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NEW SANCTUARY MOVEMENT

LEGAL TOOLKIT

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NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

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NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

ITEM #1: FAMILY PROFILES

(April 4, 2007)

This memorandum is intended to provide congregations joining the New Sanctuary Movement with profiles of immigrant families that may, if helpful, be considered when identifying families to be offered sanctuary.

The profiles offered below are simply suggestions and congregations may take other factors into account, including, for example, an immigrant family's prior relationship with the congregation, the needs of the family, the number of U.S. citizen children who live with the family, etc.

The profiles are intended to inform congregations about immigrant families in deportation proceedings or under final orders of deportation who may have an avenue to eventually obtain relief from deportation. Such families may need sanctuary for a shorter time period than families without potential relief from deportation, and the end result of granting sanctuary may be less traumatic than offering sanctuary to a family that inevitably faces deportation.

However, as stated above, congregations may decide for any number of reasons that they wish to offer sanctuary to an immigrant family regardless of their chances of winning relief from deportation. For example, a family with long-term residence of 10-20 years, strong ties here, and several US citizen children may have little hope under current law and for just that reason highlight the shortcomings of the current laws.

Here are factors that congregations may look for if they are interested in offering sanctuary to an immigrant family with some hope of eventually winning relief from deportation:

1. Immigrant has been residing continuously in the United States for at least 10 years, has a US citizen parent, spouse, or child, who would face usually extreme hardship if the immigrant was deported, and the immigrant has no serious criminal convictions.
2. The immigrant has been the victim of a serious crime (including but not limited to rape, torture, domestic violence, sexual assault, genital mutilation, peonage, involuntary servitude, kidnapping, false imprisonment, blackmail, extortion, manslaughter, felonious assault) that violated the laws of the United States and has suffered substantial physical or mental abuse as a result of this crime, and

reported the crime or otherwise assisted law enforcement in the investigation or prosecution of the crime.

3. The immigrant has been abused by his or her current spouse or a spouse from whom they were recently divorced (last two years). The abuser must be a permanent resident or citizen of the United States.

4. The immigrant has or is a child who was abused by a permanent resident or United States citizen, or the immigrant was abused by his or her son or daughter who is a United States citizen. No criminal report is required but is helpful. The abuse must be serious but may be physical abuse or mental abuse.

5. The immigrant is a minor (generally no older than 17 ½ year of age) who has been abused, abandoned or neglected in his or her home country or in the United States, is not currently living with the abuser, and whose interests would be better served by remaining in the U.S. than being deported to his or her home country.

6. The immigrant has been the victim of human trafficking (basically brought to the United States to engage in forced labor or sexual exploitation).

7. The immigrant has been persecuted (ie faced extreme discrimination or other forms of persecution) as a result of race, religion, ethnicity, political opinion, or membership in a social group or faces such persecution if returned to his or her country of origin.

8. The immigrant was ordered deported by an Immigration Judge in absentia (without attending) and was not properly informed of the date and time of the hearing or had an extraordinary incident occur that prevented him or her from attending the removal hearing.

9. The immigrant is married to a US citizen or green card holder, or has other parent-child relatives who are US citizens or green card holders, and has a petition pending to legalize his or her status or could file such a petition.

10. The immigrant appears to fit into any of the situations described above and does not appear to have had competent counsel during a removal hearing (for example, the immigrant only met once or twice with the lawyer before the hearing, the lawyer did not prepare the immigrant for examination, the lawyer did not use or properly interview witnesses, etc.)

In any case it should be understood that immigrants with serious criminal convictions, including most drug convictions, will have a difficult time to legalize their status in the United States.

Since the outcome of any case is uncertain, congregations should also consider the factors listed below (##1-4), regarding immigrants with little to no chance of being granted relief from deportation.

Here are factors that congregations may look for if they are interested in offering sanctuary to an immigrant family with little to no hope of eventually winning relief from deportation:

1. The immigrant family presents unique humanitarian factors that may warrant introduction of a private bill by the Representative for the immigrants' district or the State's Senators.
2. The immigrant is unlikely to abscond in the end to evade arrest and removal.
3. Children can be accommodated so there is no or little family separation, or interruption of children's education, etc.
4. In the event a departure is required, how arrangements may be made to provide ongoing support following removal.

