

# RELIGIOUS OUTLAWS: NARRATIVES OF LEGALITY AND THE POLITICS OF CITIZEN INTERPRETATION

BARBARA BEZDEK\*

## *Table of Contents*

I.	INTRODUCTION . . . . .	900
	A. <i>A Brief Overview of the Sanctuary Movement</i> . . . . .	900
	B. <i>Conceptual Approach and the Use of Narrative</i> . . . . .	907
II.	SANCTUARY AS AN ASSERTION OF INTERPRETIVE AUTHORITY . . . . .	910
	A. <i>"The Awakening Church"</i> . . . . .	915
	B. <i>Living Faith Traditions</i> . . . . .	923
	1. The Transformations of Personal Knowledge . . . . .	923
	2. The Sanctuary Movement's Continuity with Ancient Traditions of Sanctuary . . . . .	928
	3. Sanctuary's Essential Independence from its Recognition at English Common Law . . . . .	931
	4. Sanctuary in America . . . . .	933
	5. The Practice of Public Sanctuary for Central Americans . . . . .	935
	C. <i>Law Read Through Religious Sanctuary: Melding Discourses</i> . . . . .	939
III.	THE LAW'S REBUKE: CONSTRUCTING SANCTUARY GIVERS AS RELIGIOUS OUTLAWS . . . . .	946
	A. <i>The Illegality Narrative of Investigation and Prosecution</i> . . . . .	946
	B. <i>The Judicial Embrace of the Illegality Narrative</i> . . . . .	958
	1. Procedural Suppression of the Narrative of Legality . . . . .	952
	2. Judicial Narration . . . . .	957
	a. The Texas Sanctuary Precedents . . . . .	958
	b. The Tucson Prosecution . . . . .	963

---

\* Assistant Professor of Law, University of Maryland School of Law. B.A., University of South Carolina (1975); J.D., Columbia University (1978); LL.M., Georgetown University (1986). I give sincere thanks to several colleagues: to Taunya Banks, David Luban, Theresa Glennon, Jana Singer, and Robin West, who provided thoughtful responses to early drafts of this article, and to Richard Boldt, Marc Feldman, Howard Lesnick, and Ted Tomlinson, for their helpful comments. For valuable research assistance, I thank Susan Waysdorf, Shahrzad Tadjbakash, and Michael Yeager. I am grateful to the University of Maryland at Baltimore for its grant from the Designated Research and Initiative Fund which supported my field research.

IV. NARRATIVES OF LEGALITY . . . . .	966
A. <i>Legalism's Account: Breach of Laws</i> . . . . .	967
B. <i>Civil Initiative: To Uphold the Law</i> . . . . .	970
1. Distinguishing Civil Initiative from Civil Disobedience . . . . .	971
2. Defining Civil Initiative . . . . .	976
3. Engagement Beyond Petitions to Government . . . . .	979
V. CITIZEN INTERPRETATION AND JUDICIAL RESISTANCE . . . . .	982
A. <i>The Problem of Recognizing Religious Conscience         and Dissent Together in Law</i> . . . . .	984
B. <i>Judicial Denigration of Dissent</i> . . . . .	991
VI. CONCLUSION . . . . .	996

The twentieth century has created so many symbols, so many new concepts. It has also created a new human species: the refugee. Now what is the characteristic of a refugee? It is that she or he has no citizenship. Hundreds of thousands, if not millions, of human beings have felt — overnight — unwanted.

What has been done to the word *refuge*? In the beginning the word sounded beautiful. A refuge meant "home." It welcomed you, protected you, gave you warmth and hospitality. Then we added one single phoneme, one letter, e, and the positive term refuge became *refugee*, connoting something negative.

ELIE WIESEL<sup>1</sup>

The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken.

ROBERT COVER<sup>2</sup>

## I. INTRODUCTION

### A. *Brief Overview of the Sanctuary Movement*

In 1985, the United States sought and obtained the indictment of two nuns, a Protestant minister, two Quakers, several lay Catholic and Protestant employees of church-sponsored social services, and members of religious

---

1. Elie Wiesel, *The Refugee*, in SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE 10 (Gary MacEoin ed., 1985).

2. Robert Cover, *Nomos, and Narrative*, in NARRATIVE, VIOLENCE, AND THE LAW 95, 144 (Martha Minow et al. eds., 1992).

congregations, for their work in assisting Central American refugees<sup>3</sup> to enter and find safe haven in this country, despite the efforts of Immigration and Naturalization Service (INS) efforts to capture and return them. The “sanctuary movement” was a church community awakened by refugees’ eyewitness accounts of death squads, torture, and the disappearance of citizens<sup>4</sup> and of church aid and other humanitarian aid workers.<sup>5</sup> For North Americans, these accounts provoked a double trauma: the knowledge of extensive human rights abuses in Central America by United States-supported forces, coupled with the refusal of the United States government to harbor refugees until the hostilities in El Salvador abated.<sup>6</sup>

By the time of the Tucson indictment, the Sanctuary Movement<sup>7</sup>

---

3. As a matter of United States and international law, “refugee” is a term of art meaning a person who has a “well-founded fear” that he or she will face persecution on account of their “race, religion, nationality, membership in a particular social group or political opinion” if returned to the country of origin. See Immigration and Nationality Act of 1952 § 101(a)(42), 8 C. § 1101(a)(42) (1988); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 T. 6223, 606 U.N.T.S. 267. This is narrower than the colloquial sense of the term, which refers more generally to persons displaced from the security of their homes and communities, particularly due to military hostilities, political instability, human rights abuses, and perhaps natural disaster.

The Immigration and Nationalization Service (INS) refers to people who have entered the United States without proper visas and whom it has not yet determined to be “refugees,” as “illegal aliens.” Compare 8 C. § 1101(a)(42) with 8 C. § 1101 (frequently using the undefined term “illegal aliens”).

This Article refers to people fleeing war and human rights abuses and claiming to be refugees, as refugees, without regard to whether they are aware of the law’s technical requirements. Where “refugee” is used as a term of art, it will be indicated or evident by context.

4. See discussion *infra* part II.A.2.

5. See discussion *infra* part II.B.

6. Instead, the INS imprisoned the new refugees and deported them promptly, systematically violating refugees’ legal rights to legal counsel and an opportunity to apply for asylum. See discussion *infra* part IV.B.3.

7. “Sanctuary Movement” is used in this Article primarily as an historian might use it to refer to the network of people and congregations who aided Central American refugees coming to or through the United States during the Reagan and Bush Administrations. The policies of those administrations regarding the governments of Central American nations, asylum applications of fleeing citizens of those countries, and adherence to international agreements concerning human rights, figure prominently in any effort to describe and understand the actions of the individuals prosecuted for their Sanctuary work. Readers should bear in mind, however, that Central Americans continue to flee northward from civil wars and persecution, and the Sanctuary Movement continues to offer assistance for safety. By “Sanctuary workers,” I mean people who consciously and actively participated in the Sanctuary Movement, whether by actually providing assistance to particular refugees or by organizing the work of other participants.

sprawled across the nation, from California, Arizona, and Texas on the border of Mexico; north to Seattle; east to Cleveland, Chicago, New York, and Boston, and even into Canada.<sup>8</sup> The growing network of Sanctuary providers and their supporters continually reiterated the religious principles of the people providing aid and sanctuary. The Movement developed practices of "testimony" presented to churches, a practice which disseminated refugees' stories of persecution and escape. In this way, Sanctuary workers invoked familiar church-based rhetoric of ministry and aid, as they called on other faith communities to provide similar sanctuary assistance. The relief network spread across the country, chiefly through religious congregations, despite federal criminal sanctions for harboring or transporting "illegal aliens."

As the Sanctuary network spread, its inconsistency with official interpretation of United States immigration laws against harboring illegal aliens became more evident. After first dismissing the Movement as irrelevant piety, federal officials changed tack; in 1984 and 1985, several participants in the Sanctuary Movement were arrested and prosecuted in Texas and Arizona on charges of alien smuggling, harboring and concealing, and conspiracy.<sup>9</sup> Officials in Washington, D.C., authorized the extended undercover investigation nicknamed "Operation Sojourner," which relied on bugged informants' participation in church services and Bible studies as well as attendance at meetings of the Tucson Ecumenical Council's task force on

---

Two excellent books written by journalists recount the rise and spread of the North American Sanctuary Movement during the 1980s: ANN CRITTENDEN, *SANCTUARY* (1988); ROBERT TOMSHO, *THE AMERICAN SANCTUARY MOVEMENT* (1987). Some Sanctuary Movement participants have written invaluable accounts of the Movement's development, the most comprehensive of which are: IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* (1985); RENNY GOLDEN & MICHAEL MCCONNELL, *SANCTUARY: THE NEW UNDERGROUND RAILROAD* (1986); CHICAGO RELIGIOUS TASK FORCE ON CENTRAL AMERICA, *SANCTUARY: A JUSTICE MINISTRY* (1986); Wiesel, *supra* note 1.

8. In the San Francisco area, some 26 Christian and Jewish congregations comprised the East Bay Sanctuary Covenant, and others formed the San Francisco Sanctuary Covenant. In Texas, church-related shelters offered housing, and Central American families subsequently resettled with churches throughout Texas. In Arizona, the Tucson Ecumenical Council (TEC) formed a task force to organize the shelter of as many refugees as it could in church buildings and parishioners' homes. TEC volunteers solicited community legal resources to aid refugees to secure asylum under immigration laws and raised money to bond refugees out of INS detention centers while asylum claims were pending. The Chicago Religious Task Force on Central America later agreed to coordinate the resettlement of refugees coming through Arizona, to church communities far from the border.

9. See *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), *amended after denial of rehearing*, 883 F.2d 662 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991); *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986); *United States v. Merkt*, 764 F.2d 266 (5th Cir.), *reh'g and reh'g en banc denied*, 772 F.2d 904 (1985); *United States v. Elder*, 601 F. Supp. 1574 (S.D. Tex. 1985).

Central America.<sup>10</sup> The investigation eventually led to the criminal indictment of various members of the Tucson area's Movement in January 1985.<sup>11</sup>

What ensued was the highly publicized Tucson trial whose every media report underscored the contesting rhetorical claims of the parties. Prosecutors described the defendants as alien-smugglers, conspirators, and felons.<sup>12</sup> But Sanctuary defendants and supporters countered. At press conferences on the courthouse steps, weekend speaking appearances, and through media reports, the defendants explained that:

Sanctuary is not a building. It is not one man or one woman or 16 of them. It is a response rooted in faith and nurtured by prayer and conscience that has captured the hearts of tens of thousands of persons across the country. It is a sign of hope and compassion that is springing forth from an ever-growing number of faithful every day.<sup>13</sup>

The defendants in these actions understood their Sanctuary efforts as an integral part of a religiously directed way of life, in which they had been able to respond to refugees with shelter and protection from the persecution and strife that the refugees fled. Federal officials, however, responded as if the Sanctuary defendants were practicing *coyotismo*, the cruel servitude into which entrepreneurial alien smugglers sell any whom they can slip into the United States.<sup>14</sup> Subsequent court decisions excluded evidence and arguments that the Sanctuary defendants sought to address the issue of whether their actions of humane assistance violated United States laws.<sup>15</sup>

---

10. See *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989) (challenging the electronic surveillance of church activities); *infra* part III.B.

11. See discussion *infra* part III.A.

12. See *infra* text accompanying notes 190-92 (discussing the prosecution's more colorful and Communist-phobic characterization).

13. BAU, *supra* note 7, at 181 (quoting a joint statement issued by religious leaders after the Arizona indictments in support of Sanctuary ministry).

14. *Coyotismo* is transit in exchange for often extortionate payments, with no guarantee of successful passage into the United States. *Coyotes* can and do exploit their "passengers," by robbing, raping, or prostituting them, and even abandoning them to die in the desert. See, e.g., MIRIAM DAVIDSON, *CONVICTIONS OF THE HEART: JIM CORBETT AND THE SANCTUARY MOVEMENT* 6-12 (1988) (discussing the 13 middle-class Salvadorans, ill-equipped for desert travel, who died after being abandoned by their coyotes in Organ Pipe National Monument); *Alien Deaths Followed Long March in Texas*, N.Y. TIMES, May 2, 1984, §1, at 16 (four illegal aliens killed in train wreck during 20-hour forced march without food and water); Al Senia, *Thirteen Smuggled Salvadorans Found Dead in United States Desert*, WASH. POST, July 6, 1980, at A1; see also TED CONOVER, *COYOTES: A JOURNEY THROUGH THE SECRET WORLD OF AMERICA'S ILLEGAL ALIENS* (1987) (discussing a slightly less gruesome account of coyotismo in the underground economy of Mexican laborers in the United States agricultural industry).

15. See *supra* note 9; *infra* part III.B. Only in the first legal test was a Sanctuary

These clashes on the field of legal process have been variously assessed by commentators as “persecution” of the Sanctuary workers, as the reluctant response of an administration<sup>16</sup> pressured to act by the media’s baiting,<sup>17</sup> and as an overtly political trial in which government officials intended to criminalize the Movement’s relief activities<sup>18</sup> or to constrain nongovernmental humanitarian charity.<sup>19</sup>

Between the birth of the North American Sanctuary Movement, in 1980, and the Tucson trial, in 1985, participants forged the praxis and philosophy of the Sanctuary movement, at the center of which a discourse honored and encouraged the faith-basis for that work. A burgeoning number of faith communities around the United States agreed to shelter and support Central Americans who had fled war in their home countries, and who then were aided by Sanctuary workers to cross into the United States and evade detention and deportation. In the linked practices of border-crossing, sheltering, and aiding the Central Americans to give testimony of the conditions that the refugees had fled, Sanctuary participants enacted their own interpretations of the United States and international laws of refugee recognition and assistance. These interpretations were contrary to the ones enforced by United States officials. As I will explain in Part IV, Tucson Sanctuary participants developed a collective interpretive authority in their practice of “civil initiative”—a conscientious community practice to uphold human rights law even when the government persists in violating such law. In welcoming Central Americans into public, church-based Sanctuary, the Movement’s leaders consciously invoked ancient religious traditions of safe refuge, and prepared to confront the Government over its claim to interpret authoritatively the meaning of law.

Despite the unmistakable centrality of mainstream churches to the spread of the Sanctuary Movement, the Government fundamentally failed to perceive the practices of Sanctuary as religious expression. Indeed, the Government’s investigation, prosecution strategies, and judicial pronounce-

---

defendant permitted to present a legal defense based on the First Amendment’s Free Exercise Clause. *Elder*, 601 F. Supp. 1574.

16. See Katherine L. Vaughns, *Of Morality, Politics and the Legal Order*, 14 MD. J. INT’L. L. & TRADE 127, 137 (1990) (reviewing CRITTENDEN, *supra* note 7).

17. See, e.g., CRITTENDEN, *supra* note 7, at 101, 105, 115, 190-92 (1988).

18. See Sophie H. Pirie, *The Origins of a Political Trial: The Sanctuary Movement and Political Justice*, 2 YALE J.L. & HUMAN. 381, 383 (1990). Generally, “political trials” refers to trials in which political motivation rather than legalism drives the decision to prosecute, political considerations affect the outcome, or participants intend their conduct to make the most of the political consequences of appearing before courts. *Id.* at 384 (citing N. Dorsen & L. Friedman, DISORDER IN THE COURT, REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT 79 (1973)).

19. See Gregory A. Loken & Lisa R. Bambino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119 (1993).

ments denigrated the religious impulses of Sanctuary, and left a written record that elevates state power at the expense of conscience. Still, the power of Sanctuary workers' practices—in which thousands of United States citizens participated, and still do—suggests that such practices have not been fully subordinated to statist legal discourse.

This Article considers what this phenomenon of “religious outlaws” may teach us about the capacity of law to retain its customary authoritative rule, in the face of contrary experience among citizens which makes them willing to interpret the law differently. What is the social meaning of thousands of ordinarily conventional and quietist “people in the pew” engaging in a subculture of opposition? Virtually all contemporary analysis of this recurring phenomenon examines such conflicts of religious and civil duty from the perspective of the law, posing the question: How does (or should) the law treat religiously motivated activity in the socio-political sphere?<sup>20</sup> My project begins at the opposite end of the frame, asking: How do people, whose religious convictions lead them to take actions proscribed by law, view the law? What empowers them to resist and reframe the law as interpreted by government officials and courts? What cognitive, discursive, or other means render the citizens' legal interpretation possible—indeed, a social force to be reckoned with?

In Part V of this Article, I consider what we ought to make of this phenomenon of citizen interpretive authority, and particularly, of the claim that Sanctuary civil initiative strengthens rather than demeans the law. How dangerous, or how valuable, are such processes of citizen interpretation? This Article is a project in which I read the social meanings of law, by referring to the understandings ascribed by members of society to matters about which the law speaks, and not only to positive laws and the institutions which make and apply them. While this Article primarily considers Sanctuary Movement participants, whose culture of religiously prompted practice contested the Government's interpretation of federal laws concern-

---

20. Scholars debate whether generally applicable law should provide an exemption, and if an exemption exists, whether an implicit interpretation of legal rules, explicit mandate, or a constitutional right. See Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (developing arguments for exemption); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992); Symposium, *Georgetown Symposium on Church and State and Society and Law Colloquium*, 7 J. L. & RELIGION 261 (Mark Tushnet ed., 1989) (discussing the constitutional status of claims of exemption); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 624 (1990).

ing legal entry,<sup>21</sup> similar situations might be expected to arise in our ever-more religiously diverse nation.<sup>22</sup>

I began with interviews of Sanctuary defendants, enabling me to learn from the “religious outlaws” how they framed the questions of societal obligations and of religious liberty, before their faith-motivated efforts made them lawyers’ clients and defendants in federal criminal trials.<sup>23</sup> I wished

---

21. See *United States v. Aguilar*, 871 F.2d 1436 (9th Cir. 1989). Eight Sanctuary workers were convicted on 18 felony counts for violating 8 C. §§ 1324(a), 1325 (1952). All defendants received sentences of probation; none served in prison. *Aguilar*, 883 F.2d at 667. Three others were found not guilty. Originally 16 were indicted, and 60 unindicted co-conspirators were named. *Id.*

The Immigration and Nationality Act of 1952 was amended after the Tucson indictment, by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 112(a), 100 Stat. 3381. The successor version of § 1324(a) changes the scienter standard from “willfully or knowingly” to “knowing or in reckless disregard.” *Id.*

22. See Loken & Bambino, *supra* note 19. The Gulf War began the day after the Supreme Court denied *certiorari* in *Aguilar*, and congregations made a new round of Sanctuary declarations, offering counseling and shelter to military personnel refusing deployment. *Id.* A number of churches offered Sanctuary throughout the United States during the Vietnam War, even though its role in that protest was collateral and not central. See discussion *infra* part I.B.2.; MITCHELL K. HALL, *BECAUSE OF THEIR FAITH: CALCAV AND RELIGIOUS OPPOSITION TO THE VIETNAM WAR* (1990).

23. The Designated Research Institutional Fund of the University of Maryland at Baltimore funded my interviews with Sanctuary participants. Some participants’ contemporaneous views were recorded in secret tapes and transcripts made as part of the federal undercover investigation of the Sanctuary movement, “Operation Sojourner.” I reviewed the tape transcripts identified for trial, courtesy of Jim Brosnahan of Morrison & Foerster in San Francisco.

I employed a narrative interview procedure for my primary research, drawn from traditional ethnographic work, see, e.g., IRVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959), with sensitivity to the cognitive framework associated with Jerome Bruner. See JEROME S. BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* (1986). Each interview began with an open-ended discussion of the subject’s life, in response to the request to: “Tell me about yourself, and particularly how you came to be involved with the Sanctuary Movement.” The interviews continued through open-ended questions posed in multiple sessions, ranging from 90 minutes to several hours. Questions were designed to elicit personal background; views of self as religious; senses of faith, law, and obligations prior to and following arrest; expectations and assessment of risks, before and after arrest; and finally, views of faith, law, and the subject’s conduct, in light of the outcomes of trial and appeal.

All interviews took place some five years after the verdicts, just as probation was ending for those convicted. I met with some Sanctuary workers and defendants because of introductions made by the first defendant with whom I met. By that time, several Sanctuary defendants had moved away from Tucson, some having trained for other work (by going to seminary, learning a language, preparing to teach school). A few dropped out of sight altogether, and neither conventional leads nor the continuing Sanctuary network located them. Some defendants whom I met were cautious about my research; one interrogated me first



to learn the stories of the defendants, independent of the analytic frame and premises used by the few courts who judged their actions. Because these Sanctuary accounts are missing from the courts' recitals or serious analysis, we are invited to compare and contrast the accounts with the courts' analytic method to address both the religious and criminal conceptions of defendants' acts.

### *B. Conceptual Approach and the Use of Narrative*

This Article relates two narratives: that of Sanctuary participants, including many of those who were prosecuted in Arizona in *United States v. Aguilar*, and that of federal prosecutors and judges. To speak of narrative ordinarily implies three essential elements: a story about an event, a narrator who tells it, and the audience to whom it is told.<sup>24</sup> My effort is complicated by the fact that the Sanctuary givers' actions were the subject of narration and interpretation by officials of the federal legal system. In presenting both the Sanctuary and the official narratives, I necessarily give each narrative a story form: the beginnings, continuities, and conclusions to organize the flow of events through time. Because every project relating events in the past requires some starting point and some perspective, all historical accounts are contingent on interpretive narrative.<sup>25</sup> Narrative

---

about what I would do if my notes were subpoenaed. Others sought no conditions or limitations on our meeting or my use of the materials produced.

The perspectives of the two Mexican defendants, Father Ramon Quinones and Maria Socorro de Aguilar, are largely missing from this and all other published accounts of the government's prosecution of Sanctuary providers. According to several interviewees, these defendants were stung by the prosecution—Senora Aguilar by the personal betrayal of herself and her priest by the government's informant, Jesus Cruz, and Father Quinones by what he saw as the North American obsession with the superiority of the United States, whose materialistic culture he viewed as foreign and dangerous for Central Americans' traditional and spiritual values. Just as focusing on the defendant Sanctuary workers tends to obscure the breadth and nature of the rescue movement, so does focusing on United States participants obscure the extensive efforts at protection made throughout Mexico on the behalf of fleeing Central Americans. Nevertheless, I only attempt to discuss the church-state/religion-politics tangle on the United States side of a binational network.

24. See GERALD A. PRINCE, A DICTIONARY OF NARRATOLOGY 58 (1987) (providing a detailed definition of "narrative": "Narrative: The recounting . . . of one or more real or fictitious EVENTS communicated by one, two or several narrators to one, two or several . . . NARRATEES").

25. This perspectival character of witnessing in history distinguishes history from mere chronology, and from "detachable" conclusions of science. See SHOSHANA FELMAN & DORI LAUB, TESTIMONY: CRISES OF WITNESSING IN LITERATURE, PSYCHOANALYSIS AND HISTORY 94 (1992). All use of narrative to tell history has the potential to illuminate, yet stories may simultaneously distract or deceive. *But see* William Cronon, *A Place for Stories: Nature, History and Narrative*, 78 J. AM. HIST. 1347, 1349 (1992) (stating that "the very authority with which narrative presents its vision of reality is achieved by obscuring large

remains an essential tool for searching out meaning in a complicated and conflicted world.<sup>26</sup>

I begin with the Sanctuary movement counterstory because of the power of the official narration generally, and its specific exercise in regard to the Sanctuary Movement, which has sought to eliminate from its annals any trace of the Sanctuary protagonists' search for the moral interpretation of the United States law in responding to refugees.<sup>27</sup> The official narratives, constructed through the conventions of the legal system, are rendered with a uniquely legal perception of the world. As Kim Scheppele reminds us, "Those trained in the law learn to see the world in particular ways, and the particular ways come to be seen unproblematically as the only truth there is."<sup>28</sup> The force with which narrative studies have emerged within legal scholarship in the past decade<sup>29</sup> attests to the function of the narrative form

portions of that reality"); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 673 (1993) (explaining that "every narrative . . . leaves out something"); Michael A. Coffino, Comment, *Genre, Narrative and Judgment: Legal and Protest Song Stories in Two Criminal Cases*, 1994 WIS. L. REV. 679, 684-85 (1994).

26. See Cronon, *supra* note 25, at 1374.

27. See David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2155-56 (1989). See also Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984) ("The power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.").

28. Kim L. Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2088 (1989); see also JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 18 (1976) (legal analysis transforms episodes from persons' lives into rules of law, thereby subverting the stories that led to the cases); KIM L. SCHEPPELE, LEGAL SECRETS (1976) (judges construct factual stories to justify their selection of legal rules); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982) (explaining that judges experience decision-making as constrained by precedent); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (explaining that law responds to a narrow form of reasoning, by demanding litigants to express their claims in high degree of rationality); see also Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 740 (1989) (explaining that law constructs its own social reality, and its language makes communication with other social discourses extremely difficult).

The multisided character of reality, rendered incompletely by any telling, is partially recognized in studies of trial practice. See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981) (analyzing jury decision-making as assessment of the competing stories told through testimony); BERNARD JACKSON, LAW, FACT AND NARRATIVE COHERENCE 61 (1988) (explaining that prosecutor and defense counsel present facts in the form of a story, and both select from available facts to construct a narrative that is persuasive, i.e., conveys meaning favorable to their respective "sides" of the whole).

29. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (explicating methodologies of feminist narrative scholarship and analyzing several critiques

in judging the consequences of human actions. Thus, my aim in Part II is to convey “from the inside” the perspectives of people doing the activities of Sanctuary. Like most legal scholars using narrative methods, I share the premise that a situated complex of live detail is instructive to us all as we construct meaning in the processes of law and life.<sup>30</sup>

The legal-system narrative, presented in Part III,<sup>31</sup> takes the form and outcome that we might predict based on patterns of judicial resistance to citizen interpretation of legal obligation. With few exceptions, Sanctuary prosecutions resulted in felony convictions, sternly conservative rationales by two federal circuits, and utter disinterest on the part of the Supreme Court. No sympathetic rules of law or dicta survived the court fights; some repressive law was made concerning the legality of government surveillance of church activities. Yet several participants in the Sanctuary movement see important successes. Clearly, they look somewhere other than I did at the start of this project.

Like social scientists studying Europeans who had come to the aid of refugees from the Third Reich,<sup>32</sup> I initially framed my research to inquire

of feminist narrative scholarship); Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630 (1992); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Richard Delgado & Jean Stefanic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 35 (1984) (using narratives in problem-solving to demonstrate “the nature of story and argument as meaning-making acts of persuasion”); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

30. Scholars who use narrative as a means of relating law and religion include: MILNER S. BALL, *THE WORD AND THE LAW* (1993) (providing narratives of seven lives in the law, juxtaposed with Biblical and literary texts); Cover, *supra* note 2; Carol Weisbrod, *Charles Guiteau and the Christian Nation*, 7 J. L. & RELIGION 187 (1989) (use of narrative in discussion of religious faith and the law of insanity).

31. I use the phrases “legal-system narrative” and “official narrative” interchangeably, to indicate the depiction by government actors— federal investigators, prosecutors, judges, and others—of the Sanctuary workers’ context, motives, reasons, and conduct.

My sources for this section are a combination of primary and secondary sources. The record of *Aguilar* is huge: there are over 100 volumes of the reporter’s transcripts containing over 16,000 pages. Fourteen pretrial hearings and conferences entailed thousands of pages of pleadings. The trial lasted six months, even though the defendants did not testify. I reviewed portions of the trial record and appellate materials made available to me by some Sanctuary defendants and by two members of the defense team, Ellen Yaroshevsky and James Brosnahan. A large army of the press witnessed and reported the courtroom dynamics and exchanges. One *New York Times* reporter observed much of the trial and conducted extensive interviews with the principal government investigators and prosecutors and published a well-documented book. See CRITTENDEN, *supra* note 7. I have cited to aspects of this work where I have been able to corroborate her account through other participants or sources and, in a few instances, where it is the only practically available source.

32. See SAMUEL P. OLINER & PEARL M. OLINER, *THE ALTRUISTIC PERSONALITY*:

about the qualities that cause some people to help undocumented persons in spite of government claims that such activity is a serious crime. I learned that I was asking misleadingly individuated questions. The response of Sanctuary was a communitarian one. Thus the more pertinent question might be: In what kind of community are people empowered to act to protect the human rights of others, despite the opposition of their own government?

Part IV compares the inconsistent concepts behind the state-oriented legalism of the official narratives, and the civil-initiative narrative of Sanctuary participants. Here, the flashpoint is the official denial of any interpretive authority for communities of citizens to frame appropriate response to matters of human rights. While the Sanctuary civil initiative perceived responsibility to do justice under principles of refugee law once their government defaulted, the government actors used frames of criminality and alienation to obscure a very real crisis of legal meaning. In Part V, I examine two strands of the vigorous judicial resistance to citizen interpretation of legal meaning. One is the problem of judicial skepticism of religious consciousness, particularly when this consciousness is not neatly compartmentalized in a sectarian identification. The second problem is judicial denigration of dissent, which is potentially a more serious blow to vital democracy.

## II. SANCTUARY AS AN ASSERTION OF INTERPRETIVE AUTHORITY

It is often reported that the participants of the Sanctuary Movement of the 1980s generally concede the illegality of their assistance to undocumented Central American immigrants to the United States.<sup>33</sup> If providing shelter, transportation, and protection did violate federal immigration laws, then the media's framing of Sanctuary made sense: Sanctuary as a resurgent movement to protest government policy, analogous to civil disobedience

---

RESCUERS OF JEWS IN NAZI EUROPE (1988); Kristen R. Monroe, *John Donne's People: Explaining Differences between Rational Actors and Altruists through Cognitive Frameworks*, 53 J. POL. 394, 424 (1991).

33. See, e.g., Charles Austin, *More Churches Join in Offering Sanctuary for Latin Refugees*, N.Y. TIMES, Sept. 21, 1983, at A18; Jim Bencirenga, *Church Sanctuary—Ancient Tradition in a Modern World*, CHRISTIAN SCI. MONITOR, Aug. 22, 1983, at 5; Geraldine Brooks, *Offered Sanctuary: Scores of Churches Take In Illegal Aliens Fleeing Latin America*, WALL ST. J., June 21, 1984, at 1, 27; Ari L. Goldman, *Churches Becoming Home to Central American Exiles*, N.Y. TIMES, Apr. 1, 1984, § 4, at 9; Marita Hernandez, *Refugees Travel Openly, Illegally to Find a Haven*, L.A. TIMES, June 30, 1984, at 1; *Offering Sanctuary to Salvadoran Refugees—Illegally*, PHILADELPHIA INQUIRER, Mar. 5, 1985; *Churches Defy Law-Form Network to Harbor Salvadoran Refugees*, CHRISTIAN SCI. MONITOR, August 20, 1982, at 6; George Volsky, *Churches Offer Sanctuary to Aliens Facing Deportation*, N. Y. TIMES, Apr. 8, 1983, at A1, A16.

during the Vietnam War era, with its images of deconstructed social order and resultant prosecutions of individuals who conspired to question the Administration's authority in foreign policy and other executive arenas. This rendition of Sanctuary as law-breaking protest evokes a familiar picture and, for many Americans, not a terribly troubling narrative of maintaining social order through the rule of law in the world's premier democracy.

I want to disturb this still life, first by unsettling the claim that participants in the Sanctuary Movement regarded their conduct as "illegal." The network nearest the border with Mexico has had the most direct experience with refugees from Central American wars who, since 1981, have sought safety in the North. As their numbers—and the decade—advanced, so too did the activities and the understanding of Sanctuary providers throughout the borderlands between the United States and Mexico. Theirs was a situated knowledge, born of receiving refugees, many of whom were physically scarred and emotionally shattered by the time they reached the United States border. Their responsive practice developed in the circumstances of that time and place. The flood of needy new arrivals shaped a community practice that differed in important respects from practices of others concerned to do Sanctuary yet who lived far away from the border. Among the people who have constituted the Sanctuary Movement in American's Southwest, Sanctuary is an American instance of civil initiative: the conscientious practice of people joined by a faith-based understanding of the importance and possibility of responding to the sufferings of strangers, by enacting a way for society to comply with human rights laws although the Government persisted in violating them.

