

# Sanctuary Cities: The Newest Immigration Battleground

by Michael J. Davidson



Recently the Virginia state legislature considered anti-sanctuary city legislation.<sup>1</sup> Senate Bill 705 would make sanctuary cities “responsible for the full amount of any personal injury or property damage caused by an illegal alien within such locality” and Senate Bill 270 prohibited any locality from adopting any law or policy restricting full enforcement of federal immigration law, reducing state funding in response to a violation of the prohibition.<sup>2</sup> House Bill 481 prohibited corrections facilities from releasing an incarcerated alien subject to an Immigration and Customs Enforcement-issued detainer and that the alien had to be held beyond his or her scheduled release date if required by federal or state law.<sup>3</sup> Eventually, House Bill 481 and Senate Bill 270 were modified and advanced as nearly identical pieces of legislation that would forbid state law enforcement officials and facilities from releasing an incarcerated alien subject to an ICE detainer, but were vetoed by the governor.<sup>4</sup>

Used by Immigration and Customs Enforcement (ICE), an immigration detainer “advises other law enforcement agencies of its interest in individual aliens whom those agencies are currently holding in relation to criminal violations.” ICE can then apprehend undocumented aliens for purposes of removal.<sup>5</sup> A detainer does not mandate that state and local authorities hold aliens, it merely requests they do so.<sup>6</sup>

Several other states have considered anti-sanctuary city legislation as well. They

include New York, Florida, Arizona, Nebraska, Kansas, Wisconsin, Louisiana, Iowa, Georgia, and North Carolina, with North Carolina being the only state to have enacted such legislation.<sup>7</sup>

The controversial subject received widespread media attention following the fatal shooting of Kathryn Steinle in San Francisco, allegedly by an undocumented alien who had multiple felony convictions and who had been previously deported five times.<sup>8</sup> Local authorities released the alleged shooter from police

custody after failing to honor an ICE detainer request.<sup>9</sup> In the wake of the Steinle shooting, the House of Representatives passed federal anti-sanctuary legislation, “Enforce the Law for Sanctuary Cities Act,” which would make ineligible for certain grants those cities that refused to cooperate with federal immigration agents.<sup>10</sup> The legislation was opposed by the Administration and eventually failed to pass the Senate.<sup>11</sup>

### Sanctuary

The modern concept of sanctuary refers to an ancient tradition “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>12</sup> It is best visualized in the Disney adaptation of Victor Hugo’s novel, *The Hunchback of Notre Dame*, when Quasimodo sweeps down to rescue Esmeralda from the executioner’s block, quickly carrying her to the safety of Notre Dame Cathedral, shouting “Sanctuary!”<sup>13</sup>

A very robust and legalistic system of sanctuary developed in Medieval England, which provided for a period of time (usually forty days) within which the fugitive either agreed to submit to the King’s justice or, alternatively, to forfeit all property, abjure the realm, and depart the country.<sup>14</sup> Henry VIII largely eliminated any legal right to sanctuary from England and it ceased to exist within Europe by the 1700s.<sup>15</sup>

Sanctuary was not invoked in the United States until the Vietnam War, when numerous churches across the country granted protection to war resisters.<sup>16</sup> Several churches provided sanctuary to soldiers Absent Without Leave (AWOL) during Operation Desert Storm and at least two soldiers were granted sanctuary in the US and Canada during the recent military operations in Iraq after they refused to deploy.<sup>17</sup>

During the 1980s, the Reagan Administration’s aggressive deportation policies in response to a massive influx of Central American immigrants gave rise to the Sanctuary Movement. Starting in March 1982, several churches began to grant sanctuary to illegal immigrants and ultimately over 300 churches offered sanctuary with another 2,000 churches offering support.<sup>18</sup> The Department of Justice’s Office of Legal Counsel issued a legal opinion determining that no legal basis existed for sanctuary and, as a general rule,

churches that invoke it have justified it on a moral, rather than legal, grounds.<sup>19</sup>

