Ecclesiastical Sanctuary: Worshippers' Legitimate Expectations of Privacy

Julie A. Mertus

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylpr

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/ylpr/vol5/iss2/13
Ecclesiastical Sanctuary: Worshippers’
Legitimate Expectations of Privacy

Julie A. Mertus*

The Immigration and Naturalization Service (INS) has repeatedly
sent spies into Arizona churches to collect information about wor-
shippers’ efforts to aid Central American political refugees, efforts
commonly termed “the sanctuary movement.” In both civil and
criminal cases, churches and sanctuary workers have argued that the
government’s sending of informers into religious meetings without
prior judicial approval violates worshippers’ legitimate expectations
of privacy in their places of worship as guaranteed by the fourth
amendment. In rejecting this argument, courts have refused to sup-
press evidence gathered through government-sponsored church in-
filtration,¹ and have instead held that “as far as the fourth
amendment claims are concerned . . . there was no legitimate expec-
tation of privacy.”²

This Current Topic examines the tension between the govern-
ment’s right to enforce laws and an individual’s right to practice reli-
gion freely, in the context of the sanctuary trials. It argues that due
to the sacred nature of religious places and the special protections
they are granted under the first amendment, worshippers do indeed
have a reasonable expectation of privacy from government spying.
Thus, there is a strong presumption that government infiltration of
churches violates the fourth amendment.

* The author would like to thank attorneys Ellen Yaroshefsky at the Center for Con-
stitutional Rights in New York, and Janet Napolitano at Lewis and Roca in Phoenix,
Arizona, for their assistance. However, the views expressed in this Current Topic, as
well as any errors, are those of the author alone.

1. Pretrial Ruling at 1097, United States v. Aguilar, No. Cr. 85-008-ENC (D. Ariz
Jan. 14, 1985), appeal docketed, No. 86-1208-1215 (9th Cir. Aug. 6, 1986). See also com-
panion cases: United States v. Anthony Clark, 86-1209 DC, No. Cr. 85-008-EHC (D.

86-0072 PHX CLH (D. Ariz. Oct. 30, 1986) (granting defendant’s motion to dismiss and
summarily holding that the federal government has sovereign immunity and that “plain-
tiffs’ churches have no standing to raise the freedom of religion claim.”) appeal docketed,
No. 86-2860, (9th Cir. Nov. 18, 1986).
I. Introduction: The Sanctuary Trials

A considerable and growing number of clergy and lay people have become concerned about the plight of Central American refugees escaping political oppression in El Salvador and Guatemala. Motivated by scripture and supported by declarations from their denominations, people of faith meet, discuss, pray, and conduct services about these refugees. From these religious concerns has come what is called the sanctuary movement, a term that covers a wide range of denominations, churches, individuals and activities.

In January 1985, 16 sanctuary workers were indicted on criminal charges of conspiracy to violate the laws of the United States, including bringing in, transporting, concealing, and harboring illegal aliens. On May 1, 1986, eight of these workers were convicted in U.S. v. Aguilar. The evidence on which the indictments and subsequent convictions were based was collected during an undercover operation in which federal government informants, posing as sanctuary workers, taped church services and conversations, producing over 40,000 pages of transcripts.

As planned and conducted, the scope of the INS undercover operation, entitled "Operation Sojourner," was not restricted to those individuals who were targeted for surveillance, and probable indictment. Instead, Sojourner involved the unwarranted taping, surveillance, and infiltration of churches, services, Bible study meetings, and mission planning meetings that included persons who were not even arguably engaged in criminal behavior. For example, at one

3. Church officials are not only concerned about refugees in a religious and humanitarian sense but also are concerned "that the present U.S. administration's treatment of these refugees violates the Geneva and Helsinki Accords, the U.N. Convention on Refugees, and the U.S. Refugees Act of 1980, and that this lawlessness undermines the fabric of respect for law." MacEoin, A Brief History of the Sanctuary Movement, in Sanctuary: A Resource Guide for Understanding and Participating in the Central American Refugees' Struggle 14 (G. MacEoin ed. 1985) [hereinafter Sanctuary].


6. Indictment, United States v. Aguilar, No. CR 85-008-EHC (D. Ariz. Jan. 14, 1985), appeal docketed No. 86-1208-1215 (9th Cir. Aug. 6, 1986). Prosecution was based upon 8 U.S.C. § 1324, which forbids the transportation and harboring of illegal aliens. Six of the defendants were convicted of conspiring to smuggle Central Americans into the United States. Two other defendants were found guilty of lesser charges, including harboring or transporting illegal aliens. N.Y. Times, May 2, 1986, at A19, col. 2.


Ecclesiastical Sanctuary

church service, participants were given a bulletin at the door that revealed that the service would entail Bible readings, prayers, hymns, and fellowship. Without any ground for believing that criminal activity would take place, and without a warrant, government agents entered the church, pretended to engage in worship, tape-recorded virtually the entire service, and departed early in order to record the license plate numbers on worshippers’ automobiles.9

Church infiltration is currently being challenged in three cases. The defendants in Aguilar10 are appealing their convictions, arguing that evidence obtained by warrantless government informants should be suppressed.11 A group of churches in Presbyterian Church v. United States12 is suing the United States government for a declaratory judgment that the undercover infiltration was illegal, as well as for injunctive relief.13 In American Baptist Churches in the U.S.A. v. Meese,14 another group of 80 churches is suing the United States government to stop prosecution of sanctuary workers on the grounds that prosecutions have been in bad faith, and to prevent further deportation of Central American refugees.15

86-2860 (9th Cir. Nov. 18, 1986). From March 1984 until January 1985, government agents infiltrated, electronically tape-recorded, and otherwise spied on worship services, Bible study classes, and mission planning meetings at Alzona Lutheran Church in Phoenix, Camelback Presbyterian Church in Phoenix, Sunrise Presbyterian Church in Phoenix, and Southside Presbyterian Church in Tucson. Id. at 6-11.