Questions: please email Peter Schey pschey@centerforhumanrights.org, Carlos Holguin crholguin@centerforhumanrights.org, and Cynthia Lucas (clucas@centerforhumanrights.org)

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NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

ITEM #2: FAMILY INTAKE FORM

TO BE INSERTED

NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

**ITEM #3: FAMILY-CONGREGATION
 AGREEMENTS**

Being developed

NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

ITEM #4: LEGAL COMPONENT OF NSM

(April 4, 2007)

The Center for Human Rights and Constitutional Law (“Center for Human Rights”) is available to facilitate the legal components necessary for the development of the new sanctuary collaborative. This is a preliminary review on the role that lawyers may play in this movement to provide guidance to faith-based groups offering sanctuary on the profile of families who may be offered sanctuary, review of individual cases to determine whether family members facing deportation may have their cases reopened and reconsidered, training and preparation of model materials for local pro bono and non-profit counsel, technical assistance to local counsel assisting immigrant families and faith-based groups, representation in the unlikely event of criminal charges brought against faith-based groups for sanctuary or humanitarian border work, and tracking and monitoring of the legal aspects of all cases in the sanctuary program.

1. Profiling options for families for sanctuary

The Center for Human Rights has prepared and included in this Toolkit profiles of the types of families who may be offered faith-based sanctuary, most likely focusing on families ordered deported but who appear to have grounds upon which to seek reopening and reconsideration of their cases, and possibly families under deportation proceedings but not yet under final non-appelable orders of deportation. Faith-based groups may, however, opt to offer sanctuary to whatever families they feel compelled for humanitarian reasons to do so. Families with some possible remedy to reopen their cases are more likely to have a favorable outcome and not have their cases drag on for very lengthy periods of time.

2. Assistance in evaluating cases for sanctuary

We suggest development of a national network of collaborating pro bono attorneys (recruited through faith-based groups and law firms) and non-profit legal services attorneys who may assist in evaluating cases faith-based groups wish to offer sanctuary. The Center for Human Rights can facilitate or offer technical support to local counsel, as well as materials to assist in the assessment of cases.

3. Delivery of legal services to faith-based groups and immigrant families offered sanctuary

We suggest that this function also be performed through a network of local pro bono and non-profit counsel using common training, materials, model documents, etc., with the Center for Human Rights and any other groups willing to be available to facilitate the development of materials, training, and technical support on complex case,

4. Monitoring and documenting cases

Through a database program the Center for Human Rights could track legal developments in sanctuary cases and prepare periodic reports for faith-based groups, media, etc. and provide local counsel with updates on a range of cases.

The Center has created an internet system for monitoring over a thousand cases across the country for a different project (domestic violence cases), and could utilize the same approach for tracking and monitoring the cases of the sanctuary families. This system includes both confidential and non-confidential information with security access codes, and a national spreadsheet which can be continually updated by all users.

5. Collaboration among local counsel

Collaboration among local counsel involved in the sanctuary effort would be helpful to avoid duplication of effort, learn from others' experience, share resources, etc. Efforts should be made to develop a network with use of a listserv, internet web pages, conference calls, and if funding permitting, legal meetings.

6. Technical support to host congregations and sanctuary families

The Center for Human Rights and hopefully other legal groups can provide technical support to faith-based host congregations and families. Questions may be communicated telephonically, in correspondence or email. Research may be conducted as needed. Information should be shared through some mechanism (a web site, regular emails, or other device) with all of the faith-based groups offering sanctuary.

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NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

ITEM #5: LIABILITY OF CHURCHES PROVIDING SANCTUARY UNDER INA AND PATRIOT ACT

Housing

Immigration and Nationality Act § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii) (1988) states that a person is guilty of a felony who with “knowing or in reckless disregard of the fact that an aliens has come to, entered, or remains in the US in violation of the 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.”

In *United States v. Acosta de Evans*, 531 F.2d 428 (9th Cir.), cert. denied, 429 U.S. 836 (1976) the Ninth Circuit held that “harbor” in the context of § 274 means to “afford shelter to.” The Court later used this definition in *United States v. Aguilar*, 883 F. 2d 662, 690 (9th Cir. 1986), holding defendants liable because it was “clear beyond any doubt that... appellants... intended to help the aliens in question to evade INS detection.” However, in *Aguilar* the Court declined to reaffirm or criticize the holding in *Acosta de Evans*. *Id.* (“even if *Acosta de Evans* were incorrectly decided, the appellants’ claim would fail given the facts of this case.”). In short, someone merely providing shelter to an immigrant known to be illegally present could result in a prosecution.

The Supreme Court has declined to hear any cases with regard to § 1324(a) and the definition of “harbor.” However, in 1909, the Court struck down a 1907 law that made it illegal to conceal or harbor any alien involved in prostitution “not lawfully entitled to enter or reside in the United States” where the defendant had “only furnished a place” to an alien prostitute. *Keller v. United States*, 213 U.S. 138 (1909).

