

How Can Sanctuary Policies be Justified?

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Abstract

Over the past decade, the increased involvement of local police in facilitating the deportation of undocumented migrants has played a central role in creating a record-breaking volume of deportations from the United States. In response to this so-called deportation crisis, nearly 600 localities have enacted sanctuary policies that limit their cooperation with federal authorities on immigration matters. This paper explores three moral justifications for sanctuary policies: the public safety, civil disobedience, and collective resistance arguments. Specifically, it addresses two questions: Which justifications are available for which types of sanctuary policies? What must these justifications accomplish in order to be successful? I argue that although common public safety considerations can justify some sanctuary policies, others are best understood as a form of legitimate collective resistance.

I. Introduction

Over the past two decades, local police have played an increasingly important role in facilitating the deportation of unauthorized migrants from the United States. With only just more than 20,000 employees, the Immigration and Customs Enforcement Agency (better known as ICE) is unable to patrol the streets of cities to locate noncitizens subject to deportation. But under the Secure Communities Program and other related federal initiatives, ICE has enlisted thousands of local police officers to assist with immigration enforcement. This deputized local immigration force is authorized to identify, process, and detain unauthorized migrants they encounter during their daily policing activities. In response to these initiatives, nearly 600 localities have declared themselves “sanctuary jurisdictions.”¹ This term refers to the cities, counties, and states that limit their cooperation with federal authorities on immigration matters. Supporters typically argue that such jurisdictions are safer because sanctuary policies encourage good relationships between migrant communities and local law enforcement.² Opponents insist that sanctuary policies defy federal law and harbor criminals, creating a dangerous environment for American citizens.³

This paper explores three moral justifications that might be offered for sanctuary policies: the public safety, civil disobedience, and collective resistance arguments. Specifically, it addresses two questions: Which justifications are available for which types of sanctuary policies? What must these justifications accomplish in order to be successful? I will argue that although safety considerations can justify some sanctuary policies, others are best understood as a form of legitimate collective resistance. My argument will proceed as follows. First, I will provide a brief overview of the most common types of sanctuary policies. Then, I will explain what an adequate normative justification of these policies should accomplish. Finally, I will evaluate the public safety, civil disobedience, and collective resistance justifications in turn. By considering these arguments to be emblematic of two general types of sanctuary justifications—non-oppositional and oppositional—I will conclude by outlining the implications of my analyses for other arguments that fall into these categories.

II. What are Sanctuary Policies?

Specific sanctuary policies vary considerably. However, the policies I will discuss fall into two general categories. The first, colloquially referred to as “Don’t Ask, Don’t Tell” policies, limit information gathering and sharing by local officials. These policies were developed in response to the federal 287(g) Program, which deputizes local law enforcement officials to enforce immigration law, and Secure Communities, which aims to identify unauthorized migrants in police custody. Under these programs, participating local jurisdictions typically submit the fingerprints of individuals they encounter or arrest to federal immigration databases, allowing ICE to determine whether any of these persons are eligible for deportation. Specific Don’t Ask, Don’t Tell sanctuary policies include ordinances that:

- Prohibit local police from inquiring into the immigration status or place of birth of people they encounter or arrest during their daily policing activities.
- Prohibit other government employees, such as teachers or social workers, from asking about the immigration status of individuals seeking services.
- Discourage or prohibit local police from sharing information about individuals’ immigration status with federal immigration authorities.

The second category of sanctuary policies, sometimes referred to as “Don’t Enforce” policies, limit other forms of cooperation between local law enforcement agencies and federal immigration authorities. These policies were also developed in response to the 287(g) Program, together with two additional federal initiatives: ICE immigration detainers and the Criminal Alien Program. Immigration detainers are issued by ICE when a potentially deportable individual has been identified in local custody. Detainers instruct local law enforcement agencies to hold such individuals for up to 48 hours beyond when they otherwise would have been released so ICE can transfer them to a detention facility. The Criminal Alien Program provides ICE with access to local courthouses and jails where agents screen and interview inmates in order to identify noncitizens subject to deportation. These partnerships are often accompanied by agreements in which ICE pays a local or country jail to hold unauthorized migrants in detention during their deportation hearings. Specific Don’t Enforce sanctuary policies include ordinances that:

- Limit or prohibit agreements through which federal immigration authorities train and deputize local law enforcement officers to enforce federal immigration laws
- Refuse to allow federal immigration authorities into local jails and courthouses without a warrant
- Restrict immigration enforcement in sensitive locations such as hospitals and schools
- Limit or prohibit local compliance with ICE detainers
- Limit or prohibit detention contracts between ICE and local jails.

III. What Should an Adequate Justification of Sanctuary Policies Accomplish?

Now that we have an understanding of the various sanctuary policies that have been implemented, it will be helpful to consider just what a justification for these policies ought to accomplish. I will suggest that an adequate justification should meet three related criteria:

1. First and perhaps most obviously, it must satisfy the same general adequacy conditions as any other moral justification, e.g., it should be internally consistent, it should presuppose plausible notions of human agency, a realistic social ontology, and so on. Sanctuary justifications must also be consistent with the morally salient features of the

- policies they defend. Arguments that misrepresent or ignore something essential to these policies are inadequate, even if they are otherwise rhetorically effective.
2. Second, an adequate justification must be sufficiently weighty. As with all social policies, justifications for sanctuary initiatives should provide sound moral reasons for why these policies are necessary or warranted. Moreover, given the unique nature of sanctuary policies, justifications should provide credible reasons for why such policies are defensible despite federal insistence to the contrary. These reasons should outweigh any *prima facie* obligation local jurisdictions have to support federal programs or policies, if such an obligation exists. Moreover, in the current U.S context, in which federal attempts to punish local sanctuary jurisdictions are common, reasons should also be weighty enough to justify sanctuary policies in light of the risks they entail for local communities.
 3. Finally, an adequate sanctuary justification should validate only those local policies that are consistent with basic liberal principles. Given the nature of sanctuary policies, two ideals are especially important. The first is respect for individual rights. The sanctuary policies that I have outlined all attempt to shield unauthorized migrants from the negative impacts of federal immigration initiatives. However, other local migration-related policies have also been enacted, many of which would amplify rather than blunt the harmful effects of federal policies on unauthorized migrants. For instance, Arizona's SB1070 would have required noncitizens to carry registration documents at all times, required state police to determine the immigration status of individuals when there is "reasonable suspicion" that they are in U.S. illegally, and made it a state crime to "conceal, harbor, or shield" an unauthorized migrant.⁴ Supporters of this bill defended it on the grounds that it was necessary to protect vulnerable Arizonans from "violent gangs, coyotes and other dangerous criminals."⁵ However, the law immediately sparked widespread concern that it would lead to civil rights violations, including racial profiling, and most provisions have since been ruled unconstitutional. This criterion rules out justifications that would legitimize this kind of rights-violating local policy.