9. Id. at 8. The INS has acknowledged that government agents tape-recorded services that were not illegal. Transcript of Oral Argument at 52, Presbyterian Church v. United States, No. Civ. 86-0072 PHX CLH (D. Ariz. Oct. 30, 1986), appeal docketed, No. 86-2860 (9th Cir. Nov. 11, 1986). Still, that the government had no reason to believe that illegal activity would occur during the infiltrated services is not determinative. This Current Topic argues that regardless of the government’s beliefs, warrantless church infiltration is presumptively invalid.


13. First Amended Complaint, supra note 4, at 24. Even though the lead plaintiffs are the Presbyterian Church (U.S.A.) and the American Lutheran Church, the case has attracted support from a variety of religious denominations. In the appeal to the Ninth Circuit Court of Appeals, an amicus brief has been filed jointly by the National Council of Churches (U.S.A.), the American Jewish Committee, the Baptist Joint Committee on Public Affairs, the Christian Church (Disciples of Christ), the Unitarian Universalist Church, and the United Church of Christ. In addition, amicus briefs have been filed by the American Jewish Congress and the Arizona Civil Liberties Union. Telephone interview with Janet Napolitano, Attorney, Lewis & Roca (Apr. 10, 1987).


15. On Mar. 30, 1987, District Court Judge Robert F. Peckham denied the government’s motion to dismiss the claim that the government should stop prosecution of
The defendants in these cases claim that church infiltration violates: (1) the free exercise clause of the first amendment, (2) the rights of worshippers to a reasonable expectation of privacy in their places of worship as guaranteed by the fourth amendment, and (3) the due process clause of the fifth amendment. It is the second claim that is the focus of this Current Topic, which argues that because a limited concept of ecclesiastical sanctuary is deeply embedded in both American social and legal traditions, worshippers may reasonably expect freedom from governmental interference in their religious gatherings.

II. Ecclesiastical Sanctuary's Ancient Past

By the institution of sanctuary, specific persons or places may afford other individuals special safeguards that extend beyond protection of ordinary law. Ecclesiastical sanctuary is based on the ancient belief that holy places, by virtue of their sacred nature, are inviolable by pursuing mortals. Holy places, consequently, can provide asylum to the pursued. Governments have not always recognized ecclesiastical sanctuary; the concept has been applied selectively at times, and at other times it has been deemed a privilege rather than a right. Nevertheless, the many examples of sanctuary's recognition throughout history lend credence to the theory that the government-sponsored church infiltration was in bad faith. Id.

16. The churches and sanctuary workers did not argue that the act of giving sanctuary was itself protected religious expression. This argument was recently rejected in United States v. Merkt, 794 F.2d 950 (5th Cir. 1986) (although defendants contended that they were religiously motivated in conducting sanctuary activities, their convictions for transporting illegal aliens were not barred by the first amendment), cert. denied, 107 S.Ct. 1603 (1987). See also United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985) (free exercise clause of the first amendment does not preclude prosecution of defendant who felt he had a Christian commitment to assist those fleeing violence in El Salvador). See Comment, Ecumenical, Municipal & Legal Challenges to U.S. Refugee Policy, 21 Harv. C.R.-C.L. L. Rev. 475 (1986) for a discussion of other challenges to church infiltration.

17. This focus is not intended to suggest that the fourth amendment claims can be entirely separated from the first amendment claims. Indeed, this discussion of the legitimate privacy expectations of worshippers relies on and is informed by first amendment concerns.

18. This is one of the most common definitions of sanctuary. See Siebold, Sanctuary, Encyclopedia of the Social Sciences 534 (D. Sills ed. 1934).

19. Murphy, A Historical View of Sanctuary, in Sanctuary, supra note 3, at 75. This ancient concept of sanctuary is the background for the broadest conceptions of sanctuary: "It has something to do with the sacred, with almighty God, and with God's presence in our community as well as the world." Id.

that worshippers in American churches have a reasonable expectation of privacy.

The concept of ecclesiastical sanctuary is deeply imbedded in the Hebrew tradition. The institution of the "city of refuge" came into existence when the Hebrews changed from a nomadic to a sedentary existence. While wandering in the desert, a tribe carried an easily accessible tabernacle offering sanctuary to fugitives. But when all temples were abolished except the temple at Jerusalem, the Hebrews found Jerusalem difficult to reach from distant locations and, therefore, established cities of refuge. A fugitive who reached one of these cities was safe while within its walls. Such a system protected criminals from summary vengeance and simultaneously punished the criminals by making them live in exile.

An even more extensive sanctuary system was developed in ancient Greece. Temples were designated as sanctuaries and, under almost all circumstances, could protect the oppressed and the persecuted—slaves, debtors, malefactors, and criminals. Not all temples, however, gave protection to the accused; a city usually only recognized asylum in the temple of its patron god. When sanctuary was granted, even murderers and those under death sentences had a claim to protection and could dwell in the grounds surrounding a temple until their own deaths. Greek states also granted asylum to fugitive slaves and foreigners fleeing from the justice of their own countries.

