

## University of St. Thomas Law Journal

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Volume 13

Issue 3 *Sanctuary Cities Symposium*

Article 2

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2017

# Operation Sojourner: The Government Infiltration of the Sanctuary Movement in the 1980s and its Legacy on the Modern Central American Refugee Crisis

Kristina M. Campbell

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### Bluebook Citation

Kristina M. Campbell, *Operation Sojourner: The Government Infiltration of the Sanctuary Movement in the 1980s and its Legacy on the Modern Central American Refugee Crisis*, 13 U. St. Thomas L.J. 474 (2017).

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ARTICLE

**OPERATION SOJOURNER:  
THE GOVERNMENT INFILTRATION OF  
THE SANCTUARY MOVEMENT IN THE  
1980s AND ITS LEGACY ON THE  
MODERN CENTRAL AMERICAN  
REFUGEE CRISIS**

KRISTINA M. CAMPBELL\*

This Article will discuss “Operation Sojourner,” the federal government’s covert infiltration, and subsequent criminal prosecution, of persons involved in the Sanctuary Movement in the 1980s, as well as its impact on the modern Sanctuary Movement in Arizona and the Southwest occurring in response to the current Central American refugee crisis. Section I will provide an overview of the Sanctuary Movement in the 1980s, and the general religious beliefs and philosophies of those involved in the movement. Section II will discuss the genesis of Operation Sojourner by the former Immigration and Nationality Service (INS) in the early 1980s, and the criminal prosecutions of members of the Sanctuary Movement in the United States District Court for the District of Arizona. Section III will discuss one of the most high-profile cases that resulted from Operation Sojourner, *United States v. Aguilar*, and the United States Court of Appeals for the Ninth Circuit’s decision upholding the defendants’ convictions for conspiracy and harboring and transporting aliens. Section IV will discuss the current Central American refugee crisis and the litigation that has been filed on their behalf challenging the Obama Administration’s policy of detaining families seeking asylum on the U.S.-Mexico border. Finally, the Article will conclude with Section V, which makes an argument about the need for a revitalized Sanctuary Movement in churches, homes, and schools in re-

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\* Professor of Law and Jack and Lovell Olender Director, Immigration & Human Rights Clinic, University of the District of Columbia David A. Clarke School of Law. Thanks to Raquel Aldana, Andrew Ferguson, and Lindsay Harris for their helpful comments, and the organizers and participants of the University of St. Thomas Law Journal Symposium.

sponse to the government's overzealous enforcement of immigration law now and in the new administration of President Donald Trump.

## I. U.S. FOREIGN POLICY IN CENTRAL AMERICA AND THE SANCTUARY MOVEMENT

### A. Introduction

In the 1980s, Central America was ravaged by civil wars in Guatemala, El Salvador, and Nicaragua.<sup>1</sup> The United States, having just elected the extremely anti-communist Republican President Ronald Reagan, was deeply involved politically in the overthrow of social and communist regimes in Central America.<sup>2</sup> In Nicaragua, for example, the United States government was responsible for funding and training military forces to overthrow the controlling socialist party, the Frente Sandinista de Liberación Nacional (the Sandinista National Liberation Front).<sup>3</sup> Similarly, the United States government funded military groups seeking to overthrow the left-wing Frente Farabundo Martí para la Liberación Nacional (Farabundo Martí National Liberation Front), or FMLN.<sup>4</sup> Both the U.S.-backed military groups—but particularly the ones in El Salvador—were known for their brutal aggression, including torture, killings, and forced military conscription.<sup>5</sup>

Upon learning that many Central American refugees were fleeing their countries of origin due to the brutal tactics of the anti-communist military regimes, many people of faith and conscience began to organize a response to assist individuals seeking protection in the United States.<sup>6</sup> This response was particularly strong in the states on the U.S.-Mexico border, where Central American migrants were being discovered in large numbers in the desert and then placed in detention centers even after they expressed their fear of return to the countries they fled from and their desire to apply for asylum in the United States.<sup>7</sup> Stories told by survivors in the desert of the horrors they were attempting to escape in their home countries<sup>8</sup> prompted many

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1. See generally FABRICE LEHOUCQ, *THE POLITICS OF MODERN CENTRAL AMERICA: CIVIL WAR, DEMOCRATIZATION, AND UNDERDEVELOPMENT* 11–65 (2012).

2. ANANDA ROSE, *SHOWDOWN IN THE SONORAN DESERT: RELIGION, LAW, AND THE IMMIGRATION CONTROVERSY* 25–26 (2012).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 26.

7. *Id.*

8. ROSE, *supra* note 2, at 25 (“Equally as harrowing [as the stories of death in the desert] were the stories the survivors told after they recovered—stories of what they had left behind in their war-torn homeland. They told of seeing loved ones murdered, villages burned to the ground, women raped, children conscripted into guerrilla groups or government forces and of the certain death that awaited them if they were to be deported by the United States government.”).

persons in border communities to take action, particularly in Tucson, Arizona.<sup>9</sup>

People of faith and conscience in Tucson were particularly moved by the discovery of thirty-one Salvadoran migrants in the nearby Organ Pipe Cactus National Monument in July 1980, thirteen of whom ultimately died from the effects of hyperthermia.<sup>10</sup> Upon hearing about the desert survivors' detention in immigration facilities, local faith communities in Tucson raised money to pay their bonds.<sup>11</sup> They then took their humanitarian efforts a step further in activism when they learned that Salvadoran and other Central American refugees were being routinely denied the opportunity to apply for asylum at the border and immediately returned to their home countries.<sup>12</sup> Clergy and parishioners in Tucson who had assisted the survivors of the Organ Pipe incident, upon discovering what appeared to them to be the selective enforcement of U.S. immigration laws,<sup>13</sup> argued that under international law—in particular the 1951 United Nations Convention and Protocol Relating to the Status of Refugees, of which the United States is a signatory—the return of the survivors to El Salvador would be a breach of their human rights, since they are refugees as defined under the 1951 Convention<sup>14</sup> and the Refugee Act of 1980.<sup>15</sup>

The Refugee Act of 1980, which was signed by President Jimmy Carter, incorporated the United Nations High Commissioner for Refugees (UNHCR) definition of refugees into U.S. law and remains in our laws today.<sup>16</sup> However, the Sanctuary Movement was born because the position of the United States government was that the Central Americans flooding the country and fleeing violence in their home countries were not refugees under either the UNHCR or the Refugee Act of 1980.<sup>17</sup> The basis for the government's argument was that because many of the refugees fleeing the civil wars in Central America had fought and killed in those wars, they were excluded from the definition of refugee under both the Convention and the Act.<sup>18</sup> At the same time, the U.S. government was granting refuge

9. *Id.* at 26.

