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Universities as "Sanctuaries"

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UNIVERSITIES AS “SANCTUARIES”

PROFESSOR MARYAM AHRANJANI¹

“The arc of the moral universe is long, but it
bends toward justice.”

Rev. Dr. Martin Luther King, Jr.

Abstract

When Donald Trump, a businessman and reality television personality with anti-immigrant views, was elected President of the United States in November 2016, thousands of students, faculty and staff at many colleges and universities around the country implored their institutions to affirmatively declare themselves sanctuaries for undocumented students. Enjoying support both from the estimated 200,000 undocumented university students and other stakeholders, the movement gained quite a bit of momentum, but many contentious battles also have occurred. According to the author’s empirical analysis, only twenty of the more than 5,000 institutions of higher education in the United States have adopted the sanctuary campus designation.

This piece explores the legal and policy implications of the “sanctuary campus” designation and the balance between the goal of the designation and the effects. In concluding that the sanctuary movement should focus on promoting policies and programs, this article argues: 1) there is a lack of clarity about the term “sanctuary,” 2) to the extent that there is agreement about the term, universities already are de facto and de jure sanctuaries and efforts to affirmatively adopt the designation may undermine the presumption, and 3) there are some persuasive political and other reasons to focus on targeted assistance rather than a name that may not mean much.

¹ Assistant Professor, University of New Mexico (UNM) School of Law. I extend heartfelt gratitude to: fellow members of the UNM Undocu Task Force; my supportive deans, Alfred Mathewson and Sergio Pareja; Rayman Solomon and the editors and board of the Journal of College and University Law; Michael Olivas, Susan Brooks, Jenny Moore, Nathalie Martin, Mary Pareja, Jen Laws, Gabe Pacyniak, and Cliff Villa for their collegiality, mentorship and feedback; Ernesto Longa and research assistant Kristen Edwards; Lumen Mulligan and the University of Kansas School of Law faculty for their thoughtful comments and suggestions during a faculty exchange presentation in April, 2018; and my Iranian American parents and Peruvian American husband, all of whom made tremendous personal sacrifices in pursuit of higher education in the U.S.

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I. Introduction

When Donald Trump, a reality television personality with anti-immigrant views, was elected President of the United States in November 2016, thousands of students, faculty and staff at many colleges and universities around the country asked their institutions to affirmatively declare themselves sanctuaries for undocumented students.² Young people justifiably feel and felt threatened by President Trump's campaign and post-election rhetoric, including derogatory statements about Mexicans,³ Haitians, and Africans,⁴ promises to ramp up immigration enforcement, and the plan to build a wall and require Mexico to pay for it.⁵ Leaders at a number of higher education institutions immediately voiced support for undocumented students and embraced the "sanctuary" label.⁶

The movement gained quite a bit of support and momentum,⁷ but many contentious battles have also occurred.⁸ The threshold challenge is that there are different definitions of the term "sanctuary campus," and it is not clear that all campuses are on the same page in terms of how far they will go to defend the designation.⁹ There are approximately 5,300 institutions of higher education in the United States,¹⁰ and only a tiny fraction of those have adopted the term.¹¹ Since a relatively small number of campuses have adopted the term,¹² the question of how to best address undocumented students on university campuses remains a live and ongoing issue.

2 *The University as a Sanctuary*, University of Southern California Pullias Center for Higher Education (Jan. 2017), https://pullias.usc.edu/wp-content/uploads/2017/01/The_University_as_a_Sanctuary_Final.pdf.

3 Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, Time (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/>.

4 Julie Hirschfeld Davis, *Trump Alarms Lawmakers With Disparaging Words for Haiti and Africa*, N.Y. Times (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html>.

5 Donald Trump: *Mexico Will Pay for Wall, '100%'*, BBC.com (Sept. 1, 2016), <http://www.bbc.com/news/election-us-2016-37241284>.

6 Yara Simón, *28 Universities That Vow to Offer Sanctuary to Their Undocumented Students*, Remezcla (Nov. 22, 2016, 11:13 AM), <http://remezcla.com/lists/culture/sanctuary-campus-daca/>.

7 American Association of University Professors, *Sanctuary Campus Movement* (Aug. 11, 2017), <https://www.aaup.org/issues/sanctuary-campus-movement>.

8 Lana Shadwick, *Battle Over 'Sanctuary Campuses,' In-State Tuition to Dreamers Heats Up*, Breitbart (Jan. 22, 2017), <http://www.breitbart.com/texas/2017/01/22/battle-to-defund-sanctuary-campuses-and-deny-instate-tuition-to-dreamers-heats-up/>.

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

10 Jeffrey J. Selingo, *How Many Colleges and Universities do We Really Need?*, Wash. Post (Jul. 20, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/07/20/how-many-colleges-and-universities-do-we-really-need/?utm_term=.02e258f3f1f2.

11 César Cuauhtémoc García Hernández, *Sanctuary Campuses Map*, crImmigration.com, <http://crimmigration.com/2017/02/07/sanctuary-campuses-map/>.

12 See *infra* Section III.A. for a description of the author's database of sanctuary campuses.

Immediately prior to the current president's election, I became faculty advisor to the newly formed Immigration Law Student Association, and a few months later became a member of our university's Undocu Task Force.¹³ The Undocu Task Force's charge is to better coordinate resources for our undocumented and "DACAmended"¹⁴ students across units on campus, identify gaps in services and attempt to fill those gaps. New Mexico provides relatively strong supports for undocumented students both by law and by practice,¹⁵ but our largest state institutions have declined to go so far as to call ourselves "sanctuaries."¹⁶ Despite the high population of immigrants and Latinos, the same is true of our neighboring (border) states of Arizona and Texas.¹⁷ The goals of the sanctuary campus movement at my and other institutions are to protect undocumented, immigrant and international students so they can learn and promote solidarity.¹⁸

This piece explores some of the legal and policy implications of the "sanctuary campus" designation and aims to affirm the role of universities as safe places to pursue knowledge and skills for all students. It does not seek to provide exhaustive technical legal advice to counsel at and for universities. Rather it seeks to encourage university thought leaders, including counsel, to think more broadly about the institutions they serve and how to pursue the broad aims of their institutions rather than get tied up in the politics surrounding the "sanctuary" term.

In particular, this piece makes the following arguments: 1) there is a lack of clarity about the term "sanctuary," 2) to the extent that there is agreement about

13 University of New Mexico, *Undocumented UNM*, <http://undocumented.unm.edu/>.

14 A commonly used term for students who have authorization to remain and work in the U.S. pursuant to the Deferred Action for Childhood Arrivals Program.

15 Maryam Ahranjani, *What Does Immigration Status Have to Do with Law School Diversity*, CLEO Edge 50 (Winter/Spring 2018), [http://mydigitalpublication.com/publication/?i=459668&pre=1#{"issue_id":459668,"page":50}](http://mydigitalpublication.com/publication/?i=459668&pre=1#{) (describing the ways in which diverse students are supported in New Mexico). See also uLEAD network: New Mexico Policy (Jan. 9, 2018), <https://uleadnet.org/map/new-mexico-policy> for an explanation of SB 582, New Mexico's law passed in 2005 that makes all qualified residents of New Mexico eligible for in-state tuition and state-funded financial aid, regardless of immigration status, and prohibits post-secondary institutions from denying admission based on immigration status.

