

**SANCTUARY:  
A MODERN LEGAL ANACHRONISM**  
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*The crowd saw him slide down the façade like a raindrop on a windowpane, run over to the executioner’s assistants with the swiftness of a cat, fell them both with his enormous fists, take the gypsy girl in one arm as easily as a child picking up a doll and rush into the church, holding her above his head and shouting in a formidable voice, “Sanctuary!”<sup>1</sup>*

I. INTRODUCTION

The ancient tradition of sanctuary is rooted in the power of a religious authority to grant protection, within an inviolable religious structure or area, to persons who fear for their life, limb, or liberty.<sup>2</sup> Television has

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<sup>1</sup> VICTOR HUGO, *THE HUNCHBACK OF NOTRE-DAME* 189 (Lowell Bair ed. & trans., Bantam Books 1956) (1831).

<sup>2</sup> Michael Scott Feeley, *Toward the Cathedral: Ancient Sanctuary Represented in the American Context*, 27 *SAN DIEGO L. REV.* 801, 802 (1990) (“Sanctuary is the power of guardians of a defined religious site to grant protection to one who seeks safety out of fear of life or limb.”); see M. M. Sheehan, *Asylum, Right of*, in *I NEW CATHOLIC ENCYCLOPEDIA* 994 (1967) (Sanctuary, also known as religious asylum, concerns “the custom or privilege by which certain inviolable places become a recognized refuge for persons in danger.”). Sanctuary differs markedly from modern-day “asylum,” which is a statutorily based “form of humanitarian protection that provides refuge for individuals who are unable or unwilling to return to their home countries because they were persecuted or have a well-founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.” U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES* 11–12 (2008). The law concerning asylum was first  
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romanticized the ancient tradition of sanctuary in such shows as *Highlander*,<sup>3</sup> in which combatants could not kill each other on holy ground, as well as *M\*A\*S\*H*<sup>4</sup> and *Law & Order*,<sup>5</sup> in which individuals running afoul of the law have invoked sanctuary as a legal protection against military or civil authorities.

Seen more frequently on television than in the courtroom, this legal anachronism continues to be raised in modern times against law enforcement authorities despite the legal basis for it having been eliminated long ago.<sup>6</sup> Undocumented aliens and war resisters have invoked sanctuary with some limited success,<sup>7</sup> albeit the success resulting for more practical than legal reasons. Further, some domestic jurisdictions are now pursuing passive-aggressive policies in opposition to enforcement of immigration laws by becoming so-called sanctuary cities.<sup>8</sup>

First, this Article discusses the ancient origins of the sanctuary tradition.<sup>9</sup> Next, the Article discusses the development of sanctuary in the United States from a virtual dearth of incidents to a relatively recent flurry of activity involving illegal aliens and war resisters.<sup>10</sup> With this historically recent flurry of activity, law enforcement has radically altered

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established in the Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102-06 (1980) (codified at 8 U.S.C. §§ 1101(a)(42), 1157-1159 (2012)). *Id.* at 1 n.1.

<sup>3</sup> See *Highlander: The Series* (Gaumont television broadcast). The fictional right to sanctuary as portrayed in the television series is loosely similar to the church doctrine established during the Middle Ages, which provided a refuge from blood feuds. *St. John's Evang. Luth. Church v. Hoboken*, 479 A.2d. 935, 938 (N.J. Super. Ct. Law Div. 1983) (“If [a combatant] could reach a place sheltered by the protection of the church, he could evade the challenge to battle.”).

<sup>4</sup> In *M\*A\*S\*H: A Holy Mess*, Father Mulcahy, a Catholic Army Chaplain, grants sanctuary to a soldier in the mess tent. See *M\*A\*S\*H: A Holy Mess* (CBS television broadcast Feb. 1, 1982). Although there are no reported instances of sanctuary being granted in a military chapel, the possibility exists that military clergy will be confronted with such a request. See GERALD R. GIOGLIO, *DAYS OF DECISION: AN ORAL HISTORY OF CONSCIENTIOUS OBJECTORS IN THE MILITARY DURING THE VIETNAM WAR* 234 (1989) (discussing a Vietnam War-era soldier who was denied a conscientious objector discharge after he had initially planned to seek sanctuary in the base chapel).

<sup>5</sup> See *Law & Order: Sanctuary* (NBC television broadcast Apr. 13, 1994) (depicting a criminal suspect taking sanctuary in a church).

<sup>6</sup> See *infra* Parts II.B-C, III.

<sup>7</sup> See *infra* Part III.A-B.

<sup>8</sup> See *infra* Part III.C.

<sup>9</sup> See *infra* Part II.A-B.

<sup>10</sup> See *infra* Parts II.C-III.B.

its reaction to sanctuary claims despite the general recognition that no legal right to sanctuary-related protections exist in the United States.<sup>11</sup> Finally, the Article discusses sanctuary cities—an institutional act of civil disobedience against the nation’s immigration laws with only a tangential link to religious moralism.<sup>12</sup>

## II. HISTORICAL BACKGROUND

### A. Ancient History

The sanctuary tradition dates back to at least biblical times. The ancient Israelites designated six cities as places of refuge: on the west side of the Jordan River was Kedesh, Shechem, and Hebron; and to the east of the Jordan River was Bezer, Ramoth, and Golan.<sup>13</sup> These cities of refuge were partially in response to the ancient practice of blood vengeance (also known as a blood feud); a close male relative of a homicide victim had both the responsibility and right to avenge the killing.<sup>14</sup> Any Israelite, or a person dwelling with an Israelite, who committed an unintentional homicide could seek refuge in these cities pending a trial by the city elders.<sup>15</sup> However, the family avenger could put the fugitive to death if the avenger caught the fugitive before he reached the city of refuge.<sup>16</sup>

If the sanctuary seeker proved to the city elders that the killing had been accidental, the blood avenger could not seek vengeance within the “city or its suburbs.”<sup>17</sup> No protections existed beyond these areas, however, and the avenger could take revenge if the fugitive ventured outside the protected area.<sup>18</sup> The fugitive was required to remain within the city until the death of the high priest, after which the fugitive could

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<sup>11</sup> See *infra* Part III.B.

<sup>12</sup> See *infra* Part III.C.

<sup>13</sup> MARY MIKHAEL, 2009–2010 HORIZONS BIBLE STUDY: JOSHUA 71–72 (W. Eugene March ed., 2009). The cities of refuge were created shortly after the tribes of Israel entered and occupied portions of the land of Canaan, sometime between 1250 B.C. and 1200 B.C. See *id.* at 6, 71.

<sup>14</sup> *Id.* at 71; see also IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES 125 (1985) (“[A]ny killing—even if accidental—could not be expiated by monetary compensation (‘ransom’), but only by another death.”).

<sup>15</sup> MIKHAEL, *supra* note 13, at 71.

<sup>16</sup> BAU, *supra* note 14, at 125.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

return home in safety.<sup>19</sup> Conversely, the fugitive would be put to death if the city elders determined that the killing was deliberate.<sup>20</sup>

A form of altar sanctuary also existed in ancient Israel, but this type of limited sanctuary likely predated the cities of refuge and appears not to have carried the legal force of the protections afforded by the cities of refuge.<sup>21</sup> After the Israelites entered Canaan, they replaced the local custom of altar asylum with a limited and temporary version.<sup>22</sup> In the two Old Testament references to altar asylum, Solomon granted it to one attempted usurper to his throne, but denied it to another—and ordered him to be killed—without any meaningful distinction between the two decisions.<sup>23</sup>

Some form of sanctuary existed in ancient Greece and during the early Roman Empire.<sup>24</sup> Sanctuary within Greek temples was originally intended as a humanitarian act, designed to provide a safe haven for those who committed involuntary crimes or who were otherwise being pursued.<sup>25</sup> Eventually, criminals began to abuse the Greek system and the misuse was “aggravated by the extension of sanctuary protection to cemeteries (where there were tombs of Greek heroes), forests, and even entire cities.”<sup>26</sup> Some Greeks resorted to starving the fugitive into surrender because the vilest

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<sup>19</sup> *Id.* (“[T]he fugitive could return home and the avenger of blood would lose the right of vengeance if the reigning high priest died.”); see J. CHARLES COX, *THE SANCTUARIES AND SANCTUARY SEEKERS OF MEDIAEVAL ENGLAND* 1 (1911) (The refugee must remain “until released from banishment by the death of the high priest.”). The death of the high priest served as the “substitutionary death” that satisfied the avenger’s blood feud requirements. BAU, *supra* note 14, at 126.

<sup>20</sup> Feely, *supra* note 2, at 805.

<sup>21</sup> BAU, *supra* note 14, at 129 (“[A]ltar sanctuary could be violated with impunity by a strong-willed ruler.”).

<sup>22</sup> *Id.* at 128.

<sup>23</sup> *Id.* at 128–29 (discussing 1 Kings 1:50–53 and 1 Kings 2:28–29).

<sup>24</sup> *Id.* at 130; see also *St. John’s Evang. Luth. Church v. Hoboken*, 479 A.2d 935, 937 (N.J. Super. Ct. Law Div. 1983) (noting the Greeks and Romans recognized sanctuary); LINDA RABBEN, *GIVE REFUGE TO THE STRANGER* 50 (2011) (“Cultures and societies remote from Western civilization also have long traditions of sanctuary and asylum.”); Sheehan, *supra* note 2, at 994 (noting that the ancient Jews, Egyptians, Greeks, and Romans recognized sanctuary).

<sup>25</sup> BAU, *supra* note 14, at 130; COX, *supra* note 19, at 2.

<sup>26</sup> BAU, *supra* note 14, at 130; see also NORMAN MACLAREN TRENHOLME, *THE RIGHT OF SANCTUARY IN ENGLAND: A STUDY IN INSTITUTIONAL HISTORY* 5 (Frank Thilly ed., 1903) (“[I]n Greece the right of asylum became an abuse rather than a benefit.”).

criminal could claim sanctuary and not be forcibly removed from the place of refuge.<sup>27</sup>

Also well intentioned,<sup>28</sup> the Roman Empire's sanctuary system was more limited and regulated than the Greek model.<sup>29</sup> Sanctuary afforded only temporary protection from civil authorities and it terminated at trial.<sup>30</sup> Before formally being granted sanctuary protections, the fugitive was extensively questioned at a preliminary hearing during which the fugitive was required to present a legal defense.<sup>31</sup> The Roman system also suffered from abuses, as fugitives claimed sanctuary after "fleeing to statues and busts of the Caesars, pictures of the emperors, battle standards of the Roman legions[,] and even the persons of vestal virgins."<sup>32</sup>

For Christian churches, the custom of granting sanctuary to fugitives reflected the early church's commitment to preventing bloodshed and violence.<sup>33</sup> The Christian custom was first recognized in the fourth century following Constantine's Edict of Toleration in 303 A.D.<sup>34</sup> The Theodosian Code of 392 is the first known law to specifically recognize sanctuary as a legal right.<sup>35</sup> Initially, the Code limited sanctuary's protection to the area of the altar within the church, but, by 450 A.D., the protection extended beyond the church itself, "to the walls of the churchyard or precincts, including the houses of bishops and clergy, cloisters, courts, and

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<sup>27</sup> TRENHOLME, *supra* note 26, at 4.

<sup>28</sup> "[T]he Roman Empire generally sought to limit the protection of the sanctuary privilege for the unfortunate and needy who would be unable to endure the often harsh and merciless application of the criminal law." BAU, *supra* note 14, at 130.

<sup>29</sup> *Id.*; see also TRENHOLME, *supra* note 26, at 6, 7 ("The right of [sanctuary] . . . was made a part of their legal system . . ." *Id.* at 7.).

<sup>30</sup> BAU, *supra* note 14, at 130; see also TRENHOLME, *supra* note 26, at 6 ("The right of [sanctuary] was . . . afforded protection and immunity until formal inquisition could be made and judgment, based on evidence, given.").

<sup>31</sup> BAU, *supra* note 14, at 130.

