



The State Assault on Local Sanctuary Policies

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November 2018



Introduction

Since the 1980s, cities have adopted various “sanctuary policies” setting out when and in what circumstances local officials will participate in federal immigration enforcement. In recent years, however, these policies have come under unprecedented attack. Cities have historically turned to sanctuary policies as a means of addressing local concerns: trust between police and immigrant communities, the efficient allocation of scarce municipal resources, and the need to clearly define the role and responsibilities of local officials. But as federal immigration enforcement has become dependent on local participation, these policies have become a flashpoint in the national immigration debates. Indeed, there is now an active anti-sanctuary movement aimed at eliminating the discretion that local communities have traditionally exercised over their involvement in the federal immigration enforcement efforts.

When it comes to anti-sanctuary policies, much of the attention thus far has been on the federal attacks on sanctuary cities, especially by the Trump administration. But while cities have successfully forestalled federal anti-sanctuary efforts thus far in court, a separate and more significant challenge is emerging at the state level. In the past three years, eight states have enacted laws banning local sanctuary policies and mandating local participation in federal immigration enforcement.¹ Eighteen others have introduced anti-sanctuary bills, including some even more restrictive than what has been enacted thus far.² Moreover, because of the power that states have

¹ See AL Code § 31-13-5 (2015) (Alabama); Ind. Code § 5-2-18.2 (2017) (Indiana); Iowa Code § 825.1 (2018) (Iowa); GA Code §§ 36-80-23 (2017) (Georgia); Miss. Code Ann. § 25-1-119 (2017) (Mississippi); S.B. 145, Gen. Assemb., Reg. Sess. (N.C. 2017) (North Carolina); H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018) (Tennessee); S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (Texas).

² See H.B. 205, 30th Leg., 2d Reg. Sess. (Alaska 2018); S.B. 1378, 53d Leg., 2d Reg. Sess. (Ariz. 2018); S.B. 14, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); Cal. Gov’t Code § 7282 (2017); S.B. 18-220, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018); H.B. 9, Gen. Assemb., Reg. Sess. (Fla. 2018); 5 Ill. Comp. Stat. 805/5 (2017); H.B. 501, Gen. Assemb., Reg. Sess. (Ky. 2018); H.P. 272, 128th Leg., Reg. Sess. (Me. 2017); H.B. 4105, 99th Leg., Reg. Sess. (Mich. 2017); H.B. 611, 65th Leg., Reg. Sess. (Mont. 2017); S.O. 3698, Gen. Assemb., Reg. Sess. (N.Y. 2018); H.B. 179, 132d Gen. Assemb., Reg. Sess. (Ohio 2017); H.B. 1804, 51st Leg., Reg. Sess. (Okla. 2007); S.B. 10, Gen. Assemb., Reg. Sess. (Pa. 2017); H.B. 1985, 65th Leg., Reg. Sess. (Wash. 2017); S.B. 275, Leg., Reg. Sess. (Wis. 2017); H.B. 105, 64th Leg., Budget Sess. (Wyo. 2018).

traditionally exercised over their localities, the recent wave of state-level anti-sanctuary legislation has resulted in laws that are broader, more coercive, and more punitive than those that have been pursued at the federal level.

All state preemption laws interfere with local democracy to some degree. Nevertheless, the scope and structure of the recent wave of anti-sanctuary legislation raise particular concerns. Unlike traditional preemption statutes—which simply repeal local regulations of individuals and businesses—state anti-sanctuary laws target the local governments themselves by commandeering local officials and mandating their participation in federal immigration enforcement. More than simply repealing local policies, these laws also curtail the ability of residents to determine the role and responsibilities of their own officials, and the priorities towards which local resources are directed. Further, many state anti-sanctuary measures undermine the local democratic process by censoring the political speech of local officials, and chilling policy initiatives on all sorts of matters not directly related to immigration.

The Rise of State Anti-Sanctuary Laws

To understand the significance of state anti-sanctuary laws, it is necessary to examine more closely what is being enacted and introduced. To be sure, state anti-sanctuary laws are not new; as long as cities have adopted sanctuary policies, there have been state efforts to overturn them.³ But the most recent wave reveals some alarming trends. Their numbers are growing. Their scope is expanding. Their penalties are more severe. Taken together, state anti-sanctuary laws today go beyond what has been attempted at the federal level. Indeed, they represent the most significant effort thus far to conscript local officials into federal immigration enforcement.

