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## "Sanctuary Cities" and Local Citizenship

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# “SANCTUARY CITIES” AND LOCAL CITIZENSHIP

*Rose Cuison Villazor\**

“San Francisco has become less like its [sanctuary city] self-image and more like many other cities in the United States: deeply conflicted over how to cope with the fallout of illegal immigration.”<sup>1</sup>

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1. Jesse McKinley, *San Francisco at Crossroads Over Immigration*, N.Y. TIMES, June 13, 2009, at A12 [hereinafter McKinley, *Crossroads*], available at [http://www.nytimes.com/2009/06/13/us/13sanctuary.html?\\_r=1&scp=1&sq=san%20francisco%20at%20crossroads%20over%20immigration&st=cse](http://www.nytimes.com/2009/06/13/us/13sanctuary.html?_r=1&scp=1&sq=san%20francisco%20at%20crossroads%20over%20immigration&st=cse).

## INTRODUCTION

Citizenship's location is generally understood to reside primarily in the nation-state.<sup>2</sup> Accordingly, the term citizenship<sup>3</sup> typically evokes membership in a particular country. Yet, the concept of citizenship as one only bounded by national borders has long given way to the recognition that there are other places—both outside and within the nation-state—where citizenship is also located.<sup>4</sup> Indeed, as scholars have noted, sub-federal and sub-state spaces such as cities are sites where citizenship, particularly local citizenship or membership, has been articulated, constructed, or contested.<sup>5</sup> Critically, the construction of local citizenship within the larger space over which national citizenship dominates, presents complex legal, theoretical, political, and policy concerns.<sup>6</sup> Among these issues is the potential conflict between rights and privileges of local citizenship with the attendant rights and privileges of national membership.<sup>7</sup>

Perhaps no other area of law best illustrates the tension between local and national citizenship than immigration law, particularly when examining the scope of membership, rights, and privileges of non-citizens. At the outset, the ability of non-citizens to gain full membership to the United States is governed by the federal government through the plenary power of Congress to regulate immigration law.<sup>8</sup> Specifically, through the Immigration and Nationality Act (“INA”) and subsequent amendments.<sup>9</sup> Congress estab-

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2. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 23 (2006) (stating that “[c]itizenship is presumed, with little question, to be a national enterprise—a set of institutions and practices that necessarily take place within the political community, or the social world, of the nation-state”).

3. By citizenship, I mean membership to a particular polity. See *id.* at 18-20 (discussing the understanding of “citizenship as a concept that designates some form of community membership”).

4. *Id.* at 23; see also Yishai Blank, *Spheres of Citizenship*, 8 *THEORETICAL INQUIRIES L.* 411, 412-21 (2007) (noting the various spheres of citizenship—local, national, and global).

5. See SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS* 315 (2006) (explaining that cities have formulated new forms of citizenship); Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 *U. CIN. L. REV.* 1441, 1479 (2009) (explaining that cities have been forums of shifting notions of membership); Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 *MICH. L. REV.* 567, 577-78 (2008) (noting that certain cities, which have become the sites of active engagement concerning the rights and privileges of immigrants, “conceive of citizenship in broadly inclusive terms”).

6. See BOSNIAK, *supra* note 2, at 37-57; Blank, *supra* note 4, at 447-52.

7. See BOSNIAK, *supra* note 2, at 37-57.

8. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

9. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

lished the terms and conditions upon which non-citizens may be admitted,<sup>10</sup> removed,<sup>11</sup> become eligible for legal permanent residence,<sup>12</sup> and apply for naturalization.<sup>13</sup> Collectively, these provisions within the INA help to define some of the rights and privileges of non-citizens and determine the process by which non-citizens may ultimately become full members of the national polity.

Sub-federal governments that pass laws that are inclusionary<sup>14</sup> or exclusionary<sup>15</sup> of non-citizens, particularly those who are in the United States without authorized immigration status or undocumented immigrants, fundamentally affect the congressionally prescribed rights and privileges of non-citizens. For instance, laws and policies that provide municipal identification cards to all residents, including undocumented immigrants,<sup>16</sup> convey the local government's intent to formally recognize and include them as *local* citizens.<sup>17</sup> By contrast, laws that deny undocumented immigrants entry into residential leases<sup>18</sup> signal their intent to exclude unauthorized

10. See 8 U.S.C. § 1182 (2008) (listing the categories of noncitizens who are inadmissible).

11. See 8 U.S.C. § 1227 (2008) (identifying the class of deportable noncitizens).

12. See 8 U.S.C. § 1255 (2008) (explaining eligibility for adjustment of status to legal permanent resident).

13. See 8 U.S.C. § 1422 (2008) (stating eligibility for naturalization).

14. I use the term "inclusionary" to describe laws, policies, and measures that are intended to integrate or be more inclusive of non-citizens within a particular state or local domain.

15. By contrast, I use the term "exclusionary" to refer to laws, policies, and measures that are intended to remove or exclude non-citizens from a particular state or local domain.

16. See, e.g., Jeff Holtz, *This Summer's Surprise Hit: An Elm City ID*, N.Y. TIMES, Sept. 16, 2007, at 14CT6, available at <http://www.nytimes.com/2007/09/16/nyregion/nyregionspecial2/16peoplect.html?scp=2&sq=%22Summer%27s+Surprise+Hit%22&st=nyt> (discussing the issuance of resident identification cards to undocumented immigrants in Elm City, Connecticut); Jennifer Medina, *New Haven Approves Program to Issue Illegal Immigrants IDs*, N.Y. TIMES, June 5, 2007, at B6, available at <http://www.nytimes.com/2007/06/05/nyregion/05haven.html?fta=y> (discussing the first program for the issuance of municipal identification cards to undocumented immigrants).

17. See *infra* Part III (explaining San Francisco public officials' desire to include undocumented immigrants within the local community).

18. E.g., HAZLETON, PA., ORDINANCE 2006-13 (Aug. 15, 2006) available at [http://www.hazletoncity.org/090806/2006-13%20\\_Landlord%20Tenant%20Ordinance.pdf](http://www.hazletoncity.org/090806/2006-13%20_Landlord%20Tenant%20Ordinance.pdf); FARMERS BRANCH, TEX., ORDINANCE 2952 (Jan. 22, 2008) available at <http://www.ci.farmers-branch.tx.us/sites/default/files/Ordinance%20No%202952.pdf>. Both laws have been struck down on preemption grounds. See *Villas at Parkside v. City of Farmers Branch*, No. 303-CV-1615, slip op. 2010 WL 1141398 (N.D. Tex., Mar. 24, 2010) (ruling that federal law preempted Farmers Branch Ordinance 2952); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007) (holding that federal law preempted Hazleton's rental ordinance against undocumented immigrants).

immigrants from local borders, and therefore classify them as non-members in the local polity.<sup>19</sup> As these examples illuminate, both categories of laws—inclusionary and exclusionary—affect and shape the meaning of citizenship within the United States.

This Article explores the ways in which sanctuary laws illustrate the tensions between national and local citizenship. Specifically, this Article examines how “sanctuary cities” have arguably constructed membership for undocumented immigrants located within their jurisdictions. Recognizing sanctuary cities as sites of local citizenship for undocumented immigrants takes the first step towards analyzing what implications, if any, these places might have on national citizenship, which may be examined more fully in the future. To be clear, the Article uses the label “sanctuary city” to describe some municipalities that have adopted sanctuary, non-cooperation, or confidentiality policies for undocumented residents, which may be viewed as inclusionary types of laws.<sup>20</sup> Among these cities is San Francisco, whose sanctuary ordinance has received considerable media attention in the last few years.<sup>21</sup> As explained *infra*, San Francisco’s sanctuary law prohibits the use of city funds and resources to aid in federal enforcement of immigration law.<sup>22</sup> It also expressly proscribes city government employees from asking or reporting the immigration status of individuals they encounter to federal immigration authorities unless such individuals have

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19. See Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 10-11 (2007); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1126-27 (2009).