As practiced throughout the Southwest, Sanctuary honed and extended the rule of law. Beyond protest, dissent against governmental practices, or petitions to the Government to comply with law, Sanctuary workers together established a public space for citizens to reclaim authority delegated to the state because, in their view, Government officials violated federal and international laws.<sup>34</sup>

---

34. Two conceptions of lawful Sanctuary conduct among Sanctuary workers must be clarified. First, very early on, many throughout the Tucson Sanctuary network and beyond believed that they were complying with the positive law concerning refugees. This was true for those who presented refugees for asylum application and who had first-hand experience with the abrupt shift in administrative policy, in 1981, to arrest and deport, rather than to process asylum applications for Salvadorans. See discussion *infra* part II.A. This early stance and its positivist interpretive tenor coincided with an expectation—encouraged perhaps by the Government's long delay in seeking indictments—that, should there be arrests and confrontations in court, the INS' errors would be uncovered and brought into line. Second, that understanding was supplanted over time among a number of movement participants by a clearer denial to the government of full interpretive authority. This perception was sharpened by defendants' and their colleagues' experience of the Tucson trial as an obfuscating and farcical avoidance of the pursuit of truth, umpired by a government actor with vested interests in state-sanctioned policy viewpoints. This two-part schema is, of

Media, prosecutors, and courts have all vied with the Sanctuary workers to speak authoritatively about the work of the Sanctuary Movement. The story, as told by the press, was structured as an “underground railroad” tale in which all were cast as secretive alien smugglers. Thus, many persons in the press accepted and perpetuated the governmental definitions of illegality even while they deemed it just or noble.<sup>35</sup> The Government prosecutors utilized the discourse of illegality, criminal conspiracy, and immigration law’s focus on alienage, as they precluded the defendants’ possible explanations and defenses raised at trial. The judicial narrative tells of a conspiracy by misguided, if not bad actors, to violate the social order and breach the borders. That judicial tale shrouds and silences an inner story of a conscientious, ecumenical movement among people who constructed a community faith and practice for doing justice, and an interpretive practice for reading the law. Sanctuary workers developed and employed a discourse and interpretive commitment, very different from that used by the formal institutions of the law, that simultaneously expressed and helped to constitute their experiences of knowledge, faith, community, and responsibility for justice.

Surely several meanings may be deduced from the official rulings resulting from the Sanctuary prosecutions. But which? Robert Cover shows us that legal meaning can only be spoken in plural voice and that the task of interpretation is inherently pluralist. The formal institutions of law, the positive legal rules, and the conventions of the social order to cede to courts the power of authoritative legal interpretation, are surely important in answering this question. Still, they are “but a small part of the normative universe that ought to claim our attention,” for no set of legal prescriptions can exist—much less claim our exclusive allegiance—wholly apart from the narratives that give them meaning.<sup>36</sup> Legal meaning is discernable only against the norms of the communities we inhabit. It is constructed or received according to the interpretive commitments of our social existence—only one of which is official application of legal rules.

In Robert Cover’s vision, we inhabit a normative universe, a *nomos*, within which “[w]e constantly create and maintain a world of right and

---

course, a simplification; Sanctuary workers no doubt differed in the importance they attached to thinking through such distinctions.

35. See SUSAN B. COUTIN, *THE CULTURE OF PROTEST* 47 (1993). Coutin observes that accompaniment stories are free of this implication of risk before law, though full of physical dangers of traveling in Central American countries.

36. Cover, *supra* note 2, at 95. Cover stated:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

*Id.* at 95-96.

wrong, of lawful and unlawful, of valid and void.”<sup>37</sup> Sanctuary participants in the Southwest engaged in a *nomos*, creating an understanding of refugee law that diverged from the State’s official interpretation of refugee laws. The law they created—like all law—was constituted both by interpretation and commitment. Sanctuary workers sought to enact legal meaning when they acted on their understanding that fleeing Central Americans were refugees entitled to assistance and nonreturn. State actors similarly did more than merely interpret the law. Police, prosecutors, and judges also must possess more than an interpretive understanding to make legal meaning operative; they must commit to that meaning in order to employ the State’s apparatus to enforce the official illegality interpretation.<sup>38</sup>

The commitment of the State to its law is indicated by the narratives it chooses, but the law of refugees, and the law of citizen conscience unfettered by the government’s preferences, are also parts of the construction of legal meaning. Cover taught: “The normative universe is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments—of officials and of others—do determine what law means and what law shall be.”<sup>39</sup>

For individuals, the normative universe is only partly comprised of the rules and institutions identifiable as the legal structure. One’s *nomos* is also constituted, in significant part, by the stories told and heard. Cover explains: “Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral.”<sup>40</sup>

In constructing the Sanctuary Movement’s own discourse, participants drew on preexisting discourses and crafted new elements. First, theology provided the discourse elements of Biblical injunctions to love thy neighbor, to see Christ in the poor, and to live Christ’s teachings or God’s commandments. Because applications of such theological precepts have historical predicates in social gospel ideas, these ideas dovetailed with Americans’ vague awareness of the forceful liberation theology in Central America.

Secondly, at church meetings, public Sanctuary caravans, and services of welcome and celebration, Sanctuary participants adopted practices of “testimonies” by Central American refugees.<sup>41</sup> These practices drew on the history of the Holocaust, when the world declined to hear the pleas of those who sought refuge from Nazism, and on the discursive practices within

---

37. *Id.* at 95.

38. See Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, 11 *CARDOZO L. REV.* 1687, 1701-02 (1990); Susan P. Koniak, *The Law Between the Bar and the State*, 70 *N.C. L. REV.* 1389, 1402 (1992).

39. Cover, *supra* note 2, at 98-99.

40. *Id.* at 96.

41. See COUTIN, *supra* note 35, at 67-68.

Central American liberation-theology.<sup>42</sup> A third element of the Sanctuary Movement discourse involved consciousness of border-crossings: not just the borders of nations, but the psychological and political boundaries between First and Third Worlds, between affluence and poverty, security and risk, apathy and faith.<sup>43</sup> Finally, to call on the nation and its people to do justice, the Movement countered governmental interpretations of reality confronting Central Americans as well as the justice and legality of the Sanctuary Movement's actions.

This discourse depicts something far from the picture of hardened alien smugglers. The Tucson participants' crossing and transporting stories are replete with their own inexperience, stupidity, and luck.<sup>44</sup> Sanctuary stories underscore the primacy of concern for Central Americans' safety.<sup>45</sup>

The courtroom proceedings of the Tucson trial were effectively insulated from this Movement discourse by the Government's sweeping motion in

---

42. This practice was an expression of knowledge that we are located in history: our sense of society as both moral and legal community. See David A.J. Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489 (1985); see also Susan Waysdorf, *Popular Tribunals, Legal Storytelling, and the Pursuit of a Just Law*, 2 YALE J.L. & LIB. 67 (1991).

43. North Americans who traveled and worked in Central America with displaced people commonly observed that their status as internationals with powerful governments and access to press offered them appreciable protection from most political terror. Such crossings between the First and Third World is something with which the legal system and its discourse have extremely limited experience. *But see* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, the court held that the family of a Paraguayan tortured there could bring suit in the United States against the Paraguayan police officer who committed the torture. *Id.* In so holding, the court recognized trends in modern international law to lift traditional restraints on the adjudication by one nation of the conduct of another toward its citizens. Such "transnational public law litigation" promotes important social purposes by denying repose and safe haven to those who perpetrate international crimes. Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2397-98 (1991).

44. Several participants echoed the view offered by one pastor who participated in the border crossings, stating: "We didn't plan. We just got a call that somebody was at the border, and you had to go. And, it was really *dumb*." Author's Interview with Sanctuary Defendant Subject No. 47 (June 1992) (redacted transcript on file with the *Tennessee Law Review*). Due to the author's assurances of confidentiality, more specific information regarding dates and places of interviews with Sanctuary defendants are not available. However, redacted transcripts of language quoted from these interviews are on file with the *Tennessee Law Review*.

45. Some stories also indicate differences of opinion within the movement about the degrees of care shown to the safety of refugees and border workers. Many Sanctuary participants viewed this as a gendered split. The issue was whether Fife and Corbett were too accommodating to the press who rushed to cover border crossings, when that energy might be applied to ameliorating the immediate human needs of refugees. All of my interviewees saw this tension in the incident in which two young women volunteers were accidentally left in the desert for several hours without water because of the rush to load refugees and reporters into the cars. Author's interviews with multiple subjects.



limine, which excluded as irrelevant every element of fact, knowledge, and understanding which gave meaning to the Sanctuary defendants' conduct.<sup>46</sup> That exclusion did not change the fact or effect of the movement discourse on participants or on those persons who had access to information beyond the media's portrayal of the trial. Indeed, what was allowed into court was considerably narrower than what was available to the public. Beyond the official forum, there were press conferences on the courthouse steps, press reports, and the persistence of Sanctuary despite the government crack-down.<sup>47</sup>

To understand the effects that silencing this story in court may have on the legitimacy, power, and vitality of citizen-initiated justice practices, readers should hear, as I did, the defendants' telling unmediated by prosecutors' and judges' privileged narration.

#### A. "The Awakening Church"

According to accounts of the Sanctuary participants, the Sanctuary Movement arose spontaneously along the United States-Mexico borderlands, in response to a dramatic increase, beginning in 1980, in the flow of Salvadoran refugees into the United States. At that time, few Americans knew much about El Salvador, although there were news reports that its archbishop, Oscar Romero, had been assassinated while giving communion, after he had made direct appeals to the Carter Administration to cease supplying military aid to his country. Romero's murder pushed to the international political stage significant religious and social realignments in Central America since changes in the Catholic Church were implemented by Vatican II during the mid-1960s. The Church had made a sharp rhetorical shift to express commitment to the poor. Although Romero assumed the post of archbishop as a conservative, he had been radicalized by the murder of one of his priests because of his work with the poor.<sup>48</sup>

---

46. See discussion *infra* part III.A.

47. The Movement paused for about 12 hours after the indictments. Sanctuary participants moved refugees whom they feared might be arrested and briefly froze all pending plans for refugee aid, but then unindicted workers continued the Sanctuary network's border crossings and social assistance.

48. See GUSTAVO GUTIERREZ, *THE POWER OF THE POOR IN HISTORY* 126 (Robert R. Barr trans., 1983). Gutierrez wrote:

The reality of poverty, misery, and exploitation in the life of the vast majority of Latin Americans doubtless constitutes the most radical challenge to the proclamation of the gospel. ... [sic] [T]his is a society that is supposed to be Christian. But the gospel reveals to us a God who — as Karl Barth put it, echoing the message of Scripture— takes sides with the poor.

*Id.* at 125 (citing Karl Barth, who stated that "God always takes his stand unconditionally and passionately on this side and on this side alone: against the lofty and on behalf of the lowly; against those who already enjoy right and privilege and on behalf of those who are

At the 1968 Bishops Conference in Medellin, Colombia, religious leaders sought to implement Vatican II principles and advocated formation of Christian "base" communities to discuss the religious, doctrinal, human, and political issues facing Catholics. As a result of the Medellin decisions, many parish priests and nuns changed dramatically. Although they had begun the 1970s by ministering to the poor and obeying the instructions of their bishops, they learned by experience that neither their commitment to the *campesinos* nor the principles of Medellin could be carried out without political action. Base Christian communities cried out against Church tendencies to skirt the liberation of the poor by giving it a spiritual focus: the communities viewed this as foreign to the Christian message and to the concrete circumstances of Latin America's poor.<sup>49</sup> When peaceful attempts to obtain food, land, and other rights ended without effecting changes in repression, growing numbers of clerics moved to nonviolent opposition. Some clerics even came to support violence,<sup>50</sup> viewing violence as necessary to defend against the violence of suffering and destruction inflicted on the poor by the social structures throughout Latin America.<sup>51</sup> Such structures exemplify the majority's extreme material deprivation and increasing exclusion from production, while small traditional elites make ostentatious display of great wealth.

When, in December 1980, four American religious women were raped and murdered, and the Salvadoran National Guard was suspected of the crimes, churches in the United States began to pay more attention to El Salvador. American missionaries in Central America smuggled stories of terror to their home churches. United States newspapers began to report, with growing frequency and particularity, the allegations of death squads and human rights abuses linked to the government of a United States ally. Mounting armed conflict and human rights abuses in El Salvador and Guatemala fomented an exodus of refugees to other Central American

---

denied it and deprived of it." 2 KARL BARTH, CHURCH DOGMATICS 386 (1957)).

49. See GUTIERREZ, *supra* note 48. The "preferential option for the poor" is not intended to exclude the not-poor. The Medellin Document on Poverty declared:

We wish to heighten our awareness of the obligation to have solidarity with the poor, an obligation that is prompted by charity. This means that we shall make their problems and struggles our own.

This must be fleshed out by our denunciation of injustice and oppression, by a Christian struggle against the intolerable situation of many poor people, and by a process of dialogue with the groups responsible for this situation that will help them to appreciate their obligations.

*Id.* at 128-29.

50. See WALTER LAFEBER, INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA 222-23 (1984) ("A religious commitment to ameliorate poverty could end in a political, even an armed, commitment to oppose the government.")

51. See, e.g., Robert M. Brown, *Preface* to GUSTAVO GUTIERREZ, THE POWER OF THE POOR IN HISTORY ix, *supra* note 48.

nations, to Mexico, and to the United States. The conditions of civil war prompted distressed people in El Salvador and Guatemala to choose between persecution at home or exile in foreign lands.

One example of this recurring refugee story was captured in a bugged conversation between undercover government agents and Sister Darlene Nicgorski, one of the Tucson defendants. The agents were posing as Sanctuary volunteers and had offered to drive a Salvadoran family, the Nietos, from Phoenix to Albuquerque. The Nietos explained their departure:

We were neither in the military nor with the guerrillas. It's just that we had worked with, you might say community work. . . . church services . . . with the church. With the, displaced communities. The product of the war . . . There is a lot of displaced people in the country. . . . Many of the priests have been killed - something like 12. [We had problems not with the military] but with the government, yes, because of the policy that they have towards the religious people. It's basically the same that they have towards people that are collaborating against them.<sup>52</sup>

Another example, also taped covertly by Government agents, was the reunion of Lucio Chavez with his children in Los Angeles, whom he had not seen for three years. During the drive from Arizona, Lucio described his work for a labor union in San Salvador and the day the army burst in, took and tortured him and others, insisting they were guerrillas. Numerous accounts given by Sanctuary workers and refugees are similar.<sup>53</sup>

Development of liberation theology in Latin America<sup>54</sup> met with a long

---

52. Tape from Operation Sojourner Investigation Interview, by INS agents (July 26, 1984) (author's notes from transcript on file with the *Tennessee Law Review*) (the author studied the transcripts courtesy of Jim Brosnahan of Morrison & Foerster in San Francisco). See also CRITTENDEN, *supra* note 7, at 156-58.

53. Tape of Operation Sojourner Investigation Interview, by INS agents (May 28, 1994). See also COUTIN, *supra* note 35; CRITTENDEN, *supra* note 7; GOLDEN & MCCONNELL, *supra* note 7.

54. United States investigators mistakenly categorized liberation theology with leftist political groups. See James V. Spickard, *Transcending Marxism: Liberation Theology and Critical Theology*, 42 *CROSS CURRENTS* 326 (1992). Latin American liberation theologians have borrowed Marxist analytic tools of immanent social analysis and an eschatological vision of history, but they refashion them in a Christian form that remains quite distant from orthodox Leninist Marxism, and from Latin American Communist parties. Important to this analysis is an appreciation for the multiplicity of heirs to "Marxist" thought. This point has been obscured in the United States by generations of Cold War demonization and the silencing and fragmenting of the "Left."

During the early twentieth century, Marxists in Europe were divided over whether the principal problem of workers as a class was their "oppression" (a political concept for which the Social Democrats prescribed revision of the political system through the struggle for political democracy), "exploitation" (an economic idea, animating the Leninist agenda to struggle for a socialist economy), or "domination" (a cultural concept, championed by the

tradition of religious activism in the United States.<sup>55</sup> An orientation to religious activism was common among many participants in the Sanctuary Movement. One participant was a seventy-nine-year-old Quaker woman who had worked for the Red Cross in World War II and remained a devoted pacifist. Another participant was a boy went door to door with his minister-father collecting money for a *New York Times* advertisement that protested the Christmas bombings of Hanoi. Many participants had been involved with the civil rights struggle in the South in the 1960s.<sup>56</sup> For years, religious activists pursued their convictions concerning nuclear disarmament, housing for the homeless, farmworkers' rights, and divestment from South Africa.

United States churches have a considerable history of caring for refugees—from Cuba, Vietnam and Cambodia, Indonesia, and Chile—with the support of the United States government. In July 1980, a group of Salvadorans were discovered in the Arizona desert where their *coyotes* had left them to die.<sup>57</sup> Several Tucson churches kicked into gear to aid the

---

Hegelian school emphasizing the consciousness of social actors and the role of social construction of forms of thought that impede the development of working-class consciousness). *Id.*

Unlike Latin American Marxist groups which discredit the working classes, liberation theologians hold as a central tenet the right and capacity of the common people to become active, creative agents of their own history. Methodologically, liberation theology seeks to empower poor people, respecting popular culture and its stories, songs, and folk art. Liberation theology recognizes that Latin American Catholicism has been both a source of oppression and a source of popular creativity. The eschatology in which it is set is not class warfare but building the reign of God on earth and the full development of the human family in physical, emotional, and spiritual terms. *Id.*

55. See, e.g., A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* (1985) (recounting the extensive involvement of religious people and bodies during many of the significant changes in the course of politics in the United States). Since the beginning of the eighteenth century, the Quakers and Methodists have been regarded as some of the first religious people to abolish slavery. See WILLIAM H. SEIBERT, *THE UNDERGROUND RAILROAD FROM SLAVERY TO FREEDOM* 93-99 (1968); REICHLEY, *supra* at 190-93. The Quakers and Methodists were also some of the first supporters of the Civil Rights Movement of the 1950s and 1960s. See REICHLEY, *supra* at 247-50. Consider also the rise of the Social Gospel Movement at the turn of the twentieth century, seeking to apply Christian ethics to the country's social order. See SYNDEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 786-97 (1972). Religious involvement also appeared in the temperance and Vietnam Anti-War Movements. See REICHLEY, *supra* at 215-17, 250-53; HALL, *supra* note 22. Religious concerns also account for much of the emotive force in the contemporary controversies over abortion and the turn to electoral politics of a "new religious right." See REICHLEY, *supra*, at 319-30.

56. See COUTIN, *supra* note 35, at 25.

57. See DAVIDSON, *supra* note 14 (recounting that 13 middle-class Salvadorans, ill-equipped for desert travel, died after being abandoned by their *coyotes* in Organ Pipe National Monument); ARON SPILKEN, *ESCAPE!* (1983) (relating the same tragedy based on

survivors, and found that the INS was preparing to deport them to the nation they had fled. Thus began American church workers' lesson in the difference to the Government between a refugee and a "refugee," a politicized legal status rather than a state of need.

The five men and six women, whom the Government would later prosecute in *United States v. Aguilar* as key to organized Sanctuary, already lived and worked in the border region. Many were employed by church organizations to provide basic social services to migrants and other poor people in the region. Father Tony Clark was a parish priest at Sacred Heart Church in Nogales, Arizona, a twin city to Nogales, Mexico, separated by the barbed-wire fence that is "the border." Long before the spread of Sanctuary among United States churches in the 1980s, his church had provided food and shelter to people in need—many who were no doubt Mexicans and Central Americans without documents to enter the United States. Just across the border in Mexico's Nogales, Father Ramon Quinones was pastor of Our Lady of Guadalupe, a church which also had established an all-purpose social service agency for refugees. Maria del Socorro Pardo de Aguilar, a fifty-eight year old widow, was a devoted parishioner of Our Lady Guadalupe, helping with the mission work and opening her home in Nogales to people who came to the church for help.<sup>58</sup>

Jim Corbett, a fiftyish, grizzled, one-time philosophy professor, rancher, and Quaker, for years had lived and moved freely through the Sonoma desert country. In this area which embraces Tucson yet extends deep into Mexico, Corbett raised goats and worked with others on both sides of the border to develop a cooperative for goat milk products.<sup>59</sup> His experience with refugees began in May 1981 when he accompanied a friend to the INS office to learn what had happened to the Salvadoran hitchhiker picked up by his friend the night before but who was arrested when the Border patrol stopped the car. Corbett is widely credited with prompting the organization of efforts to protect Central Americans, both by his personal decision to lead undocumented Salvadorans across the border, and by his circulation of position papers created by Tucson Sanctuary workers seeking agreement on guiding principles. Corbett was made a national embodiment of the movement by media coverage, including a *60 Minutes* broadcast.<sup>60</sup>

---

interviews with the survivors).

58. See CRITTENDEN *supra* note 7, at 50-51, 84, 136 (discussing individual members and leaders of the Sanctuary Movement).

59. See JIM CORBETT, *GOATWALKING* (1992).

60. See *60 Minutes* (CBS television broadcast, Dec. 12, 1982). Ironically, Corbett was not convicted on any charge. Evidence supporting the government's case relied upon bits of the undercover tapes of the Ecumenical Council's meetings. Through much of the period when these tapes were made, Corbett traveled through Mexico, and much of the border crossing was conducted by numerous other Sanctuary volunteers. Author's interviews with Jim Corbett, *infra* part III.

Similarly, the Reverend John Fife was treated in numerous press accounts as a cofounder, because the church he pastored, Southside Presbyterian Church in the Tucson barrio, was a hub of Sanctuary services as well as the first church to declare itself a public sanctuary. Southside's ministry got under way in 1980, when "refugees started to show up in Tucson."<sup>61</sup> With a small group of clergy who met to discuss their concerns for "the persecution of the church in El Salvador," the pastor began an old-fashioned prayer vigil once a week, at the federal building in downtown Tucson, which became a focal point for people who wanted to learn more about Sanctuary.<sup>62</sup> As a long-time pastor and national officer in a mainstream denomination, Fife also generated recognition for the movement within established church circles.<sup>63</sup>

Peggy Hutchison worked in Tucson in the early 1980s, first for two years as a stateside missionary for the United Methodist Church, and then for the Tucson Metropolitan Ministry, a local social service agency. Her job included establishing a "border ministry for undocumented Mexicans and Central Americans."<sup>64</sup> Hutchison volunteered to assist Corbett and Quinones in their visits to the Nogales, Mexico prison, as a natural outgrowth of her work.<sup>65</sup>

Philip Conger, the son of Methodist missionaries, grew up traveling through Central and South America. As a social worker with the Tucson Metropolitan Ministry, he too joined in the prison visits, and in 1982, he became the part-time director of the Tucson Ecumenical Council.<sup>66</sup> Hutchison and Conger visited regional jails and detention centers, and aided people to apply for asylum, and as they did so, learned the dismal odds for approval.<sup>67</sup> Both became involved in border crossings.

---

61. Author's Interview with Rev. Fife, in Tucson, Ariz. (June 28, 1992) (redacted transcript on file with the *Tennessee Law Review*).

62. *Id.*

63. In 1992, despite a felony conviction, Fife was elected to head the three million member Presbyterian Church (USA). See Tom Turner, *Sanctuary's Rev. Fife to Lead Presbyterian Church*, ARIZ., DAILY STAR, June 4, 1992, at 1; see also CRITTENDEN, *supra* note 7, at 69-71.

64. CRITTENDEN, *supra* note 7, at 97.

65. *Id.*

66. CRITTENDEN, *supra* note 7, at 97-98. Conger subsequently attended seminary and became an ordained minister in the United Methodist Church, and he now pastors a church in the border region. *Id.*

67. *Id.* Hutchison later recounted the choices she saw for herself then:

I could lobby Congress; I could work for extended voluntary departure; I could educate people; I could visit the jails and detention centers. That could be my ministry. Or I could get involved on a deeper level, with the sanctuary ministry. I studied the 1980 Refugee Act and the international refugee laws and concluded that it was the INS that was breaking the law. If the values I had been brought up by meant anything, I had to get involved in sanctuary.

Darlene Nicgorski was a nun of the order of the School Sisters of Saint Francis. From 1980 to 1981, she was a missionary in rural Guatemala, until the rising level of paramilitary violence came to her parish with the murder of its priest. She and the Guatemalan sisters managed to escape first to Honduras, and then to Mexico where over 100,000 Guatemalan refugees lived in refugee camps. She returned to the United States in October 1982; while recuperating with her family in Phoenix, she sought to develop Central American aid groups. Through other nuns, Nicgorski came to work with refugee families to identify safe settling points away from the border. In 1983, the Chicago Religious Task Force on Central America, coordinating with Tucson churches, asked her to screen and counsel refugees. The remaining defendants were only peripherally involved.<sup>68</sup> Numerous other Sanctuary workers were never indicted.<sup>69</sup>

When the Tucson religious community first began assisting Central Americans in 1980, the INS would release detainees on their own recognizance if they had a letter written on church stationery stating that the church would provide social services for them. Legal assistance for asylum applications was provided by the Manzo Area Council, a community organization founded during the 1960s War on Poverty to work with Mexican migrant workers. By 1981, the Council found increasing numbers of undocumented Central Americans among its clients. Several months after Reagan's inauguration in January 1981, however, this INS policy changed to a policy of mass detention and aggressive deportation.<sup>70</sup> Manzo Area Council found several of its clients detained at El Centro, hours away in California, and found 200 other Central Americans detained in deplorable

---

CRITTENDEN, *supra* note 7, at 98 (quoting Peggy Hutchison).

68. The prosecutor explained, "A conspiracy doesn't function without the gofers. . . . This prosecution was really for deterrence; it was not for punishment." CRITTENDEN, *supra* note 7, at 193 (quoting Don Reno). Wendy LeWin, a 26-year-old volunteer in Phoenix, was convicted of transporting illegal aliens because she drove a family of Guatemalan refugees to Albuquerque. The evidence, however, was ambiguous as to whether she knew that they were undocumented. See Brief of Appellant at 136-42, *United States v. Aguilar* (9th Cir. 1987) (Nos. 86-1208, 86-1209-1210, 86-1212-1215). Her conviction was nonetheless affirmed on appeal. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1988).

Nena McDonald, a Quaker nurse and volunteer for the TEC Task Force, and Mary Kay Espinoza, director of religious education at Father Clark's church, were found not guilty. CRITTENDEN, *supra* note 7, at 284-85. Crittenden suggests the inclusion of these three came to symbolize the appeal of the movement to "ordinary" Americans beyond those who followed overtly religious vocations. *Id.*

69. See *Aguilar*, 883 F.2d at 667 (explaining that eight sanctuary workers were convicted, three were found not guilty, sixteen were indicted, and 60 co-conspirators were named, though not indicted).

70. See Arthur Helton, *Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353, 363-64 (1984) (discussing change in detention policies). See also COUTIN, *supra* note 35, at 26.

conditions.<sup>71</sup> Participants from the prayer vigils, the ecumenical council, and Manzo Area Council met, and initiated an energetic effort to raise bond money to bail out every Salvadoran.<sup>72</sup>

Individuals put up their homes for bond; church workers acquired hands-on knowledge of the obstacles facing Central Americans seeking political asylum. Translating refugees' stories into government application forms was a transforming, committing experience for many participants.<sup>73</sup> The bond-raising effort garnered \$1 million in two weeks, yet the government's capacity to detain and deport seemed boundless. A southwestern regional meeting of religious and legal groups in the fall of 1981 revealed that the impediments to asylum applicants from Central America were systematic and widespread, and "not the isolated situation of some red-necked administrator."<sup>74</sup> Bond amounts escalated; once fixed at \$1,000, they jumped to \$3,000, then \$5,000.<sup>75</sup> The INS was separating families in detention and employing deception to obtain waivers of asylum rights: telling one member that the other had signed deportation papers, insisting that Central Americans sign papers printed in English and denying them counsel. Salvadorans and Guatemalans were denied asylum uniformly around the country.<sup>76</sup> Legal workers reported INS harassment. Corbett concluded:

"The most urgent need of the vast majority of Salvadoran refugees is to avoid capture. Actively asserting the right to aid fugitives from terror means doing it—not just preaching at a government that is capturing and deporting them, not just urging legislation that might help future refugees."<sup>77</sup>

To this end he formed the "Tucson refugee support group" (Trsg) with other Quakers and members of the goatmilking cooperative.<sup>78</sup>

---

71. COUTIN, *supra* note 35, at 15.

72. *Id.*

73. *Id.* at 26.

74. *Id.* at 27 (quoting one of the Tucson ministers involved in the bail-bond effort).

75. *Id.*

76. *Id.* See also figures and sources, *infra* note 132 and accompanying text.

77. Jim Corbett, Preliminary Statement Concerning Salvadoran Refugees, Speech Before the National Council of Churches of Christ Consultation on Immigration (Jan. 28-30, 1982), reprinted in *Borders and Crossings: Some Sanctuary Papers* 86B (April 1976) [hereinafter Corbett, *Borders and Crossings*] (unofficially published papers, cited portions of which are on file with the *Tennessee Law Review*) (listing a series of documents related to the Sanctuary Movement). See also COUTIN, *supra* note 35, at 27 (quoting Jim Corbett).

78. COUTIN, *supra* note 35, at 27.



*B. Living Faith Traditions*

## 1. The Transformations of Personal Knowledge

From their first-hand experiences with Central Americans who showed the marks of torture and recounted terror and persecution, religious workers along the border concluded that these people were indeed refugees who needed and were entitled to safe haven in the United States. Knowledge of the refugees' sufferings led many volunteers into Sanctuary work. When asked why one of the earliest border crossers became involved with the Sanctuary Movement, the worker answered,

Refugees were arriving. Many had suffered [sic] torture, had lost immediate relatives, in ways that involved extreme inhumanity. . . . [The principles of] what one does in these circumstances had been settled after the Second World War. There was really no question of simply turning our backs on them. You don't send people back to conditions like that.<sup>79</sup>

The immediacy of direct personal knowledge was key for many people to take action to implement the principle that someone should prevent the arrest and return of refugees. "I don't think I would have responded the way congregations responded farther away from the border, if I [had]n't run into it personally," Corbett told me.<sup>80</sup> Other interviewees made similar observations, for example: "when [ordinary folks] got to know the refugees as *people* . . . *they* began to change. . . . It was a kind of conversion process."<sup>81</sup>

"We did everything that we could think of to stop the deportations. Increasingly, people knew what the true story was, and they learned what was happening in these countries. We wondered what we could do to stem the flow. Because if a legal office . . . is *all* that we do—and don't misunderstand me, I think that it's important—but if it's *all* that we do, then the conditions that cause people to flee from their country won't change. ...[sic]

What we *were* doing wasn't getting anywhere. We realized that number one, when we had had firsthand experience with real live refugees, our own lives and our understandings had changed. Since that's how we'd been converted, we thought that it might work for others as well. ...[sic] They could always dismiss us as bleeding hearts, or naive, or liberals, or

---

79. Author's Interview with Sanctuary Defendant Subject No. 66 (redacted transcript on file with the *Tennessee Law Review*).

80. Author's Interview with Jim Corbett (June 1992) (redacted portions of the transcript on file with the *Tennessee Law Review*).

81. *E.g.*, Author's Interview with Sanctuary Defendant Subject No. 38 (June 12, 1992) (redacted transcript on file with the *Tennessee Law Review*).