The expanding scope of today's state anti-sanctuary laws is most apparent with respect to the how sanctuary is defined. There has never been a precise definition of what constitutes "sanctuary." Federal law prohibits policies that limit communication between local officials and federal authorities with respect to immigration-related information.⁴ The recent trend at the state level, however, has been towards a much more expansive definition. States are increasingly turning to "catch-all" provisions to define the types of sanctuary measures that are prohibited. Indiana and Virginia, for example, prohibit cities from limiting or restricting their involvement in immigration enforcement to anything "less than the full extent permitted by federal law."⁵ States are also beginning to target local activities that fall short of formal policies. Texas' anti-sanctuary law applies to "patterns and practice[s],"⁶ Iowa's targets "informal, unwritten polic[ies],"⁷ and a proposed bill in Florida covers "procedures and customs."⁸ Indeed, even mere expressions of support for sanctuary are now under attack. Texas made it illegal for local officials to "endorse" any limitations on their city's involvement in immigration enforcement, even if no such limits are actually put into place.⁹ Local officials in Iowa cannot "discourage" any other official from

³ The earliest state anti-sanctuary provision was in Proposition 187 adopted by California voters in 1994. Another wave of anti-sanctuary measures were also enacted in the late 2000s and early 2010s. *See, e.g.*, 74 OK Stat § 74-20j (2007); S.B. 1070, ch. 113, 2010 Ariz. Sess. Laws 450; S.C. Code Ann. § 6-1-170 (2011); Mo. Rev. Stat. § 67.307 (2012).

⁴ *See* 8 U.S.C. § 1373.

⁵ Ind. Code § 5-2-18.2 (2017); Va. Code § 15.2-1409.1 (2018).

⁶ S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov't Code 752.053(a)(1)).

⁷ Iowa Code § 825.1 (2018).

⁸ H.B. 9, § 2, Gen. Assemb., Reg. Sess. (Fla. 2018).

⁹ S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov't Code 752.051(a)(2)). A preliminary injunction against this "endorsement" provision was recently upheld by a federal

inquiring about immigration status or assisting in immigration enforcement.¹⁰ Florida’s proposed anti-sanctuary bill prohibits local representatives from voting in favor of a sanctuary policy irrespective of whether such a policy is actually enacted or implemented.¹¹

The expanding scope of what is now prohibited by state anti-sanctuary laws is also being paired with new mandates with respect to what cities must do. Federal law does not require local officials to assist federal immigration authorities, much less actively engage in federal immigration enforcement themselves. Even the “immigration detainers” issued by the federal government are, as many courts have now held, simply requests that local law enforcement officials continue to maintain custody of an individual suspected of unauthorized entry, but not an order that they do so.¹² State anti-sanctuary laws, however, are now making mandatory what had long been discretionary. States like Iowa and Tennessee now require all local law enforcement agencies in the state to comply with federal detainer requests or risk losing state funding.¹³ Texas also requires local officials to notify federal authorities about the release of anyone suspected to be an unauthorized immigrant, and allow federal officials full access to local detention facilities.¹⁴ Alabama’s law goes even further, “subcontracting” local officials to the federal government by requiring them to “fully comply with and . . . support the enforcement of federal [immigration] law.”¹⁵

Penalties for violating the most recent wave of state anti-sanctuary laws have also become more severe. Traditionally, when a local policy is preempted by state law, that policy is simply rendered unenforceable. In the anti-sanctuary context, however, states are imposing sanctions directly upon local residents and officials. Nearly all of the new anti-sanctuary laws being considered or enacted deny state funding to any city or locality that violates their prohibitions or mandates.¹⁶ In addition, states like

appellate court, but only with respect to elected local officials. *See* *City of El Cenizo v. Texas*, 890 F.3d 164, 182 (5th Cir. 2018).

¹⁰ Iowa code § 825.4 (2018).