Initially, law enforcement officials did not honor sanctuary, arresting individuals avoiding induction into the armed forces during Vietnam and AWOL military personnel within the confines of a church.<sup>20</sup> During the sanctuary movement of the 1980s, however, law enforcement agents generally avoided apprehending aliens in places of worship, largely motivated by adverse publicity concerns.<sup>21</sup>

Now, as a matter of practice or policy, law enforcement generally will not apprehend those aliens granted sanctuary by churches and other religious institutions. A 2014 media survey of law enforcement entities in Arizona, for example, determined that while most of the law enforcement agencies did not have a formal policy regarding apprehending aliens in churches, generally “they respect the sanctity of the church and try not to enter without permission, unless it’s an emergency.”<sup>22</sup> Currently, ICE policy and practice is not to apprehend undocumented aliens at specified sensitive locations, including churches and other institutions of worship, absent compelling circumstances.<sup>23</sup>

### Sanctuary Cities

Reports of sanctuary cities date back to the Bible’s six cities of refuge that provided protection to any Israelite who committed an unintentional homicide.<sup>24</sup> The first recorded instances of an attempt to establish a sanctuary city occurred in Berkeley California during the Vietnam War, when the Berkeley City Council advanced a resolution to provide sanctuary to war resisters and to ban city employee’s from cooperating in apprehending sanctuary seekers.<sup>25</sup> Although the term is occasionally linked to the sanctuary movement of the 1980s,<sup>26</sup> modern-day sanctuary city policies are not similarly motivated by exclusively religious concerns.

There is no commonly accepted definition of a “sanctuary city,” and the number of states, counties, and cities charged with embracing sanctuary policies varies widely.<sup>27</sup> In general the term refers to a jurisdiction that will not cooperate (to various degrees) with law enforcement officials enforcing some aspect of federal law, most commonly immigration law.<sup>28</sup> The level of noncooperation runs the spectrum from those jurisdictions that simply are unwilling to assist federal immigration officials in limited matters up to

those jurisdictions that actively oppose federal immigration deportation efforts.<sup>29</sup> Some policies “have included, among other things, restricting state and local police from arresting persons for immigration violations, limiting the sharing of immigration-related information with federal authorities, and barring police from questioning a person about his or her immigration status.”<sup>30</sup>

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Many sanctuary city policies appear to conflict with federal immigration law. In particular, 8 U.S.C. §1373(a) provides:

“Notwithstanding any other provision of Federal, State, or local law, a Federal, State or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”

In addition, 8 U.S.C. §1373(b) makes illegal prohibiting or in any way restricting sending information concerning an individual’s immigration status to ICE.

Proposed federal anti-sanctuary city legislation targeted any jurisdiction that “has in effect any law, policy, or procedure in contravention of subsection (a) or (b) of . . . (8 U.S.C. 1373); or . . . prohibits State or local enforcement officials from gathering information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”<sup>31</sup> As originally offered, Virginia Senate Bill 270 would have prohibited sanctuary policies and further denied state funding to any locality violating the provision, targeted localities that “adopt[ed] any ordinance, procedure, or policy that restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law.”<sup>32</sup> Recent legislative efforts by both the federal and various state legislatures have been the most aggressive measures taken to date.<sup>33</sup>

Despite the apparent conflict of sanctuary city policies with federal immigration law, the

federal government has not launched a direct legal challenge to these policies, although at least one former ICE director appears to have advocated suing sanctuary cities to force compliance.<sup>34</sup> The federal government has, however, advanced the Priority Enforcement Program (PEP) and reprioritized its deportation efforts to focus on those immigrants “who pose threats to our national security, public safety, and border security.”<sup>35</sup> The PEP limits detainees to those convicted (vice arrested) of certain ICE-designated priority offenses and now are generally used to request that a jurisdiction notify ICE when an alien is to be released rather than actually hold the alien for ICE past the alien’s normal release date.<sup>36</sup> In the wake of its more palatable deportation policy, the federal government has reached out to sanctuary jurisdictions seeking their cooperation.<sup>37</sup>