'Oh, they're just church people,' or whatever. But they couldn't dismiss the refugees who told about their own experiences. ...[sic]"<sup>82</sup>

These Sanctuary volunteers experienced some of the risk entailed in listening to human suffering. Hearing refugees' traumatic narratives can shake one into a crisis of perception about one's own boundaries, one's separateness, and one's connectedness to others. Professionally trained receivers of testimonies about war's atrocities pass through such crises too; for some listeners, there develops a sense of obligation to act on the knowledge one listens to with care.<sup>83</sup>

Many Sanctuary volunteers who lived through World War II recalled the boatloads of Jews fleeing Nazism, which were turned away at every port.<sup>84</sup> The analogy of Central Americans' flight to lands with unwelcoming governments was particularly powerful for many Jews in the Sanctuary Movement. One example is this housewife from Tucson:

"My son in particular became fast friends with the little boy in the [Salvadoran] family that I was involved with, and every time I used to see them together, I used to think of my own child, and I would think, 'What if the situation were reversed? What if it was Germany?' And I would hope that someone would be there to help my kids."<sup>85</sup>

Unlike most Christian Sanctuary workers who labored to comprehend the experiences of the Central American refugees, many of the Jewish Sanctuary workers had themselves been refugees, or were the children or grandchildren of refugees.<sup>86</sup> Among Coutin's subjects, one Jewish man related that his parents entered the United States illegally by bribing federal officials; others recounted their own flights from Germany as children. A Tucson rabbi said,

"My father was an undocumented alien. And I figure that it's the same thing whether you escape from the Kaiser in 1913, or whether you escape from Central America in the 1980s. I had an aunt and uncle that escaped

82. COUTIN, *supra* note 35, at 28 (quoting an unnamed minister from the Tucson Sanctuary Movement).

83. See FELMAN & LAUB, *supra* note 25, at 57-73.

84. COUTIN, *supra* note 35, at 26 (quoting the same unnamed minister from the Tucson Sanctuary Movement).

85. *Id.* at 80 (quoting Adele Tilberg, a member of the Tucson Sanctuary Network). For some Jews in uninvolved synagogues, comparisons to the Holocaust were offputting rather than apt, in that the Holocaust was hatred and execution of a people rather than the more indiscriminate persecutions in Central America. One rabbi responded to such arguments by distinguishing the experience of the Holocaust from the lessons it teaches, particularly the honor shown to the Righteous Gentiles for putting themselves at risk to save Jews. "You honor the dead by creating a situation where the living don't have to repeat the horror that the dead experienced." *Id.*

86. *Id.*

to France, and they couldn't find anyone to take them in, and so they were sent back to Germany, and they were killed in a concentration camp, so I know. I know what happens to people when you don't let them in."<sup>87</sup>

The religious journey led to the parallel invention of Sanctuary, independently arrived at in distant parts of the nation. In Arizona, Corbett requested the churches in Tucson to turn the space of their houses of worship into shelter, and sent letters around the country making the plea. In 1981, congregations in the San Francisco Bay area which had joined for Bible study and succor of Central Americans, independently formed a covenant of support for the two churches that literally sheltered refugees, including one of the survivors of the group abandoned in the Organ Pipe desert by paid *coyotes*. According to the pastor of one of these churches:

"We decided that we should establish some achievable goals. ...[sic] We said that [the refugees] would stay in the church building for five days, from Wednesday through Sunday. And during those five days we would try to do certain things. We would try to get 500 letters written to Ronald Reagan. We would try to get 100 volunteers to go over and monitor asylum hearings in San Francisco. We would try to get ...[sic] twenty people who would be trained to do paralegal work and help in filling out asylum applications, and I think it was \$5,000 we wanted to raise. And we did all of those things in those five days. We did everything.

And then we had a procession after church of all of the five churches ...[sic] and we celebrated that we were doing this; we were involved in this together."<sup>88</sup>

By the covenant, East Bay churches embodied "their sense of functional legitimacy, congregational authority, and organizational identity."<sup>89</sup> Tucson participants cohered differently, through personal connections, bonds of work, faith and trust, both within and across participating congregations. Rev. Fife explained:

[T]he real importance of the sanctuary movement [is]: we didn't ground it in exceptional individuals. We grounded it in congregations who had to make that [sanctuary] decision as ordinary folks together. It really was grounded in mainline, conventional religious communities. . . . [W]hen the government did try the indictments . . . [t]here was no give in at all, no backing off at all by anybody. And I think that's because it was grounded in ordinary grass roots communities of faith . . . . [I]t was pretty hard for the folks in Tucson to believe [the prosecutor's view] that all those [church] folks . . . were a bunch of radical communist atheists.<sup>90</sup>

87. *Id.* at 80-81 (quoting a Tucson Rabbi involved in the Sanctuary Movement).

88. *Id.* at 30 (quoting a minister whose church was involved in the Sanctuary Movement).

89. *Id.* at 31.

90. Author's Interview with Rev. Fife, in Tucson, Ariz. (June 28, 1992) (redacted

Jewish congregations also participated in the ecumenicism of the Tucson wing of the Sanctuary Movement. At one synagogue which initially declined, its rabbi raised the issue a second time. He explained:

"I decided that this was the most important issue that everything else depended on, and I prayed to God, I prayed to please let it go through. And I decided that if it didn't pass [the second time], I would give up my rabbinate. So, when Yom Kippur came around, which is one of the most important Jewish holidays, I didn't write a normal sermon, and I didn't speak from notes. I walked away from the pulpit and I preached a sermon facing the congregation eye-to-eye. And the president of the congregation walked out halfway through the sermon. But afterwards, a man came up to me with tears in his eyes, and he said, 'Now I know why I belong to a synagogue.'"<sup>91</sup>

The Sanctuary declaration passed two-to-one on the second vote.<sup>92</sup> Jewish activists in the Bay area invited a rabbi to address their group a few months later and, as was the testimonial practice, a refugee spoke as well. As one of the 100 persons in attendance related,

"[I]t was the most *moving* thing. And after that they said, 'Whoever wants to help get Jews involved in sanctuary, please come up to the front.' So I went. I mean, I was crying, that's how moving it was. He related it all to the Holocaust, and he was a brilliant speaker."<sup>93</sup>

Many participants described the work of Sanctuary as profoundly spiritual. One defendant recalled the collective effort this way: "In some ways it felt like a Christian base community, in that we were together every Monday night, struggling over the issues of how to put our faith into action. . . . [W]e were doing things that were risky and we had to trust each other."<sup>94</sup>

Another volunteer, a white-haired grandmother who regularly invited refugees staying at her church home for Sunday dinners, made her first border crossing in 1984, and helped a group of two women and five children cross through a desert canyon near the border. She explained her decision as one required in order to live her faith:

I . . . would expect churches to be the first place, the first people to reach out to someone who needed help. . . . [O]ur church attempts at least to live

---

transcript on file with the *Tennessee Law Review*).

91. COUTIN, *supra* note 35, at 32 (quoting the rabbi who lobbied among members of his Tucson synagogue for them to declare themselves a sanctuary).

92. *Id.*

93. *Id.* at 33 (quoting attendee Karen Hirsch).

94. Author's Interview with Sanctuary Defendant Subject No. 32 (June 1992) (redacted transcript on file with the *Tennessee Law Review*).

what we were taught, and [what] we know Jesus would want if he were here physically . . . . I could just see him with these people.<sup>95</sup>

As knowledge of the terrifying patterns among the refugees' experiences spread, many North Americans thought of their comparative safety as United States citizens. One stated:

[Y]ou can't do what Jesus would like to have us do and not take risks. . . . I would think about what the Central Americans were living through all these years. . . . the risk that they were in, just trying to keep their head above water . . . and that anything we might suffer by being arrested would be so much less then [sic] what they go through daily . . . .<sup>96</sup>

Sanctuary workers who had worked in refugee camps in Mexico and Honduras learned from their own observations of military's *in terrorem* tactics to control the people. In the face of these tactics, they reported that they were startled and instructed by the compassion and deep faith among the camps' refugees. Many were also aware of their relative immunity from physical harm by virtue of being United States citizens, and viewed this as a further injustice because the Central Americans did not deserve the cruel treatment that they received.<sup>97</sup> Several North Americans recounted their rising awareness that the United States provided massive military material for the killing and containment that they observed.<sup>98</sup> For many in the

---

95. Author's Interview with Sanctuary Defendant Subject No. 70 (June 29, 1992) (redacted transcript on file with the *Tennessee Law Review*).

96. *Id.*

97. El Salvador endured cycles of suppression by opponents of military-dominated governments since the 1930s. In 1980, the most recent cycle intensified with the escalation of death squads' campaigns against the networks of political organizers, labor leaders, human rights workers, teachers, and the religious, who had organized opposition and massive demonstrations against rightist governments and their military supporters throughout the 1970s. The killings became less and less discriminating as the 1980s advanced.

The institutionalization of violence against the civilian population is chronicled by the Commission on the Truth for El Salvador. The Commission established the January 1992 peace accord "to seek, find and publicize the truth about the acts of violence committed by both sides during the war." *Report of the Commission on the Truth for El Salvador*, U.N. Doc. S/25500 (Apr. 1, 1993) reprinted in *From Madness to Hope: The Twelve-Year War in El Salvador*, Commission on the Truth for El Salvador, at 18, U.N. Doc. S/25500, Annex 1 (1993) (on file with the *Tennessee Law Review*). The Report analyzes the evidence of cases and patterns of massacres of peasants by the Government armed forces and of assassinations by death squads, executions and abductions by the rebel forces of the FMLN; lists victims of the violence; and makes recommendations of legal, political, and administrative measures to prevent the recurrence of such horror. *Id.*

98. See Mark Danner, *The Truth of El Mozote*, THE NEW YORKER, Dec. 6, 1993, at 50. Danner provides a concise and readable history of El Salvador's civil war and United States financial and political support for the government despite evidence of human rights

Sanctuary Movement, this situation was the international expression of the power of the rich to trample on the poor. Sermons in Sanctuary churches often reflected this political understanding. One minister expressed this as a choice between conventional thinking and serious Bible reading:

[T]hat's what the Gospel says. If you read the Bible that's the A-number-one issue the Bible talks about. That is, the [divide between] the poor and the rich. I mean, that's what preoccupied Jesus and that's what preoccupied the Prophets. . . . It's why the whole story [of] the people of Israel, was formed in the first place: to try to provide some care to the folks who were outcast. . . . So I guess that's primary. I really am convinced that you can't be part of the dominant culture and still preach the Gospel. It's just impossible.<sup>99</sup>

## 2. The Sanctuary Movement's Continuity with Ancient Traditions of Sanctuary

In describing their relief work as "sanctuary," participants drew upon an ancient tradition of accommodation between religious and governmental senses of social order. The deep chord of memory struck by "sanctuary" was indicated by the rapidity with which the practice spread and the strength and breadth of its support, following the first public declaration of sanctuary

---

violations on a grand scale.

Multiple United States Administrations' policies in Central America had been marked by anxiety to deter the spread of international Communism. It is perhaps important to note that these events were shaped before the "end of the Cold War," the fall of the Berlin Wall, and the disintegration of the Soviet Union. When, in 1979, Nicaragua's Somoza government, the rightist regime supported by the United States, was successfully deposed, some policymakers in Washington feared that El Salvador's ongoing civil war might also be won by Leftist rebels.

Even President Jimmy Carter, who pressed the Salvadoran government to improve its regard for human rights, and who cut off all United States aid after the government-linked murder of four American churchwomen, succumbed to that fear. He restored millions in aid just weeks later. In January 1981, newly elected President Ronald Reagan immediately increased the amount of military and other aid for El Salvador's government, as well as funding for the *contras* in Nicaragua. By the time the 12-year civil war ended, the United States had spent more than \$4 billion to fund the war. *Id.* at 53.

99. Author's Interview with Sanctuary Defendant Subject No. 47 (June 1992) (redacted transcript on file with the *Tennessee Law Review*). The Old Testament is replete with instances of God's condemnation for those who enrich themselves through unjust practices. For example, *Isaiah* 3:13-15 reads: "The lord comes forward to argue his case and stands to judge his people. . . . You have ravaged the vineyard, and the spoils of the poor are in your houses. Is it nothing to you that you crush my people and grind the faces of the poor?" *Isaiah* 3:13-15 (The New English Bible, 1970). Consider also *Isaiah* 10:1-2, which states: "Shame on you! you who make unjust laws and publish burdensome decrees, depriving the poor of justice, robbing the weakest of my people of their rights, despoiling the widow and plundering the orphan." *Isaiah* 10:2.

for Central American refugees by Southside Presbyterian Church in Tucson in March 1982.

Sanctuary workers cite Biblical injunctions for the care they show to refugees. For example, the Old Testament instructs that “the alien living with you must be treated as one of your native-born. Love him as yourself, for you were aliens in Egypt.”<sup>100</sup> The Gospel adds that the Lord himself is present in the refugee who needs our help.<sup>101</sup> John Fife, pastor of the Southside church, repeatedly invoked the following text:

Keep on loving one another as brothers and sisters. Remember to welcome strangers into your homes; there were some who did that and welcomed angels without knowing it. Remember those who are in prison as though you were in prison with them. Remember those who are suffering as though you were suffering with them.<sup>102</sup>

To understand the chord struck by the claim to offer “sanctuary” in a religious tradition, one must reckon with more than the recognition of sanctuary in English common law, and its abrogation before the common law leapt the Atlantic ocean. The history of the notion that sanctified ground will protect the fugitive and its religious roots is voluminous and ancient. The Old Testament cities of refuge<sup>103</sup> incorporated the provision of asylum into the ancient regulation of blood retribution, mitigating the harshness of that regime.<sup>104</sup> An earlier practice of altar sanctuary also

---

100. *Leviticus* 19:34.

101. *Matthew* 25:35-40. See also JIM CORBETT, *THE SANCTUARY CHURCH* 6 (1986) [hereinafter, CORBETT, *THE SANCTUARY CHURCH*]. Both of these scriptural texts resonated and were quoted or cited frequently by Sanctuary workers with whom I spoke. The text from *Leviticus* 19:33-34, begins, “When an alien resides with you in your land, you must not oppress him. He is to be treated as a native born among you.” *Id.* Additionally, *Matthew* 25:35-40 states, “For when I was hungry, you gave me food; when thirsty, you gave me drink; when I was a stranger you took me into your home, when naked you clothed me; when I was ill you came to my help, when in prison you visited me.” *Matthew* 25:35-40.

102. Tape of Camelback Service from Tape No. 74 of Operation Sojourner Investigation 4 (Oct. 1, 1984) (referring to *Hebrews* 13:1-3) (transcript on file with the *Tennessee Law Review*).

103. See *Numbers* 35:15 (“These . . . cities shall be places of refuge so that any man who has taken like inadvertently, whether he be Israelite, resident alien, or temporary settler, may take sanctuary in one of them.”). The primary Biblical text is *Numbers* 35:6-34. See also *Deuteronomy* 19:1-13; *Joshua* 20:1-9; *Exodus* 21:12-14.

104. The underlying presumption was that any killing could not be expiated by payment of money, but only by the taking of another life. The advent of refuge cities was roughly equivalent to converting a sentence of death into one of life imprisonment, for the accused “manslayer” had to reach a refuge city, and once there, prove through trial by the “congregation” that the killing had indeed been accidental. A fugitive who did so was protected, so long as he remained within the asylum city. If found outside, he could still be killed. The fugitive could return home, and the right of vengeance ended, upon the death

appears in the Old Testament, where fugitives who fled to the local temple altar received protection.<sup>105</sup> The ancient Phoenician, Syrian, Egyptian, and Greek civilizations practiced Sanctuary.<sup>106</sup> The Roman concept granted protection and immunity from violence until a formal inquiry could be made and judgment rendered based on evidence offered.<sup>107</sup> After Constantine established Christianity as the state religion in the Roman Empire, Roman law reflected the Christian churches' broad privilege to provide sanctuary,<sup>108</sup> and thus interposed the Church as intercessory moral force and physical protector.<sup>109</sup> A significant

of the reigning high priest, which substituted to satisfy the requirement of expiation by blood. See BAU, *supra* note 7, at 125-26 (citing W. GUNTHER PLAUT ET AL., THE TORAH: A MODERN COMMENTARY 1249 (1981)).

While much rabbinic tradition and law regarding cities of refuge developed in succeeding centuries, it is not known how long the cities operated, especially after the centralization of worship in Jerusalem under King David and his successors. BAU, *supra* note 7, at 127.

105. The promise in early Mosaic law to set aside a place of refuge beyond the altar for those who accidentally kill another suggests that Sanctuary predated the cities of refuge and implicitly refers to altar sanctuary:

Whoever strikes another man and kills him shall be put to death. But if he did not act with intent, but they met by act of God, the slayer may flee to a place which I will appoint for you. But if a man has the presumption to kill another by treachery, *you shall take him even from my altar*, to be put to death.

*Exodus* 21:12-14 (emphasis added). The First Book of Kings recounts the use of sanctuary. At the time of Solomon's ascendancy as king of the Israelites, he provided temporary refuge for Adonijah who had unsuccessfully attempted a coup. See *1 Kings* 1:50-52. To that place of safety, Solomon sent the message that if he would prove worthy and not wicked, his life would be spared. See *1 Kings* 2:28-29. His co-conspirator was not so lucky. *Id.*

Arab desert dwellers shared an ancient recognition that any tent could serve as a temporary sanctuary for a period of days, and some tents or other places were set aside as perpetual places of refuge. See BAU, *supra* note 7, at 127-28.

106. C. RECHT, THE RIGHT OF ASYLUM 4-5 (1935). In classical Greece, asylum was respected for all crimes, for a time, and nearly every temple was thought to afford divine protection. Later, the Athenians limited the use of asylum to people who had committed unintentional crimes, or who were at risk of summary vengeance. Trenholme, *The Right of Sanctuary in England*, 1 U. MO. STUD. 298, 301-302 (1903).

107. Trenholme, *supra* note 106, at 303.

108. J. CHARLES COX, SANCTUARIES AND SANCTUARY SEEKERS OF MEDIEVAL ENGLAND 3 (1911). Explicit references may be found in the Theodosian Code of 392 A.D. Most early Roman Christian legislation of Sanctuary addressed the flight of slaves from their masters. Many wrongdoers were excluded from seeking Sanctuary, including embezzlers, Jews, heretics, and apostates. BAU, *supra* note 7, at 131. Robbers and those guilty of grave crimes, such as murderers, adulterers, and rapists, were also excluded from sanctuary. *Id.* at 132 n.35.

109. Early legal provisions appeared to focus on the sanctity of the place, but the concept slowly extended Sanctuary from the church building, to the churchyard and precincts, and then to the houses of the bishops and clergy, cloisters, and cemeteries. See COX, *supra* note 108, at 5; Charles H. Riggs, Jr., *Criminal Asylum in Anglo-Saxon Law*, UNIVERSITY OF



occasion for this intermediary practice was in securing humane treatment for fugitive slaves.<sup>110</sup>

### 3. Sanctuary's Essential Independence from its Recognition at English Common Law

Recognition at English common law has little to do with the power or enduring quality of the idea of Sanctuary. Sanctuary featuring the intercessory role of the Church continued for centuries. Ecclesiastical asylum rules served, above all, to preserve the fugitive from violence and bloodshed, both during the asylum and when he left it.<sup>111</sup> Sanctuary was recognized in early Anglo-Saxon legal codes,<sup>112</sup> but as the modern legal tradition was born in the general cultural revival of the twelfth century, the governmental institution of outlawry grew up into an elaborate and competing procedure alongside the church-based sanctuary

FLORIDA MONOGRAPHS, Social Science 21 (1963). A papal decree in the fifth century added the requirement that an inquisitor of the church examine all fugitives seeking sanctuary, thus importantly shifting the sanctuary privilege to one of intercession by the clergy. BAU, *supra* note 7, at 133.

110. BAU, *supra* note 7, at 133.

111. See Riggs, *supra* note 109, at 37-38. In 813 the Council of Mayence decreed: Let no one dare to remove a wrongdoer who is a fugitive to a church, nor give him up from there to punishment . . . or death, that the honor of churches may be preserved; but let the rectors be diligent in securing his life and limb. Nevertheless he must lawfully compound for what he has wrongfully done.

*Id.* Notorious wrongdoers, such as those with a criminal record who might attempt to abuse the church's sanctuary, were not eligible. See JOHN G. BELLAMY, CRIME AND PUBLIC ORDER IN ENGLAND IN THE LATER MIDDLE AGES 107 (1973); COX, *supra* note 108, at 23.

112. See Riggs, *supra* note 109, at 6 ("If anyone renders himself liable to the lash and flees to the church, he shall be immune from scourging."); see also BAU, *supra* note 7, at 134-36.

As tensions between church and state increased, other purely secular types of Sanctuary were developed and protected under Saxon kings. One form was created under a royal charter and protected by the king's peace. Another form of secular Sanctuary existed in the jurisdiction of every local lord who had royal rights and where the king's writ did not run. Thus, even after the general church Sanctuary privilege was abrogated by Henry VIII in the fifteenth century, many sanctuary-seekers continued to seek Sanctuary with the central churches of these independent jurisdictions. See Isobel D. Thornley, *The Destruction of Sanctuary*, in TUDOR STUDIES PRESENTED BY THE BOARD OF STUDIES IN HISTORY IN THE UNIVERSITY OF LONDON 182 (R.W. Seton-Watson ed., 1924)); see also BAU, *supra* note 7, at 140.

Churches and clergy emphasized the sanctity of the place of church sanctuary, irrevocable by the king, whereas kings claimed the privilege was merely personal, granted to particular clergy and revocable at the king's will. BAU, *supra* note 7, at 141-50. Into the eleventh century, Sanctuary remained a part of the basic Saxon law curtailing the bloodfeud tradition, under which vengeance was traded for damages and fines (the Church collected all fines for Sanctuary violations). BAU, *supra* note 7, at 141.

privilege. A fugitive from justice whom the local sheriffs could not locate was declared an outlaw by the county court. An outlaw forfeited his goods and chattels to the king and his lands escheated. Outlaws were subject to summary execution upon capture,<sup>113</sup> with the result that they could more readily be driven into churches, and made to submit to the law.<sup>114</sup> The criminal law incorporated and reduced the sanctuary privilege through the adoption of abjuration of the realm, by which a fugitive in sanctuary was required to choose either to undergo trial and punishment or given a "safe conduct" to leave England permanently. A sanctuary seeker would be protected for thirty days, during which time civil authorities were without power to compel him or her to leave sanctuary.<sup>115</sup>

The increasing governmental regulation of widespread church sanctuary tended to secularize the practice, impressing clergy into the roles of royal officers of the courts, rather than of ecclesiastical intercessors. Furthermore, as the Middle Ages advanced and England's society became increasingly commercial, more of those running afoul of the law and seeking sanctuary were debtors seeking to escape their creditors, rather than fugitives seeking to evade blood revenge. During the fifteenth century, the Pope restricted sanctuary to fugitives at physical, rather than economic risk.<sup>116</sup> The king's judges limited sanctuary in law through the application of rigid rules of procedure: a person in sanctuary would be arrested and removed if the proper pleading was not made to the king's officers, and if wrongfully removed, he could only assert violation of sanctuary as a defense upon meeting another rigid pleading requirement.<sup>117</sup>

Vigorous efforts by government to end sanctuary's legal life demonstrate that sanctuary continued to survive as a customary matter.<sup>118</sup> Not until the

---

113. See BELLAMY, *supra* note 111, at 105-06. The assassination of Thomas of Becket, Archbishop of Canterbury, in his own cathedral may be the most famous violation of church sanctuary. See COX, *supra* note 108, at 34-35. In its stark moral confrontation, it prefigures the assassination of Archbishop Romero eight centuries later. See discussion *supra* part I.A.1.

114. See Riggs, *supra* note 109, at 43-45.

115. See BAU, *supra* note 7, at 145-46 (citing BELLAMY, *supra* note 111, at 108).

116. The papal bull provided that sanctuaries were only to protect fugitives in physical danger, that a fugitive lost the protection of a sanctuary upon leaving it, and that the king could send soldiers into the sanctuary to guard fugitives who had committed treason. See Thornley, *supra* note 112, at 200; see also BAU, *supra* note 7, at 152.

117. See BAU, *supra* note 7, at 152-53.

118. Henry VIII enacted limiting regulations for much of his reign. See Thornley, *supra* note 112, at 203-04. Catholic Church canon law incorporated sanctuary for centuries: "A church enjoys the right of asylum, so that guilty persons who take refuge in it must not be taken from it." *Id.* (citing Code of Canon Law of the Roman Catholic Church, canon 1179). When revised in the mid-1980s, this provision was omitted. BAU, *supra* note 7, at 153.

eighteenth century could Blackstone report that sanctuary was abrogated from English common law (as a vestige of "popery").<sup>119</sup> Although formally extinguished at law, some sanctuary practices nonetheless persisted as a matter of political life, as the Crown, the Government, and the courts all maintained as inviolate the privilege of the monarch to grant sanctuary to aliens who fled persecution in their own countries.<sup>120</sup>

#### 4. Sanctuary in America

The Pilgrims and Puritans first settled in America soon after the formal abolition of sanctuary in English law. The colonists' journey was an exodus from the religious and social oppression of England, and the entire continent was a sanctuary—a refuge from the Protestant Reformation and the Catholic Counter-Reformation. Though few colonies had laws specifying the rights of sanctuary,<sup>121</sup> there are recorded instances of its practice.<sup>122</sup>

When, some two hundred years later, the Underground Railroad similarly provided practical sanctuary for escapees from slavery, it did so without an express invocation of a legal privilege. Its participants labored in the face of the Fugitive Slave Act of 1850, which prohibited the harboring or assistance of fugitive slaves anywhere in the United States. Thus, the Fugitive Slave Act ended the safe haven formerly available to escaped slaves who made it into the free states of the North. Of innumera-

---

Numerous legislative efforts were made to extinguish any governmental authority for sanctuary. Bills against the privilege were introduced throughout Elizabeth's reign. In 1624 Parliament declared "that no Sanctuarie or Privilege of Sanctuary shall be hereafter admitted or allowed in any case." *Id.* at 157 (citing 21 James I, c.28).

119. 4 WILLIAM BLACKSTONE, COMMENTARIES \*332.

120. See RECHT, *supra* note 106, at 12; Regina v. Bernard, 8 L.J.Q.B. 887, 1055, 1061 (the trial court concluding that providing sanctuary to a persecuted foreigner was "glory of this country").

121. Massachusetts Bay Colony did provide a right of asylum for Christians fleeing persecution. See BODY OF LIBERTIES OF THE MASSACHUSETTS COLONY IN NEW ENGLAND 2, 89 (Mass. 1641).

122. For example, in New Haven in 1660, the same ship that brought the news that Charles II had taken the throne, also brought two officers of Cromwell's army and Justices of the court that had tried Charles I and issued his death warrant. They became fugitives and fled to New Haven to escape royal officers who arrived to bring them back to England for trial.

Rev. John Davenport received the fugitives, and the governor of New Haven Colony delayed the king's officers, requiring the officers to attend Sabbath services, where the Rev. Davenport preached on the scriptures of *Isaiah* 16:3: "Hide the fugitives, do not betray the refugees." The governor also had the royal arrest warrants read aloud in a public meeting rather than treated as secret government documents. The king's officers were unable to find the fugitives in New Haven. They lived in the colony for three years and then in Massachusetts for another seven, dying of natural causes. See ROLLIN G. OSTERWEIS, THREE CENTURIES OF NEW HAVEN 1638-1938 at 55-57 (1953)); see also BAU, *supra* note 7, at 160.

ble operators, many were prosecuted for violating the Act.<sup>123</sup> Churches and church communities also were involved<sup>124</sup> and employed Biblical texts<sup>125</sup> to support their work for the abolition of slavery and the relief of the suffering of fugitive slaves.<sup>126</sup>

Explicit invocation of church sanctuary in the United States during the Vietnam War, also drew from the religious traditions of sanctuary rather than on its recognition at English common law.<sup>127</sup> Churches that offered sanctuary to draft resisters conceptualized the strength of sanctuary in its moral and political stance against the will of the state. One church put it this way:

The offer of sanctuary means what the medieval church offered to individuals who were being persecuted, namely the moral protection of the Christian community. Food and lodging would be offered so that if there is to be an arrest, it could take place in the church building where the moral confrontation will be obvious.<sup>128</sup>

---

123. See SIEBERT, *supra* note 55, at 272-81.

124. *Id.* at 93-98.

125. *Id.* at 160 (quoting *Deuteronomy* 23:16-17) (stating "If a slave has taken refuge with you, do not hand him over to his master. Let him live among you wherever he likes and in whatever town he chooses. Do not oppress him."). See also HORATIO T. STROTHER, *THE UNDERGROUND RAILROAD IN CONNECTICUT* 182 (1962) (sermon themes following the *Dred Scott* decision, *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)).

126. Furthermore, for most of the nation's history, the image of the United States as a haven for the oppressed has enjoyed considerable political vitality, if not unanimity of view. The Declaration of Independence protested England's obstruction of immigration and naturalization to America, and the new nation adopted liberal national policies toward immigration. See *THE DECLARATION OF INDEPENDENCE* ¶ 9 (U.S. 1776). Throughout the nineteenth century, both Republican and Democratic political parties' platforms invoked the image of the United States as asylum. See RECHT, *supra* note 106, at 18.

127. No legal doctrine of sanctuary was recognized in United States law because English common law formally abrogated this practice in England by the time of the American colonies' independence. See *Warden Maryland State Penitentiary v. Hayden*, 387 U.S. 294, 321 (1967) (Douglas, J., dissenting).

128. See Dennis Willigan, *Sanctuary: A Communitarian Form of Counter-Culture*, 25 *UNION SEMINARY Q. REV.* 533 (1970) (discussing Declaration of the St. Andrew United Presbyterian Church of Marin City, California); see also BAU, *supra* note 7, at 162. In the first such declaration, made in a "Service of Conscience and Acceptance" in October 1967, at a Boston church, where some 300 draft resisters turned their draft cards over to members of the clergy as a protest against the war, the Rev. William Sloane Coffin Jr., then chaplain at Yale University, preached:

Now if in 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 had committed both a sin and a crime, could they not today offer an indefinite period to one who had committed no sin?

Countless churches became centers for public witnesses against the war.<sup>129</sup> The Government's response, as anticipated, resulted in the invasion of all recognized sanctuaries by civil or military authorities.<sup>130</sup> All sanctuary seekers were eventually prosecuted by civil and/or military courts, although no sanctuary providers were prosecuted for harboring deserters.<sup>131</sup>

##### 5. The Practice of Public Sanctuary for Central Americans

Both Biblical and English-derived notions of sanctuary had formative influence on the development of the Tucson Sanctuary Movement. The decision to claim publicly the mantle of the religious "Sanctuary" tradition was an alchemy of religious expression and preemptive strike. By the fall of 1981, a handful of Tucson ministers and parishioners had accepted Jim Corbett's conclusion that the refugees' greatest need was to avoid capture in the first instance. In their minds, some unaided refugees faced death; at best, capture and detention in the United States were the first steps to a fate of dread and brutality.<sup>132</sup> Corbett employed his desert knowledge by

---

... 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 sanctity of conscience was being violated.

*Id.* at 532.

129. Churches became more integrally involved in the larger anti-war movement. Several American universities, in 1968 and 1969, also declared themselves secular sanctuaries. Sanctuary was eclipsed by the mute public and massive mobilizations of protest, in which a broad spectrum of churches participated to different degrees. See HALL, *supra* note 22 at 170-77.

130. BAU, *supra* note 7, at 164-67. In 1968, police removed deserters from a church in New York's Washington Square; in 1971, military authorities did so in San Diego.

131. The law permitted invasions of the sanctuaries. *But see* 8 U.S.C. § 1071. See *Bridges v. Davis*, 443 F.2d 970, 971 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972) (churches provided sanctuary for AWOL servicemen); *United States v. Beyer*, 426 F.2d 773 (2d Cir. 1970) ("symbolic sanctuary" established in a church during the Vietnam War). Coffin's role in the service led to his conviction for conspiring to counsel, aid and abet those refusing induction into the army, and was sentenced to two years imprisonment and a \$5,000 fine. The conviction was overturned on appeal in 1969. See BAU, *supra* note 7, at 162 (citing Michael Ferber, "A Time to Say No," in *CIVIL DISOBEDIENCE IN AMERICA* 271 (David R. Weber ed., 1978)).