20. In this Article, I use the terms “non-cooperation,” “confidentiality,” and “sanctuary” policies interchangeably to refer to laws, ordinances, resolutions, and policies that, as discussed in more detailed analysis in the text, restrict the ability of government employees to obtain information about an individual’s immigration status and reporting such information to federal officials. It is important to limit the use of the term “sanctuary” to policies regarding confidentiality of immigration information. As I have argued elsewhere, “sanctuary” has been unfairly used to also describe services that are required by law. See Rose Cuison Villazor, *What “Sanctuary”?*, 61 SMU L. REV. 133, 151-53 (2008) (explaining that the word sanctuary has also been equated with the provision of K-12 education and emergency health care to undocumented immigrants). Public education is available to all children, regardless of immigration status. See *generally* Plyler v. Doe, 457 U.S. 202 (1982). Emergency health care services are also open to all persons irrespective of immigration status. See 42 U.S.C. § 1395dd(b) (2003). Classifying these services as “sanctuary”—in the pejorative sense—conflates public services that are required under the law with those types of laws and policies that specifically address what government employees may do concerning an individual’s immigration status. See Villazor, *supra* at 153-54.

21. See *infra* Part II.A-B (discussing the history of San Francisco’s ordinance and current controversial events).

22. See S.F., CAL., ADMIN. CODE § 12H.2 (1989).

been detained for committing a felony.<sup>23</sup> In December 2009, the city's Board of Supervisors amended the law to delay the reporting of accused juvenile offenders' immigration information until after the immigrants have been proven guilty of the alleged crimes.<sup>24</sup> The Mayor of San Francisco, Gary Newsom, however, has announced that he would not enforce the law; accordingly, he called into question both the implementation and effectiveness of the new law.<sup>25</sup>

The political showdown between the Board of Supervisors and the Mayor has propelled San Francisco's sanctuary law to the center of the current national preemption debate over the extent to which state and local governments may legitimately pass laws that affect non-citizens without violating the exclusive power of Congress to regulate immigration law.<sup>26</sup> Indeed, the Mayor has grounded his refusal to enforce the sanctuary law in his belief that the amended version of the law violates 8 U.S.C. § 1373, which prohibits federal, state, and local governments from proscribing their employees from voluntarily reporting the known immigration status of individuals.<sup>27</sup>

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23. See S.F., CAL., ADMIN. CODE § 12H.2-1 (1989); see also Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1470 (2006); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1392 (2006). See generally Rodriguez, *supra* note 5 (examining local sanctuary laws and policies). For a list of various sanctuary laws, ordinances, resolutions, and policies, see NAT'L IMMIGRATION LAW CTR., LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (2008), <http://www.nilc.org/immlawpolicy/LocalLaw/locallaw-limiting-tbl-2008-12-03.pdf>.

24. Jesse McKinley, *San Francisco to Delay Reports on Charges Against Immigrants*, N.Y. TIMES, Oct. 21, 2009, at A19 [hereinafter McKinley, *San Francisco to Delay Reports*].

25. Phillip Matier & Andrew Ross, *Illegal Teen's Arrest Stirs Sanctuary Law Fight*, S.F. CHRON., Jan. 18, 2010, at C1, available at [http://articles.sfgate.com/2010-01-18/bay-area/17829152\\_1\\_illegal-immigrant-sanctuary-law-david-campos](http://articles.sfgate.com/2010-01-18/bay-area/17829152_1_illegal-immigrant-sanctuary-law-david-campos) (reporting that Mayor Gavin Newsom refuses to enforce the new sanctuary law as applied to undocumented juvenile immigrants).

26. McKinley, *San Francisco to Delay Reports*, *supra* note 24. The question of whether states and local government may participate in regulating immigration law is a broader, significant issue that many scholars have examined. See, e.g., McKanders, *supra* note 19, at 10-11; Pham, *supra* note 19, at 1126-27; Rodriguez, *supra* note 5, at 569-80.

27. See 8 U.S.C. § 1373 (1996) (prohibiting any federal, state, or local government from preventing or restricting any governmental entity or official from communicating information regarding the citizenship or immigration status of any individual to the Immigration and Naturalization Service); see also Jesse McKinley, *California: Immigration Conflict*, N.Y. TIMES, Nov. 11, 2009, at A23 [hereinafter McKinley, *Immigration Conflict*].

The controversy between the Mayor and the Board of Supervisors, however, reveals more than a dispute about preemption.<sup>28</sup> As this Article argues, it also highlights how the city's sanctuary law illuminates contested views about whether to recognize some undocumented immigrants within the city's domain as members or local citizens. Mayor Newsom believes that immigrants who have committed crimes, regardless of their age, should not be able to benefit from the sanctuary policy.<sup>29</sup> Thus, although the Mayor has stated his support for the non-cooperation law, he contends that the immigration information of undocumented juvenile delinquents should be reported to the Immigration and Customs Enforcement ("ICE") officials. The Board of Supervisors that voted for the amendment, however, contends that juvenile offenders must be provided with due process of law and not be reported to ICE, which could subject them to removal from the United States, until proven guilty of the crimes for which they have been accused.<sup>30</sup> Despite their dichotomous positions regarding the treatment of juveniles, both camps recognize that the sanctuary law provides protection for some undocumented immigrants within the local sphere.<sup>31</sup> Importantly, both have taken the normative position that the law is necessary to encourage undocumented immigrants to feel protected, despite living in the "shadows,"<sup>32</sup> and to participate in local matters as members of their communities.<sup>33</sup> Seen from this vantage point, San Francisco's ordinance acknowledges undocumented immigrants as de facto members of the local community.

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28. This Article does not conduct a doctrinal analysis of whether the conferral of local citizenship vis-à-vis San Francisco's ordinance is preempted by 8 U.S.C. § 1373(a). Where relevant, however, I raise questions that relate to preemption issues related to the ordinance. In a forthcoming Article, my co-author and I provide a more detailed analysis of the preemption questions that the ordinance raises. See Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, WAYNE L. REV. (forthcoming 2010) (on file with Fordham Urban Law Journal).

29. See McKinley, *San Francisco to Delay Reports*, *supra* note 24; discussion *infra* Part II.C and text accompanying notes 126-127; see also McKinley, *Crossroads*, *supra* note 1.

30. See McKinley, *Crossroads*, *supra* note 1; discussion *infra* Part II.C and notes 138-139 and accompanying text.

31. See discussion *infra* Parts II.C, III.

32. As the Supreme Court noted in *Plyler v. Doe*, 457 U.S. 202 (1982), undocumented immigrants constitute a "shadow population." See *Plyler*, 475 U.S. at 218 (quoting *Joint Hearing before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary and the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 9 (1981) (statement of Att'y Gen. William French Smith)).

33. See discussion *infra* Part III (providing statements by some San Francisco officials expressing their aim to be inclusive and protective of undocumented immigrants).

The Article's examination of sanctuary cities such as San Francisco as loci of local citizenship contributes to our understanding of the tension between local and national citizenship in at least two ways. First, it highlights the competing views for creating and rejecting membership because of one's immigration status. As explained more fully below, supporters of San Francisco's non-cooperation policy believe that persons within a locality's borders ought to be able to participate in and be allowed to contribute to community affairs regardless of their immigration statuses.<sup>34</sup> They also contend that non-citizens should be eligible for local benefits and privileges despite their unauthorized presence in the country. By contrast, many within the city strongly oppose the grant of local citizenship status and provision of any rights or privileges to undocumented immigrants.<sup>35</sup>

Second, the Article underscores the challenges that local governments face in their desire to maintain the confidentiality of immigration status information of undocumented persons they encounter. Acknowledging either the intent or effect of the sanctuary policy to confer local citizenship to undocumented immigrants highlights the ways in which the local citizenship collides with the federal government's authority to determine who may belong in the United States. In particular, from the federal government's view, the grant of local functional or citizenship-like status is incompatible with the national government's conception of who should be a proper member of the United States. Thus, conducting a citizenship analysis of a "sanctuary city" helps to crystallize the underlying doctrinal questions that ultimately need to be addressed, including whether San Francisco's ordinance is preempted by 8 U.S.C. § 1373.