All cases decided under § 1324(a) involve defendants who “simply kept silent about the aliens’ presence, rather than individuals who have reported the aliens’ presence to the INS but who have continued to shelter them.” 1983 OLC LEXIS 96, 7 Op. O.L.C. 168 (FYI this was quoted prior to IRCA and Aguilar; however, it still holds true).

Accordingly, a church that houses undocumented migrants will likely not be prosecuted unless they are attempting to conceal such alien from Immigration and Customs Enforcement detection. If they are prosecuted, the mere provision of shelter could be considered harboring. However, if the immigrant had some application pending before the federal Government for relief from deportation, it

seems unlikely someone providing shelter would successfully be prosecuted for harboring.

First, the language “from detection” can be construed to be describing “harbor” implying that harboring must be accompanied by an intent to evade detection. Second, the term “harbor” has no clear definition and therefore, the rule of lenity requires that federal courts choose the narrowest reading of the statute. This is especially true where a broader reading would raise constitutional concerns such as, in this case, First Amendment freedom of association claims.

In addition, Senate bill 2611, *Comprehensive Immigration Reform Act of 2006*, passed the Senate 62-36 in May 2006 (but never enacted) provides a specific exception from liability for individuals who or organizations that encourage a person to reside in the United States or harbor an illegal alien from detection with knowing or reckless disregard of their illegal status. The exemption applies to individuals or organizations, not previously convicted of a violation of this section, who “provide an alien who is present in the United States with humanitarian assistance, including medical care, housing, counseling, victim services, and food, or to transport the alien to a location where such assistance can be rendered.”

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C., 50 U.S.C., 22 U.S.C., 31 U.S.C., and 47 U.S.C.) (hereinafter “Patriot Act”) amended 18 U.S.C. 2339 to state that a person shall be fined or imprisoned for not more than 10 years if they “harbor or conceal[s] any person who he knows, or has reasonable grounds to believe, has committed, or is about to commit, an offense under section 32 (relating to destruction of aircraft or aircraft facilities), section 175 (relating to biological weapons), section 229 (relating to chemical weapons), section 831 (relating to nuclear materials), paragraph (2) or (3) of section 844(f) (relating to arson and bombing of government property risking or causing injury or death), section 1366(a) (relating to the destruction of an energy facility), section 2280 (relating to violence against maritime navigation), section 2332a (relating to weapons of mass destruction), or section 2332b (relating to acts of terrorism transcending national boundaries) of this title, section 236(a) (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284(a)), or section 46502 (relating to aircraft piracy) of title 49...”

The Patriot Act also amended 18 U.S.C. § 2339A that a person is liable where they provide “material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing

or intending that they are to be used in preparation for, or in carrying out..." a terrorist act (pertinent actions are listed under *infra* under Housing). Material support means any "property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials..." A conviction under the material support section could lead to a fine or imprisonment of not more than 15 years, or both. If the death of any person results, the sentence may be life in prison.

While the Patriot Act leaves open the possibility of prosecution of someone who provides sanctuary in the form of housing under § 2339, the success of such a prosecution is unlikely due to the mens rea (intent) requirement. An individual or organization would have to have reasonable grounds to believe that the alien has committed or is about to commit one of a few very specific crimes. However, the material support section, § 2339A, of the Patriot Act is more worrisome because the terrorist act itself does not have to be on the verge of occurring; rather, it must simply be in preparation. "Lodging" is material support and therefore, housing an alien clearly falls under this section. At the same time, the mens rea required is equally as high as under § 2339 – knowing or intending to support the terrorist act.

Day Laborer site

INA § 274a(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A) states that *it is unlawful to "hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien."* Under § 274(a)(1)(A)(iv) a person may be liable who "encourages, or induces an alien to... reside in the United States, knowing or in reckless disregard of the fact that such... residence is or will be in violation of law." Moreover, a person is equally liable who "aids or abets the commission of ... [these] acts." § 274(a)(1)(A)(v)(II).

An organization that offers sanctuary to undocumented aliens will not be charging aliens or employers as part of the day laborer site. Therefore, it will not be liable under § 274A. However, it may possibly be liable under § 274(a)(1)(A)(iv) or (II) if the prosecution can argue that the services offered at this site encourage undocumented aliens to continue to reside in the United States illegally. However, the mental requirement for § 274 - knowingly - is a high standard and would be difficult for the prosecution to prove, especially if a day labor site was open to all, regardless of immigration status.

