/index.html>.

Children Arrivals (“DACA”) program had shielded nearly 790,000 young immigrants who were brought to the United States as children from deportation.²¹ Through DACA, undocumented students have been able to set aside some fear of deportation in order to have access to institutions of higher education and provide a better life for themselves.²²

1. Origin of “Sanctuary City”

The sanctuary movement in the United States can, in many instances, trace its primary significance back to the 1980’s,²³ during which many Central Americans from El Salvador and Guatemala fled to the United States hoping to find refuge from the dangerous circumstances posed by the political landscape of their home countries.²⁴ Operating from the belief that there existed a moral duty to aid the

²¹ See Jens Manuel Krogstad, *DACA has shielded nearly 790,000 young unauthorized immigrants from deportation*, PEW RESEARCH CENTER (Sept. 1, 2017), <http://www.pewresearch.org/fact-tank/2017/09/01/unauthorized-immigrants-covered-by-daca-face-uncertain-future/>; see also, Gustavo Lopez, *Key facts about unauthorized immigrants enrolled in DACA*, PEW RESEARCH CENTER (Sept. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/>.

²² Tom K. Wong, et.al., *Results from a Nationwide Survey of DACA Recipients Illustrate the Program’s Impact*, CTR. FOR AMERICAN PROGRESS (July 9, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/07/09/117054/results-from-a-nationwide-survey-of-daca-recipients-illustrate-the-programs-impact/>.

²³ See generally Susan Gzesh, *Central Americans and Asylum Policy in the Reagan*, MIGRATION POLICY INSTITUTE (Apr. 1, 2006), <http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>. See also Cuison Villazor, *infra* note 24.

²⁴ See Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133 (2008).; Cong. Research Serv., *Enforcing Immigration Law: The Role of State and Local Law Enforcement* (Aug. 14, 2006).; Cong. Research Serv., *State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement* (July 10, 2015).

immigrants who sought shelter in the United States, churches and other private institutions provided temporary “places of refuge” for them.²⁵ The word “sanctuary” initially had a positive connotation, conveying Americans’ commitment to aid during a humanitarian crisis, but became tainted when used negatively in reference to individuals, institutions, and cities that were “soft on crime” or in violation of federal laws.²⁶

By 1996, several cities had implemented policies in support of the sanctuary movement; these policies became principal identifying features of sanctuary cities.²⁷ Primarily, in cities with these so-called “non-cooperation” policies, also referred to as “don’t ask-don’t tell”²⁸ policies, government employees “would neither ask nor report...immigration status to the federal government.”²⁹ Simply, these cities did not “require their employees ... to report to federal officials aliens who may be illegally present in the country.”³⁰ However, non-cooperation policies have taken various forms.³¹ Although there are some jurisdictions with express policies requiring employees to refrain from complying with demands from the federal government for information about undocumented immigrants, there are others many that simply do not require inquiry into or the collection of such information while still permitting their

²⁵ Cuison Villazor, *supra* note 24, at 140 (discussing the origin of “sanctuaries” in the immigration context).

²⁶ See Norma Stoltz Chinchilla et al., *The Sanctuary Movement and Central American Activism in Los Angeles*, 36 *LATIN AM. PERSPECTIVES* 101, 106 (2009); Cf. Matt Ford, *Why is Jeff Sessions Attacking the Police*, *THE ATLANTIC* (Apr. 21, 2017) <https://www.theatlantic.com/politics/archive/2017/04/jeff-sessions-sanctuary-city-nypd/524001/>.

²⁷ Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 *U. CIN. L. REV.* 1373, 1384 (2006).

²⁸ Cuison Villazor, *supra* note 24, at 142–43.

²⁹ *Id.* at 142.

³⁰ Cong. Research Serv., (Aug. 14, 2006), *supra* note 24, at 26.

³¹ Cuison Villazor, *supra* note 24, at 148–49.

employees the choice of reporting.³² The distinction in the specificity of the policy is important when determining which jurisdictions, if not all, would be affected by defunding legislation from the federal government.

Public officials' vocal opposition to sanctuary city movement efforts illustrate the negative rhetoric surrounding the movement, and often target the churches and private institutions that have supported the undocumented immigrant population.³³ Professor Rose Cuison Villazor writes that the "politically motivated disapproving use of the word sanctuary has unfairly conflated legitimate state and local policies that serve local interests or policies that comply with the Constitution or federal laws with legislation that is intended to supersede immigration law."³⁴ Moreover, legitimate education and healthcare policies have been placed under the negative discourse on sanctuary policies³⁵—primarily through the characterization of federally prescribed provision of public education and healthcare services to all residents as efforts to aid the undocumented and undermine federal law. Opponents of the sanctuary city movement made attacks on cities that allowed undocumented individuals to enroll in school, often using such policies as a defining characteristic for designating a locality as a sanctuary and as proof that such localities violated immigration law.³⁶

³² *Id.* (describing the differences in non-cooperation policies between New York City, New York and Takoma Park, Maryland).

³³ *Id.* at 134–35 (discussing efforts of politicians Rudy Giuliani and Mitt Romney to distance themselves from the sanctuary designation during the 2008 presidential campaign).

³⁴ *Id.* at 136 (relying on Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34 (explaining that tuition benefits constitute "purely state benefits" that can be provided or withheld to undocumented college students without implicating federal immigration laws)).

³⁵ *Id.* at 152–53.

³⁶ *See, e.g., id.* at 153 (discussing 2008 Republican presidential candidate Fred Thompson criticisms of "sanctuary cities," which were

Led by fear of detection and deportation, many immigrants have thought it necessary to remove their children from school.³⁷ These actions deprive undocumented children and children of undocumented parents from educational benefits that would likely improve their future economic circumstances. Education has long been considered a fundamental part of developing an informed American democracy.³⁸ Although undocumented individuals in the United States are guaranteed certain constitutional rights, including access to some education, undocumented immigrants live in continued fear of being ejected from the country.³⁹ Undocumented students generally belong to low-

described as places that allowed unauthorized immigrants to enroll their children in school or obtain hospital services”).

³⁷ At various times in recent American history, changes in immigration law oftentimes cause fear among immigrant families. Fearing deportation, immigrant families often remove their children from school to avoid detection. *See, e.g.*, The Associated Press, *Texas: Immigrants Pull Children From School*, N.Y. TIMES (Oct. 5, 2007), <http://www.nytimes.com/2007/10/05/us/05brfs-school.html>; The Associated Press, *Alabama: Many Immigrants Pull Children From Schools*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/us/alabama-many-immigrants-pull-children-from-schools.html> (noting the disappearance of Hispanic children from public school districts because of a state law requiring schools to check immigration status); *see also* Luis H. Zayas & Laurie Cook Heffron, Ph.D., *Disrupting young lives: How detention and deportation affect US-born children of immigrants*, American Psychological Association (Nov. 2016), <http://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation.aspx> (presenting research on how the fear of detection prevents undocumented parents from enrolling children in school and using healthcare services).

³⁸ *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (“‘the grave significance of education both to the individual and to our society’ cannot be doubted”); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance”); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (“Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government”).

³⁹ *See* Consuelo Arbona et al., *Acculturative Stress Among Documented and Undocumented Latino Immigrants in the United States*, 30 HISP. J. BEHAVIORAL SCI. 362 (2010) (finding that undocumented immigrants reported a greater fear of deportation than documented immigrants).

income families struggling to afford the cost of living.⁴⁰ These families often “cannot spare money for any level of tuition whether it is at a discounted rate or not.”⁴¹ Fear of deportation and limited economic means therefore increase barriers placed on education. Given the recognized importance of education in American society⁴², limiting undocumented immigrants’ access to education at any level may demonstrate a desire to exclude those individuals from American society. It is against this backdrop that the sanctuary campus movement has developed and must be understood.

2. *Rise of the Sanctuary Campus Movement*

After the 2016 presidential election, thousands of college students and supporters took to the streets to stage demonstrations in support of the undocumented.⁴³ Students staged walkouts and protests in an effort to push their respective schools to declare themselves as “sanctuary campuses” to protect undocumented students from deportation and to protest the potential repeal of the Deferred Action for Children Arrivals (“DACA”) immigration program. Like “sanctuary city,” the term “sanctuary campus” does not have an official legal definition;⁴⁴ nonetheless, the demonstrations were meant to pressure colleges to establish certain policies to safeguard their undocumented students.⁴⁵ President Trump’s immigration stance place thousands of immigrants in a state of uncertainty, including the over 700,000 young immigrants

⁴⁰ See Passel, *supra* note 17.

⁴¹ See Melissa Cook, *A High Stakes Game Texas Can’t Afford to Lose: Interpreting Federal Immigration Law on in-State Tuition for Undocumented Students*, 11 TEX. TECH ADMIN. L.J. 225 (2009).

⁴² See *Meyer*, 262 U.S. at 400.

⁴³ See *infra* Part II.

⁴⁴ Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions Than Answers*, THE ATLANTIC (Nov. 22, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/>.

⁴⁵ Eduard Saakashvili, *So What Does a Sanctuary Campus Actually Look Like?*, DAILY GAZETTE (Nov. 23, 2016), <http://daily.swarthmore.edu/2016/11/23/so-what-sanctuary/>.

who gained temporary relief from deportation under DACA.⁴⁶ The program has helped many students gain access to higher education while also relieving some of the financial burden by making them eligible to apply for federal aid with their DACA-provided Social Security numbers.⁴⁷

While several colleges have joined the movement, many others have refused to declare themselves as sanctuaries. Opponents give various reasons for their position. Many argue that the movement supports the violation of federal law while other institutions avoid the designation but continue to pledge their support for undocumented students.⁴⁸ The movement has raised questions not only about the validity of its objectives but also about the extent of a college's ability to protect

⁴⁶ Jens Manuel Krogstad, *Unauthorized Immigrants Covered by DACA Face Uncertain Future*, PEW RESEARCH CENTER (Jan. 5, 2017), <http://www.pewresearch.org/fact-tank/2017/01/05/unauthorized-immigrants-covered-by-daca-face-uncertain-future/>; Serena Marshall, *What Could Happen to DACA Recipients Under Donald Trump*, ABC NEWS (Nov. 16, 2016), <http://abcnews.go.com/Politics/happen-daca-recipients-donald-trump/story?id=43546706>.