Part I of this Article frames the arguments presented here by highlighting basic definitional concepts regarding citizenship. Part II provides a historical and current discussion of San Francisco's ordinance. As this Part explains, a number of factors led to changes in the ordinance, including a lawsuit by a family whose family members were allegedly murdered by an undocumented immigrant. Part III examines the relationship between San Francisco's sanctuary policy and local citizenship. The conclusion raises the implications of the citizenship analysis on doctrinal preemption issues.

#### I. FOUR DIMENSIONS OF CITIZENSHIP AND LOCAL CITIZENSHIP

To understand how San Francisco's ordinance may be viewed to have constructed a type of local citizenship for undocumented immigrants and

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34. See discussion *infra* Part III.A.

35. See discussion *infra* Part III.A.



residents within its jurisdiction, it is necessary to first provide some basic definitional citizenship concepts.

### A. Defining Citizenship

Citizenship, as Linda Bosniak has articulated, may be considered along four dimensions that describe different types of membership.<sup>36</sup> The first refers to formal citizenship or the legal status of citizenship.<sup>37</sup> This generally means that as a citizen, one is considered a formal member of a specific political community.<sup>38</sup> Citizenship, notes Bosniak, “designates formal, juridical membership in an organized political community.”<sup>39</sup> Importantly, the legal status of citizenship confers one with rights, privileges, and obligations.<sup>40</sup>

The second considers citizenship to mean the “entitlement to, and enjoyment of, rights.”<sup>41</sup> From this perspective, citizenship focuses less on formal status and more on the enjoyment of rights and privileges. As Bosniak explains, “[c]itizenship requires the possession of rights (to noninterference, originally, and now to other goods as well), and those who possess the rights are usually presumed thereby to enjoy citizenship.”<sup>42</sup> The rights-based understanding of citizenship may refer to various types of rights, including civil, political, and social.<sup>43</sup>

Third, citizenship stands in relation to one’s participation in democratic self-government. That is, citizenship refers to one’s ability to participate actively in the political process.<sup>44</sup>

Fourth, citizenship refers to the sense of belonging, or one’s emotional ties to a community.<sup>45</sup> This view of citizenship, as Bosniak expresses, refers more to the ways in which “people experience themselves in collective terms.”<sup>46</sup> All four dimensions of citizenship—formal status, rights, political participation, and identity—provide useful frameworks for analyzing how membership has been constructed in a particular location.

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36. See BOSNIAK, *supra* note 2, at 18-20.

37. See *id.* at 19.

38. See *id.*

39. *Id.*

40. See *id.*

41. *Id.*

42. *Id.*

43. See *id.*

44. See *id.*

45. See *id.* at 20.

46. *Id.*

## B. Local Citizenship

The definition of citizenship may not be fully understood without examining where it is located. As previously noted, many have generally situated citizenship within the nation-state.<sup>47</sup> The national-centric view of citizenship bears a close connection to the definition of citizenship as formal status. Indeed, national citizenship is granted mainly by nation-states and is given recognition internationally.<sup>48</sup>

Yet, citizenship is also created and located within sub-federal borders such as cities.<sup>49</sup> As Yishai Blank has noted, there is a general consensus that the concept of local citizenship exists.<sup>50</sup> Although the precise substance of what local citizenship is, or what it should be, is still open for discussion,<sup>51</sup> it is perceived to be distinguishable from national citizenship. Local citizenship, similar to national citizenship, involves questions of membership, rights, and privileges attendant to citizenship.<sup>52</sup> Yet, it is descriptively different because much of the negotiations for membership and rights occur at the municipal level,<sup>53</sup> which give rise to the opportunities that shape the rights, privileges, and obligations of local citizenship.<sup>54</sup> From a normative perspective, local citizenship is desirable because it equips local residents with a sense of autonomy and control over things that would have immediate effects on their lives.<sup>55</sup>

An important facet of local citizenship is that it is based on presence in a territory.<sup>56</sup> Unlike national citizenship—membership of which is acquired

47. *See id.* at 23 ("Citizenship is presumed, with little question, to be a national enterprise—a set of institutions and practices that necessarily take place within the political community, or the social world, of the nation-state.").

48. *See id.* at 24.

49. *See* Blank, *supra* note 4, at 421-24; *see also* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1128 (1996) ("Local citizenship can be seen, not simply as a matter of residence, but as primarily a relation of membership in an on-going entity.") (internal quotation marks omitted); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1843 (1994) (examining the impact of racial segregation and political geography, and emphasizing the importance of local citizenship).

50. *See* Blank, *supra* note 4, at 421 n.23 (citing scholars and theorists who have examined local citizenship).

51. *See id.* at 421 (noting that scholars are still debating both the substance of local citizenship and what "local" means).

52. *See id.*

53. *See id.* at 423.

54. *See id.* at 421-24; Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 473 (2000).

55. *See* Bosniak, *supra* note 54, at 473.

56. *See* Blank, *supra* note 4, at 423.

by birth or naturalization<sup>57</sup>—membership in a local sphere is determined by residency.<sup>58</sup> In this fundamentally unique way, local citizenship is acquired by mere presence in a particular space.

Beyond these general descriptions, one can consider how the four conceptions of citizenship would apply at the local level. To begin, persons who reside within a polity may acquire formal local citizenship.<sup>59</sup> As formal local citizens, they gain rights, privileges, and entitlement to various services as well as obligations to the community.<sup>60</sup> For instance, formal membership allows residents to vote for local officials and enroll their children in public schools.

We may also examine membership in the locality from the perspective of citizenship that gives rise to rights and obligations. Although this view is not as evident as formal citizenship acquired through residency, the idea becomes plausible when we consider that there may well be a package of rights and entitlements that might be extended to persons within a local polity even if they lack residency there.<sup>61</sup> For example, entitlement to services traditionally provided by local governments, such as police protection and health services, are available to all persons located within the locality.

It is possible to see citizenship as the exercise of democratic participation by looking at the ways that residents participate in the political life of their local communities.<sup>62</sup> The ability of a resident to advocate for a position at the local level demonstrates his membership in the community. Indeed, this type of citizenship may be particularly clear in the local context because of the propinquity between residents and their elected officials.

Finally, the broader sense of citizenship from the collective identity perspective is also conceivable within the local sphere. An individual's connection to a specific city or locality is evidenced in articulations of proud membership that are manifested in varied ways. In fact, local citizenship as identity arguably does not need a residency requirement. One might consider herself a member of a local community, perhaps based on

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57. U.S. CONST. amend. XIV, § 1 (stating that persons who are born or naturalized in the United States are U.S. citizens).

58. See Blank, *supra* note 4, at 424 (explaining that the logic of local citizenship is grounded on residency or *jus domicili*).

59. The issuance of municipal identification cards to residents, for instance, constitutes an example of the active legitimization of a resident's membership in the community.

60. See Blank, *supra* note 4, at 422.

61. Richard T. Ford, *City-States and Citizenship*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 209 (Thomas A. Aleinikoff & Douglas Klusmeyer eds., 2001); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 323 (1993).

62. See Blank, *supra* note 4, at 423.

her previous residency or her parents' connection to such community, even if she does not reside there.