The second basic liberal principle that an adequate sanctuary justification must be consistent with is federalism. Federalism holds that states may legitimately assign different responsibilities to different levels of government and each level of government should be allowed the autonomy it needs to carry out its own responsibilities. As a general rule, no level of government is permitted to interfere with others in the carrying out of the tasks for which they are responsible. Since this federalist principle is presumptive, it does not entail that such interference can never be justified; however, it does mean that policies that impede the federal government's capacity to do its job require a special justification. For the sake of my arguments in this paper, I accept the commonly held idea that responsibility for adopting and enforcing immigration policy is the responsibility of the federal government.

IV. Oppositional vs. Non-Oppositional Justifications

With these criteria in hand, I now turn to the various justifications of sanctuary policies that I will consider. Since our adequacy criteria leave open the possibility that there will be more than one successful justification for sanctuary protections, I will divide these arguments into two categories: non-oppositional justifications and oppositional justifications. Non-oppositional justifications claim that sanctuary policies are justified because they are necessary to achieve local policy objectives that are shared by the federal government. More specifically, they argue that sanctuary policies, not enforcement partnerships, are the best means by which to achieve shared policy objectives. These justifications are non-oppositional in two senses: (a) they defend sanctuary policies as a means of achieving policy objectives that are also endorsed by the federal government; and (b) they do not take a moral stand against federal immigration policies. The public safety argument, which argues that sanctuary policies make local communities safer for everyone, is the most prominent example.

Oppositional justifications, in contrast, claim that sanctuary policies are a morally justified response to unjust federal immigration policies. They argue that sanctuary policies are necessary not because they are the best means by which to advance shared (and usually uncontroversial) policy goals, such as public safety, but rather because they are a justified response to unjust federal immigration initiatives. Oppositional justifications typically claim that sanctuary policies serve one or more of the following purposes: to communicate the local community's condemnation of federal immigration policy; to limit local participation in immigration enforcement practices considered to be unjust; or to shield migrants from the harmful effects of federal immigration policies. Insofar as

oppositional justifications claim that sanctuary policies advance legitimate policy goals, these goals diverge from, in fact often oppose, those promoted by federal policies. The most prominent of these oppositional justifications claims that sanctuary policies are a morally justified form of civil disobedience.

V. The Public Safety Justification

Advocates of local/federal immigration enforcement partnerships, such those established by the Secure Communities program, typically defend them by claiming that they make the U.S. safer by identifying unauthorized migrants who have been arrested for a crime and removing them from the country.⁶ Proponents of the public safety justification for sanctuary policies also endorse public safety as an important policy goal. However, they claim that sanctuary policies, not enforcement partnerships, make local communities safer for everyone by encouraging good relationships between migrant communities and local law enforcement.⁷ This is because enforcement partnerships erode community trust. When even casual contact with local police can result in deportation, unauthorized migrants are less likely to come forward to report a crime or voluntarily cooperate with police investigations. Local/federal enforcement partnerships also have a chilling effect on authorized migrants reporting criminal activity or assisting in criminal investigations. Thus, greater involvement of local police in immigration enforcement hinders community policing efforts and reduces overall public safety for the broader community.

The public safety argument hinges on two key premises:

1. Enhancing public safety is a legitimate policy aim.
2. Sanctuary policies do indeed enhance public safety.

The first premise is less controversial. That the state has a duty to protect the basic security rights of residents is a fundamental tenet of liberalism; even minimal-state libertarians acknowledge that public safety is a legitimate function of government, provided that policing strategies do not infringe on individual rights. However, the second premise has the been the subject of sharp debate.

Sanctuary proponents have offered several reasons in support of their claim that sanctuary policies promote public safety. In particular, they cite studies showing that local involvement in immigration enforcement discourages migrants from reporting crimes or cooperating with police, particularly in Latinx communities, to the detriment of all city residents.⁸ They also contend that tasking local

police with enforcing federal immigration law diverts human and material resources away from local criminal law enforcement.⁹

Assuming these reasons are persuasive, is the safety argument an adequate justification for sanctuary policies? It certainly provides a weighty moral defense of sanctuary policies, thus satisfying our second criterion, since protecting public safety is an important function of local governments. However, concerns arise with respect to our third criterion, which requires that a justification would validate only those policies that are consistent with basic principles of justice. First, critics could argue that sanctuary policies impede federal immigration enforcement by making it difficult to discover and detain unauthorized migrants, thus violating the principle of federalism. Patti Lenard offers a response to this objection. Specifically, she contends that it fails to distinguish between policies that positively impede immigration control and those that merely protect local officials from doing work beyond their remit.¹⁰ As we have seen, the principle of federalism prohibits one level of government from interfering with another in the execution of its responsibilities. Since the federal government is tasked with immigration enforcement, federalism implies that local policies that impede immigration control would violate federalism, whereas policies that merely protect local officials from having to perform tasks for which federal immigration authorities are responsible would not. Although sanctuary policies justified on safety grounds discourage or prohibit local law enforcement officers from actively collaborating with federal immigration authorities, they do not require them to subvert or otherwise impede enforcement activities. To the contrary, Lenard argues, such sanctuary policies merely protect local police from having to do the work of federal immigration authorities. It follows, she concludes, that sanctuary policies justified on safety grounds are consistent with the principle of federalism.