<sup>32</sup> *Id.*

<sup>33</sup> COX, *supra* note 19, at 3; see also HUW PRYCE, *NATIVE LAW AND THE CHURCH IN MEDIEVAL WALES* 170 (1993) (discussing eighth-century Irish canon law, which provided for sanctuary and was partially in response to "the code of the bloodfeud," providing protection "from the avenging kinsman of the victim").

<sup>34</sup> COX, *supra* note 19, at 2; see also TRENHOLME, *supra* note 26, at 7; *St. John's Evang. Luth. Church v. Hoboken*, 479 A.2d 935, 937 (N.J. Super. Ct. Law Div. 1983) ("It is probable that the church sanctuary came into existence from the time of Constantine, A.D. 303.").

<sup>35</sup> COX, *supra* note 19, at 3 ("[The] law . . . was [enacted, however,] in order to explain and regulate a privilege already recognized and well established.").

cemeteries.”<sup>36</sup> Further, sanctuary protections did not extend to embezzlers of state funds, Jews, heretics, or apostates.<sup>37</sup> Pope Leo I issued a papal decree confirming these laws, but also required that a Church official examine the sanctuary seekers and take action based on the evidence obtained.<sup>38</sup>

### *B. England*

Although some form of sanctuary was likely practiced during the Roman occupation of England,<sup>39</sup> it was not until the sixth century that any record of its official recognition exists.<sup>40</sup> In 597 A.D., the newly converted and baptized Christian King Ethelbert, King of Kent, issued an Anglo-Saxon code of laws that included the recognition of the Church’s right to grant sanctuary and provided a penalty for a violation of the Church’s peace (*frith*).<sup>41</sup> Sanctuary was specifically recognized in the subsequent laws of Ine, King of Wessex, in 680 A.D., Alfred the Great in 887 A.D., King Athelstan in 930 A.D., and King Ethelred in 1000 A.D.<sup>42</sup>

England recognized two general types of sanctuary: chartered sanctuary and the more general sanctuary privilege afforded to all churches and other qualifying religious structures.<sup>43</sup> The King granted a special charter to certain favored locations, which then enjoyed the Peace of the King,<sup>44</sup> whereas churches and various religious buildings possessed the

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<sup>36</sup> *Id.*; see also BAU, *supra* note 14, at 131.

<sup>37</sup> BAU, *supra* note 14, at 131; see also COX, *supra* note 19, at 4. By the sixth century, the exclusions were extended to “murders, adulterers[,] and ravishers of virgins.” *Id.* at 4. Cf. TRENHOLME, *supra* note 26, at 8–9 (“Certain classes of offenders had been excluded[, including] debtors, . . . murderers, adulterers, and committers of rape.”).

<sup>38</sup> BAU, *supra* note 14, at 131; COX, *supra* note 19, at 3.

<sup>39</sup> COX, *supra* note 19, at 5.

<sup>40</sup> *Id.* at 5–6.

<sup>41</sup> *Id.* at 6; see also TRENHOLME, *supra* note 26, at 11 (“[T]his reference to the sanctity of churches is important, as showing how quickly they came to be recognized as inviolable.”).

<sup>42</sup> COX, *supra* note 19, at 7–8. Alfred the Great provided that anyone fleeing to a church was protected from harm for three to seven days. TRENHOLME, *supra* note 26, at 13. Anyone who harmed a sanctuary seeker during this period was subject to a heavy fine. *Id.* Eighth-century Irish canon law recognized the right to sanctuary, which was “modelled on the Levitical ‘cities of refuge.’” PRYCE, *supra* note 33, at 169. Welsh law also recognized sanctuary by the eighth century and similarly based it on the biblical cities of refuge. *Id.*

<sup>43</sup> COX, *supra* note 19, at 48; see also PRYCE, *supra* note 33, at 164.

<sup>44</sup> TRENHOLME, *supra* note 26, at 13.

Peace of the Church.<sup>45</sup> Some religious locations possessed both.<sup>46</sup> Generally, chartered sanctuaries enjoyed more extensive jurisdiction and formalized procedures than ordinary sanctuary.<sup>47</sup> In 930 A.D., for example, King Athelstan granted a charter to St. John of Beverley, which extended the protected area for sanctuary seekers from the church itself to over a mile from the church door.<sup>48</sup>

Following his conquest of England in 1066, Norman King William the Conqueror adopted the bulk of the existing Saxon laws and customs as part of a policy of conciliation toward the local populace.<sup>49</sup> In 1067, King William granted a charter to Battle Abbey in Hastings, which permitted the resident monks the power to afford “full and complete sanctuary to fugitives and criminals.”<sup>50</sup> By the eleventh century, sanctuary was firmly established in England and would remain relatively unchanged for the next three centuries.<sup>51</sup> However, the King began to seek more control over sanctuary as the secular legal system matured.<sup>52</sup> For example, the Pope permitted the regulation of sanctuary to King Henry VII in 1486.<sup>53</sup>

Sanctuary was not afforded to anyone who was armed<sup>54</sup> or to “those guilty of heresy, necromancy, or witchcraft.”<sup>55</sup> Further, the clergy refused sanctuary to those who committed crimes within the church itself.<sup>56</sup> In 1487, King Henry VII, with the accord of the Pope, “exclud[ed]” every form of high treason in England from sanctuary benefit.<sup>57</sup>

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<sup>45</sup> *Id.* (Anglo-Saxon times).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 47.

<sup>48</sup> *Id.* at 14.

<sup>49</sup> *Id.* at 18.

<sup>50</sup> *Id.* at 19; *see also* COX, *supra* note 19, at 195 (“On this religious house the Conqueror conferred every possible privilege, as is testified in a succession of charters, which were confirmed by several of his successors.”).

<sup>51</sup> TRENHOLME, *supra* note 26, at 26.

<sup>52</sup> *See, e.g., id.*

<sup>53</sup> RABBEN, *supra* note 24, at 64. “Kings Henry VII and VIII severely limited its operation.” *Id.* at 67.

<sup>54</sup> COX, *supra* note 19, at x (“[T]he Church never suffered any sanctuary seeker to approach who bore in his hand or on his person any kind of a weapon.”); *see* RABBEN, *supra* note 24, at 65 (“[T]he sanctuary seeker could bring no weapons into the church.”).

<sup>55</sup> COX, *supra* note 19, at 59.

<sup>56</sup> *Id.*; *see* PRYCE, *supra* note 33, at 164 (It “excluded from sanctuary those who abused it by fighting or killing in its precincts.”).

<sup>57</sup> COX, *supra* note 19, at 93.

The requirement for a formal abjuration of the realm appeared early during the thirteenth century<sup>58</sup> and its application was generally limited to England.<sup>59</sup> Indeed, the practice of sanctuary generally was more firmly established in England than in the rest of Europe.<sup>60</sup> After a period of time, usually forty days, a person granted sanctuary had to elect to stand trial in the crown's court or confess to the alleged misconduct, take an oath to abjure the realm of England, and travel quickly to a nearby port for transport to another kingdom.<sup>61</sup> Those who failed to make an election during the grace period were often starved.<sup>62</sup>

Frequently, an administrative official known as a coroner provided the abjurer with specific traveling directions, including instructions on where to spend the night.<sup>63</sup> The safety of the abjurer was inviolable while traveling along the King's highway to a port of embarkation so long as the abjurer adhered to any restrictive conditions.<sup>64</sup> Constables gave protection to some abjurors during their journey.<sup>65</sup> Straying from the prescribed route, however, was done at the abjurer's peril.<sup>66</sup>

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<sup>58</sup> *Id.* at 10; *see* TRENHOLME, *supra* note 26, at 23 (“Abjuration of the realm is first definitely met with at the close of the twelfth century and beginning of the thirteenth . . .”). Originally, abjuration of the realm was intended to extend the sanctuary seeker's period of protection beyond the initial period of refuge. COX, *supra* note 19, at 11.

<sup>59</sup> COX, *supra* note 19, at 10 (“Abjuration was of Anglo-Norman origin and peculiar to England . . .”); *see* TRENHOLME, *supra* note 26, at 23 (“[A]bjuration of the realm became a peculiarly English institution.”). Although it may have been practiced “for a time and irregularly, in Normandy, it has to be considered as derived from England.” COX, *supra* note 19, at 12.

<sup>60</sup> COX, *supra* note 19, at 34.

<sup>61</sup> *Id.* at 10–11, 12–15, 27, 113–14; *see also* TRENHOLME, *supra* note 26, at 23–24. During the forty-day period, the sanctuary seeker remained unharmed in the church, but lost this protection if the sanctuary seeker committed a felony within the church. PRYCE, *supra* note 33, at 164.

<sup>62</sup> TRENHOLME, *supra* note 26, at 24.

<sup>63</sup> COX, *supra* note 19, at 29.

<sup>64</sup> *Id.* at 11 (“[T]he person of the abjurer was sacred, under certain conditions, whilst seeking a port of embarkation.”); *see* TRENHOLME, *supra* note 26, at 22 (“Sanctuary-seekers were . . . allowed to depart unharmed from the precincts of the sanctuary to take their journey into exile.”).

<sup>65</sup> COX, *supra* note 19, at 114, 118.

<sup>66</sup> *Id.* at 32 (“Several examples of the beheading of an abjurer who had strayed from the highway, by the populace or individuals, [can] be found . . .”); TRENHOLME, *supra* note 26, at 24 (“[T]hese unfortunate beings journeyed along the king's highway, turning neither to the left nor to the right, for fear of being slain.”).



One who abjured the realm forfeited all property to the crown.<sup>67</sup> In some cases, the abjurer had to relinquish all clothing and travel to the port of embarkation, dressed only in a sackcloth or white robe bearing a red cross.<sup>68</sup> Some abjurors were made to carry a wooden cross while traveling.<sup>69</sup> During the reign of King Henry VIII, abjurors were branded to identify them, should they attempt to return to England.<sup>70</sup> Abjuration was for life, unless the King pardoned the offender.<sup>71</sup>

The Church enforced sanctuary through imposition of acts of penance<sup>72</sup> or by excommunication,<sup>73</sup> which could sometimes be lifted through absolution after payment of a large fine.<sup>74</sup> The Church officially recognized excommunication as a penalty for violating sanctuary in the late seventh century.<sup>75</sup> In addition, sanctuary was enforced through a system of fines and monetary penalties.<sup>76</sup> In some cases, the penalty

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<sup>67</sup> TRENHOLME, *supra* note 26, at 24.

<sup>68</sup> COX, *supra* note 19, at 32; TRENHOLME, *supra* note 26, at 24.

<sup>69</sup> COX, *supra* note 19, at 114.

<sup>70</sup> THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 431 (5th ed. 1956) (noting that, if the abjurer was caught returning, the abjurer was subject to being hanged); *see also* TRENHOLME, *supra* note 26, at 29.

<sup>71</sup> COX, *supra* note 19, at 25; *see also* TRENHOLME, *supra* note 26, at 24 (“Their oath of abjuration bound them never to set foot in England again, save by [license] of the king . . .”). For a short period of time, Henry VIII prohibited abjurors from leaving England; instead, he required them to live in an English sanctuary for life. *Id.* at 29. Henry was concerned by the large numbers of abjurors leaving England and was also concerned that they were “harming the country by instructing foreigners in archery and disclosing the secrets of the realm.” *Id.*

<sup>72</sup> COX, *supra* note 19, at 151.

<sup>73</sup> *Id.* at 42, 193, 247; PRYCE, *supra* note 33, at 163; TRENHOLME, *supra* note 26, at 72, 82, 84.

<sup>74</sup> COX, *supra* note 19, at 52.

<sup>75</sup> RABBEN, *supra* note 24, at 56. The Catholic Church did not eliminate excommunication as a penalty for violating sanctuary until the 1919 Code of Canon Law. *Id.* at 56, 69.