¹¹ *See* H.B. 9, § 2, Gen. Assemb., Reg. Sess. (Fla. 2018).

¹² *See, e.g.,* *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014)

¹³ *See* Iowa Code § 825.1 (2018); Tenn. Code Ann. § 4-59-102(3)(D).

¹⁴ *See* S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov’t Code § 772.0073).

¹⁵ AL Code § 31-13-5(b) (2015).

¹⁶ *See, e.g.,* S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017); Iowa Code § 825.9 (2018); H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018); S.B. 145, Gen. Assemb., Reg. Sess. (N.C. 2017); VA. CODE § 15.2-1409.1 (2018).

Texas now authorize fines, sometimes as high as \$25,000 a day, against cities that fail to comply.¹⁷ States are also seeking to make local communities legally liable for the actions of unauthorized immigrants. North Carolina, for example, strips cities that violate its anti-sanctuary statute of all governmental immunity in torts for any crime committed by an undocumented immigrant.¹⁸ A proposed anti-sanctuary bill in Florida would go even further by allowing anyone to sue a sanctuary city for personal injuries or property damage committed by an unauthorized immigrant.¹⁹

Even more troubling than the various penalties imposed upon local governments and their residents is the escalation of sanctions against local officials themselves. Local officials who violate Texas' anti-sanctuary law can be forced out of office, and those who fail to comply with a federal immigration detainer request can be charged with a crime.²⁰ In Alabama, fines are not levied against the community as a whole, but directly upon the local officials themselves.²¹ Indeed, even if an official does not personally violate the anti-sanctuary law, he or she can still be charged with a crime in Alabama for failing to report a violation committed by someone else.²² Iowa's anti-sanctuary law does not punish local officials directly. Nevertheless, it too encourages local residents to force local officials out of office by allowing state funding to be restored earlier if the officials responsible for the anti-sanctuary violation are removed from or leaves their positions.²³

The recent wave of state anti-sanctuary laws goes well beyond what has been attempted at the federal level. More importantly, their provisions are far more intrusive and punitive than those that states have traditionally enacted in other preemption contexts.²⁴ State anti-sanctuary laws limit not only what kinds of regulations local governments can adopt, but also seek to conscript local officials

¹⁷ See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov't Code 752.056).

¹⁸ See S.B. 145, Gen. Assemb., Reg. Sess. (N.C. 2017).

¹⁹ See H.B. 9, Gen. Assemb., Reg. Sess. (Fla. 2018).

²⁰ See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov't Code 752.0565 and Tex. Penal Code 39.07).

²¹ See ALA Code § 31-13-5(d) (2015).

²² See *id.*

²³ See Iowa Code § 825.10 (2018).

²⁴ It is worth noting that punitive measures are also now becoming more common in other state preemption statutes, especially with respect to state laws banning local gun control regulations. For an analysis of the rise of "punitive preemption," see Richard Briffault, *Punitive Preemption: An Unprecedented Attack on Local Democracy*, LSSC White Paper 2018, available at <https://www.abetterbalance.org/resources/punitive-preemption-white-paper/>.

directly. Their expansive scope and harsh sanctions cover more local activities than just the enactment of formal sanctuary policies.

The Impact of State Anti-Sanctuary Policies on Local Communities

The rise of state anti-sanctuary laws has implications for national immigration policy and the enforcement of federal immigration laws. But these laws also affect the role of local governments more generally, their accountability to local residents, and the powers that local residents have traditionally exercised through the local democratic process. There are many good reasons why local communities feel that it is important to limit their participation in federal immigration enforcement—from the effect that such participation has on their immigrant communities, to the ability of police to address other law enforcement priorities. Not only do state anti-sanctuary laws frustrate local efforts to address these concerns, they also strike at the heart of local governance more generally.