A further concern is that the safety argument could be used to justify local policies that violate the rights of vulnerable migrants. Social philosophers often note that naïve consequentialist arguments could be used to justify policies that would protect the interests of the majority at the expense of those in the minority. This hazard is particularly acute in the case of public safety policies because national security interests are often cited in defense of coercive practices that otherwise would not be justified. As we have seen, the safety argument provides a consequentialist justification for sanctuary policies: it claims that such policies are morally acceptable (indeed, even required) because they make local communities safer. So far, I have considered this argument as a possible justification for the sanctuary policies that I outlined at the beginning of my talk. However, one might rightly be concerned that the argument could also be used in service of anti-migrant local

policies, such as SB1070. After all, proponents of this measure leveraged public fears about an alleged immigrant criminal threat to gain support for it. Of course, this assumes that such policies would actually enhance public safety, as required by premise two of the safety argument, which is doubtful given the considerations I canvassed above.¹¹ However, we can avoid the concern altogether by adding an additional premise to the argument:

3. Sanctuary policies must respect individual rights.

The addition of this premise forestalls the concern I have been discussing. The argument now entails that safety-promoting and rights-respecting local policies are justified, whereas rights-violating policies are not, even if they would otherwise enhance public safety. The safety justification thereby rules out policies such as Arizona's SB1070, while justifying the sanctuary policies I have outlined since these policies do not violate anyone's rights.

Setting aside these initial concerns, I will now discuss an important limitation of the safety justification that cannot be dismissed so easily. To begin, it is worth noting that although the safety justification could reasonably be used to justify many of the sanctuary policies I identified at the beginning of this paper, it does not apply to others. Specifically, public safety considerations could justify limitations on information sharing and other related cooperative enforcement arrangements between local police and federal immigration authorities. However, they do not easily apply to sanctuary policies that prohibit other public employees, such as teachers or healthcare workers, from inquiring about the immigration status of individuals seeking services or sanctuary policies that bar ICE agents from entering hospitals and schools without a warrant. These practices surely discourage local residents from accessing basic public services for themselves and their children. However, they do not pose the same kind of straightforward threat to public safety as do cooperative arrangements between local police and federal immigration authorities.

Of course, one could argue that discouraging noncitizens from accessing basic healthcare services would pose a risk to public health. For instance, one might claim that barring noncitizen children from public immunization programs could contribute to an outbreak of vaccine-preventable diseases, adversely affecting both migrants and citizens. Thus, we might attempt to justify sanctuary policies that extend information sharing prohibitions to all public employees, including healthcare workers, or ban warrantless ICE agents from hospitals and schools on the grounds that such policies are necessary to protect public health. However, it is important to

recognize that as non-oppositional justifications, neither the public health nor the public safety argument can appeal directly to the social or security rights of migrants if the federal government does not acknowledge these rights. And this, I think, is the primary limitation of non-oppositional justifications: they are inherently conservative. Although they can justify sanctuary policies that challenge the means by which federal policy goals are achieved, they cannot justify sanctuary policies that reject these goals. Thus, although non-oppositional justifications, such as the public safety argument, can justify some sanctuary policies, they cannot legitimize sanctuary policies that take a moral stand against federal immigration policies. If such policies are to be justified, a viable oppositional justification will be needed.

To explain this point, it will be helpful to consider sanctuary policies in their historical context. Contemporary sanctuary policies grew out of the Sanctuary Movement, which emerged in the 1980s as religious communities began helping refugees from U.S.-sponsored civil wars in Central America settle in the United States in direct defiance of federal immigration authorities. Although the 1980 Refugee Act allowed for the discretionary granting of asylum, the applications of Salvadoran and Guatemalan refugees were routinely rejected because the Reagan administration refused to acknowledge the atrocities that were being committed by Central American governments. Instead, the administration labeled these refugees as “economic migrants” and began deporting them as quickly as possible.

In reaction to these policies, religious and civic groups along the U.S. border began to offer a range of humanitarian assistance to Central American refugees, including the provision of shelter, food, and clothing. Some arranged legal representation during deportation hearings or transported migrants from one place to another. A number of churches declared themselves “sanctuaries,” sheltering refugees who were hiding from deportation authorities. Participants in the Sanctuary Movement recognized the potential legal penalties of their actions; indeed, several movement leaders were indicted and tried on federal felony charges of conspiracy and human smuggling in a series of high-profile cases in the mid-1980s.¹² However, sanctuary activists believed that their acts of civil disobedience were a necessary moral response to unjust and unconstitutional U.S. policies.

In due course, what originally began with churches as proactive efforts to provide humanitarian aid to Central American refugees led to state and local governmental efforts to ensure that refugees would be safe within their borders. Localities bolstered the efforts of the Sanctuary Movement by passing laws that declared that their public places would also serve as sanctuaries. Similar to statements by church leaders, these measures were often expressly tied to condemnation

of federal immigration policies. Contemporary sanctuary policies build on these earlier laws, while differing from them in at least two respects: (a) protections directed toward Central American refugees have been extended to all unauthorized migrants; and (b) policies that once aimed primarily to provide humanitarian assistance now seek to accomplish a broader range of goals. However, despite these differences, some commentators have suggested that contemporary sanctuary policies should be understood as “municipal acts of civil disobedience.”¹³

VI. The Civil Disobedience Justification

Is this an accurate portrayal of sanctuary policies? If so, it provides grounds for an additional justification of these initiatives. Specifically, supporters could argue that sanctuary policies are a morally justified form of collective civil disobedience against unjust federal immigration and detention policies. To determine whether sanctuary policies can properly be understood as a form of collective civil disobedience, we will need an account of civil disobedience that explains its distinctive features. I will draw upon Rawls’s conception because it is the most prominent account of civil disobedience in the philosophical literature. Rawls’s account is also particularly well-suited to understanding sanctuary policies as a form of civil disobedience because it defines civil disobedience narrowly, excluding covert and violent acts of dissent.

Rawls defines civil disobedience as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”¹⁴ In explaining this definition, he suggests that civil disobedience has five essential features. First, it is public in the ordinary sense that it is engaged in openly and with fair notice. Second, it is nonviolent in that it does not injure others or interfere with their civil liberties. Third, civil disobedience is conscientious in the sense that it is undertaken out of sincere, considered, and deeply held moral conviction. However, not every conscientious motivation qualifies a disobedient act as an act of civil disobedience. Thus, a fourth characteristic of civil disobedience is that it is also political in a fairly specific sense: (a) it is a form of public political expression aiming to condemn and bring about changes to a policy or law; and (b) it is motivated by a commitment to the political principles that regulate the constitution and social institutions. In justifying an act of civil disobedience, participants do not appeal to principles of personal morality or to religious doctrines, but rather to a commonly shared conception of justice. Finally, Rawls contends that dissenters engaged in civil disobedience must act within the general limits of fidelity to the law. Fidelity “is

expressed by the public and nonviolent nature of the act and by the willingness to accept the legal consequences of one's conduct."¹⁵

Provided that sanctuary policies satisfy these conditions, justifying such policies as a form of civil disobedience would have three distinct advantages. First, as an oppositional justification, the civil disobedience argument would foreground an essential feature of sanctuary policies that the safety justification overlooks. Specifically, identifying sanctuary policies as a form of collective civil disobedience would regard contemporary sanctuary policies as a moral response to unjust federal immigration policies. Doing so would place these policies squarely in their historical context—that is, as an important development in an ongoing collective struggle against immoral U.S. immigration policies.