<sup>76</sup> COX, *supra* note 19, at 86 (sheriff fined); *id.* at 126–27, 151; RABBEN, *supra* note 24, at 61 (“In the second half of the [eleventh] century[,] William the Conqueror’s laws . . . established stiff fines for its violation.”); TRENHOLME, *supra* note 26, at 15 (noting that, by 1014, Saxon law dictated a scale of fines depending upon the nature of offense against one granted sanctuary and the importance of the church in which the offense occurred). Restitution was also imposed on those who damaged the church while violating sanctuary. *See, e.g.*, COX, *supra* note 19, at 9 (espousing that, in 1004, local Englishman, who burned down a monastery in order to kill several Danes who had taken sanctuary after

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system was elaborate. For example, sanctuary at the Church of the Blessed John of Beverly in Northern England was enforced by “six degrees of safety.”<sup>77</sup> The penalty for violating sanctuary within one mile of the town surrounding the church was 16 pounds, which increased to 32 pounds if violated within the town, 48 pounds within the walls surrounding the church, 96 pounds within the church itself, and 144 pounds within “the gates of the quire.”<sup>78</sup> A stone chair, located near the church altar, was considered inviolable because “no pecuniary penalty could compensate for the outrage . . . .”<sup>79</sup> Under Saxon law, one who killed an individual under sanctuary while within church walls was subject to the death penalty.<sup>80</sup>

Regardless, violations occurred infrequently during the Anglo-Saxon period, but more frequently as the practice matured and became subject to abuse.<sup>81</sup> Approximately 1,000 persons per year took advantage of sanctuary protections during the bulk of England’s experience with the practice.<sup>82</sup>

Increasingly, sanctuary began to be seen as an abusive mechanism for thwarting justice.<sup>83</sup> The Earl of Chester (the Earl) viewed the grant of sanctuary as a significant source of revenue, collecting fines from all sanctuary seekers and offering sanctuary to virtually anyone who desired it.<sup>84</sup> In exchange, the Earl suspended the requirement to abjure the realm within forty days and, instead, granted permanent residence.<sup>85</sup> Eventually,

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being condemned to death, were required to pay restitution adequate to rebuild the monastery and increase its endowments).

<sup>77</sup> COX, *supra* note 19, at 155.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> TRENHOLME, *supra* note 26, at 15. They were “thrown into prison to await torture and ‘a horrible kind of death.’” *Id.* at 74.

<sup>81</sup> *Id.* at 16, 25. *But cf.* COX, *supra* note 19, at ix (“For every violation of sanctuary, there were hundreds of cases wherein its privileges were profoundly respected, and carried out after the accustomed fashion.”).

<sup>82</sup> COX, *supra* note 19, at 33 (“[T]here were usually a thousand persons in sanctuary during any given year for several centuries of England’s history . . . .”); *see also* TRENHOLME, *supra* note 26, at 70.

<sup>83</sup> TRENHOLME, *supra* note 26, at 26 (“Owing to the undue extension of the privilege of sanctuary it soon began to be a great abuse and a clog on justice in England.”); *see* PRYCE, *supra* note 33, at 163 (“Abuse of the privilege prompted attempts—by Charlemagne, for example—to prevent certain categories of offenders, such as homicides, from availing themselves of it.”).

<sup>84</sup> TRENHOLME, *supra* note 26, at 85–86.

<sup>85</sup> *Id.* at 86.

“Palatinate of Chester became the most notorious nest of criminals in England,” until King Henry IV passed an act revoking the immunity of residents of Chester “and made [them] liable to abjuration or outlawry and forfeiture of their goods.”<sup>86</sup>

In 1402, there were accusations that the College of Saint Mary’s le Grand in London was providing sanctuary and refuge to bandits, which triggered opposition to the Church’s unbridled sanctuary powers.<sup>87</sup> The House of Commons launched a series of largely unsuccessful efforts to reduce the Church’s sanctuary powers.<sup>88</sup> In 1467, to respond to abuses of the privilege, King Henry VII obtained a papal bull from Pope Innocent VIII that limited sanctuary’s scope, including revoking protections for anyone granted sanctuary who continued to commit felonies.<sup>89</sup> Still, in 1487, groups of sanctuary men ventured forth from Westminster Abbey to rob the homes of soldiers loyal to King Henry VII while the soldiers were with the King in the field putting down a rebellion.<sup>90</sup>

With minor exceptions, sanctuary came to an end in England during the reign of King Henry VIII.<sup>91</sup> In 1624, any remaining legal rights associated with sanctuary were formally abolished by statute.<sup>92</sup> Similarly, “sanctuary had all but disappeared [in the remainder of Europe] by the 1700s.”<sup>93</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 27 (“This began the war against privileged places of sanctuary resort, especially in the metropolis.”).

<sup>88</sup> *Id.* at 27–28 (“In 1425, in 1429, in 1454, and finally in 1478, the Commons sought to modify and abridge the Church’s right to afford sanctuary.”).

<sup>89</sup> *Id.* at 28.

<sup>90</sup> RABBEN, *supra* note 24, at 66 (quoting Isobel Thornley, *The Destruction of Sanctuary*, in *TUDOR STUDIES* 182, 186 (R.W. Seton-Watson ed., 1924)). Cf. PRYCE, *supra* note 33, at 173 (“[P]eople could seek sanctuary in order to escape the enmity of their princes, only to set out more boldly from it to attack the surrounding countryside.”).

<sup>91</sup> COX, *supra* note 19, at 33; see also TRENHOLME, *supra* note 26, at 28–29. Until her death in 1558, there was a very limited resurgence of the tradition during the short reign of Queen Mary. COX, *supra* note 19, at 74, 148. Sanctuary in Scotland was largely abolished during the Reformation. TRENHOLME, *supra* note 26, at 92. Until 1880, Scottish debtors continued to obtain sanctuary at the royal palace in Holyroodhouse. RABBEN, *supra* note 24, at 68.

<sup>92</sup> RANDY K. LIPPERT, *SANCTUARY, SOVEREIGNTY, SACRIFICE: CANADIAN SANCTUARY INCIDENTS, POWER, AND LAW 3* (2005).

<sup>93</sup> *Id.* at 175. In 1539, King Francis I abolished sanctuary in France. RABBEN, *supra* note 24, at 69.

*C. Early History of the United States*

For almost the first 200 years of its existence, the United States did not experience the invocation of sanctuary by a religious authority or entity against civil authorities.<sup>94</sup> The American colonists did not resurrect sanctuary as a legal privilege.<sup>95</sup> Although many colonists came to the New World to escape persecution, sanctuary as a legal right existed neither in statute nor as a matter of common law.<sup>96</sup>

Prior to the American Civil War, slaves escaped from Southern bondage to the freedom of the North along a decentralized and often haphazard system of routes popularly known as the Underground Railroad.<sup>97</sup> Although these escape routes existed since at least the early 1800s,<sup>98</sup> the term Underground Railroad did not become popular until the widespread construction of railroads in the late 1830s to early 1840s,<sup>99</sup> which immediately preceded the greatest period of Underground Railroad

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<sup>94</sup> BAU, *supra* note 14, at 161; ANN CRITTENDEN, *SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND LAW IN COLLISION* 63 (1988) (explaining that sanctuary was first explicitly invoked in the United States during the Vietnam War).

<sup>95</sup> Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168, 169 (1983) (“[The Office of Legal Counsel] ha[s] found no evidence that the colonists revived church sanctuary in America.”); BAU, *supra* note 14, at 159 (“[T]he law of sanctuary was not adopted as part of the colonial common law.”); RABBEN, *supra* note 24, at 72 (“The Massachusetts Bay Colony and other early European settlements in America did not have sanctuary laws.”).

<sup>96</sup> Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. at 170 (“[S]anctuary . . . did not enter the United States as part of the common law.”); CRITTENDEN, *supra* note 94, at 62 (“The sanctuary privilege never became part of American common law or statute, although it could be argued that the continent itself was a sanctuary, a new Promised Land for early colonists.”).

<sup>97</sup> Larry Gara, *Myth and Reality*, in *UNDERGROUND RAILROAD* 7, 11 (1998) (“[T]here was some organized activity in certain localities, but none nationwide. Much of the aid to fugitives was haphazard.”); see RABBEN, *supra* note 24, at 85 (noting that the Underground Railroad was “a decentralized, grassroots network”); see also C. Peter Ripley, *The Underground Railroad*, in *UNDERGROUND RAILROAD*, *supra*, at 45, 45 (“As a formal term, it refers to the movement of African-American slaves escaping out of the South and to the allies who assisted them in their search for freedom.”).

<sup>98</sup> CHARLES L. BLOCKSON, *THE UNDERGROUND RAILROAD* 1 (1987) (noting that the Underground Railroad was popular at “the beginning of the nineteenth century”).

<sup>99</sup> RABBEN, *supra* note 24, at 85; Gara, *supra* note 97, at 11; see BLOCKSON, *supra* note 98, at 2 (explaining that the Underground Railroad did not have a name in the early 1830s).

activity.<sup>100</sup> Associated with the imagery of railroads, the movement had no meaningful link to that form of transportation.<sup>101</sup>

The fleeing slaves usually traveled at night and “were hidden in livery stables, attics, and storerooms, under feather beds, in secret passages, and in all sort of out-of-the-way places.”<sup>102</sup> Members of the clergy and some religious communities assisted fleeing slaves<sup>103</sup> by hiding them in churches.<sup>104</sup> Much of the criticism behind the antislavery movement stemmed from a sense of Christianity-based morality.<sup>105</sup>

Although churches and religious figures were active in the Underground Railroad,<sup>106</sup> there is no record of a church or its clergy expressly invoking sanctuary as a legal privilege.<sup>107</sup> To some extent, the absence of a single reported invocation of sanctuary may be explained by prevailing views of the majority of clergy. Surprisingly, through at least 1850, the bulk of American clergy were either hostile or indifferent to the

<sup>100</sup> BLOCKSON, *supra* note 98, at 4 (“[T]he period of greatest activity [was] from 1850 through 1860.”); RABBEN, *supra* note 24, at 96 (“During the 1850s, as the nation moved toward civil war, the UGRR stepped up its activities . . .”).

<sup>101</sup> Ripley, *supra* note 97, at 45 (noting that the Underground Railroad had “no literal association with railroading”).

<sup>102</sup> BLOCKSON, *supra* note 98, at 2–3.

<sup>103</sup> See, e.g., RABBEN, *supra* note 24, at 86–87 (describing the ways in which Quakers in North Carolina helped slaves); Ripley, *supra* note 97, at 58 (noting that ministers in Washington, D.C. assisted fleeing slaves).

<sup>104</sup> CRITTENDEN, *supra* note 94, at 63; see, e.g., BLOCKSON, *supra* note 98, at 206–07 (explaining that fleeing slaves passing through Ohio were hidden in churches); *id.* at 245 (stating that the Mother Zion Church “became a sanctuary for freedom-seeking slaves until all danger of discovery disappeared”); RABBEN, *supra* note 24, at 89 (noting that Philadelphia’s African Methodist Episcopal Church was an Underground Railroad “station”).

<sup>105</sup> HENRY F. BEDFORD, *THE UNION DIVIDES: POLITICS AND SLAVERY 1950–1861*, at 13–14 (1963) (“The northern indictment of slavery rested on the premise that Negro servitude was a moral evil incompatible with the principles of democracy and of the Christian faith.”).

<sup>106</sup> BAU, *supra* note 14, at 160 (“[I]t is well documented that churches and church communities formed integral parts of the Underground Railroad.”); see, e.g., BLOCKSON, *supra* note 98, at 166 (stating that a reverend in South Carolina offered “a haven for journeying fugitive slaves”).