The Romans restricted the right to sanctuary and integrated that right into their legal system. During the reign of Emperor Tiberius, places of asylum were ordered to prove to the Roman Senate their right to accord asylum. Generally, Roman justice did not yield to

---

21. For example, in the Book of Kings of the Bible there is mention of Adonija who, suspected of conspiring against Solomon, fled, found refuge at the foot of an altar and left it when the king promised to spare his life. 1. Kings, 1:50-53. A.P. Bissel, The Law of Asylum in Israel (1884), quoted in S. Sinha, supra note 20, at 7.

22. See Exodus 21:13, Joshua 20:5, Numbers 35:6-34, Deuteronomy 4:41-43. In addition to the cities of refuge, 48 Levite cities were able to give asylum with the consent of their inhabitants. L. Ginzberg, Asylum in Rabbinical Literature, reprinted in 2 Jewish Encyclopedia 257-59 (C. Adler ed. 1902).


25. Siebold, supra note 18, at 534. The Greeks' policy of providing sanctuary for murderers and convicted criminals has been criticized as being too lenient. N.M. Trenholme, supra note 23, at 4. Also, some very notable cases of violations of sanctuary have been recorded. Id. Despite such violations, the Greeks are generally noted for having one of the most extensive systems of sanctuary in the Western world. Id.


27. S. Sinha, supra note 20, at 9.
religious sentiments. A limited system of sanctuary was eventually recognized, however, especially for slaves. In most cases, the fugitive would be taken by government officials from the sanctuary—often a temple of Caesar—and would offer his defense before a magistrate. If the magistrate found him guilty, the fugitive would suffer the appropriate penalty. Sanctuary thus only saved a criminal from summary and immediate vengeance and afforded a respite before trial.28

The practice of allowing Christian churches to extend sanctuary to fugitives dates from the time of Constantine's Edict of Toleration in 313 A.D.29 Church authorities interceded before the courts and the emperor to defend the persecuted, to obtain a modification of a sentence passed upon the condemned, and to free those imprisoned.30 In 431 A.D., Theodosius the Younger extended the privilege from the churches' altars and naves to the adjacent buildings.31 Certain classes of offenders were excluded from sanctuaries in accordance with considerations of state policy. By the Novella of Justinian, public debtors, murderers, adulterers, and rapists were all denied the protection of sanctuaries.32

Throughout the Middle Ages, the extent of protection afforded by ecclesiastical sanctuary was dependent upon the relative power of state and church.33 When ecclesiastical power grew, churches no longer restricted asylum to the maliciously pursued innocent; they extended it to all fugitives. Places of sanctuary were increasingly expanded to include convents, monasteries, cemeteries, homes of bishops, hospitals, and even crosses placed along a road.34 When state authority increased, a struggle was mounted against the perceived abuses of sanctuary, including the belief that the most "guilty of malefactors . . . enjoy[ed] immunity within sacred walls."35 The Catholic Church limited the right of sanctuary by barring certain criminals, such as assassins and political offenders, but retained the institution in principle.36

29. Id. See also S. Sinha, supra note 20, at 10.
30. Siebold, supra note 18, at 535.
31. S. Sinha, supra note 20, at 11.
32. Novella XVII, c.7, cited in N.M. Trenholme, supra note 23, at 9 n.15. See also Siebold, supra note 18, at 535.
33. Siebold, supra note 18, at 535.
34. S. Sinha, supra note 20, at 11.
36. Codex juris canonicorum, can. 1160, 1179, cited in Siebold, supra note 18, at 586. Church buildings were still declared inviolable, and refugees were not to be removed from them without permission of the rector. Id.
Ecclesiastical Sanctuary

The growth of centralized, secular power and the development of effective national systems of justice eventually led to a shift from the practice of ecclesiastical asylum to that of political asylum. There is no clear demarcation line in history to indicate this shift. A gradual change occurred between the seventeenth and eighteenth century.\(^{37}\) In England, for example, ecclesiastical sanctuary was greatly curtailed under the reign of Henry VIII and was officially abolished in 1727. The concept of sanctuary was also gradually abandoned in France after the French Revolution.\(^{38}\)

In time, ecclesiastical sanctuary was no longer widely recognized as a formal, inviolable system. Yet, because it was so deeply entrenched in the traditions of so many peoples, it did not simply disappear. The idea of hospitality and protection underlying the practice of sanctuary continued to exist in a modified form. Sanctuary began to be developed in places not recognized as religiously sacred, such as certain towns and countries.\(^{39}\) The idea that religious places have a special, sacred nature that may place them beyond the reach of government also did not vanish.\(^{40}\) This idea, albeit modified, is deeply entrenched in American society and is reflected throughout American law.

III. The Bases of an Ecclesiastical Sanctuary Doctrine

One of the objectives of the first amendment is to protect religious liberty and to prohibit coercion of religious practices.\(^{41}\) In line with this objective, the Court has determined that separation of church and state requires that secular institutions avoid direct involvement with religious organizations.\(^{42}\) It is such "excessive gov-


\(^{38}\) See Murphy, supra note 19, at 77. See also M.C. Bassiouri, supra note 37, at 90. For an account of the decline of ecclesiastical sanctuary in Central America, see C.N. Ronning, Diplomatic Asylum 25-26 (1965).

\(^{39}\) For example, cities of asylum were established on the Hawaiian Islands. S. Sinha, supra note 20, at 36 n.7. Also, because of its special status in international law as a neutral state, Switzerland continues to grant sanctuary today to foreigners fleeing prosecution for political crimes. Siebold, supra note 18, at 537.