⁴⁷ See Sanam Malik, *DACA Helps Undocumented Students Access Higher Education*, CENTER FOR AMERICAN PROGRESS (Apr. 7, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/04/07/110558/daca-helps-undocumented-students-access-higher-education/> (discussing the beneficial impacts of DACA on undocumented students' access to higher education).

⁴⁸ While many schools have adopted the "sanctuary campus" designation, others have refused to do so for a variety of reasons. See, e.g., Molly Parker, *SIU Leaders Say School Won't Adopt 'Sanctuary Campus' Designation*, SOUTHERN ILLINOISAN (Jan. 9, 2017), <http://thesouthern.com/news/local/siu/siu-leaders-say-school-won-t-adopt-sanctuary-campus-designation/> (noting that SIU President Randy Dunn rejected the sanctuary campus title in part because it would suggest the "university would be willing to violate the law"); Nicholas S. Zeppos, *Letter to Students* (Nov. 29, 2016), <https://news.vanderbilt.edu/2016/11/29/a-message-from-chancellor-zeppos-on-university-policies-regarding-sanctuary/> (explaining Vanderbilt University's stance on the sanctuary movement, noting that the University does not have the option to disobey federal law); but see Hannah Natanson, *Faust Says Harvard Will Not Be a 'Sanctuary Campus'*, THE CRIMSON (Dec. 7, 2016), <http://www.thecrimson.com/article/2016/12/7/faust-sanctuary-campus-policy/>

undocumented or DACA students from federal action. This note will address this issue by exploring the safeguards already in place to protect undocumented individuals and how colleges can expand on these protections in order to provide meaningful assistance.

In early September 2017, President Trump announced via Twitter that he would be ending the DACA program, thus putting its beneficiaries at risk of deportation.⁴⁹ This announcement caused the United States Citizenship and Immigration Services (“USCIS”) to refuse any initial or renewal DACA applications.⁵⁰ Despite that sudden declaration, President Trump has since met with Democratic officials to devise a deal to protect these individuals from deportation.⁵¹ It is the hope of many that these discussions produce positive results for the undocumented whose fate is now uncertain. In light of these events, it is of the utmost importance that sanctuary campuses devise proper mechanisms within the bounds of the law to assist their undocumented students, especially those who are DACA recipients, from falling prey to deportation. It is only by finding these proper mechanisms that the sanctuary campus movement can truly protect students.

Similar to sanctuary cities, colleges and universities that establish sanctuary campus status also face threats of

⁴⁹ Memorandum on Rescission of Deferred Action For Childhood Arrivals (DACA), DEPARTMENT OF HOMELAND SECURITY (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

⁵⁰ See Consideration of Deferred Action for Childhood Arrivals (DACA), U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca>.

⁵¹ Ed O’Keefe & David Nakamura, *Trump, top Democrats agree to work on deal to save ‘dreamers’ from deportation*, WASHINGTON POST (Sept. 14, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/09/13/trump-top-democrats-agree-to-work-on-deal-to-save-daca/?utm_term=.bee4894dae67.

defunding from legislators.⁵² Depending on the percentage of funds that would be endangered, some colleges may have no choice but to refuse the “sanctuary campus” designation. This does not, however, mean that these colleges would be forced to implement federal immigration policies as there are still certain laws in place that protect student data.⁵³ While the moral symbolism of the sanctuary campus movement is perhaps clear to most (the demonstration of solidarity and arguing the importance of education), it is unclear what the legal significance of declaring sanctuary campus status will be both for the colleges that make such a declaration and the undocumented students who choose to attend.

B. Law Behind the Movement

In order to fully understand the sanctuary movement, a discussion of the different laws affecting current policing of undocumented immigrants is imperative. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The IIRIRA provides that:

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States. 8 U.S.C. § 1373.⁵⁴

According to the Senate Report, the statute intended

⁵² See *infra* Part II B; see also Sophie Quinton, ‘Sanctuary Campuses’: Controversy Blown Out of Perspective, PEW CHARITABLE TRUSTS (Dec. 16, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/16/sanctuary-campuses-controversy-blown-out-of-perspective>.

⁵³ See *infra* Part II B. 3.

⁵⁴ Pub. L. 104-208, § 110 Stat. 3009 (1996) Title VI § 642 (codified as 8 U.S.C. § 1373).

to give State and local officials the authority to communicate with the Immigration and Naturalization Service (INS) regarding the presence, whereabouts, and activities of undocumented immigrants...[and was] designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.⁵⁵

This section of the IIRIRA was particularly important during the sanctuary city movement as it greatly restricted any proactive methods cities or states could use to protect undocumented immigrants by setting the boundaries of what policies were possible.

While the IIRIRA does not require states to provide information to the federal government, it does prohibit State or local government action to actively impede voluntary communication with federal agencies. The Act was in part an answer to policies implemented around the country expressly prohibiting the transfer of information regarding immigration status to the federal government and its agencies.⁵⁶ Many cities and states argued that non-cooperation policies served to protect the confidentiality and safety of citizens within local borders. Without them, they feared undocumented individuals would be less likely to trust the police and report crime.⁵⁷ The current sanctuary

⁵⁵ See H.R. Rep. No. 104-469 at 277 (1996)

<https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf> (explaining that the IIRIRA was designed to “prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS”).

⁵⁶ Cong. Research Serv., (Aug. 14, 2006), *supra* note 24, at 26 (noting a list of cities with sanctuary policies); Cong. Research Serv., (July 10, 2017), *supra* note 24, at 9 (noting that some jurisdictions used either formal or informal policies to respond to the requirements of IIRIRA).

⁵⁷ Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373,

campus movement urges colleges to similarly limit cooperation with federal immigration enforcement. And fortunately, students are guaranteed a level of privacy from disclosure of their personal data under the Family Educational Rights and Privacy Act (“FERPA”), potentially making limited cooperation more plausible.⁵⁸ Protections under FERPA may indeed indicate refusal to transfer information on the immigration status of undocumented students as a lawful practice by college officials, at least in certain circumstances. This next section will further examine the IIRIRA and other federal immigration laws, the right or lack thereof of undocumented children to have access to education, and the legal obstacles surrounding the issue.

1. *Undocumented Children and Access to Education*

In 1982, the Supreme Court held that all students, regardless of their immigration or citizenship status, should have access to public education.⁵⁹ Justice Brennan explained in *Plyler v. Doe* that undocumented children should not be punished for their parents’ conduct and the court found unconstitutional a Texas statute that threatened school funding and allowed local schools to deny enrollment to undocumented students. The Court found that the Texas statute “impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status.”⁶⁰ In reaching this conclusion, the Court discussed the restrictions imposed by the equal protection clause of the Fourteenth Amendment,⁶¹ which prohibits discriminatory practices and class-based state action.⁶² Having found that the equal protection clause applies to all individuals within a state’s

1399 (2006) (stating that undocumented immigrants “may refuse to report crimes or participate in criminal investigations, for fear of the immigration consequences”).

⁵⁸ See *infra* Part I B. 2.

⁵⁹ See *Plyler v. Doe*, 457 U.S. 202, 226 (1982) (holding that states could not deny public education to undocumented children in grades K-12).

⁶⁰ *Id.* at 223.

⁶¹ U.S. CONST. amend. XIV.

⁶² See *Plyler*, 457 U.S. at 216–22 (applying a rational basis review to the Texas legislation).

jurisdiction regardless of immigration status, the Court held, under a rational basis review, that its restrictions extend protection to undocumented students against discriminatory state practice.

Notwithstanding its holding in *Plyler*, the Court acknowledged, as it had in previous cases, that there is no fundamental right to a public education. There is only recognition of its importance in maintaining a democracy.⁶³ In addition, the Court's opinion in *Plyler* was limited to elementary school education.⁶⁴ The absence of a national consensus on access to higher education aids the confusion surrounding the sanctuary campus movement and the right of undocumented students. Currently, only Alabama, South Carolina, and Georgia ban the enrollment of undocumented students in public colleges.⁶⁵ However, there are still private institutions within these three states that do allow undocumented students to enroll.

2. *Legal Obstacles to Higher Education*

Congress reestablished its stance on undocumented immigration through the IIRIRA. In Section 505 of the IIRIRA (effective 1998) Congress provided that:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall

⁶³ See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (finding that a Nebraska statute that prohibited foreign language instruction was unlawful); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (finding that Texas education finance system violated the Equal Protection Clause of the Fourteenth Amendment for discriminating among districts).

⁶⁴ 457 U.S. 202 at 226 (stating the absence of a national policy supporting state denial of elementary educational to undocumented immigrants).

⁶⁵ See H.B. 56, Reg. Sess. §8 (Al. 2011); H.B. 4400, 117th Leg., 2nd Reg. Sess. (S.C. 2008); University System of Georgia's Board of Regents Policy Manual, Policy 4.1.6; see also Matt Vasilogambros, *The Folly of Under-Educating the Undocumented*, THE ATLANTIC (Mar. 16, 2016), <http://www.theatlantic.com/politics/archive/2016/03/the-folly-of-under-educating-the-undocumented/473877/>.

not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.⁶⁶

Similarly, under Section 1611 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter “PRWORA”) Congress denied undocumented students eligibility to receive federal financial aid.⁶⁷ The prohibitions on in-state tuition benefits and federal financial aid make it more difficult for undocumented students to obtain higher education since they are more likely than other students to be from low-income families and unable to pay out-of-pocket costs.⁶⁸ For that reason, restricting tuition benefits available to undocumented students through the IIRIRA and PRWORA may have resulted in holistic bans to higher education for undocumented students who were otherwise unable to afford tuition.