The second advantage is closely related: the civil disobedience justification would provide a weighty moral justification of sanctuary policies. Civil disobedience is widely considered to be a morally justified response to unjust laws or policies, provided certain conditions are met. Rawls names three. First, civil disobedience should be limited to cases of “substantial and clear injustice.”¹⁶ Second, it should be considered a last resort, used only when legal means of political protest have failed or in rare cases, as a first line of opposition against laws which enact “some outrageous violation of equal liberty.”¹⁷ And third, dissenters should attempt to coordinate their actions with other groups who are similarly justified in resorting to civil disobedience. When such conditions are met, many theorists, including Rawls, argue that individuals have a moral right to engage in civil disobedience.¹⁸

Finally, the civil disobedience justification would validate only those local policies that are consistent with basic principles of justice, including respect for individual rights. As we have seen, Rawls argues that legitimate acts of civil disobedience must be motivated by a conscientious conviction that a policy or law violates the conception of justice of the majority. In the case of sanctuary policies, this most obviously means that the local community must strongly believe that a federal immigration policy violates shared principles of justice. However, this constraint also entails that sanctuary policies themselves must be consistent with these principles. That is, since a sanctuary policy must be guided by the belief that a federal immigration and detention policies violate basic principles of justice, consistency requires that the sanctuary policies that protest these policies must also be consistent with these principles, including respect for basic individual rights. Thus, in this way, the civil disobedience justification rules out local migration-related policies, such as Arizona's SB 1070, that do not respect individual rights.

This discussion suggests that there are good reasons for justifying sanctuary policies as a form of collective civil disobedience. However, this justification will be plausible only if sanctuary policies can legitimately be understood as civil disobedience. As we have seen, Rawls maintains that civil disobedience has five key features: it is public, nonviolent, conscientious, and political; and it expresses disobedience to the law within the limits of fidelity to the law. Sanctuary policies are clearly public and nonviolent. Are they also conscientious and political? An initial obstacle to characterizing sanctuary policies as a form of civil disobedience is that traditional accounts, including Rawls's, tend to portray civil disobedience as an act undertaken by individuals. Yet since sanctuary policies are best understood as collective endeavors, this seems to suggest that such policies are not a legitimate form of civil disobedience. This obstacle can be easily overcome, however, as there are plenty of real-life examples of collective civil disobedience, and a theoretical account of civil disobedience can be modified to include collective actions. The defining feature of civil disobedience is not that it is undertaken only by individuals, but rather that it is a distinctive form of political expression aiming to condemn and bring about changes to a law or policy.

Of course, to understand civil disobedience as a collective undertaking, we need to know what it means for both: (a) an action to be considered collective; and (b) a collective action to be considered conscientious. Without wading too deeply into the thorny issues surrounding collective responsibility, it is relatively uncontroversial to suggest that an action can be considered to be a collective action of a group if it was explicitly endorsed and carried out by all the individuals belonging to that group.¹⁹ Thus, for instance, the blocking of a highway to protest police brutality could be considered a collective action of a group of protesters if the members of that group all planned, agreed to, and executed that action.

Things are trickier in the case of public policies. However, in democratic political contexts, the question of whether a policy can be considered collective also depends on the decision-making process leading up to it. At minimum, collective policies must have been developed and approved through democratic processes characterized by equality among the participants. In a representative democracy, the required equality may be somewhat shallow. For instance, it may suffice that the policy was endorsed by representatives who were fairly elected and remain responsive to their constituents. Thus, municipal transit policies approved by the city council could be considered to be collective policies in the relevant sense, provided that supervisors take seriously the interests of their constituents, are responsive to their concerns, and so on.

When, then, is a collective action conscientious? Here again, we can look to the process through which it was developed and approved. Rawls contends that a conscientious action is undertaken out of a sincere, considered, and deeply held moral conviction. It is fairly easy to see how this might work in the case of small groups. For instance, a group of activists might carefully deliberate about whether a particular policy is unjust and which action would best draw attention to this injustice and persuade others to join the group in condemning it. If members agree to undertake a particular action and to accept its legal consequences, their action could be considered conscientious. Of course, the case of a democratic policymaking is more difficult. However, it is reasonable to suggest that policies that result from an inclusive, participatory, and deliberative democratic decision-making process can be considered to be conscientious. Such a democratic process must allow for fair, reasonable, and consequential deliberation by those who will be affected by the collective decision.²⁰

This suggests that in a sufficiently robust democratic community, policymaking could be considered to be a collective, conscientious undertaking. Provided that deliberative processes are guided by moral convictions of a specific kind, namely those embodied in a shared conception of justice, resulting policies would also be political in the Rawlsian sense. Thus, in principle, sanctuary policies could be considered to be collective, conscientious, and political. Does it follow that sanctuary policies could legitimately be understood as a form of civil disobedience? Despite the parallels I have outlined, two important features of sanctuary policies pose challenges to this understanding.