10. *Id.* at 25.

11. *Id.* at 26.

12. *Id.*

13. *Id.* at 27.

14. CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 14 (2010), <http://www.unhcr.org/en-us/1951-refugee-convention.html> (defining a refugee as a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”).

15. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

16. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2014) (codifying the definition of “refugee”).

17. ROSE, *supra* note 2, at 27.

18. CONVENTION AND PROTOCOL, *supra* note 14, at 16. The UNHCR Convention and Protocol Relating to the Status of Refugees, Article 1, Section F(a), provides that anyone who has

to persons fleeing communist regimes, such as the USSR, who could also be arguably excluded from the definition of refugee for engaging in the same conduct as the Central Americans fleeing civil war in their countries.<sup>19</sup> This was perceived as hypocrisy by many, and the faith leaders in Tucson quickly rose to the forefront of critical voices that gave rise to the Sanctuary Movement.

### B. *The Tucson Ecumenical Council Task Force on Central America*

The Tucson Ecumenical Council Task Force was organized primarily by Jim Corbett, a local Quaker, and Reverend John Fife of the Tucson Southside Presbyterian Church.<sup>20</sup> After helping Central American refugees get released from detention, the Ecumenical Council Task Force turned its attention to providing legal assistance to those seeking asylum, assisting them with preparation of the applications submitted to INS, and accompanying them to their deportation hearings when necessary.<sup>21</sup> However, it was the decision of the members of the Task Force to provide shelter to refugees in their places of worship—and, at times, their own homes—that placed them squarely in the line of fire of the federal government and, ultimately, led to the creation of Operation Sojourner.

The inspiration for the decision to shelter Central American refugees in houses of worship and the homes of congregants was the Underground Railroad, which facilitated the sheltering and smuggling of slaves to freedom before and during the United States Civil War.<sup>22</sup> The organizers of the Sanctuary Movement were not naïve—they were well aware of the fact that, like the anti-abolitionists who participated in the Underground Railroad, they were providing shelter to persons in violation of federal law.<sup>23</sup> It should also be noted that the Sanctuary Movement was heavily influenced by Liberation Theology,<sup>24</sup> a school of thought particularly popular in Latin American Catholicism “which emphasizes active opposition to all forms of oppression.”<sup>25</sup>

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“committed a crime against peace, a war crime, or crime against humanity” is excluded from the definition of refugee. *Id.*

19. ROSE, *supra* note 2, at 27.

20. *Id.* at 28–29.

21. *Id.*

22. See HILARY CUNNINGHAM, *GOD AND CAESAR AT THE RIO GRANDE: SANCTUARY AND THE POLITICS OF RELIGION* 37 (1995). Interestingly, the FBI and INS initially named their infiltration of the Movement “Underground Railroad,” but ultimately changed it to “Operation Sojourner” for reasons that are not entirely clear, but appears to be reference to the progressive Christian magazine, *Sojourners*, which covered the Movement extensively. *Id.*

23. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864) (authorizing the apprehension and return of runaway slaves to their owners, even if they made it to northern states or territories that were free states).

24. ROSE, *supra* note 2, at 28–29.

25. Sophie H. Pirie, *The Origins of a Political Trial: The Sanctuary Movement and Political Justice*, 2 *YALE J.L. & HUMAN.* 381, 403 (1990).

Thus, those who participated in the Sanctuary Movement were intentionally engaging in an act of civil disobedience<sup>26</sup> against what, in their opinion, was the unjust and unequal application of both international and domestic refugee law.<sup>27</sup>

An important difference between the Sanctuary Movement and the Underground Railroad is that, unlike the Underground Railroad, the Sanctuary Movement was not a clandestine operation. Rather, part of the strategy of the Movement was the open defiance of U.S. immigration policy toward Central American refugees. In addition to providing shelter to refugees once they had crossed the U.S.-Mexico border, several Movement volunteers actually accompanied refugees across the border and shepherded them to safety.<sup>28</sup> Participating congregations across the U.S.—not just those in Tucson—received Central American refugees and integrated them into their communities, providing them with homes and jobs. All of the participants in the Sanctuary Movement were aware that their actions subjected them to potential prosecution, as alien harboring and smuggling is a violation of the United States Immigration and Nationality Act (INA).<sup>29</sup>

However, Reverend John Fife and the Southside United Presbyterian Church took their civil disobedience a step further, by essentially daring the United States government to stop them from providing safe harbor to Central American refugees. The church was sheltering dozens of Central Americans on a daily basis, even hanging a banner outside the church proclaiming that refugees were being provided sanctuary there.<sup>30</sup> Indeed, Reverend Fife wrote a letter to the Attorney General of the United States, William French Smith, informing him of the sanctuary actions being undertaken by the Southside United Presbyterian Church:

We are writing to inform you that Southside United Presbyterian Church will publicly violate the Immigration and Nationality Act, Section 274(A) . . . . 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 . . . . The current administration of United States law prohibits us from

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26. See CUNNINGHAM, *supra* note 22, at 40. Fife and other Movement leaders ultimately decided that their actions were not ones of civil disobedience, and instead coined the term “civil initiative” to describe their actions. Civil initiative “was rooted in the principles of the Nuremberg Trials, according to which citizens are legally obligated to disobey inhumane governments.” *Id.*; see ROSE, *supra* note 2, at 30–31. The Sanctuary Movement workers defined civil initiative as “the legal right and the moral responsibility of society to protect the victims of human rights violations when government is the violator,” as they believed that the United States government was violating its own laws in its refusal to treat Central American refugees as bona fide asylum seekers. *Id.*

27. ROSE, *supra* note 2, at 30.

28. *Id.* at 28.

29. *Id.* at 28–29.