\(^{40}\) For example, in the United States during the Civil War, congregations and abolitionists who participated in the Underground Railroad relied on biblical texts to justify giving refuge to fugitive slaves. H. Strother, The Underground Railroad in Connecticut 182 (1962). Many years later, at the time of the Vietnam War, churches claimed a right to provide sanctuary to conscientious objectors and to soldiers who went AWOL. Ferber, A Time to Say No (1967), reprinted in Civil Disobedience in America 271 (D. Weber ed. 1978).


ernmental entanglement with religion" that threatens private liberty and public order alike. Thus, the Constitution demands that government protect religious liberty without entangling itself in religious practices. Recognition of a limited concept of ecclesiastical sanctuary advances this separation in a manner similar to other judicial doctrines that afford greater protections to religious institutions than are available to secular ones, when such protections are necessary to preserve the very sacred nature of religion.

A. Traditional Treatment of Religious Institutions

Perhaps the most striking situation in which courts have found that the first amendment requires that religious organizations be treated differently from secular institutions is the seminal tax case, Walz v. Tax Commission of City of New York. In Walz, a real estate owner claimed that the Tax Commission's grant of exemptions to church property indirectly required him to make a contribution to religious bodies, thereby violating the establishment clause of the first amendment. Rejecting Walz's contention, Chief Justice Burger's opinion for the majority found it significant that Congress, from its earliest days, has taxed churches on a different basis than secular institutions.

One rationale for treating religious organizations differently from secular institutions in tax policy is that religious institutions provide special services that are in the public interest. The Court in Walz sustained the tax exemptions and emphasized that such exemptions result in less entanglement with religion than would the taxation of church property. Chief Justice Burger warned that eliminating the exemption would "give rise to tax valuation of church property, tax

44. Private liberty is endangered because government involvement in religion may promote the supremacy of particular religious beliefs, lead to the official establishment of religion, and encourage the suppression of divergent beliefs. Board of Educ. v. Allen, 392 U.S. 236, 254 (1968). Government entanglement also necessitates government involvement in the internal workings of religious sects and decreases religious leaders' authority. Public order is threatened when the state allies itself with one particular form of religion, causing the government to incur "the hatred, disrespect, and even contempt of those who hold contrary beliefs." Engel v. Vitale, 370 U.S. at 431.
45. Professor Lawrence Tribe summarizes: "The Supreme Court has recognized for nearly a quarter-century that, whatever may be true of other private associations, religious organizations as spiritual bodies have rights which require distinct constitutional protection." L. Tribe, American Constitutional Law 876 (1978).
47. 397 U.S. at 677.
48. 397 U.S. at 672-73.
Ecclesiastical Sanctuary

liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." 49

Church “autonomy” cases provide other striking examples in which religious associations are treated differently by the courts because of their very nature. Judicial deference to the internal decisionmaking organs of these groups began as early as 1871 in Watson v. Jones.50 There the Court held:

[When]ever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of those church jurisdictions to which the matter has been carried, the legal tribunal must accept these decisions as final and binding on them, in their application to the case before them.51

The Court later reaffirmed the ability of religious organizations to establish their own rules and regulations for internal discipline and governance in Kedroff v. Saint Nicholas Cathedral.52 At issue in Kedroff was a New York religious corporations law that had the effect of transferring the administration and control of Russian Orthodox churches in North America from Moscow to authorities selected by a convention of North American churches.53 The Kedroff Court held that the law violated the first amendment, not so much because any individual’s religious liberty was infringed demonstrably by the transfer, but because the government should respect:

a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.54

Even in those cases where a legally recognized property right followed from church custom or law on ecclesiastical issues, church

49. 397 U.S. at 674. Similarly, in concurring opinions, Justice Brennan sought to avoid “extensive state investigation into church operations and finances.” 397 U.S. at 691 (Brennan, J., concurring), and Justice Harlan indicated concern about the entanglement of “government in difficult classifications of what is or is not religious.” 397 U.S. at 698 (Harlan, J., concurring).
50. 80 U.S. (13 Wall) 679 (1871).
51. 80 U.S. at 727.
52. 344 U.S. 94 (1952).
53. 344 U.S. at 99 n.3.
54. 344 U.S. at 116. See also Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (applying Kedroff principle to parallel attempt by New York courts). Even more recently, in Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976), the Court stated that “the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.” See also Hutchinson v. Thomas, 789 F.2d 392 (6th Cir. 1986) (district court did not have subject matter jurisdiction over action by minister challenging his enforced retirement under church disciplinary rules).
rule has been held to be controlling.\(^5\) The Court has thus continually recognized that religious associations have rights which may be different from those of similarly situated secular institutions.

B. \textit{Differential Treatment Based on Sacred Nature of Religious Institutions}

In many cases, courts have justified the differential treatment of a religious organization by citing the state's legitimate interest in protecting religion's sacred nature. Some courts have found that, in order to protect free exercise, harms directed against sacred places may be met with harsher sanctions than near-identical harms directed against secular buildings. For example, in \textit{State v. Vogenthaler},\(^5\) the court affirmed a conviction for violation of a state statute prohibiting desecration of a church. The court reasoned that the statute, which defined desecration of a church as willfully, maliciously, and intentionally defacing a church or any portion thereof, did not violate the federal or state constitutions' clauses prohibiting the establishment of religion.