16 Russell Contreras and Sophia Tareen, *Universities Exploring 'Sanctuary' Status for Immigrants*, Associated Press (Dec. 3, 2016), <https://apnews.com/d792a64476f248f9a1552e780d8f8b8e/universities-exploring-sanctuary-status-immigrants>.

17 Yoohyun Jung, *Arizona's Public Universities Will Not Consider Becoming 'Sanctuaries'*, Ariz. Daily Star (Feb. 11, 2017), http://tucson.com/news/local/education/arizona-s-public-universities-will-not-consider-becoming-sanctuaries/article_8432d51c-ffda-55fb-87bb-e6a8cca301d2.html; Julián Aguilar, *Ahead of Thursday Hearing, Texas Senate Adds Muscle to Anti-Sanctuary City Bill*, Tex. Trib. (Feb. 1, 2017, 11 AM), <https://www.texastribune.org/2017/02/01/texas-senate-adds-muscle-anti-sanctuary-city-legis/>.

18 Dulce Morales, *A Movement for Sanctuary Campuses Takes Shape*, Institute for Policy Studies (Mar. 15, 2017), <http://www.ips-dc.org/a-movement-for-sanctuary-campuses-takes-shape/>. Note that the terms "immigrant," "undocumented" "non-citizens" and "DACAmended" have distinct legal definitions but are sometimes used interchangeably in this piece because sometimes the relevant legal distinction is between citizens and non-citizens. Further, sometimes the general public conflates the terms. Finally, and perhaps most importantly, the sanctuary campus movement's concerns about inclusion and solidarity extend to all students, regardless of immigration status.

the term, universities already are sanctuaries and efforts to affirmatively adopt the designation may undermine the reality, and 3) there are sometimes legitimate, persuasive political and policy reasons to pursue sanctuary policies but not the designation. Since anti-immigrant sentiment has always and will likely always exist, this piece argues that while the effort spent on the sanctuary campus movement has been useful in many ways, it is the policies created by the movement that matter most. The author concludes with policy recommendations that further the goals of inclusion and solidarity that drive the sanctuary campus movement.

II. Background

The term “sanctuary campus” first arose in response to President Trump’s anti-immigrant campaign rhetoric, including his mantra, “Make America Great Again.”¹⁹ During the campaign season, he promised to force Mexico to build a contiguous border with Mexico, referred to Mexicans as “rapists,” and allowed neo-Nazis to support him.²⁰ Because of the campaign rhetoric, there was widespread concern about rescission of DACA,²¹ the Obama-era executive order protecting individuals who were brought to the U.S. as children and who meet certain criteria. After the January 2017 executive orders on enhancements of border security²² and foreign terrorist entry (also known as the “Muslim ban”),²³ campuses across the country began to prepare for aggressive enforcement of immigration law on college and university campuses. The term “sanctuary campus” arose as a way to demonstrate support for all immigrant students. The concern about rescission of DACA became a reality on September 5, 2017.²⁴

Borrowed from earlier immigrants-rights movements, the term “sanctuary campus” evolves from the idea of churches²⁵ and cities as sanctuaries from federal law enforcement of immigration law.²⁶ The idea of state agents – cities, towns and

19 Pamela Engel, *How Trump Came up with his slogan ‘Make America Great Again,’* Bus. Insider (Jan. 18, 2017), <http://www.businessinsider.com/trump-make-america-great-again-slogan-history-2017-1>.

20 John Bowden, *Neo-Nazis Celebrate Trump ‘s---hole’ comment: He’s ‘on the same page as us,’* Hill (Jan. 12, 2018, 4:53 PM), <http://thehill.com/blogs/blog-briefing-room/news/368807-neo-nazis-celebrate-trump-shithole-comment-hes-on-the-same-page>; Melissa Ryan, *How the President and Neo-Nazis Work Hand in Hand*, Progressive (Jan. 31, 2018), <http://progressive.org/magazine/trump-s-army-how-the-president-and-neo-nazis-work-hand-in-ha/>.

21 Julianne Hing, *Fear and Fight in the Final Days of DACA*, Nation (Jan. 25, 2017), <https://www.thenation.com/article/fear-and-fight-in-the-final-days-of-deferred-action/>.

22 Exec. Order No. 13769, 82 Fed. Reg. 8977 - 8982 (Jan. 25, 2017); White House, *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States* (rev. Mar. 6, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

23 *Id.*

24 U.S. Dept. of Homeland Security, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

25 Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 Cap. U. L. Rev. 583, 597-608 (2014).

26 Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 Cap. U. L. Rev. 583, 609-616 (2014). Rose Cuison Villazor, *What is a Sanctuary?*, 61 SMU L. Rev. 133, 154-156 (2008).

other localities – declaring themselves as sanctuaries arose in the 1980s from the church sanctuary movements to protest federal immigration policies that denied asylum to refugees from Guatemala and El Salvador.²⁷ San Francisco passed a law in 1989 prohibiting local police from holding undocumented immigrants in custody if they do not face charges or don't have a record of violent felonies.²⁸

As of the 2016 election, approximately 300 cities and counties across the country have various iterations of sanctuary city policies despite the threat of losing federal assistance.²⁹ A number of cities have sued the U.S. Department of Justice for its efforts to punish them by withholding funds.³⁰ The Seventh Circuit Court of Appeals recently sided with Chicago by finding that the Justice Department may not withhold public safety grants from cities that limit cooperation with the current administration's immigration policy.³¹ Litigation in other jurisdictions is pending.³²

The relevance of the sanctuary cities movement to the topic of this piece is that this movement, while controversial, has arguably grown and seems to have influenced the birth of the sanctuary campus movement. For example, as public support for immigrants swells in his state and others, Governor Jerry Brown of California signed legislation in January 2018 declaring the entire state a sanctuary for undocumented immigrants, a move that Administration officials have condemned.³³

Writing in the context of the sanctuary cities movement of 2007-2008 immediately preceding President Obama's election, Professor Rose Cuison Villazor made some interesting points regarding sanctuaries in the city context that are worth applying to higher education.³⁴ First, she points out, for better or for worse, that for some the term "sanctuary" is politically charged and evokes somewhat negative connotations, including condoning evasion of immigration laws and enforcement.³⁵ Use of a term that adds fuel to the fire of anti-immigrant sentiment seems counter-productive. Second, suggests that perhaps the more

27 Rose Cuison Villazor, *What is a Sanctuary?*, 61 SMU L. Rev. 133, 134-136 (2008).

28 <http://sfgov.org/oceia/sanctuary-city-ordinance-0> (last visited January 30, 2018); Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions than Answers*, Atlantic (Nov. 22, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/>.