132. Between mid-1980 and mid-1981, approximately 13,000 Salvadorans had been apprehended at the border, and more than 10,000 were returned after signing "voluntary departure" statements. Virtually all the remainder were deported in the ordinary sense. CRITTENDEN, *supra* note 7, at 55. They returned to a country where 9,000 civilians died by

helping refugees safely cross brutal deserts from the border into the United States, and then caring for their basic needs. Corbett and his wife had been hosting from twelve to twenty Salvadorans at a time in tiny trailers on their ranch when he appealed to Rev. Fife in Tucson to use his church to house Central Americans. The church elders of Southside Presbyterian Church acquiesced. Fife drove refugees from the border to Tucson once or twice a week, without publicizing this fact.<sup>133</sup> However, he did make public statements that his congregation was providing refuge for Central Americans.

Their efforts soon reached INS officials in Tucson, as rumors spread that the city's clergy were defying the immigration laws. INS sent a message through a Manzo Area Council attorney who stated, "We're not sure what Fife and Corbett are up to, but tell them to stop or we'll indict them."<sup>134</sup> Late in November 1981, Sanctuary workers met in Fife's living room to consider their options. They could stop the border crossings and other assistance, which none of them believed was possible in good conscience, or they could continue their efforts and face criminal prosecution. Unappealing as that might appear, the most troubling possibility was that the Government would impanel a grand jury and seek to compel the disclosure of the names and whereabouts of refugees and others in the Sanctuary network. Sanctuary leaders and workers could prevent disclosure by refusing to testify. However, a judge could imprison them for contempt without giving them an opportunity to explain their actions to the country. Fife proposed to "beat 'em to the punch," to go public about their rescue work, so that even if indictments did follow, at least the national church community would understand the issue.<sup>135</sup> Many churches in the border region remembered the religious tradition of Sanctuary, and a letter from the Lutheran Social Services of California in October 1981 reintroduced Sanctuary as a means of seeking justice for refugees deprived of it.<sup>136</sup>

---

political violence in 1980 alone, according to the estimates of the State Department. *Id.*

133. In hindsight, Fife describes his border runs as insane and reckless in manner, although not in purpose. He and his Isuzu pick-up were well-known to officials in the region; he had little knowledge of Border Patrol roadblocks; and used neither secret routes nor careful precautions. He just "got on the main highway and headed north." *Id.* at 57.

134. *Id.* at 61.

135. *E.g.*, Author's Interview with Rev. Fife (June 1992) (notes on file with the author).

136. Letter from Rev. John H. Wagner, Jr. to Author (Oct. 22, 1981) (on file with the *Tennessee Law Review*). The letter recounted that a man being pursued by an INS officer had run into a downtown church. The officer chased him through the nave and finally caught him, then led him away in handcuffs to deportation. The local INS director, in response to a complaint by church representatives, pledged to issue an administrative order to immigration officers that under no circumstances was a person to be pursued if he or she entered a church, hospital, or school. Invoking the intercessory aspect of historic church sanctuary, Rev. Wagner described sanctuary's function as "negotiator/advocate. . . . The

The decision came when many in the Tucson region interpreted the experiences of Central American asylum applicants to mean that the legal system did not work and neither did the political system.<sup>137</sup> Political efforts to lobby Congressmen and INS regional staff had no discernable effect. Many people thought that if the United States were financing the planes that bombed Salvadorans and their children, the citizens of the United States had an absolute moral obligation to help the victims escape.<sup>138</sup> Since the summer, they had raised some \$750,000 for bonds, and they saw no means to raise such sums indefinitely to pay what they considered to be ransom. Furthermore, by mid-1981 the task force had filled out hundreds of asylum applications, and not a single one had been granted.<sup>139</sup>

Thus, the Tucson group devised a public declaration and an enactment of their experience of the church, as historic possessor of moral authority to provide sanctuary from hostile powers.<sup>140</sup> The authority to provide sanctuary was clearly religious and moral, not a legal privilege as had existed for a time in England. And, while rooted in the customary sacredness of churches and temples, the sanctity of Sanctuary for Central Americans was conceived as deriving from the consecrated, committed church community rather than from the physical site understood to be inviolably sacred by ancient Hebrews, Greeks, Romans, or medieval English.

The day before the public declaration, a letter from John Fife was delivered to the Attorney General, the United States Attorney, and the Border Patrol, pledging that until deportation proceedings of Salvadoran and Guatemalan refugees ceased, "we will not cease to extend the sanctuary of the church to undocumented people from Central America. Obedience to God requires this of us all."<sup>141</sup>

---

Church walks through the process with the person. If a person has sought sanctuary, they have a story to tell, and they are apprehensive of the systems used to resolve the situation." *Id.*

137. Doonesbury cartoon: "What do I need [to meet the burden of proof of well-grounded fear of persecution?]" "A note from your dictator." The legal office, run by the Manzo Council and independent of the churches, was not keen on a declaration of sanctuary, which might detract from the litigation-based effort to aid refugees (cartoon on file with the author).

138. Author's Interviews with Sanctuary Defendant Subjects Nos. 23, 32 (redacted transcripts on file with the *Tennessee Law Review*); see also CRITTENDEN, *supra* note 7, at 65.

139. CRITTENDEN, *supra* note 7, at 64-65.

140. Because church-based sanctuary had never been entirely lost in American religious practice, it was resurrected by others outside the Tucson network. Also in the fall of 1981, a group of congregations in the San Francisco area formed the East Bay Sanctuary Covenant. Several of these agreed to coordinate announcements of public Sanctuary with that in Tucson.

141. Letter from Rev. John M. Fife to Hon. William French Smith, Attorney General of the United States (Mar. 23, 1982) (unsigned copy on file with the *Tennessee Law Review*)

On March 24, 1982, the public declaration of Sanctuary took place before eight television cameras and local, national, and international reporters.<sup>142</sup> The declaration was a step by a community of faith, seeking to serve justice by providing shelter and aid to refugees. Identity obscured, "Alfredo," the head of the refugee family who had agreed to enter public sanctuary<sup>143</sup> at Southside, outlined conditions in Central America. Corbett made brief remarks on the moral necessity of Sanctuary aid to Salvadorans seeking asylum and as church witness against deportations of Central Americans. These deportations were "violations of international law" and "[a]bduction, torture and murder pos[ing] as law and authority."<sup>144</sup> John Fife explained the decision to declare Sanctuary, and told of the financial and resettlement support provided by 100 churches around the country—either financially or by receiving refugees for resettlement. After a procession through downtown Tucson, a dozen clergy led some 200 people in the first of many ecumenical services in "human solidarity" to receive refugees into church-sponsored Sanctuary.<sup>145</sup> The service featured a

---

and copy on file with the author).

142. After extensive efforts by the Tucson group to plan in secret, in keeping with their strategic sense to seize the advantage by going public, the announcement was leaked to the FBI by a dissenting Southside member. CRITTENDEN, *supra* note 7, at 70. The local paper and the *Washington Post* got wind of the story, and five days beforehand, the story was out. "Next week," the local paper reported, Rev. Fife "will publicly defy the U.S. government to arrest him as a felon in violation of immigration laws. . . . Fife and his church will dare the government to stop their work." Randall Udall, *Local Pastor and Church to Defy the Government on Aid to Salvadorans*, TUCSON CITIZEN, Mar. 19, 1982, at 1.

143. See CRITTENDEN, *supra* note 7, at 72. In the typical Sanctuary arrangement, a congregation openly housed a refugee family, either in its church or synagogue, or in a member's home. Refugees who went into "public sanctuary" committed to recount their experiences to North American audiences of congregation members, journalists, and others. CHICAGO RELIGIOUS TASK FORCE ON CENTRAL AMERICA, PUBLIC SANCTUARY FOR SALVADORAN AND GUATAMALAN REFUGEES: ORGANIZER'S NUTS & BOLTS (1982) (copy on file with the *Tennessee Law Review*); see also CRITTENDEN, *supra* note 7, at 119-20. At John Fife's church, newly arrived refugees regularly bedded down at night literally in the sanctuary in which church services were held on Sundays.

Many congregations supported Sanctuary in different fashions, however, such as contributing funds for bail bonds, rental of refugee houses, sending volunteers to provide social services, organizing community events to foster awareness of Central American issues, or financing delegations to Central America. In Tucson, many volunteers took in refugees for days, weeks, or longer, without publicizing the fact or expecting public presentations from the immigrants they housed.

144. Jim Corbett, Press Release at Southside Presbyterian Church (Mar. 24, 1982) (on file with the *Tennessee Law Review*).

145. *Id.* Many churches throughout the United States independently developed connections with Central Americans, and it would be erroneous to regard Tucson as the pivotal point in a well-oiled administration of entry and passage to resettlement sites. American congregations established sister-church relationships with congregations in Central



sermon of support for the provision of Sanctuary by the head of the United Presbyterian Church, USA; other prominent clergy participating were the monsignor of the Catholic cathedral in Tucson and the rabbi of the city's largest Reform synagogue.

Ultimately, the Biblical "city of refuge" was reinterpreted and reenacted by a dozen United States cities to afford sanctuary to Central Americans.<sup>146</sup> The effect of the declarations was to remove local city agencies, including the police, from enforcement of the immigration laws by checking alien status or turning suspected aliens over to the INS.<sup>147</sup>

### C. Law Read Through Religious Sanctuary: Melding Discourses

Corbett, Fife, and the ecumenical group of concerned others in Tucson first engaged the official meanings of immigration and asylum law through the bail-bonding efforts, which at the outset did not challenge official interpretations of the law. But the revised INS practices—to detain all applicants, double the cost of bail bonds, and forcibly return Central Americans—appeared intentionally to defeat the citizens' efforts to help Central Americans navigate the asylum system.

The Refugee Act of 1980 defined "refugee" as a person who flees her country as a result of a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or

---

America, which enjoyed years-long correspondence, support, and intervisitation and an independent basis for observation and verification of the political conditions reported by Central Americans.

In several instances such relationships resulted in American congregations' aid to Salvadoran clergy and church members known to them. Several churches who were not the focus of press or government attention unilaterally established programs to assist Central Americans to travel to, and surreptitiously enter, the United States. *E.g.*, *Hearings on Break-Ins of Sanctuary Churches Before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 43-58 (1987) (Testimony of Rev. Donald J. Cook).

146. The cities included Madison, Wisconsin; San Francisco, California; Los Angeles, California; Cambridge, Massachusetts; and Santa Fe, New Mexico, which during the Tucson trial, proclaimed itself a "city of refuge for refugees from El Salvador and Guatemala," and Governor Toney Anaya issued a statement declaring the support of the entire state of New Mexico for the Sanctuary movement. Toney Anaya, *Sanctuary: Because There Are Still Many Who Wait for Death*, 15 HOFSTRA L. REV. 101, 102-03 (1986) (explaining the proclamation, and recounting that, as a result, the INS accused Anaya of promoting anarchy and of perpetrating a "cruel hoax" to "lure aliens into the Land of Enchantment"); *see also* Arthur Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 493, 496 (1986).

147. The New Mexico declaration was the basis for the acquittals of the last Sanctuary case prosecuted. *Two Acquitted of Smuggling in Salvadorans in Sanctuary Case*, L.A. TIMES, Aug. 2, 1988, at 1.

political opinion,"<sup>148</sup> and provided that a refugee may not be deported back to the place of persecution.<sup>149</sup> Yet in the Tucson region, the INS routinely deported all Central Americans. Evidence accumulated that the 1980 Refugee Act was discriminatorily applied. At the time, only 2-3% of Central Americans' applications for refugee status were granted nationwide, while over 40% of the applications by Soviet Bloc citizens were granted.<sup>150</sup> Criticism mounted that Cold War ideology directed asylum decision-making, contrary to the politically neutral standard and procedure of the 1980 Act. The Administration refused to provide safe haven status to Central Americans and to delay departure from this country until conditions improved in their own countries on the grounds that these were economic

---

148. Immigration and Nationalization Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (Supp. 1994). This statute incorporated the "well-founded fear of persecution" standard of United States obligations under international law. See Protocol Relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223.

The purpose of the 1980 Act was to commit the United States to make refugee status available according to the terms of the Protocol, which were deemed politically neutral in contrast to the prior United States standards, which were based on the political nature of the country from which the refugee fled. Prior to the ratification of the Protocol, ideology and geography directed decisions to admit refugees, under either of two procedures, "conditional entry," or the exercise of the Attorney General's power of parole. The failure of the INS to follow the politically neutral standard of the Protocol prompted the passage of the 1980 Refugee Act.

149. The Refugee Act of 1980 § 243(h), 8 U.S.C. § 1253(h) (1988 & Supp. 1994). Section 243(h) incorporates the *non-refoulement* mandate of the Refugee Convention that no refugee be returned to a place where his or her life or freedom would be threatened on any of the enumerated grounds. Convention Relating to the Status of Refugees, art. 33.1, July 28, 1951, 189 U.N.T.S. 137.

The Refugee Act also created a statutory basis for asylum, by authorizing the Attorney General to grant asylum to those who satisfy the definition of "refugee." The Refugee Act of 1980, §208(a), 8 U.S.C. §1158 (1988).

150. See Arthur Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 253 (1984); Scott M. Martin, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 23 HARV. INT'L L.J. 357, 368 (1983). The determination of whether an applicant's fear of persecution is well founded turns on Department of State advisory opinions to the immigration authorities.

To critics, this process ensured that determinations would be based on United States foreign policy considerations, rather than politically neutral evaluation of applications. See *Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary on H.R. 3195 Refugee Assistance*, 98th Cong., 1st Sess. 107-10 (1983) (statement of Arthur C. Helton, Director, Political Asylum Project, Lawyers Committee for International Human Rights); see also, Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 35-36 (1984) (observing that foreign policy influences on immigration policy have made the administration of the Refugee Act of 1980 "seem incoherent and arbitrary," yet defending such influence as a manifestation of increased U.S. dependence on the good will of other nations in attaining its foreign policy objectives).

rather than political refugees.<sup>151</sup> Considering that several other groups of aliens from other parts of the world received refugee status, the Government's explanations appeared thin, and essentially unreviewable.<sup>152</sup>

The Tucson network needed time and experience to develop the understanding that their Sanctuary work upheld the law rather than defied it. Praxis came first, theoretical framing later. First, people behaved as they thought they should and deferred their worries about the relations among citizens, the law, and the state. In the border region in particular, the participants' primary thoughts were dominated by the overwhelming magnitude of the need.

In a state of emergency, and with little deliberate rhetoricism, early participants in the Tucson area sometimes spoke in terms of the 1960s concept of civil disobedience, with its ready imagery and repertoire of resistance to oppressive legal authorities.<sup>153</sup> Indeed, Fife's letter to the Attorney General heralding the original declaration of public Sanctuary asserted that his congregation would "publicly violate the Immigration and Nationality Act, Section 274(A)."<sup>154</sup> With equal vigor the letter asserted that the government was violating its own laws,<sup>155</sup> and insisted that the

---

151. This view is still reiterated, even after the Sanctuary trials and appeals faded from the public eye. In the fall of 1989, Senator Alan Simpson opposed a bill to provide safe haven status for Salvadorans and Nicaraguans, arguing that economic conditions motivated the flight of Central Americans and insisting that there is "no proof that 'returnees' lives are in danger." *Recent Developments*, 66 INTERPRETER RELEASES, Oct. 30, 1989, at 1197, 1199 (quoting Sen. Simpson).

152. The procedure for establishing safe haven status requires a decision by the Attorney General to grant "extended voluntary departure" (EVD) status to specified groups of aliens. In a lawsuit challenging the Attorney General's decision to withhold EVD, the D.C. Circuit ruled that the decision to grant or withhold the status is squarely within the broad powers granted to the Attorney General by the Immigration and Nationality Act, 8 U.S.C. § 1103(a)(1988), authorizing the Attorney General to issue regulations and perform such other acts as he deems necessary to administer his statutory authority. *Hotel and Restaurant Employees Union v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988). The court found the reasons proffered by the Attorney General to be a facially legitimate exercise of that discretion, and thus sufficient to withstand its very limited and deferential review. *Id.*

The Government asserted that its decision not to grant EVD status to Salvadorans was based on (a) the number of Salvadorans in the country already; (b) the current surge of illegal immigrants in the country; (c) the prospect that EVD would induce still more Salvadorans to come to the United States; (d) the drain of illegal immigration on the finite resources of the United States for law enforcement, social services, and other economic resources; and (e) the availability of other, statutory means of relief, particularly application for asylum. *Smith*, 846 F.2d. at 1510.

153. But that does not mean their later analysis was merely instrumental or false: meaning-making is a social process, the creation of culture through the experiences of providing sanctuary. See discussion *supra* in part II.A.2.

154. Letter from John Fife to William French Smith, *supra* note 141.

155. "We believe our government is in violation of the 1980 Refugee Act and

declarants would do what was just under that law—i.e., provide Sanctuary—until the government did so.<sup>156</sup>

Thus, officialdom's administration of the law to deprive Central Americans of the law's apparent promise—a promise of individuated opportunity to demonstrate fear of persecution—set the stage for the Tucson Sanctuary workers to reconceive the legal obligations of citizens and state for the implementation of the law. The "civil initiative" conception signifies the right and obligation of citizens to enforce laws, where the government fails to do so. For participants in the Sanctuary Movement, this understanding entailed two significant dimensions: belief and action. First, they independently interpreted United States immigration laws, concluding that individuals who merited asylum were "refugees" whether or not labelled by a court. This interpretive independence declared that private citizens could recognize an individual's refugee status as well as government officials could.<sup>157</sup> Second, Sanctuary workers enacted their legal interpretations, reasoning that to provide shelter and transportation to Central American refugees obeyed rather than violated the law, and eventually established a process to screen those who sought their aid.

"The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken."<sup>158</sup> The crucial difference is between speculation and practical interpretation. Sanctuary workers produced an alternative legal reality, part critique and part replication of the

---

international law by continuing to arrest, detain and forcibly return refugees to the terror, persecution and murder in El Salvador and Guatemala." *Id.*

156. The writer continued:

We take this action because we believe the current policy and practice of the United States Government with regard to Central American refugees is illegal and immoral. . . . We believe that justice and mercy require that people of conscience actively assert our God-given right to aid anyone fleeing from persecution and murder. We ask that "extended voluntary departure" be granted to refugees from Central America and that current deportation proceedings against these victims be stopped. Until such time, we will not cease to extend the sanctuary of the church to undocumented people from Central America.

*Id.*

157. In California, the East Bay Sanctuary covenant likewise identified its legal basis in United States obligations under international law, citing the 1951 United Nations Convention and the 1967 Protocol Agreements on refugees, which establish the rights of refugees not to be sent back to their countries of origin, as well as the United Nations declaration that Central Americans were legitimate refugees of war. COUTIN, *supra* note 35, at 109.

158. Cover, *supra* note 2, at 144. This quote cites and slightly modifies Heidegger's more general proposition of *Being-toward-possibilities*: interpretation as "the working out of possibilities projected in understanding." *Id.* at 145 (quoting M. HEIDEGGER, *BEING IN TIME* 188-89 (J. Macquarrie & E. Robinson trans., 1962)).

official enforcement of asylum laws—intertwining power and resistance. Their commitment to the proposition that the Sanctuary Movement followed the law is illustrated by the growth of Movement screening practices in 1983. Screening took place after the Tucson network was contacted by Central Americans seeking help to cross into the United States, and a counselor was sent to the border. Essentially the counselor assessed the possible political asylum claim under the United Nations Refugee Protocol and Geneva Conventions: Why had they left their countries, what did they fear would happen to them if they returned, had they experienced persecution? Those people deemed refugees received help across the border,<sup>159</sup> while those not determined refugees did not;<sup>160</sup> other forms of assistance were generally provided, nonetheless.

Some Tucson Sanctuary workers found it difficult to reconcile the faith basis for their participation with the civil initiative commitments to uphold law, and they struggled to observe both. For example, consider this account by a counselor who struggled with *Matthew 25* (in which Jesus tells his followers that when they aided the needy, they aided him):

Once, when I was in Hermosillo, we went down to talk to what we thought were seven people who were interested in crossing the border, but once we got there, we actually met twenty-five—including ten people with babies who were just emaciated from hunger. And we really had to struggle with what our decision was going to be as to whether or not to cross them. Were they politically persecuted? And we had to conclude that they weren't. The way that we reached that decision was to go back to the Refugee Act of 1980, which is what sanctuary is based on. ...[sic] [F]or me it was a dilemma between the 1980 Refugee Act and *Matthew 25*. *Matthew 25* called me to help all those who are in need. So what we did in the end was that we assisted them with food and with advice about how

---

159. The Sanctuary counselors first determined the refugee status of people who could not stay in Mexico and who did not intend to accept voluntary departure if detained. For these individuals, counselors determined which of three legal-action categories best fit persons determined to be refugees: (1) affirmative application for asylum in the United States; (2) refugee in transit to seek asylum in another country; and (3) further legal counseling needed for refugees unable to decide.

After the Fifth Circuit reversed Merkt's conviction, *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985), the Tucson participants further formalized their crossing assistance to require that a letter be sent notifying the INS District Director of refugees' arrival with the ongoing assistance of Tucson Sanctuary volunteers to obtain legal status. Author's interview with Jim Corbett, *supra* note 80, at 49 (redacted portion of transcript on file with the *Tennessee Law Review*).

160. Tucson Sanctuary workers declined to assist those who "just wanted a job" or a cheaper, safer transit than those sold by *coyotes*, on grounds that such assistance failed to further the civil initiative and possibly endangered their networks of safe passage for refugees fleeing persecution.

to come to the U.S., but we didn't cross them. Crossing them wouldn't help the goal of sanctuary.<sup>161</sup>

Tucson declared it would aid refugees from both the Right and the Left in order to rectify what it perceived as a political bias in the official asylum process.<sup>162</sup> After the development of "public sanctuary" as legal and media strategy, the Chicago Religious Task Force encouraged those working on the border to give priority to refugees who would be willing and effective spokespersons regarding the political conditions in Guatemala and El Salvador. Tucson Sanctuary givers varied in their sympathy to this view, but, as a practical and spiritual matter, felt they had to deal with anyone who arrived at the border who fit the civil initiative's definition of "refugee." Their interpretation allowed them to resolve that they not limit their aid only to Central Americans with a political message.<sup>163</sup>

Early publications within the movement offered information on Sanctuary's legal, constitutional and human rights dimensions. Additionally, publications offered practical advice that stressed the need for a congregation's shared commitment to adequately support refugees.<sup>164</sup> Publications after the arrests of Conger, Merkt, and Elder in 1984, also emphasized the conflict between Sanctuary proponents' legal interpretations and the Government's interpretations. "To declare sanctuary is a serious decision. The reasons that justify challenging the current administration's interpretation of the law must be understood."<sup>165</sup>

161. COUTIN, *supra* note 35, at 114-15.

162. Texas defendants, on the other hand, did make distinctions on the basis of country of origin, declining to assist most Nicaraguans, on the view that the Sandanista government was not comparably brutal. GOLDEN & MCCONNELL, *supra* note 7; CRITTENDEN, *supra* note 7, at 93.

163. Author's Interviews with Sanctuary Defendant Subject Nos. 23, 32, 38 (on file with the *Tennessee Law Review*).

164. E.g., AMERICAN FRIENDS SERVICE COMMITTEE AND CHURCH WORLD SERVICES, *SEEKING SAFE HAVEN: A CONGREGATIONAL GUIDE TO HELPING CENTRAL AMERICAN REFUGEES IN THE UNITED STATES* (1983); CHICAGO RELIGIOUS TASK FORCE ON CENTRAL AMERICA, *supra* note 144.

165. Wiesel, *supra* note 1, at 199 (advising on the organizational, practical, economic, psychological and social needs of refugee families and obligations of the community that will shelter them; and outlining legal risks). The necessity of congregational grounding was emphasized: "[i]t is essential that the entire community (congregation) reach a consensus before declaring sanctuary" and "[t]he decision should come from a faith commitment." *Id.* at 199-200.

Charges to which undocumented aliens and Sanctuary workers expose themselves, were framed this way:

The INS, following administrative policy, refuses to recognize that Central Americans have a well-founded fear of persecution that entitles them to political asylum under the UN Convention on Refugees and the U.S. Act of 1980. Neither does it recognize the right not to be returned to their homeland. . . . *The refusal of the administration to recognize the legitimacy of their claims to refugee status under U.S. and international*

The Sanctuary workers' concern to know and enforce the law revolved around securing the safety of Central Americans. Sanctuary workers, like rescuers of Jews from Nazi Europe, were aware of the potential risks and costs to themselves by giving help. But these risks were viewed strategically, affecting how a rescuer might go about giving help, without affecting the decision whether to try to help.<sup>166</sup>

Essential to their religious approach was concern for the refugees as persons. Like the rescuers of Jews in Nazi Europe, Sanctuary rescue behavior may best be explained by a common perception among rescuers who perceived themselves as strongly linked to other people by virtue of their shared humanity. To hear Central Americans recount their persecution and suffering, and to come to know particular families housed and aided by one's church impressed many of the middle-class North Americans, who respected the courage, faith, and spirituality of Central America's poor. Several Sanctuary workers remarked, as did this one:

Why is it that I should deserve to make \$26,000 and live in a nice home and have all the food I can eat, and someone who earns \$2,000 a year doesn't have the right to do this, and it's my tax-paying dollars that keeps the person in poverty through oppression and through that kind of regime?<sup>167</sup>

This attitudinal orientation formed the basis for the stinging rejection by the Tucson network of the more narrowly political stance of some other solidarity groups. Under this conceptualization, the church cannot aspire to become the State or to access its powers, which is the objective of political contestants. The alternative of the Church is to forge an inclusive human community by offering love to the refugee at the door. It cannot be mimicked or substituted by the ideological interpretation of events thousands of miles away.<sup>168</sup>

---

*law does not render their presence unlawful. The position of the sanctuary movement is that what it is doing is lawful. It may, however, be years before the courts make a definitive ruling. In the meantime, all sanctuary workers and refugees are subject to prosecution. So far, only two have been convicted [Elder and Merkt, in Texas] . . . and the convictions are being appealed. Others have been indicted and await trial.*

*Id.* at 204-205 (emphasis added).

166. Kristen R. Monroe et al., *Altruism and the Theory of Rational Action: Rescuers of Jews in Nazi Europe*, 101 *ETHICS* 103, 108 (1990) (recent empirical research on rescuers of Jews from Nazi Europe, rejecting the traditional idea that cost-benefit calculation precedes the choice to act altruistically); see also Monroe, *supra* note 32.

167. COUTIN, *supra* note 35, at 68. Monroe found no pattern whatsoever in adherence to particular ethical or religious standards: rescuers came from all over the spectrum of organized religions, and included agnostics and atheists as well. Monroe et al., *supra* note 166, at 111. Yet "a spiritual belief of closeness to others or of being part of a family of man", is reported as important among the rescuers. The independence of this dimension from organized denominations was described by a typical subject as "pious from the inside." Monroe, *supra* note 32, at 418-19.

168. Jim Corbett, Address at Austin, Texas (Oct. 28, 1982) (on file with the *Tennessee Law Review*).

While participants of the Tucson network who spoke with me viewed their work as an undertaking required by religious understanding, none of them appeared to believe that the Free Exercise Clause of the First Amendment of the United States Constitution either did, or should, protect them as “religious” people from adverse governmental reactions to their conduct.<sup>169</sup> This result coincides with the state of Free Exercise jurisprudence; religiously motivated acts that contravene governmental prescriptions are almost uniformly rejected on this constitutional ground.<sup>170</sup> The saving features appear to be a clearly confinable instance of a worship-practice which is church-directed, church-contained (it does not send one into deserts to rescue refugees) and hard to confuse with political action.

### III. THE LAW’S REBUKE: CONSTRUCTING SANCTUARY GIVERS AS RELIGIOUS OUTLAWS

#### A. *The Illegality Narrative of Investigation and Prosecution*

The Sanctuary Movement prosecutions were based as much upon the media’s characterization of the Sanctuary activities as illegal as on the actual assistance to

---

169. Free Exercise claims were made by the Tucson defendants’ lawyers on appeal, after their exclusion by the trial court’s grant of the government’s motion in limine. The Ninth Circuit rejected their claims handily. See discussion *infra* part III.B.

170. The few exceptional winners have been the Amish school children, excused from compulsory attendance laws in recognition of the insularity of Old Order Amish religious communities, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and seventh-day Sabbath observers, exempted from aspects of unemployment compensation schemes which effectively conditioned receipt of government benefits on religious beliefs, see *Bowen v. Roy*, 476 U.S. 693 (1986); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). All other points of contest that cannot be tucked neatly into a state-dominant view of the relation between citizens of religious conscience and their government are losers in court.

All the more so since the Supreme Court’s startling abandonment of compelling interest analysis in favor of the starkly formalistic neutrality of *Employment Div. v. Smith*, 494 U.S. 872 (1990) (finding no Free Exercise infringement in application of a generally applicable and religiously neutral controlled substance statute to the use of peyote by members of the Native American Church, of which peyote use is sacramental). The opinion has been roundly criticized by scholars and religious communities, and Congress has sought to reverse its effect by enactment of the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b) (Supp. 1994) (explaining that the act’s purpose is to “restore the compelling interest test as set forth in” *Sherbert* and *Yoder* “and to guarantee its application in all cases where free exercise of religion is substantially burdened”).

In June 1993, prior to enactment, the Court did uphold a Free Exercise claim under the *Smith* test, unanimously invalidating a city ordinance prohibiting ritual animal sacrifice as neither neutral (because its purpose was to suppress the Santeria sect’s practice) nor generally applicable (because only directed at sacrifice for religious purposes). *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217 (1993).



Central Americans. On appeal of the convictions, the Government brief painstakingly outlined two years' worth of press reports prior to any active INS investigation. This "passive investigation" followed the media and other public materials, beginning with Southside's public declaration ceremony in March 1982 about which the INS noted that one Tucson paper reported that Fife would "publicly defy the U.S. Government to arrest him as a felon in violation of immigration laws."<sup>171</sup> In August 1982, after *People* magazine featured a border crossing by Corbett of a Salvadoran family and their reception at Southside Presbyterian Church, the INS asked the United States Attorney's Office in Phoenix for prosecution advice.<sup>172</sup>

In September, *U.S. News & World Report* featured a story on the Sanctuary activities of many churches, including Southside, and in December, CBS's *60 Minutes* ran a segment describing Corbett as "a smuggler who had broken the law many times by smuggling and transporting Guatemalans and Salvadorans,"<sup>173</sup> and identifying Southside Presbyterian Church as "one of several churches that provide sanctuary to illegal aliens."<sup>174</sup> Three days later, INS Western Region ordered an investigation and prosecution consultation with the United States Attorney's Office.<sup>175</sup> In December, a Tucson newspaper stated, with such bite that the Government reiterated it in its appellate brief, that:

For nearly a year, they have publicly flouted the law without reprisal....[sic]  
[They] have been publicized in the national media, where ringleaders detail their acts with impunity, almost daring officialdom to respond....[sic]

Since then it has grown to include hundreds of people and dozens of churches in the United States and Mexico.<sup>176</sup>

The appearance of escalation among churches in providing sanctuary prompted the regional INS officials to adopt a more aggressive investigation and to seek approval from the INS central office to infiltrate the Sanctuary Movement with an informant.<sup>177</sup> Before the Ninth Circuit, the Government summarized its view of the precipitating event: "After two years of baiting the INS in the national media with their 'catch me if you dare' acts of alien smuggling, the

171. Respondents' Brief at 8, *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (Nos. 86-1208-1215) [hereinafter Respondents' Brief].

172. INS was informed that any prosecution would have to be based on facts or activity independent of the news media. *Id.* at 11.

173. *Id.* at 12.

174. *Id.*

175. *Id.*

176. *Id.* at 12-13.