<sup>107</sup> BAU, *supra* note 14, at 160 (“[T]here was . . . no express invocation of the defunct English privilege.”); see RABBEN, *supra* note 24, at 96 (“[C]hurches providing sanctuary did not seek to claim a legal privilege.”).

antislavery movement,<sup>108</sup> with the obvious exception of African-American ministers.<sup>109</sup> A large segment of the clergy disfavored “antislavery agitation” and its disruptive effect on the Union.<sup>110</sup> Further, a significant number of clergy were slave owners. By 1851, “an estimated 16,346 ministers of the Methodist, Presbyterian, Baptist, and Episcopal faiths owned slaves.”<sup>111</sup>

In addition, the legal consequences of assisting fleeing slaves could be severe. Federal law imposed a fine on anyone who assisted a slave to escape.<sup>112</sup> Southern laws were particularly harsh, “stipulating heavier fines and hard-jail time for anyone convicted of helping a slave on the run.”<sup>113</sup> The Fugitive Slave Act of 1850<sup>114</sup> provided slaveholders with enhanced legal rights for reclaiming slaves who had fled to the North and imposed significant penalties on U.S. marshals and deputy marshals who refused to enforce the law or did so poorly.<sup>115</sup> In addition, the Fugitive Slave Act provided for a fine not to exceed \$1,000 and imprisonment of up to six months for anyone who knowingly obstructed the arrest of a fugitive slave,

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<sup>108</sup> STANLEY W. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860*, at 66–67 (1970). The bulk of the population from the North did not actively oppose slavery or laws protecting the rights of slave owners. *See id.* at 49 (“By far the greater majority [of Northerners], . . . although unsympathetic with the harsh provisions of the law, was willing to acquiesce in the return of fugitive slaves to their owners in order to maintain good relations with the South and to prevent disruption of the Union.”).

<sup>109</sup> BLOCKSON, *supra* note 98, at 4 (“Many black ministers, in particular, felt that organized assistance to fugitives was necessary to challenge the prevailing religious dogma of many white churches that a truly religious person was patient, in passive acceptance of the will of God.”).

<sup>110</sup> CAMPBELL, *supra* note 108, at 66. Abolitionist clergy were also subject to acts of violence. *See, e.g.*, Scott McCabe, *Crime History: Pro-Slavery Mob Kills Abolitionist Publisher*, WASH. EXAMINER, Nov. 7, 2012, at 8 (describing an abolitionist pastor who published a religious newspaper that was killed by a proslavery mob in Alton, Illinois).

<sup>111</sup> CAMPBELL, *supra* note 108, at 67.

<sup>112</sup> Ripley, *supra* note 97, at 51 (subjecting one who assisted a slave in escaping to a \$500 fine under the Fugitive Slave Law of 1793).

<sup>113</sup> *Id.*

<sup>114</sup> Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1851) (repealed 1864).

<sup>115</sup> CAMPBELL, *supra* note 108, at 24. Marshals who refused to enforce the law were subject to a fine up to \$1,000. *Id.* Further, a marshal who lost custody of a fugitive slave “was liable for the slave’s full value.” *Id.*

or a person who “attempted to rescue, aid, harbor, or conceal a fugitive, knowing him to be such.”<sup>116</sup>

The Fugitive Slave Act, which abolitionists claimed violated biblical injunctions,<sup>117</sup> triggered a gradual change in Northern public opinion against slavery,<sup>118</sup> but it did not inspire widespread efforts to eradicate slavery or actively assist slaves fleeing to freedom in the North.<sup>119</sup> The inaction of Northern clergy reflected the sentiment of their congregations that “the shepherds were driven by the sheep.”<sup>120</sup>

### III. MODERN APPLICATION

#### A. *War Resisters*

The Vietnam War was the most divisive American war of the twentieth century.<sup>121</sup> Eventually, resistance to the war became widespread, with the religious community expressing antiwar sentiment.<sup>122</sup> One way in which the religious community expressed this sentiment was through granting sanctuary to war resisters.<sup>123</sup> Several churches publicly declared themselves sanctuaries. Yale University’s Chaplain, William Coffin Jr.,

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<sup>116</sup> *Id.*

<sup>117</sup> “Abolitionists thundered that the law violated the biblical injunction in Deuteronomy 23:15–16 ‘not to deliver unto his master the servant that hath escaped.’” RABBen, *supra* note 24, at 95.

<sup>118</sup> Ripley, *supra* note 97, at 63 (“[T]he Fugitive Slave Law changed popular attitudes among many Northerners who viewed some provisions of the 1850 law as serious violations of cherished personal liberties and constitutional guarantees.”).

<sup>119</sup> CAMPBELL, *supra* note 108, at vii–viii. “[O]nly a few citizens in isolated communities engaged in active opposition to enforcement of the Fugitive Slave Law.” *Id.* “A great majority of the northern population . . . did not actively oppose this unpopular law.” *Id.* at 55. Generally, the policy of the federal government was to enforce the law and federal marshals endeavored to do so. *Id.* at viii. “[T]he law was enforced by those charged with responsibility for enforcement . . .” *Id.* “[I]t was the policy of the national government . . . to enforce the law.” *Id.* at 113. In contrast, many Southerners believed that the North was not adequately enforcing the Fugitive Slave Act of 1850 and that the institution of slavery was in peril, fueling secession efforts. *Id.* at 110.

<sup>120</sup> *Id.* at 68. “Of an estimated [30,000] ministers in the United States . . . ‘not one in a hundred’ openly condemned slavery or ‘lifted a finger’ to protect a fugitive slave.” *Id.* (quoting SAMUEL J. MAY, *SOME RECOLLECTIONS OF OUR ANTISLAVERY CONFLICT* 365 (1869)).

<sup>121</sup> *A COMPANION TO THE VIETNAM WAR*, at xi (Marylin B. Young & Robert Buzzanco eds., 2002).

<sup>122</sup> BAU, *supra* note 14, at 161–64, 167–69.

<sup>123</sup> *Id.*

publicly offered its chapel “as a sanctuary from police action for any Yale student conscientiously resisting the draft.”<sup>124</sup> At an antiwar rally on October 16, 1967, Reverend Coffin called on churches to revive the ancient tradition of sanctuary, not based on any legal right, but rather as a symbolic act of civil disobedience against what he viewed as an unjust war.<sup>125</sup>

One of the first reported incidents of a war resister taking sanctuary in a church occurred on May 20, 1968 at the Arlington Street Unitarian Church in Boston, Massachusetts.<sup>126</sup> William Chase—a soldier absent without leave (AWOL)—and Robert Talmanson—a draftee who had recently unsuccessfully challenged his induction into the military—were granted sanctuary.<sup>127</sup> Significantly, church officials acknowledged that the act was not grounded in the law, but an act of civil disobedience based on “a moral imperative.”<sup>128</sup>

After receiving assurances concerning his conscientious objection to the war, Chase surrendered to Army authorities nine days after taking sanctuary.<sup>129</sup> Talmanson’s departure was much more eventful. U.S. marshals seized Talmanson from the church’s pulpit and escorted him through protestors outside with the assistance of Boston police.<sup>130</sup>

Soon after, other churches followed the example of the Arlington Street Unitarian Church. The following month, the Unitarian Universalist Church of the Mediator in Providence, Rhode Island, granted sanctuary to

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<sup>124</sup> WARREN GOLDSTEIN, WILLIAM SLOANE COFFIN JR.: A HOLY IMPATIENCE 196 (2004) (internal quotation marks omitted). Reverend Coffin also became a leader of Clergy and Laity Concerned About Vietnam, which offered “sanctuary in churches and synagogues to draft resisters.” *Obituary: Rev. William Sloane Coffin*, CHI. TRIB., Apr. 13, 2006, at C9. In 1984, as a minister of the Riverside Church in New York City, Coffin granted sanctuary to a Guatemalan family. RODNEY GOLDEN & MICHAEL MCCONNELL, SANCTUARY: THE NEW UNDERGROUND RAILROAD 54 (1986).

<sup>125</sup> BAU, *supra* note 14, at 161–62.

<sup>126</sup> *Id.* One of the earliest recorded incidents of a soldier taking sanctuary in England dates to 1440, but the underlying misconduct necessitating the act was unreported. COX, *supra* note 19, at 83.

<sup>127</sup> BAU, *supra* note 14, at 162–63. Shortly before seeking sanctuary, Talmanson learned that the United States Supreme Court had refused to overturn his conviction for refusing to be inducted. *Id.*

<sup>128</sup> *Id.* at 163.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* Federal authorities transported Talmanson to a correction facility in Virginia, where he served a three-year sentence. *Id.*



two young men indicted for refusing induction.<sup>131</sup> Mirroring the Arlington Street experience, church officials relied only on the moral and political force of the sanctuary tradition.<sup>132</sup> Law enforcement officials—this time the Federal Bureau of Investigation (FBI)—reacted similarly, forcing their way into the church to arrest the two war resisters.<sup>133</sup>

Other examples followed. In June 1968, law enforcement authorities arrested a war resister, who had refused induction into the Army, from a Methodist Church in Greenwich Village, New York, after the church board had voted to grant him sanctuary.<sup>134</sup> Later that summer, AWOL soldiers were granted sanctuary at the Friends Meeting House in Cambridge, Massachusetts, and at the Rockefeller Chapel of the University of Chicago, respectively.<sup>135</sup> During the following fall, the Harvard Divinity School provided sanctuary to an AWOL marine, and the Boston University School of Theology organized a sanctuary for an AWOL soldier at the university chapel.<sup>136</sup>

On the Pacific Rim, several California churches offered sanctuary to Navy personnel opposed to the war.<sup>137</sup> In September and October 1971, the King Roman Catholic Church of San Diego granted sanctuary to nine sailors from the aircraft carrier *USS Constellation*.<sup>138</sup> The parish priest did not invoke any legal right to sanctuary, but instead stated, “Because of our Christian heritage, we cannot turn away anyone.”<sup>139</sup> Further, the San Diego Auxiliary Bishop distanced the Catholic Church from the actions of

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 164.

<sup>133</sup> *Id.* The FBI also arrested “nine other protestors who were attempting to non-violently obstruct the FBI.” *Id.* In August 1968, federal agents entered a Unitarian Church in Buffalo, New York to arrest a draft resister after obtaining sanctuary in the church for twelve days. Gene Warner, *Exiles Fought Their Own War*, BUFF. NEWS, May 2, 2000, at A1.

<sup>134</sup> BAU, *supra* note 14, at 164.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 165, 252 n.28 (citing J. Dennis Willigan, *Sanctuary: A Communitarian Form of Culture*, UNION SEMINARY Q. REV., Summer 1979, at 517, 536–37; *Army Deserter Removed from Boston U. Chapel*, N.Y. TIMES, Oct. 7, 1968, at 29). Boston police and federal agents arrested the soldier and returned him to military authorities for court-martial. *Id.* at 165.

<sup>137</sup> *Id.* at 167–69 (starting in 1971, “over twenty churches in California declared themselves as sanctuaries”).

<sup>138</sup> *Id.* at 167.

<sup>139</sup> *Id.*

the parish priest, conceding that “[t]he concept of sanctuary does not apply in the United States, where church buildings do not have jurisdictional exemption from civil law.”<sup>140</sup> Once again, federal agents afforded little weight to the invocation of sanctuary. The agents entered the church, arrested the sailors, and turned them over to military authorities.<sup>141</sup>

In early 1972, churches in California granted sanctuary to two additional sailors. In January, an AWOL sailor from the *USS Hancock* took sanctuary in the LaJolla Friends Meeting House, and three Palo Alto churches granted sanctuary to another AWOL sailor from the *USS Midway*.<sup>142</sup> Further, the Church of the Crossroads and the Unitarian Church in Honolulu, Hawaii, declared themselves sanctuaries, and collectively sheltered twenty-four AWOL service members as an act of protest against the war.<sup>143</sup>

One of the first recorded attempts to create a sanctuary city in the United States occurred during this time period.<sup>144</sup> On November 10, 1971, the Berkley City Council, prompted by ten churches declaring themselves sanctuaries the day before, passed a resolution “to provide a facility for sanctuary for any person who is unwilling to participate in military action” and banned any city employee from assisting in the investigation or arrest of any sanctuary seeker.<sup>145</sup> The Berkley City Manager refused to follow the resolution and the local U.S. Attorney threatened to prosecute anyone who actually provided sanctuary.<sup>146</sup>

Significantly, during the Vietnam War, sanctuary was not raised as a legal obstacle to the arrest of fugitive members of the military, and it was never offered as a defense in court.<sup>147</sup> Instead, sanctuary was offered as a

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* The sailors were flown to their ship, sentenced to thirty days in corrective custody, and then eight of the nine were discharged from the Navy. *Id.* at 167–68.