There is currently a lawsuit pending in Virginia against the town of Herndon which gave a permit to a non-profit organization to allow them to host a day laborer site. This is a unique lawsuit and the plaintiff's are arguing liability

under both federal and state law including 8 U.S.C. §§ 1324(a)(1)(A)(v)(iv),(v)(II), 8 U.S.C. § 1324a(a)(1)(A), 18 U.S.C. § 2 (aiding and abetting), and 18 U.S.C. § 371 (conspiracy). The lawsuit is currently still in the pleadings stage, but the outcome will be pertinent to the question of whether someone can be held liable under the INA for hosting a day laborer site. It should be noted that this is a civil suit, not a criminal prosecution.

As stated above, the Patriot Act amended 18 U.S.C. § 2339A to say that a person is liable where they provide “material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out...” a terrorist act (pertinent actions are listed under *infra* under Housing). Material support means any “property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials...”

We doubt that these provisions have any bearing on the operation of a day labor site.

Transportation

Under INA § 274(a)(1)(A)(ii) 8 U.S.C. § 1324(a)(1)(A)(ii), a person is liable if he or she “knowing[ly] or [with] reckless disregard of the fact that an alien... remains in the US in violation of law transports, moves or attempts to transport or move such alien within the United States... *in furtherance of such violation of law.*” The penalty for violating this section may include a monetary penalty or imprisonment for not more than 5 years. 8 U.S.C. § 1324(a)(1)(B) (1988).

In the landmark case of *United States v. Aguilar*, 883 F. 2d 662 (9th Cir. 1986), defendant religious workers were convicted for both transporting and aiding and abetting in the transportation of undocumented migrants. Citing *United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977) (emphasizing that the act of transportation must be directly and substantially related to the furtherance of an undocumented alien’s presence), defendants argued that it was not illegal to transport a person who is known to be an undocumented alien out of purely humanitarian concern. *Id.* at 687. The Ninth Circuit, however, rejected this argument instead holding that transporting aliens “throughout the country *as part of [a] plan to shelter illegal aliens out of the INS’s grasp*” was “*hardly incidentally related to furthering the aliens’ illegal status.*” *Id.* The defendants in this case received probation and were not sentenced to time in prison.

Transporting an undocumented alien to the hospital or to a medical appointment would likely be distinguished from the Ninth Circuit's holding in *Aguilar*. While the Circuit Court in *Aguilar* rejected the idea of humanitarian efforts serving as a complete defense to a transportation charge, it reiterated that the underlying reason for the transportation must be more than "incidentally related to furthering the alien's presence in the country." *Id.* Transporting an alien to and from a medical appointment would likely not be construed as anything more than incidental to the alien's illegal presence in the United States.

Moreover, as noted in the Housing section above, Senate bill 2611 exempts from liability individuals or organizations, not previously convicted of a violation of this section, who "provide an alien who is present in the United States with humanitarian assistance, including medical care, housing, counseling, victim services, and food, or to transport the alien to a location where such assistance can be rendered."

As stated in both the Housing and Day Laborer sections above, the Patriot Act states that a person is liable where they provide "material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out..." a terrorist act (pertinent actions are listed under *infra* under Housing). Material support means any "property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials..."

The Patriot Act specifically limits the liability of individuals and organizations that lend support in the form of medicine or religious materials. Accordingly, religious workers would likely not be criminally liable for transporting undocumented aliens to medical appointments or to the hospital under the material support section of the Patriot Act.

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NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

**ITEM #6: OPINION OF THE OFFICE OF LEGAL
COUNSEL: CHURCH SANCTUARY FOR
ILLEGAL ALIENS**

The following is an US Attorney General opinion from 1983 discussing Churches acting as sanctuaries. It should be noted that it is somewhat outdated. For example, in 1986 the law was amended so that harboring etc may be shown by a "reckless disregard of an alien's status" versus actual knowledge, as previously required. Nevertheless, it brings up interesting history and context on the issue.

OPINION OF THE OFFICE OF LEGAL COUNSEL
CHURCH SANCTUARY FOR ILLEGAL ALIENS
1983 OLC LEXIS 96; 7 Op. O.L.C. 168
October 31, 1983

SYLLABUS:

[*1]

The historical tradition of providing church sanctuary for criminal offenses was abolished by statute in England in 1623 and thus did not enter the United States as part of the common law.

Providing church sanctuary to illegal aliens probably violates 8 U.S.C. § 1324(a)(3), which forbids the harboring of illegal aliens.

Courts are unlikely to recognize church sanctuary as legally justified under the Free Exercise Clause of the First Amendment, because disagreement with the government's treatment of aliens is not a religious belief that is burdened by enforcement of the immigration laws, and the government has a compelling countervailing interest in uniform law enforcement.