29 Richard Gonzales, *Mayor Rahm Emanuel: 'Chicago Always Will Be a Sanctuary City'*, npr (Nov. 14, 2016 at 7:57 PM EST), <https://www.npr.org/sections/thetwo-way/2016/11/14/502066703/mayor-rahm-emanuel-chicago-always-will-be-a-sanctuary-city>.

30 Dan Levine, *Appeals Court Rules against U.S. on Funds for Sanctuary Cities*, Reuters (April 19, 2018), <https://www.reuters.com/article/us-usa-immigration-ruling/appeals-court-rules-against-u-s-on-funds-for-sanctuary-cities-idUSKBN1HQ2WG>.

31 *Id.*

32 *Id.*

33 Jonathan Blitzer, *In Calling for Politicians' Arrest, An Ice Official Embraces His New Extremist Image*, New Yorker (Jan. 4, 2018), <https://www.newyorker.com/news/news-desk/in-calling-for-politicians-arrest-an-ice-official-embraces-his-new-extremist-image>.

34 Rose Cuison Villazor, *What is a Sanctuary?*, 61 SMU L. Rev. 133, 154-156 (2008).

35 *See id.*

important question than what is a sanctuary is why sanctuary, which, applied to our higher education space, shifts the focus to dealing with the lack of meaningful support felt by undocumented students.³⁶ Finally, she highlights the importance of distinguishing between the use of the term in the public versus private context since the law is usually different in the two.³⁷

However, there is an important distinction between sanctuary cities and sanctuary universities. Sanctuary cities have police forces that could theoretically face off with immigration officers, or affirmatively refuse to enforce federal law, but institutions of higher education simply do not have that manpower, which leaves them more vulnerable to federal enforcement officers than cities.³⁸ However, it would be extremely difficult, logistically, fiscally and politically, for federal immigration officers to pursue the tens, if not hundreds of thousands of cases, of undocumented students on campus, not to mention the terrible optics for the administration that would result from enforcement efforts on campuses.

The third predecessor to the sanctuary campus movement is the precedent set by the Supreme Court in 1982 in *Plyler v. Doe*.³⁹ In *Plyler*, the Court held that states, should they choose to offer public education, may not deny students that basic privilege on the basis of immigration status. The Court differentiated between adults who made the decision to enter or stay in the United States without legal authorization and children who were brought to the country by an adult.⁴⁰ Writing for the majority, Justice Brennan points out that “by denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute even in the smallest way to the progress of our Nation.”⁴¹ Over 90% of students in the K-12 context attend public schools, and hundreds of thousands of them are undocumented, so the implications of the decision are far-reaching.⁴²

Despite this longstanding precedent guaranteeing access to public education for undocumented students, K-12 students—both undocumented and those with legal authorization—face hardships and discrimination on the basis of immigration

36 *See id.*

37 *See id.*

38 Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions than Answers*, Atlantic (Nov. 22, 2016) (explaining concerns by some college presidents).

39 457 U.S. 202 (1982).

40 *Id.* (explaining that “legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice”).

41 *Id.* at 209.

42 Jack Jennings, *Proportion of U.S. Students in Private Schools is 10 Percent and Declining*, Huffington Post (Dec. 6, 2017), https://www.huffingtonpost.com/jack-jennings/proportion-of-us-students_b_2950948.html; The Education Trust-West, *Undocumented Students in California: What You Should Know* (Apr. 2017), https://29v0kg31gs803wndhe1sj1hd-wpengine.netdna-ssl.com/wp-content/uploads/sites/3/2015/11/ETW_CA-Undocumented-Students-What-You-Need-to-Know-FINAL-April-2017.pdf (explaining that 250,000 undocumented young people ages 3-17 are enrolled in California schools).

status.⁴³ Each fall when school begins, there are reports of students being denied access to public schools when they are unable to produce a social security number or other proof of residency.⁴⁴ Notwithstanding clear legal precedent in favor of undocumented K-12 students, some districts recently have chosen to adopt the “sanctuary” designation to show solidarity and support because the right to attend is just one barrier.⁴⁵

Given resistance to or at least ignorance of longstanding Supreme Court precedent, it should come as no surprise, then, that there is resistance to the idea of undocumented students being protected in the higher education realm. However, arguably, the same logic applied in *Plyler* applies in the higher education context. That is, failing to provide education to undocumented students will only make their lives harder and will mean they have less opportunity to contribute to society. This idea of equal opportunity motivates the sanctuary movement.

III. Analysis

Understanding the history of the movement leads to the question of whether the designation is necessary to achieve the goals of the movement. This section argues there is no need to affirmatively designate universities as sanctuaries because 1) there is a lack of clarity about the term, 2) even applying the most sweeping definition of the term, unlike cities, universities already are de facto and de jure sanctuaries, and 3) there are sometimes legitimate, persuasive political and policy reasons to pursue policies and programs that underlie the sanctuary campus designation without adopting the title.

A. *The Term “Sanctuary” Lacks Universal Meaning*

What does “sanctuary” mean? The answer depends on the respondent and her pre-existing experience with the term. Scholars have documented the sanctuary church and city movements quite effectively, so this piece focuses on the prior movements only to the extent necessary to distinguish the sanctuary campus movement.⁴⁶ This section explains how the use of a term that may have different meanings within those prior movements leads to a lack of clarity in the higher education context.

43 Eric T. Schneiderman, *Immigrant Children Have a Right to a Good Education*, Educ. Week (Mar. 11, 2016), <https://www.edweek.org/ew/articles/2016/03/16/immigrant-children-have-a-right-to-a.html> (explaining investigations into dozens of school districts across New York who denied immigrant children access to public schools).

44 *See id.*

45 District of Columbia Public Schools, *Keeping DC Schools Safe for All Families and Students* (Mar. 10, 2017), <https://dcps.dc.gov/release/dcps/keeping-dc-schools-safe-all-families-and-students-0>; Ray Sanchez, *US Public Schools Take Steps to Protect Undocumented Students*, cnn (Feb. 24, 2017, 4:45 PM), <https://www.cnn.com/2017/02/23/us/public-schools-immigration-crackdown/index.html>.

46 Laura Jarrett & Tal Kopan, *Federal Judge Again Blocks Trump from Punishing Sanctuary Cities*, cnn (Sept. 15, 2017), <https://www.cnn.com/2017/09/15/politics/chicago-lawsuit-trump-sanctuary-cities-jag-funds/index.html>.

In an attempt to understand the actual scope of the movement, I decided to create a comprehensive database. My assiduous research assistant began with Xavier Maciel and Aparna Parikh's interactive map of universities and colleges that declared themselves to be sanctuary campuses, were petitioned to become sanctuary campuses, or denied requests to become sanctuary campuses.⁴⁷ That map became the basis of a more current, detailed and extensive database including the names of 204 schools, a link to and summary of each school's most recent policy statements, description of whether schools offered in-state tuition to undocumented students, and whether the schools were in red or blue states.⁴⁸

Our research concludes that only twenty schools have made an official declaration as a sanctuary campus.⁴⁹ The majority (17) are located in Democratic states and a slim majority (11) are public.⁵⁰ Many otherwise reiterated a commitment to serving undocumented students by publicly offering statements of support (and even "unequivocal support"), declaring themselves "safe campuses," and issuing statements of solidarity.⁵¹ However, even if schools were not willing to adopt the sanctuary term, most of the 204 were willing to affirm general support and/or implement at least some of the policies requested in the sanctuary petitions, such as not using campus police to inquire about immigration status or enforce immigration laws.⁵² It was difficult to ascertain whether pledged support and resources are new or preexisting.