Given the expansive scope of state anti-sanctuary laws today, cities and local leaders will likely find it difficult to determine what they must do. What does it take to “fully comply with and . . . support the enforcement of federal immigration law?” What steps must a local government take to root out “customs” and “practices” that might be seen as promoting less than full compliance with and support of federal immigration authorities? Local governments are likely to struggle to interpret the increasingly broad prohibitions now common in state anti-sanctuary laws. And given the severe penalties that many of these laws sets out, the danger is that local officials will overcompensate. Can a police officer be ordered to focus on the task for which he was hired—murder investigations, neighborhood outreach, parking enforcement—rather than pursuing immigration violations? Could a city provide social services or affordable housing to local residents irrespective of their immigration status, or would that constitute a limit on local immigration enforcement to less than the “full extent permitted by federal law?” The issue is not just how a court might eventually rule. It is also whether local officials are willing to take the risk. Indeed, given the degree to which immigration now intersect with various aspects of local governance, local officials might feel compelled to steer away from worthwhile local policies, even those not directly on immigration enforcement, simply because there is a chance, however slight, that it might run afoul of state anti-sanctuary prohibitions.

State anti-sanctuary measures also threaten to erode the political and fiscal accountability of local governments to their residents. They do so by constraining the ability of cities to oversee their workforce, manage the use of municipal resources, and structure their internal administration. On the political front, the concern is that local governments in general, and local law enforcement officials in particular, will be blamed for the fallout of immigration enforcement activities that are the result of state laws and federal policies. Those consequences include not only the erosion of trust between immigrant communities and the police, but also the risk of corrupt and abusive policing by “rogue” officials who are effectively severed from local government supervision on immigration enforcement matters. On the fiscal front, state anti-sanctuary laws impose financial burdens on cities and other local governments that are not borne by either the state or the federal government for which local officials are conscripted to serve. In order to comply, local officials will be required to raise taxes or redirect resources and personnel from other local priorities, all without any input by the local residents who will be affected the most. Indeed, the reason that state anti-sanctuary laws stand out from other state preemption statutes—such as those banning local minimum wage or anti-discrimination ordinances—is the degree to which they impose affirmative obligations upon local governments and interfere with their ability to manage the internal governance of their officials and employees.

Finally, state anti-sanctuary laws are increasingly structured as an attack on not only local sanctuary policies, but also the local democratic process itself. In seeking to prohibit even “endorsements” in favor of limits to local immigration enforcement, as Texas has done, or votes cast in favor of such limits, as Florida proposes, state seems eager to dictate not only what kinds of policies local governments can legally enact, but also what local representatives and their constituents can politically debate. By targeting not only formal policies, but also “customs” and “practices” and “discourage[ments],” state anti-sanctuary laws seem to be targeting the norms and culture of a community in addition to the official actions taken by its leaders and representatives. Indeed, the dramatic rise of *personal* sanctions seems specifically designed to coax local officials to act in their own personal best interest rather than as a political advocate for the residents they represent and serve. Issues important to local residents—racial profiling, allocation of resources, government accountability—might be purposefully excluded from the local political agenda when immigration is involved simply because the very act of discussing them might trigger penalties for

local officials. States may have the power to preempt local policies. They may even be able to dictate the actions of local officials. But the manner in which states are doing so in the anti-sanctuary context threatens many aspects of local democracy that is traditionally imagined to be independent of the powers that states wielded over their local governments.

In short, the proliferation of state anti-sanctuary laws poses a number of unique challenges to cities, their residents, and the state-local relationship. These challenges are not just the result of what anti-sanctuary laws seek to do, which is to compel local communities to actively participate in federal immigration enforcement efforts; they are also a consequence of how states are now choosing to accomplish this goal. This suggests that state anti-sanctuary laws should not be assessed solely through their impact on immigration and immigrants. Attention should also be paid to how these laws affect the traditional role of local governments, and democratic decision-making over their priorities and responsibilities.

Responding to State Anti-Sanctuary Laws

The rise of state anti-sanctuary laws threatens to undermine the traditional discretion that local governments have exercised in setting law enforcement priorities, and in deciding their role in federal immigration enforcement. Given these concerns, how might cities and their advocates respond?