The respondent in \textit{Vogenthaler} argued that the statute advanced religion generally by making it a greater crime to desecrate a church than to criminally destroy any other kind of property.\(^5\) The court dismissed this argument, finding that the state had a legitimate interest in protecting religion, and, to best protect religious exercise, the statute had a rational basis for treating criminal damage to a church differently from criminal damage to other property.

Churches 'uniquely contribute to the pluralism of American society by their religious activities.' Neutrality of the state toward religion 'does not dictate obliteration of all our religious traditions.' A rational basis for treating criminal damage to a church differently than criminal damage to other property is the role of religion in society as a whole.\(^5\)

\(^{55}\) Presbyterian Church in the United States v. May Elizabeth Blue Hill Memorial Presbyterian Church, 393 U.S. 440 (1969) (the state's common law, which implied a trust on local church property on the condition that the general church adhere to its tenants of faith, violated the first amendment; therefore, the common law could not be used to resolve a property dispute).

\(^{56}\) 548 P.2d 112 (N.M. 1976), cited with approval in Friedman v. Board of County Comm. of Benalillo County, 781 F.2d 777, 792 n.6 (10th Cir. 1985) (upholding use of Latin cross and Spanish motto translated as "with this we conquer" on county seal).

\(^{57}\) 548 P.2d at 114. The statute applicable to churches made damage of less than $1,000 a misdemeanor while the statute applicable to secular buildings made such damage a petty misdemeanor.

\(^{58}\) 548 P.2d at 115 (citations omitted). Vogenthaler also claimed that the statute advanced the religion of one religious group over others. The court rejected this argument, finding that the term "church" as used in the statute did not advance the Christian religion because it was meant to apply to all places of worship. 548 P.2d at 113.
Ecclesiastical Sanctuary

Special sanctions have thus been applied against those who violate the sacred nature of a place of worship by defacement.59

In a like manner, courts have found legitimate the state's interest in protecting the special, sacred nature of churches and therefore have upheld convictions based upon statutes prohibiting the disturbance of religious meetings. In *Riley v. District of Columbia*,60 the district court found that the defendants had disturbed a church service in violation of a local statute by passing out leaflets during the service. The court reasoned that the statute did not constitute an establishment of religion, but protected the rights of members of a religious group to hold services in a manner in accordance with their faith.61 The defendants' actions, the court explained, violated the sacred nature of the religious service.

[T]he convictions are based upon the cumulative effect of the appellants' actions upon members of the congregation and of the clergy by disobeying a specific directive of the pastor and distributing literature during the offertory, in a precipitous manner, contrary to the customs and usages of the Blessed Sacrement Church, causing prayers to be interrupted and the Mass to be halted.62

It is commonplace for differential treatment toward speech or conduct inside a church to be upheld because of the need to protect the church's sacred nature.63 In one case, *State of Minnesota v. Donald Olsen*,64 the defendant was convicted of violating a statute prohibiting conduct disturbing the peace and quiet of others. The conviction rested on the fact that the defendant's loud speech occurred inside a church, instead of some other, nonsacred building. The court wrote:

[W]e believe that one who invites himself to a private place of worship such as a church or synagogue in order to contest the teachings of its pastor, minister, or rabbi, in the presence of a congregation engaged

---

59. This is not a new doctrine. *See Saffell v. State, 167 S.W. 483 (Ark. 1914)* (upholding conviction based on statute making it a misdemeanor to cut, write on, deface, disfigure, or damage any part or appurtenance of any church); *State v. Brant, 14 Iowa 180 (1862)* (affirming judgment for willful and malicious injury to a church). *See also State of Connecticut v. Harold Fahy, 183 A.2d 256 (Conn. 1962)* (finding willful injury to public property when defendants painted swastikas on synagogue; in light of severity of penalty, 60 days in jail, decision arguably was based in part upon sacred nature of the synagogue).

60. 283 A.2d 819 (D.C. 1971).
61. 283 A.2d at 823.
62. 283 A.2d at 824 (footnote omitted).
64. 178 N.W.2d 230 (Minn. 1970).
in formal religious worship, should inform himself before doing so whether and when such a disputation would be considered less than offensive.\textsuperscript{65}

The defendant in \textit{Olsen} interrupted what the court found was the most "profoundly solemn" part of the service, the Canon of the Mass.\textsuperscript{66} Because "the defendant could be expected to be sensitive to the religious feelings of others," the court held that his insulting remarks "exceeded the permissible limits of free speech and . . . infringed upon the rights of others to worship according to the dictates of their conscience."\textsuperscript{67}

The sacred nature of a religious organization and the legitimate state interest in protecting this special nature have also influenced courts' reasoning in cases other than those concerning disturbance and desecration. Many courts have upheld statutes and ordinances that recognize the sacred nature of alcohol in religious services. For instance, \textit{Salatka v. Oklahoma Alcoholic Beverage Control Board}\textsuperscript{68} held that religious officials, unlike other citizens, were not required to make wine purchases from licensed liquor stores because use of wines solely for sacramental purposes was not included in the term "alcoholic beverage" as used in state laws.\textsuperscript{69} Courts have also upheld ordinances prohibiting the issuance of licenses to sell liquor within a certain distance to places of worship. Such ordinances, reflecting a desire to protect the sacred nature of a church, have been justified as reasonably related to health and public welfare.\textsuperscript{70} Similarly, courts have rejected arguments that ordinances regulating the sale of kosher food violate the establishment clause. Rather than establishing religion, courts have found that such statutes merely reflect the state's legitimate interest in safeguarding the observance of a religion and prohibiting actions that improperly interfere with religious freedom.\textsuperscript{71}

