

Sanctuary: Common Law And Common Sense

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I. *Introduction*

To entertain the obviously demented notion that sanctuary may have survived in the common law into the 21st century as some kind of private jurisdiction, albeit temporary, enjoyed by the Christian churches at least, is to risk being thought mad, and certainly ignorant of the constitutional revolution of the English Reformation in establishing the modern, unitary, sovereign and legally homogeneous state, as well as demonstrating a severely suspect nostalgia for things medieval in a postmodern world. No sane, worldly-wise lawyer would make such a career-stopping assertion. So at the outset, permit me to adopt a personal voice to state that I do not think that sanctuary has survived.

Nevertheless, while looking into another topic recently, I came across the early 17th century legislation which is said to abolish sanctuary, and noting ambiguity in its wording, did a little research which has left doubts as to whether sanctuary was effectively and completely abolished. The purpose of this short note is not to make the historical, legal or constitutional case for the survival (or revival) of sanctuary but to publish these doubts which others more knowledgeable might sustain or demolish. Sanctuary as a topic requires encyclopedic knowledge and skill in a wide range of areas including medieval and modern law, canon law and its relation to civil law, constitutional, criminal, human rights and refugee law, domestic and international law and English and American law. Perhaps a scholar with such a catholic range of skills will follow up the leads I have found. My purpose here is simply to ask the question.

II. *Differences of Opinion*

The act of 1624 said to have abolished sanctuary states:

And Be it alsoe enacted by the authoritie of this present Parliament, that no Sanctuarie or Privilege of Sanctuarie shall be hereafter admitted or allowed in any case.¹

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¹ (Eng.) 21 Jac. I, c. 28 (1624).

Considered without reference to its historical context and on the basis of strict construction, this provision clearly abolishes the use of sanctuary as a plea in a defence in legal proceedings but is either silent or at most ambiguous about the continued existence of sanctuary as a right in the common law. Blackstone construed the legislation as abrogating sanctuary as a plea but also concluded that sanctuary was thereby effectively abolished.² Notwithstanding this interpretation, a substantive right of sanctuary was asserted after 1624 in England and in at least one American colony after its reception date for the common law. Until abolished in 1727,³ the Savoyard Whitefriars in London was a place of refuge where civil immunity from arrest for debt existed,⁴ and palatinates such as Chester, Durham and Lancaster also offered sanctuary from the King's writ on the basis of being private jurisdictions again until the early 18th century.⁵ While some scholars think these were sanctuaries in the ecclesiastical sense,⁶ Professor Baker thinks they were secular liberties where the King's writ did not run.⁷ All agree that they were not fully integrated into the sovereignty of the British state until the 18th century. There appears to be one, possibly unreliable, report of sanctuary in 1807,⁸ and although not a part of the common law, the Abbey of Holyroodhouse in Scotland was apparently acknowledged to enjoy a right of sanctuary into the early 19th century.⁹

Even if the 1624 act meant the complete abolition of sanctuary in the English common law, for the United States it would remain as part of the common law inheritance from prior to the reception date for the common law in those colonies and states which consider 1607, the first year of English colonization, to be their reception date.¹⁰ For those states whose reception date is after 1624, the survival of sanctuary as a common law

² William Blackstone, *Commentaries on the Laws of England*, (Oxford: Clarendon Press, 1769; reprinted Chicago: University of Chicago Press, 1979), IV at pp. 326; 429.

³ (U.K.) 8 & 9 Will. III, c. 27, s. 15 (1727).

⁴ Norman M. Trenholme, "The Right of Sanctuary in England" *University of Missouri Studies*, (Columbia: University of Missouri Press, 1903) at 388.

⁵ William C. Ryan, "The Historical Case for Sanctuary" (1987) 29 *Journal of Church and State* 209 at 229.

⁶ *Ibid.* at 229.

⁷ J.H. Baker, *The Reports of Sir John Spelman* (London: Selden Society, 1978) at 335; and "The English Law of Sanctuary" (1990-1992) 2 *Eccl. L.J.* 8 at 13, n. 29.

⁸ Thomas John de Mazzinghi, *Sanctuaries*, (Stafford: Halden & Son, 1887) at 4.

⁹ *Earl of Strathmore v. Laing* (1826), 2 W. & Sh. 1; Peter Halkerston, *Treatise on the History, Law, and Privileges of the Palace and Sanctuary of Holyroodhouse*, (Edinburgh: MacLachlan and Stewart, 1831). For a brief discussion of the nature of sanctuary into the early 19th century in Scots law, see: David M. Walker, *A Legal History of Scotland*, (Edinburgh: T. & T. Clark, 1998), V. 613-614.