Opponents of sanctuary city policies argue that such policies allow violent offenders to be released into the general population rather than turned over to ICE for deportation.<sup>38</sup> Such policies place federal immigration agents in danger by requiring them to apprehend dangerous aliens, such as violent felons and gang members, within the community rather than apprehending them as they are released from a secure confinement facility. Critics of sanctuary policies also note that the costs associated with maintaining an undocumented alien population can strain local resources.<sup>39</sup> Further, sanctuary city policies arguably undermine the rule of law, with critics charging that such policies flout federal law and make it difficult to enforce immigration law without the cooperation of local law enforcement.<sup>40</sup>

In contrast, proponents of sanctuary city policies argue that cooperation with federal immigration authorities undermines efforts to build trust between local law enforcement and their immigrant communities, who may fear reporting crimes because of the threat of deportation.<sup>41</sup> Further, beyond simply possessing a philosophical opposition to immigration enforcement efforts, some posit that enforcement of federal immigration law is a federal responsibility and the federal government should bear the burden of enforcing federal law.<sup>42</sup>

### **Conclusion**

The future of immigration law, and related enforcement efforts, is a contentious and

oft-debated subject, with sanctuary cities being part of a larger dialogue. Given the recent flurry of activity designed to discourage sanctuary city policies, immigration law attorneys, grant recipients and practitioners, and those attorneys who advise municipalities and religious institutions, should closely monitor these efforts and their potential legal consequences.

## Endnotes:

- 1 Jenna Portnoy, *Bills in Va. Target Illegal Immigration*, Wash. Post (March 6, 2016), at C1.
- 2 2016 Session SB 705 Sanctuary cities; liability or certain injuries and damages caused by an illegal alien (as introduced), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=161&typ=bil&val=sb705>; SB 270 Sanctuary policies: U.S. Immigration and Customs Enforcement (Introduced), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=161&typ=bil&val=sb270>
- 3 2016 Session, HB 481 Compliance With Detainers; U.S. Immigration and Customs Enforcement (enrolled) available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=161&typ=bil&val=hb481>
- 4 Travis Fain, *McAuliffe Vetoes Immigration Bills*, Daily Press (April 1, 2016), available at <http://www.dailypress.com/news/politics/shad-plank-blog/dp-mcauliffe-vetoes-immigration-bills-20160401-post.html>; 2016 Session SB270, *supra* note 2; HB 481, *supra* note 3.
- 5 Michael J. Garcia and Kate M. Manuel, *State and Local "Sanctuary" Policies Limiting Participation in Immigration Enforcement*, Congressional Research Service 13-14 (July 10, 2015).
- 6 *Id.* at 16; *see* Portnoy, *supra* note 1, at C2 (Virginia attorney General determined detainee requests to be optional).
- 7 Paula Katinas, *Brooklyn Daily Eagle* (March 11, 2016) available at <http://www.brooklyn.eagle.com/articles/2016/3/10/assembly-gopers-push-crackdown-sanctuary-cities>; Portnoy, *supra* note 1, at C 2; Robert McClendon, *'Sanctuary cities' like New Orleans could lose funding under lawmaker's proposal*, The Times-Picayne (March 1, 2016), available at [http://www.nola.com/politics/index.ssf/2016/03/immigration\\_sanctuary\\_cities\\_n.html](http://www.nola.com/politics/index.ssf/2016/03/immigration_sanctuary_cities_n.html); David Pitt, *Iowa Republicans Look to Eliminate 'Sanctuary Cities'*, Wash. Times (Feb. 4, 2016), available at <http://www.washingtontimes.com/news/2016/feb/4/iowa-bill-emerges-that-would-halt-sanctuary-city-c/>; Jeremy Redmon, *Georgia Legislature Seeking to Crack Down on Illegal Immigration*, The Atlanta Journal-Constitution (March 3, 2016) ("Georgia's Senate has approved mea-  
sures to crack down on so-called 'sanctuary cities' . . ."), available at <http://www.myajc.com/news/news/state-regional-govt-politics/georgia-legislature-seeking-to-crack-down-on-illeg/nqcs/>
- 8 Mike DeBonis, *House Votes to Punish 'Sanctuary Cities'*, Wash. Post (July 24, 2015), at A2.
- 9 *Id.*
- 10 *Id.*; *see* H.R. 3009, *Enforce the Law for Sanctuary Cities Act* (July 9, 2015) available at <https://www.congress.gov/114/bills/hr3009/BILLS-114hr3009ih.pdf> [Hereafter H.R. 3009].
- 11 For The Record, Senate, *Sanctuary City Penalties*, Wash. Post (Oct. 29, 2015), at Local Living page 24 (both Virginia Senators voted against the legislation); Statement of Administration Policy, H.R. 3009-Enforce the Law for Sanctuary Cities Act (July 23, 2015) available at [https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr3009h\\_20150723.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr3009h_20150723.pdf).
- 12 Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 Cap. U. L. Rev. 583 (Summer 2014)
- 13 *See* Victor Hugo, *The Hunchback of Notre Dame* 189 (Lowell Bair ed. & trans. Bantam Books 1956) (1831).
- 14 Davidson, *supra* note 12, at 590
- 15 *Id.*, at 593.
- 16 *Id.* at 597.
- 17 *Id.* at 601.
- 18 *Id.* at 603.
- 19 Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168 (1983).
- 20 Davidson, *supra* note 12, at 599-600.
- 21 *Id.* at 607
- 22 Peria Trevizo, *Latest Immigration Debate: Are Churches, Schools Safe Havens?*, Arizona Daily Star (May 18, 2014), available at <http://tucson.com/news/local/border/2b6a7573-fb91-5f9b-82aa-aa7150149d06.html>.
- 23 Pamela Constable, *Reports of Raid Plans Concern Immigrants*, Wash. Post (14 May 2016) at B1 ("avoid detaining people at schools, hospitals and churches"); Memorandum From John Morton, Director ICE, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011) (sensitive locations include "churches, synagogues, mosques or other institutions of worship, such as buildings rented for the purpose of religious services"), available at <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>
- 24 *Joshua* 20.
- 25 Ignatius Bau, *This Ground is Holy: Church Sanctuary And Central American Refugees* 168, 170 (1985).
- 26 Garcia and Manuel, *supra* note 5, at 8.