Despite the federal restrictions on in-state tuition, certain states over recent years have allowed undocumented students to be eligible for in-state tuition rates.⁶⁹ New York, for example, allows undocumented students to obtain financial assistance by redefining its state residency requirement. In-state tuition benefits in the state are available to individuals who “attended an approved New York high school for two or more years, graduated from an approved New York high school and applied for attendance at an institution or educational unit of the state university

⁶⁶ 8 U.S.C. § 1623.

⁶⁷ 8 U.S.C. § 1611 (limiting eligibility for federal financial aid in post-secondary education to persons classified as “qualified alien[s]”).

⁶⁸ See Passel, *supra* note 17.

⁶⁹ See *In-State Tuition and Unauthorized Immigrant Students*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 19, 2014), <http://www.ncsl.org/research/immigration/in-state-tuition-and-unauthorized-immigrants.aspx> (providing a list of state policies on in-state tuition for undocumented students).

within five years of receiving a New York state high school diploma....”⁷⁰ By redesigning its residency requirement, New York, and states with similar provisions, make it possible to both abide by the federal law and provide access to higher education.

In addition to the IIRIRA, the Immigration and Nationality Act (“INA”) imposes a criminal penalty on any individual or entity that “harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, [undocumented immigrants] in any place, including any building or any means of transportation.”⁷¹ Those who protest the existence of “sanctuary cities” argue that jurisdictions and institutions that implement policies providing safe havens for undocumented immigrants are in criminal violation of the requirements of INA, IIRIRA, or both, through their non-cooperation policies.⁷² If this critique were to form part of the sanctuary campus analysis, the question would be to determine whether sanctuary campuses would be deemed in violation of INA for “harboring” undocumented students because of noncompliance with immigration requests. The answer to this question may depend on the specific policies implemented by colleges or universities. The characteristics of each individual school’s sanctuary policies will determine whether they are found to be in violation of these federal laws and unable to protect the students they seek to support.

With respect to students’ personal information, FERPA⁷³ protects the privacy of student information by

⁷⁰ N.Y. EDUC. LAW § 355 (McKinney).

⁷¹ 8 U.S.C. § 1324(a)(1)(A)(iii). *See also* 8 U.S.C.A. § 1644.

⁷² *See, e.g.,* Gregg Jarrett, *Will Donald Trump Channel Ronald Reagan to Put an End to Sanctuary Cities?* FOX NEWS (Nov. 18, 2016), <http://www.foxnews.com/opinion/2016/11/18/gregg-jarrett-will-donald-trump-channel-ronald-reagan-to-put-end-to-sanctuary-cities.html>.

⁷³ FERPA restrictions apply to certain educational agencies and institutions receiving federal funds. The protections of FERPA apply only to students as defined by 20 U.S.C. § 1232g(a)(6). Under Section 1232g(a)(6), FERPA does not apply to applicants to an institution not in attendance at such institution. *See also* 34 C.F.R. §§ 99.1, 99.3; *Tarka v.*

prohibiting “nonconsensual disclosure of student educational records to any party besides the student or the parents of a minor student.”⁷⁴ FERPA “generally prohibits the improper disclosure of personally identifiable information derived from education records” unless the eligible student or their parent has given written consent.⁷⁵ To determine whether an improper disclosure has occurred, the Act provides specific situations where consent is or is not required by an eligible student⁷⁶ or his or her guardian. Despite the safeguards that are put in place, the protections afforded by FERPA are limited to “students” as defined under the Act.⁷⁷ Furthermore, FERPA does not prohibit institutions from disclosing the personal information of students applying for or receiving federal financial aid.⁷⁸ The Act therefore leaves the undocumented individuals who apply but are unable to gain admission to institutions of higher education unprotected; the “fact that these students do not qualify for either federal student aid or the in-state tuition rates places a major financial burden on the private higher education

Franklin, 891 F.2d 102 (5th Cir. 1989) (holding that plaintiff, who was denied admission, arguing for a right to access to his admission file and recommendation letters was not a student in attendance at the University of Texas at Austin for purposes of FERPA).

⁷⁴ Tamu K. Walton, *Protecting Student Privacy: Reporting Campus Crimes As an Alternative to Disclosing Student Disciplinary Records*, 77 IND. L.J. 143, 147 (2002).

⁷⁵ U.S. DEPARTMENT OF EDUCATION, *FERPA General Guidance for Students*, <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html>.

⁷⁶ 20 U.S.C. § 1232g(d) requires the consent of the student rather than the parent when the student attains eighteen years of age or when the student attends a postsecondary institution. When either of these conditions occurs the student is considered an eligible student.

⁷⁷ 20 U.S.C. § 1232g(a)(6) provides:

For the purposes of this section, the term “student” includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

⁷⁸ 20 U.S.C. § 1232g(b)(1)(D) provides that disclosure of education records or personally identifiable information pursuant to an “application for, or receipt of, financial aid” does not place an institution in violation of FERPA.

institutions.”⁷⁹ The lack of assurance that immigration status will not be disclosed through an application for federal financial assistance may further deter undocumented students from pursuing a college education. Lastly, FERPA contains several exceptions under which disclosure of student information (such as directory information)⁸⁰ absent consent is permitted, such as disclosure to comply with federal regulations or subpoenas.⁸¹ These lapses in the protections afforded by FERPA also place undocumented students at risk. It is important to note where these federal laws fail to protect the interests of these students so that universities and other institutions that pledge to protect them look into their internal policies to formulate solutions that do.

Many are worried about the impact that immigration policies proposed by President Trump will have on undocumented students’ access to education. “Sanctuary cities” may be particularly vulnerable if the new administration is able to overcome constitutional barriers (especially regarding limitations on the spending clause) in its attempts to defund them. Defunding these cities may

⁷⁹ See, e.g., Laura Yates, *Plyler v. Doe and the Rights of Undocumented Immigrants in Higher Education: Should Undocumented Students Be Eligible for In-State College Tuition Rates*, 82 WASH. U. L. REV. 585 (2004).

⁸⁰ 20 U.S.C. § 1232g(a)(5)(A) provides:

For the purposes of this section the term “directory information” relating to a student includes the following: the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

Under FERPA institutions are permitted to disclose “directory information” without consent of the student or parent/guardian but requires notice and a reasonable period for the student or guardian to inform the institution that the information should not be released. 20 U.S.C. § 1232g(a)(5)(B).

⁸¹ See, e.g., 34 C.F.R. § 99.31(9) (2002); 20 U.S.C. § 1232g(b), (j).

greatly impact those public colleges and universities that rely on federal funds and permit the enrollment of undocumented students. There is hope, however, in the New York example. Economically strong cities like New York will be able to avoid violating IIRIRA by revising residency policies, and may fare better than other more vulnerable cities if they are able to rely on their own funding mechanisms to allow them to continue accepting the undocumented without fearing a loss of revenue.

III. THE SANCTUARY CITY MOVEMENT AND THE PUSH FOR SANCTUARY CAMPUSES

A. Threats Facing the Sanctuary City Movement

As already noted, the sanctuary city movement began as a response to the great number of undocumented immigrants fleeing violence in Central American countries.⁸² While sanctuary cities have never had an uncontested existence, recent developments have led to a resurgence of negative discourse.⁸³ There is no legal definition of a sanctuary city, but the determination is generally dependent on whether a given city implements policies and laws regarding the level of cooperation with federal enforcement of immigration laws.⁸⁴ Both state and federal government

⁸² See Cuison Villazor, *supra* note 24, at 135.

⁸³ After the death of California resident Kathryn Steinle in 2015, information that the suspect was Juan Lopez-Sanchez, an undocumented immigrant from Mexico several times deported, intensified the debate surrounding the treatment of undocumented immigrants. Knowledge that Lopez-Sanchez was able to travel freely in California because of a non-cooperation policy in San Francisco sparked intense discussion on the existence of so-called “sanctuary cities”. See Christina Littlefield, *Sanctuary Cities: How Kathryn Steinle’s Death Intensified The Immigration Debate*, L.A. TIMES (July 24, 2015), <http://www.latimes.com/local/california/la-me-immigration-sanctuary-kathryn-steinle-20150723-htlstory.html>. The presidential campaign and election of Donald Trump also served as a catalyst for negative discourse against sanctuary cities.

⁸⁴ The Ohio Jobs & Justice PAC (OJJPAC) provides a list of cities with sanctuary status. OHIO JOBS & JUSTICE PAC, <http://www.ojjpac.org/sanctuary.asp>.

officials have come out against the classification of sanctuary cities, vowing to restrict or repeal funding to those cities.⁸⁵

In August 2017, cities and counties in various parts of Texas brought action against the state challenging the constitutionality of Senate Bill 4 (hereinafter “SB 4”), a piece of anti-sanctuary city legislation.⁸⁶ Specifically, the plaintiffs filed motions for preliminary injunction against the state’s planned legislation arguing that the conditions imposed were unconstitutional or preempted by Congress. SB 4 imposed restrictions on local authorities relating to: immigration status inquiries, sharing and maintaining immigration status information, immigration enforcement assistance and granting immigration enforcement officers access to jails and would also impose fines for noncooperation.⁸⁷ The District Court of the Western District of Texas granted preliminary injunction finding multiple parts of the law potentially unconstitutional. For example, the court held that SB 4’s requirement that local authorities comply with all immigration detainer requests from U.S. Immigration and Customs Enforcement (hereinafter “ICE”) could potentially result in inadequate assessment of probable cause by local police and therefore violate the Fourth Amendment.⁸⁸ In addition, the District Court found that the mandates of SB 4 “upset the delicate balance between federal enforcement and local cooperation.”⁸⁹

Threats from the federal government to cancel funding call into question the constitutional limits, particularly Congress’s spending power. Article 1 of the Constitution provides that Congress has the power to tax

⁸⁵ Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, at 5 (Aug. 15, 2016) 35 YALE L. & P. REV. (forthcoming).