Nine of the twenty sanctuary schools are private and eleven are public.⁵³ Almost all of the private schools are small and well-endowed.⁵⁴ Of the eleven public schools, ten are in California or Oregon, states that wholeheartedly embrace immigrant and undocumented students, as demonstrated through strong legislation and/or sympathetic political environments.⁵⁵

One of the first universities to adopt the identity is Wesleyan University (population 3,200), which publicly declared that it would not willingly assist with government efforts to deport students, faculty and staff who are undocumented.⁵⁶ Wesleyan's embrace reflects the finding that nearly 90% of private schools to adopt

47 César Cuauhtémoc García Hernández, *supra* note 11.

48 Database on file with author.

49 Database on file with author.

50 Database on file with author.

51 Database on file with author.

52 Database on file with author.

53 Database on file with author.

54 One school is large (25,000) and one school's endowment is under \$10 million. Database on file with author.

55 American Association of University Professors, *Sanctuary Campus Movement* (Aug. 11, 2017), <https://www.aaup.org/issues/sanctuary-campus-movement>; Gutmann Declares 'Sanctuary,' Pa. Gazette, Jan/Feb 2017, at 16.

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

the designation are small (under 5,000) and with endowments ranging between \$137 million and \$12 billion dollars.⁵⁷ Small and well-endowed means the decision to declare sanctuary is low-risk. For well-endowed, small private schools with tiny undocumented populations, adopting the designation does not carry the same risks as it does for public entities dependent on state funds appropriated by often hostile state legislatures.

With a population of 25,000, the University of Pennsylvania is the largest of the private schools to adopt sanctuary campus.⁵⁸ President Amy Gutmann came out early in the movement to demonstrate unflagging support for undocumented students when she sent an email to the campus community with the following message: “Penn is and has always been a “sanctuary” – a safe place for our students to live and to learn. We assure you that we will continue in all of our efforts to protect and support our community including our undocumented students.”⁵⁹ The UPenn reflects the finding that supportive declarations may simply be reiterations of existing university and city / state policies.⁶⁰

It has been more difficult for state higher education institutions, particularly those in states without pre-existing laws protecting undocumented students like California⁶¹ and Oregon⁶² and less-wealthy private colleges to declare themselves as sanctuaries.⁶³ In the absence of a federal DREAM Act to protect undocumented students’ access to higher education,⁶⁴ over the 17 years since the first attempt at passage of a federal statute, 21 states (over 40%) have moved to offer in-state tuition to students who are undocumented.⁶⁵ These so-called “baby DREAM Acts” typically allow in-state tuition for students who achieved a high school diploma or GED from an in-state high school and who pledge to apply for legal status as soon as eligible.⁶⁶ The number of states providing protections has steadily increased,

57 Database on file with author.

58 Database on file with author.

59 Cassie Owens, *Amy Gutmann: Penn is a Sanctuary Campus and We’ll Protect Undocumented Students*, Billy Penn (Nov. 30, 2016, 2:30 PM), <https://billypenn.com/2016/11/30/amy-gutmann-penn-is-a-sanctuary-campus-and-well-protect-undocumented-students/>.

60 *Id.* See also database on file with author.

61 University of California, *Undocumented Student Resources: California State Legislation*, <http://undoc.universityofcalifornia.edu/legislation-basics.html>.

62 Oregon State University, *DACA and Undocumented Student FAQs*, <http://leadership.oregonstate.edu/executive/deferred-action-childhood-arrivals-daca-and-undocumented-student-faqs>.

63 Jeff Charis-Carlson, *Most Iowa Campuses Stop Short of Declaring ‘Sanctuary’ Status*, Iowa City Press-Citizen (Jan. 30, 2017, 2:58 PM), <http://www.press-citizen.com/story/news/education/college/2016/12/09/some-iowa-campuses-stop-short-declaring-sanctuary-status/95134322/>.

64 Yamiche Alcindor and Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize ‘Dreamers,’* N.Y. Times (Sept. 15, 2017), <https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html>.

65 Diana Ali, *In-State Tuition for Undocumented Students: 2017 State-Level Analysis*, NASPA.org (July 21, 2017), <https://www.naspa.org/rpi/posts/in-state-tuition-for-undocumented-students-2017-state-level-analysis>.

66 Nat’l Conf. of State Legislatures, *Tuition Benefits for Immigrants*, (Jul. 15, 2015), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx>.

reflecting the idea that universities have both remained consistent and adapted to fit the needs of society.⁶⁷

It is worth noting that while some argue that the vast majority of Americans are in support of undocumented students,⁶⁸ which means, in theory, that state legislatures would be in support of the sanctuary designation, in fact, a number of state institutions have indicated hesitation at best and strong resistance at worst.⁶⁹ After students in Arkansas, Georgia and Texas called for their campuses to declare themselves as sanctuaries, Republican legislators threatened to cut off funding.⁷⁰ Even institutions in states that provide in-state tuition and other protections for undocumented students have indicated concerns about overtly adopting “sanctuary” status.⁷¹

So, what exactly does a declaration of “sanctuary” actually mean? The term can signify many things, from affirmatively providing legal help for undocumented students to financial assistance to simply not allowing Immigration and Customs Enforcement agents on campus without a warrant.⁷² Proposed policies include a range of actions, including:

- Not allowing Immigration and Customs Enforcement Officers (ICE) and Customs and Border Patrol (CBP) officers onto campus without a warrant,
- The refusal of campus police to enforce immigration law,
- Not sharing student immigration status with ICE/CBP,⁷³
- Refusing to use E-Verify,
- Not gathering information on immigration or citizenship status,
- Providing tuition support, including in-state tuition rates at public universities to students with DACA status,

67 David Watson, *What is a University For?*, Guardian (Jan. 14, 2002, 8:34 AM), <https://www.theguardian.com/education/2002/jan/15/highereducation.news>.

68 Adriana Gomez Licon and Emily Swanson, *Majority of Americans Support Dreamers Staying in the US, poll says*, Christian Sci. Monitor (Oct. 11, 2017), <https://www.csmonitor.com/USA/Politics/2017/1011/Majority-of-Americans-support-Dreamers-staying-in-the-US-poll-says>.

69 *Controversy over ‘sanctuary campuses is misleading, legal analysts say*, PBS NewsHour (Dec. 17, 2016, 2:22 PM), <https://www.pbs.org/newshour/nation/sanctuary-campus-controversial>.