ADDRESSEE:

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

OPINIONBY: OLSON

OPINION:

We have discussed briefly at various times the legal issues raised by churches offering sanctuary to illegal aliens, recently those from El Salvador. n1

We have undertaken to provide you with a preliminary and very general analysis of those issues. In doing so, we have examined whether there is any law which makes it illegal to provide sanctuary and have concluded that the practice probably violates 8 U.S.C. § 1324(a)(3). We have also examined whether a charge [*2] of violating 8 U.S.C. § 1324(a)(3) could be defeated by the defense that sanctuary should be recognized at common law or should be protected by the First Amendment. We do not believe that a court would recognize either of these defenses.

n1 See Wash. Post, Oct. 11, 1983, at B1, col. 2; N.Y. Times, Sept. 21, 1983, at A18, col. 1; Time, Apr. 25, 1983, at 118; N.Y. Times, Apr. 8, 1983, at A1, col. 1.

I. Historical Background

The practice of providing asylum in a church or other sacred place has roots in ancient history, n2 although Christian churches were not recognized by Roman law as places of sanctuary until the 4th century. n3 Ecclesiastical sanctuary spread with the growth of the church but the exact nature of the privilege varied from country to country. n4 The English common law permitted an accused felon to seek sanctuary in a church where he could choose either to submit to trial or to confess and leave the country. n5

n2 See generally 24 Encyclopedia Americana 218 (1983); 19 Encyclopaedia Britannica 992-93 (1971); 13 Encyclopaedia of the Social Sciences 534 (1935). See also Deuteronomy 4:41, 4:42.

n3 Encyclopaedia Britannica, supra note 2, at 993. [*3]

n4 Encyclopedia of the Social Sciences, supra note 2, at 535-36.

n5 W. Blackstone, 4 Commentaries on the Laws of England 332-33 (1765).

The general demise of government recognition of church sanctuary took many years and is usually seen as the result of the growth of strong central governments and the development of effective national systems of justice. n6 In England, efforts to curtail abuses of church sanctuary or to eradicate sanctuary altogether achieved their first major success during the Reformation when many of the recognized sanctuaries were abolished and replaced by a limited number of cities of refuge. n7 Sanctuary for criminals in England was finally abolished in 1623. n8

n6 T. Plucknett, A Concise History of the Common Law 382 (2d ed. 1936); Encyclopaedia of the Social Sciences, supra note 2, at 536-37 (1935).

n7 Encyclopaedia Britannica, *supra* note 2, at 993.

n8 An Act for Continuing and Reviving of Divers Statutes, and Repeal of Divers Others, 1623, 21 Jac. 298, 303, ch. 28, § 7. See also Blackstone, *supra* note 5, at 333. Sanctuaries from civil process lingered on in some districts until 1723. Encyclopaedia Britannica, *supra* note 2, at 993. [*4]

We have found no evidence that the colonists revived church sanctuary in America. n9 A search of both federal and state case law has revealed no case recognizing church sanctuary as a legitimate barrier to law enforcement. It is true that American churches have been used at times as symbolic sanctuaries. During the Vietnam War, for example, some churches offered "sanctuary" to young men who did not want to serve in the Armed Forces. See *Bridges v. Davis*, 443 F.2d 970 (9th Cir. 1971), cert. denied, 405 U.S. 919 (1972); *United States v. Beyer*, 426 F.2d 773 (2d Cir. 1970). In both of the cited cases federal officers eventually entered the churches and arrested individuals. n10 Thus, as with the protection presently being offered by churches to illegal aliens, the continued existence of the "sanctuary" depended entirely upon the authorities' desire to avoid a confrontation.

n9 For example, church sanctuary is not referenced in such basic sources as *The Records of the Federal Convention* (M. Farrand ed. 1966), *J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836), *The Federalist Papers* (C. Rossiter ed. 1961), or *The Complete Anti-Federalist* (H. Storing ed. 1981). [*5]

n10 That the men had been taken from a church was recited in the facts of both cases but played no part in either court's legal analysis.