30. Pirie, *supra* note 25, at 399 (“[O]n March 24, 1982, on the second anniversary of Archbishop Romero’s death, Fife draped his church with banners reading, ‘This is a Sanctuary for the oppressed of Central America’ and ‘Immigration: Do not profane the sanctuary of God.’”).

sheltering refugees from Central America. Therefore, we believe the administration of the law is immoral as well as illegal . . . . Until such time [deportations are stopped], 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>31</sup>

As his letter to Attorney General Smith indicates, Fife and others involved in the Sanctuary movement believed that their defiance of the law was justifiable because they had a higher moral duty, rooted in their faith, to love their neighbors and welcome strangers.<sup>32</sup> Jim Corbett further elaborated on the Movement's philosophy by explaining:

Because the U.S. government takes the position that aiding undocumented Salvadoran and Guatemalan refugees in the country is a felony, we have no middle ground between collaborating and resistance . . . . For those of us who would be faithful to our allegiance to the Kingdom, there is also no way to avoid recognizing that in this case collaboration with the government is a betrayal of faith . . . . We can serve the Kingdom, or we can serve the kingdoms of this world—but we cannot do both.<sup>33</sup>

Corbett's explanation of the motivations behind the Movement reflects the evolution of his personal philosophy since his initial involvement in the cause. Corbett stated that at first, "he acted out of neither religion nor reason but out of anger. He thought he could simply call the immigration authorities and ask that Central Americans facing violence be allowed to stay in the United States."<sup>34</sup> Soon, however, Corbett's Quaker faith became his ultimate guiding principle in resisting the government's deportation of Central American refugees, and he believed that these principles would unite people of faith in resisting the government because "[t]he protection of people threatened by murder and torture is fundamental to the faith of many denominations."<sup>35</sup> Ultimately, this devotion to faith and conscience was the impetus for the creation of an undercover government sting targeting the Sanctuary Movement—Operation Sojourner.

## II. OPERATION SOJOURNER

Operation Sojourner, the Federal Bureau of Investigation (FBI) and INS program carried out over a ten-month period beginning in December 1983, involved agents from the former INS and their paid informants who "posed as sanctuary workers, dressed as clergy, taped meetings and religious services, [and] recorded license plate numbers from a church parking

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31. ROSE, *supra* note 2, at 29.

32. *Id.*

33. *Id.* at 34.

34. Wayne King, *Trial Opening in Arizona in Alien Sanctuary Case*, N.Y. TIMES (Oct. 21, 1985), <http://www.nytimes.com/1985/10/21/us/trial-opening-in-arizona-in-alien-sanctuary-case.html?pagewanted=all>.

35. *Id.*

lot.”<sup>36</sup> One of the chief INS officials who conceived of Operation Sojourner, INS Criminal Investigator James Rayburn, stated that Operation Sojourner would result in: “successful prosecutions that would disband the underground railroad and stop the illegal activities being engaged in by its members.”<sup>37</sup> Thus, the FBI and INS then recruited individuals to pose as Christian church members sympathetic to the Sanctuary Movement, with the express purpose of gathering evidence against church members involved in the Movement in order to build a case against them for what they believed to be an alien-smuggling conspiracy.<sup>38</sup>

There is also evidence that some government officials, and Rayburn in particular, believed that the Sanctuary Movement was a religious front for a political operation.<sup>39</sup> Initially, the government ignored the efforts of the Sanctuary Movement, because they did not want to make them martyrs for their religious cause.<sup>40</sup> In abandoning their initial “hands-off” position, the government adopted a political stance of its own—that lawbreakers could not hide behind their faith in order to avoid prosecution.<sup>41</sup>

One of the Operation Sojourner informants, Jesus Cruz, had been an INS informant since 1980. That was when he and his nephew, Salomon Graham, “were implicated in an alien-smuggling ring [in] Bonita Springs (Fla.)”<sup>42</sup> In exchange for immunity from prosecution, both Cruz and Gra-

36. Scott McCartney, *The Government's 'Operation Sojourner'*, ASSOCIATED PRESS, LEWISTON DAILY SUN, Oct. 24, 1985, at 7.

37. Betsy McDonald, *Sanctuary Trial Begins in Arizona*, MILITANT, Nov. 8, 1985, at 20; see also CHRISTIAN SMITH, *RESISTING REAGAN: THE U.S. CENTRAL AMERICA PEACE MOVEMENT* 297 (1996) (“Rayburn had been following the Sanctuary movement, which had received much media attention, for two years. The purpose of Operation Sojourner, as Rayburn began to envision it, was not to simply break up an immigrant-smuggling ring, but to determine the ‘true purpose’ of the movement (Rayburn suspected drug smuggling), to ascertain whether it constituted a threat to U.S. sovereignty, and to ‘neutralize’ the positive media publicity Sanctuary had been receiving” (internal citations omitted)).

38. McDonald, *supra* note 37, at 20.

39. See CUNNINGHAM, *supra* note 22, at 36 (stating Rayburn was particularly paranoid, and has been described as “a forty-one year old veteran of the Border Patrol from Texas [who] had served in the Vietnam War . . . and had a passionate hatred of Communism”).

40. See King, *supra* note 34 (noting a January 1983 internal government memorandum “suggested that any damage to immigration control caused by the sanctuary movement was minor compared to the ‘merits of achieving martyrdom’ the movement would gain if its members were arrested.” Similarly, Border Patrol agent Thomas Martin wrote in a memo to his superiors that “[a] ploy [of the Sanctuary Movement] is going to be Border Patrol ‘baiting’ and in order to demonstrate to the public that the U.S. Government thinks nothing of breaking down the doors of their churches to drag Jesus Christ out to be tortured and murdered . . . all political implications should be considered before any further action is taken toward this group.”).

41. *Id.* (“A. Melvin McDonald, the United States Attorney who signed the original indictments in January, said in announcing them that ‘merely because they wear the garb of the clergy, they have no greater or no lesser rights than anyone else.’”).