¹⁰ Lawrence M. Friedman, *A History of American Law*, (New York: Simon & Schuster, 1973) at 96-98.

right would depend on the interpretation of the legislation restricting it to the abolition of the right to plead sanctuary as a defence only. Thus, some American commentators believe that the common law right to sanctuary has survived in whole or in part in some states, although never pleaded in any case as a medieval relic, and never abrogated by legislation in any state whatsoever.¹¹ How sanctuary is to be interpreted in the vastly different religious landscape of modern America from medieval England is unclear, to say the least. Whether a “strict separation” reading of the First Amendment¹² could include temporary private ecclesiastical jurisdictions is also unknown because sanctuary has never been subjected to judicial consideration as a First Amendment right.¹³

For Canada, the same considerations apply. If sanctuary survives, it can only be as a right and not a defence in the absence of legislation to abrogate it, since the reception dates for the common law are all much later than 1624. How it might be incorporated into the Canadian religious landscape is unknown and whether it has any constitutional room is even less certain than in the United States given the absence of a strict separation trajectory in Canadian constitutional and *Charter* law.¹⁴

The only historical anecdote about sanctuary, from New Haven in the 1660's, suggests the difficulty of translating the medieval right to the colonial context. Two members of Cromwell's army and the High Court of Justice which had issued the death warrant for Charles I arrived by ship in Boston in July 1660, together with the news that Charles II had ascended the throne. The new King sent officers to the colonies to bring them back to England for trial but they escaped to the New Haven Colony where a sympathetic minister arranged for them to go into hiding. They were hidden in New Haven for three years and in Massachusetts for another seven years, dying there of natural causes.¹⁵ American Christian churches have provided “sanctuary” at various times, most prominently in the mid 19th century by operating the underground railroad for fugitive slaves fleeing north, and in the late 20th century for Vietnam War draft

¹¹ Ryan, *supra*, note 5 at 230-231. See also: Ignatius Bau, *This Ground is Holy: Church Sanctuary and Central American Refugees* (New York: Paulist Press, 1985), ch. 7; Hilary Cunningham, *God and Caesar at the Rio Grande: Sanctuary and the Politics of Religion* (Minneapolis: University of Minnesota Press, 1995) ch. 5.

¹² “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

¹³ A recent, helpful, comprehensive study of the complex First Amendment jurisprudence is provided by John Witte, Jr., *Religion and the American Constitutional Experiment* (Boulder, Colorado: Westview, 2000).

¹⁴ Most recently, see: M.H. Ogilvie, “After the *Charter*: Religious Free Expression and Other Legal Fictions in Canada” (2002) 2 O.U.C.L.J. 219.

¹⁵ Rollin G. Osterweis, *Three Centuries of New Haven, 1638-1938* (New Haven: Yale University Press, 1953) at 55-57; recounted in Bau, *supra*, note 11 at 159.

resisters and Central American refugees. It is unlikely that these were consciously based on any continuation of common law sanctuary, rather were faith-based expressions of the concept of sanctuary generally. The Central American sanctuary movement trials raised the possibility of assimilating certain international treaty rights for refugees with the older common law sanctuary as discussed below.¹⁶

While the common law either abrogated completely or ignored what little, if any, remained of sanctuary, Roman Catholic canon law contained a declaration of its existence until 1983. For the first time in 1591, as sanctuary was being eliminated in civil law by the newly Reformed states of Western Europe, Pope Gregory XIV responded with a bull (*Cum alias*) which declared the inviolability of church buildings, so that fugitives should only be removed with the permission of the rector, on pain of excommunication. The Council of Trent (1545-1563) had previously stated that the church's right of sanctuary was of divine origin. Several subsequent popes restated this view and the 1917 Code of Canon Law provided as follows:

Canon 1179: Churches enjoy the right of asylum such that pursued ones who take refuge in them shall not be removed, unless necessity urges, without the assent of the Ordinary or at least the rector of the church.¹⁷

Notwithstanding strong support for its retention, the 1983 Code of Canon Law¹⁸ is silent about the right of sanctuary, although at least one prominent canonist has written that "as the right of sanctuary has such good moral foundation its disappearance from the Code of Canon Law does not mean its extinction from church life."¹⁹ He goes on to argue that giving sanctuary is an authentic expression of Christian morality, thereby

¹⁶ See generally: Bau, *supra*, note 11; Cunningham, *supra*, note 11. See also: Ann Crittenden, *Sanctuary: A Story of American Conscience and the Law in Collision* (New York: Weidenfeld and Nicholson, 1988); David Matas, *The Sanctuary Trial* (Winnipeg: Legal Research Institute of the University of Manitoba, 1989); and Hilary Cunningham, "Sanctuary and Sovereignty: Church and State Along the U.S.- Mexico Border" (1998) 40 *Journal of Church and State* 371. For other similar faith-based sanctuary examples, see: Stephen A. Kent and James V. Spickard, "The 'Other' Civil Religion and the Tradition of Radical Quaker Politics" (1994) 36 *Journal of Church and State* 373.