177. *Id.* at 18. The parties disputed whether this approval was granted. Defendants contended that Central Office had not approved the undercover operation commenced on March 26, 1984. The Government insisted that the Central Office had approved the informant, by telephone, while conceding that there had been no approval by a joint Justice-INS committee as required under the new undercover guidelines effective on March 19, 1984, because "no mechanism was available to implement them." *Id.* at 18-19.

defendants finally succeeded in finding themselves on trial for the very criminal acts they had so provocatively professed to the nation's media."<sup>178</sup>

In 1984, Phil Conger, director of the TEC, was the first arrestee. The case was dismissed for Fourth Amendment violations regarding the search of his car.<sup>179</sup> However, there were papers in his backpack that listed addresses for members of Sanctuary networks all around the country and a lengthy memorandum written by Corbett two months earlier describing in detail "religious communities' refugee defense activities" from deep in Mexico throughout the United States to Canada.<sup>180</sup> Conger's papers persuaded prosecutor Don Reno<sup>181</sup> that religion was merely a facade for creating a nationwide network in order to violate the law and import people who would speak publicly, and who were, in Reno's view, "real hard-core Marxists" and liberation theologians.<sup>182</sup>

Just days after Conger's arrest, new undercover guidelines for the INS went into effect,<sup>183</sup> and subsequently, the regional INS office approved recordings of telephone calls, and equipping the informant Jesus Cruz to secretly tape conversations.<sup>184</sup> The request for approval described a highly political antiwar movement, smuggling aliens for use in a propaganda campaign against United States policies in Central America. To his superiors in Washington, INS investigator Rayburn stressed the Sanctuary

---

178. *Id.* at 85.

179. Conger was indicted in May 1984, for transporting four Salvadorans, and the indictment was dismissed following a pretrial hearing in which the stop was successfully challenged. *United States v. Conger*, CR 84-106, TCU-ACM (1984); *see also* Respondents' Brief, *supra* note 171, at 10 n.6.

180. Jim Corbett, *Some Proposals for Integrating Smuggling, Refugee, Relay, Sanctuary and Bailbond Networks*, in *Borders and Crossings*, *supra* note 77 (on file with the *Tennessee Law Review*).

181. Reno, a former criminal defense attorney, was hired in January 1984 as the first special assistant U.S. attorney in the country whose assignment was to handle interstate alien-smuggling cases only for the INS. In his first few months on the job, he and investigator Rayburn got an indictment and conviction against one of the biggest farmers in Idaho for twenty counts of labor violations and brought an alien-smuggling case in Florida that used four undercover agents. CRITTENDEN, *supra* note 7, at 146.

182. *Id.* at 148 (citing Crittenden's interviews with Donald M. Reno, in Phoenix, Ariz. (Nov. 1986)).

183. The new Undercover Guidelines Review Committee provided a Washington-level consideration of sensitive investigations to prevent serious and embarrassing abuses. Sensitive investigations included those involving "sensitive techniques," that is, eavesdropping, for more than six months, or whose target was a foreign government, or encroached on attorney-client privilege, or involved religious organizations, such as this one. CRITTENDEN, *supra* note 7, at 139.

184. CRITTENDEN, *supra* note 7, at 132 (discussing the testimony of James Rayburn, May 23-24, 1985 in *Aguilar*).

Movement's claim of forty-five public Sanctuaries and "the public endorsement and support of over 600 'co-conspiring' congregations and religious organizations," and Sanctuary organizing committees "across the entire length and breadth of the U.S.A."<sup>185</sup> After summarizing the belief among Sanctuary workers that giving sanctuary to political refugees was justified by law and treaty, Rayburn nonetheless concluded that, "[t]he movement, which may have initially expressed humanitarian motives, has slowly evolved to sanction a more lawless and political stance."<sup>186</sup> This interpretation was constructed significantly from quotations from *Basta!*, the newsletter of the Chicago Religious Task Force on Central America.<sup>187</sup> During the nine-month undercover operation, Cruz and INS agents made ninety-one audio tapes of recorded meetings, including worship services of several congregations active in providing Sanctuary.<sup>188</sup>

---

185. *Id.* at 140 (quoting Undercover Operation Request from James A. Rayburn, INS Phoenix, to INS Central Office, Washington, D.C., April 24, 1984).

186. *Id.* at 141.

187. For example:

Sanctuary offers a concrete and direct way to challenge the inhuman policy of the United States government in Central America and the Immigration and Naturalization Service.

. . . We think a mass movement of resistance in the United States using direct action is best.

If we allow the court of law or lawyers to direct the sanctuary movement, we will be letting United States law dictate the parameters of our work and the limits of our conscience.

*Id.* Corbett's writings were quoted, as were the Tucson Counseling Guidelines which set forth the screening process used for refugees considering public Sanctuary. Rayburn represented that the Sanctuary Movement was recruiting on the Mexico/Guatemala border, and that those chosen for Sanctuary under the guidelines tend to be "young, middle-class, well-educated, well-spoken, with values/beliefs inclined toward the 'left.'" *Id.* at 145. The operation was approved for a period of three months. *Id.*

188. These were the Southside Presbyterian Church, the Camelback Presbyterian Church, Alzona Lutheran Church, Risen Savior, and Emerson Unitarian Church. Appellants' Opening Brief at 18, *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (Nos. 86-1208-1215).

A half-dozen tapes recorded the regular Monday night meetings of the Tucson Ecumenical Council Task Force on Central America (TEC) held at Southside Church, in which Sanctuary volunteers discussed what they could and would do to assist Central American refugees at "high risk." Tape Nos. 54, 61, 83, 89 from Operation Sojourner Investigation (transcripts on file with the *Tennessee Law Review*). Of particular importance to the government were the decisions to assist particular Central Americans to cross safely from Mexico into the United States. The taped conversations show the regular participants evaluating the refugee status and degree of risk of each person seeking this assistance from the Tucson network. *See, e.g.*, Tape from Operation Sojourner Investigation of TEC Meeting (Aug. 20, 1984) (author's notes from transcript on file with the *Tennessee Law Review*) (declining to aid three Hondurans in Nogales, Mexico, who were not high risk); Tape No.

Many in Washington, D.C., did not share Reno's and Rayburn's enthusiasm for prosecuting the Sanctuary workers. The Department of Justice questioned the utility of the Sojourner Operation, its length, and its timing, just before the presidential election. The week after Reagan's reelection in November 1984, Reno and the investigation's chief met in Washington, D.C., with the INS Commissioner and other top officials, who continued to press for other ways to proceed besides criminal prosecution—perhaps by an injunction or some civil proceeding. Reno, who wanted search warrants against the churches, argued vigorously against skeptics who viewed the nine month undercover operation as having found nothing more than alien smuggling. In the final indictment review in the United States attorney's office in Phoenix, all high-ranking members of the Justice Department in Phoenix and Tucson voted against the indictment, except for Reno and Phoenix's United States Attorney McDonald. McDonald approved the indictment.<sup>189</sup> On January 10, 1985, a grand jury returned indictments against sixteen people.

Believing that they were dealing with Communist collaborators, the investigators overread the snippets of evidence that served this storyline. The Government videotape of the search of Sister Nicgorski's Phoenix apartment captured a frightened Salvadoran woman who was staying with Nicgorski, who had told the nun that two of her brothers had been killed by death squads and her husband shot by a national guardsman. The government agents spent four hours examining Nicgorski's extensive files on the Sanctuary network. During this time, the camera turned again and again to a large poster in the living room that read, "Dump Reagan in 1984." Of the dozens of items removed by the agents from the apartment were a notebook on liberation theology and forty-four photographs, one of which showed Nicgorski with Nicaragua's interior minister, Tomas Borge, taken while she

---

89 from Operation Sojourner Investigation of TEC Meeting (Nov. 26, 1984) (transcript on file with the *Tennessee Law Review*) (assigning Fr. Quinones to screen Salvadoran groups once they arrive at border).

They also reveal Conger directing government informant Cruz, posing as a Sanctuary volunteer, not to help non political refugees to enter the United States. *E.g.*, Tape from Operation Sojourner Investigation of phone call (May 18, 1984) (Conger to Cruz: "But you will have to say no, right?" Cruz: "I want to be volunteer with you." Conger: "Yes, yes. Then it is best if you don't [help a man find a paid *coyote*.]") (author's notes from transcript on file with the *Tennessee Law Review*); Tape from Operation Sojourner Investigation of TEC Meeting (Aug. 20, 1984) (Conger: "If someone falls with refugees that aren't truly political refugees that is going to hurt all of us. . . . [I]f we, the church mix with people like that and fall, it's going to go out nationwide that we are only helping people that only want to come be with their family, and we aren't helping them for that reason.").

The independent activities of several other U.S. congregations to bring Central Americans out of Mexico is also indicated *in passim*, whose actions were not under the direction of TEC, and whose participants were never prosecuted.

189. See CRITTENDEN, *supra* note 7, at 189-92.

was on a tour with a group of nuns. Prosecutor Reno later described this photo to the press as showing the nun "with Communist guerrillas down in Central America."<sup>190</sup>

Despite this enthusiastic overreading, none of the seized materials indicated any connection between the nun and any political organizations or foreign governments, nor contradicted her self-presentation as an activist nun who believed that God commanded her to love and serve the poor. Nonetheless, the search and seizure reinforced INS investigators' perception that they had nailed a tough and devoted Marxist.<sup>191</sup> Nicgorski's perception of the event was quite different; she saw her government determined to use every means, including egregious invasions of privacy, to stop the Sanctuary Movement. For her and others who had worked in Central America, her Government's agents were approaching the control tactics employed by repressive governments in Central America.<sup>192</sup>

The prosecution's trial strategy was to manipulate the rhetorical framing of the issue to prevent the defendants from reminding the jury of the national self-image of the United States as the last haven of the oppressed and to ignore the independent religious thinking that led the Pilgrims to begin a new nation. The prosecution employed a strategy that excluded all issues about religious freedom and motivation, refugee law, and stories of Central Americans' forced flight.

To limit what judge and jury would see of the true contest between the Government and the Sanctuary Movement, the prosecutor filed a sweeping motion in limine to preclude the introduction of evidence on issues collateral to his theory of a conspiracy to "smuggle aliens." Key to undermining the defendants' legal understanding, the motion sought to exclude defense arguments that the Refugee Act of 1980 or any international treaty confers refugee status on any of the undocumented people named in the indictment; that defendants' conduct was justified by their religious faith; that defendants had any good motives or beliefs that negated criminal intent; and that necessity compelled defendants to act as they did.<sup>193</sup>

---

190. *Id.* at 200. Substantially similar accounts were given by Sanctuary defendants who had viewed the videotape. Author's Interviews with Sanctuary Defendant Subject Nos. 01, 23, 38.

191. *Id.* at 201.

192. Author's Interview with Sister Nicgorski (June 1992) (on file with author). One reaction at the time was to show the government that the sanctuary movement would not be deterred. Two days after the indictment, one of the unindicted co-conspirators led a Guatemalan family of four over the border and across the desert. The family recounted that a year before, they had allowed the older two daughters to visit their grandfather; when the mother returned for them, government agents were hosing out the garage, and insisted that the family did not live there anymore. The grandparents, the two children, and an aunt were never heard from again, according to the Sanctuary worker who helped the family. CRITTENDEN, *supra* note 7, at 201 (citing Crittenden's interview, 1986).

193. In an interview with one reporter, Reno said he drafted the motion by listing

The motion also sought to strictly curb the courtroom discourse, by asking the judge to bar any reference to the aliens aided by defendants as “refugees” or “asylees,”<sup>194</sup> to any “alleged episodes, stories or tales of civil strife, war, or terrorism that may have occurred or are occurring” in countries of Central America, or to the numbers of Central Americans who applied for asylum. The motion in limine further sought to prohibit mention or evidence that any policies of the United States toward any Central American country is “immoral or in violation of any international law,” or of policies regarding the grant or denial of asylum by the U.S. from any countries, “either communist-dominated governments or countries undergoing a socialist or communistic revolution.”<sup>195</sup> To reinforce his argument, Reno attached a copy of *Basta!*, the newsletter of the Chicago Religious Task Force on Central America, whose articles pledged to turn the trial into an opportunity to make a political statement and educate Americans about the abuses occurring in Central America.<sup>196</sup> Defendants filed some fifteen motions in reply, challenging the stunning breadth of the motion in limine and seeking dismissal of the indictments.

### B. *The Judicial Embrace of the Illegality Narrative*

#### 1. Procedural Suppression of the Narrative of Legality

The Sanctuary defendants in *Aguilar* pursued two lines of defense: the legality of the defendants’ acts, and the outrageousness of the government’s conduct toward these religious actors.<sup>197</sup> According to the primary defense

---

everything he could think of that might possibly exculpate the Sanctuary defendants. CRITTENDEN, *supra* note 7, at 219 (discussing Crittenden’s interview with Don Reno (Nov. 1986)).

194. The defense responded with a motion to bar the prosecution from referring to “illegal aliens.” Judge Carroll eventually prohibited both terms, and ruled that each Central American be called by name. CRITTENDEN, *supra* note 7, at 271.

195. Government’s Motion in Limine, *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (Nos. 86-1208-1215); *see also* CRITTENDEN, *supra* note 7, at 220. The motion further sought exclusion of evidence or argument on the impacts that a guilty verdict for defendants would have upon Central Americans applying for asylum under the Immigration Act, and of amnesty or extended voluntary departure for Salvadorans, including those unindicted co-conspirators in the indictment. *Id.*

196. *See* CRITTENDEN, *supra* note 7, at 220.

197. *See* Appellants’ Opening Brief at 34, 305-09 (*United States v. Aguilar*, 883 F.2d 709 (1989) (Nos. 87-1771, 87-2275) [hereinafter Appellants’ Opening Brief]. An earlier defense motion included the defense of necessity, asserting that the defendants’ acts were justified, and thus not illegal, because the defendants believed their Sanctuary actions were necessary to prevent the more serious danger of forced deportation. *Id.* at 233 (citing Defendants’ Opposition to Motion to Exclude Necessity Defense); CRITTENDEN, *supra* note 7, at 221.

of legality, the Central Americans whom the defendants were accused of transporting and harboring, were legally entitled to status as political refugees under the Refugee Act of 1980 and the 1967 U.N. Protocol Relating to the Status of Refugees, to which the United States was bound.<sup>198</sup> The defendants argued that they were complying with the governing law, whereas the INS' deportations, not the defendants actions, violated U.S. and international law. Under this theory, the defendants moved immediately to dismiss the indictments on the ground that the acts stated in the indictment were in fact legal.

The defense also moved to dismiss the indictments on grounds of the Government's outrageous conduct of its undercover investigation since the Government was dependent upon agents and informants with substantial records of dishonesty, double-dealing, and disregard for investigative guidelines.<sup>199</sup> After a pretrial hearing, this motion was denied based on a finding that the Government's infiltration of churches was "not acceptable," yet was not "outrageous Government conduct," and thus, was not a violation of the Due Process Clause "or other violation that would cause the indictment to be dismissed."<sup>200</sup>

The defendants' last effort to have the case thrown out before trial was based on selective prosecution.<sup>201</sup> This argument was also rebuffed, despite considerable evidence that cases involving smuggling were not prosecuted in Arizona unless they entailed financial exploitation of undocumented persons and that the government declined to prosecute employers

---

In another motion to dismiss, based on the First Amendment's guarantee of the right of free exercise of religion, the defendants argued that they were following their sincere religious belief in the Biblical directive to take in strangers, and that this religious interest outweighed the Government's interest in prosecuting Sanctuary workers. Appellants' Opening Brief, *supra*, at 257-61.

198. Appellants' Opening Brief, *supra* note 197, at 80-81 & n.47. The defense argued that international law is incorporated into the law of the United States, and that norms of customary international law regarding refugees prohibit the forced return of refugees to their countries if they faced danger of persecution. The defendants believed that the people they aided were fleeing such circumstances and that the Geneva Conventions and other international laws required them to act. CRITTENDEN, *supra* 7, at 221.

199. Appellants' Opening Brief, *supra* note 197, at 324; *see* CRITTENDEN, *supra* note 7, at 222-24. One agent apparently pimped for migrant farmworkers while on the government's payroll. Another agent, Jesus Cruz, had a long record of arrests for mercenary alien smuggling, and aided the illegal sale of firearms in violation of federal gun laws while a government agent. Furthermore, the chief investigator for the INS, James Rayburn, who directed the agents, demonstrated an ideological ax to grind. CRITTENDEN, *supra* note 7, at 224.

200. *See* Appellants' Opening Brief, *supra* note 197, at 309 (quoting Pretrial Reporters' Transcript at 1097); *see also* CRITTENDEN, *supra* note 7, at 228-29.

201. Appellants' Opening Brief, *supra* note 197, at 331-32.

even though it knew such employers went to Mexico to induce illegal entry.<sup>202</sup>

The court denied all the key defense motions: It refused to dismiss under international law, ruled that the defense could not offer evidence of violence in Central America, and denied that the government's investigative tactics violated the First Amendment right to the free exercise of religion.<sup>203</sup>

The defendants wanted the jury to hear evidence on whether there were reasonable legal alternatives to the defendants' actions: Why did they not encourage Central Americans to apply for asylum at the border or to apply at the nearest INS office as soon as they entered the country, either of which would shield the refugees from deportation throughout the long appeals process?<sup>204</sup> The defendants wanted to answer these questions with evidence of the arrest of applicants and the detention of families in penal centers with little access to legal assistance.<sup>205</sup> The defendants also wanted to demonstrate the 2% success rate for Salvadoran and Guatemalan asylum applicants, and the refugees' fears that if they did turn themselves in to immigration officials, the INS might convey information to refugees' governments, an act that would endanger them and their relatives who remained behind.<sup>206</sup>

At the hearing on the availability of the necessity defense, the court challenged defense counsel to explain why there had not been more lawsuits

---

202. *Id.* at 340, 345 (discussing testimony of INS Supervising Agent, Jim Rayburn, and United States Attorney, Stephen McNamee).

203. *Id.* at 33, 237, 309; *see also* CRITTENDEN, *supra* note 7, at 229-30.

204. CRITTENDEN, *supra* note 7, at 230-31. Defendants made an offer of proof on three contentions: (1) Salvadorans and Guatemalans were prevented from applying for asylum at the Mexican border because of INS regulations; (2) Mexican immigration authorities arrested and summarily deported Central Americans; and (3) illegal status in Mexico rendered Central Americans vulnerable to robbery and rape. *See* Appellants' Opening Brief, *supra* note 197, at 223-38.

205. CRITTENDEN, *supra* note 7, at 231.

206. *Id.* at 231, 366 (discussing reports that deportees were tortured and murdered upon return to the countries from which they fled); *see also* HELSINKI WATCH, DETAINED, DENIED, DEPORTED: ASYLUM SEEKERS IN THE UNITED STATES 55-57 (1989).

A State Department study of the fate of deportees found that of 482 deportees, only 38% were confirmed to be in no danger, while the fate of the other 62% was unclear. U.S. DEP'T ST., SURVEY OF 482 DEPORTED SALVADORANS AND SALVADORAN MONITORING SURVEY METHODOLOGY, Washington, D.C. (1982); *see also* AMERICAN CIVIL LIBERTIES UNION, THE FATES OF SALVADORANS EXPELLED FROM THE UNITED STATES (Sept. 5, 1984) (reporting 112 likely cases of persecution, including 52 political murders, 47 disappearances, and 13 unlawful political arrests).

Two years after the *Aguilar* trial, the Ninth Circuit took judicial notice of reports that persons deported to El Salvador "have been tortured and have been killed." *Lazo-Majano v. INS*, 873 F.2d 1432, 1435 (9th Cir. 1987).



challenging INS procedures at its detention centers and at the border.<sup>207</sup> The defense counsel explained that several such cases had been filed, but had not yet been resolved.<sup>208</sup> The court advised the prosecutor to encourage INS to comply with its own procedures.<sup>209</sup> Nonetheless, the court ruled that there was no basis for a defense of necessity, duress, or futility.<sup>210</sup> One month later, the court rejected the claim that Sanctuary was a religious ministry exempt from prosecution under the Free Exercise of Religion Clause.<sup>211</sup> Only a single ruling favored the defense: There could be testimony that the defendants lacked the specific intent to violate U.S. immigration laws.<sup>212</sup>

So framed, the juridical contest was over well before the case came to trial.<sup>213</sup> The unprecedented scope and success of the prosecution's motion in limine effectively muzzled the defendants in court, treating as legally irrelevant every aspect important to the defendants' case and to defendants' understanding of their conduct.<sup>214</sup> Denial of the motions prevented each

---

207. CRITTENDEN, *supra* note 7, at 231.

208. *Id.*; see *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385-87 (C.D. Cal. 1982) (granting preliminary injunction to class of Salvadorans and directing the INS to halt its summary removal of Salvadorans from the United States), *aff'd sub nom.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (upholding a finding that since the early 1980s, the INS "engage[d] in a broad systematic process of illegality").

209. CRITTENDEN, *supra* note 7, at 231. The prosecutor countered that he did not represent INS, only "the Government," for which he was reprimanded. *Id.* at 232.

210. *Id.*

211. *Id.*; see also Appellants' Opening Brief, *supra* note 197, at 258.

212. See *id.* at 55-58. CRITTENDEN, *supra* note 7, at 232. In other words, a good faith misunderstanding of the law was a valid defense, although "mistake of law" was not. Defendants could then argue that they did not intend to break the law because they believed they could present refugees to an INS office at some reasonable, but later, time. Appellants' Opening Brief, *supra* note 197, at 55-58.

213. CRITTENDEN, *supra* note 7, at 232.

214. See Douglas L. Colbert, *The Motion in Limine—Trial Without Jury: A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5 (1986) [hereinafter Colbert, *The Motion in Limine*]. The purpose of a motion in limine is to obtain a pretrial evidentiary ruling precluding the opposing party from using a particular item of evidence at trial. *Id.* at 10. In a criminal case, the motion in limine was originally intended to protect an accused's right to a fair trial by excluding prejudicial evidence from the jury's consideration. *Id.* at 22. When motions in limine are used by the prosecution to exclude entire defenses, as in *Aguilar*, the effect is to force the defense to reveal its trial strategies and to prove the relevancy of its defenses to the trial court, long before the government has made its case and before the defense could challenge the government's case through cross-examination and presenting its own witnesses. *Id.* at 23-24, 54. The government's use of the motion in limine jeopardizes the accused's fundamental right to remain silent, to be free from self-incrimination, and to insist that the prosecution assume its full burden of proving guilt. *Id.* at 53-54.

defendant from giving testimony to the jury,<sup>215</sup> just as it precluded the jury from serving its appointed role as fact-finder.<sup>216</sup> The prosecution, in precluding the democratic possibility of trial, impaired the efforts of these civil initiative practitioners to “engag[e] and respect[] the procedure that was [in] place.”<sup>217</sup>

Despite the legal winnowing and nearly complete adverse rulings, the facts admitted at trial made the defendants hopeful of an acquittal.<sup>218</sup> The Government’s case, which seemed so solid, began to disintegrate when the trial began.<sup>219</sup> The Government’s case turned on its star witness, agent Cruz, who had attended the Monday night meetings at Southside Church where requests and plans for Sanctuary assistance were discussed.<sup>220</sup> On cross-examination, Cruz appeared to be a duplicitous betrayer, smuggler, and gunrunner willing to do anything for money.<sup>221</sup> Agent Cruz’s comprehension of English was weak, a startling contrast to his astonishing recall of incriminating details that he displayed when testifying in Spanish.<sup>222</sup> This cast doubt on the veracity of his reports of Sanctuary meetings that he attended which were conducted in English.<sup>223</sup>

The Government, at the risk of failing to make its case in chief,<sup>224</sup> called three Sanctuary members, each of whom would have been able to corroborate Cruz’s testimony.<sup>225</sup> All three Sanctuary witnesses moved to quash the subpoenas as a violation of their First Amendment right to exercise freedom of religion.<sup>226</sup> The court declined to quash the subpoe-

---

215. As one Tucson defendant later explained, “If we testified we were doing the public information thing through our testimony, but [then] we were going to go down the tubes. . . . [because we’d] admit we did what we did, and more. . . . [W]e would have just laid it all out . . . .” Author’s Interview with Sanctuary Defendant Subject No. 47.

After the motions in limine were granted virtually in toto, defendant Fife thought testimony would serve a purpose only if the defense politicized the trial in the tradition of the Chicago 7 defendants. Author’s Interview with Rev. Fife (June 28, 1992) (redacted transcript on file with the *Tennessee Law Review*).

216. See Colbert, *The Motion in Limine*, *supra* note 214, at 54.

217. Author’s Interview with Jim Corbett, *supra* note 80.

218. CRITTENDEN, *supra* note 7, at 270.

219. *Id.* at 270 (discussing the devastating effect the testimony of Agent Cruz had on his own credibility).

220. See *Aguilar*, 883 F.2d at 668-71 (discussing the role of Agent Cruz in infiltrating the Movement).

221. CRITTENDEN, *supra* note 7, at 270.

222. *Id.*

223. *Id.*

224. *Id.* at 280 (discussing Agent Cruz’s perjury).

225. *Id.* at 305.

226. *Id.* at 305-06.

nas.<sup>227</sup> After all three refused to testify, they were sentenced to house arrest until the defense rested one month later.<sup>228</sup>

Reno then sought to admit taped portions of the Monday night conversations.<sup>229</sup> The defense countered by urging that the tapes be admitted in their entirety, as the surest way for the trier of fact to hear the concerns and motives of the Sanctuary defendants.<sup>230</sup> Reno objected, and the court refused to admit the tapes in their entirety, which resulted in studied nitpicking over which snippets of tape to admit into evidence.<sup>231</sup>

The Government also called as witnesses several Central Americans named as unindicted conspirators.<sup>232</sup> Many of these witnesses were classic refugees, and the defense sought to have the jury hear their entire testimony.<sup>233</sup> The prosecution objected to this evidence as "irrelevant and prejudicial," and the court agreed.<sup>234</sup> Although offers of proof were made, the jury heard only the small portion of the refugees' testimony detailing the actual border crossing.<sup>235</sup> After the court rejected all but two of the 126 jury instructions proposed by the defense,<sup>236</sup> the jury convicted eight of the eleven defendants on multiple felonies.<sup>237</sup>

---

227. *Id.* at 306.

228. *Id.* at 306-07.

229. *Id.* at 307.

230. *Id.*

231. *See id.* The court allowed only portions of the tape into evidence. *Id.* at 308.

232. CRITTENDEN, *supra* note 7, at 272.

233. *Id.*

234. *Id.*

235. *See* CRITTENDEN, *supra* note 7, at 273. As an example, the Gomez's family story, not heard by the jury, began with his comfortable job as a factory manager and a union leader in El Salvador. His wife worked for an American company and they owned two houses and a car. In June, 1983, Gomez was arrested, beaten, accused of being a guerrilla and a subversive, and forced to sign a blank confession. Gomez left El Salvador, and went to the United Nations High Commissioner for Refugees (UNHCR), in Mexico City, which certified him as a refugee.

The UNHCR named five countries, including the United States, where he might seek asylum. The officer approached the American consulate for him. Gomez was apprised of the regional quotas in effect for refugees applying to the United States from outside the country, and of the United States preference for Cuban applicants. The jury, however, heard only the Gomez story beginning with his stay with Socorro Aguilar in her Nogales, Mexico, home immediately prior to his crossing into the United States. *Id.* at 273-76.

236. *Id.* at 316.

237. Appellants' Opening Brief, *supra* note 188, at 24-26. Aguilar was convicted of bringing in a 13-year-old girl by walking ahead of her through the Port of Entry. Quinones and Conger were convicted of aiding and abetting the illegal entry of two Salvadoran men, by pointing out holes in the international fence and the steeple of Clark's church on the United States side. *Id.*

Conger, Fife, and Nicgorski were convicted of aiding and abetting illegal transportation. Nicgorski and Fife were convicted of aiding and abetting illegal transportation. Clark and

## 2. Judicial Narration

The federal courts hearing the Sanctuary cases spoke only the narrative of legalism. This result is not surprising since judges are empowered to write the authoritative text of what transpired in their courtroom. Judges write in two personas: as functionaries in a system, and as declarers of social norms. In the judicial opinions, the judges present the Sanctuary prosecutions as if they arose *ab initio*, with few of the contours, and fewer of the “basic facts,” which my account provides. The effect is the silencing of these other narratives, which are overwritten with rhetorically denigrating flourish by judicial hands.

### a. The Texas Sanctuary Precedents

By the time the *Aguilar* appeal reached the Ninth Circuit, only a handful of prosecutions of Sanctuary workers had produced published opinions.<sup>238</sup> In one such case, Stacey Lynn Merkt and a nun were arrested while driving three Salvadorans from the Brownsville, Texas area to the INS district office in San Antonio to file for asylum.<sup>239</sup> A jury found her guilty on three counts, sentencing her to ninety days in prison in June 1984, which was then converted to two years’ supervised probation.<sup>240</sup>

On appeal, in June, 1985, Merkt challenged the jury instructions on the requisite knowledge and intent for an alien’s violation of the immigration laws under 8 U.S.C. section 1324(a)(2), and on the government’s “nearest office” instruction.<sup>241</sup> Merkt’s conviction was reversed on all three counts.<sup>242</sup> The court ruled that the jury instruction effectively removed the essential elements of intent from the jury’s consideration.<sup>243</sup> Furthermore, the court ruled that “if the jury should find as a fact that Merkt intended to present the aliens to the proper officials so that they could seek legal status in this country, it should find that she did not have the requisite

---

Nicgorski were each convicted of one count of harboring. LeWin was convicted of transporting a family from Phoenix to Albuquerque. Hutchison, Father Quinones, Aguilar, Reverend Fife, Sister Nicgorski, and Philip Conger were all convicted of conspiracy, under 18 U.S.C. § 371, to violate 8 U.S.C. § 1324(a). *Id.*; see also CRITTENDEN, *supra* note 7, at 323.

238. See, e.g., United States v. Merkt, 764 F.2d at 269-70.

239. *Id.* at 269-70. Merkt alleged that the undocumented people she had been transporting were political refugees under the Refugee Act of 1980; and that the nearest INS office was violating U.S. law by immediately detaining and deporting aliens who presented themselves in order to seek asylum. *Id.* at 269.

240. *Id.* at 269-70.

241. *Id.* at 275.

242. *Id.* at 268.

243. *Id.* at 272.

criminal intent necessary for a conviction . . . ."<sup>244</sup> Merkt raised no religion-related defense in this case, although several amici did.<sup>245</sup>

In December, 1984, while Merkt's first case was pending, she was again indicted, along with Casa Romero's director, Jack Elder, for two counts of transportation and one count of conspiracy for driving three Salvadorans to a bus station in March, 1984.<sup>246</sup> The district court's opinion is the only arguably empathetic judicial opinion that addresses the religious basis for the actions of the Sanctuary workers.<sup>247</sup> The district court recognized a compelling free exercise of religion interest in the Sanctuary workers, finding that Elder met his initial burden of showing that religious beliefs motivated his conduct.<sup>248</sup> The district court opened its opinion by noting that "courts have recognized that the exercise of religious freedom can sometimes excuse criminal conduct."<sup>249</sup> Yet, in the next breath, the court reiterated the doctrine that the First Amendment absolutely protects belief, but not action.<sup>250</sup> The "perceived mandates of religious practice" must yield to the "appropriate analysis" of the "prohibitions of a criminal statute."<sup>251</sup>

244. *Id.* Here is a discrete instance in which the interpretation of law by a citizen was crisply articulated at trial and eventually adopted by the reviewing court. The district court rejected Merkt's arguments and ruled that her belief that the aliens genuinely qualified for political asylum was no defense. *Id.* at 270. The court of appeals' ruling on the jury instructions, on the other hand, made willful transportation "'in furtherance' of the alien's illegal presence" a prerequisite for conviction under the statute. *Id.* at 272. On the other issues presented, the Court held for the Government. *Id.* at 275. The government did not retry the case.

