



Episcopal Diocese of Massachusetts

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May 15, 2017

To: Clergy, Wardens, and Vestries of the Episcopal Diocese of Massachusetts
From: Edward Notis-McConarty, Chancellor
Re: Sanctuary Parishes

This letter compiles resources for parishes of the Episcopal Diocese of Massachusetts as they consider what steps, if any, to take in response to the increased federal emphasis on deporting or detaining undocumented immigrants. In recent months, a number of Episcopal parishes — like innumerable congregations of various other faiths — have considered whether to become sanctuary parishes.¹

The term “sanctuary parish” may mean different things to different parishes. As used in this letter, the term means a parish that has chosen to assist undocumented immigrants by providing them shelter and assistance, including assistance with legal needs and simple day-to-day needs.

The establishment of a sanctuary parish involves a number of nuanced legal issues, and therefore is an undertaking best initiated in consultation with legal counsel. Nonetheless, there are a several general principles that may inform the discussion of whether to begin that process.

The first principle is that a sanctuary parish may not actively conceal the presence of undocumented immigrants. In other words, if a parish becomes a place of refuge, it may not take steps to hide the identities of those who have taken refuge.

The second principle is that if a federal or state law enforcement officer arrives at the parish with a valid warrant, any interference with the enforcement of that warrant can give rise to criminal penalties under federal and state law. By contrast, a parish need not grant access to a law enforcement officer who lacks a warrant.

¹ These considerations have received significant media attention, both in major and religious-focused media outlets. E.g., Lisa Wangsness, “Congregations in Mass. Preparing to Shelter Immigrants,” *The Boston Globe*, A1 (Feb. 21, 2017) (available at <https://www.bostonglobe.com/metro/2017/02/20/sanctuary-congregations-preparing-shelter-immigrants/Hgat97Ke2d3eItbDIgNI4H/story.html>); Laurie Goodstein, “Houses of Worship Poised to Serve as Trump-Era Immigrant Sanctuaries,” *New York Times*, A1 (Dec. 27, 2016) (available at https://www.nytimes.com/2016/12/27/us/houses-of-worship-poised-to-serve-as-trump-era-immigrant-sanctuaries.html?_r=0); Sarah Queszada, “How Churches Can Give Sanctuary and Still Support the Law,” *Christianity Today* (March 2017) (available at <http://www.christianitytoday.com/women/2017/march/how-churches-can-give-sanctuary-to-immigrants-and-still-sup.html>); Kaya Oakes, “How St. Agnes Church Became the First Jesuit Parish in America to Declare Itself a Sanctuary,” *America* (Mar. 7, 2017) (available at <http://www.americamagazine.org/politics-society/2017/03/07/how-st-agnes-church-became-first-jesuit-parish-america-declare-itself>).

The third principle is that federal law in this area is not well-defined and that uncertainty could be used to justify aggressive federal criminal law enforcement in Massachusetts. The most pertinent provision of federal law establishes that harboring an undocumented immigrant is a federal felony. The uncertainty is around what constitutes harboring. The law itself says that “any person who” knowingly (or with willful ignorance of immigration status) “conceals, harbors, or shields from detection” an undocumented immigrant may be imprisoned or fined. 8 U.S.C. § 1324(a)(1)(A)(iii). Attempting to “conceal, harbor, or shield[] from detection” an undocumented immigrant may result in the same consequences. *Id.* Whether the simple act of providing shelter — without a further act to conceal the identity or whereabouts of the immigrant — constitutes harboring is not crystal clear. Most federal appellate courts have concluded that the provision of shelter and sustenance, alone, is not a crime. Indeed that is the law in much of the northeastern United States (including in Connecticut, Vermont, New York, New Jersey, Pennsylvania, and Delaware).² But the federal appellate court with jurisdiction over Massachusetts — known as the United States Court of Appeals for the First Circuit — has not weighed in on the issue. Accordingly, a particularly aggressive federal administration could bring federal charges against individuals who provide shelter to undocumented immigrants. On the other hand, forced entry into churches may be a step beyond what public officials may be willing to risk from a political and public relations perspective. Whether such charges would be successful is an open question, but the process associated with them can be costly and daunting.