¹⁷ *The 1917 or Pio-Benedictine Code of Canon Law in English Translation*, trans. by Edward N. Peters (San Francisco: Ignatius Press, 2001) at p.401. For the Latin version: *Codex Iuris Canonici*, Petro Cardinal Gasparri comp. (Rome: Polyglot Press, 1918) at p. 335. For a study of sanctuary in canon law, see: L. Kirby, *Sanctuary. A Canonical History of the Right of Asylum* (Washington, D.C.: Canon Law Society of America, 1986).

¹⁸ Various translations. For the Canadian English-Latin version, see: *Code of Canon Law Annotated*, E. Caparros, M. Theriault, J. Thorn, eds. (Montreal: Wilson and Lafleur, 1993).

¹⁹ Robert Ombres, o.p., "Letter" (1990-1992) 2 *Eccl. L.J.* 121.

confirming the contemporary trend to asserting sanctuary on an allegedly moral rather than a legal basis.

By contrast, Anglican canon law has never contained such an assertion even when it overlapped historically with the common law when the common law still contained the sanctuary principle, and the “laws” of other Christian denominations have never so provided. However, as is self-evident from the activities of most religious organizations, Christian or other than Christian, in Western societies today, sanctuary is regarded as a moral duty and as an expression of faith. Whether it can be founded in the common law as well is less clear.

III. *Sanctuary Before 1624: A Very Brief Synopsis*

Sanctuary has been practised in almost every society. The concept is shrouded in myth: Romulus, the mythical founder of Rome, is said to have made the Palatine Hill an asylum for fugitives to increase the male population of Rome.²⁰ In ancient Greece, asylum was available in temples and cemeteries where heroes’ tombs were found. However, ancient sanctuaries were as subject to abuse as later sanctuaries by enterprising criminals so that they were not always refuges for the oppressed or misjudged. Roman law responded by excluding murderers, adulterers and rapists from sanctuaries, which were secular not sacred places,²¹ and this concept of sanctuary as a temporary asylum for the innocent, oppressed or wrongfully accused characterized also the earliest Christian sanctuaries recognized by both Roman and canon law. Sanctuary was also practised among the ancient Hebrews in two forms to which the Hebrew Scriptures or Old Testament attest. The earliest, altar sanctuary, was located in holy places such as the local temple,²² but the later, communitarian or city sanctuary was located in a geographical place. The six cities of refuge were commanded to be established by the Israelites in Canaan after they were freed from slavery in Egypt and were meant to provide a refuge from blood feud for those accused of manslaughter: once a fugitive had persuaded the elders of a city that the killing was accidental, he could stay in the protection of the city. To venture outside was to risk being murdered.²³

Although sanctuary in the O.T. would be an obvious immediate

²⁰ This paragraph is based on: Ryan, *supra*, note 5 at 211-215; Bau, *supra*, note 11 at ch. 5; Cunningham, *supra*, note 11 at ch. 4. See also: Teresa Field, “Biblical Influences on the Medieval and Early Modern English Law of Sanctuary” (1990-1992) 2 *Eccl. L. J.* 222.

²¹ *Novella* 17:7; *Justinian Code*, 1.12; *Theodosian Code* 9.35.45. Various collections of Roman codes are available.

²² Exod. 21: 12-14; 1 Kings 1: 50-53; 1 Kings 2: 28-29.

²³ Num. 35: 6-34; Deut. 4: 41-43; Deut. 19: 1-13; Josh. 20: 1-9.

ancestor for Christian concepts of sanctuary, the superficial similarities of sacred place and recognition of mitigating circumstances in killings, should not disguise the shift in authority from the community to the clergy as the basis for sanctuary in early Christianity. Alleged criminal conduct was no longer a matter of community concern but one about the clergy's authority to intercede between the sanctuary seeker and both the state and God for justice and mercy from both.²⁴ An alternative source of authority in civil society to the state was in the making.

The earliest Roman law reference to Christian sanctuary dates from the Theodosian Code of 392 which assumes sanctuary had been in existence for some time after Constantine's conversion earlier in the 4th century.²⁵ Sanctuary could be found in church precincts but not inside churches themselves and could not be claimed by embezzlers of public funds, heretics, apostates or Jews. By the time of Justinian's Code in the early 6th century, the right of sanctuary had been extended to the interior of churches, the houses of bishops and clergy, cloisters and cemeteries, and made unavailable as well to tax officials, murderers, rapists and adulterers. However, Pope Leo I decreed at about the same time that the church had the right to examine all persons seeking sanctuary, thereby signalling the church's assertion of independent authority over sanctuary. In fact, most sanctuary seekers in the later Roman period were runaway slaves who were not juridical persons in Roman law, so church and state conflict was minimal, but once sanctuary seekers were drawn from society at large, conflict inevitably escalated.