<sup>142</sup> *Id.* at 168–69. After four days, the Navy arrested Richard Larson of the *USS Midway* and convicted him of being AWOL, but then honorably discharged him from the Navy as a conscientious objector. *Id.*

<sup>143</sup> *Bridges v. Davis*, 443 F.2d 970, 971–72 (9th Cir. 1971) (per curiam).

<sup>144</sup> BAU, *supra* note 14, at 170 (It was “a new form of sanctuary unknown in the United States history.”).

<sup>145</sup> *Id.* at 168 (internal quotation marks omitted).

<sup>146</sup> *Id.*

<sup>147</sup> CRITTENDEN, *supra* note 94, at 63 (Sanctuary seekers were often arrested in church and the “sanctuary concept was never tested in court.”); see BAU, *supra* note 14, at 169 (“[T]here was still some invocation of the ancient religious privilege even though the sanctuary churches acknowledged that such a privilege would not be recognized by law.”).

religious-based act of civil disobedience to protest the unpopular war.<sup>148</sup> Further, law enforcement officials rarely honored sanctuary because of the absence of its legal grounding.<sup>149</sup>

During Operation Desert Storm, there was a brief resurgence of sanctuary. Three soldiers fleeing military service took sanctuary in the Riverside Church of New York.<sup>150</sup> At least fifteen churches reportedly provided refuge to service members.<sup>151</sup>

At least one individual has sought sanctuary in the United States because of the recent hostilities in Iraq and Afghanistan.<sup>152</sup> On March 27, 2003, a soldier on the verge of deployment to Iraq left his unit at Fort Hood, Texas, and sought sanctuary at the St. John Vianney Catholic Church in Round Rock, Texas.<sup>153</sup> Specialist Ralph Padula, an eleven-year Army veteran and military policeman, alleged that his emotional health began to deteriorate following the death of his girlfriend, and he contacted the church after his request to be discharged as a conscientious objector was denied.<sup>154</sup> An opponent of the war, St. John Vianney's priest offered

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<sup>148</sup> CRITTENDEN, *supra* note 94, at 63 (“It was seen as an act of civil disobedience, rooted in moral opposition to an unjust war, a political protest dramatizing a conflict between individual conscience and government.”); see BAU, *supra* note 14, at 169 (“[T]he primary purpose of proclaiming and offering sanctuary was to emphasize the moral objections to the war in Vietnam.”).

<sup>149</sup> BAU, *supra* note 14, at 170 (“[T]he sanctuaries were all eventually invaded by the civil or military authorities . . . .”); see *Bridges v. Davis*, 443 F.2d 970, 972 (9th Cir. 1971) (per curiam) (“In early September, 1969, Armed Service policemen entered the church sanctuaries and arrested [twelve] fugitives who were AWOL.”); Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168, 169 (1983) (noting two cases in which “federal officers eventually entered the churches and arrested individuals”).

<sup>150</sup> Laurie Goodstein, *Churches Give Resisters Shelter from War's Storm*, WASH. POST, Feb. 27, 1991, at A3.

<sup>151</sup> *Id.*; see *S.F. Cop Fights Going to Gulf War*, S.F. CHRONICLE, Jan. 23, 1991, at A7 (discussing National Guardsman who sought sanctuary in a church in San Francisco).

<sup>152</sup> In 2006, a Methodist Church in Tacoma, Washington declared itself a sanctuary for service members, but had yet to receive any sanctuary applications. Mike Barber, *Troops Refusing Iraq Duty Get a Haven*, SEATTLE POST-INTELLIGENCER (June 15, 2006, 10:00 PM), [http://seattlepi.nwsourc.com/local/273988\\_sanctuary15.html](http://seattlepi.nwsourc.com/local/273988_sanctuary15.html).

<sup>153</sup> Eileen E. Flynn, *AWOL Soldier Seeks Sanctuary in Church*, AUSTIN AM.-STATESMAN (Mar. 29, 2003), <http://mo.statesman.com/asection/content/news/iraq/0303/0330awol.html>.

<sup>154</sup> *Id.* Padula originally contacted his ex-wife, a youth minister at St. John Vianney Church. *Id.* Army officials denied that Padula requested conscientious objector status prior to his unit receiving orders to deploy. *Id.*

sanctuary to the AWOL soldier, although he acknowledged that the “ancient church tradition . . . carries little legal weight today.”<sup>155</sup> On April 9, 2003, Padula turned himself in to military authorities at Fort Hood.<sup>156</sup>

Furthermore, a U.S. soldier took sanctuary in a Canadian church. Rather than deploy to Iraq for a second tour of duty, Army Specialist Rodney Watson fled to Canada in November 2006, and he applied for asylum.<sup>157</sup> On September 18, 2009, Watson obtained sanctuary at the First United Church in Eastside, Canada—the first Canadian church to grant sanctuary to a U.S. soldier—after Watson’s asylum application had been denied.<sup>158</sup> Similar to the United States, Canada does not recognize sanctuary as a legal right.<sup>159</sup>

## B. *Illegal Immigrants*

### 1. *The Sanctuary Movement of the 1980s*

During the 1980s, thousands of Salvadorans, Guatemalans, and Nicaraguans fled their countries’ civil wars, and they illegally entered the United States across the Mexican border.<sup>160</sup> Federal officials increased surveillance along the border and actively deported the illegal aliens.<sup>161</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> Eileen E. Flynn, *Objecting Soldier Back at Fort Hood*, AUSTIN AM.-STATESMAN, Apr. 10, 2003, <http://www.statesman.com/nationworld/content/news/Iraq/0403/0410sanctuary.html>.

<sup>157</sup> Chris Cannon, *The Deserter*, VANCOUVER MAG., Mar. 28, 2011, [http://www.vanmag.com/News\\_and\\_Features/The\\_Deserter?page+0%2CO](http://www.vanmag.com/News_and_Features/The_Deserter?page+0%2CO). Trained as a cook, Watson alleged that, in Iraq, he was required to search vehicles for explosives, detain prisoners, and operate X-ray equipment, despite being untrained to perform the tasks. *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (“Technically, Canadian Border Services could go in and take him, but the public-relations image of the government would take a beating.”); see also Mike Howell, *Illegal Asylum Seekers Remain in Church Sanctuary in Vancouver*, VANCOUVER COURIER, June 7, 2012, <http://www.vancourier.com/errorpage/illegal-asylum-seekers-remain-in-church-sanctuary-in-vancouver-1.379696> (“They are in violation of Canada’s immigration law and are in Canada illegally, said Faith St. John, a spokesperson for the border services agency . . .”).

<sup>160</sup> See María Cristina García, “*Dangerous Times Calls for Risky Responses*”: *Latino Immigration and Sanctuary, 1981–2001*, in LATINO RELIGIONS AND CIVIC ACTIVISM IN THE UNITED STATES 159, 160 (Gastón Espinosa et al. eds., 2005). By 1990, nearly 1 million Central Americans illegally entered the United States. *Id.*

<sup>161</sup> *Id.* at 162. The United States deported between 500 and 1,000 Guatemalans and Salvadorans per month. GOLDEN & MCCONNELL, *supra* note 124, at 1.

Numerous religious and civic groups along the border areas provided various levels of humanitarian assistance to these aliens.<sup>162</sup>

In March 1982, the Southside Presbyterian Church of Tucson, Arizona, became the first church to declare publicly itself a sanctuary for refugees who were fleeing war in Central America.<sup>163</sup> On the same day, five churches in Berkley, California, also declared themselves sanctuaries.<sup>164</sup> The sanctuary movement in support of Central Americans spread quickly. In July 1982, the Wellington Avenue Church, supported by fifty-nine churches and synagogues in the Chicago area, publicly proclaimed itself a sanctuary for El Salvadoran refugees.<sup>165</sup> On December 2, 1982, St. Benedict the Moor and Cristo Rey in Milwaukee, Wisconsin, became the first two Catholic churches to declare publicly themselves sanctuaries for Central American refugees.<sup>166</sup> Eventually, the sanctuary movement boasted over 300 churches serving as sanctuaries, with as many as 2,000 additional churches providing logistical support.<sup>167</sup> Numerous religious organizations publicly endorsed the sanctuary movement.<sup>168</sup>

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<sup>162</sup> García, *supra* note 160, at 163.

<sup>163</sup> MIRIAM DAVIDSON, *CONVICTIONS OF THE HEART: JIM CORBETT AND THE SANCTUARY MOVEMENT* 72 (1988). Reverend John Fife of the Southside Presbyterian Church justified the action by citing to “United Nations policy, U.S. and international law, and Jesus’ own example.” David B. McCarthy, *Lundy, Mary Ann Weese*, in *ENCYCLOPEDIA OF RELIGIOUS CONTROVERSIES IN THE UNITED STATES* 269, 269 (George H. Shriver & Bill J. Leonard eds., 1997). In Europe, some churches began to grant sanctuary to migrants starting in the 1970s. LIPPERT, *supra* note 92, at 4.

<sup>164</sup> García, *supra* note 160, at 164.

<sup>165</sup> Kathleen L. Villarruel, Note, *The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values*, 60 S. CAL. L. REV. 1429, 1433–34 (1987).

<sup>166</sup> GOLDEN & MCCONNELL, *supra* note 124, at 11.

<sup>167</sup> Villarruel, *supra* note 165, at 1433. “Between 1982 and 1987, some 400 to 500 churches decided to offer sanctuary to Central Americans.” RABBEN, *supra* note 24, at 136.

<sup>168</sup> GOLDEN & MCCONNELL, *supra* note 124, at 53–54 (“[G]rass-roots denominational pressure had successfully committed formal national adjudicatory/conference endorsement of sanctuary by almost every national Protestant denomination.”); García, *supra* note 160, at 164 (“More than twenty U.S. religious bodies endorsed the sanctuary movement, including Pax Christi, the American Lutheran Church[,] and the Unitarian Universalist Service Committee.”). The sanctuary movement remained active until the early 1990s. LIPPERT, *supra* note 92, at 4.

Despite this support, the controversial topic divided congregations within the American religious community.<sup>169</sup> Although some individual priests, nuns, and bishops voiced support, conservative bishops opposed the sanctuary movement, and the Catholic Church in the United States elected not to take an official, public position on the movement.<sup>170</sup> “[T]he National Association of Evangelicals refused to endorse [the movement] . . . .”<sup>171</sup>

The sanctuary movement spread to Canada, albeit on a much smaller scale. In January 1984, church officials and local supporters declared St. Andrew’s United Church (near Montreal) as a sanctuary for a Guatemalan migrant facing deportation.<sup>172</sup> The sanctuary providers characterized their actions as “God’s law coming before the government’s.”<sup>173</sup> This public declaration of sanctuary was the first invocation of the tradition in Canadian history.<sup>174</sup>

In the twenty years following the Montreal incident, Canada experienced thirty-six more invocations of sanctuary,<sup>175</sup> which involved 261 migrants<sup>176</sup> representing twenty-eight different nationalities.<sup>177</sup> Unlike the United States, Canada’s sanctuary experience was not the product of an organized movement, but rather was “a collection of local incidents that were disconnected socially and geographically from one another.”<sup>178</sup> During the twenty-year time period, Canadian officials never entered a

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<sup>169</sup> García, *supra* note 160, at 166 (indicating this movement “divide[d] religious congregations”).

<sup>170</sup> *Id.*; RABBEN, *supra* note 24, at 138; *see also* United States v. Elder, 601 F. Supp. 1574, 1578 (S.D. Tex. 1985) (noting disagreement among members of the Catholic faith concerning sanctuary movement activists); GOLDEN & MCCONNELL, *supra* note 124, at 54 (“The National Council of Catholic Bishops has not endorsed sanctuary but individual bishops have.”). Among the public supporters of sanctuary was the Archbishop of the Catholic Diocese of Milwaukee. *Id.* at 6.

<sup>171</sup> RABBEN, *supra* note 24, at 138.

<sup>172</sup> LIPPERT, *supra* note 92, at 1.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1, 15

<sup>175</sup> *Id.* at 2.