In sum, although much about local citizenship still needs to be explored, there is no doubt that citizenship is active and occurring at the local level. Although local citizenship is generally defined by residency, both presence and connection to a polity might also facilitate the recognition of citizenship within the local sphere.

## II. SAN FRANCISCO'S ORDINANCE

In order to apply the foregoing concepts of citizenship to sanctuary policies and, in particular, San Francisco's non-cooperation ordinance, this Part provides a brief historical background of the law and events that led to recently adopted changes in the law.

### A. Historical Background

In 1985, the City of San Francisco designated itself a "City of Refuge"<sup>63</sup> as part of an overall protest<sup>64</sup> against the treatment of non-citizens from El Salvador and Guatemala who became subject to deportation after the government denied their claims to asylum.<sup>65</sup> A few years later, on October 24, 1989, the city passed an ordinance that strengthened its safe haven declaration by expressing the city's policy of non-involvement with federal immigration enforcement. The ordinance articulated this position explicitly by explaining how city employees are to treat information about the immigration status of individuals in the city. In particular, Chapter 12 of the city's Municipal Code provides in relevant part: "No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of federal immigration law. . . ."<sup>66</sup>

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63. S.F. Res. 1087-85 (1985) (resolution declaring San Francisco a "City of Refuge"), available at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=486>.

64. See, e.g., S.F., CAL., ADMIN. CODE § 12H (1993); TAKOMA PARK, MD., ORDINANCE 2007-58 (2007) (amending TAKOMA PARK, MD., CITY CODE § 9.04 (2004)), available at <http://www.takomaparkmd.gov/clerk/ordinance/2007/or200758.pdf>; see also Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CAL. L. REV. 567, 571-72 (2009) (discussing the history of sanctuary policies); Press Release, Office of the Mayor, Mayor Newsom Launches Sanctuary City Outreach Campaign (April 2, 2008), available at [http://www.sfgov.org/site/mayor\\_index.asp?id=78378](http://www.sfgov.org/site/mayor_index.asp?id=78378).

65. McKinley, *Crossroads*, *supra* note 1.

66. S.F., CAL., ADMIN. CODE § 12H.2 (1992).

The ordinance also delineated other prohibited conduct. It provided that city employees may not “gather . . . information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by Federal or State statute, regulation or court decision.”<sup>67</sup> Moreover, it explained that employees are prohibited from “disseminat[ing] information regarding the immigration status of individuals . . . .”<sup>68</sup>

In other words, the ordinance may be described as a type of “don’t ask, don’t tell” policy.<sup>69</sup> That is, similar to other jurisdictions that have adopted sanctuary or non-cooperation policies, it discourages government officials from asking about a person’s immigration status and prohibits them from revealing such information to federal officials.<sup>70</sup>

In 1992, the city amended the law to exempt from protection any non-citizen who had been convicted of certain crimes.<sup>71</sup> In particular, unauthorized non-citizens that had previously been convicted of a felony or alleged to have committed a felony, might have their immigration status reported to federal officials.<sup>72</sup> In particular, the ordinance provided that:

Nothing in this Chapter shall prohibit, or be construed as prohibiting, a law enforcement officer from identifying and reporting any person pursuant to state or federal law or regulation who is in custody after being booked for the alleged commission of a felony and is suspected of violating the civil provisions of the immigration laws.<sup>73</sup>

Moreover, on December 13, 1995, the San Francisco Police Department promulgated General Order 5.15, which identified the narrowed scope of San Francisco’s non-cooperation policy.<sup>74</sup> The General Order provided that officers

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67. *Id.*

68. *Id.*

69. Kittrie, *supra* note 23; Pham, *supra* note 23; Rodriguez, *supra* note 5.

70. Kittrie, *supra* note 23; Pham, *supra* note 23; Rodriguez, *supra* note 5.

71. S.F., CAL., ADMIN. CODE § 12H.2 (1992).

72. In addition, nothing in this Chapter shall preclude any City and County department, agency, commission, officer or employee from (a) reporting information to the INS regarding an individual who has been booked at any county jail facility, and who has previously been convicted of a felony; (b) cooperating with an INS request for information regarding an individual who has been convicted of a felony[;] or (c) reporting information as required by federal or state statute[.] *Id.*

73. *Id.*

74. *See* Bologna v. City of San Francisco, No. C 09-2272 SI, 2009 WL 2474705, at \*3 (N.D. Cal. Aug. 11, 2009).

shall not inquire into an individual's immigration status unless the individual has been arrested for (1) various offenses involving controlled substances, (2) is in custody after being booked for alleged commission of a felony, (3) is booked after previously having been convicted of a felony, or (4) if the [U.S. Immigration and Naturalization Service ("INS")] makes a request for information and the individual has previously been convicted of a felony.<sup>75</sup>

Thus, San Francisco's "don't ask, don't tell" policy did not necessarily apply to non-citizens who were booked for or had been convicted of felony crimes. Accordingly, police officers had the flexibility to voluntarily report immigration information to ICE.

Despite the ordinance and policy, news reports in 2008 revealed that although certain criminals and alleged criminals were reported to ICE under the revised ordinance, the city had a different policy and practice with respect to juvenile defendants.<sup>76</sup> Specifically, the media reported that city officials had chosen to place undocumented youth offenders in juvenile hall instead of reporting them to immigration officials so they can be processed for removal.<sup>77</sup> Reports emerged that up to 185 youths had been "shielded under San Francisco's sanctuary city policy."<sup>78</sup> In some instances, city officials flew unauthorized juveniles who were alleged to be drug dealers back to Honduras in order to avoid their removal from the United States.<sup>79</sup> In carrying out the policy, the city admitted to spending over \$2.3 million in 2005 alone.<sup>80</sup> The following story had a particular role in leading to recent changes to the ordinance.

### B. The Bologna Lawsuit

In late June 2008, Anthony Bologna and his three sons, Michael, Matthew, and Andrew, were stopped in San Francisco traffic when a car pulled up beside them. Someone in the car immediately began shooting at the Bo-

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75. *Id.*

76. See Heather Knight, *S.F. Sanctuary Policy Shielded Up to 185 Youths*, S.F. CHRON., Apr. 3, 2009, at A1, available at [http://articles.sfgate.com/2009-04-03/news/17194960\\_1\\_drug-charges-juvenile-probation-system-youths](http://articles.sfgate.com/2009-04-03/news/17194960_1_drug-charges-juvenile-probation-system-youths).

77. *See id.*

78. *Id.*

79. *See id.*

80. David Kelly & Maria L. La Ganga, *'Dumping' May Land S.F. in Court*, L.A. TIMES, July 4, 2008, § California, at 1, available at <http://articles.latimes.com/2008/jul/04/local/me-immig4>.

logna family,<sup>81</sup> leading to the deaths of all but one, Andrew.<sup>82</sup> The accused shooter, then-twenty-one-year-old Edwin Ramos, is allegedly a member of the dangerous Mara Salvatrucha, or “MS-13” gang. A citizen of El Salvador, he has resided in San Francisco for many years.<sup>83</sup> Moreover, he was allegedly present in the United States in violation of the Immigration and Nationality Act.<sup>84</sup>

The surviving Bologna family members brought a wrongful death lawsuit against the City of San Francisco, blaming the city for the deaths of their loved ones.<sup>85</sup> At the heart of their lawsuit is San Francisco’s “City of Refuge” ordinance,<sup>86</sup> which prohibits city employees from asking about or reporting immigration information to ICE “unless required by law.”<sup>87</sup> In their complaint,<sup>88</sup> the plaintiffs alleged that the city’s non-cooperation, or “sanctuary,” ordinance caused city officials to harbor individuals, like Ramos, known to have committed drug offenses and other violent crimes.<sup>89</sup> Specifically, when Ramos was a minor, he had brushes with the criminal law.<sup>90</sup> City officials placed him at the Log Cabin Ranch School, a post adjudication facility for male juveniles who have been adjudged delinquent.<sup>91</sup> Critically, city officials did not inform ICE that Ramos was in the United

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81. *Bologna v. City of San Francisco*, No. C 09-2272 SI, 2009 WL 2474705, at \*1 (N.D. Cal. Aug. 11, 2009); Jaxon Van Derbeken, *Edwin Ramos Won’t Face Death Penalty*, S.F. CHRON., Sept. 11, 2009, at D1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/09/11/BAM819L7NE.DTL>.