First, most sanctuary policies are perfectly legal. As we have seen, civil disobedience is not simply a “public, nonviolent, conscientious yet political act,” it also involves a specific breach of a law with the aim of bringing about a change in law or policy. Traditional accounts of civil disobedience, including Rawls’s, do not require that dissenters disobey the same law that is being protested.²¹ However, they do insist that civil disobedience breaches some law. Yet, despite the current federal administration’s claims to the contrary, the sanctuary policies I have outlined are legal with just one exception: Don’t Tell policies that prohibit or explicitly limit local law enforcement officers from voluntarily conveying information regarding an individual’s immigration status to federal immigration authorities were outlawed in 1996.²²

Second, sanctuary policies are not solely expressive and symbolic. My discussion so far suggests that sanctuary policies are political in the Rawlsian sense insofar as they are guided by shared principles of justice. However, it is important to remember that Rawls claims that civil

disobedience is political in two respects: it is motivated by a commitment to a shared conception of justice and it is a form of public, political expression aimed at bringing about changes to a policy or law. This understanding of the political nature of civil disobedience complicates an effort to understand sanctuary policies as a form of civil disobedience. Sanctuary policies certainly have an expressive dimension. Many, especially those adopted recently, have been defended with reference to the injustice of federal immigration policies, and some proponents have explicitly criticized particular federal practices.²³ However, characterizing sanctuary policies solely as a form of political expression would overlook an important morally salient feature of these policies—namely, their important policy-oriented objectives. Although sanctuary policies have an expressive and symbolic dimension, they are not merely a form of political speech; rather, they are public policies with specific policy-oriented goals, including shielding local communities from the harmful effects of federal deportation and detention policies.

Of course, it might be possible to defend an understanding of sanctuary policies as a form of collective civil disobedience by modifying the conditions that pose these difficulties. This approach might well be favored by critics of Rawls, who argue that his account is too narrow because it excludes “uncivil” acts of dissent.²⁴ However, the revisions that would be required to overcome these particular obstacles—that sanctuary policies are legal and aimed toward the public interest—would come at a high cost to both the concept of civil disobedience and sanctuary policies. For instance, although we could expand our account of civil disobedience to include legal acts of political protest, altering this distinctive feature of civil disobedience would weaken the explanatory and normative force of the concept considerably. And while we could argue that sanctuary policies should be understood primarily as a form of political expression, this would obscure their legitimate policy-oriented aims.

Due to these important differences between civil disobedience and sanctuary policies, the civil disobedience justification ultimately fails to meet our criteria for an adequate justification of such policies. As we have seen, our first criterion requires that a justification of sanctuary policies be consistent with the morally salient features of these policies, but the civil disobedience justification misconstrues sanctuary policies in at least two respects: (a) it wrongly implies that sanctuary policies violate federal law; and (b) it represents sanctuary policies as a mode of political expression rather than as public policies with an expressive dimension. As a consequence, the civil disobedience justification also fails to satisfy our other two criteria for an adequate justification, despite my initial suggestion to the contrary. My discussion of the advantages of the civil disobedience justification

implied that it would meet our second and third criteria: it would provide a weighty moral justification for sanctuary policies and it would validate only those policies that are consistent with basic liberal principles. However, these judgments are both contingent upon the assumption that sanctuary policies can legitimately be understood as a form of civil disobedience, and it is now clear that this is not the case. Thus, although the civil disobedience justification certainly gets something right—that oppositional sanctuary policies should be understood as a moral response to unjust federal immigration initiatives—the differences between sanctuary policies and civil disobedience are just too significant. The civil disobedience argument fails to provide an adequate justification for these sanctuary policies. Where, then, does this leave us?

VII. The Collective Resistance Justification

My arguments so far suggest that oppositional sanctuary policies have three defining features. First and most obviously, they are oppositional: they limit local cooperation with federal enforcement initiatives on moral grounds. They are also practical in the sense that they are social policies with important policy-orientated aims, including shielding local migrant communities from the harmful effects of federal practices. Finally, insofar as they convey local opposition to federal immigration policies, oppositional sanctuary policies have an expressive and symbolic dimension.

In the final section of this paper, I will outline an alternative justification of sanctuary policies that is consistent with these features. According to this justification, oppositional sanctuary policies should be understood as a morally justified form of collective political resistance. To explain this justification, we will need a working account of political resistance. Following Candace Delmas, I understand resistance as designating “a multidimensional continuum of dissenting acts and practices, which all express, very broadly, a refusal to conform to the dominant system’s norms.”²⁵ Historically, many political philosophers, including Rawls, have conceived of resistance as by definition unlawful and violent. However, on Delmas’s view, acts of political resistance “may be legal or illegal, public or covert, violent or nonviolent, injurious or harmless, addressed to the public (government, citizenry) or a private agent (university, corporation).”²⁶ Agents who undertake acts of resistance might be willing to accept punishment or try to evade it; they may be motivated by shared principles of justice or other moral ideals. Political resistance thus includes a broad range of activities, from petitions and demonstrations, to slowdowns and strikes, to boycotts and acts of conscientious objection, to civil disobedience and direct action.²⁷ Importantly, resistance may be undertaken for three related purposes: (a) to communicate condemnation of a law, policy, or

institution; (b) to refuse to participate in a wrong one condemns; and/or (c) to prevent harm to an individual or a group.²⁸

With this account in hand, we can now determine whether sanctuary policies should be understood as a form of collective resistance. My discussion of the civil disobedience justification established that sanctuary policies that were approved through a sufficiently robust democratic decision-making process can be considered to be collective policies. Are they also modes of resistance? They certainly meet the general definition of resistance as dissenting practices that express a refusal to conform to dominant norms. In fact, refusal to cooperate in advancing federal immigration goals is the defining feature of oppositional sanctuary policies. Sanctuary policies may also serve the three purposes of resistance that Delmas lays out.²⁹ My discussion of the civil disobedience justification suggests that oppositional sanctuary policies have an expressive dimension: by limiting local cooperation with federal immigration enforcement on moral grounds, sanctuary policies convey disapproval of federal immigration priorities. Moreover, the actual text of some sanctuary resolutions, along with official statements made in their defense, explicitly denounce specific federal immigration initiatives.³⁰ This suggests that oppositional sanctuary policies are compatible with the first purpose of collective resistance, which is to express condemnation of a law, policy, or institution.

Sanctuary policies also signal a community's refusal to participate in a wrong it condemns. In this respect, oppositional sanctuary policies are similar to conscientious objection, which is the refusal to comply with an injunction, directive, or order on moral grounds. Although conscientious objection is sometimes associated with pacifism, the practice arises in numerous domains, from healthcare provision to criminal justice. Examples include the pharmacist who refuses to supply contraception, the judge who refuses to hand down a mandatory sentence, and the soldier who refuses to redeploy. Conscientious objection shares several features with civil disobedience: it is conscientious and nonviolent, and it is public in the sense that one's noncompliance is assumed to be known to authorities. However, unlike civil disobedience, conscientious objection does not necessarily violate a law; it might disobey an order or directive that falls short of a law. Thus, whereas civil disobedience is invariably illegal, conscientious objection is sometimes legal. For instance, in a military draft, conscientious objection is often regarded as legitimate grounds for avoiding frontline military service.