70 *Id.*

71 Justin Cox, *New Mexico State University’s President Says Campus Will Not Become a Sanctuary Campus*, krqe (Dec. 3, 2016), <http://krqe.com/2016/12/03/new-mexico-state-universitys-president-says-campus-will-not-become-sanctuary-campus/>.

72 Ashley Cleek, *Weighing the Risks of a ‘Sanctuary’ Campus*, Pub. Radio Int’l (Feb. 16, 2017, 5:00 PM EST), <https://www.pri.org/stories/2017-02-16/weighing-risks-sanctuary-campus>.

73 Except that with regard to students on F, J and M visas, in accepting SEVIS certification, the institution has agreed to share with DHS certain information and also to ICE/SEVP campus visits with regard to students comprised within the SEVIS system. 8 C.F.R. § 214.3(g), <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-17197/0-0-0-20666.html>.

- Publicly supporting the DACA program,
- Providing distance-learning options for deported students to complete their degrees,
- Enforcing policies with all college or university staff and all contractors and subcontractors and their employees working on property owned or controlled by the college or university, and/or
- Providing confidential legal support to students with immigration law questions and issues.⁷⁴

An institution that adopts all these elements may be at risk of local and national political pressure, as well as challenges by its state legislature, the Departments of Justice, Homeland Security, Education, and the National Institutes of Health (which provide funding to institutions that follow applicable federal laws), and others.⁷⁵ On the least inclusive end, an institution that adopts the term but merely says it will not allow ICE officials onto campus without a valid judicial warrant really is not saying much not already required by law. All institutions should require valid judicial warrants from law enforcement officers for any students before complying with law enforcement requests or risk facing legal by students.⁷⁶ For example, a student whose class schedule is released to an Immigration and Customs Enforcement official and whose person and backpack is subsequently searched and items therein seized may be able to raise FERPA and Fourth Amendment claims if the official did not have a valid judicial warrant.⁷⁷

Critics have argued that the lack of shared meaning is a threshold problem with sanctuary designation.⁷⁸ Others have said that there is a baseline understanding that the term sends a message of solidarity and inclusion.⁷⁹ While the author echoes the first concern, regardless of one's response to the lack of semantic clarity, this paper argues that universities already are sanctuaries and that the goals of

74 Immigration Response Initiative at Harvard Law School and Cosecha Movement, *Sanctuary Campus Frequently Asked Questions* 32, <https://today.law.harvard.edu/wp-content/uploads/2017/02/Sanctuary-Campus-Toolkit.pdf> (providing a wealth of data and resources related to support for undocumented students).

75 *Supra* note 72.

76 Charis-Carlson, *supra* note 63, noting exception regarding students covered by the SEVIS system.

77 See U.S. Department of Education, <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>; U.S. Const. amend. IV. The Family Educational Rights and Privacy Act (FERPA) protects the privacy of student education records. Generally, if a student is over 18, an institution must seek the student's permission prior to releasing an education record such as a class schedule. Further, the fourth amendment prohibits warrantless searches and seizures unless a specific exception applies.

78 Michael Olivas, *Sanctuary Campuses Won't Provide Real Sanctuary for Immigrant Students*, Inside Higher Educ. (Nov. 29, 2016, 3:00 AM), <https://www.insidehighered.com/views/2016/11/29/sanctuary-campuses-wont-provide-real-sanctuary-immigrant-students-essay>.

79 American Council on Education, *Immigration Post-Election Q & A: DACA Students, "Sanctuary Campuses," and Institutional or Community Assistance* (Dec. 2, 2016), www.acenet.edu. See also, UNMSanctuary Campus, <http://www.unmsanctuarycampus.org/> (stating that the faculty working group "stands in solidarity with undocumented students and community members by pushing to make UNM a Sanctuary Campus").

sanctuary movement in some contexts may be better served by focusing on actual programs and services for students.⁸⁰

The brief background section introduced the history of, reasons for, and goals of the sanctuary campus movement in higher education. While the fuzziness of the term is a threshold problem, this section continues by proposing that 1) as a matter of law, policy, and public opinion, universities already are sanctuaries, and 2) for *some* institutions,⁸¹ the goals may be achieved without the designation and, relatedly, that the designation means nothing if policies and programs to support the goals are not in place.

The overarching tension in the debate over sanctuary designation is how to provide a safe, supportive environment for *all* students, especially immigrant students, while complying with the law. Legal concerns include, *inter alia*, compliance with due process, equal protection, first amendment, HIPAA, and FERPA rights on the one hand and threats to loss of funding and/or political ostracism for perceived non-compliance with federal immigration law.⁸² The next section more directly addresses legal issues related to the designation and concludes that the on the whole, individual rights of undocumented students outweigh concerns about non-compliance.

B. Universities Already Are Sanctuaries

In addition to concerns over the actual meaning, if any, of the sanctuary designation,⁸³ there are other reasons the designation may undermine the goals of the movement. This section explains how, because of their historic role, treatment in fact and by law, universities already are sanctuaries. Therefore, all students – regardless of citizenship—do and should enjoy protection.

1. The Role of the University in American Society

Since its inception in medieval Europe, the modern university system has been dedicated to discourse and learning free from restraints present in other societal contexts.⁸⁴ The word “university” derives from the Latin *universitas magistrorum et scholarium*, which roughly translates to “community of teachers and scholars.”⁸⁵

80 Charis-Carlson, *supra* note 63 (quoting University of Iowa President Bruce Harreld as saying “What I’m really worried about is if we put a label across it that doesn’t mean anything, we actually as an institution...might actually start relaxing the things we’re doing to really help individually.”).

81 *See id.*

82 Immigration and Naturalization Act Sec. 274. [8 U.S.C. § 1324] (Harboring Certain Alien and General Compliance).

83 Hannah Natanson, *Faust Says Harvard Will Not be a ‘Sanctuary’ Campus*, Harvard Crimson (Dec. 7, 2016), <https://www.thecrimson.com/article/2016/12/7/faust-sanctuary-campus-policy/> (describing the Harvard University’s decision to deny the label because “it had no legal significance [and] could actually further endanger undocumented students.”).

84 Christopher Z. Mooney, *The Vital Role of Scholarship in Public Discourse*, Chron. Higher Ed. (Dec. 3, 2017), <https://www.chronicle.com/article/The-Vital-Role-of-Scholarship/241956> (describing the critical role of American academics producing independent scholarship, particularly in an era of “fake news”).

85 A History of the University in Europe: Vol. 1 8 (Walter Rüegg, ed., 1992).

Although it has evolved and will continue to evolve, the idea of community is perhaps the single defining characteristic of universities since their inception nine hundred years ago.