⁸⁶ *City of El Cenizo v. State*, No. SA-17-CV-404-OLG, 2017 WL 3763098 (W.D. Tex. Aug. 30, 2017).

⁸⁷ *Id.* at *5.

⁸⁸ *Id.* at *35.

⁸⁹ *Id.* at *40.

and spend for the general welfare of the country.⁹⁰ This power is subject to restriction as determined by the development of constitutional jurisprudence. It has been well established that the Constitution prohibits Congress from commandeering the States and forcing the implementation of federal regulatory schemes.⁹¹ In both *New York v. United States* and *Printz v. United States*, the Supreme Court struck down attempts by the federal government to compel States to enforce regulatory programs. However, the Court also left open that while Congress cannot force States to enact programs, the federal government may use incentives to encourage State cooperation with such federal programs.⁹² In *South Dakota v. Dole*,⁹³ for example, the Supreme Court held that Congress's act of conditioning the receipt of federal highway funds on the State's adoption of a minimum drinking age was not an abusive or coercive use of the Congress's spending power. This case was instrumental in setting limits on Congressional power and was also key in determining constitutionally acceptable ways in which Congress could encourage State action. The current threats to defund sanctuary cities for refusing to comply with federal demands for immigration status information necessarily implicate an analysis of Congress's spending power. As many cities prepare for the possibility of such policies, it is important to address the potential obstacles that the federal government would face with the implementation of such policy.⁹⁴

⁹⁰ U.S. CONST. art. I, § 8, cl. 1.

⁹¹ See *New York v. United States*, 505 U.S. 144 (1992) (holding that the federal government could not compel the state to implement a program for establishing the disposal and title of radioactive waste); *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress could not force state officers to complete background checks for gun purchases).

⁹² Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, at 7 (Aug. 15, 2016) 35 YALE L. & P. REV. (forthcoming).

⁹³ *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁹⁴ See, e.g., Octavio Blanco, *Sanctuary Cities Risk Billions in Defiance of Trump*, CNN (Nov. 19, 2016), <http://money.cnn.com/2016/11/19/news/economy/sanctuary-cities-trump->

1. *Federal Defunding of Sanctuary Cities May Violate Congress's Spending Power.*

The constitutionality of a federal law defunding states, municipalities, or various public institutions depends on the manner in which Congress goes about seeking to deny funding. Under *Dole*, in order for a restrictive federal funding policy to be considered a reasonable exercise of Congressional spending power, the measure must be in pursuit of the general welfare, Congress must state the objective unambiguously so that States can make a proper choice of whether or not to risk defunding, and the condition upon which funding relies should not become so oppressive that it is coercive.⁹⁵ In *Dole*, the threatened funds constituted only five percent of the highway budget and less than one percent of the State's overall budget. Given these numbers, the Court found the statute to be a reasonable and non-coercive use of the spending power.

Assuming that the limits placed on Congress's spending power with respect to States also apply when local city funding is being threatened, these factors become increasingly important in finding ways to protect the undocumented.⁹⁶ Whether a federal defunding measure targeting sanctuary cities would be considered constitutional would depend in part on the percentage of funding that would be at risk, as was seen in *Dole*. Apart from the percentage limitation, any defunding measure would also need to fulfill the other two conditions set out in *Dole* (the measure must be in pursuit of the general welfare and

funding/; Lauren Etter & Tim Jones, *Sanctuary-City Mayors Gird for Fight as Trump Threatens Budgets*, BLOOMBERG (Nov. 16, 2016), <http://www.bloomberg.com/politics/articles/2016-11-16/sanctuary-city-mayors-gird-for-fight-as-trump-threatens-budgets>; The Associated Press, *'Sanctuary Cities' Vow to Protect Immigrants From Trump Plan*, NBC NEWS (Nov. 16, 2016), <http://www.nbcnews.com/news/us-news/sanctuary-cities-vow-protect-immigrants-trump-plan-n684551>.

⁹⁵ *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁹⁶ Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, at 50 (Aug. 15, 2016) 35 YALE L. & P. REV. (forthcoming).

Congress's objective must be unambiguous so as to give the state or city a proper choice). The latter condition, that of the existence of a real choice ties into the percentage limitation.

Where threats have been made to completely defund cities, the percentage of the budget at stake (and the ability to specify which sectors of city funding to reduce) will determine whether Congressional action is coercive and therefore unconstitutional.⁹⁷ If a complete federal defunding composed a large enough percentage of the city budget, one presumably higher than in *Dole*, then the Congressional action would likely be coercive. This percentage distinction was key in the Supreme Court's ruling in *National Federation of Independent Businesses v. Sebelius*,⁹⁸ where the Court found threats to cut federal funding in states not participating in the new insurance program to be extremely coercive due to the large budgetary percentage implicated. Under *Sebelius* the Court implied that a budget threat of ten percent or more would be too coercive to States. The question then is whether this percentage is also considered coercive when it comes to cities, or conversely, whether some new level would need to be devised. If courts do apply this standard to cities, it should follow that a total defunding measure may likely be held coercive as it was in *Sebelius*.

⁹⁷ For a comprehensive analysis of federal funding in sanctuary cities please see Adam Andrzejewski and Thomas W. Smith, *Federal Funding of America's Sanctuary Cities*, OPEN THE BOOKS (Feb. 2017), https://www.openthebooks.com/assets/1/7/Oversight_FederalFundingofAmericasSanctuaryCities.pdf (providing detailed analysis of federal funding to major sanctuary cities including case studies and a breakdown of the several city departments receiving federal grants and direct funding in New York and San Francisco). See also *Federal Grants to State and Local Government*, CONGRESSIONAL BUDGET OFFICE (Mar. 2013), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/03-05-13federalgrantsonecol.pdf> (explaining federal funding policies and the mechanisms for determining how much aid to provide and how it must be distributed).

⁹⁸ 567 U.S. 519 (2012) (holding that Congress threat to fully defund states that did not expand health services was a coercive use of the spending power).

Since President Trump's inauguration in January 2017, the administration has attempted to defund sanctuary cities. Following the imposition of additional conditions on the provision of federal grants under the Edward Byrne Memorial Justice Assistance Grant Program (the "Byrne JAG grant"), the city of Chicago brought suit for injunction against the Attorney General of the United States, Jefferson Sessions, III.⁹⁹ Specifically, these new conditions required local authorities to: pre-notify federal agents about the release from correctional facilities of individuals suspected of immigration violations, and also grant immigration agents access to City detention facilities and individuals detained therein.¹⁰⁰ On September 15, 2017, the District Court of the Northern District of Illinois granted the city of Chicago a preliminary injunction.¹⁰¹ Specifically, the court found that the Attorney General did not possess Congressional authority to impose the new notice and access conditions on the Byrne JAG grant.¹⁰² The court did not, however, opine on the constitutionality of the two conditions with respect to Congress's spending power since the authority to impose them had not been delegated to the Attorney General.¹⁰³ Thus the question of what specific percentage of a city's budget would imply coercive federal action remains unsettled.

2. Implications for State Sovereignty: Federalism Under the Tenth Amendment

Although Congress is allowed to incentivize states to act in accordance with federal policy, the Constitution is clear that states reserve some autonomy to govern. The Constitution provides that any rights not given to Congress,

⁹⁹ Compl. for Injunctive and Declaratory Relief, *City of Chicago v. Sessions*, No. 1:17-cv-5720, 2017 WL 3386388 (N.D. Ill. Aug. 7, 2017).

¹⁰⁰ *City of Chicago v. Sessions*, No. 17 C 5720, 2017 WL 4081821, at *1 (N.D. Ill. Sept. 15, 2017).

¹⁰¹ *Id.* at *14 (noting also that its holding and analysis of the grant conditions in this case apply nationwide).

¹⁰² *Id.* at *7.

¹⁰³ *Id.*

or prohibited from the states, are reserved to the states or the people.¹⁰⁴ While the Tenth Amendment does not completely shield states from federal regulation,¹⁰⁵ it allows for a degree of sovereignty in determining state policy, especially when it pertains to general welfare. Still, courts have allowed some federal regulation of states. For example, the Second Circuit has upheld the constitutionality of the IIRIRA as a valid exercise of congressional authority.¹⁰⁶ Additionally, where a federal demand on a state is ministerial in nature the Supreme Court has considered that there may be no implication of the anti-commandeering principle if the requested information is generally possessed by the states.¹⁰⁷

The lack of an acceptable legal definition of “sanctuary city” presents a challenge for the “ministerial” defense. Because there is no clear definition of what a “sanctuary city” is and since cities labeled as such vary in their policies and in their level of cooperation with federal immigration enforcement,¹⁰⁸ a defunding policy may in fact force some cities and states to implement federal policies in order to receive funding. This would be contrary to the anti-commandeering principle. For instance, where a state would be forced to collect immigration information they otherwise would not have (for example, if they previously operated under a “don’t ask-don’t tell” policy) in order to obtain federal grants, it could be considered the implementation of a new federal program—making concern for state sovereignty of utmost importance to reviewing courts. A measure to defund a sanctuary city in such circumstance should then be

¹⁰⁴ U.S. CONST. amend. X.

¹⁰⁵ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹⁰⁶ *See e.g., City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) (finding IIRIRA’s prohibitions on restricting voluntary exchange of immigration information to be within Congress’s authority).

¹⁰⁷ *See Printz v. United States*, 521 U.S. 898 (1997).

¹⁰⁸ These variations range from collecting immigration information in the normal process of business but not requiring the transfer of information, to “don’t ask-don’t tell” policies which do not collect information to begin with.

considered unconstitutional for forcing the city to participate in the federal regulatory program.

