In 1983, the Office of Legal Counsel of the U.S. Department of Justice (OLC) issued an opinion on the legality of "sanctuary churches"[1] in U.S. law. Its three main findings were: (1) there is no common-law basis for church sanctuary; (2) churches who harbor undocumented immigrants violate federal immigration law; and (3) sanctuary for undocumented immigrants is not protected under the Free Exercise Clause of the First Amendment. Historical context shaped OLC's response to this issue. During the 1980s, several churches throughout the country had begun to openly shelter refugees who had fled from civil war in Central America. As this movement grew, the government felt increasing pressure to act. However, as Michael Davidson noted in "Sanctuary: A Modern Legal Anachronism," churches have one choice when it comes to harboring undocumented migrants: "[a]lthough no legal right to sanctuary exists, federal law enforcement agencies have appeared to adopt a practice of avoiding church arrests." (Davidson, 616).

This state of affairs only came about after the INS *did* attempt to prosecute church members for harboring undocumented aliens in what has been referred to as "The Sanctuary Trials." However, this process ended in embarrassment INS and the Department of Justice. Davidson describes the fallout of the case: "Rather than recognizing any legal protections afforded to sanctuary seekers, the practice of the federal law enforcement officials was attributed to avoiding bad publicity and creating a concomitant public relations victory for the sanctuary movement." These trials mark the last attempt of the federal government to enforce the OLC's opinion on sanctuary cities. Since that time, sanctuary churches have existed in a limbo state: neither operating legally nor facing any threat of imminent sanction.

The current context for these debates has changed in many fundamental ways, and it's now time to reexamine these issues. First, the initial cases were devoted to issues surrounding Reagan's covert actions in Central America. There was broad agreement amongst large portions of the population – be they religious or not – that this presented a serious humanitarian crisis. As Julie Metus notes in her article "Ecclesiastical Sanctuary: Worshippers' Legitimate Expectations of Privacy," the sanctuary movement of the 1980s had broad support. More than 500 churches self-designated as sanctuaries. And several of the largest mainline Protestant and Jewish organizations signaled support for the movement. This included the Presbyterian Church, the American Baptist Churches of America, the American Lutheran Church and the Jewish National Committee. After "The Sanctuary Trials," enthusiasm among these organizations waned. The number of religious buildings self-identifying as sanctuaries declined. Our current situation is different. Contemporary sanctuary churches mostly shelter undocumented migrants from Mexico who came for economic purposes. While in the past year, an increasing number have aligned themselves with this new iteration of the sanctuary movement, there is so far nothing like the groundswell that marked the movement in the 1980s.

Second, although the OCL memo argued that there is no First Amendment protection for sanctuary churches, there has been no corresponding case law confirming this understanding. Moreover, the idea of what is covered by the Free Exercise has changed since OCL wrote the memo. OCL leans on the case *Sherbert v. Verner*, 374 U.S. 398 (1963) for its argument. This case introduced the famous "Verner Test," a balancing test that requires that the government show both that there is a substantial government interest and that the law in question is narrowly tailored to the issue at hand. The OCL argued that enforcement of immigration laws was substantial enough

[1] I will use this term throughout this paper even though many religious communities outside of Christianity pursued sanctuary policies. Specifically, many Synagogues were also heavily involved in the movement.

and specifically attenuated enough that it outweighed the sanctuary churches' free exercise claims. It wrote:

> 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 [...] the federal government has a compelling countervailing interest in insuring that the law is enforced throughout our country. The integrity of our government would be seriously threatened if individuals could escape the criminal law by pleading religious necessity. (OCL Memo, 2).

The test introduced in that case was codified in the 1990s as the Religious Freedom Restoration Act (RFRA), which was held constitutional for federal statutes in *City of Boerne v. Flores*, 521 U.S. 507 (1997). This not only confirmed this test, but lowered the evidentiary standard required to show that an entity's free exercise of religion would be burdened. While the *test* OCL used is still the standard approach, it is not at all clear that the application would result in the decision OCL argues.[2] Indeed, the broadness or narrowness of one's First Amendment right under the law has swung back and forth. Until a court takes up this specific decision, it is not altogether clear that OCL's argued-for conclusion is the only possible one.

Finally, the abovementioned Metus article argues for another constitutional ground for protection of sanctuary status: the constitutional right to privacy. Her argument is that since churches are treated as a special category where the state's police powers are circumscribed, enforcement of immigration laws within the confines of the church itself violate the constitutional rights of their members.

The current debate is therefore much more open-ended than it might at first appear. While the government has not altered its position since the 1983 OLC memo, nor has it enforced it since that time. This uneasy stasis means that we are currently in a position where it is difficult to say for certain *what* rights sanctuary churches can claim and expect. And as the law surrounding the original memo has changed with time, so have our circumstances. With a new level of heightened scrutiny for sanctuary cities, it is not unreasonable to expect that the government will cease its inaction and bring these questions to the courts.

Works Cited

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Mertus, Julie A. (1986) "Ecclesiastical Sanctuary: Worshippers' Legitimate Expectations of Privacy," Yale Law & Policy Review: Vol. 5 Issue 2, Article 13. Available at: http://digitalcommons.law.yale.edu/ylpr/vol5/iss2/13

[2] As an example, consider the recent decision in *Burwell v. Hobby Lobby,* 573 U.S. ___ (2014). A topic this case raises is where sanctuary could fit into the kind of religious liberty argument that currently exists.