II. Legality of Sanctuary

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. n11 Although the churches alert the INS that they are offering the aliens shelter, the most recent case law rejects the notion that harboring must involve actually hiding the alien or otherwise "clandestine" activity. *United States v. Acosta De Evans*, 531 F.2d 428, 430 (9th Cir. 1981). Instead, harboring has been held to include knowingly taking steps that "afford shelter to" an illegal alien, even if done without the purpose of concealing the alien from the immigration authorities. *Id.* "The term was intended to encompass conduct tending substantially to facilitate an alien's 'remaining in the United States illegally,' provided, of course, the person charged has knowledge of the alien's unlawful status." *United States v. Lopez*, 521 F.2d 437, 41 (2d Cir.) (citation omitted), cert. denied, 423 U.S. 995 (1975). See also *United States v. Cantu* [*6], 557 F.2d 1173, 1180 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978). The debate on the conduct covered by harboring is not entirely settled, however, as there are older cases that take a contrary

position. See *Susnjar v. United States*, 27 F.2d 223 (6th Cir. 1928). In addition, all of these cases involved defendants who simply kept silent about the aliens' presence, rather than individuals who have reported the aliens' presence to the INS but who have continued to shelter them.

n11 Section 1324(a)(3) provides:

Any person . . . who . . . willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation . . . any alien . . . not duly admitted by an immigration officer . . . shall be guilty of a felony

We believe that it is unlikely that the historical tradition of offering sanctuary would provide a defense to an indictment under 8 U.S.C. § 1324(a)(3). As noted above, church sanctuary for criminal offenses was abolished by statute in England in 1623 and thus did not enter the United States as part of the common law. It has [*7] never, as far as we can discover, been recognized here by any state or federal legislation. n12 The only way to use church sanctuary as a successful defense on historical grounds would be to persuade the courts to resurrect the common law right. This is unlikely. Not only have centuries passed since sanctuary was abolished by statute, but there are major policy implications in a decision to revive sanctuary. Sanctuary grew out of the need of primitive societies for a place of respite. Where blood feud and tribal concerns dominate a society or the courts are weak or the executive is too ready to dispense harsh and bloody punishment, there may be a need for sanctuary. None of these conditions exists in this country today. We doubt the courts would be willing, even in the face of sympathetic facts, to hold that they were no longer able to enforce the country's laws in the church sanctuaries. n13

n12 Although a complete search of all state laws enacted since 1789 is impractical, we have reviewed human rights treatises, general and specialized encyclopedias, and historical reference works without uncovering any reference to an American law dealing with church sanctuary. Churches have often opposed particular government policies by preaching civil disobedience, but not, as far as we can determine, by claiming a general exemption from the legal process. There was no claim, for example, that either the Underground Railroad or the sit-ins of the modern Civil Rights movement were legal -- only that the particular laws involved were immoral and should, therefore, be changed. [*8]

n13 The issue for countries with modern governments, such as the United States, has instead become whether to grant asylum to aliens (in derogation of a sister state's laws), leaving behind the more primitive question of whether to permit derogation of one's own criminal laws by permitting churches to act as sanctuaries -- and thus, as alternate sources of temporal power.

Nor do we believe that a court would recognize sanctuary as legally justified under the Free Exercise Clause of the First Amendment. n14 Although there are cases recognizing that some government regulations must yield if contrary to the sincere religious convictions of a citizen, n15 we do not believe that the analysis in those cases will protect people harboring illegal aliens. First, disagreement with the government's treatment of illegal aliens is not a religious belief that is burdened by enforcement of the immigration laws. *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963). Church members are not compelled by our deportation of aliens to forego a religious practice, such as resting on the Sabbath. Even if granting sanctuary were viewed as a legitimate religious practice authorized by modern canon law, [*9] which all the evidence suggests it is not, the federal government has a compelling countervailing interest in insuring that the law is enforced throughout our country. n16 The integrity of our government would be seriously threatened if individuals could escape the criminal law by pleading religious necessity.

n14 N.Y. Times, Apr. 8, 1983, at A16, col. 5 (reporting the view of Thomas Cannon of the Marquette University School of Law that offering sanctuary could be legally justified under the First Amendment and as an observance of an ancient custom with roots in the Judeo-Christian tradition).

n15 See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

n16 Unlike the beliefs protected in *Yoder*, which were recognized by the Supreme Court as having been practiced consistently for centuries, church sanctuary has been a nullity for over three hundred years. The comments of various church leaders, see supra note 1, indicate that while the bishops may sympathize with their pastors' intentions, they also recognize that harboring the aliens is illegal and not immunized by an invocation of church sanctuary.

III. [*10] Suggestions for Statement

It has been suggested that the Department might wish to issue a formal statement on the growing use of churches as places of sanctuary for illegal aliens. If it is decided to do so, we recommend that the statement indicate that there is a statutory right to file for asylum in this country. 8 U.S.C. § 1158. INS does not deport aliens during the pendency of an application. The statement might reiterate our determination to adjudicate all asylum claims fairly, and urge that those with bona fide claims file them promptly.

