ON HOLY GROUND: CHURCH SANCTUARY IN THE TRUMP ERA

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"Then he said, 'Come no closer! Remove the sandals from your feet, for the place on which you are standing is holy ground.'"
Exodus 3:5[1]

I. INTRODUCTION

The number of deportations of unauthorized immigrants has increased dramatically since the election of Donald Trump.[2] In keeping with long-standing tradition, religious com(el(us)-262()(cr)-ue23 Tm0 g0 G[(I)18(n)-10( )-129(k)11(

Like their predecessors, participants in the New Sanctuary Movement rely heavily on religious values in explaining their provision of sanctuary and their work for immigration reform.[55]

Immigration authorities have long had a policy of refraining from entering houses of worship in pursuit of those claiming sanctuary there.[56] However, they maintain that they have the right to do so and that those providing physical sanctuary are in violation of the law.[57] Sanctuary workers, on the other hand, claim that as long as they are open about their provision of physical sanctuary, they are not in violation of the law.[58] Both positions have support in current law.

III. THE CURRENT LAW ON SANCTUARY

United States law does not currently recognize a right of sanctuary for unauthorized immigrants in sacred places, despite the deep roots the right of sanctuary for those seeking to escape criminal prosecution has in ancient history. In 1983, at the height of the sanctuary movement involving refugees from Central America, the Justice Department's Office of Legal Counsel issued an opinion stating "The housing of illegal aliens by churches would appear to be a violation of [the federal law forbidding the harboring of illegal aliens]."[59] That conclusion, however, would appear to be undercut by more recent case law.

The statutory provision in question is part of the federal Immigration and Nationality Act and provides that criminal penalties may be imposed against any person who:

> knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, **conceals, harbors, or shields from detection**, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation. . .

8 U.S.C. § 1324(a)(1)(A)(iii) (emphasis added).[60]

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and harboring them in Los Angeles until they applied for asylum.[68] The facts relevant to the harboring indictment were that the agent had provided housing in an apartment complex for the baseball players, who he accompanied to see an immigration lawyer.[69] During the relevant time period, the baseball players were free to come and go from the apartment complex and did so, training for and playing ball games, socializing in public places, and even participating in the making of a documentary.[70] The court held that the evidence did not support the conclusion that the agent substantially facilitated the players escaping detection by immigration officials.[71] To the contrary, the evidence in no way suggested that the players were trying to avoid immigration officials.[72]

In 2013, the Fifth Circuit Court of Appeals permanently enjoined enforcement of a city ordinance which required adults living in tenant housing to obtain an occupancy license which was conditioned upon the occupant being a citizen or having lawful immigration status.[73] The court held that the ordinance was preempted by federal immigration law.[74] In so doing, the court noted that it had previously held that the statutory language in 8 U.S.C. § 1324(a)(1)(A)(iii) required something more than mere housing of an unauthorized immigrant.[75] It had interpreted the language "'harbor, shield, or conceal' to imply that 'something is being hidden from detection.'"[76]

In 2015, the Seventh Circuit Court of Appeals affirmed the conviction of an individual who had provided employment, housing, utilities and food to unauthorized immigrant kitchen workers.[77] The court held "when the basis for the defendant's conviction under § 1324(a)(1)(A)(iii) is providing housing to a known illegal alien, there must be evidence from which a jury could conclude, beyond a reasonable doubt, that the defendant intended to safeguard that alien from the authorities."[78] The court concluded that the

68. United States v. Dominguez, 661 F.3d 1051, 1056-59 (11th Cir. 2011).

69. *Id.* at 1058.

70. *Id.*

71. *Id.* at 1063.

72. *Id.*

73. Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 526 (5th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1491 (2014).

74. *Id.*

75. *Id.* at 529 (quoting United States v. Rubio-Gonzalez, 674 F.2d 1067, 1073 n.5 (5th Cir. 1982)).

76. *Id.* (quoting United States v. Varkonyi, 645 F.2d 453, 459 (5th Cir. 1981)); *see also* Cruz v. Abbott, 849 F.3d 594, 600 (5th Cir. 2017).

77. United States v. McClellan, 794 F.3d 743, 751 (7th Cir. 2015).

78. *Id.*

defendant engaged in deliberate conduct aimed to impede the detection of the unauthorized immigrants in question by immigration authorities.[79] The provision of free housing near their place of employment, payment of utilities, and provision of food prevented them from engaging in the type of

found to be in violation of the federal harboring provision may depend on the jurisdiction in which the sacred space is located.

IV. RECOMMENDED FEDERAL LAW AND POLICY ON SANCTUARY IN SACRED PLACES

The better approach would be for federal courts to follow the majority view and hold that it is not illegal for religious communities to provide housing and social services to unauthorized immigrants as long as they do not engage in conduct intended to shield the aliens from detection by immigration authorities. This is consistent with the history of 8 U.S.C. § 1324(a)(1)(A)(iii) and the context in which the term "harboring" appears in the provision itself.

The statute in question originated with the Immigration Act of 1907, which made the smuggling and transport of aliens into the United States a criminal act.[87] In 1917, that statute was amended to add prohibitions against concealing and harboring unauthorized immigrants.[88] In 1948, the Supreme Court ruled that the statute did not provide a penalty for its prohibition against concealing and harboring unauthorized immigrants.[89] Four years later, Congress responded by adding a penalty for anyone who "willfully or knowingly conceals, harbors, or shields from detection" an unauthorized immigrant.[90] No definition for the term "harbors" was provided. However, Congress changed the statute in 1986 to its current form, retaining the phrase "conceals, harbors, or shields from detection."[91] The fact that the "harbors" language was added to a statute addressing smuggling suggests a desire to prohibit clandestine activity aimed at evading immigration authorities.

Dictionaries do not consistently define "harbor;" sometimes it is defined as being synonymous with "shelter" and sometimes it is defined as connoting concealment.[92] Therefore, it is best to construe the term by its statutory context.[93] In 8 U.S.C. § 1324(a)(1)(A)(iii), "harbors" is one of three

Religious communities enjoy a special status under the First Amendment to the United States Constitution which proscribes the establishment of religion and prescribes its free exercise.[104] Americans have long placed a particular value on the principles of religious freedom and separation of church and state reflected in that amendment.[105]

The history and tradition of providing sanctuary in sacred spaces should be recognized by federal regulation and honored by present day immigration officials. Physical intrusion into sacred spaces by government officials to enforce immigration laws offends American First Amendment values. Those charged with enforcing immigration laws should not be authorized to enter sacred spaces for purposes of apprehending unauthorized immigrants seeking sanctuary there.

104. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). The question of whether the free exercise clause protects church sanctuary providers from prosecution under federal immigration law is beyond the scope of this article.

105. JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 21-40 (Westview Press 3d ed. 2011); *see generally* MICHAEL