The collapse of the Empire and the virtual disappearance of Roman law in the West left the church as the only continuing institution and repository of Roman legal traditions. Recognition of sanctuary was one such, of which the earliest recognition in the area that would become England was found in the law code of Æthelbert of Kent, promulgated in 597.²⁶ The code provided that the penalty for violating the church's peace was twice the amount for violating the King's peace. In 680 King Ine of Wessex promulgated a code which expressly permitted anyone liable to the death penalty to take sanctuary in a church and save his life by paying compensation to the church, while in 887 King Alfred permitted anyone accused of any crime to have sanctuary for three days provided he was willing to arrange terms with his accuser. Subsequent Anglo-Saxon codes

²⁴ Cunningham, *supra*, note 11 at 71.

²⁵ *Supra*, note 20 for references.

²⁶ The major historical studies are: Mazzinghi, *supra*, note 8; Trenholme, *supra*, note 4; J. Charles Cox, *The Sanctuaries and Sanctuary Seekers of Medieval England* (London: George Allen & Sons, 1911); Charles H. Riggs, "Criminal Asylum in Anglo-Saxon England" (1963), 18 University of Florida Monographs, Social Science. See also: Ryan, *supra*, note 5 at 216-219; Bau, *supra*, note 11 at ch. 6; Cunningham, *supra*, note 11 at ch. 4.

widened the sanctuary privilege, so that it was available to anyone being pursued for a fixed period of time, typically 30 days, to permit the negotiation through the clergy of a resolution. Additionally, by a charter in 937 to St. John of Beverley, King Athelstan granted the privilege of sanctuary by royal charter to a particular place for the first time. Moreover, this charter extended the privilege for a mile in each direction from the shrine with boundaries marked by wooden crosses.

While sanctuary was at its most extensive by the end of the Anglo-Saxon period, its legal nature was subtly changing. Sanctuary became increasingly conceptualized as a place rather than as a privilege associated with the clergy; clergy were increasingly reduced to intercessors between sanctuary seekers and royal justice; and the grant of the privilege of sanctuary by the King by charter toward the end of the period signalled the transferral of the authority to declare sanctuary from the church to the crown. Sanctuary was no longer a privilege claimed by the church and recognized by the crown because issuing from an independent authority in society.

Always part of the common law, sanctuary underwent some changes in the medieval period which ultimately resulted in its decline and fall.²⁷ William the Conqueror confirmed all existing Anglo-Saxon legislation and customs, and sanctuary continued to be practised under the Normans. But its high point and most widespread use came under the Angevins from the 12th to the 14th centuries. During these centuries, there was considerable legislation so that the legal nature and status of sanctuary became institutionalized in the common law. However, the common law status of sanctuary, like that of the other privilege of the church, benefit of clergy, was also under threat as exceptions to the very nature of the common law itself under the strengthening sovereignty of the crown-in-parliament.

At its height, there were two types of sanctuary in medieval England: common or general sanctuaries and private sanctuaries. Common

²⁷ In addition to the general studies of sanctuary listed, *ibid.*; the following deal more specifically with the medieval period: I.D. Thorneley, "The Destruction of Sanctuary," in Robert W. Seton-Watson, ed., *Tudor Studies Presented to...Albert Frederick Pollard* (London: Longmans, Green & Co., 1924), at pp. 182-207; I.D. Thorneley, "Sanctuary in Medieval London" (1933) N.S. Vol. xxxvii *Journal of the British Archaeological Association* 293; R.F. Hunnisett, *The Medieval Coroner* (Cambridge: Cambridge University Press, 1961), ch. 3; R.F. Hunnisett, "The Last Sussex Abjurments" (1965) 102 *Sussex Archaeological Collections* 49; N.H. MacMichael, "Sanctuary at Westminster" (1971) 27 *Westminster Abbey Occasional Papers* 9-14; John Bellamy, *Crime and Public Order in England in the Later Middle Ages* (London: Routledge & Kegan Paul, 1973) at pp.106-115; J.H. Baker, *supra*, note 8. For Wales, see: Huw Pryce, "Ecclesiastical Sanctuary in Thirteenth-Century Welsh Law," (1984) 5 *Journal of Legal History* 1.

sanctuary was available in every church in England where divine services were held, but private sanctuaries were those whose privileges were derived from royal or papal charters (if confirmed by the crown) as well as by prescription, as frequent resorts of sanctuary seekers.²⁸ Private sanctuaries were protected by the King's peace and were not ecclesiastical jurisdictions. In addition, there was a third type of jurisdiction not typically treated as sanctuary, the private secular franchises and palatinates in the north and west, to which fugitives from royal justice frequently fled.²⁹ Since the King's writ still did not run there until the 18th century, they should not be considered as common law sanctuaries, although they provided sanctuary for those who had escaped the reach of the common law. For both common law and private sanctuaries, the privilege attached to the place and not any person. It appears to have been available to almost every person with the possible exception of heretics; claimed by placing oneself within the designated sanctuary place; and entitled the sanctuary seeker to 40 days of security and sustenance from the mid 13th century.