82. *Bologna*, 2009 WL 2474705, at \*1.

83. *Id.*; Van Derbeken, *supra* note 81.

84. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)).

85. *Bologna*, 2009 WL 2474705, at \*1.

86. S.F., CAL., ADMIN. CODE § 12H.1 (1989).

87. *Id.*

88. The complaint alleged five causes of action: (1) negligence; (2) negligent infliction of emotional distress; (3) violation of the California Constitution; (4) violation of the decedents’ constitutional rights under 42 U.S.C. § 1983; and (5) violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-1968 (2006). *See Bologna*, 2009 WL 2474705, at \*2.

89. *Bologna*, 2009 WL 2474705, at \*1.

90. *Id.* (stating that Ramos “has been arrested by San Francisco police officers on multiple occasions for violent crimes and drug offenses and has been identified as a suspect in other serious crimes, including murder”). It should be noted that the characterization of defendant’s criminal history is contested. *Compare* Van Derbeken, *supra* note 81 (stating that while Ramos had no adult record, he had two gang-related offenses as a juvenile: assault and attempted robbery), *with* Bob Egelko, *Judge Lets Victims’ Kin Sue S.F. Over Sanctuary*, S.F. CHRON., Sept. 15, 2009, at C2, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/09/15/BAC519N0BR.DTL> (explaining Ramos had been “arrested twice as a juvenile, for assault in 2003, and an attempted purse-snatching in 2004”).

91. *Bologna*, 2009 WL 2474705, at \*1; *see also* Egelko, *supra* note 90.

States without lawful status and that he had committed crimes in the past.<sup>92</sup> The Bologna family contended that if Ramos's earlier arrests had been reported to ICE, then ICE would have removed Ramos from the country and thereby prevented him from committing the murders.<sup>93</sup> Yet, according to the plaintiffs, the city's non-cooperation ordinance unlawfully prevented San Francisco police officers from reporting Ramos's drug-related detentions and thus violated several state and federal laws.<sup>94</sup>

### C. Recent Changes

These stories ultimately prompted Mayor Newsom to require the police department to contact ICE when juveniles are arrested for felony crimes.<sup>95</sup> Police officers were also allowed to contact ICE if the juveniles were suspected of being in the United States without lawful immigration status and they had been convicted of felony crimes.<sup>96</sup>

Many immigrants' rights advocates protested the shift in the city's non-cooperation policy.<sup>97</sup> Opponents of the policy change argued that it would lead to the deportation of many undocumented juveniles who are either innocent or have been arrested for minor crimes.<sup>98</sup> Since the mayor changed the policy, more than one hundred minors have been turned over to immigration officials.<sup>99</sup>

Months later, a member of the Board of Supervisors, David Campos, introduced an amendment to the policy that would restrict when police officers may report a juvenile's immigration status.<sup>100</sup> In particular, the amendment provided that the police would delay the reporting of the immi-

92. Egelko, *supra* note 90.

93. *Bologna*, 2009 WL 2474705, at \*1.

94. *See id.* at \*2. On February 23, 2010, the Bologna's family lawsuit was dismissed. *See* Bob Egelko, *Judge Tosses Sanctuary Suit in S.F. Killings*, S.F. CHRON., Feb. 24, 2010, at C1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/02/24/BA0N1C63N7.DTL>.

95. *See* McKinley, *Crossroads*, *supra* note 1.

96. *See* McKinley, *San Francisco to Delay Reports*, *supra* note 24.

97. *See* Marisa Lagos, *Mission District Rally for Immigrant Rights*, S.F. CHRON., Feb. 26, 2009, at B3, available at [http://articles.sfgate.com/2009-02-26/bay-area/17188791\\_1\\_immigration-raids-immigrant-families-jordan-school](http://articles.sfgate.com/2009-02-26/bay-area/17188791_1_immigration-raids-immigrant-families-jordan-school); Marisa Lagos & John Coté, *New Sanctuary Proposal on Protecting Youths*, S.F. CHRON., Aug. 18, 2009, at A1, available at [http://articles.sfgate.com/2009-08-18/news/17177061\\_1\\_immigration-sanctuary-felony](http://articles.sfgate.com/2009-08-18/news/17177061_1_immigration-sanctuary-felony).

98. *See* McKinley, *Crossroads*, *supra* note 1.

99. *See* McKinley, *San Francisco to Delay Reports*, *supra* note 24.

100. *See id.*



gration status of juveniles to ICE until after the juveniles have been convicted of a felony crime.<sup>101</sup>

The proposed change brought a sharp rebuke from the Mayor's Office. In a legal memorandum that the Mayor's Office leaked to the media,<sup>102</sup> the attorney for the City of San Francisco wrote that Campos's proposal might jeopardize the entire ordinance.<sup>103</sup> Explaining that the legality of sanctuary policies remains unsettled, the city's attorney urged against passing the amendment.<sup>104</sup>

On October 20, 2009, however, the Board of Supervisors approved the amendment to the ordinance.<sup>105</sup> Anticipating that Mayor Newsom would veto the bill, the Board passed a veto-proof bill. As expected, Mayor Newsom vetoed the amendment, but the Board eventually prevailed in overriding the veto.<sup>106</sup>

The Mayor has publicly announced that he will refuse to enforce the amendment,<sup>107</sup> contending that the policy violates federal law.<sup>108</sup> Indeed, he sought advice from the U.S. Attorney's Office to determine whether or not city employees will be prosecuted for complying with the ordinance.<sup>109</sup> The U.S. Attorney's Office explained that it cannot guarantee that city officials and employees would not be prosecuted for violating immigration law.<sup>110</sup> The amendment to the ordinance became effective on December

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101. *See id.*

102. *See* Heather Knight & Jaxon Van Derbeken, *Sanctuary Policy at Risk, City Attorney Warns*, S.F. CHRON., Aug. 20, 2009, at A1, available at [http://articles.sfgate.com/2009-08-20/news/17178119\\_1\\_immigration-sanctuary-memo](http://articles.sfgate.com/2009-08-20/news/17178119_1_immigration-sanctuary-memo).

103. *See* Bob Egelko, *Feds Courts May Step in if Supes Shield Youths*, S.F. CHRON., Nov. 10, 2009, at A1, available at [http://articles.sfgate.com/2009-11-10/news/17179222\\_1\\_immigration-felony-youth](http://articles.sfgate.com/2009-11-10/news/17179222_1_immigration-felony-youth); *see also* McKinley, *San Francisco to Delay Reports*, *supra* note 24.

104. *See* McKinley, *San Francisco to Delay Reports*, *supra* note 24.

105. *Id.*

106. *See* Heather Knight, *Newsom Vetoes Change in S.F. Sanctuary Law*, S.F. CHRON., Oct. 29, 2009, at A11 [hereinafter Knight, *Newsom Vetoes Change*], available at [http://articles.sfgate.com/2009-10-29/news/17184624\\_1\\_sanctuary-legislation-change](http://articles.sfgate.com/2009-10-29/news/17184624_1_sanctuary-legislation-change); Heather Knight, *Sanctuary Veto Overridden Legal Action Possible*, S.F. CHRON., Nov. 11, 2009, at C1 [hereinafter Knight, *Veto Overridden*], available at [http://articles.sfgate.com/2009-11-11/bay-area/17178997\\_1\\_legislation-sanctuary-law](http://articles.sfgate.com/2009-11-11/bay-area/17178997_1_legislation-sanctuary-law).