First, state leaders should be made aware of the impact of these laws on local control and local democracy. The national political controversy over immigration appears to be the driving force behind the recent wave of state anti-sanctuary laws. But in deciding whether to outsource their local governments to the federal government, state legislatures should also keep in mind the effect this has on the role of local governments and state-local relations. Should local residents be burdened with the cost of carrying out what has long been a federal responsibility? Does the perceived need for increased immigration enforcement justify the erosion of a locality's ability to manage their own workforce, set local priorities, and allocate scarce resources? Are punitive measures—both against local officials and local residents, the best way to ensure compliance? In addition to the national immigration context, state legislatures should also give weight to the unique local circumstances and interests that lead certain communities to establish policies on when, and to what extent, they wish to participate in federal immigration enforcement efforts. States leaders should also recognize the effect that broadly-drawn anti-sanctuary legislation has on the

ability of localities to address local issues not directly tied to immigration at all. In considering state anti-sanctuary measures, state legislatures should not let the federal government's interests in immigration enforcement displace the traditional considerations that have long guided how the role and responsibilities of local governments are determined.

Second, in addition to the federal constitutional claims that have already been raised,²⁵ cities and other localities should also consider what protections their state constitutions offer against the kind of anti-sanctuary laws now being considered. These protections may include guarantees of local self-governance, or state constitutional limits on the states' abilities to interfere with the internal governance of local communities. In many states, for example, local governments and their residents have been granted constitutional powers of Home Rule over their own affairs. State courts also frequently draw a distinction between state laws that preempt local regulations of individuals and business, and those that directly mandate local action or deny the ability of a local community to define the responsibilities of their officials and the duties of their employees.²⁶ In addition, some states have adopted "unfunded mandate" provisions into their constitution, which impose limits when states can force localities to assume financial burdens without adequate funding.²⁷ These and other state laws might be useful in determining the constitutionality of state anti-sanctuary legislation in general, or what states and mandate or prohibit in how such laws are structured. To be sure, these legal protections vary from state to state, as every state has its own history with respect to how state-local relations have developed. As such, cities and advocates should fully explore how these developments affect the kinds of state laws that can be enacted in the anti-sanctuary context. These state law claims

Third, there should be a stronger campaign to expand the political conversation over sanctuary and anti-sanctuary beyond the narrow confines of the national immigration context. There are many reasons why localities should be involved in federal immigration enforcement, and why they might choose to limit their participation.

²⁵ For an example of the types of federal constitutional claims that have been raised against state anti-sanctuary laws thus far, see *City of El Cenizo v. Texas*, 890 F.3d 180 (5th Cir. 2018) (upholding the lower court injunction against SB 4's "endorsement" ban on First Amendment grounds, but rejecting claims based on federal preemption, the Fourth Amendment, and vagueness).

²⁶ See, e.g., *State ex rel. Strain v. Huston*, 65 Ohio App. 139, 142 (1940); *State ex rel. Sprague v. City of St. Joseph*, 549 S.W.2d 873 (Mo. 1977).

²⁷ See, e.g., *Tenn. Const. Art. II, § 24*; *FLA. CONST. art. VIII, § 18*.

More importantly, the strength and merits of these reasons also vary from one community to the next. The political debate over these decisions, however, has largely been subsumed by the partisan battle over immigration policy and its enforcement at the national level. The local considerations underlying the sanctuary and anti-sanctuary debate, and the equally important question about the proper balance between state and local policymaking, are almost entirely lost. Admittedly, the federal government's interests over immigration are not irrelevant. But when the consequence is an erosion of local discretion, and the transformation of a federal responsibility into a local obligation, equal emphasis should be placed on what we believe to be the proper role of local governments, and the extent to which the community residents should be able to determine that through the local democratic process.

Conclusion

While federal attacks on local sanctuary policies have stalled, a separate and more significant anti-sanctuary effort is emerging in a number of states. Moreover, the scope and sanctions associated with this new wave of state anti-sanctuary legislation not only go beyond what the federal government has attempted thus far, but also what states have historically enacted as preemptive legislation. These laws displace the ability of localities to determine the role of their local governments, and the priorities towards which local resources should be directed. They sever the political and fiscal accountability of local officials to the residents that they serve and represent. Moreover, the expansion of what constitutes sanctuary threatens to undermine many of the political features that have long been associated with local democracy—from what can be discussed and debated, to what issues can appear on the local agenda. These concerns should be taken seriously in the current debate over sanctuary and anti-sanctuary, and even more so when the states are involved.