In the American context, universities have enjoyed a special status for over three centuries. They have educated clergy and private citizens, served as tools to learn about and address societal needs and problems, provided opportunities to promote upward social mobility, and have served as havens for all manner of debate regarding societal issues.⁸⁶

For as long as universities have existed, however, they have been criticized.⁸⁷ Some of the critiques include that universities are elitist, graduation rates are low, they are expensive, they are too market-driven, they are not market-driven enough, quality controls vary greatly, faculty selection and review processes are flawed, they perpetuate social status, they are unable to keep up with rapidly changing technology.⁸⁸

Notwithstanding their shortcomings, they occupy a unique and protected place in American society that are unmatched by any other societal institution and largely unmatched by any other nation.⁸⁹ They have advanced social reform, promoted science and technology, and inculcated valuable skills for citizenship and leadership.⁹⁰ Because of that unique space, universities already offer protections and stand as “sanctuaries” to protect the “marketplace of ideas.”⁹¹ Understanding this history helps frame the redundancy of calling universities “sanctuaries.”

2. *Universities as De Facto Sanctuaries*

In terms of universities as de facto sanctuaries or places of refuge, picture in your mind any university or college with which you are familiar. Consider its physical characteristics, including its location, appearance, and subtly or actually somewhat inaccessible by outsiders. More than likely, the institution is physically quite beautiful, well-kept, and safe. American higher education institutions are systems whose “structure, formal rules, and powerful traditions have evolved over three centuries”⁹² but who share an “ambience of intimacy and leisured

86 Michael Roth, *What Is a University For?* Wall Street J. (Mar. 4, 2016 at 5:21 PM EST), <https://www.wsj.com/articles/what-is-a-university-for-1457130080>.

87 Christopher J. Lucas, *American Higher Education* xi-xxi (1994).

88 Arthur M. Cohen, *The Shaping of American Higher Education* 1 (1998).

89 Roger L. Geiger, *The History of American Higher Education* x (2015) (explaining that the four unique aspects of American higher education include: 1) all members of society, not just the elite, are welcome 2) applied and practical studies are available both to undergraduates and graduate students, 3) public and private institutions provide market-based, mass higher education that responds to student demands, and 4) high-quality teaching and scholarship has led to a “world-leading status for American science.”

90 *Id.*

91 Clay Calvert, *Where the Right Went Wrong in Southworth: Underestimating the Power of the Marketplace*, 53 Me. L. Rev. 53 (2001). *But see* James F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties, and Unfinished Tasks* 26 J.C. & U.L. 875 (2010) (explaining how in recent decades, there has been an increase in regulations affecting university campuses).

92 Geiger, *supra* note 89, at 539.

contemplation.”⁹³ When crimes happen on campuses, people seem shocked and outraged, as if they are immune from social realities.⁹⁴ In terms of public perceptions of universities, scholars point out that college attendance has both an “economic and iconic status” in our society.⁹⁵

3. *Universities as De Jure Sanctuaries*

With regard to the preexisting status of universities as de jure sanctuaries, from the founding of the University of Paris in the 12th century, the institution has been recognized by church and political leaders as one requiring and deserving special legal protection.⁹⁶ Henry Dunster, Harvard’s first president, solidified the governance of the college, the first established in the United States, by obtaining charter of incorporation from the General Court.⁹⁷ Over time, higher education institutions have become regulated by a web of public and private control.⁹⁸

Notwithstanding the fact that recent social movements have brought increased regulation to universities,⁹⁹ the law treats university students with special care.¹⁰⁰ From campus safety and security reporting¹⁰¹ to sex discrimination¹⁰² to free speech¹⁰³ to disability rights¹⁰⁴ to equal protection and diversity¹⁰⁵ to student health privacy and records protection,¹⁰⁶ courts and legislatures have considered

93 Lucas, *supra* note 87, at 289.

94 Aimee Lee Ball, *Staying Safe on Campus*, NY Times (July 20, 2012), <https://www.nytimes.com/2012/07/20/education/edlife/students-fear-venturing-out-alone-at-night-on-campus.html>.

95 Geiger, *supra* note 89, at ix.

96 Geiger, *supra* note 89, at xiv (describing how medieval universities were “given separate legal incorporation by Popes or monarchs and accorded the right to confer degrees”).

97 Geiger, *supra* note 89, at 4.

98 Cohen, *supra* note 88, at 39.

99 James F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties, and Unfinished Tasks* 26 J.C. & U.L. 875 (2010).

100 Leonard M. Niehoff, *Introduction: Civil Rights in the Academy*, 75 Mich. B.J. 1145 (1996).

101 U.S. Dept. of Education, *The Handbook for Campus Safety and Security Reporting: 2016 Edition*, <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

102 U.S. Dept. of Education, *Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School*, <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf>; Know Your Title IX, *College Resources* (<https://www.knowyourix.org/college-resources/>) (explaining that even under the current administration, Title IX protects all higher education students, including international and undocumented students).

103 Board of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000). *Rosenberger v. Rector and Visitors of Univ. of Va.* 515 U.S. 819 (1995).

104 U.S. Department of Education, *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, <https://www2.ed.gov/about/offices/list/ocr/transition.html>.

105 *Fisher v. Univ. of Tex. at Austin*, 579 U.S. __ (2016) (finding that the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause).

106 Association of State and Territorial Health Officials, *Comparison of FERPA and HIPAA Privacy Rule for Accessing Student Health Data* (Aug. 11, 2017), <http://www.astho.org/programs/preparedness/public-health-emergency-law/public-health-and-schools-toolkit/comparison-of-ferpa-and-hipaa-privacy-rule/> (explaining HIPAA and FERPA protections for university students).

and established special protections for students in higher education. In addition to the special legal protections enjoyed by universities as business entities, the individual rights recognized by courts and legislatures support the argument that universities are de jure sanctuaries. Further, noncitizens—including, arguably, those on campuses—enjoy many of the same protections as citizens.

Scholars have pointed out that noncitizens are in fact entitled to a number of constitutional protections.¹⁰⁷ Many U.S. Supreme Court opinions from the 1970s reinforce this idea.¹⁰⁸ David Cole¹⁰⁹ points out that since the U.S. Constitution only expressly limits to citizens the right to vote and to run for federal elective office, one may deduce that “equality between non-nationals and citizens would appear to be the constitutional rule.”¹¹⁰ Despite public misunderstanding, “the Constitution extends fundamental protections of due process, political freedoms, and equal protection to all persons subject to our laws, without regard to citizenship.”¹¹¹

While the Constitution is silent as to additional limitations for non-citizens, Professor Cole concedes that the U.S. Supreme Court has made distinctions. However, he points out that where the Court subjects non-citizens to obligations, it also generally has entitled them to protections.¹¹² He further recognizes that under international human rights law, non-citizens of a country are entitled to the same protections as citizens since, as recognized by the Court, obligations imply protections.¹¹³

Admittedly, there are arguments in favor of treating non-citizens differently from citizens. Professor Cole articulates a number of them.¹¹⁴ Non-citizens have taken no oath of loyalty (although most U.S. born people haven’t either), they have no constitutional right to reside in the U.S., treating non-citizens and citizens equally may devalue the very notion of citizenship, and the whole purpose of immigration law is to set conditions for foreign nationals to reside in the U.S.¹¹⁵

107 Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 U. Conn. L. Rev. 879 (2015); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. Jefferson L. Rev. 367 (2003).