<sup>176</sup> *Id.* at 35. Three sanctuary incidents accounted for 166 migrants. *Id.*

<sup>177</sup> *Id.* at 36.

<sup>178</sup> *Id.* at 13.

legitimate church to arrest migrants seeking sanctuary, and they did not charge any sanctuary providers.<sup>179</sup>

Unlike Canada, the United States Government actively opposed the sanctuary movement. The Reagan Administration reminded sanctuary supporters that sanctuary was recognized neither by common law nor statutory law.<sup>180</sup> Further, the Department of Justice reminded religious leaders “that church workers and clergy were not exempt from prosecution.”<sup>181</sup>

The Department of Justice’s Office of Legal Counsel (OLC) issued a legal opinion, rejecting sanctuary as a legal right in the United States under federal, state, or common law.<sup>182</sup> The OLC opinion noted that sanctuary had never “been recognized here by any state or federal legislation.”<sup>183</sup> Further, the opinion cast doubt on the ability to invoke sanctuary as a legal defense to a charge of illegally harboring an alien—a violation of 8 U.S.C. § 1324.<sup>184</sup> The opinion also registered its doubt “that a court would recognize sanctuary as legally justified under the Free Exercise Clause of the First Amendment.”<sup>185</sup> Members of a religion are not required to forgo a particular practice by virtue of enforcement of immigration laws, and “disagreement with the government’s treatment of illegal aliens is not a religious belief that is burdened by enforcement of immigration laws.”<sup>186</sup> Rather than attempting to invoke sanctuary for illegal aliens escaping from strife-filed nations, the proper course of action, according to OLC, was to take advantage of the “statutory right to file for asylum in this country.”<sup>187</sup>

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<sup>179</sup> *Id.* at 40 (footnotes omitted) (“No Canadian sanctuary incident between 1983 and 2003 saw immigration officials or police enter a legitimate church to arrest those granted sanctuary on immigration charges or to charge their providers with an offence.”). In 1998, local police in Montreal entered a church to arrest a sanctuary seeker, but police authorities considered the church to be illegitimate. *Id.* at 176. In March 2004, Quebec City police entered a church to arrest an Algerian migrant, generating a significant public outcry. *Id.*

<sup>180</sup> García, *supra* note 160, at 165.

<sup>181</sup> *Id.* (“Violators faced fines of up to \$2,000 and imprisonment for up to five years for harboring or smuggling and \$10,000 fines and five years [of] imprisonment for conspiracy to harbor.”); *see also* GOLDEN & MCCONNELL, *supra* note 124, at 1 (“The U.S. government calls what they are doing criminal . . .”).

<sup>182</sup> Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168, 168–70 (1983).

<sup>183</sup> *Id.* at 170.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 171 (citing *Sherbert v. Verner*, 374 U.S. 398, 403–06 (1963)).

<sup>187</sup> *Id.* (citing 8 U.S.C. § 1158 (2012)).

In the early 1980s, federal law enforcement officials conducted surveillance operations on sanctuary workers.<sup>188</sup> In addition, undercover federal agents entered sanctuary churches in Arizona wearing “body bugs” to record conversations.<sup>189</sup> Numerous members of the sanctuary movement were arrested, convicted, or both for their activities.<sup>190</sup> Of those convicted, some received prison sentences.<sup>191</sup> Significantly, at least two courts rejected a freedom-of-religion defense to sanctuary activities under the First Amendment.<sup>192</sup>

Operation Sojourner—the largest federal operation against the sanctuary movement—began as a covert operation involving two Immigration and Naturalization Service (INS) agents and two informants infiltrating the sanctuary movement in Arizona.<sup>193</sup> The agents and informants attended numerous meetings over a ten-month period, accumulating over 100 tape-recorded conversations.<sup>194</sup> Nearly 100 supporters of the sanctuary movement were arrested, sixteen were initially indicted, and eleven eventually went to trial.<sup>195</sup> After a six-month trial, the jury convicted eight of the eleven defendants.<sup>196</sup> A groundswell of support for the defendants followed their convictions; hundreds of letters seeking

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<sup>188</sup> García, *supra* note 160, at 166.

<sup>189</sup> *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 520 (9th Cir. 1989). Cf. Villarruel, *supra* note 165, at 1431 (discussing government informants taping discussions at bible study groups).

<sup>190</sup> García, *supra* note 160, at 166–67; *see also* *United States v. Merkt*, 794 F.2d 950, 953 (5th Cir. 1986) (noting the two defendants were affiliated with “the self-styled sanctuary, Casa Oscar Romero”); *United States v. Elder*, 601 F. Supp. 1574, 1576 (S.D. Tex. 1985) (“[The defendant] regards Casa Romero as a sanctuary in the biblical sense.”).

<sup>191</sup> García, *supra* note 160, at 167, 172 (stating that, in 1984, Stacey Lynn Merkt became the first sanctuary worker to be sentenced to prison, receiving a sentence of 269 days’ incarceration, which was eventually reduced due to medical issues).

<sup>192</sup> *Merkt*, 794 F.2d at 954–57; *Elder*, 601 F. Supp. at 1580; *see also* LIPPERT, *supra* note 92, at 153 (“[F]ailed use of religious freedom as a legal defense in the [U.S.] sanctuary trials . . . ultimately resulted in convictions of eight providers.”).

<sup>193</sup> García, *supra* note 160, at 167. The Southside Presbyterian Church was a primary target of the operation. *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* The Department of Justice dropped charges against five defendants. *Id.* “Eleven stood trial: two Catholic priests, one nun, a Presbyterian minister, a Methodist missionary, a Catholic director of religious education, the director of . . . refugee services, a Unitarian volunteer, a Mexican lay worker from Nogales, and two Quaker volunteers.” RABBEN, *supra* note 24, at 141.

<sup>196</sup> García, *supra* note 160, at 167.



leniency for the defendants were sent to the judge overseeing the case.<sup>197</sup> Ultimately, all of the defendants received suspended sentences and three to five years of probation.<sup>198</sup>

In an apparent break with past practices, federal law enforcement agents did not arrest sanctuary seekers or providers in the church itself.<sup>199</sup> Rather than recognizing any legal protections afforded to sanctuary seekers, the practice of the federal law enforcement officials was attributed to avoiding bad publicity and creating a concomitant public relations victory for the sanctuary movement.<sup>200</sup>

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<sup>197</sup> *Id.* Forty-seven members of Congress submitted a letter seeking leniency. *Id.*

<sup>198</sup> *Id.* One commentator opined that the trial encouraged others to join the sanctuary movement and generated negative publicity for the government. *Id.* at 168–69; *see also* RABBEN, *supra* note 24, at 144 (causing the number of participating churches to increase). One of those convicted, John Fife, was subsequently “elected moderator of the General Assembly of the Presbyterian Church (USA) in 1992.” *Id.* at 143.

<sup>199</sup> GOLDEN & MCCONNELL, *supra* note 124, at 44 (“Chicago INS . . . [spokesman noted]: ‘We have enough illegal aliens without making raids on churches.’”); *see also id.* at 47 (stating that a border patrol official noted that the officials would not “touch” a Presbyterian church providing sanctuary); *id.* at 53 (“[N]o refugee has been taken from a sanctuary.”); *id.* at 71 (noting that an INS official disavowed any intent to take aliens out of a church, preferring to wait them out); RABBEN, *supra* note 24, at 132 (“[T]he INS . . . order[ed] agents not to pursue aliens into churches, schools, or hospitals.”); *id.* at 141 (“[N]o refugee in sanctuary in the 1980s was ever arrested.”).

<sup>200</sup> *See* GOLDEN & MCCONNELL, *supra* note 124, at 44 (“[T]he churches want a confrontation.”); *id.* at 47 (“[T]he government would end up looking ridiculous, especially as far as going into church property . . . . These church groups wanted publicity. They were baiting us to overreact.”); *id.* at 71 (“We[ a]re not about to send investigators into a church to start dragging people out in front of television cameras.”); *see also* Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168, 169 (1983) (“[T]he continued existence of ‘sanctuary’ depended entirely upon the authorities’ desire to avoid a confrontation.”); Emily Breslin, Note, *The Road to Liability Is Paved with Humanitarian Intentions: Criminal Liability for Housing Undocumented People Under 8 U.S.C. § 1324(a)(1)(A)(iii)*, 11 RUTGERS J.L. & REL. 214, 219–20 (2009) (noting that the government restrained itself from sending agents into churches to make arrests because of concerns that such actions would engender “bad press”).

## 2. *The New Sanctuary Movement*

The practice of providing sanctuary to illegal immigrants continues in modern times.<sup>201</sup> Referred to as the New Sanctuary Movement in the United States since at least 2006, a small number of churches in the United States have either offered sanctuary to illegal immigrants or expressed their intent to do so.<sup>202</sup> This new movement is loosely based on, or at least inspired by, the sanctuary movement of the 1980s.<sup>203</sup> Similarly, the movement is rooted in religious principles and beliefs. One sanctuary supporter described the practice as “an act of biblical hospitality.”<sup>204</sup> Other supporters of the movement “believe their actions are grounded in biblical injunctions to protect the weak, the prosecuted[,] and victims of injustice.”<sup>205</sup>

Although based on the 1980s sanctuary movement, the New Sanctuary Movement has not achieved the same level of popularity. By mid-2008, approximately 450 churches and sanctuaries had formed thirty-five sanctuary coalitions, but only twelve churches actually provided sanctuary to illegal immigrants.<sup>206</sup> Many in the religious community feared becoming involved in the movement.<sup>207</sup> Similar to the 1980s sanctuary movement, federal law enforcement officers have apparently followed a practice of not entering the churches to arrest illegal aliens.<sup>208</sup>

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<sup>201</sup> See RABBEN, *supra* note 24, at 147. In Europe, isolated cases of church sanctuary being granted to refugees from the 1980s to the present have been reported in “Germany, France, Belgium, the Netherlands, Norway, Switzerland, and Australia.” *Id.*

<sup>202</sup> *Churches Offer Sanctuary to Illegal Aliens*, WASH. TIMES, May 10, 2007, at A3; see also Julia Duin, *California’s Safe-House Soldiers*, WASH. TIMES, May 30, 2008, at A1 (discussing a Catholic church in Los Angeles and a Lutheran church in North Hollywood starting a “new sanctuary movement”).

<sup>203</sup> *Churches Offer Sanctuary to Illegal Aliens*, *supra* note 202, at A3.

<sup>204</sup> Duin, *supra* note 202, at A14.

<sup>205</sup> Editorial, *Illegals in American Churches*, WASH. TIMES, May 29, 2008, at A18 (“However, immigration officials are reluctant to step onto church property . . .”).

<sup>206</sup> Julia Duin, *Safety Under the Steeple: Churches Fuel Movement to Aid Illegal Immigrants*, WASH. TIMES, May 27, 2008, at A1.

<sup>207</sup> *Id.*

<sup>208</sup> *Churches Offer Sanctuary to Illegal Aliens*, *supra* note 202, at A3 (“[A government spokesperson] . . . [did confirm its view that federal] agents had the authority to arrest anyone violating immigration laws.”); see also RABBEN, *supra* note 24, at 218 (“[D]espite the lack of protection for sanctuary in U.S. law, in recent years federal officials have made it known that they will not raid churches, schools[,] or hospitals to apprehend undocumented migrants.”); Duin, *supra* note 206, at A1 (“Churches are not legally exempt  
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### C. Sanctuary Cities

The concept of a sanctuary city has existed at least since biblical times and is found in many different cultures.<sup>209</sup> The Hawaiians, for example, possessed two cities of refuge, “which afforded an inviolable sanctuary even to the vilest criminal who entered their precincts and during war offered safe retreat to all the noncombatants of the neighboring districts who flocked into them, as well as to the vanquished.”<sup>210</sup>

In early medieval England, certain cities, known as liberties, received fugitives and were beyond the reach of royal authority.<sup>211</sup> Liberties afforded permanent sanctuary to fugitives from the law.<sup>212</sup> Even King Henry VIII, while phasing out sanctuary in England, established seven cities of refuge for a brief period that provided protection to those guilty of minor offenses.<sup>213</sup>

In modern times, communities who oppose the nation’s immigration laws have resurrected this ancient tradition. The modern concept of sanctuary cities now refers to “jurisdictions [that] have adopted formal or informal policies limiting cooperation with federal immigration authorities.”<sup>214</sup> These jurisdictions have enacted “state laws, local ordinances, or departmental policies limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws.”<sup>215</sup> A remarkably large number of jurisdictions across the United States have followed some form of sanctuary policy. Jurisdictions within

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from immigration raids, but police tend not to come on church property.”); *Illegals in American Churches*, *supra* note 205, at A18 (“[I]mmigration officials are reluctant to step onto church property.”).