Federal courts have expressed this very opinion during the past year. Shortly after being inaugurated, President Trump signed Executive Order 13768¹⁰⁹ giving discretion to both the Attorney General and the Secretary of the Department of Homeland Security to deny federal grants to “sanctuary jurisdictions.”¹¹⁰ In April 2017, the County of Santa Clara filed suit for a preliminary injunction against the President’s executive order and was granted such relief by the District Court of the Northern District of California.¹¹¹ Finding in favor of the Santa Clara, the court held Section 9(a) of the executive order in violation of the principle of separation of powers as well as the Fifth and Tenth Amendments.¹¹² The granting of a nationwide permanent injunction by the same District Court followed this temporary relief on November 20, 2017.¹¹³ In doing so, the court made clear that the executive order attempted to “use coercive methods to circumvent the Tenth Amendment’s direct prohibition against conscription” which is a violation of the anti-commandeering principle.¹¹⁴ Notably, the court focused heavily on the administration’s improper use of Congress’s exclusive spending power by placing conditions on funding Congress had repeatedly declined to apply.¹¹⁵ While the court’s ruling in this case is based on action taken by the executive branch, a similar measure imposed by Congress itself may likely face constitutional challenges with respect to potential commandeering effects.

¹⁰⁹ Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

¹¹⁰ *Id.* at 8801.

¹¹¹ *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

¹¹² *Id.* at 531–32, 534.

¹¹³ *Cty. of Santa Clara v. Trump*, No. 17–cv–00574–WHO, 2017 WL 5569835, at *16 (N.D. Cal. Nov. 20, 2017).

¹¹⁴ *Id.* at *14.

¹¹⁵ *Id.* at *12.

B. The Sanctuary Campus Movement and Its Requests

1. *Defining the Objectives of the Sanctuary Campus Movement*

Each year, approximately 65,000 undocumented students graduate from high school in the United States.¹¹⁶ Unfortunately, these students do not have the same access to higher education that other documented immigrants and native-born individuals enjoy.¹¹⁷ Fearing the risk of deportation and the inability to pay college expenses, most undocumented students must forfeit the opportunity to further their education and become more economically stable.¹¹⁸ While no federal statute explicitly prohibits undocumented students from being admitted to colleges, provisions of several statutes can increase the costs and risks of attendance.¹¹⁹ To address this problem, previous administrations implemented several policies granting undocumented students legal status or allowing them to obtain federal identification.¹²⁰ The immigration policies

¹¹⁶ Sanam Malik, *DACA Helps Undocumented Students Access Higher Education*, CENTER FOR AMERICAN PROGRESS (Apr. 7, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/04/07/110558/daca-helps-undocumented-students-access-higher-education/>.

¹¹⁷ *Id.*

¹¹⁸ Laura Yates, *Plyler v. Doe and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible for In-State College Tuition Rates?* 82 WASH. U. L. Q. 585 (2004).

¹¹⁹ See, e.g., 8 U.S.C. § 1623, *supra* note 66; The Personal Responsibility and Work Opportunity Act of 1996 (“PRWORA”) also prohibit the provision of federal financial aid to undocumented students, limiting eligibility to qualified aliens. 8 U.S.C. §§ 1611, 1641; The Higher Education Act (“HEA”) of 1965 limits the eligibility for federal financial aid to documented U.S. residents. 20 U.S.C. § 1091(a); Pub. L. 89-329.

¹²⁰ The Development, Relief, and Education for Alien Minors (“DREAM”) Act and Deferred Action for Childhood Arrivals (“DACA”) were proposed to address the difficulties faced by undocumented immigrants in the United States. The DREAM Act, if approved would have given lawful status to undocumented individuals by creating a path to legalization and make it easier for them to attend college by repealing in-state tuition restrictions created by the IIRIRA. Michael A. Olivas, *IIRIRA, The Dream Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435

proposed by the Trump administration threaten to, among other things, repeal DACA in order to fulfill his promise to deport millions of undocumented immigrants from the United States.¹²¹ The sanctuary campus movement like the sanctuary city movement sees the possible deportation of millions of individuals as antithetical to American values.

The sanctuary campus movement has been a united effort to rally against potential immigration policy changes that would exclude undocumented immigrants from campuses and make them subject to deportation. Following the *Plyler v. Doe*¹²² decision in 1982, it was quite clear that undocumented students, like American citizens, would have access to primary and secondary public education. Legal immigration status could not be a requirement for admission to public schools.¹²³ However, whether the *Plyler* right of access to education applied to institutions of higher education was not clarified, making the position of undocumented students in these institutions more precarious. These students can be barred from admission based on their undocumented status, and even if admitted they also are not afforded the same protections as other students.

The goals of the sanctuary campus movement vary from campus to campus but each localized movement includes a call for colleges to limit cooperation with federal immigration enforcement.¹²⁴ The sanctuary campus

(2003-2004). DACA, currently facing possible repeal, provides temporary relief from deportation for eligible individuals and the opportunity to obtain a short-term work-permit.

¹²¹ DONALD J. TRUMP FOR PRESIDENT, *Immigration*, available at <https://www.donaldjtrump.com/policies/immigration>

¹²² 457 U.S. 202 (1982).

¹²³ *Hispanic Interest Coal. of Ala. v. Alabama*, 691 F.3d 1236, 1249–50 (11th Cir. 2012) (holding as unlawful an Alabama law mandating the procurement of birth certificates for admission to public schools. The court also found that the purpose of the law was to deter enrollment of undocumented students).

¹²⁴ See Catherine E. Shoichet & Azadeh Ansari, 'Sanctuary Campuses' Protests Target Trump Immigration Policies, CNN POLITICS (Nov.

movement is a humanitarian effort that recognizes and stays true to the impetus behind the sanctuary cities movement of the 1980s¹²⁵ through supporting the right to live and learn. As the movement's demonstrations became more frequent at the end of 2016, the media and government officials took notice. The attention has bolstered debates over the place of undocumented immigrants in the country and about steps institutions of higher education can take to help students (whether DREAMers, DACA beneficiaries, foreign students or otherwise). The executive orders signed by President Trump during his first week in office targeting what the new administration determined was a serious immigration problem¹²⁶ have propelled the significance of this issue.

As with sanctuary cities, sanctuary campuses face similar threats to funding by federal and state entities.¹²⁷

16, 2016), <http://www.cnn.com/2016/11/16/politics/sanctuary-campus-protests/>.

¹²⁵ Cuison Villazor, *supra* note 24, at 138.

¹²⁶ Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (describing sanctuary jurisdictions as those which “willfully violate federal law in an attempt to shield aliens from removal from the United States.” The order refers extensively to sanctuary jurisdiction compliance with 8 U.S.C. 1373 described *supra* Part I, B. The Order goes further in restricting the applicability of the Privacy Act of 1974, 5 U.S.C. § 552a, (which protects personally identifiable information held by federal agencies) to citizens and permanent residents. If this measure were to apply to undocumented students they would be more vulnerable to potential deportation especially if the Order were to supersede the protections offered to students under FERPA. Since its implementation the Order has been reformed and deemed unconstitutional by several federal courts.) <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

¹²⁷ On December 16, 2016, the “No Funding for Sanctuary Campuses Act” was proposed in the House by Congressman Duncan Hunter. The proposed legislation is meant as an amendment to the Higher Education Act of 1965 and would prohibit the provision of funds to colleges that violate immigration laws. The proposed legislation also puts forth a potential legal definition for “sanctuary campus” and, if passed, would place the power to determine sanctuary campus status in the hands of the Department of Homeland Security (continuing the trend of making all immigration policy a matter of national security). H.R. 6530 114th Congress (2015-2016); *see also* Patrick Svitek, *Abbott Vows to Cut Funding*

Some claim that the controversy surrounding sanctuary campuses is misguided and misleading with respect to current laws,¹²⁸ and that the current furor may give the impression that an institution using the term “sanctuary campus” will “harbor” undocumented immigrants in violation of the IIRIRA and INA or that institutions can provide complete protection against deportation.¹²⁹ These commentators question the necessity of the sanctuary campus designation, arguing that there is little that colleges can do, or that what the movement requests is already addressed in the administrative policies of many institutions. Opponents of the movement argue that the pressure to designate sanctuary campuses is merely a reflection of a lack of respect for federal law.¹³⁰ With respect to the overly expansive view of sanctuary campuses as disrespectful to federal law, it is important to constantly contextualize and analyze the requests of each individual school before making this sort of general pronouncement, as each school’s approach and policy differ, and has a history outside of this recent moniker.

Among the several demands of the sanctuary campus movement are the following: (1) that an institution of higher education refuse access to immigration officials on campus without a warrant, (2) that an institution refuse to participate in any voluntary sharing of information with

for “Sanctuary Campus” Schools, TEXAS TRIBUNE (Dec. 1, 2016), <https://www.texastribune.org/2016/12/01/abbott-vows-cut-funding-sanctuary-campus-schools/>.

¹²⁸ See Sophie Quinton, *Controversy Over “Sanctuary” Campuses is Misleading, Legal Analysts Say*, PBS NEWSHOUR (Dec. 17, 2016), <http://www.pbs.org/newshour/rundown/sanctuary-campus-controversial/>.

¹²⁹ See discussion of the Immigration and Nationality Act, *supra* note 71.

¹³⁰ Attacks against sanctuary campuses have generally phrased their attacked by stating that such institutions place themselves at risk for violating federal law and that compliance with immigration enforcement would be against such designation. See, e.g., FOX NEWS INSIDER, *GA Lawbreaker: ‘Sanctuary Campuses’ Should Not Receive Taxpayer Money* (Dec. 2, 2016), <http://insider.foxnews.com/2016/12/02/ga-lawmaker-sanctuary-campuses-should-not-receive-taxpayer-money>

immigration officers or agencies, to the extent possible under the law, and (3) that institutions prohibit inquiry into or the recording of an individual's immigration status.¹³¹ These requests will be analyzed in turn. The critical issue is whether taking any or all of these actions would place an institution in violation of federal immigration laws such as the IIRIRA or the INA.¹³²

2. *Analyzing Sanctuary Campus Policy Requests*

Immigration officials' access to campuses. Among the main policy demands of the sanctuary campus movement is restricting immigration officials' access to campuses. In requesting that this action be taken by their respective institutions, proponents of the sanctuary campus movement make the assumption that (a) immigration officers have access to campus without the use of warrants, and (b) that immigration raids would occur on a college campus. To understand the impact that such a restriction would have on a college campus it is imperative that we understand the reach immigration officials have. Particularly, we must understand whether immigration officials can indeed gain access to college campuses without first obtaining warrants and whether they would conduct raids with or without such warrants.