Another important difference is that conscientious objection is not necessarily political in either of the two senses that Rawls attributes to civil disobedience. First, whereas civil disobedience

is a form of political expression aimed to bring about a change in policy or law, those undertaking conscientious objection do not necessarily seek out occasions for disobedience as a way to state their cause and may have no expectation of changing laws or policies. Rather, the primary purpose of noncompliance is to avoid participating in a practice based on a sincere conviction that the practice is deeply morally wrong. Second, whereas civil disobedience is guided by a commitment to commonly shared principles of justice, conscientious objection need not appeal to the majority's sense of justice. It may be grounded on political principles, but it also might draw upon other moral or religious ideals.

When we think of conscientious objection, we typically imagine a person acting on her religious or moral conviction that the practice she has been ordered to participate in is deeply immoral, e.g., the conscriptee who refuses to comply with a military draft on pacifist grounds. However, oppositional sanctuary policies may also enact a refusal to cooperate with a federal directive based on weighty moral reasons. The most straightforward of these reasons is that deportation practices are unjust. Several arguments have been given for this view. For instance, some open borders advocates argue that deportation is inherently unjust because it violates individuals' fundamental human right to free international movement.³¹ Others argue that most deportations would be unjust even in the absence of a universal right to free international movement. One prominent version of this argument, often referred to as the social membership argument, grants that liberal states have a presumptive right to regulate migration, but insists that resident noncitizens develop moral claims to legal rights and legal status within a society by living in it over time.³² Simply put, the idea is that people who live, work, go to school, establish friendships, and raise their families in a society become members of that society by virtue of their social, cultural, and economic participation, whatever their legal status. Over time, this social membership generates claims to civil, social, and political rights, including the right to remain, and ultimately to full citizenship. Because deporting social members infringes upon these rights, the practice is unjust.

These arguments imply that oppositional sanctuary policies are compatible with the second purpose of collective resistance, which is to refuse to participate in a wrong one condemns. Provided they are sound, they also indicate that sanctuary policies may protect local residents, both citizen and noncitizen, from the harms associated with federal immigration initiatives.³³ Most obviously, sanctuary policies may shield migrants from rights infringements that would otherwise follow from federal policies. Joseph Carens defends this line of reasoning. In his view, sanctuary policies are necessary to protect the basic security rights of migrants.³⁴ He begins with the claim that

states must respect the basic human rights of everyone present in their territories, regardless of their immigration status. Furthermore, he argues, mere formal recognition of basic rights is insufficient; to genuinely respect human rights, states must enable people to exercise their rights in practice. In his words, “[i]t makes no moral sense to provide people with purely formal legal rights under conditions that make it impossible for them to exercise those rights effectively.”³⁵ Yet this is precisely the plight of unauthorized migrants who are not protected by sanctuary policies: they are legally entitled to basic security rights, but they are often reluctant to pursue legal protections due to a justified fear of being discovered by immigration authorities. Thus, Carens concludes, sanctuary policies that establish an information “firewall” between local law enforcement and federal immigration authorities are both justified and necessary.³⁶

One could also argue that sanctuary policies are necessary to minimize other harms stemming from federal deportation and detention policies, including the fear and hardship faced by members of mixed families in which at least one member is undocumented, the psychological trauma, poverty, and long-term health risks that children often experience when a parent is deported, and the stress, uncertainty, marginalization, and feelings of powerlessness that come with living under the threat of being uprooted from one’s life and community. Provided they are sound, these arguments suggest that oppositional sanctuary policies are also compatible with the third goal of collective resistance, which is to prevent harm to an individual or a group.

I have argued that oppositional sanctuary policies are consistent with the definition of collective resistance and align with its primary purposes. This implies that sanctuary protections can reasonably be considered to be a form of collective resistance. But is the collective resistance argument an adequate justification of oppositional sanctuary policies? I will suggest that it is for three reasons. First, the collective resistance justification foregrounds important, morally-salient features of these policies that other justifications misrepresent or overlook. Whereas the safety justification portrays sanctuary protections as the best means to achieve shared policy goals, the collective resistance justification understands them as a collective moral response to unjust federal immigration policies. And whereas the civil disobedience justification mischaracterizes sanctuary policies as a form of unlawful, political expression, the collective resistance argument understands them as expressive social policies designed to protect local communities. As a result, the collective resistance justification applies to a broad range of oppositional sanctuary policies. Carens’s appeal to basic security rights could justify limitations on information sharing and other cooperative arrangements between local law enforcement and federal immigration authorities. And the social

membership argument could legitimize many of the other sanctuary policies I outlined at the beginning of this paper. For instance, appealing to migrants' rights, as social members, to access basic social services could justify sanctuary policies that prohibit other public employees, such as teachers or healthcare workers, from inquiring about the immigration status of individuals seeking services. Likewise, appeals to migrants' basic due process rights could justify policies that limit or prohibit local compliance with ICE detainers and detention contracts between ICE and local jails.

The collective resistance argument also provides a weighty moral justification for sanctuary policies. Suitably constrained political resistance is widely considered to be morally justified in democratic societies; in fact, some theorists, including Delmas, insist that citizens have a duty to resist unjust social schemes.³⁷ Of course, more must be said about what constitutes a "suitably constrained" form of resistance. As we have seen, some theorists, including Rawls, deny that violent or covert forms of disobedience qualify. There is, I think, room for reasonable disagreement about this point with respect to some forms of political resistance, such as actions involving property destruction. However, it is clear that sanctuary policies must be both nonviolent and public to qualify as a suitably constrained (and thus morally justified) form of collective resistance. It goes without saying that a public policy should be nonviolent in the sense that it does not cause unnecessary harm to individuals or prevent them from exercising their basic rights. Sanctuary policies must also be public in two senses: (a) they must have been developed and approved through fair and transparent democratic processes; and (b) they must be supported by moral reasons that are public in the sense that they could serve to justify the policies to the people who will be affected by them. Although these reasons need not be strictly political in the Rawlsian sense, they must be consistent with fundamental liberal principles of justice, including moral equality and respect for basic individual rights. Provided that sanctuary policies meet these conditions, they are morally justified on the same grounds as other forms of (suitably constrained) political resistance. This general justification is bolstered by the specific public reasons that justify particular sanctuary policies, such as those developed in the arguments I have outlined.