<sup>209</sup> See *infra* notes 210–13 and accompanying text.

<sup>210</sup> RABBEN, *supra* note 24, at 52 (alteration in original) (citation omitted) (internal quotation marks omitted).

<sup>211</sup> *Id.* at 64.

<sup>212</sup> *Id.* at 66.

<sup>213</sup> TRENHOLME, *supra* note 26, at 88.

<sup>214</sup> YULE KIM & MICHAEL J. GARCIA, CONG. RESEARCH SERV., RS22773, “SANCTUARY CITIES”: LEGAL ISSUES 1 (2009); see Rose Cuison Villazor, “Sanctuary Cities” and Local Citizenship, 37 *FORDHAM URB. L.J.* 573, 576 (2009) (footnote omitted) (internal quotation marks omitted) (“[M]unicipalities that have adopted sanctuary, non-cooperation, or confidentiality policies for undocumented residents.”). *But cf. Virginia Beach Ripped as ‘Sanctuary’ for Illegals*, *WASH. TIMES*, Apr. 16, 2007, at B5 (“There is no generally accepted official description of what constitutes a ‘sanctuary city’ and no federal agency awards the distinction.”).

<sup>215</sup> KIM & GARCIA, *supra* note 214, at 1 (internal quotation marks omitted).

the United States that have, or previously had, adopted some form of sanctuary policy include: Anchorage and Fairbanks, Alaska;<sup>216</sup> Chandler and Phoenix, Arizona;<sup>217</sup> Fresno, San Diego, the City and County of San Francisco, Los Angeles, and Sonoma County, California;<sup>218</sup> Chicago, Evanston, and Cicero, Illinois;<sup>219</sup> Orleans and Cambridge, Massachusetts;<sup>220</sup> Portland, Maine;<sup>221</sup> Baltimore and Takoma Park, Maryland;<sup>222</sup> Ann Arbor and Detroit, Michigan;<sup>223</sup> Minneapolis, Minnesota;<sup>224</sup> Durham, North Carolina;<sup>225</sup> Albuquerque, Aztec, Rio Arriba County, and Sante Fe, New Mexico;<sup>226</sup> Newark, New Jersey;<sup>227</sup> New York City, New York;<sup>228</sup> Ashland, Gaston, and Marion County, Oregon;<sup>229</sup>

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<sup>216</sup> LISA M. SEGHETTI ET AL., CONG. RESEARCH SERV., RS32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 26 n.85 (2006).

<sup>217</sup> *Id.* (discussing Chandler, Arizona); see also Jerry Seper, *Phoenix to Alter 'Sanctuary Status,'* WASH. TIMES, Dec. 10, 2007, at A6 (discussing how the Phoenix mayor sought to alter city's fifteen-year-old sanctuary policy).

<sup>218</sup> SEGHETTI ET AL., *supra* note 216, at 26 n.85; see also KIM & GARCIA, *supra* note 214, at 3 (San Francisco); Jerry Seper, *Suit Targets LAPD over 'Sanctuary Law,'* WASH. TIMES, Apr. 13, 2007, at A12 ("Special Order 40-which bars its officers from asking about the immigration status of persons they encounter on duty.").

<sup>219</sup> SEGHETTI ET AL., *supra* note 216, at 26 n.85; Seper, *supra* note 217, at A12 (discussing Chicago's sanctuary policy).

<sup>220</sup> SEGHETTI ET AL., *supra* note 216, at 26 n.85; see also *'Sanctuary City' Too Pricey,* WASH. TIMES, May 8, 2006, at A8 (noting that Cambridge has been a sanctuary city since 1985). Cf. Stephen Dinan, *Romney Ad Raps 'Sanctuary Cities,'* WASH. TIMES, Aug. 22, 2007, at A3 (noting four Massachusetts cities had sanctuary policies).

<sup>221</sup> SEGHETTI ET AL., *supra* note 216, at 26 n.85.

<sup>222</sup> *Id.*; see also Steve Hendrix, *Town Will Stay an Immigrant 'Sanctuary,'* WASH. POST, Oct. 30, 2007, at B2; Jon Ward, *Montgomery County Activists Seek Anti-INS Resolution,* WASH. TIMES, Dec. 2, 2002, at B1 (stating that Takoma Park, a sanctuary city, "has not enforced immigration laws since 1985").

<sup>223</sup> SEGHETTI ET AL., *supra* note 216, at 26 n.85.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* But cf. *United States v. Perez-Partida*, 773 F. Supp. 2d 1054, 1057 (D.N.M. 2011) (noting that the new Albuquerque mayor ended the sanctuary policy).

<sup>227</sup> Dinan, *supra* note 220, at A3

<sup>228</sup> SEGHETTI ET AL., *supra* note 216, at 26 n.85; see also KIM & GARCIA, *supra* note 214, at 2, 3 (noting that it was done via executive order); Dinan, *supra* note 220, at A3.

<sup>229</sup> SEGHETTI ET AL., *supra* note 216, at 26 n.85.

Austin, Houston, and Katy, Texas;<sup>230</sup> Seattle, Washington;<sup>231</sup> and Madison, Wisconsin.<sup>232</sup> Although loosely rooted in the sanctuary movement of the 1980s,<sup>233</sup> a modern link to a religion-based movement is not obvious.

In 1989, to illustrate a sanctuary policy, New York City's mayor issued an Executive Order, which prohibited:

Any [c]ity officer or employee from transmitting information regarding the immigration status of any individual to federal immigration authorities unless: (i) such employee's agency is required by law to disclose such information, (ii) an alien explicitly authorizes a [c]ity agency to verify his or her immigration status, or (iii) an alien is suspected by a [c]ity agency of engaging in criminal behavior.<sup>234</sup>

Even if a line worker suspected an alien of criminal activity, the worker had to report the suspected activity to another city official for evaluation rather than contacting federal immigration officials directly.<sup>235</sup>

Using the very broad concept of a sanctuary city, as a jurisdiction that has adopted a formal or informal policy limiting cooperation with federal immigration authorities, California may have become the first sanctuary state following its recent passage of California Assembly Bill 4 (Trust Act).<sup>236</sup> Signed into law on October 5, 2013, the Trust Act prohibits "local law enforcement officials from detaining immigrants longer than necessary for minor crimes so that federal immigration authorities can take custody of them."<sup>237</sup> "[I]mmigrants in this country illegally would have to be charged with or convicted of a serious offense to be eligible for a [forty-

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<sup>230</sup> *Id.*; see also Seper, *supra* note 219, at A12 (stating that Houston and Austin, Texas have sanctuary policies).

<sup>231</sup> SEGHETTI ET AL., *supra* note 216, at 26 n.85.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 26 ("[Modern] sanctuary cities . . . have their roots in the 1980s religious sanctuary movement by American churches." (internal quotation marks omitted)).

<sup>234</sup> *City of New York v. United States*, 179 F.3d 29, 31 (2d. Cir. 1999) (citing N.Y.C. Exec. Order No. 124 (Aug. 7, 1989)). Two subsequent mayors reissued the Executive Order. *Id.* at 32.

<sup>235</sup> *Id.*

<sup>236</sup> See Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 735 n.195 (2013) (citation omitted).

<sup>237</sup> Patrick McGreevy, *California Forges Ahead on Immigration Laws*, WASH. POST, Oct. 7, 2013, at A15.

eight]-hour hold and transfer to U.S. immigration authorities for possible deportation.”<sup>238</sup>

Supporters of sanctuary cities justify the practice under several rationales, but rarely do modern justifications include religious-based objections to immigration laws.<sup>239</sup> Supporters argue that “immigration enforcement is the responsibility of the federal government, and that local efforts to deter the presence of unauthorized aliens would undermine community relations, disrupt municipal services, interfere with local enforcement, or violate humanitarian principles.”<sup>240</sup> Some argue that state and federal collaboration on immigration enforcement leads to police misconduct and racial profiling.<sup>241</sup> Others argue that such policies actually encourage police reporting, resulting in fewer criminals on the streets.<sup>242</sup>

Opponents argue that sanctuary policies defy federal law,<sup>243</sup> encourage illegal entry of aliens into the United States,<sup>244</sup> “offer shelter to would-be terrorists by allowing illegal aliens to establish themselves as residents,”<sup>245</sup> facilitate gang activity,<sup>246</sup> and increase costs to local governments.<sup>247</sup> Some

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<sup>238</sup> *Id.*

<sup>239</sup> See Villarruel, *supra* note 165, at 1434 (“These secular entities do not invoke the traditional religious bases for sanctuary, but instead focus on the human rights issues involved.”).

<sup>240</sup> KIM & GARCIA, *supra* note 214, at 2–3; see also Seper, *supra* note 218, at A12 (“[Current immigration law] undermines community policing efforts and undercuts effective law-enforcement and anti-terrorism efforts by diverting resources and leading to additional litigation.”).

<sup>241</sup> Seper, *supra* note 218, at A12.

<sup>242</sup> Douglas G. Revlin, Letter to the Editor, *Chertoff on Sanctuary Cities*, WASH. TIMES, Sept. 13, 2007, at A18 (“When local cops pledge not to inquire about the immigration status of crime victims and witnesses, they encourage people to report crime and take more criminals off the streets.”).

<sup>243</sup> Dinan, *supra* note 220, at A3 (“[C]ities are flouting federal law . . .”).

<sup>244</sup> Seper, *supra* note 218, at A12 (“Immigration opponents argue that sanctuary laws encourage illegal entry.”); see also KIM & GARCIA, *supra* note 214, at 3 (arguing that sanctuary policies “encourage illegal immigration”).

<sup>245</sup> Seper, *supra* note 218, at A12.

<sup>246</sup> Barbara Hollingsworth, *There’s No Such Thing as a Free Sanctuary*, WASH. EXAMINER, Apr. 13, 2010, at 23 (“[H]undreds of gang members know they will not be deported—even if they are busted for selling drugs, stealing cars or other serious offenses.”).

<sup>247</sup> *Id.* (“An estimated \$243 million is spent annually [by Montgomery County, Maryland] on low-income housing, medical care, public education[,] and other human  
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point to reports of criminal misconduct that could have been avoided if local law enforcement cooperated with federal immigration officials.<sup>248</sup>

The principle legal argument against the practice is that it violates § 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>249</sup> (Immigration Reform Act), which “bars any prohibition on a federal, state, or local government entity or official’s ability to send or receive information regarding immigration or citizenship status to or from federal immigration authorities.”<sup>250</sup> Also, § 434 of the Personal Responsibility and Work Opportunity Reconciliation Act<sup>251</sup> (Welfare Reform Act) “proscribes any prohibition or restriction placed on state or local governments to send or receive information regarding [the] immigration status of an individual to or from federal immigration authorities.”<sup>252</sup>

In *City of New York v. United States*,<sup>253</sup> the Second Circuit upheld both statutes against challenges that they violated the Tenth Amendment’s anticommandeering doctrine.<sup>254</sup> The City of New York had sought declaratory and injunctive relief by arguing that the two statutes were unconstitutional and, thus, did not invalidate New York City’s Executive Order that prohibited “its employees from voluntarily providing federal immigration authorities with information concerning the immigration status of any alien.”<sup>255</sup>

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services for the county’s illegal immigrant population, including the cost of maintaining foreign-born criminals in its correctional facilities.”).