In 2011, the Director of the Immigration and Customs Enforcement agency signed and distributed a memorandum to field office directors and agents regarding immigration

¹³¹ See, e.g., Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions Than Answers*, THE ATLANTIC (Nov. 22, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/>; Eduard Saakashvili, *So What Does a Sanctuary Campus Actually Look Like?* DAILY GAZETTE (Nov. 23, 2016), <http://daily.swarthmore.edu/2016/11/23/so-what-sanctuary/> (listing various characteristics requesting in a petition to declare Swarthmore College a sanctuary campus)

¹³² See *infra* Part II B. 2. for a discussion on challenges faced by the "sanctuary campus" movement.

enforcement in “sensitive locations.”¹³³ The purpose of the new policy measure was to ensure that “enforcement actions do not occur at nor are focused on sensitive locations unless (a) exigent circumstances exist, (b) other law enforcement actions have led officers to a sensitive location... [or] (c) prior approval is obtained.”¹³⁴ Among the places included in the definition of “sensitive locations” are schools (including institutions of higher education), places of worship, sites during public demonstrations, and hospitals. Absent the exceptions contained within it, the policy could have provided protection for student privacy by disallowing immigration enforcement on college campuses especially with regard to collecting data, however, the memorandum was narrowly phrased. The policy applies only to “(1) arrests; (2) interviews; (3) searches; and ...surveillance.”¹³⁵ Expressly exempted from protection are the immigration enforcement actions opposed by the sanctuary campus movements. This includes “obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits.”¹³⁶ Thus, while the policy prescribed by the memorandum may limit the possibility of an immigration raid on a college campus, it does allow immigration officers to request information that potentially reveals an individual’s immigration status.

To address such issues, California Assembly Member Ash Kalra introduced a bill entitled “Public postsecondary education: Access to Higher Education for Every Student,” which proposes a legal implementation of the sanctuary campus movement.¹³⁷ The bill embodies some of the most prominent demands of the sanctuary campus movement. By

¹³³ Memorandum from John Morton, Director, *U.S. Immigration and Customs Enforcement*, “*Enforcement Actions at or Focused on Sensitive Locations*” Policy Number: 10029.2 (Oct. 24, 2011).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ A.B. 21, 2017-2018 Reg. Sess. (Cal. 2017).

adding to the Donahoe Higher Education Act, the bill requires

Trustees of the California State University and the governing boards of community college districts [to, among other things,] refrain from releasing certain information regarding the immigration status of students and other members of the communities served by these campuses; [and] refuse to allow officers or employees of United States Immigration and Customs Enforcement to enter campuses of their respective segments on official business of that agency unless they provide specified information and at least 10 business days' advance notice.¹³⁸

Assembly Bill 21 passed on October 5, 2017 and will protect undocumented students in public colleges and universities, which are most vulnerable to defunding threats. As with other aspects of the sanctuary campus movement, the bill protects against actions that are likely beyond the reach of immigration agents on college campuses. However, to ensure adequate protection of those seeking higher education, it would be practical for other states to consider expansive measures similar to this bill.

Nearly one year into the Trump administration, the state of California expressed increased support for sanctuary policies. In October 2017, California passed Senate Bill No. 54 (hereinafter "SB 54") which "[prohibits] state and local law enforcement agencies, including school police and security departments," from using state resources to cooperate with federal immigration officials where they have discretion to do so.¹³⁹ SB 54 further prohibits California law enforcement agencies from inquiring into a person's immigration status for immigration enforcement purposes.¹⁴⁰ This state sanctuary legislation has been condemned by some opponents as dangerous to public safety but lauded by

¹³⁸ *Id.*

¹³⁹ S.B. 54, 2017-2018 Reg. Sess. (Cal. 2017).

¹⁴⁰ *Id.* at § 7284.6(a)(1)(A).

sanctuary supporters who welcome the strong posture in response to pressure from the Trump administration.¹⁴¹

Sharing of information. Sanctuary campus advocates also request institutions of higher education to refrain from voluntarily sharing information with immigration officials. As discussed above, the IIRIRA prohibits state and local governments from implementing policies prohibiting officers from voluntarily sharing information with immigration officers and agencies.¹⁴² The question here is whether institutions of higher education are subject to the communication restrictions imposed by Section 1373. Being subject to the section would limit a college or university's ability to refuse disclosing its students' or employees' information to immigration officials. I conjecture that any applicable restrictions would apply only to public colleges and universities establishing limited disclosure policies since those institutions are under the control of state or local government and in receipt of federal funding.¹⁴³ Furthermore, it is possible the Section 1373 restriction may only apply where the policy comes directly from the government body controlling such public institutions;¹⁴⁴ this analysis, of course, depends on whether those institutions would be considered "government entities" or their administrators considered "officials" under the statute.

The language of Section 1373 appears narrow in its application, restricting itself to regulating only those actions

¹⁴¹ Kristine Phillips, *In message of defiance to Trump, lawmakers vote to make California a sanctuary state*, WASHINGTON POST (Sept. 16, 2017) https://www.washingtonpost.com/news/politics/wp/2017/09/16/in-message-of-defiance-to-trump-lawmakers-vote-to-make-california-a-sanctuary-state/?utm_term=.17ca2099bcd.

¹⁴² 8 U.S.C. § 1373.

¹⁴³ See *Johnson v. Hurtt*, 893 F. Supp. 2d 817, 839 (S.D. Tex. 2012) (noting that Section 1373 deals expressly with communication between federal agencies and government entities and officials)

¹⁴⁴ *Id.* (stating that Section 1373 operated to "[ensure] federal immigration agencies receive State and local government assistance in the enforcement of immigration matters").

taken by government organizations.¹⁴⁵ While the state laws in California, Alabama, and South Carolina¹⁴⁶ may be subject to review for potential violations of federal immigration laws, private postsecondary institutions may well be free to enact policies restricting the unnecessary sharing of information without fear of violating the IIRIRA. Additionally, “a fair reading of the text [of Section 642 of the IIRIRA] and history of the statutes suggests that the anti-sanctuary provisions were not intended to and do not repeal conflicting privacy protections in federal law.”¹⁴⁷ These include the protections under FERPA and the Health Insurance Portability and Accountability Act (hereafter “HIPPA”), which prohibit the sharing of personally identifiable health information.¹⁴⁸ So while states such as Alabama may implement immigration status reporting requirements, schools or medical officials blindly complying with such policies risk violating these federal privacy laws. Likewise, if a school were to implement a policy refusing to share information about immigration status, federal privacy laws would likely support such action despite the communication prohibitions of Section 1373.

¹⁴⁵ 8 U.S.C. § 1373 provides: “Notwithstanding any other provision of Federal, State, or local law, a *Federal, State, or local government entity or official* may not prohibit, or in any way restrict, *any government entity or official* from....” (emphasis added). See also *Hurt*, 893 F. Supp. 2d at 839 (stating that Section 1373 “speaks expressly in terms of preventing prohibitions or restrictions on the communications between ICE and any government entity or *official*” and did not show a clear intention of Congress to “address the individual concerns of officials in sharing information with ICE”).

¹⁴⁶ Alabama and South Carolina currently prohibit the admission of undocumented students to public postsecondary institutions and require the establishment of immigration status verification systems; see South Carolina Illegal Immigration Reform Act, S.C. Code Ann. § 59-101-430 (2008); Ala. Code § 31-13-8 (2014).

¹⁴⁷ Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and A Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 202 (2016).

¹⁴⁸ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 262, 110 Stat. 1936, 2029 (codified as amended at 42 U.S.C. § 1320d-6).

Furthermore, it is important to establish whether educational funding can be tied to the communication restrictions under Section 1373 since other sections of the IIRIRA govern the provision of such funding to undocumented students in institutions of higher education.¹⁴⁹ If funding could constitutionally be conditioned on compliance with Section 1373, sanctuary campuses implementing non-sharing policies would be at risk of defunding.

Inquiry into and recording of immigration status. The sanctuary campus movement requests that institutions of higher education prohibit security officials from inquiry into or the recording of a person's immigration status. For this goal to be achieved it is important to determine what information institutions of higher education may be *required* to request from potential students and whether such institutions would be subject to any recording requirements. First, both the IIRIRA and the PRWORA prohibit schools from offering in-state tuition to undocumented students in specific circumstances. Institutions, including private colleges and universities, must consider citizenship status when determining eligibility for federal, state, and internal school financial assistance.¹⁵⁰ If an institution does not request information about a potential student's immigration status, that school may be less able to provide financial assistance or protect that student. Moreover, the likelihood that an institution may inadvertently alert the federal government to the existence of undocumented students who apply for federal financial assistance, is among the risks associated with not requesting immigrant status information.

¹⁴⁹ 8 U.S.C. § 1623 (prohibiting distribution of in-state tuition benefits to undocumented students unless offered to national or state residents).

¹⁵⁰ See, e.g., H.B. 4400, 117th Leg., 2nd Reg. Sess., § 59-101-430 (S.C. 2008); Columbia University in the City of New York, Financial Aid, *Eligibility for Federal Aid*, <http://sfs.columbia.edu/fin-aid/elig-fed-aid> (last visited Nov. 26, 2017).