For common sanctuaries, at the end of the 40-day period, it was illegal to take the fugitive out but anyone who fed or otherwise made provision for the fugitive was regarded as an accessory. Other than starving, or escaping successfully, including to a private sanctuary for which there was no time limitation, the fugitive could abjure the realm. This involved making a confession to the alleged crime before witnesses to a coroner and then leaving the country for life by means of a prescribed route. To return without a royal licence was to risk death without trial.³⁰ In 1531, Parliament abolished abjuration of the realm and replaced it with inland abjuration to English sanctuaries because it was believed that too many criminals were joining continental armies.³¹

The most notorious and truly lawless sanctuaries were the private sanctuaries where claims to be such were based on royal charters or papal charters, of which some were probably forged. The sanctuary privilege was often unlimited and extended over property beyond the ecclesiastical or monastic precincts themselves. Residents often went in and out and because many of these were located in towns and cities, criminals took refuge for the purpose of enjoying an urban base for their activities. By the 15th century, many contemporaries were appalled that the church should countenance such abuse, as sanctuaries had become, in the words

²⁸ For what follows, see especially: Bau, *supra*, note 11 at ch. 6; Ryan, *supra*, note 5 at 219-228; and Baker, *supra*, note 7.

²⁹ Durham, Lancashire, Cheshire, Welsh Marches, Tynedale and Redesdale.

³⁰ This was a highly ritualized procedure; see: Hunnisett, *supra*, note 27; Baker, *supra*, note 7 at 336-339; Bau, *supra*, note 11 at 144-150.

³¹ (Eng.) 22 Hen. VIII, c. 14 (1531).

of Thomas More, “a rabble of theves, murtherers, and malicious heyghnous Traitours.”³²

The records of two private ecclesiastical sanctuaries have survived. Between 1464 and 1524, 332 persons sought sanctuary at St. Cuthbert’s in Durham, of whom 195 were accused of murder. Between 1478 and 1539, 469 persons sought sanctuary at St. John’s, Beverley, of whom 173 were accused of murder.³³ All told it has been estimated that about 1,000 sanctuary claims were made annually in England in the later middle ages.³⁴

Despite the preponderance of murderers among sanctuary seekers, the abuse of sanctuary by debtors led to the earliest attempts to curb the privilege. By the late 14th century, debtors often assigned their property to friends, fled to sanctuary, settled with creditors and then left sanctuary to reclaim their property. Some early legislation attempted to protect creditors’ claims against such fraudulent practices.³⁵ Another commercial issue was also early targeted, that is, at the sanctuary of St. Martin le Grand in London, craftsmen who were not guild members took refuge and produced various inferior wares which competed in the market with the more expensive wares of guild members. These illicit craftsmen frequently attempted to evade the payment of taxes, so that sheriffs routinely entered the area and distrained goods for non-payment.³⁶ The long-term solution for these commercial abuses would be the abolition of private sanctuaries.

The royal courts mounted the earliest successful campaigns to curb sanctuaries and expand the jurisdiction of the crown-in-parliament over them.³⁷ In a series of cases in the late 15th century, the common law judges decided that private sanctuary could only be claimed if the royal or papal grant dated from before time immemorial (1189);³⁸ that sanctuary by prescription would not be allowed unless confirmed by parliament;³⁹ and that a sanctuary claim on the basis of a papal grant could only be

³² *The History of King Richard III*, R.S. Sylvester, ed., (1963) at 27. Cited by Baker, *supra*, note 7 at 340.

³³ Bellamy, *supra*, note 27 at 110; Bau, *supra*, note 11 at 149.

³⁴ For the historical debate and sources, see Bau, *supra*, note 11 at 149.

³⁵ (Eng.) 50 Edw. III, c. 6 (1377); (Eng.) 2 Richard II, c. 3 (1379); (Eng.) 2 Henr. V, c. 5 (1414); (Eng.) 9 Henr. V, c. 7 (1421).

³⁶ See Thorneley, *supra*, note 27 at 187-197 for the history of these problems.

³⁷ For the decline of sanctuary, see especially: Thorneley, *supra*, note 27; Baker, *supra*, note 7 at 340-346.

³⁸ *R. v. Stafford*, Y.B. Pasch. 1 Henr. VII, pl.15 (1486); Y.B. Trin. 1 Henr. VII, pl. 1 (1486), reprinted in Mary Hemmant, ed., *Select Cases in the Exchequer Chamber*, (London: Selden Society, 1948) at 115-124.