107. *See* Knight, *Veto Overridden*, *supra* note 106; Matier & Ross, *supra* note 25 (reporting that an undocumented juvenile boy was reported to federal officials after he was charged with murder).

108. *See* 8 U.S.C. § 137 (2010); *see also* Knight, *Veto Overridden*, *supra* note 106.

109. *See* Knight, *Veto Overridden*, *supra* note 106.

110. *See* Maria L. La Ganga, *California, S.F. Overrides Sanctuary Veto*, L.A. TIMES, Nov. 11, 2009, at A3.

10, 2009<sup>111</sup> and available for implementation sixty days after its effective date.<sup>112</sup> Yet, as explained earlier, the Mayor has declined to enforce it.

### III. SAN FRANCISCO'S ORDINANCE AND LOCAL CITIZENSHIP

The contentious debates regarding the changes to San Francisco's sanctuary ordinance highlight the various legal issues that the municipality's law implicates. As noted earlier, one such issue is whether the city's sanctuary law is responsible for the deaths of the Bologna family members.<sup>113</sup> A second issue confronting San Francisco is whether the ordinance violates § 1324(a)(1)(A) of Title 8 of the U.S. Code, which proscribes the harboring of undocumented noncitizens.<sup>114</sup> Indeed, the U.S. Attorney's Office has begun investigating whether the city contravened 8 U.S.C. § 1324(a)(1)(A) when it placed juveniles such as Edwin Ramos in group homes.<sup>115</sup> A third issue, underscored by the political confrontation between the Mayor and the Board of Supervisors, is whether the sanctuary ordinance violates 8 U.S.C. § 1373.<sup>116</sup> Related to this preemption argument is the view, recently validated by a state court, that the San Francisco sanctuary law violates California law's requirement of reporting the immigration status of persons who have committed crimes to federal authorities.<sup>117</sup>

San Francisco's ordinance raises more than just legal questions, however. As public statements about the *Bologna* case reveal, the sanctuary ordinance highlights broader theoretical and social perceptions regarding the law's impact on the rights of citizens and lawful members of the community. In an interview about the ordinance, Angela Alioto, a member of the Board of Supervisors, stated that if not for the ordinance, the "Bolognas would be alive today[.]"<sup>118</sup> One commentator noted the absurdity of "San Francisco . . . putting 'sanctuary' for illegals ahead of the interests of its

111. Memorandum from Dennis J. Herrera, City Attorney, Therese M. Stewart, Chief Deputy, Jesse Capin Smith, Chief Assistant & Buck Delventha, Deputy City Attorney, to David Campos, Supervisor, S.F. Bd. of Supervisors (Dec. 16, 2009), *available at* <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=471>.

112. *See id.*

113. *See supra* Part II.B.

114. 8 U.S.C. § 1324(a)(1)(A).

115. *See* Bob Egelko, *Federal Probe into S.F. Sanctuary City Policy*, S.F. CHRON., Oct. 4, 2008, at A1, *available at* [http://articles.sfgate.com/2008-10-04/news/17135434\\_1\\_sanctuary-city-policy-federal-grand-jury-federal-immigration-authorities](http://articles.sfgate.com/2008-10-04/news/17135434_1_sanctuary-city-policy-federal-grand-jury-federal-immigration-authorities).

116. 8 U.S.C. § 1373 (1996).

117. CAL. HEALTH & SAFETY CODE § 11368 (2010); *Fonseca v. Fong*, 167 Cal. App. 4th 922, 929 (Cal. Ct. App. 2008).

118. *The O'Reilly Factor: Unresolved Problem* (Fox News television broadcast Oct. 22, 2009) [hereinafter *The O'Reilly Factor*].

own citizens.”<sup>119</sup> These statements accentuate a larger, social perception about how the ordinance has conferred rights to undocumented immigrants at the cost of the rights of citizens and other lawful members of the city. Implicit in this position is the perception that the ordinance has essentially recognized undocumented non-citizens as members of the community.

Using the different frameworks of citizenship previously described, this Part explores the ways in which San Francisco’s ordinance reflects hotly polarizing views about local citizenship. In so doing, this Part takes the first step in examining the broader implications of sanctuary laws on national citizenship. Although I divide the discussion below along Bosniak’s four descriptions of citizenship, namely status, rights, political engagement, and identity, it should be noted that these descriptions overlap in many ways.

### A. Local Citizenship as Legal Status

As Part I explained, citizenship as legal status “refers to formal or nominal membership in an organized political community.”<sup>120</sup> In other words, “to be a citizen is to possess the legal status of a citizen.”<sup>121</sup> Admittedly, this conception of citizenship, which is generally tied to the nation-state,<sup>122</sup> presumes that undocumented immigrants who lacked authority to enter or remain in the United States cannot be considered legal citizens.<sup>123</sup> To ultimately attain formal legal citizenship status on the national level, undocumented immigrants would first have to apply for legal status.<sup>124</sup>

Yet, arguably, formal or nominal local membership for undocumented immigrants is plausible through measures such as San Francisco’s sanctuary law. As residents in a local territory, undocumented immigrants who are covered by the city’s sanctuary law are entitled to rights, privileges, and obligations that are available to all other residents in the city. For example, similar to U.S. citizens and documented individuals who interact with public officials such as police officers, educators, and health care services, undocumented immigrants would not be asked about their immigration status. Moreover, those whose unauthorized status have become known to local public officials would not have to worry about being reported to federal of-

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119. *Sanctuary Absurdity*, PITTSBURGH TRIB. REV., Oct. 10, 2009 [hereinafter *Sanctuary Absurdity*], available at [http://www.pittsburghlive.com/x/pittsburghtrib/s\\_647311.html](http://www.pittsburghlive.com/x/pittsburghtrib/s_647311.html).

120. Bosniak, *supra* note 54, at 456.

121. See BOSNIAK, *supra* note 2, at 24.

122. See *id.* at 24-25.

123. See *id.* at 37-39.

124. See *id.*

ficials. As recognized members of the city resulting from the sanctuary law, undocumented immigrants in San Francisco are presumed to belong to the city and, thus, treated as if their lack of valid immigration status is irrelevant.

San Francisco's sanctuary law thus makes a person's immigration status immaterial in some public interactions. Undocumented immigrants are viewed to be stakeholders in a particular space because they live there and, thus, they are viewed to be "citizens." Notably, various public officials, including Mayor Newsom, have echoed the recognition of undocumented immigrants as members of the community. As he noted in an interview, San Francisco continues to be "immigrant friendly" by issuing "identification cards to residents regardless of legal status, the promotion of low-cost banking, and the city's long-standing opposition to immigration raids."<sup>125</sup> Together, these inclusionary measures—sanctuary policy, municipal ID cards and other supportive policies—have helped establish undocumented immigrants as local members. They belong in the city despite their unauthorized status.

It should be recalled that San Francisco's sanctuary law and policy recognize only some undocumented immigrants as local residents. As discussed previously, the law does not confer any protective measures to undocumented adult immigrants who have committed, or have been detained for committing, felony crimes. It also excludes from its coverage unauthorized juveniles who have been convicted of certain crimes. Indeed, it is the question of whether undocumented juveniles should at all be covered by the sanctuary law that led to the political quarrel between Mayor Newsom and the Board of Supervisors.<sup>126</sup> Mayor Newsom believes they should not, and, when he vetoed the amendment, explained in a letter that "[t]he sanctuary ordinance . . . was designed to protect those residents of our city who are law abiding . . . . It was never meant to serve as a shield for people accused of committing serious crimes."<sup>127</sup> Board of Supervisor Campos, by contrast, believes that unauthorized juveniles should be treated like members of the community. As he explained, "I think the point of sanctuary is

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125. McKinley, *Crossroads*, *supra* note 1.