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- 27 DeBonis, *supra* note 8, at A2 (noting two groups identified 276 and 360 jurisdictions, respectively).
- 28 See Garcia and Manuel, *supra* note 5, at 7 (“states and municipalities [that] have adopted formal or informal policies which prohibit or substantially restrict police cooperation with federal immigration enforcement efforts”)
- 29 *Id.* at 1, 7.
- 30 *Id.* at 8.
- 31 H.R. 3009, *supra* note 10 §§2, 3(c).
- 32 Senate Bill No. 270 (offered Jan 13, 2016) available at <https://lis.virginia.gov/cgi-bin/lepp604.exe?ses=161&typ=bil&val=SB270&sub=GO>
- 33 See Debonis, *supra* note 8, at A2 (“most dramatic action taken by Congress”)
- 34 Stephen Dinan, *Sanctuary Cities May Be Facing Legal Action*, Wash. Times (July 11, 2012), at A1.
- 35 Progress Update: President’s Immigration Accountability Administrative Actions (July 22, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/07/22/progress-update-presidents-immigration-accountability-administrative>
- 36 Garcia and Manuel, *supra* note 5, at 16-17
- 37 See e.g., Stephen Dinan, *House Vote Stokes Debate Over Sanctuary For Illegals*, Wash. Times (July 24, 2015), at A1, A5 (DHS Secretary reached out to San Francisco Sheriff’s Department)
- 38 Dinan, *supra* note 34, at A14.
- 39 Barbara Hollingsworth, *There’s No Such Thing as a Free Sanctuary*, The Washington Examiner (April 13, 2010), at 23 (Montgomery County Maryland spends \$243 million annually)
- 40 See e.g., Stephan Dinan, *Romney Ad Raps ‘Sanctuary Cities,’* Wash. Times (August 22, 2007), at A3.
- 41 DeBonis, *supra* note 8, at A2; Portnoy, *supra* note 1, at C2.
- 42 Natasha Altamirano, *‘Sanctuary Policy’ Draws Calls for County Reversal*, Wash. Times (June 6, 2007), at B2.



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