³⁹ *Rollsley v. Toft*, Y.B. Hil. 9 Henr. VII, pl. 15 (1495), reprinted in J.H. Baker, ed., *The Notebook of Sir John Port*, (London: Selden Society, 1986) at 31-36.

allowed if confirmed by a royal grant as well.⁴⁰

The judicial coup de grâce for sanctuary came in *Savage's Case*,⁴¹ in which the alleged killer of a justice of the peace was seized from the Clerkenwell sanctuary, tried, convicted, but ultimately pardoned. Although the seizure was likely related to the fact that Sir John Savage came from a west of England family which had resisted the expansion of the Tudor monarchy, the judicial response to his defence of violation of sanctuary is significant. Notwithstanding that Clerkenwell was a sanctuary since time immemorial, had its privileges confirmed by papal bulls and ten kings, and had royal and papal charters with intact seals to prove this, the King's Bench decided that no sanctuary privilege beyond the 40 days allowed by the common law to every church, existed unless there was usage confirmed at eyre. No private sanctuary could likely meet this new test, defended by Fyneux C.J. on the ground that permanent sanctuaries were contrary to the public welfare and public safety. This position was confirmed in the Star Chamber over which both Henry VIII and Cardinal Wolsey L.C. presided on 10 November 1519.⁴²

Parliament was unable to get in on the act simply because Henry VIII did not call it until its assistance was required to procure his first marriage annulment and to legislate attacks on ecclesiastical privileges identified as a legislative strategy for securing that objective. The Reformation Parliament reduced the sanctuary privilege by steps over an eleven year period: (i) in 1530 branding with an "A" on the thumb was introduced for abjurors;⁴³ (ii) later in 1530 abjuration of the realm was replaced by inland abjuration;⁴⁴ (iii) in 1534 sanctuary was abolished for treason;⁴⁵ (iv) in 1535 legislation deprived a sanctuary man of sanctuary if he did not wear a prescribed badge, carried a weapon, or was caught out at night three times;⁴⁶ and (v) in 1540 all private sanctuaries with eight named exceptions⁴⁷ were abolished; common sanctuary was abolished for murder, rape, burglary, robbery and arson; and all sanctuaries limited to 40

⁴⁰ *R. v. Boswell*, KB 27/1008, Rex m. 12 (Lent 1513), reprinted in Baker, *ibid.*, note 39 at 37-38.

⁴¹ (1516), Keil. 188, 72 E.R. 365 (K.B.), (1516), Keil. 192, 72 E.R. 370 (K.B.). For a detailed study of this case, see: E.W. Ives, "Crime, Sanctuary, and Royal Authority under Henry VIII: The Exemplary Sufferings of the Savage Family" in Morris S. Arnold et al., *On the Laws and Customs of England. Essays in Honour of Samuel E. Thorne*, (Chapel Hill: University of North Carolina Press, 1981) at 296-320.

⁴² Thorneley, *supra*, note 27 at 200-201.

⁴³ (Eng.) 21 Henr. VIII, c. 2 (1530).

⁴⁴ (Eng.) 22 Henr. VIII, c. 14 (1530).

⁴⁵ (Eng.) 26 Henr. VIII, c. 13 (1534).

⁴⁶ (Eng.) 27 Henr. VIII, c. 19 (1535).

⁴⁷ Wells, Westminster, Northampton, Norwich, Derby, York, Manchester and Launceston.

days.⁴⁸ In addition, legislation was enacted to end the private franchises and palatinates,⁴⁹ although it would be the 18th century before integration within the royal justice system was accomplished.

Despite this diet of legislation, sanctuary still existed in a reduced state and was even partially restored for all felonies except treason, murder and aggravated theft during the reign of Edward VI.⁵⁰ Bills introduced during the reign of Elizabeth I to curb continuing abuses suggest that contemporaries regarded sanctuary as a problem still awaiting final solution. Indeed, James I's first Parliament repealed all the Henrician legislation about sanctuary in 1604, thereby effectively reinstating the common law.⁵¹ The last piece of legislation was the ambiguous act of 1624 alleged to sweep away sanctuary entirely.

If the 1624 act does inadvertently preserve the right of sanctuary, what has been preserved? Examining the ambiguous 1604 legislation, the answer may be that 40 days sanctuary has survived for both common and private sanctuaries for all persons except those alleged to have committed treason, murder, rape, burglary, robbery and arson. Since private sanctuaries could only ever be established by royal or papal charter (if affirmed by the crown), then common sanctuary alone would be part of the common law received in the overseas colonies prior to their respective common law reception dates. If the 1604 act is limited to the repeal of only certain legislation of Elizabeth I, as may be fairly argued from its ambiguous frame, then the Henrician and Edwardian legislation which limited but did not abolish sanctuary entirely would remain in place so as to be available in churches for 40 days for all except those accused of treason, murder or theft. Add to this a strict construction of the 1624 act and the common law right to sanctuary *qua* right might still be a part of the law in Canada!⁵²

IV. Sanctuary Beyond the Rio Grande: Another Brief Synopsis

Modern sanctuary claims appear to have begun in 1967 when some American churches declared themselves sanctuaries for Vietnam War

⁴⁸ (Eng.) 32 Henr. VIII, c. 12 (1540)

⁴⁹ (Eng.) 26 Henr. VIII, c. 5 (1534); 26 Henr. VIII, c. 6 (1534); 27 Henr. VIII, c. 24 (1536); 27 Henr. VIII, c. 47 (1536).

⁵⁰ (Eng.) 1 Edw. VI, c. 12 (1547).