245. *Id.* at 268. Several amicus briefs, including the National Council of Churches and the Unitarian Universalist Association, did raise religion-related defenses, which were ignored by the court. *Id.*

246. *United States v. Elder*, 601 F. Supp. 1574, 1676 (S.D. Tex. 1985). Merkt was also arrested for violation of probation. *Id.*

247. *Id.* Although Judge Head heard Elder's motions to dismiss based on freedom of religion, domestic and international refugee law, selective prosecution, and estoppel, as well as a motion to suppress evidence, Judge Head noted that only the religion and refugee law questions were "sufficiently unique to merit a written opinion." *Id.* at 1576.

248. *Id.* at 1577. Since the Sanctuary prosecutions preceded *Employment Div. v. Smith*, 494 U.S. 872, the analysis for the application of Free Exercise doctrine was simpler: the courts need only apply the three-part compelling state interest test fashioned in *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, the Court held that for conduct to be protected under the Free Exercise Clause, (a) it must result from a sincere religious belief, (b) which is burdened or inhibited by the government action or regulation, and (c) the government interest must be less than compelling. *Id.* at 402-03. Even where the governmental interest is deemed compelling, the state must show that its chosen means are the least restrictive on the impacted religious practice. *Id.*

249. *Elder*, 601 F. Supp. at 1577 (quoting *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

250. *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)).

251. *Id.*

Elder presented the testimony of clergymen of several Protestant denominations, as well as the testimony of the Roman Catholic Bishop of Brownsville, nearest to Casa Romero.<sup>252</sup> The clergy explained that “meeting material human needs represents an essential aspect of Christianity, and that each individual remains free to fulfill this obligation according to the directives of his or her own conscience.”<sup>253</sup> Providing sanctuary, according to the clergy, is an appropriate expression of this obligation, even though no directive of the Roman Catholic or other church requires it.<sup>254</sup> Elder also filed numerous statements by witnesses to civil strife and atrocities in El Salvador.<sup>255</sup>

The court specifically refrained from finding any facts concerning the described horrors, explaining that it need only find that Elder believed the reports to be true.<sup>256</sup> The court also took pains to reassure readers that it “need not make any foreign policy judgments” and that “other members of the Roman Catholic faith may oppose Elder’s activist response to the situation in Central America.”<sup>257</sup>

Nonetheless, the district court found that the Government justified its limitation of Elder’s religious conduct, in the least intrusive way, by showing “an overriding interest in protecting a congressionally-sanctioned immigration and naturalization system designed to maintain the integrity of this Nation’s borders.”<sup>258</sup> The court cited authority for the proposition that the judiciary has a particularly limited role in such matters.<sup>259</sup> By characterizing immigration control as a national security interest, the court elevated the importance of judicial deference to the executive and legislative branches, and thereby mitigated its function to protect individual interests under constitutional guarantee. Because border control is “inherent in sovereignty” and “vital to the welfare and security of the people,”<sup>260</sup> Elder’s breach of national security by driving to a bus station became “Elder’s do-it-yourself immigration policy,” “which while charitable, gives away what is not his to give away.”<sup>261</sup>

The court’s account of the asylum application procedure reinforces this deferential stance. The procedure, as recounted by the court, sounds plausibly fair at every turn: Would-be asylum applicants may make their applications even during exclusion or deportation hearings; those denied

---

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 1578.

257. *Id.*

258. *Id.*

259. *Id.* (citing *Fiallo v. Bell*, 430 U.S. 787 (1999)).

260. *Id.*

261. *Id.*

asylum by an immigration judge may appeal within the INS; and petitioners who are denied asylum have recourse to all levels of the federal courts for review of the denial.<sup>262</sup> In contrast to the neat legal order prevailing in this judicial district, the practical knowledge gained by Sanctuary workers, including Merkt and Elder, in the borderlands, painted a not-so-rosy picture of the INS and their procedures for repatriating refugees. Despite their formal procedures, the INS, throughout the Southwest, rendered these provisions meaningless by practices of detention, disinformation, and coercion until refugees signed "voluntary departure agreements" that acted as formal consents to immediate deportation.<sup>263</sup> Occasionally, federal courts have found as fact many of the particular INS violations of U.S. law known by Sanctuary defendants.<sup>264</sup>

---

262. *Id.* at 1579-80 (citing 8 C.F.R. § 208.3(a)); see *Immigration and Naturalization Serv. v. Stevic*, 467 U.S. 407 (1984).

263. See, e.g., *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1511-14 (C.D. Cal. 1988), *aff'd sub nom.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (entering a permanent injunction of INS practices of summary deportation of Salvadorans and attendant violations of due process rights).

264. *Id.* The INS's heavy-handed practices led to the prolonged incarceration of thousands, and to adjudicated violations of the constitutional and statutory rights of detainees. See, e.g., *Louis v. Nelson*, 472 U.S. 849 (1984) (holding that INS detention program violated equal protection clause); *Nunez v. Boldin*, 537 F. Supp. 538 (S.D. Tex. 1982) (holding that INS violated due process clause by not advising aliens of their right to apply for political asylum), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982). In the early 1980s, lower federal courts demonstrated a new willingness to grant classwide relief to enjoin INS's detention policies. See *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (enjoining mass deportation of detained, undocumented Haitians together with mass processing and denial of asylum claims); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982) (enjoining mass detention, deportation, and coerced voluntary departures of Salvadorans); *Fernandez-Roque v. Smith*, 567 F. Supp. 1115 (N.D. Ga. 1983) (enjoining prolonged detention of excludable Cubans pending deportation), *rev'd*, 734 F.2d 576 (11th Cir. 1984). For arguments that most INS detainees are asylum seekers, see T. ALEINKOFF & D. MARTIN, *IMMIGRATION PROCESS AND POLICY* 464-65 (1985).

A decade ago, Peter Schuck argued persuasively that the INS practices "seared the judicial conscience as few events since the civil rights struggles of the 1950s and 1960s." Schuck, *supra* note 150, at 68-69. But the persistent influx of people fleeing the severe privations of Cuba since 1980 appear to have eroded judicial oversight of the INS, as the subsequent history of similar cases suggests. See, e.g., *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1515 (11th Cir. 1992) (reversing district court decision enjoining forcible repatriation of a class of Haitians in absence of procedural safeguards for their asylum claims); *Committee of Central American Refugees v. INS*, 795 F.2d 1434 (9th Cir. 1986) (affirming denial of an injunction to prohibit transfer of members of the class of detained aliens to remote detention center, as neither an interference with the right to counsel nor a denial of due process rights to apply for asylum or to be advised of right of counsel); *Pulma v. Verdeyen*, 676 F.2d 100, 104-05 (4th Cir. 1982) (upholding indefinite detention of an alien after an unsuccessful attempt to deport him).

On appeal, the Court of Appeals for the Fifth Circuit cast Merkt and Elder quite differently than had the district court.<sup>265</sup> The defendants were presented, not as sincerely religious people whose beliefs required them to minister to the needs of poor and persecuted by offering “sanctuary in the Biblical sense,”<sup>266</sup> but as stubborn supplicants for a “free-exercise-haven.”<sup>267</sup> The court assessed the value of Merkt’s and Elder’s religious motivations by comparing their beliefs to the beliefs of other Christians whose beliefs did not morally require their participation in the Movement.<sup>268</sup>

The court asserted that the immigration law imposed no burden on appellants’ religion because devout Christianity does not “mandate[] participation in the ‘sanctuary movement.’”<sup>269</sup> Moreover, the court suggested that the appellants could have assisted Salvadorans in several legal ways: as missionaries or by preparing petitions for legal entry.<sup>270</sup> Because “[t]hey chose confrontational, illegal means to practice their religious views—the ‘burden’ was voluntarily assumed [by the appellants] and not imposed on them by the government.”<sup>271</sup> Besides, noted the court, there were many persons worthy of such Christian charity in the United States that the appellants could aid without entanglement in federal foreign policy.<sup>272</sup> Furthermore, the court noted that the uniform enforcement of border control laws was a compelling state interest and that federal courts lacked the institutional competence to interfere.<sup>273</sup> Finally, the court

---

265. Compare *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986), *cert. denied*, 480 U.S. 946 (1986) with *Elder*, 601 F. Supp at 1576. In January 1985, a jury found Elder guilty of transportation and conspiracy charges despite Elder’s religious motivation defense. BAU, *supra* note 7, at 83. Elder also claimed that his arrest was the product of selective enforcement because other persons who committed the same offense, but for different reasons—namely *coyotes* and employers of illegal aliens—were not arrested. This defense was also rejected. *Id.*; see *supra* text accompanying notes 197-217.

At Merkt’s separate trial in February 1985, before a different judge, a religious motivation defense was proffered but excluded. BAU, *supra* note 7, at 83. The jury found Merkt not guilty of unlawful transportation of an illegal alien, but guilty of conspiracy. She was ordered to serve 179 days of an 18-month sentence, to disassociate from Casa Romero, and not to speak publicly about Sanctuary pending an appeal. *Id.*

266. *Elder*, 601 F. Supp. at 1576.

267. *Merkt*, 794 F.2d at 954. The court noted that “ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.” *Id.* at 955 (quoting *Wisconsin v. Yoder*, 406 U.S. at 230).

268. *Id.* at 956.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 957.

273. *Id.* at 956. The court also rejected an argument that the Government’s evident lack of success in enforcing border laws removes border control from the category of



reasoned that no less restrictive means was called for to accommodate the appellants' beliefs.<sup>274</sup> Thus, the court concluded that "Appellants' 'do-it-yourself' immigration policy, even if grounded in sincerely held religious conviction, is irreconcilably, voluntarily, and knowingly at war with the duly legislated border control policy."<sup>275</sup>

b. The Tucson Prosecution

On the appeal of *Aguilar*,<sup>276</sup> the Court of Appeals for the Ninth Circuit, like the Fifth Circuit, was dismissive of the Sanctuary workers' religious conscience argument and hostile to the legal interpretations engendered by their interpretive understanding.<sup>277</sup> As at trial, the judicial perspective focused on the border crossing from Mexico into Arizona.<sup>278</sup> This focus foreshortened time, and stripped away, neatly and completely, all background and context for the Sanctuary workers' conduct.<sup>279</sup>

---

compelling state interest. *Id.*

274. *Id.* at 956-57. Appellants had argued that more carefully tailored governmental measures might include deportation of the defendants, or confiscation of vehicles used to transport undocumented persons, rather than criminalizing the appellants' work. The court rejected these suggestions as trivial. *Id.* at 957.

275. *Id.* Additional charges were brought against Elder and Merkt in December 1984, just before the Arizona indictment. They were indicted for conspiracy and transporting, and Elder was indicted on one count of bringing in refugees. *BAU*, *supra* note 7, at 82. This time Elder was not allowed to present evidence on religious motivations or evidence concerning United States refugee law. Elder was convicted on all six counts in March 1985. Again, the court offered Elder two years' probation on the condition that he quit Casa Romero and not speak publicly about the Sanctuary movement. *Id.* Elder refused, and was sentenced to six concurrent one-year terms, which were reduced to 150 days in a halfway house. *Id.* This conviction was not appealed, and Elder reported in April, 1985. *Id.* Merkt was convicted of conspiracy, and the judge revoked her parole. *Id.* at 82-83.

276. 883 F.2d 662 (9th Cir. 1989).

277. The Sanctuary workers put forth six arguments: (1) the defendants committed no crime under 8 U.S.C. § 1324(a) because the Central Americans they helped were entitled to enter and reside as "refugees" under the Refugee Act of 1980, and thus, were lawfully in the country; (2) even if they were mistaken in their interpretation of the Act, they acted on an honest belief, which was a good defense to the knowledge element of § 1324(a) (under the rule of *Liparota v. United States*, 471 U.S. 419 (1985), a mistake of law defense exists where the legislature has included knowledge of a legal status within the definition of the crime charged); (3) the Government's investigation tactics negated substantive elements of § 1324(a) and precluded the conviction of Sanctuary workers; (4) Sanctuary workers' conduct was protected either under the First Amendment Free Exercise Clause, or under a more specific humanitarian exception to the prohibitions of § 1324(a); (5) their conduct was justified by "necessity"; (6) the defendants' actions did not constitute harboring as used in § 1324(a). *See generally* Appellants' Opening Brief, *supra* note 197.

278. *See id.* at 666-71.

279. *See generally* Mark Kelman, *Interpretive Construction in the Substantive Criminal*

In the preamble to the opinion, the court discussed the only conviction of the Sanctuary workers that it deemed legally significant: the fact that the Sanctuary workers "were convicted of masterminding and running a modern-day underground railroad that smuggled Central American natives across the Mexican border . . . ." <sup>280</sup> The moral dimension of the defendants' claims was diminished by the court's depiction of defendants as liars, who contended that they assisted bona fide political refugees legally in the United States, but who had only "disdain for federal immigration law" because they "counseled the aliens to avoid American immigration authorities at all costs and to lie to them if apprehended." <sup>281</sup>

This narrative failed to show any of the precipitating persecution of the Central American witnesses or of the illegal, coercive deportations by the INS. <sup>282</sup> The Sanctuary defendants explained that they advised a policy deliberate avoidance because the INS failed "to approve the meritorious political asylum applications" made at official ports of entry, but this explanation was rejected without substantive consideration because the defendants also offered a mistake of law defense. <sup>283</sup> The court reconstructed the Sanctuary workers' views to show that presentment was not necessary, and then dismissed the Sanctuary workers beliefs as "profess[ed] naivete and ignorance" about presentment in light of the Sanctuary workers' detailed knowledge of the INS' procedures for dealing with asylum applications. <sup>284</sup> The court noted that this contradiction created a "patent tension" that "permeate[d] this entire case." <sup>285</sup> In this twisted way, the court acknowledged that the defendants knew facts, which the court would not admit into its juridical stance.

The court began, not with the concerns voiced in *Elder* and *Merkt* of breached borders, impaired national security, or contested laws, but with an angry denunciation of the Appellants who "sought and received extensive media coverage of their efforts on behalf of Central American aliens." <sup>286</sup> The court implied that the Appellants had gotten what they deserved by stating that "the INS accepted appellants' challenge to investigate their alien smuggling and harboring activities." <sup>287</sup>

---

*Law*, 33 STAN. L. REV. 591, 593-94 (1981) (discussing the use of time-framing as an unconscious, interpretive method of shaping the way a fact pattern is viewed in judging).

280. *Aguilar*, 883 F.2d at 666.

281. *Id.* at 667 (discussing an instance in which Father Clark instructed Salvadorans not to identify their nationality if stopped).

282. *See supra* notes 263-64.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 668.

287. *Id.*

The court then predicated its summary of the Government's undercover investigation by reiterating the news stories that incensed the Government.<sup>288</sup> It cited the Southside Church's declaration of public Sanctuary, and media coverage highlighted in the Government's brief, as if equally damnable and equally attributable to the defendants.<sup>289</sup>

The court's opinion provides no sympathetic context for the Central Americans' flight from persecution at home and in Mexico, nor background about the Sanctuary defendants or their motives, unlike that provided in Elder's first trial.<sup>290</sup> Nor does the opinion hint at the contemporaneous national movement to provide sanctuary, nor reference the politicized character of the asylum determinations or the unlawful detention practices of the INS.

Instead, the opinion details the "considerable contributions" to the Sanctuary work by the government informants and their participation in three discussions at Southside Church, which formed the basis for the indictment.<sup>291</sup> The shocking breadth of the motion in limine<sup>292</sup> was obscured by the court's characterization that the motion "essentially" sought to exclude evidence of the belief that the Refugee Act of 1980 made entry lawful.<sup>293</sup> The court did not analyze the justice or injustice of its use.

Having framed the questions as arising out of deceitful, self-aggrandizing publicity-grabbing by the appellants, the court was ready to eradicate at law the counter-*nomos*<sup>294</sup> of the Sanctuary workers' assertions of human rights and religious response, embraced by so many across the country. The court's trump card was its emphasis on an orderly trial process. The court stated that the "[a]ppellants' attempt to admit evidence concerning their understanding of section 1324 . . . cuts to the heart of the concern about trial management."<sup>295</sup> According to the court, the Sanctuary workers' reading of the Refugee Act of 1980 was neither genuine nor pertinent; it was "intended to provide a series of minitrials" as to each Central American's well-founded fear of persecution.<sup>296</sup> The defendants' approach was an effort to "overwhelm the trial judge with a barrage of evidence that would have included graphic descriptions of horrifying torture and human

---

288. *Id.*; see also Respondent's Brief, *supra* note 171, at 8.

289. *Aguilar*, 883 F.2d at 668.

290. *Compare Merkt*, 794 F.2d at 956 with *Elder*, 601 F. Supp. at 709.

291. *Aguilar*, 883 F.2d at 668-71.

292. See *supra* notes 193-96 and accompanying text.

293. *Aguilar*, 883 F.2d at 671.

294. *Nomos* is a legal world conceived purely as legal meaning. See Robert M. Cover, *The Supreme Court 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983).

295. *Aguilar*, 883 F.2d at 673 (discussing the court's fear of hearing several "minitrials").

296. *Id.*

rights abuses in Central America.”<sup>297</sup> To have permitted such evidence, stated the court, would have amounted to “a rule which would allow defendants to put Reagan Administration foreign policy on trial.”<sup>298</sup> Allowing such a defense, stated the court, would be “foolish” because of the expenditure of judicial resources and because it “would have placed an intolerably difficult burden on the government—to refute appellants’ claim of their mistaken understanding of the law.”<sup>299</sup> In addition, the court sneered at the “*purported* religious interest”<sup>300</sup> animating Sanctuary actions “after *purportedly* finding that the proper legal channels were futile.”<sup>301</sup>

The *Aguilar* court was peculiarly sloppy with the language and history of the harboring statute. It found no distinctions between harboring to further the exploitation of *coyotismo* and the evasion of the unconstitutional deportation practices of the INS to protect refugees.<sup>302</sup>

#### IV. NARRATIVES OF LEGALITY

The exterior judicial narrative of conspiracies by misguided actors to violate the social order and to breach the borders shrouds and silences another story: the narrative of a conscientious, ecumenical movement among people who constructed a community faith and practiced what they believed to be justice. In this section, the elements and methods of the government

---

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 696 (emphasis added).

301. *Id.* at 693 (emphasis added). By 1989, the Movement’s factual, moral, and legal contentions that the procedures and standards for determining the asylum claims of Central Americans were egregiously flawed were succeeding in federal courts in California. See *supra* notes 263-64. The case of *American Baptist Church v. Meese*, 760 F. Supp. 796 (N.D. Cal. 1991), first filed in 1987, presented the issue of discriminatory application of the immigration laws. In March, 1989, the district court observed that the Executive’s alleged chronic failure to exclude nationality in its asylum decisions, uncontradicted by the government, permitted the Salvadoran’s Equal Protection claims to go forward. *American Baptist Churches v. Meese*, 712 F. Supp. 756-774 (N.D. Cal. 1989).

302. *Aguilar*, 883 F.2d at 689-90; see Loken & Bambino, *supra* note 19 (arguing from legislative history that “intent to evade detection” is almost certainly directed at people harboring in order to exploit refugees). Some judicial effort has been made by federal courts to distinguish humanitarian aid and *coyotismo* under the Act. See, e.g., *United States v. Salinas-Calderon*, 585 F. Supp. 599, 602 (D. Kan. 1984).

Further, in 1987, the Supreme Court essentially vindicated the Sanctuary defendants’ interpretation of “refugee.” See *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (affirming that the “plain language” of the 1980 Refugee Act indicated Congress intended a more generous standard of proof for asylum-seekers than the INS had been applying).

officials' account of Sanctuary, and Sanctuary's self-description of Sanctuary as civil initiative, are each detailed.

*A. Legalism's Account: Breach of Laws*

The government responded, albeit belatedly, to the Movement by arresting and prosecuting Sanctuary workers for harboring and transporting "illegal aliens" in violation of the Immigration and Nationality Act.<sup>303</sup> By invoking the familiar criminal procedure, the Government simultaneously invoked cultural meanings of "law," and the particularly strong cultural meaning of law-breaking.

The United States is a country preoccupied with legalistic measures of responsibility to the rights of others. The American legal culture is peppered with illustrations of a schizoid attachment to the articulation of legal standards, but also to the manipulability of their content. Legalism is unmasked when the political understandings embedded in semantics are exposed as illegitimate or obsolete. "Refugee" and "persecution" are among those terms that are vague and manipulable, yet critical to the recognition of persons' rights.<sup>304</sup>

Expeditious application of the immigration laws to deport Central Americans upon arrival was supported by U.S. government explanations that the Central Americans were really economic refugees coming north to take jobs from Americans.<sup>305</sup> The Reagan Administration argued that U.S. support for Jose Napoleon Duarte's government in El Salvador, like its support for the *contras* in Nicaragua, was necessary to forestall Cuban and Soviet influence, and promoted, rather than limited, human rights.<sup>306</sup> The Administration appealed for reliance on governmental expertise concerning the facts of Latin American conditions, and it implicitly reminded citizens

---

303. COUTIN, *supra* note 7, at 35.

304. See Pirie, *supra* note 18, at 393 (discussing the similarity between the INS and judicial interpretations of the definition of "refugee" so as to deny asylum to Central Americans).

305. See Ass't Sec'y of State Elliott Abrams, *Statement Before the Subcommittee on Rules of the House Committee on Rules* (June 20, 1984), in DEP'T ST. BULL., Sept. 1984, at 5-6 (attributing Salvadoran migration to the overpopulation and poverty of El Salvador); Sharon Stephan, U.S. Policy Towards Undocumented Salvadorans, Congressional Research Service No. MB82223, at 2 (Mar. 15, 1985) (summarizing the Government's position that the primary motivation for Salvadoran migration to the United States is economic).

306. See President Ronald Reagan, Address to the Nation, Mar. 16, 1986, in DEP'T ST. BULL., (May 1986), at 28-32; President Ronald Reagan, Address to Congress, Mar. 14, 1985, in DEP'T ST. BULL., (May 1986), at 32-33 (explaining that the first reality which must define American policies in the 1980s is Soviet expansionism and exploitation of regional conflicts, which have resulted in a "staggering human toll" in Vietnam, Cambodia, Afghanistan, Cuba, Africa, and "the effort to use communist Nicaragua as a base from which to extinguish democracy in El Salvador and beyond").

of the complete separation of church and state.<sup>307</sup> In a legal order that depends to a great degree on the elitist preservation of the means by which legal meaning is assigned, keeping citizens factually ignorant promotes a lack of confidence in the citizens' own powers of analysis, and furthers the appearance of consent, obedience, and acquiescence on the part of the citizens.<sup>308</sup>

Churches have long participated in the regime of legalism, occupying the assigned role of charitable institutions, without a legitimate role in political protest. Even along the border at the time the Movement arose, there was a longstanding local practice of acquiescence to INS rule.<sup>309</sup> Many Sanctuary workers and several of the Tucson defendants had worked for years in border ministries, providing church-based social services and charitable visits to INS detention sites and Mexican jails.<sup>310</sup> In the borderlands, arrest and detention of Hispanics (including American citizens), and deportation of Mexicans and Central Americans, were quite routine. But the faultline within the generally accommodated law of deportation was its exception for people facing persecution: INS procedures would designate most Mexicans as economic migrants and deport them, yet provide safe haven for the truly persecuted.<sup>311</sup> So the church workers believed. The legalism on which church acquiescence stood was shaken and transformed by citizens' experiences in 1981 and 1982, when legalism's terms and logic were negated by government policy and agency practice.<sup>312</sup>

The very vagueness of the Refugee Act of 1980 requires its interpretation, yet that interpretive process is formally preserved to a complex legal bureaucracy. Although the Act was intended to depoliticize U.S. refugee and deportation policy by providing for the adjudication of individual asylum cases under the humanitarian legal standard of "well-founded fear of persecution,"<sup>313</sup> its administration as an arm of legalism soon splintered.

---

307. See PIRIE, *supra* note 18, at 404.

308. See NOAM CHOMSKY, *MANUFACTURING CONSENT* 1-35 (1986); see also MICHAEL J. PARENTI, *INVENTING REALITY: THE POLITICS OF THE MASS MEDIA* (1986) (arguing that news media distort and misrepresent important aspects of political and social life through implicit systems of ideological control, including deferential treatment of official news); W. RUSSELL NEUMAN ET AL., *COMMON KNOWLEDGE: NEWS AND THE CONSTRUCTION OF POLITICAL MEANING* (1992) (discussing an active, meaning-constructing audience of mass media who seek to integrate news reports with what they already know and finding that individuals with less prior knowledge about a subject depend significantly on the style and structure of news presentation when formulating an opinion).

309. PIRIE, *supra* note 18, at 396-97.

310. *Id.* at 396.

311. *Id.* at 396-97.

312. CRITTENDEN, *supra* note 7, at 12-19.

313. H.R. REP. NO. 608, 96th Cong., 1st Sess. 18 (1979). Congress' intent was to "conform the language of [the deportation withholding] section [of the INS] to the Convention [on the Status of Refugees] . . . so that the U.S. statutory law clearly reflects our

This division exposed the Administration's ambivalence about the use of legalism to recognize and to defend the rights of vulnerable people. To receive asylum, a refugee must meet two key elements of the legal test: one, a "well-founded fear," two, "of persecution."<sup>314</sup> These terms are vague vessels ready to be filled by Cold War perspectives where victims of previous torture and death threats remain unlikely to receive asylum, while stars and athletes from communist countries receive asylum.<sup>315</sup>

Great hardships have resulted from INS and judicial interpretations that require asylum applicants to prove that they face different and greater dangers than do other people in their region. Distinguishing between individualized persecution and the more generalized ravages of civil war may seem appropriate in the abstract. In practice, however, people fleeing combat zones have a more difficult burden to demonstrate circumstances warranting protection than do people fleeing nonwar zones like Cuba.

Legalism also circumscribes the information which is deemed authoritative by the officials to whom interpretation of the Refugee Act is formally committed. The principal information sources for INS judges are, not surprisingly, the official ones: advisory opinions issued by the State Department in each asylum case and the annual country reports also issued by the State Department. During the 1980s, both of these sources denied the existence of extensive and politically motivated human rights abuses in El Salvador and neighboring nations.<sup>316</sup> Use of politicized "facts" was compounded by adjudicators' preference for documenting the applicants' bases for fear of persecution, despite the unlikelihood that targets of persecution would possess such existing documents or coolly consider how to obtain such evidence prior to flight.<sup>317</sup>

The fact-finding of the official process is further constrained by bureaucratic mindsets. Because INS judges tend to view refugees as similarly situated, the members of large groups whom INS judges must "process" but about whom they know little, the judges often fit new

---

legal obligations under international agreements." *Id.*; see also *Cardoza-Fonseca*, 480 U.S. at 436-37.

314. See 8 U.S.C. § 1101(a)(42) (defining "refugee").

315. Sophie H. Pirie, Note, *The Need for a Codified Definition of "Persecution" in United States Refugee Law*, 39 STAN. L. REV. 187, 203 (1986).

316. Organizations such as Amnesty International, with a strong reputation for political neutrality and objective fact-finding, reported extensive, contrary evidence. AMNESTY INTERNATIONAL USA, REASONABLE FEAR: HUMAN RIGHTS AND U.S. REFUGEE POLICY (1990) (documenting evidence of INS and State Department bias against Salvadoran, Guatemalan, and Haitian asylum seekers).

317. See, e.g., Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135, 137-38 (1993) (citing cases in which immigration judges declined to find "persecution" because applicants had fled prior to their arrest).

applicants' claims into the patterns set by previous cases.<sup>318</sup> This process does not allow hearing each story as a narration of individualized persecution. The process for hearing applicants' claims merges the familiar tales of the "normal" dangers of civil war from which ordinary people naturally will flee, into refugees' concerns for getting a livelihood. Thus, the refugees' reasons for seeking asylum appear to be merely "economic," not fears of political persecution.<sup>319</sup> Immigration judges who rely on their own conceptions of conditions in the applicant's home country may be expected to evaluate the applicant's "credibility" on whether the testimony coheres with the judge's conception.<sup>320</sup>

One certain result of such a confluence is that the United States has sacrificed Central Americans to the fates that awaited them on deportation in exchange for foreign policy objectives. But this sacrifice devalues the idea that refugees ought not be repatriated when they are truly threatened. This devaluation comes at a cost to the legalism that, we are told, govern the humanitarian duties that we have adopted toward persecuted people: refugees' rights to fair procedures for deciding claims for asylum. Federal courts can, and do, sometimes recite that "foreign policy [is] not relevant" to the determination of asylum applications.<sup>321</sup> Such recitals reinforce the claims of the state to submit to a regime of legalism.

### B. Civil Initiative: To Uphold the Law

It is tempting, as it certainly was to the press, to find in the Sanctuary story a revived form of the democratic practice of civil disobedience. Yet, this is an obfuscating mistake. The classic concept of civil disobedience entails open acts in violation of an offensive law, accompanied by a willingness to accept the official consequences.<sup>322</sup> The Sanctuary members with whom I spoke were religious people responding concretely to desperate persons with evident immediate humanitarian need.<sup>323</sup> General-

---

318. *Id.* See also Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 446-51 (1992).

319. CRITTENDEN, *supra* note 7, at 23 (discussing historical reasons for migration to the United States from Central America).

320. See *Matter of Paniegua-Vides* (BIA 1983), reprinted in SALVADORAN AND GUATEMALAN ASYLUM CASES—A PRACTITIONER'S GUIDE 23019 (B. Ong Hing et al. eds., 1985) (immigration judge found witness not credible because "[h]e paints a picture of conditions in El Salvador that are so bad it is not believable").

321. See, e.g., *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991).

322. See Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723 (1991); CARL COHEN, *CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW* 139-40 (1971).

323. See, e.g., CRITTENDEN, *supra* note 7, at 5-12 (discussing the religious background



ly, the Sanctuary members did not think about their own actions as “breaking the law,” and it is awkward to frame the inactions of feeding, housing, clothing, and ferrying refugees to lawyers and medical clinics within the framework of civil disobedience. Knowledge and experience led Sanctuary defendants to take a series of steps that appeared necessary to provide safety and humanitarian aid to hunted people: first, to aid Central Americans detained in American and Mexican jails, and second, to aid refugees in avoiding detention.

### 1. Distinguishing Civil Initiative from Civil Disobedience

The simplest justification for disobedience of particular rules is that the rules implicate one in immoral actions or coerce one to violate one’s own beliefs.<sup>324</sup> Disobedience might also be undertaken to expose and rearrange the premises of the legal system that harms a class of people. As Martin Luther King, Jr. taught: disobedience may be an expression of respect for the system, an act of hope in persuading others, or an act of love for enemies.<sup>325</sup> None of these rationales was claimed directly as a purpose or rationale for the Movement by any Sanctuary members with whom I have spoken. Yet, the Movement—the aggregate of the named defendants and unnamed and unnumbered participants—did challenge premises about what is “law.” The Sanctuary members claimed that they act to serve the law.<sup>326</sup> They also claimed that the U.S. government was the outlaw, acting in violation of national and international provisions of asylum and non-return to civil strife.<sup>327</sup>

A variant justification for civil disobedience does comport with the later thinking of some central figures in the Tucson Sanctuary Movement. This variant is the idea that government must earn the people’s consent over and over again to sustain democracy. The exercise of consent, however, carries with it the option to withdraw or refuse consent. From this perspective, it is possible to tell the story of the Movement as a heroic epic, challenging entrenched policies and policymakers with a contrary normative understanding, and enabling citizens to insist on changing those policies of exclusion.

---

of Rev. John Fife).

324. MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW* 114 (1988). Civil disobedience can be construed as adherence to competing, more compelling, or prior norms, such as religious beliefs, that make the disobedience of law obligatory and not merely justifiable. *Id.*

325. MARTIN L. KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 102-03 (1958).

326. CRITTENDEN, *supra* note 7, at 234.

327. James A. Corbett, *Sanctuary, Basic Rights and Humanity’s Fault Lines*, Address before Western Social Science Association (Apr. 23, 1987) (on file with author) [hereinafter *Fault Lines*].

If this is a fair depiction, then the Movement is an empowering story of respect for law that should stand alongside the counter-depiction rendered by the legal system's narrative.

