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The Rise of the Sanctuary Congregation



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with contributions from Michele Garnett McKenzie

Since the 2016 U.S. presidential election, the concept of sanctuary is noticeably becoming part of our national discourse. With an administration that has made the removal of undocumented immigrants a national priority, an increasing number of congregations across the United States (and across Minnesota) are faced with the decision of whether or not to offer support and protection to the undocumented. But what are the legal ramifications? And what issues do congregations face as they discern their role in what is becoming a newly galvanized sanctuary movement? To answer these questions, it helps to understand what sanctuary is, its historical role in our country, and the considerations congregations must balance.

What is Sanctuary?

While there is no definition of the word in a legal sense, in its most simple terms, sanctuary refers to a place of refuge and protection. The word is also used to define a holy and consecrated place. While it is tempting to believe such places have immunity from the law, this is a misconception. When we talk about sanctuary in the current political climate, we are typically referring to places of worship that have taken some form of action to provide support to undocumented immigrants. When we talk about sanctuary, we are not talking about places that shield such individuals from the law.

A Brief History of the Sanctuary Movement in the United States

Sanctuary has a long tradition rooted in Judeo-Christian norms, and it can be traced back to medieval England, where churches provided legal protection to fugitives fleeing the law. Under this early asylum, once inside the church, fugitives had 40 days to either surrender to the authorities and stand trial for their crime (punishment for which could include execution) or confess their guilt and go into permanent exile. The benefit of sanctuary, therefore, was to delay a legal decision and enable fugitives to negotiate other options. Sanctuary as a legal procedure was outlawed in England in 1623. However, the use of sanctuary to provide protection to those most vulnerable continues to this day, mainly because the sanctuary practice of the early church brought to light the notion of sanctuary as a sacred and moral duty. Consequently, there have been many examples throughout the ages of sanctuary being offered to those fleeing violence: convents that

housed battered women in the Middle Ages, the Underground Railroad that helped slaves escape to freedom in the 19th century, and families that hid European Jews from Nazi terror in the 20th century.

The modern sanctuary movement began in the 1980s, when Presbyterian minister John Fife wanted to help Central American refugees apply for asylum in the United States. He started a nonprofit organization to help them do so, but of the 13,000 applications filed, only a little more than 300 were approved. Fewer than 2 percent of asylum seekers from Guatemala and El Salvador were granted asylum. Those individuals denied were sent back to their home countries. In response to what he felt was an unfair and politically motivated application of the law—the United States was providing significant military assistance to the Guatemalan and Salvadoran governments whose atrocities had forced hundreds of thousands of people to flee—Fife started a secret smuggling operation which became known as the “Sanctuary Movement.” Member churches declared themselves official sanctuaries and committed themselves to providing food, shelter, and legal advice. Soon over 500 churches of many faiths joined the movement; public pronouncements of support were issued by leading religious organizations. This was in defiance of federal laws against smuggling, transportation, and harboring of undocumented aliens. The movement won the sympathies of many, and in 1984, it received an international human rights award. Eventually, Fife and other movement leaders were brought to trial. The defendants argued that their actions represented the call of the Gospel and an exercise of religious freedom. Fife and five others—including a priest and a nun—were convicted.

Fifteen years later, an initiative known as the New Sanctuary Movement took shape with coalitions of congregations in major cities throughout the country. As immigration enforcement and detention sharply increased, these congregations opened their doors to provide refuge. Unlike its predecessor, the New Sanctuary Movement focused on passing policy and legislation to stop or slow down deportations. It ultimately helped influence the Department of Homeland Security (DHS) to keep families together when deporting individuals, and it played a role in shaping President Barack Obama’s

executive actions on immigration, which offered benefits through executive orders after congressional inaction. The New Sanctuary Movement expanded the traditional meaning of sanctuary to a fight for immigration reform.

Sanctuary Congregations Today

Across the United States more and more congregations are going through a sanctuary discernment process. Since November 2016, nearly 30 congregations throughout Minnesota have declared their places of worship as spaces of sanctuary to immigrants seeking refuge. They see sanctuary as a sacred duty. Many believe offering sanctuary is a step toward making the conditions associated with sanctuary—peace, security, safety—the norm rather than the exception.

There are two broad types of sanctuary congregations in Minnesota. The first creates a safe place for individuals and/or families in immediate danger of deportation; these congregations offer shelter. The second is a supporting congregation, which provides tangible and physical resources to congregations offering shelter. Such resources could include financial assistance, food, clothing, toiletries, medical support, legal support, and entertainment. As they discern their level of involvement in this new movement, congregations are faced with a number of legal questions.

Places of Worship are Still Considered “Sensitive Locations”

On October 24, 2011, DHS issued a memorandum entitled Enforcement Actions At or Focused On Sensitive Locations to field office directors of U.S. Immigration and Customs Enforcement (ICE)—the agency responsible for immigration enforcement activities within the United States. The memorandum states that immigration enforcement activities such as arrests, interviews, searches, and surveillance should generally be avoided at sensitive locations and they should require either prior approval from an appropriate supervisory official or exigent circumstances necessitating immediate action. Sensitive locations include places of worship; schools (including colleges and universities); hospitals; sites of public religious ceremonies, such as funerals and weddings; and sites during the occurrence

of a public demonstration, such as marches, rallies, and parades. Courts, however, are not considered sensitive locations; separate guidance indicates enforcement actions at courthouses will only be against “individuals falling within the public safety priorities of DHS” and “will, whenever practicable, take place outside the public areas of the courthouse.”