42. *Id.*; see also McCartney, *supra* note 36 (stating there were also allegations that Graham “provided prostitutes to migrant farm workers near Phoenix”).



ham had agreed to become INS informants,<sup>43</sup> and Cruz was also ultimately paid \$18,000 by the government for his informant work on Operation Sojourner.<sup>44</sup> During their time as government informants, both Cruz and Graham “befriended dozens of sanctuary workers and Central Americans . . . ate in their homes . . . [and] attended sanctuary strategy sessions. Cruz even transported refugees from border safe houses to churches along the underground railroad.”<sup>45</sup>

As part of his informant work, Cruz infiltrated Southside United Presbyterian Church in Tucson, as well as the Arizona Lutheran Church in Phoenix, where he became part of a Bible study group comprised of Guatemalan and Salvadoran refugees.<sup>46</sup> Cruz attended and secretly recorded approximately fifteen Bible study meetings at Arizona Lutheran Church, and supplied the names of undocumented migrants to the government.<sup>47</sup> Other undercover operatives, including INS agents, also participated in the Sanctuary Movement activities under the guise of being volunteers for the Movement.<sup>48</sup> Cruz, however, was the star of the operation, due to his “portly, amiable appearance”<sup>49</sup> and the real Sanctuary Movement volunteers suspicions about the other informants.<sup>50</sup>

Once the activities of Cruz and the other government informants were discovered, attorneys and activists associated with the Sanctuary Movement voiced their belief that the infiltration and clandestine recording of church groups by a paid spy is “outrageous government conduct.”<sup>51</sup> Others argued that the government’s tactics in Operation Sojourner violated the First Amendment’s guarantee of separation of church and state.<sup>52</sup> The government, however, was unapologetic, with INS spokesman Duke Austin stating at the time that “[i]nformers are the normal course of events in smuggling

43. CUNNINGHAM, *supra* note 22, at 37 (noting two INS agents, John Nixon Jr. and Morgan Lee, were also undercover informants in the operation).

44. SMITH, *supra* note 37, at 414 n.11.

45. *Id.* at 298.

46. *See* ROSE, *supra* note 2, at 35.

47. *See* McCartney, *supra* note 36.

48. *See* CUNNINGHAM, *supra* note 22, at 38.

49. *See* Marjorie Hyer, *Minister Says Bible Class Was Infiltrated*, WASH. POST (Oct. 26, 1985), [https://www.washingtonpost.com/archive/local/1985/10/26/minister-says-bible-class-was-infiltrated/8ed5648f-d378-4b78-87ba-76c450b75fe9/?utm\\_term=.c392cfd2493d](https://www.washingtonpost.com/archive/local/1985/10/26/minister-says-bible-class-was-infiltrated/8ed5648f-d378-4b78-87ba-76c450b75fe9/?utm_term=.c392cfd2493d).

50. *See* CUNNINGHAM, *supra* note 22, at 38 (“[M]any Sanctuary volunteers had become suspicious of these ‘volunteers,’ particularly Salomón Graham, John Nixon, and Morgan Lee. These individuals just did not seem to fit the profile of a Sanctuary participant . . . [A]ll three were in their late thirties or early forties, drove Trans Ams, were available twenty-four hours a day to do transporting, and seemed eager to take days off work to drive Central Americans to safe houses.”).

51. Hyer, *supra* note 49. Following the criminal indictments against Sanctuary Movement workers in January 1985, Rep. Peter Rodino, then Chairman of the House Judiciary Committee, wrote a letter to Attorney General Edwin Meese “questioning the undercover methods, and inquiring whether the infiltration of churches was standard operating procedure by the Department of Justice.” *Id.*

52. McCartney, *supra* note 36.

cases.”<sup>53</sup> However, Sanctuary Movement attorneys and activists were not the only ones concerned with the targeting of the Movement by the FBI and the INS:

Eight months into “Operation Sojourner,” INS Commissioner Alan C. Nelson responded to a letter from 10 congressmen who urged no prosecution of sanctuary movement workers. Nelson said the federal government would neither target the sanctuary movement nor raid churches. “There will not be any special targeting of any particular individuals or groups for prosecution,” Nelson wrote. “*Consistent with past and existing policy, INS does not ordinarily enter churches.*”<sup>54</sup>

Although it later became clear that INS Commissioner Nelson lied in his response to the Congressional inquiry, the INS attempted to justify their actions by continuing to insist that they were targeting alien-smugglers who just happened to be members of the faith communities, rather than the faith communities themselves.<sup>55</sup>

By January 1985, as a result of the FBI and INS surveillance activities of Sanctuary Movement workers, sixteen individuals—including Reverend Fife, Jim Corbett, and half of the members of the Arizona Lutheran Bible study group infiltrated by Jesus Cruz<sup>56</sup>—were indicted by a federal grand jury in Phoenix, Arizona, and charged with seventy-one criminal charges related to the harboring and transporting of aliens under 8 U.S.C. § 1324.<sup>57</sup> In addition to Fife, Corbett, and the Bible study group members, those indicted included two Catholic priests and a nun.<sup>58</sup> The case, controversial from the outset, is a startling example of government overreach and overzealous prosecution of non-violent people of faith and conscience.

53. *Id.*

54. *Id.* (emphasis added).

55. *Id.* (“We didn’t target the sanctuary movement,” [INS spokesman] Austin said. “We did say, ‘Hey, there’s a very active group in Phoenix.’ That was a target effort against that group of what we would say are smugglers.”)

56. See McDonald, *supra* note 37.

57. See Bill Curry, *8 of 11 Activists Guilty in Alien Sanctuary Case: Defiant Group Says 6-Month Trial Hasn’t Ended Movement to Help Central American Refugees*, L.A. TIMES (May 2, 1986), [http://articles.latimes.com/1986-05-02/news/mn-3211\\_1\\_illegal-aliens](http://articles.latimes.com/1986-05-02/news/mn-3211_1_illegal-aliens).

58. *Id.* See also McCartney, *supra* note 36; LINDA RABBen, SANCTUARY AND ASYLUM: A SOCIAL AND POLITICAL HISTORY 142 (2016) (“In January 1985, the government’s undercover campaign . . . against the movement reached its climax with the indictment of sixteen activists, including Jim Corbett and John Fife, for smuggling of illegal aliens and conspiracy, which were federal felonies . . . Eleven stood trial: two Catholic priests, one nun, a Presbyterian minister, a Methodist missionary, a Catholic director of religious education, the director of TEC’s refugee services, a Unitarian volunteer, a Mexican lay worker from Nogales, and two Quaker volunteers.”).

### III. UNITED STATES *v.* AGUILAR

#### A. *The Indictment and Trial of the Sanctuary Movement Workers*

The indictments against the Sanctuary Movement workers, which ultimately became the case captioned *United States v. Aguilar*, were handed down by a grand jury in Phoenix, Arizona on January 14, 1985.<sup>59</sup> In addition to the sixteen named defendants, there were seventy-four unindicted conspirators, and the INS conducted raids to arrest many of the Central American refugees who had been aided by the Sanctuary Movement volunteers.<sup>60</sup> While the indictments of the Sanctuary Movement workers in Arizona were not the first criminal prosecutions of Sanctuary Movement workers in the United States,<sup>61</sup> they were the largest and the most notorious.