The plight of illegal aliens in this country obviously generates strong emotions, especially when aliens are seeking escape from a strife-filled nation and argue that the government from which they are seeking sanctuary is the source of at least some of the violence. In any prosecution the courts are likely to be presented with defendants whose cases are sympathetic and whose advocates will be drawn from persons who assert a moral basis for their views. As in the case of enforcing any law affecting large numbers of people who may

have acted pursuant to strong and principled convictions, sensitivity in the process, with adequate notice to [*11] all involved and manifest concern for matters of conscience, will be an important ingredient in convincing the courts to uphold enforcement.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

ITEM #7: HANDLING EMERGENCIES AND KNOWING YOUR RIGHTS

(April 4, 2007)

This memorandum is intended to provide congregations joining the New Sanctuary Movement with basic information on handling emergencies that may arise during the course of offering sanctuary to an immigrant family.

1. In the event of a legal emergency, telephone Peter Schey, President, Center for Human Rights and Constitutional Law (CHRCL), cell 323 251-3223, or Carlos Holguin, General Counsel, CHRCL, cell 661 309-2823, or Cynthia Lucas, Staff Attorney, CHRCL 213 388-8693 ext 116, or Brooke Kirkland, Staff Attorney CHRCL 213 388-8693 ext 103. If the person you call is unavailable, leave a detailed message with your name and the best way to contact you. Then telephone the next attorney listed above. If you have important documents that you believe we should review, fax the documents to 213 386-9484, or email to pschey@centerforhumanrights.org and crholguin@centerforhumanrights.org
2. Remember that anyone questioned by law enforcement officers, regardless of immigration status, has the right to remain silent and not answer questions and ask to consult with a lawyer. It is best under such circumstances to state words to the effect: "I do not wish to answer any questions until I have an attorney present with me. I wish to telephone attorney _____ at this time,"
3. Remember that law enforcement officers may not search your premises or home unless they have your consent (or the owner of occupant's consent), or they have a search warrant. Ask to see the search warrant. Read it to understand what its scope is (the scope will usually define what they can search for, where they may search and for how long). If there is no warrant, its best to not give consent until you have had time to consult with an attorney.
4. Arrest warrants provide another basis for law enforcement officers to enter a building or a home. Again, check to read the warrant. If the person whose name appears on the awwarnt is not on the premises, so advise the officers. If there is no arrest warrant, then you need not give consent for officers to enter a building or home to make an arrest.
5. In an emergency situation do NOT flee, encourage anyone else to flee, destroy evidence, encourage anyone else to destroy evidence, or offer any physical resistance.

NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

ITEM #8: QUESTIONS AND ANSWERS

(April 4, 2007)

Family Profiles:

On the phone I mentioned three possible profiles:

1. People with final orders of deportation but a possible way out of the situation (eg ineffective assistance of counsel, new evidence that was unavailable at the time of the initial hearing, etc.). These would all require an experienced attorney to evaluate
2. People in the middle of a deportation hearing but with a possibility of winning
3. People with final orders of deportation and no obvious litigation way out (would likely need a change in the laws or a special bill in Congress).

Liability:

Does sanctuary violate the federal provisions against obstructing a deportation?

Response: I think whether or not sanctuary violates any laws depends a lot on how the sanctuary is approached. There are many scenarios I can think of –

Shelter –

1. If the person going into sanctuary is identified publicly by name there is likely no concealment and probably no violation of the law as long as the immigrant has some type of non-frivolous application pending for some type of relief. If the immigrant has nothing pending and is unlawfully present, criminal prosecution for harboring is possible. Political factors may strongly discourage the initiation of such a prosecution, unless a congregation engaged in immigrant smuggling or concealing immigrants under final orders of deportation.
2. If the identity of the person going into sanctuary is publicly identified but the congregation or family providing sanctuary hides the immigrant when law enforcement comes to search for her, this may be a violation of the law.

3. If the identity of the person going into sanctuary is publicly identified but the congregation or family refuses to allow a warrant to be executed, that may be a violation of the law (some type of interference with law enforcement)

4. If the identity of the person going into sanctuary is not publicly identified, and the person is not under a final order of deportation (by final I mean the person has not run out of appeals), and the only plan is to provide them with shelter, not to conceal them in the event they are finally under a final order of deportation, I think this probably does not violate the law. However, keep in mind that all immigrants are required to keep the Government informed of their current addresses. Though failing to do so is an administrative technical violation of law, not a criminal violation of the law.

5. If the identity of the person going into sanctuary is not publicly identified, and the person is under a final order of deportation, and the purpose is basically to conceal them from the Government (ie protect them from arrest and deportation), that may be a violation of the law

Legal representation:

Can we help identify pro bono counsel?