On February 20, 2017, DHS Secretary John Kelly signed a memorandum implementing President Donald Trump’s executive order entitled Border Security and Immigration Enforcement Improvements. In it, DHS declares the memorandum “supersedes all existing conflicting policy directives, memoranda, and other guidance” regarding the subject matter of immigration enforcement. The next day, DHS updated its website to state the sensitive locations policy remains in effect. Of course, this policy can be revoked or modified.

Criminal Liability Under 8 U.S. Code § 1324

Federal law imposes criminal liability on any person who engages in smuggling another person into the United States; harboring another person in the United States; transporting another person in the United States in furtherance of that person’s illegal presence; encouraging or inducing another person to come to the United States illegally; or engaging in any conspiracy to commit—or aiding or abetting another person to commit—any of the preceding acts. The two provisions of the statute that concern most sanctuary congregations are the antiharboring provision and the antitransporting provision. (Because different congregations have different organizational structures, the question of precisely who may face criminal charges is outside the scope of this article.)

Harboring

The antiharboring provision of § 1324 imposes criminal liability on any person who “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.” To establish a violation of the harboring provision, normally the

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government must establish the defendant's conduct facilitated a person's remaining in the United States illegally and that the defendant prevented government authorities from detecting that person's presence.¹

Many sanctuary congregations believe because they openly provide shelter, they are not violating the antiharboring provisions of the law. And because case law in some parts of the country requires the government to prove an act or an intention of concealment in order to impose liability, many congregations go so far as to notify federal authorities they are providing shelter to an individual. For congregations in Minnesota, it is important to note that, while these cases may influence other courts, neither the Eighth Circuit nor the U.S. Supreme Court has answered the question of whether or not merely providing shelter is sufficient to violate the harboring provisions.

Transporting

Section 1324 also imposes criminal liability on any person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves, or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of the law." Here, the Eighth Circuit has provided guidance on the elements required to impose liability under the antitransporting provision. To establish a violation for transporting, the government must prove: (1) the defendant transported or moved an alien within the United States; (2) the alien was in the United States in violation of the law; (3) the defendant knew or acted in reckless disregard of this fact; and (4) the defendant acted willfully in furtherance of the alien's illegal presence.²

This would suggest that if a sanctuary congregation in Minnesota transported an

immigrant to a doctor's appointment, or to school, or to a grocery store, such action would arguably not meet the requirements for a transporting violation. Whereas, transporting someone out the back door, putting the person in the car, and driving away while authorities were at the front door could be sufficient for a conviction.

Criminal Liability Under Other Statutes

Congregations should be aware that other statutes exist—both federal and local—that may impose liability. For example, 18 U.S. Code § 1071 criminalizes the harboring of criminals from justice. While most immigration violations are charged as civil offenses in administrative removal proceedings, certain immigration violations—including illegal entry into the United States—may be charged under criminal provisions. In the event a person taking sanctuary has been charged with an immigration-related or other crime, federal criminal liability under § 1071 may attach. Additionally, the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001 imposes criminal liability for individuals who harbor a person whom they know or have reasonable grounds to believe has committed, is about to commit—or who provides material support or resources knowing they are to be used in preparation for or in carrying out—a terrorist act. While the courts have held that these statutes do not prohibit all forms of aid, sanctuary congregations should consult with experienced legal counsel.

Protecting Individuals or Provoking Change?

While congregations may want to weigh their exposure to criminal liability, they must remember the individuals or families taking sanctuary remain at risk of arrest, detention, and deportation. Those taking sanctuary must have experienced legal counsel—expert in immigration law—who can advise them of legal options and advocate for them with federal immigration officials. Congregations should prepare for the potential tension, often inherent in direct action, between the needs of those affected—which may change over time—and the goals of a movement focused on policy change.

Throughout the ages, many places of worship have felt called by their faith to offer sanctuary to those who need it. This still rings true today, with more and more congregations committing themselves to serve as sanctuaries under an administration intent on expanding its efforts to deport undocumented immigrants, even though such congregations have no legal authority to prevent the deportations. And while the previous iteration of the sanctuary movement taught many lessons, sanctuary congregations today must understand that the federal government has wide discretion when deciding whether or not to press federal charges against them. Congregations wishing to be sanctuary congregations must assess the risk of that decision. For many places of worship in Minnesota and throughout the country, the decision to participate as a sanctuary congregation is solely an act of faith. For others, these legal considerations may help inform their faith-based decision

¹ See *U.S. v. McClellan*, 794 F.3d 743 (7th Cir. 2015); *U.S. v. Vargas-Cordon*, 733 F.3d 366 (2d Cir. 2013); *U.S. v. You*, 382 F.3d 958 (9th Cir. 2004) *but see U.S. v. Acosta de Evans*, 531 F.2d 428 (9th Cir. 1976) ["harbor" means to afford shelter to].

² *U.S. v. Hernandez*, 913 F.2d 568 (8th Cir. 1990).



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