\textsuperscript{65} 178 N.W.2d at 232.
\textsuperscript{66} 178 N.W.2d at 232.
\textsuperscript{67} 178 N.W.2d at 232.
\textsuperscript{68} 607 P.2d 1355 (Okla. 1980).
\textsuperscript{69} 607 P.2d at 1357.
\textsuperscript{71} See \textit{Sossin Systems v. Miami Beach}, 262 So.2d 28, 30 (Fla. 1972) (upholding conviction for violation of municipal ordinance dealing with the sale of kosher food). \textit{See generally} \textit{Hygrade Provision Co. v. Sherman}, 266 U.S. 497 (1925) (kosher food laws do not violate the fourteenth amendment); \textit{Erllich v. Municipal Court of Beverly Hills Judi-
Ecclesiastical Sanctuary

C. Circumscribed Police Powers

Several cases not only recognize the sacred nature of religious places but also circumscribe use of police powers because of such places' very nature. In People v. Woody,72 the court found that a statute proscribing use of peyote was a legitimate exercise of California's police powers. However, that statute could not be applied so as to prevent Indian tribes from using peyote in their religious worship. The court found that the statute imposed a burden on the free exercise of the religion by Navajo Indians.73 Preventing alleged deleterious effects of peyote did not constitute a state interest so compelling as to warrant abridgment of the Indians' constitutional right to freedom of religion.74

Police power was more recently circumscribed in order to protect Indian tribes' first amendment rights in Northwest Indian Cemetery Protective Association v. Peterson.75 In Northwest, government plans to permit logging in a national forest affected an area that was indispensable to Indian religious leaders as a place where they received the "power" that permitted them to fulfill their religious roles. The Ninth Circuit found that the proposed operations would "virtually destroy the plaintiff Indians' ability to practice their religion."76 Because the government's interest in timber harvesting and road construction did not justify interference with Indian tribes' free exercise rights, the government plan was declared invalid.

72. 394 P.2d 813 (Cal. 1964).
73. "Peyote itself constitutes an object of worship; prayers are directed to it as much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious. Members of the church regard peyote also as a 'teacher' because it induces a feeling of brotherhood with other members; indeed, it enables the participant to experience the Deity." 394 P.2d at 817-18.
74. 394 P.2d at 818. See also Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193 (5th Cir. 1984) (record did not show a compelling state interest in denying members the right to use peyote in religious ceremonies).
75. 795 F.2d 688 (9th Cir. 1986), cert. granted, 55 U.S.L.W. 3746 (June 4, 1987).
76. 795 F.2d at 693. The finding that the government plan would virtually destroy the Indians' free exercise rights distinguishes Northwest Indian Cemetery from Bowen v. Roy, 106 S.Ct. 2147 (1986). In Bowen, the Court found that government use of an Indian child's social security number for purposes of providing governmental benefits did not significantly impair the Indian's ability to exercise his religion. Similarly, an Indian tribe failed to establish that use of lands affected by a proposed dam was central to their religion. Sequoyah v. TVA, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980). The tribe claimed that the dam would flood their sacred homeland, destroying sacred sites. Failure to establish a significant interference with religions' exercise was also fatal in Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), cert. denied, 464 U.S. 956 (1983) (development of ski resorts on San Francisco Peaks would not cause Indian tribes to be denied access to any sacred areas).
Churches also enjoy a different status than commercial enterprises in zoning matters. Courts have explicitly held that religious use may not be prohibited by unreasonable or inappropriate regulations, even if such regulations may be applied to secular uses. Because land used for a religious purpose bears a substantial relationship to public health, safety, and welfare, courts have given religious places favored status, and have applied different standards when considering zoning applications for sacred places. In this same vein, the police power to require variances and use permits has been restricted when the applicant was a religious group.

Courts have considered the taking of property belonging to a religious organization as an interference with the free exercise of religion, when the property is unique or essential to the group's religious activities. The decision by an urban renewal authority to condemn church property, which included a religious organization's first church, interfered with the free exercise of religion in Pillar of Fire v. Denver Urban Renewal Authority. The court recognized that "religious faith and tradition can invest certain structures and land sites with significance which deserves first amendment protection." Therefore, the court found that before the state could take church property under its power of eminent domain, it had to balance the organization's interest in freedom of religion against the state's interest in urban renewal.

81. 509 P.2d at 1254.
82. 509 P.2d at 1254. The court in Order of Friars Minor of Province of the Most Holy Name v. Denver Urban Renewal Auth., 527 P.2d 804 (Colo. 1974) also required that the state urban renewal authority apply different standards when taking church property than when taking secular property. The court in Order of Friars noted that the taking of a church parking lot constituted an interference with the free exercise of religion where absence of the parking lot would discourage parishioners from attending church. The practice of exempting sacred land from condemnation is not new; in 1917, church property that was used for a sexton's house was held to be land used for church purposes and was therefore exempt from condemnation. In Re Additional Site for Boy's High School, 34 Lanc. L. Rev. 393 (Pa. 1917).
Ecclesiastical Sanctuary

Perhaps the area in which restrictions on police power are best recognized is communication between clergy and penitents. At common law, communications to clergy were not privileged. However, in most states, statutes have been enacted providing in substance that communications made to clergy in their professional capacity are privileged. A clergy-communicant privilege is also contained in the Uniform Rules of Evidence. While varying from state to state, the privilege generally has been applied broadly. Courts have concluded that statutes establishing clergy-communicant privileges do not use the term "confession" to mean only those communications that are compulsory because such a construction would make the privilege applicable only to a priest of the Catholic Church. One also need not be an ordained minister to be considered a member of the clergy within the privilege; a few courts have recognized that those whose duties conform to those of the clergy may themselves be considered clergy for the purposes of applying the privilege.