⁵¹ (Eng.) 1 James I, c. 25 (1604): "That so much of all Statutes as concerneth abjured Persons and Sanctuaries, or ordering or governing of Persons abjured or in sanctuaries, made before the five and thirtieth year of the late Queene Elizabeth's Reigne, shall also stand repealed and be voide."

⁵² I repeat: I make this assertion in fear and trembling!

draft resisters.⁵³ The nature of the claim is said to date from a sermon starting the movement preached by William Sloane Coffin Jr., chaplain at Yale University, on 16 October 1967:

Now if the Middle Ages churches could offer sanctuary to the most common of criminals, could they not today do the same for the most conscientious among us? And if in the Middle Ages they could offer forty days to a man who committed both a sin and a crime, could they not today offer an indefinite period to one who had committed no sin?

The churches must not shrink from their responsibility in deciding whether or not a man's objection is conscientious. But should a church declare itself a "sanctuary for conscience" this should be considered less a means to shield a man, more a means to expose a church, an effort to make a church really a church.

For if the state should decide that the arm of the law was long enough to reach inside a church there would be little church members could do to prevent an arrest. But the members could point out what they had already dramatically demonstrated, that the sanctuary of conscience was being violated.⁵⁴

This declaration differed from medieval sanctuary in several ways: (i) sanctuary is said to be based on conscience, the conscience of the sanctuary seeker and of the sanctuary provider; (ii) sanctuary violation by the state is tantamount to state violation of the sanctity of the individual conscience; (iii) no existing legal justification for offering sanctuary is invoked, indeed may even be said to be eschewed; (iv) the nature of a church is primarily to be a church and only secondarily to protect the sanctuary seeker as an example of that mission; (v) there is no claim to mediate or negotiate with the state; (vi) there is no limitation on the period of sanctuary; and (vii) sanctuary is not related to the sanctity or person of the clergy. Essentially, the claim is a typical liberal democratic claim to freedom of the individual conscience against the claims of the state. It is not an assertion of an alternative earthly jurisdiction to that of the state with its own "laws" about justice and forgiveness.

The offer of sanctuary to draft resisters, and later deserters, evolved from an act of conscience to a temporarily tolerated form of political protest by the anti-war movement in and by the churches. Any early legal connection to the original nature of the medieval sanctuary privilege

⁵³ There is a relatively large journalistic literature about sanctuary in the US. I have found the best scholarly studies to be: Bau, *supra*, note 11; Cunningham, *supra*, note 11; Crittenden, *supra*, note 16; Matas, *supra*, note 16. What follows is drawn from these studies.

⁵⁴ Preached at Arlington Street Unitarian Church, Boston, Massachusetts. Cited in Bau, *supra*, note 11 at 161 and Cunningham, *supra*, note 11 at 94-95.

seemed to be lost. In fact, when the concept of sanctuary subsequently re-emerged in the 1980's, it was as an explicitly political act. The so-called "Sanctuary Movement" for Central American refugees, officially declared in 1982, was overtly political from the outset. The sanctity of a separated place, a church, was the starting-point, and an appropriate one given the powerful cultural belief in the United States in the strict separation of church and state, but that place was also a base community where liberation theology's "preferential option for the poor" could be expressed by offering sanctuary within a self-conceptualized community of believers existing in defiance of the state's values, policies and actions of which it disapproved. These sanctuaries were not founded on individual rights of conscience but on the alleged right of religious communities to stand apart outside the central authority of the state. For the many Christian communities in the United States, and subsequently in the United Kingdom, European Union and Canada, which subsequently joined the sanctuary movement, and continue to offer sanctuary to refugees, the claim to do so has become a claim to possess an actual alternative cultural authority and power, in contrast to the medieval claim which by the 16th century was asserted by a declining cultural authority and shrinking temporal power.

In contrast to ancient, medieval and early modern understandings of sanctuary, a contemporary understanding must account for contemporary features of sanctuary provision. There are few, if any, places commanding special reverence in Western societies; a church is just another building, neither sanctified nor inviolable. Sanctuary is now offered by a community of believers in their building; a community of the committed is the locus for sanctuary, the building is merely the place where that community's faith is expressed. Sanctuary seekers are usually not murderers, fugitive slaves, heretics or debtors; they are typically refugees seeking a place to live or seeking to avoid deportation from the place they have lived, often for many years. Sanctuary seekers are not typically drawn from the same sociological base of the society or the community to which they flee; they are usually distinguished by race, colour, language and class. Sanctuary providers have no recognized status, power, authority or role in the modern state; when they negotiate with the state, it is as ordinary, powerless citizens of that state not as members of a separate caste with unique legal privileges. Yet, providing sanctuary is an ambiguous act: for some it is a means of challenging a state, no less, but for others it is an expression of faith by helping the helpless, no more.