126. See C.W. Nevius, *Undocumented Drug Offenders Should be Reported*, S.F. CHRON., Aug. 20, 2009, at D1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/08/20/BAG319ADTR.DTL> (explaining that Board of Supervisors member David Campos approves of the reporting of "undocumented suspects over the age of 18" to federal immigration officials).

127. Knight, *Newsom Vetoes Change*, *supra* note 106.

that you protect people and treat people the same unless they engage in some felony crime.”<sup>128</sup>

Critics of San Francisco’s ordinance seem to agree that the city’s law does confer local citizenship to non-citizens. Opponents of the new law, for instance, have explained that the sanctuary policy has made it difficult to remove felonious juvenile immigrants, particularly violent gang members, from the city.<sup>129</sup> Despite their undocumented status which makes them removable from the United States, undocumented juveniles have been treated as if they belong to the country. Indeed, critics of the sanctuary law have filed lawsuits against the city, contending that undocumented juvenile immigrants should be reported to the federal government.<sup>130</sup> According to an attorney of one of the groups suing the city, “[t]he fact that [juveniles] are undocumented doesn’t mean that they should be granted special status.”<sup>131</sup> Other critics of San Francisco’s non-cooperation law have contended that “sanctuary” policies should be disfavored because they privilege non-citizens over citizens in ways that have harmed U.S. citizens. The Bologna family’s lawsuit conveys this position. One of the bases of the complaint against the city is that the city failed to protect citizens from undocumented immigrants who were also criminals.

Thus, seen from the perspectives of both those who are supportive as well as those who are critical of San Francisco’s sanctuary law, the law has constructed a type of status to persons who are in the United States without authorized immigration status. unlawfully.

### B. Citizenship as Rights

Bosniak also explains that “citizenship requires the possession of rights, and those who possess the rights are usually presumed thereby to enjoy citizenship.”<sup>132</sup> Thus, it is not the formal status that makes them a citizen, enabling them to enjoy rights; they are citizens because they have rights.<sup>133</sup> From a local citizenship perspective, membership based on rights broadly includes within the group of “citizens” those who are residents of a polity as well as people who have connections to that polity. That is, local citi-

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128. McKinley, *Crossroads*, *supra* note 1.

129. *Id.*

130. *See* Nevius, *supra* note 126 (reporting that a conservative group called Judicial Watch has filed cases against the city for violations of state law that require reporting of undocumented immigrants to federal officials).

131. *See id.*

132. *Id.* at 464.

133. *Id.* at 466.

zenship grounded on rights includes both residents and others who are simply passing through.<sup>134</sup>

Applying the concept of citizenship as rights to San Francisco's sanctuary law reveals the ways in which the law possibly recognizes undocumented immigrants as local members. Specifically, San Francisco's sanctuary law arguably confers certain rights to undocumented immigrants that enable them to enjoy the privileges and benefits enjoyed by other local residents.<sup>135</sup> The rights created under the law include the right to not be reported to federal officials (unless the immigrant in question is an adult who has committed a felony crime). Additionally, the law bolsters other measures by the city that provide undocumented immigrants with local membership benefits, such as the acquisition of municipal identification cards that enable them to "open a bank account or identify themselves to police."<sup>136</sup>

Importantly, as comments from supporters of the ordinance have expressed, the justification for placing a bar on the reporting of immigration information is tied to normative notions of due process. The Board of Supervisors has explained that protecting juveniles' immigration information ensures family unity and avoids the deportation of innocent youths.<sup>137</sup> As the city's Public Defender argued, "[e]ven if you're undocumented, you have the right to due process."<sup>138</sup> This statement evidences the view that despite a youth's immigration status, she should be assured equal treatment under the law. In a similar statement by Supervisor Campos, he explained that, "there is the very basic principle that in this country, you are innocent until proven guilty."<sup>139</sup>

Additionally, those who favor the law insist that it is in the interest of all residents of San Francisco to adopt such a law in the first place. It would

134. Frug, *supra* note 61, at 323-24.

135. I note that there is at least one other way of thinking about the rights that may have been constructed by San Francisco's sanctuary law. Specifically, the sanctuary law may be viewed to have created "citizenship-enabling" rights such that whatever rights the sanctuary law may have conferred, their effect is not necessarily the creation of citizenship per se but rather a status that comes close to citizenship. I am grateful to Jennifer Gordon for making this point.

136. Editorial, *Campos' Sanctuary Plan is Trouble*, S.F. CHRON., Aug. 23, 2009, at E10, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/08/23/EDAQ19AH1A.DTL>.

137. McKinley, *San Francisco to Delay Reports*, *supra* note 24 (reporting that "immigration advocates say that referrals upon arrest have resulted in the deportation of innocent youths [and] the break-up of families . . .").

138. McKinley, *Crossroads*, *supra* note 1 (quoting the city's Public Defender).

139. *All Things Considered: San Francisco Youth Sanctuary Law Prompts Battle* (National Public Radio broadcast Nov. 4, 2009) [hereinafter *All Things Considered*], available at 2009 WLNR 22080014.

not only maintain community bonds and family unity but also protect all members of their respective communities by ensuring that immigrants continue to report crimes without fear of being deported from the country.<sup>140</sup> In so doing, the provision of rights to all persons promotes the good of all persons within the municipality and strengthens the foundation upon which their collective memberships are based.

Notably, supporters of San Francisco's sanctuary law contend that the conferral of some rights to undocumented immigrants does not conflict with federal law. That position is grounded on the argument that the national government may ultimately enter the local space at any time to enforce immigration law. Indeed, even Mayor Newsom has previously recognized that despite the city's sanctuary law, the city remains subject to immigration raids conducted by immigration officials.<sup>141</sup> Thus, those who favor the non-cooperation law posit that the law is not overriding federal law by providing rights to unauthorized immigrants. Ultimately, ICE is not precluded from removing unauthorized non-citizens from the local and national domains in the first instance.

Interestingly, those who oppose San Francisco's sanctuary ordinance would likely agree that the law does provide rights to unauthorized persons and effectively results in their recognition as members of the locality. Indeed, it is precisely what they see as the conferral of rights on undocumented immigrants that causes critics of San Francisco's sanctuary law and other sanctuary policies to oppose them. This criticism of the conception of citizenship as rights relates to the arguments against the recognition of unauthorized immigrants as formal members of a city. Both convey the position that the local government does not have the power to construct formal citizenship status to unauthorized immigrants as well as confer rights upon them. Perhaps most troubling to those who disfavor the sanctuary law is the ways in which the creation of rights conflict with the bundle of rights created at the federal level.

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140. See Memorandum from Daryl Gates, Chief of Police, L.A. Police Dep't (Nov. 27, 1979) (discussing Special Order 40), available at <http://www.democracyinaction.org/dia/organizationsORG/NILC/images/SpecialOrder40.pdf>; see also *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 733-34 (Cal. Ct. App. 2009) (rejecting the argument that federal law preempts Special Order 40); Christopher Carlberg, *Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments*, 77 GEO. WASH. L. REV. 740, 741 (2009) (discussing undocumented immigrants' victimization and fear of deportation).

141. Jesse McKinley, *San Francisco Bay Area Reacts Angrily to Series of Immigration Raids*, N.Y. TIMES, April 28, 2007, at A14.