A college or university is limited in its ability to restrict the recording of immigration status or information that may lead to the accidental revelation of undocumented students. Section 641 of the IIRIRA gives the government authority to implement a program to collect “from approved institutions of higher education and designated exchange visitor programs in the United States . . . information . . . with respect to aliens” admitted under certain nonimmigrant visas.¹⁵¹ Currently, the Student and Exchange Visitor Information System (SEVIS), which monitors non-immigrant students and exchange visitors, requires schools to maintain records on students admitted under F-1 and M-1 visas.¹⁵² It is this system that allows colleges to participate in the Student and Exchange Visitor Program (SEVP), which in turn enables them to offer educational opportunities in the United States to foreign students. Individuals accepted to the SEVP program and admitted to the United States and the universities that they attend are always subject to the monitoring and reporting requirements of SEVIS. An institution’s administrative board would therefore be unable to implement a broad policy prohibiting the recording of any immigrant status if that school participates in SEVIS, but may effectively have a policy restricting campus security officers from asking about or reporting on immigrant status to immigration officers. The upside to the limitations of Section 641 is that the provision pertains only to foreign students participating in a government program; it does not address reporting requirements pertaining to undocumented students generally. Therefore, a school could also potentially implement a dual recording policy, which allows them to record the immigration status of students in SEVP while also refusing to record the status of any other student.

¹⁵¹ 8 U.S.C. § 1372.

¹⁵² SEVIS currently requires schools to report, among others things, an individual’s nationality, date and place of birth, student’s current address and employment. *SEVIS Reporting Requirements for Designated School Officials*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <https://www.ice.gov/sevis/dso-requirements>.

3. *Current Protections: What Sanctuary Campuses Can Offer Students*

Protections Under FERPA. Currently, sanctuary campuses can rely on disclosure and notification requirements under FERPA to ensure the privacy of their students. FERPA currently prohibits educational institutions from disclosing students' personally identifiable information without consent.¹⁵³ Notwithstanding its protections, there are several exceptions to FERPA under which release of a student's personal information would be permitted or required. These exceptions to the general rule include the disclosure of directory information (the definition of which is quite broad), to comply with judicial orders or subpoenas, and health and safety emergency disclosures.¹⁵⁴ But despite these exceptions, an institution may still be obligated to notify students of a possible disclosure of their data. So, while an institution may be legally required to comply with a judicial order or subpoena, undocumented students may have the limited protection provided by FERPA's disclosure notification requirement.

Although a school may be allowed to disclose a student's personal identifiable information in certain circumstances, the law requires that with respect to subpoenas a school only release information if the requesting agency or institution has made reasonable efforts to notify the student or parent.¹⁵⁵ Notification allows "the parent or eligible student [to] seek protective action" unless disclosure is required for compliance with subpoenas issued for law enforcement purposes and a court has determined the contents or existence of such subpoenas are to remain confidential.¹⁵⁶ However, as previously stated, FERPA can only protect "students," which includes only those who have "been in attendance" at an institution.¹⁵⁷ Therefore the

¹⁵³ See generally 20 U.S.C. § 1232g(d).

¹⁵⁴ 20 U.S.C. § 1232g(b).

¹⁵⁵ 34 C.F.R. § 99.31(a)(9)(ii).

¹⁵⁶ *Id.*

¹⁵⁷ 20 U.S.C. § 1232g(a)(6).

information of individuals who apply but do not attend these institutions is not protected by the notification requirement. If the goal of the sanctuary campus movement is only to protect the information of those already on a college or university's campus, then FERPA would be one of the most important tools for the sanctuary campus movement. Otherwise, there may be a large sector of individuals whose information would be at risk.

Available Protections Despite the IIRIRA. The IIRIRA prescribes reporting requirements for institutions permitting admission to non-immigrant students.¹⁵⁸ The reporting requirements of the Act do not address the admission of undocumented students to institutions of higher education,¹⁵⁹ meaning that institutions are not required to report the admission of undocumented students for purposes of complying with the IIRIRA reporting provisions. It is worth noting that PRWORA likewise does not address the admission of undocumented students.¹⁶⁰ The reporting requirements under Section 641 of the IIRIRA, for instance, apply only to non-immigrant students participating in a government regulated exchange program.¹⁶¹ Additionally, the Jeanne Clery Disclosure of Campus Security Police and Campus Statistics Act (the "Clery Act"), which requires institutions to compile statistics for crimes reported to campus security or local police, does not require schools to compile information on immigration status.¹⁶² Many

¹⁵⁸ Congressional House Record –§ 501 (107th Congress) Dec. 19, 2001 (requiring, among others, the admission of foreign students and exchange visitors).

¹⁵⁹ See *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 607 (E.D. Va. 2004) (finding that the language of the IIRIRA does not address admission of undocumented students to public institutions of higher education but leaves it to the individual states to decide on the matter).

¹⁶⁰ *Id.* at 605–06.

¹⁶¹ SEVIS, *supra* note 152.

¹⁶² 20 U.S.C. § 1092(f) (1990). (The Clery Act requires that institutions of higher education collect and distribute annual crime statistics to applicants and enrolled students. Reports are required to include the school's policies and procedures in addition to the description

sanctuary institutions have pledged that their school's security officers will make no inquiry into or reporting of an individual's immigration status, instead releasing only the relevant demographical information necessary to be compliant with the Clery Act.

Limiting Access to Immigration Officials. Next one must consider whether institutions can protect students by prohibiting entry to ICE or other immigration officers by requiring the issuance of a valid warrant. As earlier discussed, the possibility of an immigration raid on a college campus may be an unlikely occurrence given ICE's policy with regard to sensitive locations.¹⁶³ Commentators have opined that the idea of a sanctuary campus is somewhat misleading because there have never been immigration raids on college campuses.¹⁶⁴ However, it stands to mention that the memorandum underlying the policy against conducting searches and arrests on school campuses may be vulnerable to repeal or change under a new administration. The policy is not law and therefore is not as difficult to overturn.¹⁶⁵ Still, while the policy is not a legal bar against immigration raids on a college campus, the social pushback, considering the demonstrations to date in support of the undocumented,

and frequency of criminal offenses on campus or in off campus buildings or properties).

¹⁶³ See 2011 Memorandum *supra* note 133.

¹⁶⁴ Michael Olivas, *Conronym and Controversy*, INSIDE HIGHER ED (Nov. 29, 2016), <https://www.insidehighered.com/views/2016/11/29/sanctuary-campuses-wont-provide-real-sanctuary-immigrant-students-essay> (discussing the meaning of the term sanctuary as used by colleges and universities in support of undocumented students).

¹⁶⁵ While administrative agencies can issue binding rules, they often also, as with the 2011 Memorandum, *supra* note 133, use less formal measures to issue guidance policies. To determine the reach of an agency's policy a court will make a distinction between legislative rules, which have the same effect as statutes, and interpretative rules, which do not have the force of law but clarify existing law. However, if it is determined that a policy statement issued by an administrative agency is meant to be just that, a policy of its current stance, it is not binding, unless the agency shows that it intends to treat it as such. *Hudson v. Fed. Aviation Admin.*, 192 F.3d 1031, 1034 (D.C. Cir. 1999).

may be enough to deter any such action. Restricting physical access to immigration officials without warrants would also compliment data disclosure restrictions under FERPA. Moreover, establishing physical restrictions is even more plausible if the limitations on searches and seizures set by the Fourth Amendment are taken into consideration.¹⁶⁶ Under this latter point, discussed further in Part IV, immigration officials would also need to consider the potential constitutional privacy violations before conducting any raid on a college campus, therefore bolstering the position of a school's demand for warrants.

IV. SOLIDIFYING THE LEGAL SIGNIFICANCE OF SANCTUARY CAMPUSES

A. Planning a Path Forward

The current sanctuary campus movement belongs on a list of similar past efforts by colleges and universities to show solidarity with those who are politically weak. During the Vietnam War, for example, colleges became a place of refuge for students who resisted fighting or the draft generally.¹⁶⁷ Similarly, after Japanese Americans were forced to relocate to internment camps during World War II, many colleges arranged for the transfer of students to universities east of military zones that were willing to take students.¹⁶⁸ As a last example, in the "Oberlin-Wellington rescue case," it was on a college's property in 1858 that a runaway slave found shelter when evading slave-catchers.¹⁶⁹

¹⁶⁶ The Fourth Amendment protects against unreasonable searches and seizures where there is a reasonable expectation of privacy. U.S. CONST. amend. IV.

¹⁶⁷ IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* (Paulist Press 1985).

¹⁶⁸ ALLAN W. AUSTIN, *FROM CONCENTRATION CAMP TO CAMPUS: JAPANESE AMERICAN STUDENTS AND WORLD WAR II* (University of Illinois Press 2007).

¹⁶⁹ WILBUR H. SIEBERT, *THE UNDERGROUND RAILROAD: FROM SLAVERY TO FREEDOM* 335–37 (Project Gutenberg ed. 201) (1898) (describing the Oberlin-Wellington rescue of the runaway slave John and

In all these examples, college campuses provided a haven to those the law did not protect. Although these actions were condemned at the time they were taken, the important humanitarian implications behind them should be recognized. The sanctuary campus movement must also be appreciated in light of the positive impacts it can have on the lives of thousands of undocumented students. Looking at the sanctuary campus movement through this lens, it is important to solidify its legal significance and devise ways in which colleges can better serve these individuals. Colleges and universities should not only look at what tools are currently in place, but also consider ways to expand on these policies to effectively fight against unfair immigration reform. Perhaps then, sanctuary movements can assist in creating a fair immigration policy respectful of American values.

1. Implementing Data Retention Policies That Expand FERPA Protections

As previously discussed, current federal policy prohibits the disclosure of students' personally identifiable information without consent in most situations. However, these legal protections are available only to those who have been enrolled in the school, leaving the personal data of the millions who do not enroll in jeopardy of disclosure. Colleges and universities purporting to be members of the sanctuary campus movement must attempt to close the gaps left by FERPA to strengthen their protective capabilities. Administrators, faculty, and students of sanctuary campuses and their supporters may consider lobbying Congress to demand reform of federal privacy laws, including FERPA. Unfortunately, it is unlikely that lobbying efforts to reform FERPA would prove fruitful for sanctuary campus proponents, as the Trump administration and the current Congress are unlikely to improve policies granting increased

the prosecution of the students and professors who helped him to continue his life as a freedman).

protections for undocumented immigrants. Considering the efforts of the Executive branch to defund sanctuary cities during the first months of Trump's presidency, this point is even more evident.