The event that set the indictments in the *Aguilar* case into motion occurred on March 7, 1984, when Tucson Ecumenical Council Task Force staff coordinator Phillip Willis-Conger was stopped and arrested by the Border Patrol on his way back from Nogales, where he had been organizing the border crossing of four Salvadoran refugees.<sup>62</sup> Incident to Willis-Conger's arrest, the government seized a knapsack in his possession, which contained "the names and addresses of Sanctuary contacts along the U.S.-Mexico border, maps to safe houses, and a document by Jim Corbett titled 'Some Proposals for Integrating Smuggling, Refuge, Relay, Sanctuary, and Bail Bond Networks.'" <sup>63</sup> Although a judge ultimately dropped Willis-Conger's indictment due to the fact that the Border Patrols' stop and search of him was illegal,<sup>64</sup> given the information in the hands of the government, the Sanctuary community believed that additional criminal charges against them were forthcoming.<sup>65</sup>

The indictments that were ultimately filed were broad in scope, including charges of assisting with the crossing of undocumented aliens, and transporting, harboring, concealing, and shielding undocumented aliens.<sup>66</sup> Each count also included conspiracy and aiding and abetting allegations.

59. See CUNNINGHAM, *supra* note 22, at 44.

60. *Id.*

61. See *id.* at 43. In addition to *Aguilar*, there were other federal criminal prosecutions for transporting undocumented migrants in the early- to mid-1980s. "In February 1984, Stacy Lynn Merkt along with a Catholic sister, Dianne Muhlenkamp, . . . and three Salvadorans were stopped by the U.S. Border Patrol in Texas. Muhlenkamp pleaded guilty to a misdemeanor and was released on a year's probation, but Merkt was indicted and convicted in May 1984 on three federal felony counts: two of aiding and abetting the unlawful transportation of undocumented aliens and one of conspiracy to transport undocumented aliens . . . . Stacy Lynn Merkt was the first person in the United States to be tried and imprisoned for her work with undocumented Central Americans." *Id.*

62. *Id.* (noting another Movement volunteer, Katherine Flaherty, was also stopped and apprehended by Border Patrol).

63. *Id.*

64. *Id.* at 44.

65. CUNNINGHAM, *supra* note 22, at 44.

66. *Id.*

Those indicted ranged from the Movement leadership to everyday, occasional volunteers.<sup>67</sup>

The *Aguilar* trial of the Sanctuary Movement workers was a contentious affair from the very beginning. The trial judge overseeing the case was United States District Judge Earl H. Carroll in Tucson.<sup>68</sup> Although both the prosecution and the defense were apprehensive about Judge Carroll's predisposition to their respective theories of the case,<sup>69</sup> Judge Carroll ultimately ruled in favor of the government in almost every pre-trial motion submitted by the parties.<sup>70</sup> Judge Carroll's rulings on the scope of the evidence that could be presented at trial and what was prohibited from being presented had the effect of eliminating or severely compromising all the arguments the defendants intended to raise:

Judge Carroll ruled in favor of [prosecutor] Reno's motions and prohibited testimony and evidence that referred to (1) international law; (2) persecution and violence suffered by the aliens in their home countries; (3) comparative statistics pertaining to asylum policies for aliens from "either Communist-dominated countries and countries undergoing a Socialist or Communist revolution"; (4) comparative statistics regarding Central American aliens who have applied for or been granted asylum under the Refugee Act of 1980; and (5) religious convictions.<sup>71</sup>

Following Judge Carroll's rulings limiting the evidence that could be presented by the defense at trial, the defendants' attorneys<sup>72</sup> sought to have the charges against their clients dismissed on grounds that the government was violating their First Amendment rights and their constitutional guarantee of due process under the Fifth Amendment and that their indictments were the result of selective prosecution by the government.<sup>73</sup> Although Judge Carroll denied all of the defense motions to dismiss, he did ultimately agree to permit the defense to argue that they "did not have a specific intent to break the law because they might have believed . . . that they could take the aliens to the INS at a 'reasonable' later date."<sup>74</sup>

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67. *See id.* at 46 for a comprehensive chart of the charges faced by each of the indicted defendants in *Aguilar*.

68. *Id.* at 53. The trial was ultimately held in Tucson, although the federal prosecutor, had "weighted [the indictments] toward those working in the Phoenix area so that the trial could be held there—a conservative and 'law-and-order' city compared to Tucson." *Id.* at 44.

69. *Id.*

70. *Id.* at 54.

71. CUNNINGHAM, *supra* note 22 (internal citations omitted).

72. *Id.* at 55 (noting eleven of the defendants in *Aguilar* ultimately went to trial, and they each hired their own individual attorney).

73. *Id.* at 54–55 (stating in their selective prosecution argument, the defendants alleged that the government had declined to prosecute Arizona ranchers who had allegedly contracted to recruit and smuggle farm workers into the United States from Mexico).

74. *Id.* at 55 (citation omitted).

The theory of the government's case was that the Sanctuary Movement was a sophisticated alien-smuggling operation, disguised as a religious humanitarian operation.<sup>75</sup> Federal prosecutor Reno cast Fife, Corbett, Willis-Conger and Sister Darlene Nicgorski as the leaders of the alien-smuggling conspiracy (with Reverend Fife being the "mastermind"),<sup>76</sup> and the rest of the defendants as working at their command.<sup>77</sup> Before the trial started, Sister Nicgorski revealed that the government had offered a plea deal, which she and some of the other defendants rejected:

Sister Darlene Nicgorski said her lawyer had told her that the prosecution had offered the defendants a deal in which they could plead guilty to lesser charges in exchange for lenient sentences. "If we were willing to plead guilty to a misdemeanor, we would get six-month suspended sentences and probation," she said. "I did not accept that offer. . . . There were some efforts on the Government's part to coerce me into accepting that," she said, "because of the fact the Government particularly wanted John Fife and me—that if we refused this plea offer, that we would get a three-to-five-year sentence. 'Hard time' was I think the word used."<sup>78</sup>