As the above discussion indicates, courts have not only treated religious institutions differently than secular ones, but also have based differential treatment on their recognition of a legitimate state interest in protecting the sacred nature of religion. Without extra protection, the courts have determined, the sacred nature of religion is often eroded and free exercise of religion is impaired.

83. Since the Restoration and for two centuries thereafter, the "almost unanimous expression of judicial opinion" was that there was no privilege. 8 J. Wigmore, Evidence § 2394 (3d ed. 1940).
87. See In Re Swenson, 237 N.W. 589 (1931) (holding Lutheran minister entitled to clergy-communicant privilege). The court reasoned that if the legislature had intended to limit the privilege to Catholic priests, the legislature would have used the word "priest" in the statute rather than the term "clergyman."
88. See In Re Verplank, 329 F. Supp. 433 (Cal. App. 1971) (draft counseling staff who were not ordained ministers came within privilege of clergy where activities conformed in a general way to those of minister of Protestant denomination); Reutkemeier v. Nolte, 161 N.W. 290 (Iowa App. 1917) (elders of Presbyterian church were ministers of the gospel within the meaning of a state statute). But see, In Re Murtha, 279 A.2d 889 (N.J. Super. 1971) (clergy-penitent privilege did not apply to a nun who had conversations with a youth suspected of homicide).
IV. The Impact of Ecclesiastical Sanctuary on Fourth Amendment Violations

In the Arizona sanctuary cases, the government ignores the courts' consistent recognition of the need to protect the sacred nature of religion and argues that, because church meetings and services are open to the public, worshippers have no legitimate expectation of privacy. The government notes that recent Supreme Court and Ninth Circuit decisions have held that the use of governmental agents or informants in undercover activities to tape-record conversations in public places does not violate the fourth amendment. Individuals were found not to have had reasonable expectations of privacy in these cases because either they consented to the presence of the informer or they assumed the risk of engaging in such conversations. The key to these decisions—none of which involved churches—was stated in Hoffa v. United States.

Neither this Court nor any member of it has ever expressed the view that the fourth amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

In the government’s view, a church should be treated just like any other public place. There is nothing sacred, special, or significant about churches that should caution concern or restraint when the government enters their premises. Under this approach, a church must close its doors to keep out unwarranted government informers. This view ignores the special treatment courts have repeatedly accorded to sacred places. Indeed, police powers are often circumscribed and different standards are applied when religious liberties are implicated. Police powers should be similarly constrained when the government seeks to obtain evidence of criminal behavior at churches.

It has been suggested that the only way to limit spying that takes place at a church would be through a per se rule requiring a search warrant for all spying on religious property. While such a rule would protect the sacred nature of churches, it would be contrary to

91. Hoffa v. United States, 385 U.S. at 902.
92. Defendant’s Motion to Dismiss, supra note 89, at 33.
sound public policy in the limited situations where immediate government surveillance on church property was necessary. However, a per se rule is not the only possibility. Instead, the courts' consistent treatment of sacred places dictates a presumptive rule: Because of the special nature of churches, church infiltration should be condoned only in conditions of absolute necessity. While the government's use of informants in churches is not unconstitutional per se, there should be a strong presumption in sanctuary cases that the fourth amendment requires both a warrant and a demonstration that infiltration is the least intrusive means for gathering information.

The presumptive rule follows from the eminent domain and zoning cases in which courts recognized the limitations of police power over religious institutions and applied different standards. It also closely parallels the desecration and disruption cases in which the court recognized that greater sanctions may be applied when harm is directed against a religious place. In the sanctuary cases, the harm directed against the church is infiltration and spying. It follows then that there should be a stronger presumption that such activity is invalid when it is directed against a religious institution rather than against a secular institution.

The proposition that the fourth amendment must be strictly applied when first amendment interests are implicated is not novel. The Supreme Court has repeatedly emphasized that one reason for adoption of the fourth amendment was to protect citizens in their exercise of first amendment liberties. A seizure which may be reasonable in one setting may be unreasonable when first amendment rights are involved. In Zurcher v. Stanford Daily, the Court explicitly stated that where the affected interest was protected by the first

---

93. See supra notes 77-82 and accompanying text.
94. See supra notes 56-67 and accompanying text.
96. In United States v. United States Dist. Court for the Eastern Dist. of Michigan, 407 U.S. 297, 314 (1972), the Court cautioned: "fourth amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs." In requiring a search warrant for electronic surveillance of defendants who allegedly bombed a CIA office, the Court reasoned that "[t]he price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power . . . For private dissent, no less than open public discourse, is essential to our free society." 407 U.S. at 314. See also Roaden v. Kentucky, 413 U.S. 496, 501 (1973).
amendment, the fourth amendment warrant requirement must be applied with "scrupulous exactitude." 97

In order to apply a presumptive rule to a sanctuary case, two conditions must be present. First, worshippers' expectations of privacy must be ones "that society is prepared to recognize as being reasonable." 98 Second, the government activity must indeed impinge on protected first amendment interests. 99 No single factor is dispositive in determining whether a privacy expectation is legitimate. In making this judgment, the Court previously has considered four factors: the intentions of the Framers of the Constitution, 100 societal expectations that have deep roots in the history of the fourth amendment, 101 the nature of the place where the intrusion occurred, 102 and the uses to which the place is put. 103