Of course, critics might argue that sanctuary policies are decidedly not "suitably constrained" because they encroach upon federal authority to regulate immigration, thus violating the principle of federalism. Two responses are available to the defender of sanctuary policies. First, as with policies justified by the public safety argument, one could argue that oppositional sanctuary policies do not impede, even if they refuse to aid, federal immigration enforcement. Consider, for instance, a Don't Ask policy that prohibits local healthcare and social workers from asking about the immigration

status of those seeking services. The federal government surely disapproves of policies designed to help unauthorized migrants exercise their healthcare rights and feel welcome in local communities. However, this policy does not require local healthcare and social workers to actively subvert or otherwise undermine federal immigration enforcement, but rather protects them from doing the work of federal immigration authorities.

The second response acknowledges that some oppositional sanctuary policies impede federal immigration enforcement, but insists that such interference is consistent with a commitment to federalism because these policies are supported by moral reasons that outweigh the presumption for non-interference. The most straightforward way to make this argument would be to identify a principled criterion by which to distinguish *seriously unjust* federal policies, which warrant enforcement-impeding sanctuary policies, from *imperfectly just* federal immigration policies, which dissenting local communities should attempt to influence only through regular democratic channels. For instance, Lenard identifies what she considers to be an uncontroversial set of conditions that minimally just admissions and deportation policies must meet.³⁸ In her view, a minimally just admissions policy must reject overtly discriminatory admissions criteria, admit asylum-seekers, prioritize family reunification, and permit long-term residents to attain legal status; a minimally just deportation policy must ensure timely and transparent deportation hearings, provide potential deportees with competent legal representation, and prohibit the return of refugees or asylum seekers to a country where they will be subject to persecution. Policies that do not satisfy these conditions are seriously unjust; policies that satisfy these conditions but fall short of some ideal of maximal justice are imperfectly just. Alternatively, one might argue that immigration policies are seriously unjust if they violate the basic rights of the individuals who are subject to them, and imperfectly just if they fall short of perfect justice but do not violate rights. Whatever baseline criterion one accepts, proponents of this response further argue that the federal immigration policies in question are seriously unjust according to that criterion. If they are successful, then the sanctuary policies that impede these federal policies are consistent with a general commitment to federalism.

Finally, the third virtue of the collective resistance justification is that it would validate only those local policies that are consistent with basic principles of justice, including respect for individual rights. As I have just argued, sanctuary policies must be both nonviolent and public to qualify as a justified form of collective resistance. That is, they must not cause unnecessary harm to individuals or prevent them from exercising their basic rights, and they must be justified by appeals to credible public reasons that are consistent with basic principles of justice, including moral equality and

respect for basic individual rights. As a result, the collective resistance justification rules out policies such as Arizona’s SB 1070 while justifying the sanctuary policies I have outlined.

These advantages suggest that the collective resistance justification satisfies our three criteria for an adequate justification of sanctuary policies. It is consistent with the specific morally-salient features and purposes of the oppositional sanctuary policies it defends, thereby satisfying our first criterion. It provides a weighty moral justification for these policies, thereby meeting our second criterion. And finally, it legitimizes only those local policies that are consistent with basic liberal principles, including federalism and respect for individual rights, thereby satisfying our third criterion for an adequate justification. Thus, I conclude that although safety considerations can justify some sanctuary policies, others are best justified as a form of legitimate collective resistance.

VIII. Implications for Other Non-Oppositional and Oppositional Justifications

Since it is possible that there may be several successful sanctuary justifications, including, perhaps, some that I have not considered here, I will close by outlining the general conditions that each type of justification—non-oppositional and oppositional—must meet in order to satisfy our adequacy criteria. Because our first criterion has the same implications for both types of justifications, e.g., that they must be internally consistent and accurately represent the morally salient features of the sanctuary policies they defend, I will focus on the second and third criteria.

As we have seen, non-oppositional justifications claim that sanctuary policies are the best way to achieve policy objectives that are shared by local communities and the federal government. Since most non-oppositional justifications are broadly consequentialist in nature, a successful justification typically must prove two claims: (a) that the policy goal is indeed legitimate; and (b) that the sanctuary policy is the best means by which to achieve this goal, or at least that it is more effective than enforcement partnerships. In addition to establishing that the sanctuary policy in question is more practically effective than enforcement partnerships, arguments for claim (b) must show that the policy is consistent with respect for individual rights. However, because non-oppositional justifications reject enforcement partnerships, rather than condemn federal immigration policies, proponents have a ready response to the concern, should it arise, that their favored sanctuary policy violates federalism—namely, that the policy does not positively impede immigration control, but simply protects local officials from having to perform tasks for which federal immigration authorities are responsible. The safety argument is the most common non-oppositional justification, but additional arguments may also be available. For instance, if the federal government

and a local community were to agree that the basic social rights of migrants must be respected, and federal authorities nevertheless demanded that local healthcare and social workers report the immigration status of their clients to ICE, one could argue that prohibiting public workers from inquiring about the immigration status of individuals seeking services is necessary to ensure that migrants are able to exercise their rights in practice.