Ultimately, despite having gathered hundreds of hours of recordings of the defendants and their unindicted co-conspirators as a result of the infiltration by Jesus Cruz and other government informants during Operation Sojourner, Reno decided not to introduce the tapes at trial because he feared a prolonged battle with defense attorneys about the admissibility of much of the evidence he wished to present.<sup>79</sup> Instead, Reno relied heavily on the testimony of Cruz, who was the first witness called to the stand in the government's case-in-chief on November 21, 1985.<sup>80</sup> However, Cruz was far from the star witness that the prosecution hoped he would be:

As his testimony progressed, Cruz's performance became highly problematic for the prosecution: he frequently contradicted information he had given to the INS; his English was extremely poor and, because Judge Carroll ruled that conversations Cruz had heard in English had to be repeated to the Court in English, much of his testimony was incoherent. . . . [T]he defense lawyers undermined Cruz's credibility as an agent of law enforcement by demonstrating that he had violated U.S. gun laws while working for the INS. In cross-examination, the defense tried to depict Cruz as a "Judas figure" . . . a person who had ingratiated himself to

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75. See Howard Witt, *Sanctuary Activists Lose Conspiracy Trial, 8 Guilty in Refugee Smuggling Case*, CHI. TRIB. (May 2, 1986), [http://articles.chicagotribune.com/1986-05-02/news/8601310946\\_1\\_sanctuary-leaders-donald-reno-rev-john-fife](http://articles.chicagotribune.com/1986-05-02/news/8601310946_1_sanctuary-leaders-donald-reno-rev-john-fife).

76. CUNNINGHAM, *supra* note 22, at 56.

77. *See id.*

78. King, *supra* note 34.

79. *See* CUNNINGHAM, *supra* note 22, at 57.

80. *Id.*

church people with gifts and lies, and then betrayed them to the government for money. To some extent, this strategy was successful; as it turned out, whenever the testimony of Cruz was the only incriminating evidence against a defendant, the jury dismissed those charges.<sup>81</sup>

In addition to Judge Carroll's rulings prohibiting the defendants from presenting the majority of the arguments in their defense as evidence, the defendants' attorneys argued that the Court was impermissibly biased in favor of the prosecution at trial.<sup>82</sup> Despite their vehement objections, however, Judge Carroll declined to grant any of the defense's motions to dismiss, and the trial continued without delay.

On May 1, 1986, the jury convicted nearly all of the defendants of alien smuggling, conspiracy, and harboring.<sup>83</sup> Six of the *Aguilar* defendants were found guilty of conspiring to smuggle aliens into the United States, and two additional defendants were convicted of harboring, transporting, and inducing the illegal entry of aliens.<sup>84</sup> James Corbett was acquitted of all the charges against him, along with Mary Kay Espinoza and Nena MacDonald.<sup>85</sup> Sister Nicgorski was "the hardest hit of the defendants . . . convicted of conspiracy and four counts of harboring."<sup>86</sup>

Following the convictions of the Sanctuary Movement workers, Judge Carroll "received hundreds of letters requesting leniency . . . [including] [o]ne . . . from forty-seven members of Congress."<sup>87</sup> Judge Carroll sentenced the convicted defendants on July 12, 1986 with suspended sentences of three to five years with probation, despite the expectation that he would sentence at least some of the more notorious defendants to jail time.<sup>88</sup> However, if the government hoped that these criminal convictions and the possi-

81. *Id.* (footnotes omitted).

82. *Id.* at 58 ("Convinced that the Court was biased, the defense team felt that it was being persecuted at every turn by a judge who favored the prosecution. He frequently permitted Reno (who had his own interpreter for the Spanish testimony) to object to the court's official translations. In one instance, where a tape recording had been introduced as evidence, Carroll ruled that what could have been either an 'un-huh' (yes), or an 'uh-uh' (no), was clearly an 'un-huh,' or yes.").

83. *Id.* at 59.

84. Murray Dubin, *8 Guilty in Sanctuary Trial*, PHILA. INQUIRER (May 2, 1986), [http://articles.philly.com/1986-05-02/news/26049094\\_1\\_tucson-presbyterian-sister-darlene-nicgorski-sanctuary-movement](http://articles.philly.com/1986-05-02/news/26049094_1_tucson-presbyterian-sister-darlene-nicgorski-sanctuary-movement).

85. *Id.*

86. CUNNINGHAM, *supra* note 22, at 59.

87. *Id.* at 60 (Other letters sent to Judge Carroll "flooded in from writers who identified themselves as nuns and priests, ministers, lawyers and law students, mothers, World War II veterans, university professors, concerned citizens, doctors and nurses, carpenters, Christians, and Americans.").

88. *Id.* at 61 ("The suspended sentences surprised most of the defendants, who had made preparations to go to jail. John Fife, for example, had been told by the national governing body of the Presbyterian Church U.S.A. that it would continue to support his family while he served his sentence, and the president of his Pittsburgh seminary pledged that he would make arrangements for Fife to begin doctoral studies while in prison." (parentheticals omitted)).

bility of prison time for the defendants imposed by the judge would put an end to the Sanctuary Movement, the opposite occurred: “the courtroom drama . . . heightened public awareness of the Sanctuary ministry, and prompted several hundred churches, a few synagogues, and twenty-two city councils to declare themselves public sanctuaries for Central American refugees . . . .”<sup>89</sup> This was due in large part to the public perception that the *Aguilar* prosecutions were selective prosecutions that were largely political in nature.<sup>90</sup>

### B. Critique of the Political Nature of the Aguilar Trial

Despite the government’s insistence that the prosecutions of the Sanctuary Movement workers was not a political act, there have been powerful arguments over the years critiquing the prosecutions as primarily, if not purely, motivated by political considerations.<sup>91</sup> Observers like Sophie H. Pirie have noted that “[t]o understand the Sanctuary Trials as political trials requires elucidating the sources of the Movement’s emergence as a challenge to the U.S. government.”<sup>92</sup> Thus, while the Sanctuary Movement may have started out as purely an expression of faith and conscience,<sup>93</sup> there is little doubt that the *Aguilar* trial had the effect of further politicizing the Movement itself, as well as the people who were active participants in the cause. One of the defendants in the *Aguilar* case, Jack Elder, stated:

I am looking for a confrontation. Not to be self-righteous about it, but there’s a moral force behind what we’re doing . . . that has the potential to focus some light on foreign policy. [The Administration] refuse[s] to look at the deeper issues. There’s a war going on in El Salvador now; there are bombing raids financed by the U.S. government. This is the issue people are fleeing from.<sup>94</sup>

Thus, like Corbett and Elder, many persons who were initially attracted to the Sanctuary Movement due to their religious convictions were radicalized politically<sup>95</sup> by the U.S. government’s criminalization of the Movement’s activities:

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89. *Id.* at 62.