Response: Yes. We can mass email attorneys in an effort to recruit pro bono attorneys.

If a family is currently representing themselves but are interested in sanctuary, do they remain pro se?

Response: I would recommend that all families entering sanctuary be assisted by locating legal counsel for the simple reason that an immigrant is far more likely to succeed in avoiding deportation if she or he is represented by counsel.

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NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

ITEM #9: DRAFT TEMPLATE LETTER OF LEGAL REPRESENTATION

CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW

256 S. OCCIDENTAL BOULEVARD
LOS ANGELES, CA 90057
Telephone: (213) 388-8693 Facsimile (213) 386-9484
www.centerforhumanrights.org

SAMPLE--DRAFT

Michael Chertoff, Secretary
U.S. Department of Homeland Security
3801 Nebraska Ave. NW
Washington, D.C. 20528

Julie L. Myers, Assistant Secretary
Immigration and Customs Enforcement
425 I Street, NW
Washington, D.C. 20001

Alberto R. Gonzales Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW
Washington DC 20530

Re: Representation of Faith-Based Congregation Providing Sanctuary

Dear Secretary Chertoff, Attorney General Gonzales, and Assistant Secretary Myers,

The purpose of this letter is to inform you that this office represents _____, a faith-based organization [or otherwise describe] located at _____

The _____ has agreed to provide sanctuary to _____, a national and citizen of _____, and her _____ U.S. citizen children, _____, _____, and _____. _____'s ICE/CIS registration number is A_____. _____ resides at _____

_____ but is being provided temporary sanctuary at _____, located at _____.

The _____ congregation intends to provide _____ and her children with temporary shelter, transportation, food, and other necessities of life, legal assistance, and _____. [If applicable: This office has entered an appearance on behalf of the immigrant - _____, and along with attorney _____, located at _____, will be providing representation to _____.]

It is not the intention of the _____ congregation to conceal Ms. _____ from the authorities. [If applicable: Indeed, the congregation will assist Ms. _____ to appear as required by any law enforcement agency].

[If applicable: The _____ Congregation, and this office, believe that Ms. _____ may be eligible for relief from deportation pursuant to _____ and her presence may therefore be authorized under federal law.]

Please inform me in the event you have any questions above the above or in the event any of your offices ever contemplates taking any adverse action of any type against the _____ Congregation or any of its members as a result of the activities described above.

Thank you for your consideration.

Very truly yours,

Etc.

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NEW SANCTUARY MOVEMENT LEGAL TOOLKIT

**ITEM #10 DRAFT TEMPLATE LETTER FROM
CONGREGATION TO ICE**

SAMPLE--DRAFT

Michael Chertoff, Secretary
U.S. Department of Homeland Security
3801 Nebraska Ave. NW
Washington, D.C. 20528

Julie L. Myers, Assistant Secretary
Immigration and Customs Enforcement
425 I Street, NW
Washington, D.C. 20001

Local District Director of ICE

Re: Sanctuary for _____

Dear Secretary Chertoff, Assistant Secretary Myers, and District Director _____,

The purpose of this letter is to inform you that this congregation, _____, a faith-based organization [or otherwise describe] located at _____ has decided to provide sanctuary to Mr. _____ and Ms. _____, nationals and citizens of _____, and their _____ U.S. citizen children, _____, _____, and _____. _____'s ICE/CIS registration number is A_____. _____ resides at _____ but is being provided temporary sanctuary at _____, located at _____.

We intend to provide _____ and her children with temporary shelter, transportation, food, and other necessities of life, legal assistance, and _____. [If applicable: The Center for Human Rights and Constitutional Law has entered an appearance on behalf of the immigrant - _____, and along with attorney _____, located at _____, will be providing representation for _____.]

It is not our intention to conceal Ms. _____ from the authorities. [If applicable: Indeed, we will assist Ms. _____ to appear as required by any law enforcement agency].

[If applicable: We have been informed by the Center for Human Rights and Constitutional Law [or by _____] and believe that Ms. _____ may be eligible for relief from deportation because _____, and her presence may therefore be authorized under federal law.]

[If applicable: We are represented in this matter by the Center for Human Rights and Constitutional Law. In the event that you have any questions, please feel free to contact Peter Schey, President, Center for Human Rights and Constitutional Law, 256 S. Occidental Blvd., Los Angeles, CA 90057, telephone 213 388-8693 ext. 104, pschey@centerforhumanrights.org].

We are taking these humanitarian steps because the Bible teaches us to welcome the stranger and to love and protect all among us without reservation.

Thank you for your consideration.

Very truly yours,

Etc.

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