108 E.g., *Alameida-Sanchez v. United States*, 413 U.S. 266 (1973) (holding that noncitizens are entitled to the same rights that attach to the criminal process as citizens); *Graham v. Richardson* 403 U.S. 365 (1971) (invalidating state statutes that denied welfare benefits to resident aliens or to aliens who did not live in the U.S. for a specified number of years); *In re Griffiths*, 413 U.S. 717 (1973) (finding that a state’s exclusion of an resident alien applicant for bar admission violated the fourteenth amendment’s equal protection clause).

109 After having been a professor of constitutional law and criminal justice at Georgetown University Law Center for nearly thirty years, Professor Cole currently serves as national legal director of the ACLU. <https://www.aclu.org/bio/david-cole>.

110 David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. Jefferson L. Rev. 367, 368 (2003).

111 *Id.* at 381.

112 *Id.* at 372.

113 *Id.* at 368.

114 *Id.*

115 David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T.

However, in response to these concerns, he points out that most citizens acquire that status merely by accident of birth, most do not affirmatively chose to live in the U.S., and the plenary power of Congress over “a uniform rule of naturalization” has been narrowed by the Supreme Court in recent years.¹¹⁶

Striking a middle ground, he asserts that at the very least, non-citizens are entitled to substantially the same constitutional rights protections as citizens, but these rights are not absolute. His net analysis is that the areas of “defensible differentiation” between non-citizens and citizens include admission, expulsion, voting and running for federal elective office,¹¹⁷ but these are much narrower than the rights of presumptive equal treatment, including due process, First Amendment freedoms of expression, association and religion, privacy, and the rights of the criminally accused.¹¹⁸

Assuming that university students enjoy special protections and that non-citizens enjoy most of the same rights as citizens, it follows that non-citizen students (including undocumented students) enjoy, without the “sanctuary” designation, protections promoted by the sanctuary campus movement. This conclusion supports the idea that while a university’s decision to call itself a “sanctuary” may, assuming it supports the claim with corresponding programs and policies, be valuable, it is not essential to the argument that undocumented students deserve equal access to and protection while on higher education campuses.

C. Universities Should Pursue Programs and Policies that Promote the Solidarity and Inclusion Goals of the Sanctuary Movement Even If They Don’t Adopt the “Sanctuary” Title

As Professor Cole points out, there are a number of public misperceptions about the rights of non-citizens, and those misperceptions contribute to the perhaps-small-but-vocal anti-sanctuary campus voices. Some institutions may hesitate to poke the bear of federal immigration enforcement and risk charges of violations of general compliance and harboring in violation of INA provisions. There may be concern that sanctuary campuses violate valid state and federal laws exercising police power to provide for health, safety, and welfare of all U.S. residents¹¹⁹ However, states may respond that federalism and commandeering principles preclude the police power argument since state laws providing support for undocumented students are not in direct conflict with federal law.¹²⁰

Jefferson L. Rev. 367, 384 (2003).

116 *Id.* at 385-387.

117 In fact, DACA recipients are not eligible for unemployment benefits, health insurance, and social security. Also, there are a number of licensing requirements that serve as obstacles for non-citizens. Justin Chan, *America’s Undocumented College Students Face Roadblocks to Employment After Graduation*, Forbes.com (May 15, 2007, 6:04 PM), <https://www.forbes.com/sites/justinchan/2017/05/15/what-job-prospects-do-undocumented-students-have/#63ddf2fa5131>.

118 Cole, *supra* note 115, at 388.

119 Douglas R. Sahmel, *How Maryland’s Sanctuary Policies Isolate Federal Law and the Constitution While Undermining Criminal Justice*, 36 U. Balt. L.F. 149 (2006).

120 See University of New Mexico Student Financial Aid Office, <http://financialaid.unm.edu/>

Professor Huyen Pham has proposed a compromise to address federalism concerns: case-by-case review under intermediate scrutiny.¹²¹ Under intermediate scrutiny, a university must show that it has an important government interest in protecting undocumented students and its policies (including a “sanctuary” designation) are substantially related to that interest. Neither the government interest nor the substantial relationship analysis seem like a slam dunk.

According to the Pew Research Center, between 200,000-225,000 postsecondary students in the U.S. are undocumented.¹²² It would be nearly impossible for federal immigration enforcement officials and immigration judges to deal with all of those cases, let alone state and local police.¹²³ In fact, political concern about the consequences of failing to turning over information about undocumented students to federal immigration officials is in direct conflict with student privacy rights under FERPA.¹²⁴

With regard to lawmakers’ and university officials stated concerns about being accused of violating federal law, it is unlikely that the designation would lead to any federal action to remove funds. In the Title IX context, for example, in the forty-six years since its enactment, not once has funding been pulled from an institution that violates it.¹²⁵ If, in fact, the Department of Education and/or Department of Justice finds that a “sanctuary” university is violating federal law, the more likely outcome is negotiation to resolve the alleged violation. Further, courts generally have been supportive of sanctuary cities,¹²⁶ which means that efforts to de-fund universities—which evoke more sympathy—for non-compliance with federal law are also unlikely to succeed.

Regardless of whether universities adopt the “sanctuary” designation, the goals of the movement may be achieved by focusing on progressive programs and policies. As a baseline, university officials should conduct regular campus climate evaluations. These evaluations should inform what programs and policies

apply/situations.html (last visited June 27, 2018) (explaining that New Mexico state law provides multiple of protection for undocumented students: non-discrimination in admissions, in-state tuition, and financial aid). See also University of California, *Undocumented Student Resources*, <http://undoc.universityofcalifornia.edu/> (last visited June 27, 2018).

121 Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373 (2006).

122 Kaitlin Mulhere, *Undocumented and Stressed*, Inside Higher Educ. (Jan. 26, 2015) <https://www.insidehighered.com/news/2015/01/26/study-finds-undocumented-colleges-students-face-unique-challenges> (explaining estimates about the population of undocumented students in the United States).

123 Jennifer M. Hansen, *Sanctuary's Demise: The Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289, 292, 318-327 (2008).

124 Deruy, *supra* note 9; Cosecha, *supra* note 74, at 12.

125 Tyler Kingkade, *Why It's Unlikely North Carolina Schools Would Lose Funding Over HB 2*, Huffington Post (Feb. 2, 2017, 4:06 PM), https://www.huffingtonpost.com/entry/north-carolina-federal-funding_us_57320239e4b096e9f092b9c6.

126 Ilya Somin, *Federal Court Rules that Trump's Executive Order Targeting Sanctuary Cities is Unconstitutional* Wash. Post (Nov. 21, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/21/federal-court-rules-that-trumps-executive-order-targeting-sanctuary-cities-is-unconstitutional/?utm_term=.bae2db281a10.

are necessary to promote inclusion and solidarity with all the students served by an institution of higher education.¹²⁷

Current best practices include individualized attention and emotional support for students who are undocumented or who are affected by the current administration's immigration policies, academic support, financial support, and legal support.¹²⁸ Institutional actors and units must recognize that stress related to immigration status will negatively affect a student's ability to learn, and their stress is related to their own legal status, how to pay for school, and concern for family members.¹²⁹ Even in states that provide in-state tuition, undocumented students often have no reliable way to pay in-state tuition and living expenses, so even the idea of in-state tuition for undocumented students is misleading.¹³⁰

That said, the University of California system has paved a path toward success in higher education that seems unparalleled.¹³¹ Depending on the institution, state and resources, programs and policies may be designed in a way that is consistent with the particularized needs of students on campus, always keeping in mind that the university's role and duty is to educate all of its students, and the UC system provides an excellent example.