The fourth principle is that Massachusetts has not enacted any criminal prohibitions that would specifically punish the provision of shelter or sustenance to an undocumented immigrant. Nevertheless, conduct that otherwise would be illegal under state law is still illegal even where it is done to protect an undocumented immigrant. So, employees or members of a sanctuary parish may not interfere with the execution of a warrant; nor may they mislead law enforcement.

For additional context, national organizations such as the ACLU have developed primers on the major legal issues. The document, *ACLU Foundation, Sanctuary Congregations and Harboring FAQ*, accompanies this letter.³ In the context of Episcopal parishes, the Episcopal Diocese of North Carolina likewise has prepared background materials. That document, prepared by Edward L. Embree, III, Chancellor of the Episcopal Diocese of North Carolina, accompanies this letter. The Catholic Legal Immigration Network also has useful Q & A document, though it was crafted in 2014 and is not completely up-to-date.⁴

² See, e.g., *United States v. Vargas-Cardon*, 733 F.3d 366, 382 (2d Cir. 2013); *Del-Rio Mocci v. Connolly Properties*, 672 F.3d 241, 246 (3d Cir. 2012). Similar conclusions have been reached in other regions of the country, as well. *Cruz v. Abbott*, 849 F.3d 594, 600 (5th Cir. 2017); *United States v. Costello*, 672 F.3d 241, 246 (7th Cir. 2012). In the nation’s largest appellate circuit, which is known as the Ninth Circuit and includes California, the provision of shelter, without more, is considered to be criminal harboring. *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976).

³ <https://www.nwirp.org/wp-content/uploads/2017/03/ACLU-Sanctuary-FAQ-March-2017.pdf>

⁴ <https://www.dropbox.com/s/oadtcpu0vntdn0u/Catholic%20Legal%20Immigration%20Network.pdf?dl=0>

These are important and complicated issues. The foregoing is intended to provide sufficient legal background to facilitate further discussion.

Very truly yours,

Edward Notis-McConarty

ENM/MPM Jr.

A CHURCH SANCTUARY PRIMER

First a caveat. This is not intended to be an exhaustive analysis of the concept of providing sanctuary in a church or the legality or illegality of the same. This should not be relied on for legal advice in dealing with sanctuary or undocumented immigrants as I am not an immigration lawyer and have no expertise in that area. I will try to provide an outline of some of the issues and references to more thorough analyses. If clergy and congregations are in need of more specific advice, I urge you to consult a competent immigration lawyer in your community or one of the resources mentioned below or in the writings listed below.

Introduction.

The primer that follows is largely a distillation of the following writings. These resources were gathered and sent to me by Prof. Deborah Weissman of the UNC-Chapel Hill School of Law in response to a request for help sent to Martin Brinkley, Dean of the School of Law and Vice-Chancellor for the Diocese. The full text of each writing is available online at <http://bit.ly/SanctuaryDocs>.

1. Church Sanctuary for Illegal Aliens, a memorandum opinion dated October 31, 1983 by Theodore Olsen, Assistant Attorney General.
2. The Legal Rights and Risks of Sanctuary, an outline prepared by the Linnartz Immigration Law Firm of Raleigh for the 2017 Loving Our Neighbor: Embodying Sanctuary Conference sponsored by the Duke Divinity School.
3. Central Americans and Asylum Policy in the Reagan Era by Susan Gzesh. This April 1, 2006 article at Source@MigrationPolicy.org.
4. Can churches provide legal sanctuary to undocumented immigrants? by Jason Hanna and issued by CNN on February 17, 2017.
5. Harboring: Overview of the Law was issued in March 2013 by the Catholic Legal Immigration Network, Inc.
6. Immigration Raids Rapid Response. I can't tell when this was issued or exactly who is the author or issuer. Credit is given to the New Sanctuary Movement in Philadelphia for putting together the document.

Some history.¹

The concept of providing asylum or sanctuary to persons in a church or religious institution arose in the Middle Ages. It varied from place to place but in England it permitted an accused felon to seek sanctuary in a church. However, this did not give the accused felon a freeride. The sanctuary provided time for the felon to determine whether he wanted to submit to trial or confess (risking forfeiture of property) and an escape from the country.