If these factors are considered in the sanctuary cases, the privacy expectations of the worshippers were indeed legitimate. First, even though the Framers did not specifically consider ecclesiastical sanctuary, they did intend to prevent government intermeddling with religion as demonstrated by both the free exercise and establishment clauses. 104 Second, courts have consistently recognized the special, sacred nature of religion and have found specifically that churches are protected places. The Court has stated succinctly:

The 'establishment of religion' clause of the First Amendment means at least this: . . . neither a state nor the Federal Government can,

97. 436 U.S. at 564. The Court went on to hold that although first amendment interests were implicated by the search of a newspaper office, the search in question did not exceed constitutional boundaries because the preconditions for the issuance of a warrant (probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness) were met. 436 U.S. at 567-68. In the present case, however, these preconditions were not met. Less restrictive means for gathering information about the sanctuary movement could have included: conducting interviews, issuing grand jury subpoenas, tailing suspects without entering religious services, and reading newspapers and watching news reports.


102. Oliver v. United States, 466 U.S. at 178, recognized that the fourth amendment "reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference." Cf. Weeks v. United States, 232 U.S. 383 (1914) (a home is a protected place).


104. James Madison, drafter of the first amendment, wrote that, "there is not a shadow of right in general government to intermeddle with religion. Its least interference would be a most flagrant usurpation." Quoted in O. Cord, Separation of Church and State: Historical Fact and Current Fiction 8 (1982).
Ecclesiastical Sanctuary

... openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Thus, numerous judicial opinions provide society with informed expectations that government will stay out of religious worship.

Not only does an expectation of privacy in religious places have deep roots in the historical treatment of the first and fourth amendments, but also in the practices of peoples from which the United States draws its traditions, thus fulfilling the third factor of the Court's test. Lastly, because churches seek to provide both a sacred forum for the devoted and a place in which to convert nonbelievers, their "public invitation" is unique. Religious openness is founded on faith, not on guarded secrecy or wary caution. Worshippers' expectations of privacy are indeed reasonable given the Framers' intent, societal expectations, and the nature and uses of such places. Therefore, even though their churches or synagogues are open to the public, worshippers have legitimate expectations that the person sitting next to them is not a government agent recording their every utterance.

What remains to be determined is whether the government's spying implicates protected first amendment interests—here, the ability of worshippers to exercise their religion freely. The Court has found that even the minimal presence of state education officials in monitoring the expenditure of funds for school supplies and course materials used in parochial schools violates the first amendment by risking government entanglement with religion. One court has also held that government subpoenas of church documents, in an investigation of the overall costs of religious schools, violated the first amendment. In sanctuary cases, the government presence is

106. See supra notes 18-40 and accompanying text.
107. For Presbyterians, "the church is called to a new openness to its own membership, by affirming itself as a community of diversity, becoming in fact as well as in faith a community of men and women of all ages, races and conditions ...." Office of the General Assembly, Presbyterian Church, The Book of Order, ch. 3, § G-3.0400 (1985).
108. Aguilar v. Felton, 473 U.S. 402 (1985) (establishment clause violated when federal funds were used to pay public school teachers who taught in parochial schools where a form of "surveillance" would be required to account for expenditures for school supplies).
109. In Surinach v. Pesquera de Busquets, 604 F.2d 75 (1st Cir. 1979), the court found that such an investigation created a substantial potential for violations of religious freedom and continuous impermissible government monitoring of religious schools. Government inquiries into church finances have been allowed, however, where no free exercise rights are violated, and the risk of governmental entanglement is minimal. See United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979) (IRS could subpoena documents shown to be necessary in determining church's tax exempt status). Also, discovery orders may be enforced where the government is not a party to the suit.
much more egregious, and the constitutional risk of entanglement is even greater; government agents physically entered worship services, posed as sympathetic worshippers, and proceeded to record conversations.

Whether religious services and church operations are immediately and physically disrupted is not dispositive. Government action that impedes religious observances may be "invalid even though the burden may be characterized as being only indirect." Church infiltration is invalid because it undermines the trust that is essential to a religious community and impinges on the confidential relationship between pastors and parishioners. Several pastors have testified to the burdensome effects of spying. In some churches, Bible study classes were cancelled because the parishioners were afraid to attend after learning of the activities of the informants. In other churches, some members have withdrawn from active participation altogether while others are fearful of such consequences as IRS audits and loss of security clearances.

Thus, the two conditions necessary for the creation of a rule that government infiltration of churches is presumptively invalid are met: worshippers have a legitimate expectation of privacy and church infiltration does indeed impinge on first amendment interests. Therefore, courts should demand both that church infiltration be the least restrictive means of gathering information and that a search warrant be procured in all but exceptional circumstances.

Conclusion

The tension between the government's right to enforce its immigration laws and an individual's right to exercise religion freely can be accommodated without crippling law enforcement or impinging on religious worship. The sacred, special nature of churches, which has been long recognized by society and the courts, demands the government's respect; the reasonable expectations of privacy held by worshippers compel government restraint in infiltrating religious organizations. Policy makers and courts should recognize a limited

Ambassador College v. Geotzke, 675 F.2d 662 (5th Cir. 1982) (sanction brought against church for noncompliance with discovery order was constitutional where government was not a party and no valid free exercise claim was raised).

12. First Amended Complaint, supra note 4, at 18.
13. Id. at 16.
Ecclesiastical Sanctuary

class of ecclesiastical sanctuary and presume that without a showing of extraordinary circumstances, church spying is constitutionally invalid.