A nuanced type of local citizenship vis-à-vis rights is reflected in the position that Mayor Newsom has taken with respect to the treatment of undocumented juvenile immigrants. As explained earlier, Mayor Newsom has posited that the sanctuary law is intended to protect law-abiding residents, including those who lack immigration status as long as they are not committing serious crimes.<sup>142</sup> Thus, from his perspective, immigrants who commit felony crimes, regardless of age, should not enjoy the benefit of the sanctuary policy. In fact, Mayor Newsom continues to take this position despite the passage of the amendment to the sanctuary law. Intensifying the political battle between him and the Board of Supervisors, the Mayor's refusal to enforce the new law has led city officials to report the immigration status of unauthorized juvenile non-citizens to federal immigration authorities.<sup>143</sup>

In sum, both supporters and critics of San Francisco's sanctuary law have articulated their divergent views about the relationship between lack of immigration status and the possession of some rights within the city. Those who favor the law posit that irrespective of immigration status, undocumented immigrants should be granted basic rights such as due process. Opponents of the law counter that unauthorized immigration status eviscerates any rights that might otherwise be conferred to non-citizens. Notably, both sides have identified the ways in which the sanctuary law effectively constructed rights for persons whom the federal argument consider not only non-members of the United States, but also removable from the country.

### C. Citizenship as Public Engagement

Citizenship as deliberative democracy is reflected in the ability of local residents to actively engage in political and legal issues that matter to them. As news articles have reported, the battle over San Francisco's new ordinance included not only city officials but grassroots organizations as well. These groups included those who favored the policy as well as those who opposed it.

When Mayor Newsom changed the policy in 2008 to allow the reporting of undocumented juveniles to federal officials, many local residents and their supporters voiced their vociferous opposition to the policy switch. For example, a protest of a "mostly Latino crowd spoke out against the city's new policy of automatically reporting undocumented juveniles ar-

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142. Knight, *Newsom Vetoes Change*, *supra* note 106.

143. Matier & Ross, *supra* note 25 (describing that local police officers reported an undocumented juvenile boy who was accused of murder to federal immigration officials).



rested for a felony to federal immigration authorities.”<sup>144</sup> The public discourse about the mayoral change, however, was not one-sided. Also present during the protest were critics of the overall sanctuary policy, conveying their general opposition to the provision of safe havens for undocumented immigrants.<sup>145</sup> As these divergent positions illustrate, the city’s sanctuary policy has driven various groups to vocalize their support and opposition to the law.

Hearings conducted by the Board of Supervisors regarding amending the law similarly drew supporters and critics of the sanctuary law. As one news article reported, “hundreds of supporters” showed up to demonstrate their agreement with Supervisor Campos’s bill. According to a news report, “simultaneous translation of supervisors’ comments were offered in Mandarin and Spanish, and when the bill was passed, with 8 to 2 with one absentee, cheers erupted in the chambers, with chants of ‘Yes We Can’ in English and Spanish echoing through the ornate City Hall.”<sup>146</sup> Finally, when the Board adopted the amendment, it was met with “raucous applause” from supporters.<sup>147</sup>

Opponents of the sanctuary law have also expressed their strong disagreement with the policy. For example, in July 2008, members of a group called the Minutemen gathered outside of San Francisco’s City Hall to protest the law.<sup>148</sup> A “group that patrols the U.S.-Mexican border to keep illegal immigrants out,” the Minutemen demanded the Mayor’s resignation.<sup>149</sup> Arguing that the city’s political leaders were “accessories to murder,” they cited the “horrific slayings of the Bologna family.”<sup>150</sup> Although largely drowned out on that day by the “hundreds of immigrants’ rights advocates” who shouted, “Smash the border, smash the Minutemen!,” ultimately, the Minutemen were nonetheless able to express their strong opposition to the sanctuary law.<sup>151</sup>

In brief, while the sanctuary law underwent changes during the past couple of years, local residents and their supporters actively fought for and against the passage of the amendment to the city’s sanctuary ordinance that

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144. Lagos, *supra* note 97.

145. *Id.*

146. McKinley, *San Francisco to Delay Reports*, *supra* note 24.

147. La Ganga, *supra* note 110.

148. See Heather Knight, *Minutemen Protest S.F.’s Sanctuary Policy*, S.F. CHRON., July 31, 2008, at B1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/31/BALJ12259Q.DTL>.

149. *Id.*

150. *Id.*

151. *Id.*

ultimately delays the reporting of immigration information to federal officials for some undocumented juvenile immigrants. Exemplifying the public engagement form of citizenship through political discourse, both sides have demonstrated their conflicting views about what rights, if any, non-citizens should have within the city's limits.

#### D. Citizenship as Identity

Finally, citizenship as identity is strikingly evident in some of the statements presented throughout the debates about the amendment to the law. Chief of the themes evoked was the long-held view of San Francisco as a "liberal enclave."<sup>152</sup> In critiquing the Mayor's 2008 policy change, Supervisor Campos asserted that, "We went from being one of the most enlightened cities . . . to be[ing] a place many steps backward to where the rest of the country is."<sup>153</sup> Indeed, during one of the hearings concerning the proposed amendment to the sanctuary law, supporters invoked Harvey Milk, an important figure in San Francisco's political history.<sup>154</sup> Supervisor Campos expressed at one point that "[i]t is a balanced, measured approach that is grounded in the values of San Francisco."<sup>155</sup>

As these events and statements suggest, it is not necessarily the sanctuary law that is viewed to be in jeopardy.<sup>156</sup> Instead, as Supervisor Campos explained, what is at stake is "San Francisco's liberal legacy."<sup>157</sup> According to him, "We have been a sanctuary city now for 20 years and, in fact, we have stood for protection of civil rights where we have not been afraid to do the right thing even in the face of a legal challenge."<sup>158</sup> Ultimately, as this statement demonstrates, membership in San Francisco is equated with the reputation of the city as a safe haven.

#### CONCLUSION

San Francisco and other "sanctuary cities" offer rich sites for exploring the ways in which undocumented immigrants acquire some form of local membership within the local domain. Ultimately, understanding the means

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152. McKinley, *Crossroads*, *supra* note 1.

153. McKinley, *San Francisco to Delay Reports*, *supra* note 24.

154. *Id.* ("Supporters continued chanting as they filed out past a bust of Harvey Milk, the trailblazing San Francisco supervisor and gay rights advocate whose name was invoked by supporters of Mr. Campos's bill.")

155. Nevius, *supra* note 126.

156. *All Things Considered*, *supra* note 139.

157. *Id.* (quoting Richard Gonzales).

158. *Id.* (quoting David Campos).

by which local citizenship arguably has been conferred to unauthorized non-citizens leads to the larger, more complicated question of how to reconcile local citizenship with national citizenship. As explained earlier, full membership in the United States is limited to citizens, who have the absolute right to enter the country and not be subject to deportation.<sup>159</sup> All non-citizens, by contrast, may be removed from the country.<sup>160</sup> Non-citizens who are here without valid immigration status and thus did not obtain the consent of the federal government to enter or remain in the nation are considered to be deportable from the country.<sup>161</sup> Accordingly, sub-federal laws and policies such as sanctuary laws that are inclusive of persons without lawful immigration status ostensibly collide with national membership.

Reconciling the tension between the two might require courts to determine whether San Francisco and other sanctuary cities should be prohibited from enacting sanctuary policies, or Congress to expressly preempt such policies. Until either of these occurs, the question of local citizenship for undocumented immigrants will continue to be defined, contested, and advocated for within the local sphere.

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159. *See* 8 U.S.C. § 1227 (2008) (listing the classes of noncitizens who are deportable from the U.S.); *see also* *Nguyen v. I.N.S.*, 533 U.S. 53, 67 (2001) (dictum) (explaining that citizens have the right to enter the U.S.).

160. *See* 8 U.S.C. § 1227 (2008).

161. 8 U.S.C. § 1227(a)(1)(A) (2008) (“Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”); 8 U.S.C. § 1227(a)(1)(B) (2008) (“Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.”).