Among the Tucson Sanctuary network, the term "civil initiative" was used to describe the loosely concerted efforts of innumerable Sanctuary workers and the national network of declared Sanctuary churches, rather than disobedience.<sup>328</sup> In so doing, Sanctuary workers claimed justification under Nuremberg principles, and viewed their acts as legally justifiable acts designed to implement principles of international law when the government persists in committing acts that violate those principles.<sup>329</sup> Civil disobedience is commonly conceived as opposing unjust laws.<sup>330</sup> By contrast, the Tucson initiative was organized to implement positive law that mandates protection of human rights.<sup>331</sup>

A second distinction between civil initiative and civil disobedience is civil initiative's notions of accountability to the legal order.<sup>332</sup> To Corbett, "[m]uch that would be appropriate as civil disobedience to nullify unjust laws tends to destroy the very laws that civil initiative strives to [p]reserve."<sup>333</sup> We might compare the Movement's adherence to its interpretation of the law with Gandhi's campaigns of civil disobedience, designed to overthrow the British legal order in India, or American draft resistance in the Vietnam War era, designed to overturn military service laws. By contrast, civil initiative means doing justice, not as vigilantism, but in the narrower sense of assuming governmental functions on an emergency basis.<sup>334</sup> Thus, when the "INS is violating refugees' rights to safe haven and the laws that delineate the extent of protection of refugees, civil initiative will involve deciding who enters and who stays in the United States" in compliance with those laws.<sup>335</sup>

Practitioners of civil disobedience have typically breached a particular positive law to demonstrate its injustice, pled guilty, and then accepted punishment as a demonstration of their good faith and moral commitment to the larger system of law.<sup>336</sup> Civil initiative, on the other hand, is

---

328. CRITTENDEN, *supra* note 7, at 203.

329. Corbett, *supra* note 327. Note the contemporary literature on "civil resistance" and strategies of civil resisters. I suggest that plowshares may be resisters, but sanctuary in the borderlands is indelibly stamped with the healing concerns of the best of religious traditions everywhere, like the rescuing of Jews from Nazism.

330. See COHEN, *supra* note 322; Minow, *supra* note 322.

331. See *Aguilar*, 883 F.2d at 662.

332. See Corbett, *Fault Lines*, *supra* note 327.

333. *Id.*

334. *Id.*

335. *Id.*

336. Some analysts would further distinguish practices of "civil resistance," involving noncriminal activities designed to prevent ongoing wrongful activities by government. See, e.g., FRANCIS A. BOYLE, DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW 5, 16-

affirmative action to protect good laws.<sup>337</sup> It is the enactment of a legal reality, obscured by statist legalism, that societies and communities retain the power and responsibility to do justice under law, especially when the state betrays its trust to do so.<sup>338</sup> Because civil initiative requires accountability to the legal order, beyond the readiness to be punished for an admitted breach of law, civil initiative imposes an obligation of vigorous legal defense of good law.<sup>339</sup> Otherwise, the trial process becomes the occasion for government to disestablish the rights which good law exercises.<sup>340</sup>

The most significant divergence between civil initiative and civil disobedience is the element of taking unlawful action. Civil disobedients occupy a stance of petition, in which their disobedient conduct has important demonstrative and tactical dimensions so as to engage their fellow citizens and their government.<sup>341</sup> The practical effect of the civil initiative understanding, however, is to lay on its adherents the obligations to constitute the remedy to the injustice.<sup>342</sup> Civil initiative necessarily proceeds from a deliberative community that acts on its shared commitment to uphold the law. Disobedience may be enacted individually, as well as in communities. While civil disobedients may declare, alone or in concert, that "my conscience prevents me from following this unjust law," civil initiative is constitutive action in which a community acts on a shared understanding that "our faith requires us to uphold principles of just law." Civil disobedience tells stories of demonstrative acts.<sup>343</sup> Civil initiative proceeds from a restorative vision of justice that implements the just law.<sup>344</sup>

---

18 (1987). Civil resisters tend to plead not guilty, and at trial they attempt to offer an international law defense based on Nuremberg principles. *Id.* at 272-73.

337. See Corbett, *Fault Lines*, *supra* note 327.

338. *Id.*

339. *Id.*

340. Although significant demarcations are possible between civil initiative and civil disobedience, they do share some defining characteristics. Both are *deliberate* undertakings made in *protest* against some publicly conducted harm; *conscientious* acts done in the honest belief that the conduct is right; and generally *public* acts since the actors ordinarily see themselves as acting in the public service to correct a civic injustice.

341. See COHEN, *supra* note 322, at 60-65.

342. See Corbett, *Fault Lines*, *supra* note 327.

343. See, e.g., COHEN, *supra* note 322. This characterization is shaped, however, by a minority of society—judges and academics—who tend to analyze instances of civil disobedience as conflicts between individual conscience and the state. Many more Americans know of mobilizations by conscientious masses as important aspects of the Civil Rights Movement, of opposition to war and conscription, and of opposition to abortion. See Charles R. DiSalvo, *Abortion and Consensus: The Futility of Speech, the Power of Disobedience*, 48 WASH. & LEE L. REV. 219 (1991).

344. See Corbett, *Fault Lines*, *supra* note 327.

This central distinction sheds light on the status of citizen interpretation of laws within “statist liberalism,” which undergirds both the government actors’ narratives of illegality and the media depictions of disobedients. At the center of statist liberalism is the sovereign state, which issues directives from the top down, within a scheme of rights the purpose of which is to secure social order.<sup>345</sup> The state’s interpretations of these rights are the sole authoritative ones, and they impose obligations with which individuals must comply.<sup>346</sup> “The state aims primarily at the protection of its citizens, not at their participation, though . . . rights of participation may be among those protected.”<sup>347</sup>

On the other hand, “communitarian liberalism” retains the importance of rights and the rule of law, but also redirects the focus of the legal order. It deems primary the relationship among citizens rather than the relationship of citizens to the state; it treats justice, not order, as the paramount legal value.<sup>348</sup> Moreover, it permits alternative interpretations of the law that percolate through society and does not insistently privilege only official interpretations.<sup>349</sup> In downplaying the authority of the state, it attaches relatively little significance to national sovereignty, and treats human rights as equally important as state-created rights.<sup>350</sup>

In the Sanctuary cases, the Government did not tolerate this “communitarian liberalist” view; it repeatedly tried to undercut the power of the Sanctuary initiative by casting aspersions on its motivations.<sup>351</sup> One tactic was to characterize the Movement as “political,” both to erode its claim of being religiously compelled and to castigate it for failing to follow the official line in the Central American conflicts.<sup>352</sup> While some branches of the Movement would accede, the Tucson Sanctuary Covenant never did; the Covenant persisted to allocate its aid to help refugees according to their need for protection, not to advance partisan purposes.<sup>353</sup>

---

345. *See id.*

346. *See* Corbett, Address in Austin, *supra* note 168.

347. *See* DAVID LUBAN, LEGAL MODERNISM 32 (1994).

348. *See id.*

349. *See id.*

350. *See* Robin L. West, *Narrative, Responsibility and Death*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 172 (1990). Rights remain significant, for “[r]ights ensure us space to create chaos, disorder, randomness, change, from which we might fashion a new order. They guarantee a realm of freedom from the social need to conserve the meanings of the past, so that new meanings may emerge.” *Id.*

351. *See, e.g., Merkt*, 794 F.2d at 964 (discussing the lack of merit of the Sanctuary workers’ international law defense).

352. *See, e.g., Aguilar*, 883 F.2d at 673 (discussing the concern that some defendants would put United States foreign policy on trial).

353. *See* Corbett, *Fault Lines*, *supra* note 327 (contrasting the bases of the Movement with the government’s use of Carl Schmitt’s friend-enemy antithesis).

In the United States, we think of the state as the political form in which civil association dwells. Life on the border, however, caused a number of ordinary citizens to discover sharp inconsistency between the principles that constitute our civil society and the routine practices of the U.S. government.<sup>354</sup> As in *Dred Scott v. Sandford*,<sup>355</sup> the issue is whether basic rights to life, liberty, and dignity are established by one's humanity or by one's citizenship.<sup>356</sup> A serious consequence of subordinating human rights to the government's definition of the national interest is that it creates an underclass of people to whom little could happen that would be worse than capture and return to the situation they had fled.<sup>357</sup> This reality, made visible by Central American refugees in the 1980s, caused Sanctuary workers to respond to their plight. The Sanctuary workers acted on a Nuremberg-like principle that it is never illegal to provide nonviolent protection of human rights.<sup>358</sup>

As the Nuremberg argument is often invoked by passing reference, it is seldom clear whether Sanctuary workers intend the argument as a legal or moral defense.<sup>359</sup> The Nuremberg court took the position that "individuals have international duties which transcend the national obligations of obedience imposed by the individual state."<sup>360</sup> Because failure to adhere to these fundamental duties was held punishable by law, it follows that conscientious performance of those duties should be defensible by law. The

354. *Id.*

355. 60 U.S. (19 How.) 707 (1856).

356. Corbett, *Fault Lines*, *supra* note 327.

357. *See id.* The Immigration Reform and Control Act of 1986 made this subordination worse for undocumented refugees by making them the property of *coyotes* trafficking in undocumented labor. One effect was the much greater bite they can take of undocumented workers' earnings, enough greater that the *coyotes* are willing to risk being caught and prosecuted. Workers so subjugated and dependent live as slaves, that is, individuals within the body politic who are not protected from arbitrary detention, assault, and exploitation. *Id.*

358. *Id.*

359. *See* Appellants' Opening Brief, *supra* note 197, at 223-56. On appeal, Sanctuary defendants made no explicit reference to Nuremberg principles. They did argue that the trial court committed reversible error in refusing to permit a necessity defense. *Id.*

360. The Nurnberg Trial, 6 F.R.D. 69, 110 (1946). Those who prosecuted individual rescuers of Jews and other victims of Nazi genocide were guilty themselves of war crimes. *See* The Justice Trial, 4 L. Rep. Trials War Crim. 1, 49 (United Nations War Crimes Comm'n. Amer. Mil. Trib. Nuremberg, Germany, 1947); Matthew Lippmann, *Nuremberg and American Justice*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 951, 961 (1991) [hereinafter Lippmann, *Nuremberg and American Justice*].

Some have seen in this Nuremberg privilege a ready extension of an Anglo-American common law rule that one may intervene to halt the commission of a crime, even to employ deadly force to prevent the commission of a crime likely to cause death or serious bodily injury. Arthur W. Campbell, *The Nuremberg Defense to Charges of Domestic Crime: A Non-Traditional Approach for Nuclear-Arms Protestors*, 16 CAL. W. INT'L L.J. 93, 114 (1986).

Sanctuary civil initiative embraced the view that inherent in the Nuremberg principles is the legal privilege of ordinary citizens, under international law, to act in nonviolent ways to halt the commission of war crimes.<sup>361</sup>

The necessary follow-up question is how to integrate such extra-governmental civil initiative into existing legal systems. In Corbett's view, this integration is possible where doers of civil initiative hold themselves and their practice accountable to the rule of law.<sup>362</sup> How this was accomplished in the Tucson network is discussed in the next section.

## 2. Defining Civil Initiative

Corbett's image of civil initiative contrasts that of a statist conception of citizenry and government that places the state and its authority at the center of social order.<sup>363</sup> From a statist perspective, the state's coercive powers are appreciated as necessary to hold civil society together.<sup>364</sup> There is no necessity for "civil initiative" to maintain or extend the rule of law because the sovereign state maintains civil order.<sup>365</sup> The state's insistence that civil initiative is always unnecessary leads to the state's view that conduct in compliance with the laws that officials are violating must be criminal behavior, or at best, civil disobedience.

To Tucson Sanctuary members, such a statist perspective ignores the fact that the state itself is a primary threat to the rule of law.<sup>366</sup> State coercive power ultimately rests on the power—and constructed legal right—to imprison and kill.<sup>367</sup> Nonetheless, mighty as those powers may be, the bulk of them are effective only when a considerable degree of social cohesion is the norm.<sup>368</sup> A state maintains a legal order only so long as the citizenry discipline themselves to obey.<sup>369</sup>

What exists as a check to prevent civil initiative from becoming do-gooder vigilantism? Corbett concedes that civil initiative is a counter-assertion of wills: it substitutes the will of persons complying with human rights laws for the will of those designated by the government to decide who enters and who stays in the United States.<sup>370</sup> Against the concern that this substitution of wills could subject society to the inconstant, unpredictable,

---

361. Corbett, *Fault Lines*, *supra* note 327.

362. *Id.*

363. *Id.*

364. *See id.*

365. *See id.*

366. *See* text accompanying notes 324-27.

367. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

368. Corbett, *Fault Lines*, *supra* note 327.

369. *Id.* This theme is repeated directly in American jurisprudence. *See, e.g.*, United States v. Sisson, 297 F. Supp. 902, 910-11 (D. Mass. 1969).

370. Corbett, *Fault Lines*, *supra* note 327.

and arbitrary will of anyone who decides that refugees' rights are being violated, Corbett argues that civil initiative requires "rigorous efforts to establish full accountability."<sup>371</sup> "The accountability of civil initiative is to the rule of law rather than to government officials."<sup>372</sup>

Corbett reasons that when the state systematically violates human rights laws, a community must take on administrative functions that are the regular province of the government.<sup>373</sup> Civil initiative is an emergency exercise of governmental function.<sup>374</sup> Its participants must take special care to preserve the laws at issue—the laws that the civil initiative is defending.<sup>375</sup> Civil initiative's essential attributes are that it is: *nonviolent*, in that it neither evades nor seizes police powers; *truthful*, in that it is open and subject to public examination; "*catholic*" rather than factional, protecting any who are being violated regardless of victims' ideological positions or utility to others' politics; *dialogic*, in the sense of addressing government officials as persons, not merely as functionaries or opponents; and *germane*, in that it pertains to victims' needs for protection.<sup>376</sup> Thus, media coverage and public opinion play less important roles where the concern is to do justice rather than to petition others to do it.

This construction of civil initiative is readily distinguishable from the arguments proffered by John Locke and Thomas Jefferson in which citizens retain the right to revolt which they may exercise when government fails them.<sup>377</sup> For Sanctuary workers, a notion of civil initiative that would lead to the shattering of civil society would fail to respond to the initiating cause, which is the protection of human lives and liberty. Because civil initiative seeks to extend the rule of law rather than dismantle it, the right to revolt and the right to lobby are equal means of evading the responsibility to protect the violated.<sup>378</sup> Neither the overthrow of constitutional government, nor the passage of more laws is responsive when the life and liberty of human beings is at stake, and government officials fail to heed the law to protect them.<sup>379</sup>

---

371. *Id.*

372. *Id.*; see COUTIN, *supra* note 7, at 34-35 (describing the process of accountability of participants to the whole).

373. Corbett, *Fault Lines*, *supra* note 327.

374. *Id.*

375. *Id.*

376. CORBETT, *THE SANCTUARY CHURCH*, *supra* note 101, at 23-24 (1986). Corbett adds that civil initiative must be *volunteer-based* and that no new bureaucracy should be formed to oppose the return of these functions to the constitutionally designated government. Further, civil initiative must be *community-centered* in order to incorporate, yet reach beyond, individual acts of conscience. *Id.* at 24.

377. Corbett, *Fault Lines*, *supra* note 327.

378. *Id.*

379. Whether Operation Rescue or similar groups can fairly be characterized as a comparable "civil initiative," justifying the same claim of citizen interpretation as the Tucson

In their initial, serendipitous responses to refugees, Corbett and other individuals found themselves readily a part of the “recombinant church,” literally spending much of their time with priests, rabbis, nuns, pastors, and lay workers in churches, convents, and synagogues, all across the borderlands.<sup>380</sup> These alliances were formed despite the varied formal ties to religious communities.<sup>381</sup> Had the Sanctuary workers been acting merely as scattered individuals outside the church, each would have been making fleeting gestures of charity, rather than community protection from the forces arrayed to return people to the terrors from which they fled. Instead, inspired by what they learned, the Sanctuary workers covenanted to do justice through community cohesion, rather than state coercion.<sup>382</sup> While individuals may resist government disobedience to law, it requires a community to do justice, to forge the basic agreements that endure through

---

Sanctuary initiative, is beyond the scope of this Article. Whether Operation Rescue or similar groups can fairly be characterized as a comparable “civil initiative,” justifying the same claim of citizen interpretation as the Tucson Sanctuary initiative, is beyond the scope of this article. It is not self-evident which if any of these function as a spiritual community which together discerned that it should act collectively to provide a government function of protection in the emergency circumstance where the government does not. Even assuming this for the sake of argument, the distinctions outweigh the parallels with the Sanctuary Movement. They are closest in their aims, in what each aims to protect “others” in whom it vests full humanity (the fetus in the case of religious anti-abortion activists, refugees in the case of Sanctuary), from violence and death (abortion, and return to the violence an persecution they fled). Two significant distinctions appear more striking. First, the unlawful acts each undertakes. Religious abortion rescuers forcefully interfere with the human and constitutional rights of other specific persons who would undergo abortions. Certainly, rescuers who resort to murder and indiscriminate bombings and shootings of abortion clinics and workers, and the threat of the same which inflicts injury, death, and fear, do not parallel the Sanctuary initiative’s non-violent evasion of deportation. The use of violence eschews dialog, and rends good social order.

Second, the societal accountability entailed in legal interpretation appears absent in the case of abortion rescuers. The Sanctuary initiative sought to uphold principles of human rights for the protection of refugees, expressed in positive law, but also produced by a long human history of refugee protection, nourished by religious communities for aeons. Presumably, had the United States not reflected these human rights principles in its own positive law, much of the Sanctuary Movement’s sense of accountability to law would remain intact. While there are similar histories of community norm and legal articulation concerning the taking of human life, and the killing of innocents, the abortion rescuers do not appear to have a similar history of legal articulation upon which to draw concerning the unborn.

380. *See id.*

381. *See supra* part II. (discussing the religious means by which the *Aguilar* defendants got into this work).

382. *See* CORBETT, THE SANCTUARY CHURCH, *supra* note 101, at 14. In Corbett’s view, individual actions can be incorporated into a sustained work of community and a persisting effort to establish and protect human rights only through an institutional foundation within civil society as substantial as that of “the church.” *Id.*



generations and extend beyond individuals, and to sustain the commitment to uphold such covenants. Neither the state nor partisan politics can ever supplant the power of such community covenants<sup>383</sup> because of the essential difference between the power of such covenants when created by the social principle of community cohesion and the state's powers of coercion and domination over which political groups contend. "The choice is between the rule of love and the rule of violence," but not for or against the rule of law.<sup>384</sup>

### 3. Engagement Beyond Petitions to Government

This discussion has been about a nonviolent, law-respecting, human-rights-regarding engagement by citizen communities with the multivalent tiers for constituting legal meaning in society. This is how participants in the Tucson region of the Movement generally regarded their acts. It would be a loss to toss aside the Movement's remarkable achievements or to lose them in tired, narrow categories of religion, politics, or fringe dissent. Despite contrary judicial description, the Movement did endeavor to use the legal system. Sanctuary workers did not, however, confine their sense of responsibility as citizens to a state-centered conception limited to petitioning the government to do justice.

The prosecution of Sanctuary workers was only one form of judicial consideration of the issues presented by the Movement. One theme, sounded by courts in the Sanctuary trials and appeals, was that the defendants should have worked within the system of laws, rather than take it upon themselves to determine the obligations of the United States to asylum seekers.<sup>385</sup> In fact, the Movement took the Government to court on several occasions.<sup>386</sup>

INS practices of detention, misrepresentation, and coercion of refugees were the subject of lawsuits.<sup>387</sup> In *Orantes-Hernandez v. Smith*, the INS was directed to halt its pattern and practice of summarily removing Salvadorans from the United States.<sup>388</sup> A permanent injunction was entered after the parties failed to reach settlement.<sup>389</sup> The INS, however, successfully defended its practice of transferring detained aliens to remote

---

383. *Id.* ("Hypnotized by the modern state's destructive powers, we often ignore our own empowerment and choose instead to be moralizing bystanders, but no amount of preaching at a superpower will convert it into a Covenant people.").

384. *See id.* at 27.

385. *Elder*, 601 F. Supp. at 1578; *Merkt*, 794 F.2d at 956.

386. *See, e.g., supra* note 264.

387. *See id.*

388. *Id.* at 385.

389. *Id.*

detention centers as neither an interference with the right to counsel nor a denial of Due Process rights.<sup>390</sup>

In *American Baptist Churches v. Meese*,<sup>391</sup> churches and refugee service organizations challenged INS application of asylum laws and customary international law to the grant of temporary refuge.<sup>392</sup> Plaintiffs included mainline national religious organizations that argued that the government's prosecutions of religious Sanctuary workers under the harboring statute unconstitutionally interferes with the First Amendment right to Free Exercise of Religion.<sup>393</sup> Although the free exercise of religion and selective prosecution questions were dismissed,<sup>394</sup> the district court recommended that the surviving litigants meet.<sup>395</sup> In January 1991, a stipulated settlement was approved by the court, defining a class of Salvadorans and Guatemalans who would be granted de novo asylum adjudication.<sup>396</sup>

Sanctuary proponents also made efforts to persuade Congress to respond to the flood of Central American refugees, to curb the atrocities in their home countries, and to amend the immigration laws and enforcement practices.<sup>397</sup> Several Sanctuary defendants, among others, participated in these efforts.<sup>398</sup> In 1990, the immigration laws were amended to allow the Attorney General of the United States to designate "temporary protected status" to classes of foreign nationals.<sup>399</sup>

---

390. *Committee of Cent. Am. Refugees v. Immigration and Naturalization Serv.*, 795 F.2d 1434 (9th Cir.), *amended by* 807 F.2d 769 (9th Cir. 1986) (affirming denial of injunction prohibiting the transfer of detainees by INS).

391. 712 F. Supp. 756 (N.D. Cal. 1989).

392. *Id.* at 759.

393. *Id.*

394. *Id.* at 763, 766 (granting government motions to dismiss for lack of standing to bring a claim for violating the right to free exercise of religion and failure to state a claim). The court did deny the Government's motion for summary judgment concerning standing of the organizations themselves to assert free exercise claims and claim of selective enforcement. *See American Baptist Churches v. Meese*, 666 F. Supp. 1358 (N.D. Cal. 1987).

395. *American Baptist Churches*, 712 F. Supp. at 775.

396. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

397. *See CRITTENDEN*, *supra* note 7, at 299 (discussing a letter the Salvadoran Archbishop sent to Congress endorsing passage of the Moakley-DeConcini Bill, S. 377).

398. Hearings were held in April 1985 on the Moakley-DeConcini bill, S. 377, which aimed to suspend deportations of Salvadorans. *Hearing on S. 377 Before Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 1 (Apr. 22, 1985). Several members of Congress urged the Attorney General to do the same. In November 1986, Congress amended the criminal harboring statute as part of the Immigration Reform and Control Act of 1986. Provision for temporary safe haven was eventually made by settlement of the *American Baptist Churches* litigation. *See supra* note 152 and accompanying text.

399. *See generally* T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION

The Movement's efforts to protect the collective operation of religious life from government incursion were less successful. When the Tucson trial of a dozen Sanctuary workers revealed that INS had conducted an undercover investigation in which informants wearing body-bugs attended and recorded church services and church-sponsored meetings,<sup>400</sup> several Tucson congregations and national church bodies sued the United States, the Department of Justice, and the INS, claiming a violation of their First and Fourth Amendment rights.<sup>401</sup> In *The Presbyterian Church v. United States*, the trial court granted the Government's motion to dismiss.<sup>402</sup> Two years later, the Ninth Circuit Court of Appeals ruled, inter alia, that the churches had alleged sufficient injury for standing purposes,<sup>403</sup> and that sovereign immunity had been waived for the churches' nonmonetary claims.<sup>404</sup> The case was remanded on the questions of whether the churches had standing to seek injunctive relief and whether the case had become moot.<sup>405</sup>

On remand, the district court held that the Government's surveillance of worship activities did not constitute a search under the Fourth Amendment and would not, in the future, require a warrant "where an undercover agent is invited to participate in suspected criminal activities."<sup>406</sup> The court also held that the First Amendment protected plaintiffs' free exercise against governmental intrusion in the absence of a good faith purpose for the investigation.<sup>407</sup>

In short, a decentralized and loosely affiliated Movement mounted a full-court press on the political institutions to accomplish acceptance of their legal interpretations. Despite the characterization of the Movement by the government as political, and by the Court of Appeals for the Ninth Circuit as media-mad, the prosecutions of the Sanctuary workers do not appear to have been a calculated strategy, or even a very carefully considered

---

AND NATIONALITY LAWS OF THE UNITED STATES: SELECTED STATUTES, REGULATIONS AND FORMS 851-52 (1991) (explaining the legislative history of these provisions). Salvadorans who had been in the U.S. since September 19, 1990, were permitted to register for this status. Unlike asylum, which allows one to stay in the country indefinitely and to apply for permanent legal residence after one year, the temporary protected status (TPS) approved for Salvadorans expired on June 30, 1992. At that time those who had TPS became eligible for "deferred enforced departure," which delayed deportation for another year and authorized the U.S. president to extend this period. *Id.*

400. *See supra* note 188 (describing taped meetings and conversations).

401. *See The Presbyterian Church v. United States*, 870 F.2d 518, 520 (1989).

402. *Id.*

403. *Id.* at 523.

404. *Id.* at 526.

405. *Id.* at 529.

406. 752 F. Supp. 1505, 1513 (D. Ariz. 1990).

407. *Id.* at 1515.

possibility, to provide a vehicle for publicity and organization for the Movement.<sup>408</sup>

### V. CITIZEN INTERPRETATION AND JUDICIAL RESISTANCE

By insisting that undocumented Central Americans were legal refugees, rather than illegal aliens, Sanctuary workers breached one discourse conducted in juridical terms by legal institutions when interpreting legal codes. While juridical terms do not delimit social meaning, the power of official interpretations may be augmented through many American social practices. Sanctuary workers observed firsthand the innumerable ways that the official interpretations ensnared undocumented refugees in a system that constituted them as "illegal."<sup>409</sup> This interpretation compels the refugee at every step of the asylum process to define himself in terms of juridical status. The daily consequence was to make a refugee's ability to work, to study, or to obtain medical care contingent on official legal definitions.<sup>410</sup>

Sanctuary workers' practices resisted these meaning-accepting social norms, and so encountered legal meanings defined by government authorities. Assisting Central American refugees in any way customary to church ministries could be construed as criminal conduct: delivering groceries to a Salvadoran family could be construed as furthering the presence of aliens; hiring a Central American to do housework could be categorized as an unlawful hiring; and driving a Guatemalan from one borderlands town to another could be criminal transporting, or alien smuggling if the trip crossed the border.

Although people have been crossing national borders since borders were first conceived, the immigration discourse featuring "illegal aliens" is a modern development, arising with the establishment of republics that confer citizenship as an abstract and legalistic relation, rather than as a status between subject and monarch.<sup>411</sup> Recognition of citizenship produces its

---

408. A few Sanctuary workers did consider the prospect of confrontations in court in ways that invite characterization as political. See GOLDEN & MCCONNELL, *supra* note 7, at 68-69 (citing Elder's desire for a moral confrontation with the Reagan Administration).

409. See Corbett, *Fault Lines*, *supra* note 327 (discussing the unavailability of medical services for injured refugees).

410. Immigration laws and bureaucracies are woven into daily life. To enroll children in school, principals asked for social security numbers; employers require job applicants to present work authorization papers; some charitable organizations began to ask for green cards prior to dispensing aid. COUTIN, *supra* note 35, at 97.

In November 1994, California voters approved Proposition 187, a sweeping initiative that would deny virtually all publicly funded services—including public school and nonemergency health care—to undocumented people and their children. See, e.g., Robert L. Jackson, *Rights Panel Voices Concern on Prop 187*, L.A. TIMES, Dec. 17, 1994, at A27.

411. EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION

opposite, alienage. For much of the United States' history, there were no "illegal" aliens. Immigration was wide open and "aliens simply arrived on our shores, found lodging and jobs, and were assimilated by degrees into the society."<sup>412</sup> As nations assumed comparable authority to regulate travel across their borders, hordes of people displaced by World War I were thrust into an absurd split in identity: a physical existence severed from any legal existence.<sup>413</sup> The lack of legal existence meant that these stateless persons were denied a physical existence, as well.<sup>414</sup> Statelessness was an essential precondition to brutal persecution.<sup>415</sup>

Besides the public venues for confronting the immigration discourse, Sanctuary workers also encountered their own ideas of law, of justice, and of identity constructed in their shadow.<sup>416</sup> Many Sanctuary workers came to understand that, while the most definitive statements about juridical status may be made by government actors, private individuals are also agents of their own, and others', subjection to this extensive system of legally-directed social identities.<sup>417</sup>

Given this understanding of the necessary connection between government-sponsored definitions and the social construction of identity, any aid rendered by religious Sanctuary workers to undocumented Central Americans had "political" implications. Thus, their work was easy prey to obfuscating, pejorative descriptions, such as "political" and bad, instead of "religious." In this concluding section, I explore why it was so difficult for the courts to give credence to religiously based civil initiative. What explains the dismissive treatment given the Sanctuary workers' alternative

LAW ENFORCEMENT 2 (1986). The concept of alienage began with the Chinese exclusion Act of 1882. In succeeding decades, the United States government has established quotas for immigration from various countries, and criteria for the exclusion of many others, chiefly Communists, homosexuals, and felons. *Id.*

412. *Id.*

413. MICHAEL R. MARRUS, *THE UNWANTED: EUROPEAN REFUGEES IN THE TWENTIETH CENTURY* 179 (1985) ("Constantly questioned about who they were, what their status was, and what was their destination, these people could not cross international frontiers, could not remain where they were, and were often not supposed to be at liberty at all.").

414. *Id.*

415. *Id.* at 180. Stateless persons were "outlaws by definition," cut off from civilized society and completely at the mercy of the police who could expel them. *Id.*; see also HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 269-87 (1966).

416. CRITTENDEN, *supra* note 7, at 234 (discussing a split in ideology between the Tucson Ecumenical Council and the Chicago Religious Task Force on Central America).

417. See generally MICHEL FOUCAULT, *POWER/KNOWLEDGE* (1980) (explaining power, not as the clash of competing interest groups, but as a characteristic inherent to social structures, including the discourse that shape social life. Foucault's approval emphasized the productive character of power to create thoughts, prompt speech, and direct action rather than its repressive sensing or limiting character); see also MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1979).

interpretation of legality that it was so completely and firmly silenced in the official accounts of our nation's law?

*A. The Problem of Recognizing Religious Conscience and Dissent  
Together in Law*

Two attributes of the Movement make it a compelling study of religious-civil law dichotomy. First, the Movement is but one part of a mosaic of contemporary movements of religiously inspired intentional resistance to the law by citizens.<sup>418</sup> Second, these forms of religiously based interpretation of law do not fit neatly into the doctrinal pattern established by the free exercise of religion conflicts from which our jurisprudence has been formed. The doctrine has developed through cases involving religious practices observed or prescribed by minority sects.<sup>419</sup> However, none of the contemporary religious-dissent movements fits this sect-contained mold. In contrast, today's clashes between religious and civic obligations turn on the intensely personal religious motivation of the participants.<sup>420</sup> Although the beliefs upon which the actors are motivated may be shared by many others, those other participants are not necessarily of the same sectarian faith.<sup>421</sup> With respect to the Sanctuary workers, the lack

---

418. Operation Rescue, antinuclear activists and antimilitarists are other such movements. Many of their participants describe their acts as necessary according to their religious beliefs. Extensive media coverage brings these organized campaigns of dissent into most American homes. Even more remarkable is the extent of participation in these movements by thousands of ordinary, law-abiding Americans, either directly or through armchair support. The Movement's relief activities often involved whole cities, and some 200 congregations offered space as safe havens for Central American refugees. See Arthur Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 493 (1986).