90. See RABBEN, *supra* note 58, at 141–47.

91. See, e.g., Pirie, *supra* note 25.

92. *Id.* at 386.

93. *Id.* at 406. Initially, there was virtually no debate—aside from internal government memoranda—questioning the religious motivations of those affiliated with the Sanctuary Movement. “Particularly in the early years of the Movement, many official, [sic] media, and other observers thought that Sanctuary was basically the extension of an initial charity response that was using a somewhat political rhetoric to express an essentially humanitarian distress about deportations to El Salvador and Guatemala.” *Id.*

94. *Id.* at 400 (footnote omitted).

95. *Id.* at 400–01. It is also true that not everyone involved in the Movement embraced the politicization of its actions: “While the handful of people involved in channelling [sic] the churches’ faith-based charity response into a coherent movement seem to have had a distinctly political agenda . . . this, of course, does not mean that those participating in and constituting the

In most cases . . . Sanctuary participants did perceive themselves to be politically engaged, even if a large part of their rhetoric was religiously referential. And at least as a partial result, the U.S. government also came to perceive of Sanctuary as politically significant, a reaction which only hardened, rather than diffused, the political convictions and motivations of those involved.<sup>96</sup>

While many of the Sanctuary Movement workers' politicization may have been reluctant at first, the government's overzealous prosecution of their members ultimately had the exact opposite effect than its intention. Sanctuary volunteers were energized, rather than deterred, by the criminal prosecutions in the *Aguilar* case.

It cannot be overstated how exceptional and unusual the government's decision to prosecute the Sanctuary Movement was.<sup>97</sup> The *Aguilar* prosecutions were particularly shocking given the fact the U.S. government "pooh-poohed Sanctuary for two years as an irrelevant gesture . . ." <sup>98</sup> Once the government decided to change its tactics and stop ignoring the Movement, it went on the offensive with the general public and began casting Sanctuary as a radical political movement. State Department official Elliot Abrams argued that:

[T]he militant activists [in the Sanctuary Movement] are really just opposing American policy in El Salvador. I think they mislead many churchgoers . . . and others in human rights groups . . . [into] thinking that there is some horrendous . . . situation and that if they don't act thousands will die by the end of the week. I've seen some of the material that is handed out by organizers to people in churches. It's horrendously misleading stuff.<sup>99</sup>

The government's attempt to demonize the Movement, however, was largely unsuccessful.<sup>100</sup> Thus, the government decided it had no other option if it wanted to delegitimize the Sanctuary Movement. It therefore pur-

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spread of Sanctuary would also perceive of their enterprise in primarily political rather than religious terms." *Id.*

96. *Id.* at 401.

97. Pirie, *supra* note 25, at 406 ([G]roups [like the Sanctuary Movement] have rarely experienced the wrath of court-based political trials . . . . The United States is fairly tolerant of radical views as long as their expression does not threaten the structure of existing power relationships.").

98. *Id.* at 407 (citing Gary MacEoin, *A Brief History of the Sanctuary Movement*, in SANCTUARY: A RESOURCE GUIDE FOR PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE 14 (1985)).

99. *Id.* at 408.

100. See RABBen, *supra* note 58, at 141 ("[T]he FBI sent professional human smugglers to infiltrate the movement, tape sanctuary meetings, and provide evidence that participants were breaking the law . . . . According to Rev. Kennon of the TEC, . . . 'To their chagrin, these tactics did not diminish the movement. On the contrary, they spurred us on. In holy defiance of outrageous policies, hundreds of religious congregations across the nation publicly declared themselves sanctuaries for Central American refugees, as did colleges and universities, cities, and even states.'" (citations omitted).



sued criminal prosecution of its members for violating federal immigration law.

As described above,<sup>101</sup> the tactics engaged in by the government in order to build its case against the Sanctuary Movement workers were unseemly, at best.<sup>102</sup> Once they realized, however, “the impossibility of directly or effectively intimidating the new world view represented and actualized by Sanctuary, the government tried to control the presentation of that view in the courts to which it had forcibly tried to remove the debate about Sanctuary”<sup>103</sup> by preventing the introduction of virtually any evidence related to the defense that the defendants wished to present.<sup>104</sup> This strategy had the effect of assuring that the trial, and the guilty verdicts that were ultimately handed down, were political. John Corbett understood the impossibility of acquittal in the circumstances he and the other defendants faced, stating: “Many of us will probably serve some time in jail before we reach the day when all juries impanelled to judge a sanctuary case will know that they are deciding whether the violation of human rights by the government necessitates sanctuary.”<sup>105</sup>

Following the verdicts, prosecutor Reno praised the convictions, stating that “[t]he jury verdict is going to have a significant impact on those persons who were well-intended but misguided into subscribing to an action that twelve persons found to be a felonious act.”<sup>106</sup> INS Commissioner Alan C. Nelson added:

Above all, this case has demonstrated that no group, no matter how well meaning or highly motivated, can arbitrarily violate the laws of the United States. . . . Perhaps now that this verdict is behind us, those of the “sanctuary” movement can redirect their energies in a manner that is within the law.<sup>107</sup>

In reality, the convictions of the Sanctuary Movement volunteers had little deterrent effect on the Movement or the people who were devoted to its cause. After her conviction, Sister Nicgorski said: “If I am guilty of anything, then I am guilty of living out the Gospel . . . [t]he only conspiracy we were involved in here is a conspiracy of love.”<sup>108</sup> Years later, Sister

101. *See supra* Section II.

102. Pirie, *supra* note 25, at 409 (describing the government’s infiltration of the Sanctuary Movement as an attempt to “intimidate [the Movement volunteers] with silencing and terrorizing techniques. The employed techniques were strikingly similar in their legal aspects, if not in the intensity and frequency of their application, to those of the crass show trials under totalitarian regimes.”).

103. *Id.*

104. *See supra* Section III.A.