¹ Much of this section is gleaned from a very concise and helpful Memorandum Opinion written by Theodore Olsen when he was an Assistant Attorney General and dated October 31, 1983. Some additional interesting facts about Olsen. He was the Solicitor General for the US on 9/11/01. His wife was on one of the planes that was hijacked and crashed. After his government service concluded, he was one of the team of attorneys who represented the plaintiffs who brought the lawsuit that ultimately determined the nationwide legalization of same sex marriage. The Olsen Memorandum contains numerous footnotes and citations which will not be reiterated here but are useful and I urge you to review them.

However, sanctuary for criminals in England was finally ended by statute in 1623. This becomes important for the United States because it meant that, at the time of American independence, there was no common (“judge made”) or statutory basis for sanctuary in England and, therefore, it did not become part of the common law of the US states inherited from England. Olson’s research “found no evidence that the colonists revived church sanctuary in America.”

There was a revival of an interest in sanctuary at the time of the Vietnam War. More recently the sanctuary movement took on new life in the early 1980s when Reagan era foreign policy toward the Central American countries of Guatemala, El Salvador and Nicaragua began to create a significant number of illegal immigrants from those countries. The treatment of these immigrants was complicated by the fact that the Reagan administration refused to accept that many of these folks were fleeing repressive governments being supported by the US. In any event, that is the setting for the Olson Memorandum and for many of the cases that are now cited in the area of sanctuary and other support for illegal immigrants.

The article by Susan Gzesh entitled Central Americans and Asylum Policy in the Reagan Era has a much more detailed discussion of the immigration issues emanating from Central America in the early 1980s.

The Law at Issue.

The applicable federal criminal law is 8 USC §1324 (a)(1) (iii) which makes it a crime for any person who

(iii) knowing or in reckless disregard of the fact that the 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.

The harboring prohibition is applicable to any person who knowingly harbors an undocumented immigrant and is not limited to persons who employ such immigrants or who are in the business of smuggling them. There are different interpretations within the federal circuit courts on precisely what “harboring” might mean. Unfortunately, the Fourth Circuit (of which North Carolina is a part) has no opinions on point.

The Memorandum on Harboring: Overview of the Law is excellent and explores in some detail the different interpretations of “harboring.”

Is there a First Amendment Defense?

No. Olsen’s memo offers these justifications or explanations for that result:

1. Since offering of sanctuary to an accused criminal in a church was abolished by statute in England in 1623, the notion was not incorporated in to the common law of the various states upon independence and there is no apparent record of any of the new states adopting statutes

concerning sanctuary, there is no historical tradition of offering sanctuary that would provide a defense to the federal law.

2. Disagreement with the government's treatment of illegal aliens is not a religious belief that is burdened by enforcement of immigration laws. That is, church members are not compelled by our deportation of aliens to forego a religious practice, such as resting on the Sabbath.
3. Even if granting sanctuary were seen as a legitimate religious practice, the federal government has a compelling countervailing interest in insuring that the law is enforced throughout the country.

So, can or will an ICE agent seize someone in a church or arrest the priest?

They certainly can. An agent with a warrant can arrest undocumented immigrants anywhere they might be; even in a church, synagogue or mosque. Priests harboring such immigrants have also been arrested before. In a sanctuary prosecution arising out of the Central American immigration of the 1980s, Rev. John Fife, a Presbyterian minister in Tucson, Arizona, and some lay people were arrested for harboring undocumented immigrants. They were all convicted but none were sentenced to active jail time. The outcome of the Arizona trial and split decisions in two similar prosecutions in Texas apparently dissuaded the government then from seeking further indictments against sanctuary activists.

ICE has said that its general policy is to avoid arrests in "sensitive locations" which would include churches and schools. The obvious basis for such a policy is the adverse publicity that would accompany any arrests in a church or of clergy harboring an undocumented immigrant. But policies can change and I'm not sure how good of a guide "Conventional Wisdom" is in today's climate.

What can you do?

The writing, Immigration Raids Rapid Response is essentially a toolkit for creating responses to the immigration enforcement practices now being cranked up. It has practical suggestions for organizing to prepare for responses to raids as well as references and links to other resources and organizations working on the issue.

As it turns out, Canon Rhonda Lee is an historian of non-violent social movements and is willing to share her expertise. She can be reached at rhonda.lee@episdionc.org. The North Carolina Council of Churches also has an immigrant rights project which you can learn more about at www.ncchurches.org.

Peace ,

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