<sup>248</sup> See, e.g., Mark Cromer, *The Cost of Sanctuary Cities*, WASH. TIMES, July 30, 2008, at A23 (noting that an illegal immigrant gang member in San Francisco, who was released after being arrested rather than held for deportation, was subsequently arrested for murder).

<sup>249</sup> 8 U.S.C. § 1373 (2012).

<sup>250</sup> García, *supra* note 214, at 2. Cf. Villazor, *supra* note 214, at 577 (discussing the concern of the mayor of San Francisco that the city’s sanctuary policy violated 8 U.S.C. § 1373).

<sup>251</sup> 8 U.S.C. § 1644 (2012).

<sup>252</sup> KIM & GARCIA, *supra* note 214, at 2.

<sup>253</sup> 179 F.3d 29 (2d Cir. 1999).

<sup>254</sup> *Id.* at 31; KIM & GARCIA, *supra* note 214, at 2. “The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”” *City of New York*, 179 F.3d at 33 (alteration in original) (quoting U.S. CONST. amend. X).

<sup>255</sup> *City of New York*, 179 F.3d at 31, 33. New York City argued that “the Tenth Amendment prohibits Congress from exercising its power to regulate aliens in a way that forbids states and localities from enacting laws that essentially restrict state and local

(continued)

In the immigration context, at least one state legal opinion suggests that county and municipal sanctuary laws and policies may constitute a legal nullity. The Texas Office of the Attorney General examined whether the state legislature possessed the authority to enact laws compelling local governments to comply with federal immigration laws, concluding that the legislature did have that power, as long as Texas law was not inconsistent with federal law.<sup>256</sup> The opinion first noted that the power to regulate immigration resided exclusively with the federal government and that the Supremacy Clause of the United States Constitution “bars or preempts state and local governments ‘from taking actions that frustrate federal laws and regulatory schemes’ established in relation to immigration.”<sup>257</sup> Citing to the Immigration Reform Act and the Welfare Reform Act, the Office of the Attorney General (OAG) also noted that federal law prohibited state or local government efforts to restrict sharing information between local and federal governments.<sup>258</sup> As the OAG explained, “a local government policy that prohibits or restricts officials and employees from sharing immigration information with federal authorities will likely conflict with [§§] 1373 and 1644 and[,] thus, be a nullity.”<sup>259</sup> Because this type of a law is likely a nullity, the OAG concluded that the Texas Legislature could adopt legislation compelling local governments “to comply with any duty

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officials from cooperating in the federal regulation of aliens, even on a voluntary basis.” *Id.* at 34.

<sup>256</sup> Local Government Policies that Hinder Enforcement of Federal Immigration Laws, Tex. Att’y Gen. Op. No. GA-0699 (Mar. 19, 2009) [hereinafter Tex. Att’y Gen. Op.], available at <http://www.oag.state.tx.us/opinions>.

<sup>257</sup> *Id.* at 1 (quoting *City of New York*, 179 F.3d at 35).

<sup>258</sup> *Id.* at 2 (citing 8 U.S.C. §§ 1373, 1644 (2012)) (footnotes omitted).

<sup>259</sup> *Id.* The Texas attorney general referenced *De Canas v. Bica*, 424 U.S. 351 (1976), a United States Supreme Court decision that gave rise to three tests used to determine if federal law preempts a local government law relating to immigration. Accordingly, a court will find federal preemption if (1) a state statute “is a regulation of immigration,” (2) “there is a showing that it was the clear and manifest purpose of Congress to effect a complete ouster of state power’ in the area of regulation,” or (3) the “state statute ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ or conflicts with federal law in such a way that compliance with both a federal and state law is impossible.” *Id.* (quoting *Villas at Parkside Partners v. City Farmers Branch*, 496 F. Supp. 2d 757, 764–65 (N.D. Tex. 2007)); see also *De Canas*, 424 U.S. at 354–57, 363. The Texas attorney general determined that such a policy failed the third test of *De Canas*. Tex. Att’y Gen. Op., *supra* note 256, at 2. Congress enacted a much more comprehensive immigration law regime since *De Conas* was decided. See *Arizona v. United States*, 132 S. Ct. 2492, 2504 (2012).



they may have to cooperate in the enforcement of federal immigration laws.”<sup>260</sup> Indeed, the OAG noted that Oklahoma had enacted such legislation.<sup>261</sup>

Sanctuary policies that restrict the exchange of information about a person’s immigration status between the federal government and state or local law enforcement agencies facially violate both the Immigration Reform Act and the Welfare Reform Act.<sup>262</sup> Similarly, sanctuary policies that obstruct “the accomplishment and execution of the full purposes and objectives of Congress” in the field of immigration law may also be preempted by federal law.<sup>263</sup> Despite the seemingly obvious conflict between city and county sanctuary laws with federal immigration law, federal efforts to confront such policies appear to be sparse and largely unsuccessful.<sup>264</sup>

#### IV. CONCLUSION

No legal right of sanctuary exists within the United States, and supporters of sanctuary rarely defend their actions on legal grounds. Indeed, active participants in a sanctuary movement risk violating the law. One who knowingly protects a deserter from military authorities commits a

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<sup>260</sup> Tex. Att’y Gen. Op., *supra* note 256, at 2.

<sup>261</sup> *Id.* (citing OKLA. STAT. tit. 74, § 20(j)(F) (2012) (“[T]his section . . . allow[s] for a private right of action by any natural or legal person lawfully domiciled in this state to file for a writ of mandamus to compel any noncooperating local or state governmental agency to comply with such reporting laws.”)).

<sup>262</sup> *Cf. Arizona*, 132 S. Ct. at 2508 (“Consultation between federal and state officials is an important feature of the immigration system.”).

<sup>263</sup> *See id.* at 2505. “The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>264</sup> Jerry Seper, *GOP Bill Targets ‘Sanctuary Cities’ for Illegal Aliens*, WASH. TIMES, Sept. 19, 2007, at A3 (discussing legislation that was introduced to withhold federal funding to sanctuary cities after similar legislation in the past had failed); *see* Stephan Dinan, *Sanctuary Cities May Be Facing Legal Action*, WASH. TIMES, July 11, 2012, at A1, A14 (discussing Department of Homeland Security officials asking the Department of Justice to take legal action to force cooperation with federal immigration officials). *Cf. Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 573 (5th Cir. 2013) (“Congress passed no law concerning either ‘sanctuary cities’ or, at the opposite pole, cities that have attempted to discourage influxes of illegal aliens.”).

federal crime.<sup>265</sup> Similarly, sanctuary participants who knowingly harbor an illegal alien could violate 8 U.S.C. § 1324.<sup>266</sup>

Indeed, the Seventh Circuit recently recognized the possibility that sanctuary participants may be acting in violation of 8 U.S.C. § 1324. In *United States v. Costello*,<sup>267</sup> the court discussed the scope of that section:

8 U.S.C. § 1324(a)(1)(A)(iii), which provides that anyone 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 do any of these things], such alien in any place, including any building or any means of transportation,” is punishable by a . . . prison term . . . and a . . . fine.<sup>268</sup>

Focusing on the meaning of harboring, the court reasoned that the term has a connotation “of deliberately safeguarding members of a specified group from the authorities” and, in the immigration context, meant “materially to assist an alien to remain illegally in the United States without publicly advertising his presence but without needing or bothering to conceal it.”<sup>269</sup> The court further noted that “harboring *could* involve advertising, for instance if a church publicly offered sanctuary for illegal aliens and committed to resist any effort by the authorities to enter the church’s premises to arrest them.”<sup>270</sup>

Although no legal right to sanctuary exists, federal law enforcement agencies have appeared to adopt a practice of avoiding church arrests. Initially, civilian law enforcement officials in the United States arrested

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<sup>265</sup> See *Bridges v. Davis*, 443 F.2d 970, 971 n.1 (9th Cir. 1971) (“[S]ervicemen, when in the sanctuaries, were defying the military authorities and could well be classified as deserters.”). Federal law criminalizes the knowing harboring, concealment, protection, or assistance of a deserter. 18 U.S.C. § 1381 (2012).

<sup>266</sup> Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168, 169 (1983) (“The housing of illegal aliens by churches would appear to be a violation of 8 U.S.C. § 1324(a)(3), which forbids the harboring of illegal aliens.”); see Breslin, *supra* note 200, at 215 (footnote omitted) (“When [a church] open[s] its doors to undocumented members of the community, [the church is] potentially criminally liable for ‘harboring’ illegal aliens . . .”).

<sup>267</sup> 666 F.3d 1040 (7th Cir. 2012).

<sup>268</sup> *Id.* at 1041–42 (alteration in original) (quoting 8 U.S.C. § 1324(a)(1)(A)(iii) (2012)).

<sup>269</sup> *Id.* at 1044, 1047.

<sup>270</sup> *Id.* at 1047.

sanctuary seekers in churches.<sup>271</sup> Although there has been no reported case of a soldier taking sanctuary in a military chapel, military police entered military chapels to arrest, remove, or arrest and remove antiwar protesters in the past.<sup>272</sup> Additionally, during the Vietnam War, military police entered two civilian church sanctuaries in Hawaii and attempted to arrest twenty-four AWOL service members seeking refuge.<sup>273</sup> In modern times, however, federal law enforcement officials appear to avoid church arrests. The reluctance to effectuate an arrest within a church is not in recognition of any legal right to provide or receive sanctuary, but rather appears to be a prudent practice to avoid bad publicity.<sup>274</sup>

Despite lacking a legal grounding and disregarding the potential for prosecution, church communities and clergy continue to invoke sanctuary, usually as a religious act of conscience intended to help those perceived to be the unjust object of law enforcement efforts. The modern invocation of the ancient privilege is most prevalent in the case of illegal aliens and, to a lesser extent, war resisters. In contrast, sanctuary city laws are rarely based in religion. Rather, those laws appear to be municipal acts of civil disobedience or, at least, public pronouncements of displeasure with federal immigration law.<sup>275</sup>

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<sup>271</sup> BAU, *supra* note 14, at 164. A fugitive, who sought sanctuary after refusing induction during the Vietnam War, was arrested in a Methodist church in Greenwich Village, New York. *Id.* During the Vietnam War, “the sanctuaries were all eventually invaded by the civil or military authorities.” *Id.* at 170.

<sup>272</sup> BARBARA HABENSTREIT, *MEN AGAINST WAR* 196 (1973). During the Vietnam War, “two dozen soldiers tried to hold a prayer meeting against the war in an army chapel, and several were arrested.” *Id.*; see TOM WELLS, *THE WAR WITHIN: AMERICA’S BATTLE OVER VIETNAM* 529–30 (1994). In November 1971, Air Force security police removed antiwar protesters from the Air Force Academy’s Protestant and Catholic chapels. *Id.*

<sup>273</sup> *Bridges v. Davis*, 443 F.2d 970, 972 (9th Cir. 1971). Twelve military fugitives were apprehended, but the remainder escaped. *Id.*

<sup>274</sup> *Illegals in American Churches*, *supra* note 205, at A18 (observing that churches only offer sanctuary to immigrants who are “both desperate and likeable enough to warrant public sympathy”); see also Frank Bruni, *At the Vatican, up Against the World*, N.Y. TIMES, Mar. 28, 2010, at WK1 (“But[, by not reporting sexual abuse cases, the Catholic Church sought] to insulate the church from outside interference and condemnation.”); Frank Bruni, *The Faithful’s Failings*, N.Y. TIMES, July 23, 2013, at A21 (“A sex-abuse scandal [in an institution of Orthodox Judaism] would[ no]t have been a great fund-raising tool. The school made the conscious and craven decision to protect its reputation.” (internal quotation marks omitted)).

<sup>275</sup> See *supra* Part III.C.

Within the United States, the government's current response to sanctuary appears to have shifted from active resistance to a grudging tolerance of this legal anachronism.<sup>276</sup> Given the continued sense of sacredness and inviolability associated with religious structures in this country, tolerance of sanctuary at the individual church level is unlikely to change. The same cannot be said with reference to sanctuary city laws, which do not enjoy the protective religious shroud and are a direct challenge to federal legal supremacy.

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<sup>276</sup> See *supra* Parts II.C–III.C.