Whatever one's views about the political theology undergirding contemporary sanctuary claims, and having a view is not necessary for the existence in law of the claim, the question remains of whether there any valid legal underpinnings for the churches, as well now as synagogues,

mosques and temples, which offer sanctuary to those seeking temporary space until their difficulties with the state are tempered although not necessarily resolved.

The sanctuary movement in the United States has usually relied, unsuccessfully, on two grounds, in constitutional law and international law.⁵⁵ The international law argument has been the weakest and was dismissed at the outset at the so-called “sanctuary trials” in 1985.⁵⁶ The argument is based on the various international treaties and protocols⁵⁷ which recognize the right to asylum in international law. But there would appear to be at least two main difficulties with basing a sanctuary right on this ground: (i) the ambiguous status of international law generally in domestic law and domestic law enforcement; and (ii) the existence of any common law rights of citizens to uphold or enforce through the courts international law against their own state which formally, at least, adopted it. The connection in the common law between international treaties and private citizens is tenuous.

So far, the constitutional argument has fared only marginally better in American courts. In the sanctuary trials, offering sanctuary as religious free expression protected by the First Amendment also has failed to persuade courts which have preferred to uphold an overriding state right to determine and enforce immigration and refugee policies. The U.S. Supreme Court has yet to consider the matter, but after 9/11 the religious free exercise argument seems even less likely to succeed. Nor would it ever likely have succeeded in section 2(a) or 2(b) *Charter* litigation because of the narrowing ambit for religious free expression after the first 20 years of *Charter* religion jurisprudence, which has effectively restricted the freedom to believe but not to act on beliefs by either speech or conduct outside one’s own religious community.⁵⁸

V. Conclusion

In the end, if the right to offer sanctuary exists at all in the common law, it is by virtue of a poorly drafted statute dating from the final year of the reign of James I, whose intent was probably to erase the practice from the

⁵⁵ For accounts of the legal issues in American law, see: Bau, *supra*, note 11 at 38-123 and Matas, *supra*, note 16. For European legal approaches, see: Teresa Sutton, “Modern Sanctuary” (1996) 4 *Eccl. L.J.* 487.

⁵⁶ Matas, *supra*, note 16.

⁵⁷ For a convenient collection, see: Anne F. Bayefsky, *International Human Rights Law*, (Toronto: Butterworths, 1992). In particular: *Convention relating to the Status of Refugees*, Can. T.S. 1969, No. 6, 189 U.N.T.S. 137 (1951) and *International Covenant on Civil and Political Rights*, Can. T.S. 1976, No. 47 (1966).

⁵⁸ Ogilvie, *supra*, note 14.

common law entirely. But what does it mean, at last, to have a right in law to act but not to plead that action as a lawful defence when charged pursuant to various provisions in the Criminal Code,⁵⁹ for example, relating to being a party to a criminal offence, since a sanctuary seeker will usually be a fugitive from the law? Can a right be concurrently both lawful and unlawful? The logical ease with which the distinction can be made conceptually is confounded by the practical difficulty in upholding in law a right which cannot also be a defence. From a practical perspective, in law there ought not to be a lawful right if it cannot also be an acceptable defence.

Yet, from a moral perspective, this logical conundrum could be a satisfactory arrangement of contradictions, which are legion in the law, should it really be the law. The privilege of giving and receiving sanctuary for a short period of time grants social space for the limited expression of deeply held views that sometimes the state's laws or the state's actors are wrong and should be challenged. After all, both sanctuary provider and sanctuary seeker know that sanctuary may be violated at any time by the agents of the state. Sanctuary was often violated in the Middle Ages. In addition to its facilitative role as a form of protest in a liberal democratic society, sanctuary offers another concept not unknown to the law of a "cooling off period," that is a "time-out" for all concerned parties; the sanctuary seeker is not likely to disappear successfully from the place of sanctuary. This was the original purpose of sanctuary, lost in the legislative rush to curb the abuses of private sanctuaries and the challenges they posed to royal justice and the territorial sovereignty of late medieval kings.

A responsible assertion and practice of sanctuary by sanctuary givers and a reasonable response by state actors, including a time limited grant of sanctuary and a measured reluctance to prosecute sanctuary givers who have acted responsibly, may facilitate acceptance in the law of a reading of the 1624 act that permits the assertion of the right to offer sanctuary. If the right exists, then the more difficult issue is who may offer sanctuary, beyond religious institutions both non-Christian and Christian. It was primarily the abuses in the private and territorial sanctuaries which led to late medieval attempts to curb the practice, although common sanctuary was also abused, and it may be foreseen that if the practice were extended to permit secular conscience based sanctuary provision, the right would again become legally unmanageable. Limits would have to be set and would be difficult to frame. At present, there would appear to be a balanced approach to the assertion of sanctuary and the response of the state in Canada, if media reports of these occasional events are accurate. The right to provide sanctuary without a defence in the law may still be a

⁵⁹ R.S.C. 1985, c. C-46, ss. 21-24.

part of the common law or a narrow reading of the act of 1624. But, I repeat, this is an assertion made in fear and trembling!