Sanctuary campuses should consider, as a possible alternative measure, reforming their internal data retention policies. As previously discussed, FERPA protections apply only to "students" as defined by 20 U.S.C. § 1232g(a)(6).¹⁷⁰ Because of this, immigration officers could potentially request immigration status information of college applicants who have never been enrolled in the school. Assuming the requests are otherwise lawful, institutions would not be able to use FERPA to deny access or require the consent of affected individuals before the personal information is released. To counter the potential risks, institutions of higher education should consider the following options: (a) having no information retention policy for students who have not been admitted to their schools, (b) having a specific policy under which only immigration status information is removed from applicant and student records, (c) lowering their data retention periods overall, or (d) adopting new employee training policies for working with and handling subpoenas for sensitive information and immigration law.

Data retention policy regarding applicants. There are few federal laws that require the retention of student records, and there are only a few states, Oregon, for example, that have some requirements.¹⁷¹ Some state administrative regulations permit colleges to destroy any or all portion of a student's education records as long as it accords with the

¹⁷⁰ 20 U.S.C. § 1232g(a)(6).

¹⁷¹ There are, for example, federal requirements for the retention of records for special education students under the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (1990). Many institutions of higher education follow the guidelines set by the American Association of Collegiate Registrars and Admissions Officers ("AACRAO") for best practices in records retention.

school's established retention policy.¹⁷² It is not yet clear what recording rules apply to *applicant* data as compared to *student* data. Because data retention policies vary amongst jurisdictions, sanctuary colleges and universities should stay abreast of the applicable data retention policies governing their respective states or localities. By acquainting themselves with these rules, and not simply relying on generalized recommendations, schools can best formulate retention policies that not only protect their *students* (as defined under FERPA) but also applicants who do not ultimately matriculate.

Specific policies to remove immigration status from records. Higher education institutions may alter their data retention policies so that immigration status information is not included in the data retained. Of course, implementation of such a policy should take into consideration any state or federal laws requiring the retention of immigration status information.¹⁷³ Alternatively, colleges could consider lowering the retention periods for certain types of data. Many colleges have varying record retention policies for individuals who do not enroll in the school. While some colleges only maintain applicant information for one year, others have much longer retention periods.¹⁷⁴ The longer

¹⁷² The Washington Administrative Code had several sections permitting the destruction of student education records for specific institutions as allowed under each school's policies. This right is subject to a student's right to request access. See Wash. Admin. Code 516-26-095; Wash. Admin. Code 132D-125-095 (permitting the destruction of education records as defined by Wash. Admin. Code 132D-125-020).

¹⁷³ See, e.g., The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act"), Pub. L. No. 107-56, §115 Stat. 396 (2001).

¹⁷⁴ Cornell University maintains a record of student education records (including applications, admissions and enrollments) and denials for one year. *Retention of University Records: Policy 4.7*, CORNELL UNIVERSITY, https://www.dfa.cornell.edu/sites/default/files/vol4_7.pdf. Columbia University's retention policy advises a ten-year maintenance of electronic enrollment data for denied applicants and admitted students who do not enroll for ten years. *Retention of Student Education Records*, COLUMBIA UNIVERSITY, http://policylibrary.columbia.edu/files/policylib/imce_shared/Retention_of_

retention policies may place undocumented students at greater risk of detection and deportation if immigration officials gain lawful access to such records. These concerns are now highly important to sanctuary campuses considering President Trump's Executive Order 13786 requesting limitations on the Privacy Act.¹⁷⁵

Internal employee training. In order to ensure that school officials are prepared to handle immigration data, institutions should implement targeted training programs, if such programs are not already in place. These trainings should cover, among other measures the school may deem prudent, instructing employees on how to properly respond to requests for student records. In addition, training should instruct employees on best practices for requesting immigration status information—specifically, whether requesting such information would be appropriate or necessary. Colleges and universities should prioritize training employees and their students on the protections of FERPA and the limitations placed on external requests for student information. By properly instructing students and employees on privacy laws, colleges and universities can be better assured that the rights of their students will be respected internally. Additionally, they should offer students and employees materials on relevant immigration law with an emphasis on the rights of non-citizens. These materials should, where applicable, include information about how the sanctuary campus movement operates within the boundaries of the law to protect undocumented individuals on school campuses.

Student_Education_Records.pdf. New York University requires a minimum two-year retention policy for applications of individuals who do not enroll. *Schedule "1" – Retention Periods for General Categories of Retainable Records*, NEW YORK UNIVERSITY, https://www.nyu.edu/content/dam/nyu/compliance/documents/Retention_Schedule.pdf.

¹⁷⁵ Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8802 (Jan. 25, 2017) (ordering agencies to restrict protections of the Privacy Act to United States citizens and lawful permanent residents).

Finally, colleges and universities wishing to participate in the sanctuary campus movement should implement financial assistance programs to assist undocumented students. Current laws restrict undocumented students' access to higher education by prohibiting schools from offering in-state tuition benefits to undocumented students. Federal laws also restrict access to higher education by making undocumented students ineligible to receive federal financial assistance available to other students. Colleges and universities can enhance their impact by expanding financial programs to help undocumented students who have difficulty paying for their education. For example, institutions can remove requirements for social security numbers and citizenship status where not entirely necessary, to be eligible to receive a scholarship. By removing such requirements, institutions would expand financial aid eligibility to students lacking such documentation. Colleges and universities should also make publicly available, comprehensive lists of scholarships available to undocumented students. In addition, colleges should consider establishing financial programs with the specific aim of helping DACA and other undocumented students with immigration related problems. This transparency would assist college applicants who may be deterred due to their ineligibility for federal aid.

2. Declaring Sanctuary Buildings May Not Be the Best Approach

Sanctuary campuses should refrain from designating certain spaces on their properties as "sanctuary spaces." The Fourth Amendment provides that where there is a higher expectation of privacy, such as in a home, there is a higher burden on the government to show that intrusions are proper.¹⁷⁶ However, designating specific areas on campuses

¹⁷⁶ Bryan R. Lemmons, *Public Education and Student Privacy: Application of the Fourth Amendment to Dormitories at Public Colleges*

as safe spaces for undocumented students does not necessarily mean that a court will find the expectations of privacy there protected by the Fourth Amendment. Colleges and universities should instead prepare materials providing students and employees with information on which locations on campus guarantee the protections of the Fourth Amendment and require the procurement of a warrant for entry by immigration officials. Indeed, “[t]he Supreme Court has established that college students do not ‘shed their constitutional rights’ at the schoolhouse gate.”¹⁷⁷ Courts have held, for example, that students have a reasonable expectation of privacy under the Fourth Amendment with respect to dorm rooms, determining that “a student who occupies a college [or university] dormitory room enjoys the protection of the Fourth Amendment.”¹⁷⁸ By providing information to students about such protected areas rather than designating arbitrary safe zones, colleges and universities would do a better job of protecting their undocumented students from possible deportation arrests on campus. To amplify the protection of this policy, schools could request any warrants being used to arrest students or access immigration status information be presented to a designated individual in the office of its general counsel who would review the validity and reach of said warrant.

3. Encouraging State and City Legislation and Helping Students to Find Legal Assistance

While measures like the recent California legislation might not be possible in all jurisdictions, sanctuary campuses should do their best within the limits of the law to support similar legislative actions in their respective states and cities. Relatedly, institutions should consider smaller supportive actions that can also have real impact on their students. To begin, colleges and universities should support

and Universities, 2012 B.Y.U. EDUC. & L.J. 31 (2012) (discussing the privacy protections afforded to students under the Fourth Amendment).

¹⁷⁷ *Id.* at 37–38 (quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975)).

¹⁷⁸ *Id.* at 38.

student and faculty efforts organized to challenge the injustice faced by undocumented students. While institutional support of these efforts may not produce legislative change, providing emotional support demonstrates to undocumented students that they can rely on the larger community. Additionally, universities with law school facilities should also create or expand pro bono immigration clinic services with volunteer attorneys and students to assist undocumented students facing possible deportation or educate immigrants about their rights. Because many undocumented immigrants are from working class economic backgrounds¹⁷⁹ and may be unable to pay for legal aid, pro bono services are incredibly important. Some law schools, such as Columbia Law School and New York University, are already equipped with pro bono immigration clinics and so have the means to assist. While these measures will not result in the broad change that city or state legislation would, undocumented students would have a much-needed supportive environment.

V. CONCLUSION

Evaluating the risks posed by the current presidential administration leads one to question the legal significance that sanctuary campuses can have for undocumented students. To fully comprehend the complexity of the sanctuary campus movement and its constraints, it is first important to understand the sanctuary city movement of the 1980s. As with that movement, the sanctuary campus movement should be considered a humanitarian effort with the simple aim of preventing injustice against those with limited rights and means. As they implement policies, sanctuary campuses have been forced to face not only the moral but also legal issues surrounding the movement. Developments in the first year of the Trump administration clearly illustrate that the administration will work to realize its conservative campaign promises on immigration policy,

¹⁷⁹ Passel, *supra* note 17.

and highlight the importance of the issue. By staying informed of local and federal requirements, institutions of higher education can be better prepared to address these challenges. They will also be less likely to violate immigration regulations through their efforts to assist the undocumented. Beyond refusing to cooperate with immigration officials if not required by the law, colleges and universities should improve privacy and data retention policies, and continue to educate their staff and students about the rights of non-citizens and protections available under current laws. By observing these practices and helping their students to rally for immigration reform, sanctuary campuses will be better able to protect the undocumented.