419. *E.g.*, *United States v. Lee*, 455 U.S. 252 (1982) (addressing Amish objections to payment of Social Security taxes); *Braunfeld v. Brown*, 366 U.S. 599, *reh'g denied*, 368 U.S. 869 (1961) (addressing Jewish observance of Saturday as the Sabbath); *Reynolds v. United States*, 98 U.S. 145 (1878) (addressing Mormon teaching of polygamous marriage).

420. The United States has long had the reputation of being more overtly religious than other Western nations. Surveys indicate that religion in America is pervasive and important. Over 90% of Americans identify with some conception of God or Supreme Being. See Ari L. Goldman, *Portrait of Religion in U.S. Holds Dozens of Surprises*, N.Y. TIMES, Apr. 10, 1991, at A1 (survey of 113,000 people finding religion to be "very important" to over 55% of the population, with the figure rising to 85% when including those for whom religion is "fairly important"). The diversity of religious identification is enormous: one standard source identifies over 1,300 primary religious organizations in the United States. See J. G. MELTON, *THE ENCYCLOPEDIA OF AMERICAN RELIGIONS* (2d ed. 1987).

421. I make this case based on my research among Sanctuary workers and upon the work of others with respect to anti-abortion protesters. My research to date indicates that Operation Rescue defendants have not argued Free Exercise claims in court.

of organizational structure has been strikingly significant in the rhetorical and strategic moves of both the prosecution teams and the courts to silence the religious-practice character of the Sanctuary defendants' acts.<sup>422</sup>

This difference limits the group identity attributed to the defendants. Sanctuary workers cannot be treated as parallel to a familiar category of religions, like Mormons, Jehovah's Witnesses, or Amish, all of whom might be accommodated or otherwise treated as unique religious associations in the larger social order. Instead, these errant actors, despite being motivated by their respective religious beliefs, are more readily described in court without reference to their understandings of religious obligation. This description is both problematic and important because it suggests that, if followed to its logical conclusion, Americans have the opportunity for presenting claims of free exercise of religion only as an adjunct to membership in recognized sects.<sup>423</sup> If so, this diverges sharply from the consensus achieved in America by the end of the eighteenth century that government should not impose upon the belief of the individual.<sup>424</sup>

Conscientious dissent may be socially tolerable when the affected group can be clearly defined. But when the affected group is less defined by a common trait such as sectarian religion, the social order is threatened. In the case of Sanctuary prosecutions, the defendants' ran headlong into this dichotomy because no traditional or authoritative body directed the activities for which Sanctuary workers were prosecuted.<sup>425</sup> This fact perhaps accounts for the relative ease with which the government was able to treat Sanctuary defendants as nonreligious. If this is so, there is a wide gulf between American legal institutions and the intensely personal, yet noncanonical, religious experience that is widespread among today's citizens.

---

422. See CRITTENDEN, *supra* note 7, at 201-02. A significant element of the Movement and its prosecution, particularly the Tucson conspiracy trial which was approved and directed in part from the Justice Department, is the problem of its characterization as "religious" or "political" as if these are mutually exclusive. Its political meanings were not lost on the government prosecutors and federal judges. See *supra* text accompanying note 187.

423. See GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 95 (1993) (discussing the success of religions which rest their claims on the Ten Commandments in Free Exercise challenges).

424. JOHN LOCKE, *A LETTER CONCERNING TOLERATION*, reprinted in JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (J.W. Gough ed., 1956).

425. See *Merkt*, 794 F.2d at 956. The Supreme Court has not literally restricted the protection of religious belief to organized religion. It has observed that the Free Exercise guarantee is not limited to those "responding to the commands of a particular religious organization," *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 820 (1989), and that it "is not limited to beliefs which are shared by all the members of a religious sect," *Thomas v. Indiana Employment Review Bd.*, 450 U.S. 707 (1981).

Courts neutralize a defendant's religious motivations through other methods, as well. Coupled with the historical tendency of the courts to exclude dissenters' beliefs from judicial proceedings, there is a strong preference to classify cases arising out of conscientious nonobedience as "political," even where the essence of the conflict is religious.<sup>426</sup> Religious claims, treated as such, appear to be cognizable if they permit the court to remind us of the firmness of separation between church and state. Cases of conscientious disobedience that arise from religious understanding, such as refusing to submit to induction into the armed forces,<sup>427</sup> tend to be characterized as involving political, rather than religious positions.

The judiciary employs resistance of its own to claims arising from religious consciousness.<sup>428</sup> It is hard for courts to credit real religious human rights work, given the analytic framework used for religious motivation in legal settings. This framework partly reflects social conventions for understanding religious experience: it is personal. It is not appropriate to urge it on other individuals or on the political process because that would run afoul of majoritarian notions of liberal political order. The public should not pay for personal religious preferences, hence the separation strand of establishment cases. People conduct their religious business in church-like settings. Once religious practices, however, have effects in the public realm, the public deals with it as politics, the effect of which is not to credit your religiously conscious experience.<sup>429</sup>

Religious persons may have a difficult time compartmentalizing because it denies a central strand of religious experience: to rely on one's faith-based understandings for one's actions, whether those actions pertain to personal, public, or political activities. For some people, this occurs at significant moments, like the receipt of a draft notice. For others, this culminates into a faith-committed life, exemplified by joining a congregation or in choosing life work.

The dismissive treatment of religious conscience in the Sanctuary cases reflects the judicial skepticism in our First Amendment jurisprudence. The Supreme Court has been operating for generations without a unifying understanding of the Free Exercise of Religion guarantee. The meaning of

---

426. *E.g.*, *American Friends Service Comm. Corp v. Thornburgh*, 961 F.2d 1405 (9th Cir. 1992); *Ryan v. United States Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991); *Intercommunity Center for Justice and Peace v. INS*, 910 F.2d 42 (2d Cir. 1990); *United States v. Allen*, 760 F.2d 447 (2d Cir. 1985) (involving a religiously motivated nuclear protestor); *Cole v. Spear*, 747 F.2d 217 (4th Cir. 1984) (involving an application by an enlistee in the armed services for discharge as a conscientious objector).

427. *See Gillette v. United States*, 401 U.S. 337 (1971).

428. *See Aguilar*, 883 F.2d at 662.

429. *See* STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 6 (1994) (arguing that in the last 20 years there has been a tendency to exclude religion from the public discourse in both law and politics).



the Free Exercise of Religion Clause of the Constitution, our most authoritative text, is always in contest by virtue of the fact that meaning lies in the relation of text to the diverse and divergent narrative traditions within the nation.<sup>430</sup> Courts have preferred to skip the narratives (although that is where compelling meaning resides).<sup>431</sup> This diminution contributes to an impoverished and incoherent recognition of religious faith when it is exercised.

Within the profession of legal interpreters, the courts' incoherence in recognizing a religious faith can be explained by recognizing the continuum which courts have employed when articulating standards applied in free exercise of religion cases. At one end of the continuum, courts impose a standard of reasonableness of the claim for constitutional protection.<sup>432</sup> At the opposite end of the continuum, courts focus on assessing the subjective belief of the claimant and the sincerity of the claim that her conduct is central to her religious belief.<sup>433</sup>

430. See Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing the acknowledgment of the proliferation of legal meaning and its necessary pluralism).

431. *Aguilar*, 883 F.2d at 662.

432. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982) (upholding the application of the Social Security tax system on the Old Order Amish, despite claimants' belief that it was necessary to provide for each other directly, and thus was wrong for them to accept or provide these government benefits). Conventionally this would be described as an objective standard, but in this context I dismiss that characterization since its effect tends to be statist in that it recognizes the most assimilated, secularized notions and practices.

For generations preceding *Employment Div. v. Smith*, 485 U.S. 660 (1988), courts have, not surprisingly, leaned toward statist/objective evaluation of free exercise claims, and the result has almost uniformly been denial of the claim. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599 (1961) (declining to enjoin a state law requiring all businesses to close on Sundays, reasoning that the burden imposed on orthodox Jewish merchants was merely "indirect"); *Davis v. Beason*, 133 U.S. 333 (1890) (Idaho's territorial legislation held valid in refusing the vote to any person who advocated the practice of polygamy); *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding conviction of a Mormon in the Utah territory under a federal law criminalizing polygamy).

In conducting this type of analysis, courts focus on several factors: (1) the societal impact of protecting the prohibited activity when religiously motivated, see *Lee*, 455 U.S. at 258-59; *Braunfeld*, 366 U.S. at 608-09; *Davis*, 133 U.S. at 341; *Reynolds*, 98 U.S. at 167-68; (2) the degree of threat posed by the activity, see *Bowen v. Roy*, 476 U.S. 693, 709-11 (1986) (upholding denial of AFDC benefits to Native American family who refused to obtain a Social Security number for their two-year-old child against claimants' belief that doing so would violate their religious beliefs); *Lee*, 455 U.S. at 258-59; *Davis*, 133 U.S. at 342-43; *Reynolds*, 98 U.S. at 165-66; and (3) the extent to which the asserted right could be carried if recognized; see *Bowen*, 476 U.S. at 699-70; *Lee*, 455 U.S. at 260; *Braunfeld*, 366 U.S. at 608-09; *Davis*, 133 U.S. at 34; *Reynolds*, 98 U.S. at 166-67.

433. *Thomas v. Indiana Employment Review Bd.*, 450 U.S. 707 (1981).

At the subjective end of the courts' analytic continuum, the threshold question is whether the actor sincerely believes the conduct is central to her religious life.<sup>434</sup> While the government may not second guess a person regarding the truth, or other aspects, of the tenets of one's religion, it may seek assurance of the sincerity of a believer in her religion if her beliefs are in conflict with the law on that basis.<sup>435</sup>

A religious belief need not be shared by all other adherents of the claimant's faith to be protected,<sup>436</sup> but it helps.<sup>437</sup> The Supreme Court's cases evidence a pattern of preferring religion in its sectarian forms, with the outward trappings of practice such as priests and appointed practices of worship.<sup>438</sup> The Court further relies on a process of analogy.<sup>439</sup> In analogizing, the court's inquiry is "whether a conscientious objector who could not demonstrate membership in a church [can] show a given belief that is sincere and meaningful occupies a place in the life of the possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."<sup>440</sup>

Likewise, federal courts demonstrate skepticism of exotic beliefs or practices for those seeking protection under the First Amendment's free exercise of religion guarantee.<sup>441</sup> To curtail unpredictably broad consequences, the courts have appeared anxious not to extend constitutional protection to unorthodox and amorphous ideas and practices.<sup>442</sup>

434. See, e.g., *id.* at 707-716; *United States v. Ballard*, 322 U.S. 78, 81-82, 86 (1944); see also *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) ("indisputed that appellant's . . . religious belief was sincerely held"); *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972) (state stipulated to the sincerity of respondents' beliefs); *Sherbert v. Verner*, 374 U.S. 398, 399 n.1 (1963) (sincerity of appellants' beliefs unquestioned).

435. See, e.g., *Thomas*, 450 U.S. at 716 (courts are not arbiters of scriptural interpretation). The Court's analysis tends to feature factors such as: (1) a concern for fraud, or the likelihood that the claimant is obscuring a secular motive in the drape of free exercise discourse; (2) how large a group of which the claimant is a representative part; (3) how well established is the practice for which protection is sought; (4) and whether denial of protection will communicate governmental hostility to sincere religious practices. See, e.g., *Yoder*, 406 U.S. at 207-18, 235.

436. See *Thomas*, 450 U.S. at 714.

437. Compare *Merkt*, 794 F.2d at 956 with *Hobbie*, 480 U.S. at 136 (1987).

438. See FLETCHER, *supra* note 423. Hence, the courts have struggled with recognizing conscientious-objector status for persons seeking draft exemptions on religious grounds who were not conventionally religious. *Id.*

439. See *Seeger v. United States*, 380 U.S. 163 (1965).

440. See *id.*; see also *Gillette v. United States*, 401 U.S. 437 (1971) (holding that the exemption was available to those opposing all wars, not just those they viewed as unjust); *Welsh v. United States*, 398 U.S. 333 (1970) (holding that draftees were not required to oppose war on religious grounds, to qualify for the exemption).

441. See, e.g., *International Soc'y of Krishna Consciousness v. Lee*, 113 S. Ct. 37 (1992).

442. See *id.*

This skepticism is illustrated in the Sanctuary cases. The *Elder* court said it recognized the sincerity and religiosity of the claimant's beliefs, albeit after hearing evidence that Roman Catholics were permitted by their Church to believe differently about a faith requirement to offer sanctuary to refugees.<sup>443</sup> The Fifth Circuit was more disparaging in *Merkt*, when it analogized the Sanctuary defendants' claims of protecting refugees under human rights laws, to religiously motivated attempts to destroy nuclear weapons;<sup>444</sup> racketeering;<sup>445</sup> and refusal to testify before a grand jury.<sup>446</sup> The judicial treatment of objectors with religious claims is so preoccupied with preserving social order that it does not comprehend the vital role that conscientious conduct plays in maintaining a just social order.

Courts necessarily play a central role in the legal culture's recognition of religious life as part of citizen life. The legislative branch cannot assert itself because it is a task eluding complete description and, more importantly, because legislated accommodations may appear to be discriminatorily preferential.<sup>447</sup>

Both the claimed need for uniformity and the periodic concern over fraudulent religious claims are misleading criteria for analyzing the prosecution of the Sanctuary workers. First, the government's prosecution of the Sanctuary workers was not the result of even-handed, methodical enforcement of the border control laws. The number of refugees assisted by Sanctuary churches was minuscule compared to either the vast numbers of

---

443. *Elder*, 601 F. Supp. at 1577.

444. *Id.* (citing *United States v. Allen*, 760 F.2d 447, 453 (2d Cir. 1985)).

445. *Id.* (citing *United States v. Dickens*, 695 F.2d 765, 772-73 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983)).

446. *Id.* (citing *Smilow v. United States*, 465 F.2d 802, 804 (2d Cir.), *vacated and remanded on other grounds*, 409 U.S. 944 (1972) (holding a refusal to testify before a grand jury based on belief in "divine punishment and ostracism from the Jewish community" outweighed by state's interest in the testimony)).

447. *See, e.g., Thornton v. Caldor*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring); *Lee*, 455 U.S. at 263 (Stevens, J., concurring). The concern to avoid discrimination by the government among religions is mirrored in free exercise cases concerned with policing against fraudulent claims of religious motive and limiting the scope of a court's inquiry into a person's religious tenets. Justice Stevens wrote:

In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.

*Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring).

people crossing the U.S.-Mexican border illegally or to the numbers of people entering the United States through other avenues.<sup>448</sup>

Second, fraudulent religious claims are not a plausible concern, in light of the evidence and the federal courts' existing methodology for testing the sincerity of belief without ruling on their truth.<sup>449</sup> Although the churches' practices of notifying the government of their decisions to provide sanctuary<sup>450</sup> do not in themselves guarantee against the false adoption of religious guise for criminal purposes, no serious question has been raised about the authenticity of Sanctuary congregations' Presbyterian, Lutheran, Quaker, Reform Judaism, and Baptist ties. Distinguishing the Movement from alien-smuggling for profit requires no difficult analysis.<sup>451</sup>

### B. Judicial Denigration of Dissent

The published opinions of Sanctuary prosecutions and appeals persistently admonished the defendants for reinterpreting the law, in lieu of using the lawful

---

448. Numbers are difficult to estimate and subject to much dispute. The number of refugees provided sanctuary are estimated from 600 to 3000. See William C. Ryan, *The Historical Case for Sanctuary*, 29 J. CHURCH & ST. 209 (1987). Judicial concern has generally been on a much larger scale, as reflected in the Supreme Court's descriptions of the substantiality of governmental interest in stanching illegal immigration. See, e.g., *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 222 (1984) (Powell, J., concurring) (noting the magnitude of illegal aliens in the United States); see also *United States v. Ortiz*, 422 U.S. 891, 899 (1975) (Burger, C.J., concurring) (discussing the effects of the tide of illegal aliens); *Immigration and Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1048 (1984) (noting "the staggering dimensions" of the problem created for INS by the large number of deportable aliens); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) (discussing "the enormous flow of illegal aliens across [America's] southern border").

Some argue that illegal entries are so common and numerous, as to make our national borders irrelevant. See J. CREWSDON, *THE TARNISHED DOOR: THE NEW IMMIGRANTS AND THE TRANSFORMATION OF AMERICA* 111 (1983); R. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 36 (1984) (international concerns historically with the regulation of immigrant refugee populations).

449. See, e.g., *Thomas*, 450 U.S. at 716.

450. See CRITTENDEN, *supra* note 7, at 73-74. The Tucson covenant called for overt, not covert, aid; it was intentionally a very open, porous operation, which led some participants to expect to be infiltrated, as they indeed were. See *id.* at 164. Since the Fifth Circuit's first *Merkt* decision, Tucson Sanctuary workers have been mailing letters of notification to INS for every crossing they assist. The letters explain that the network is helping the refugee to obtain advice of legal counsel concerning asylum application. Author's interview with Jim Corbett, *supra* note 80.

451. One of the tasks of the infiltrators appears to have been to tape evidence of Sanctuary workers' receiving money after crossing Central Americans. Govt Tape (transcript on file with author). These efforts backfired when a tape recorded an infiltrator being reprimanded for suggesting the Movement charge a fee for bringing a refugee across the border. *Id.*

process.<sup>452</sup> This admonishment is a judicial trope, argued against a fear that to claim scope for religious conscience is to claim that one's values should prevail over the values chosen by the majority. The result of such misguidance is that each conscience is viewed as a law unto itself.<sup>453</sup> The implicit political theory of this perception is that so long as one participates in the values competition of the political marketplace, one cannot claim a constitutional right to avoid compliance on the basis that his values did not win the competition.<sup>454</sup>

This assertion is preposterous in the actual historical setting of the Movement. Sanctuary workers were not able to offer their values in the political marketplace because there was no public political forum in which they might present their values. There was no public deliberation of the draconian enforcement measures of the INS that were just being discovered. The causal links between the policies of the United States toward Central American governments and the flood of refugees were not widely known, nor were they in a form for public discussion. Because those constituting the Movement learned of the causal links by working with refugees and the INS, their work allowed them to help open American foreign policy towards Central America to democratic deliberation and change. Because so few Americans knew, or were concerned, about the impact of federal policy on Central American immigration, the Sanctuary workers and other dissenters from American foreign policy towards Central America were a distinct minority. In a nation based on majoritarian rule, a minority voice is a sure loser in the context of electoral politics or interest group lobbying in the political marketplace.

The judicial opinions reiterate a familiar thread in the rhetoric of democratic life: Citizens who possess the right to vote also possess the power to change laws and remove public officials.<sup>455</sup> Non-use of these powers is construed as consent to the authority of the law and of political officeholders.<sup>456</sup> This invocation in the opinions illustrates the confusions engendered when courts discuss political theory in the guise of removed judicial review: it is murk, not analysis.<sup>457</sup> Such discussions confuse citizen acquiescence with genuine consent; it supposes,

---

452. See *Aguilar*, 883 F.2d at 667.

453. See *Employment Div. v. Smith*, 485 U.S. at 669 (discussing Smith's argument that the Constitution permitted use of peyote in religious ceremonies despite its being an illegal narcotic). The *Elder* court expressed a parallel concern by recasting Elder's religious belief into his own "do-it-yourself foreign policy." 601 F. Supp. at 1578.

454. See *CARTER*, *supra* note 429 (arguing that the federal courts specifically, and the legal culture more generally, do not take religious values seriously as a special source of conscientious objection); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993) (arguing that the Free Exercise Clause requires the recognition of religious faith as a ground for exemption from legal obligation).

455. See, e.g., *Elder*, 601 F. Supp. at 1579; A. John Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 799 (1984) [hereinafter *Simmons, Consent and Democratic Government*].

456. See *Simmons, Consent and Democratic Government*, *supra* note 455, at 797.

457. See *Elder*, 601 F. Supp. at 1579.

wrongly, that consent can be given to laws, or officials, without prior or subsequent knowledge of them, and without the intent to consent.<sup>458</sup> Most fundamental, however, is the misperception that *individuals* possess these rights, for only *majorities* do.<sup>459</sup> Thus, one's failure to exercise these rights can in no way be construed as consent to particular laws, constitutional provisions, or acts of government officials.<sup>460</sup>

To reason in this way invokes majority rule as an expression of concern to preserve the body politic.<sup>461</sup> From this perspective, the legal system cannot permit itself to be overruled by forms of dissenting claims, whether religious or other forms. The legal system also cannot rationally disregard, or totally discount, the religious discourse of those who are expected to be its obedient subjects. The arguments of this nature made by the Sanctuary courts lack the sweeping force they hoped they might carry because these arguments deny too much. This argument's position is that the citizen never has the right to choose to disobey the official laws of his or her polity. This position, however, mistakes the character of moral life altogether by eliminating the necessity that citizens must choose their obedience if they are to be free. In essence, if citizens may not choose, then the state is wholly in charge of their obedience and the practice of obedience can contain no well-thought reflection.<sup>462</sup> Thoughtful citizens are made obsolete, resulting in a political majority comprised of "thoughtless slaves."<sup>463</sup>

A slightly more persuasive argument, hinted at by the courts who decided Sanctuary cases, is that social chaos may result if legal authority can be readily contested by appeals to matters outside that juridical system.<sup>464</sup> A companion idea is that such appeals threaten peaceful and orderly "community life" under laws.<sup>465</sup> There is little historical support for this expectation, particularly within the American political order.<sup>466</sup> Granting the premise, where the injustice of the positive law is atrocious, it must be contested. While some disorder may result, the health of the body politic is served by the genuine contest over the justice or injustice of the positive laws because the resulting contest allows the public to give serious consideration to the laws.

One further troubling observation is the array of procedural moves employed by the courts who heard the Sanctuary prosecutions to preclude the articulation, in court, of knowledge and beliefs that are in "opposition" to government

---

458. See Simmons, *Consent and Democratic Government*, *supra* note 455, at 797.

459. *Id.* at 799.

460. *Id.* (arguing that failing to do something can be a means of consent only when the inaction responds to a clear choice and signifies that such a choice has been made).

461. See COHEN, *supra* note 322, at 141.

462. *Id.*

463. See *id.*

464. *Merkt*, 794 F.2d at 955; *Elder*, 601 F. Supp. at 1578; see also COHEN, *supra* note 322, at 146.

465. COHEN, *supra* note 322, at 146.

466. *Id.* at 148-49.

policies.<sup>467</sup> The motion in limine in the Tucson Sanctuary trial functioned much like the justiciability and standing barriers commonly erected in contemporary cases of politically inspired acts of protest<sup>468</sup> and the formalistic standing analysis used in the nineteenth century to avoid cases challenging slavery.<sup>469</sup>

Whether or not this is the right line to draw, it has tremendous effect. A great proportion of civil resisters who are permitted to offer an international law defense *are* acquitted by a jury.<sup>470</sup> This pattern suggests that, when able to defend their actions, fellow citizens may be convinced that their actions were not in violation of positive law. If this is the case, courts are not furthering the interests of democracy when they erect procedural barriers to the presentation of defenses because of their “oppositional” character.<sup>471</sup>

How could the legal landscape become more respecting of a defendant’s conscience? One approach would be to resurrect historical links between human rights and the concept of “obligation to obey law.” This link would serve to reinvigorate democratic political theory. Seeing our constitution of polity as a moral, as well as a legal, community is profoundly historical.<sup>472</sup> Our nation’s history reflects a conception of fidelity to law that has been transformed from one of compliance with ordained roles and functions to one centrally premised on substantive values of respect for human rights—the central exemplar of which is the inalienable right to conscience.<sup>473</sup>

For some theorists, some form or degree of political anarchism is inherent in democratic values.<sup>474</sup> This anarchistic argument is supported by its criticism of traditional attempts of democratic theory to separate thought and action.<sup>475</sup>

467. See *supra* notes 193-96 and accompanying text.

468. See Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271 (1987); Lippmann, *Nuremberg and American Justice*, *supra* note 360, at 964-68 (1991).

469. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

470. See Francis A. Boyle, *International Law, Citizen Resistance, and Crimes by the State—the Defense Speaks*, 11 HOUS. J. INT’L L. 345 (1989); Lippmann, *Nuremberg and American Justice*, *supra* note 360, at 974.

471. See Frank Lawrence, Note, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HAST. L.J. 397, 417-27 (1989); Chaya Weinberg-Brodt, *Jury Nullification and Jury Control Procedures*, 65 N.Y.U. L. REV. 825, 857-65 (1990).

472. David A.J. Richards, *Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law*, 18 GA. L. REV. 771, 772 (1984).

473. *Id.* (discussing JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*).

474. *E.g.*, WILLIAM GODWIN, *ENQUIRY CONCERNING POLITICAL JUSTICE* (1976); R.P. WOLFF, *IN DEFENSE OF ANARCHISM* (1970).

475. The United States Supreme Court has apparently felt the compulsion to limit conscience to belief, see *Cantwell v. Connecticut*, 310 U.S. 297 (1940), and at times, has also felt the power of the critique, as when it extended the protection of the Free Exercise Clause to conscientiously motivated action in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding Amish noncompliance with school attendance laws), and in *Sherbert v. Verner*, 374 U.S. 398

Efforts to limit conscience to belief “has allowed conventional morality to justify coercion of acts so that uncritical public opinion tyrannizes both thought and action in ways that compromise the moral sovereignty of persons.”<sup>476</sup> The legal enforcement of mere congruence of belief creates a tyrannous public opinion which disables people from exercising independent conscience within the two united spheres of humanity: belief and action.<sup>477</sup> Treating the right to conscience as an inalienable right protects one’s moral integrity, which is the unity of belief and action.<sup>478</sup> To limit the right of conscience to belief alone “erects a wall [against] belief and action which shrivels conscience itself when conscientious belief cannot shape the experiences of our lives.”<sup>479</sup>

But to reject this argument with the anarchists, recognition that conscience includes action alone need not be taken as a pledge for absolute protection for conscientious action.<sup>480</sup> A narrower version of the anarchistic claim also suits the Movement’s civil initiative: a state’s coercion or criminalization must satisfy an argument which expresses the greatest respect for the diverse ways in which independent conscience may be expressed and exercised.<sup>481</sup> Such a narrower version is consistent with a respect for all beliefs. Such a formulation requires the state to justify coercion by something like a requirement of likely harm to others. Thus, the state must limit its coercion to protecting what free, rational persons acknowledge and accept as the general conditions of life, integrity, and security necessary to pursue the ends defined by their independent consciences.

The prosecution of the Movement fails this test. Was it conscientious action? Yes. Did the government know that? Yes, because of its undercover tapes. The government’s process of justification, however, was filtered through a statist lens that would brook no opposition to official versions of events in Central America. The Movement posed no meaningful threat to American borders, and there is no serious argument that can be made to construe the Movement’s border crossing as profiteering *coyotismo*. It was, however, independent interpretation of the law. For not towing the official line, the Movement was construed as political dissent. Thus, the government moved to squelch it.

---

(1963) (reversing the denial of workers compensation benefits to a Seventh Day Adventist who would not accept employment on her Sabbath).

476. Richards, *supra* note 471, at 778 (discussing JOHN S. MILL, ON LIBERTY 133-204 (1873)).

477. *Id.*

478. *Id.*

479. *Id.* at 779. Mill delivered a stinging critique that “this stifling lack of freedom of thought and action in England and America as the corruption of the Anglo-American democratic tradition.” *Id.* This invites linkage to (1) creation of culture, or more specifically, manufacture of consent; and (2) tolerance data on antidemocratic beliefs of many of Americans.

480. *Id.* at 779.

481. *Cf. id.*



One final consideration is the “arguments of rights as institutional rights in constitutional democracy.”<sup>482</sup> In the American constitutional framework, one can argue procedurally and substantively about rights, thereby invalidating offending laws. This feature makes civil initiative admirable because it counters official disobedience of laws that violate rights. This alternative political ideal emphasizes, rather than muzzles, conscientious, community-tested dissent. This difference explains the significance to American politics of the First Amendment values of conscience in religion, speech, and press.<sup>483</sup>

This understanding of the Constitution requires an independent judiciary to which constitutional rights may be argued.<sup>484</sup> Independence in this sense means “not managerial control but respect for dialogue about the meaning of personal rights.”<sup>485</sup> This perspective treats a person’s resistance to violation of rights not as “anarchic utopian hallucinations of those who must be managed but as demands of independent citizens for self-respect.”<sup>486</sup> Constitutional democracy also requires the fidelity of the government to ideals of the moral sovereignty of the people as constitutive and the recognition that the obedience of citizens to the state’s assertions of the law derives from the state’s success in meeting these ideals.

## VI. CONCLUSION

In the Sanctuary contest over legality, we see two visions of adjudication which compete within American legal theory. The ascendant view today is that adjudication is the interpretation of preexisting text guided by reason.<sup>487</sup> This view has superseded, but not eliminated, the competing vision that adjudication is the creation of law, backed by the force of the state—an act of power, not of

---

482. *Id.* (discussing H.L.A. HART, *ESSAYS ON BENTHAM* 220-42 (1982)).

483. This significance is always in flux. See Robin L. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531, 535 (1988). Martin Luther King, Jr. invoked this distinction by his refusal to obey a valid court order, and by arguing from his jail cell that he protested unjust practices that violated the Constitution. See Martin L. King, Jr. Letter from Birmingham Jail (April 16, 1963) in *WHY CAN’T WE WAIT* 77 (1963); see also *Walker v. Birmingham*, 388 U.S. 307 (1967). Reverend King was vindicated in this claim when the statute under which he was imprisoned was held unconstitutional. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). The ability of disobedience to prompt constitutional elaboration of normative values and human rights marks disobedience as a form of powerful faith in the deeper ideals of constitutional government. King, in Birmingham, revealed himself to be one of the nation’s most profound constitutionalists. See Richards, *supra* note 472, at 788.

484. Richards, *supra* note 472, at 788.

485. *Id.*

486. *Id.*

487. See, e.g., Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Ronald Dworkin, *How Law is Like Literature*, in *MATTER OF PRINCIPLE* 146 (1985).

discovery.<sup>488</sup> In the interpretive view, judicial obedience to legal text is an essential guard against the exercise of power.<sup>489</sup> Where power is destructive and threatening to the community's life, obedience to text is constructive: It uplifts the communitarian and rational aspects of society by preserving the meaning of our collective life and transforming power into reason.<sup>490</sup> By all appearances, the judges who decided the Sanctuary cases patterned their analysis on this dominant view. The moral force of this approach, however, fails in the larger context of the Sanctuary Movement.

The adjudicative decisions not to confront directly the Sanctuary claims give the juridical results a decidedly imperative, rather than interpretive, cast. Judges sought to insist upon obedience to one legal text, which criminalized the assistance of aliens, while subordinating the Refugee Act of 1980, which describes persons who should receive protection. It was perfectly reasonable for citizens to understand the Refugee Act of 1980 to be part of their nation's law, to which an obligation of citizen obedience may be asserted. The legal system's punitive response to the Movement cannot fairly be understood as protecting public meaning other than obedience to the state's choice of texts and assertion of unrivaled interpretive authority. While, in many circumstances, insistence upon obedience to the state may indeed serve to protect the body politic, the mere insistence upon obedience to some legal text cannot be said to infuse the adjudication with unquestionable morality. Without a justifiable claim to obedience to selected legal text, the Sanctuary adjudications smack of muzzling dissent.

The moral fodder in the Sanctuary contest lay not in the legal texts, but in the politicized process of asylum application and adjudication. Judicial insistence that citizens obey legal text, uncoupled from a similar expectation that government do the same, erodes, rather than upholds, the institutional virtue on which the judiciary stakes its claims to speak authoritatively.<sup>491</sup>

---

488. See Robin L. West, *Adjudication is Not Interpretation*, 54 TENN. L. REV. 203 (1987).

489. Dworkin, *supra* note 486, at 146 ("Law . . . conceived [as interpretation] is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory.") *But see id.* at 146 (recognizing law can be conducted so that it is "not a matter of personal or partisan politics").

490. See West, *supra* note 488, at 247.

491. See Fiss, *supra* note 487.