Oppositional justifications claim that sanctuary policies are a morally justified response to unjust federal immigration policies. As such, a successful oppositional justification must establish two claims: (a) that the federal policy in question is indeed unjust; and (b) that the sanctuary policy is a morally legitimate response to this unjust policy. Since oppositional justifications address federal immigration policy directly, they are more likely to validate sanctuary policies that interfere with federal immigration enforcement. Thus, claim (a) places different demands on justifications of sanctuary policies that impede border enforcement than those that do not.³⁹ Justifications of enforcement-impeding policies must show that the federal policy in question is seriously unjust, and thus that the presumption for federalism is outweighed by moral considerations. Justifications of non-impeding policies must merely show that the federal policy is imperfectly just such that it warrants local opposition. Claim (b) can be proven by demonstrating that a sanctuary policy qualifies as a legitimate form of local political resistance. There may be other ways to establish this claim as well; however, claiming that sanctuary policies are a form of civil disobedience will be unsuccessful insofar as sanctuary policies are lawful.⁴⁰

These considerations suggest that determining which sanctuary justifications are available for which types of sanctuary policies will depend on the context in which sanctuary policies are developed and implemented, with the moral status of federal immigration policies playing an important role. If federal immigration policies are fully just, then non-oppositional justifications are more likely to be appropriate. However, if federal policies are unjust, then oppositional justifications will likely be required. These latter justifications place an extra burden on their proponents, since they require them to establish that federal policies are unjust. Fortunately, however, although I have not been able to defend them here, the literature on migration justice offers several such compelling arguments, including the social membership and harm-based arguments I have considered.^{41,42}

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⁴ “Arizona Senate Bill 1070” (2010), <https://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

⁵ Jan Ting, quoting Janet Napolitano, “In Defense of Arizona’s Immigration Law SB1070,” Center for Immigration Studies, May 4, 2012, <https://cis.org/Ting/Defense-Arizonas-Immigration-Law-SB1070>. The term ‘coyotes’ refers to individuals who are paid to guide migrants across the U.S./-Mexico border.

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¹¹ Data on crime, immigration, and safety in cities also shows that unauthorized migrants are less likely to commit crimes or be incarcerated than the general population. See: Wong, “The Criminalization of Immigration in the United States”; Nowrasteh, “Immigration and Crime -- What the Research Says”; Harkinson, “Actually, Sanctuary Cities Are Safer: Here’s Why All the Vitriol We’ve Been Hearing Is Misguided.”

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¹⁵ Rawls, 322.

¹⁶ Rawls, 372.

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¹⁸ Rawls, 375–76.

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²⁰ Contra early theories of deliberative democracy, this definition includes all communication that is non-coercive, capable of inducing reflection, and strives to link personal viewpoints to larger principles. This could include personal stories, humor, and ceremonial speech, as well as arguments. Threats, lies, abuse, and commands are excluded. See Iris Marion Young, *Justice and the Politics of Difference*, Revised (Princeton, New Jersey: Princeton University Press, 2011).

²¹ Rawls, *A Theory of Justice*, 320.

²² Additionally, in July 2018, a federal judge granted the Trump administration an injunction on a section of California’s labor law that limits employers’ ability to reverify an employee’s immigration status as a condition of employment. Although California’s prohibition on employer verification has not been widely endorsed by other jurisdictions, it qualifies as a sanctuary policy.

²³ For example, Lansing’s mayor Virg Bernero recently defended his city’s new sanctuary policy as “signaling opposition to [Trump’s] approach, to his demeanor, to ... the hateful and... nationalistic, jingoistic approach that we see coming out of Washington,” as well as to the administration’s deportation and detention policies, which he considers to be “highly questionable legally and constitutionally.” Michael Gerstein, “Michigan’s First ‘Sanctuary City’ Sparks Anger, Praise,” *The Detroit News*, April 5, 2017,

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²⁴ Candice Delmas, “Civil Disobedience,” *Philosophy Compass* 11, no. 11 (2016): 681–91.

²⁵ Delmas draws upon a range of legal and feminist political philosophers to develop this account. See Candice Delmas, “Political Resistance: A Matter of Fairness,” *Law and Philosophy* 33 (2014): 481.

²⁶ Delmas, 481.

²⁷ Delmas, 480–81.

²⁸ Delmas, “Political Resistance: A Matter of Fairness,” 481.

²⁹ The claim that sanctuary policies “serve a purpose” is meant to be broad enough to include two kinds of cases: sanctuary policies that were intentionally designed to advance a particular end (e.g., to protect the rights of local noncitizen residents); and policies that have a particular outcome regardless of whether it was intended by framers (e.g., policies that were designed to protect the rights of noncitizens but also convey local disapproval of federal immigration policies).

³⁰ For instance, a draft motion regarding Seattle’s “Welcoming City” resolution explicitly condemns Trump’s travel ban. See Claudia Balducci and et al, “A Motion Related to Immigration, Refugees, and the Freedom to Travel; Condemning the Related Executive Order Issued by the President on January 27, 2017,” November 30, 2017,

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³² Joseph Carens first developed this argument and remains its most prominent supporter. Most recently, see Carens, *The Ethics of Immigration*.

³³ My earlier discussion of the public safety and civil disobedience justifications also provide support for this claim.

³⁴ Carens, *The Ethics of Immigration*, 133.

³⁵ Carens, *The Ethics of Immigration*, 133.

³⁶ Carens’ argument shows that some sanctuary policies could be justified by either oppositional or non-oppositional justifications, depending upon the political context in which they are developed. For instance, non-oppositional justifications are appropriate for Don’t Ask, Don’t Tell policies if they are designed to achieve goals that are endorsed by the state, e.g., public safety. However, oppositional arguments are necessary for Don’t Ask, Don’t Tell policies that aim to achieve goals that the state rejects. Currently, the U.S. federal government does not seem to endorse the idea that migrants have the actual, universal right to physical security that Carens defends. Thus, I have included Carens’s argument as an oppositional argument. I will return to this point in the conclusion.

³⁷ Delmas, “Political Resistance: A Matter of Fairness.”

³⁸ Lenard, “The Ethics of Sanctuary in Liberal Democratic States.”

³⁹ Of course, it could be the case that no oppositional sanctuary policies impede border enforcement.

⁴⁰ If sanctuary policies were proven to be unlawful, then it would be worthwhile to revisit my early arguments, as they could possibly be considered to be civil disobedience on a non-Rawlsian account.

⁴¹ See, for instance, Carens, *The Ethics of Immigration*; Adam Omar Hosein, “Immigration: The Argument for Legalization,” *Social Theory and Practice* 40, no. 4 (2014): 609–30; Patti Tamara Lenard, “The Ethics of Deportation in Liberal Democratic States,” 2015, <https://philpapers.org/rec/LENTEO-9>; Amy Reed-Sandoval, “Deportations as Theaters of Inequality,” *Public Affairs Quarterly* 29, no. 2 (2015): 201–215.

⁴² I would like to thank Patti Lenard, KP Peck, the editor of this journal, and audiences at California State University-Northridge, California State University-Bakersfield, Northeastern University, and University of Michigan for their invaluable comments on earlier drafts of this article.