IV. Conclusion

Consider Magdalena's situation.¹³² She has survived a brutal attempted sexual assault on campus by someone she knew well, and even though she is physically okay, she has not been able to focus on her upcoming final exam. She reaches out to her mentor, a professor with whom she feels comfortable, to see whether the professor thinks it is reasonable to request an extension for her exam. The professor immediately reports the incident to the university's Title IX office, as required by law. When the Title IX coordinator reaches out to Magdalena to investigate further and determine whether to open a case against the accused assailant, Magdalena is petrified that her status as an undocumented student will be revealed to law enforcement. Thankfully, she discovers that although the Title IX liaison is required to make an inquiry, she is not required to respond. But the several days of waiting

127 University of California, *Undocumented Student Resources*, <http://undoc.universityofcalifornia.edu/> (last visited June 27, 2018) (including a detailed, and constantly changing, list of programs and policies).

128 Robert T. Teranishi, Carola Suárez-Orozco, and Marcelo Suárez-Orozco, *In the Shadows of the Ivory Tower* 20-22, UndocuScholars.org, <https://static1.squarespace.com/static/5aa69f8e8f51307aa7d7cdcb/t/5aa6c5718165f57981de21d6/1520878966718/undocuscholarsreport2015.pdf> (last visited June 27, 2018).

129 Mulhere, *supra* note 122 (explaining that 25.8% of male and 36.7% of female undocumented undergrads meet the clinical definition for generalized anxiety disorder compared to 4% and 9% of the general population).

130 Meredith Hoffman, *The Crippling Cost of College for America's Undocumented Students*, Vice (Apr. 3, 2016, 10:00 PM) https://www.vice.com/en_us/article/7bdnvy/the-crippling-cost-of-college-for-americas-undocumented-students.

131 University of California, *Undocumented Student Resources*, <http://undoc.universityofcalifornia.edu/> (last visited June 27, 2018).

132 The name and other identifying facts have been changed but are based on an actual case with which the author is familiar.

on pins and needles to figure out her obligations has re-victimized Magdalena, who is just trying to focus on her studies and make a better life for herself and her family.

This is one example of the hurdles faced by undocumented students. What would help Magdalena the most? Would it be her university deciding to call itself a “sanctuary?” Would it be her university creating a policy of anonymity, which is what some institutions have done, that somehow allows the university to meet its reporting obligations but protects vulnerable students from law enforcement?

The vast majority of institutions of higher education in the United States have not adopted the “sanctuary campus” designation.¹³³ In fact, only twenty institutions have embraced it,¹³⁴ but much time and energy is spent in its pursuit. An institution’s decision to call itself a sanctuary undeniably sends a strong moral and rhetorical message, but because of the lack of clarity and political disagreement about immigration policies, the term also invites backlash. Notwithstanding the relatively limited scope of likely repercussions for universities, there can be no doubt that there has been a rise in the alt-right voice on campuses across the country, impacting campus political climates for the undocumented and all members of campus communities.¹³⁵ To the extent that there is agreement that universities train the next generation of leaders and workers in our society, climate and culture of campus environments matter as much as curriculum.¹³⁶ For university officials to feel that raising the “sanctuary” flag would make themselves and the undocumented students they seek to protect the targets of political backlash and hate crimes,¹³⁷ there is still a way forward.

This piece should not be understood to condone capitulation to anti-immigrant sentiment. On the contrary, universities already enjoy a special historical and legal status as sanctuaries. Therefore, political, legal and financial battles may be avoided and the movement goals may be best achieved by simply affirming the pre-existing role. Affirming the role may involve some public declaration of support¹³⁸ but certainly *should* involve taking meaningful steps to create and support strong programs and policies to support undocumented and immigrant students in the face of racist, nationalist, divisive actions.¹³⁹

133 Selingo, *supra* note 10. César Cuauhtémoc García Hernández, *supra* note 11.

134 According to database on file with author.

135 Nadia Dreid and Shannon Najmabadi, *Here’s a Rundown of the Latest Campus-Climate Incidents Since Trump’s Election*, Chron. Higher Educ. (Dec. 13, 2016), <https://www.chronicle.com/blogs/ticker/heres-a-rundown-of-the-latest-campus-climate-incidents-since-trumps-election/115553>.

136 Bryan R. Warnick, *Understanding Student Rights in Schools: Speech, Religion, and Privacy in Educational Settings* 166 (2013).

137 Colleen Flaherty, *AAUP Condemns Hate Crimes, Endorses Campus Sanctuary Movement*, Inside Higher Educ. (Nov. 23, 2016), <https://www.insidehighered.com/quicktakes/2016/11/23/aaup-condemns-hate-crimes-endorses-campus-sanctuary-movement>.

138 According to the database gathered by the author, a number of institutions already have reiterated a commitment to serving undocumented students by publicly offering statements of support (and even “unequivocal support”), declaring themselves “safe campuses,” and issuing statements of solidarity

139 Patricia McGuire, *From Anger to Action for Dreamers*, Inside Higher Educ. (Sept. 8, 2017) <https://www.insidehighered.com/views/2017/09/08/how-colleges-should-respond-daca-rescission-essay>.

Beside the compelling moral argument that a person brought to the U.S. as a child cannot be sent “back” to a country they may not know, the Supreme Court has already condemned the denial of K-12 public education on the basis of immigration status. Recognizing moral obligation, legal rights of noncitizens, and economic benefits,¹⁴⁰ many states have gone further and provided protections so that these students may pursue higher education. For example, there are approximately 9,000 public school teachers in the United States who are “DACAmended,” and many of them teach in underserved urban and rural schools with a teacher shortage.¹⁴¹ There are a number of other compelling arguments in favor of welcoming undocumented students to U.S. universities.¹⁴² By focusing on policies and programs that *actually* support undocumented students, higher education will meet institutional and movement goals.

140 Teranishi, *supra* note 128 (providing data that indicates that undocumented students are net contributors to the economy).

141 Claudio Sanchez, *Nearly 9,000 DACA Teachers Face an Uncertain Future*, NPR (Jan. 29, 2018), <https://www.npr.org/sections/ed/2018/01/29/579682676/nearly-9-000-daca-teachers-face-an-uncertain-future>.

142 Sonali Kohli, *Why U.S. Colleges Should Welcome Undocumented Immigrants*, Atlantic (Jan. 31, 2015), <https://www.theatlantic.com/education/archive/2015/01/why-us-colleges-should-welcome-undocumented-immigrants/385049/>

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