105. Pirie, *supra* note 25, at 410.

106. Dubin, *supra* note 84.

107. Curry, *supra* note 57.

108. Dubin, *supra* note 84; Edward B. Havens, *A Federal Jury Thursday Convicted Eight Church Leaders of . . .*, UPI (May 1, 1986), <http://www.upi.com/Archives/1986/05/01/A-federal-jury-thursday-convicted-eight-church-leaders-of/8755515304000/>.

Nicgorski stated that she and her co-defendants were not sent to prisons despite their convictions because of Judge Carroll's fear of inadvertently energizing the movement if he did so: "[t]he judge felt that, politically, he might make us martyrs if he sent us to prison."<sup>109</sup>

In some ways, Sister Nicgorski was right. The government's aggressive targeting of the Movement backfired,<sup>110</sup> as did their defensive and self-righteous posturing following the guilty verdicts.<sup>111</sup> The Sanctuary Movement continued, though its demands that the government cease the deportations of Guatemalans and Salvadoran refugees were never realized.<sup>112</sup> However, churches involved in the Sanctuary Movement were instrumental in filing a lawsuit challenging the government's policy toward Central American Refugees, *American Baptist Churches v. Thornburgh*,<sup>113</sup> that resulted in a significant settlement that eventually permitted many Central American refugees to apply or re-apply for asylum.<sup>114</sup> Thus, while the politicization of the *Aguilar* trial was potentially devastating not just for the individual defendants, but for the Movement itself, it ultimately cast aspersions on the motivations of the United States government that made it virtu-

109. *A Devoted Career Comes Full Circle*, JOLT LEFT (Aug. 22, 2011), <http://joltleft.com/a-devoted-career-comes-full-circle/>.

110. Pirie, *supra* note 25, at 410–11 (“[B]y ‘winning’ this battle, the U.S. government hardly won its war against the Sanctuary Movement. Its tactics of infiltration could not easily disarm the sanctuary which the church offered as much to Movement participants as to refugees. Its tactics only highlighted the impoverished persuasiveness of its substantive arguments about economic migrants and the spread of communism in Central America. . . . Furthermore, the U.S. government was facing a generation of people that had a tendency, once the ordinary ideology they endorsed was cracked from without, to swing quite wholeheartedly against the elites of that ideology and to view each governmental effort to shore up its position as further evidence of its error, illegitimacy, or complicity.”).

111. Dubin, *supra* note 84 (“‘The government will continue to prosecute smuggling cases, if there is credible evidence, no matter who is doing the smuggling,’ Reno said [after the verdict]. . . . ‘This is what aggravates me. This is the question no one asks, . . . What was the government supposed to do? Turn their backs’ on immigration violations just because religious people were involved?”).

112. Pirie, *supra* note 25, at 411 (“The Sanctuary Movement, however, did not ‘win’ its conflict with the government either. . . . Salvadorans and Guatemalans continued to be deported at approximately the same 99% rate as previously. There was no referendum, however informal, on the issues surrounding Sanctuary . . .”).

113. See RABBen, *supra* note 58, at 144–46 (“Some historians have claimed that the guilty verdicts caused the movement to decline, but the number of churches giving refuge to Central Americans actually increased after the 1986 trial. . . . Meanwhile public opinion gradually turned against the Reagan administration’s support for murderous right-wing regimes in Central America, especially after the Iran-Contra Affair in 1987 and the murder of six Jesuits in El Salvador in 1989. As a result, the incoming George H. W. Bush administration began backing away from overt involvement in the region. In 1990, the government stopped deporting Salvadorans already in the United States and granted them temporary protected status.”); In 1990, a lawsuit originally captioned *American Baptist Churches v. Meese*, was filed in May 1985 “on behalf of over eighty religious, refugee, and refugee legal assistance organizations.”). Carolyn Patty Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum Seekers*, 3 INT’L J. REFUGEE L. 347, 351 (1991).

114. See RABBen, *supra* note 58, at 146.

ally impossible for them to bring forth additional criminal Sanctuary prosecutions, and opened the door for the kind of large-scale reform in U.S. refugee policy that belied the Movement.<sup>115</sup>

#### IV. “CHASING LIBERTY”: LITIGATION CHALLENGING THE DETENTION OF CENTRAL AMERICAN REFUGEE WOMEN AND CHILDREN

Since 2014, the United States has once again become involved in a complex, multi-layered Central American refugee crisis that harkens back to the flood of refugees crossing our southern border more than thirty-five years ago. However, a large difference between the Central American refugee crisis of the past several years and the one in the 1980s is that there has been little response from the Sanctuary Movement to shield the refugees *seeking* safety in the United States today. While it is true that the Sanctuary Movement enjoyed a resurgence in the first decade of the twenty-first century,<sup>116</sup> that Movement has focused primarily on providing physical sanctuary to persons who have already been ordered removed from the United States.<sup>117</sup>

Nonetheless, there is strong belief among some that the current Central American refugee crisis is on par with the humanitarian crisis in the 1980s,<sup>118</sup> and once again the U.S. government’s response has been one of overzealous enforcement and perverse interpretations of our immigration laws.<sup>119</sup> The majority of the Central American refugees currently seeking protection in the United States are women and children—both “family

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115. *See id.* at 146–47 (“Although the Sanctuary Movement presented itself as religious in character, it operated in the secular realm, and it used political strategies to gain political objectives . . . . Challenging the inequitable implementation of asylum policies, [Corbett] called upon the US government to live up to its obligations under the Constitution and international law. The churches and faith-based organizations that supported the Sanctuary Movement not only offered refuge, they also advocated for the human rights of asylum-seekers, refugees, and migrants by carrying out a variety of public activities, pressuring the government, bringing legal actions, organizing local and national groups, and building coalitions.”).

116. *See generally id.* at 244–59 (discussing the “New Sanctuary Movement” post-9/11).

117. There are individuals and groups providing other kinds of sanctuary on a largely ad-hoc basis. *See id.* at 257–59 (discussing the social and emotional support that individuals provide to vulnerable migrants and children of deported persons).

118. ROSE, *supra* note 2, at 44 (Reverend Robin Hoover of Human Borders writes, “The human rights violations of migrants, documented or not . . . are now beginning to dwarf the violations of human rights observed during the massive Central American Exodus of more than a generation ago.”).

119. Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), [https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html?\\_r=1](https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html?_r=1). The government has been candid that its motivation for subjecting asylum-seeking women and children to detention is to make examples of them and deter further migration to the United States. “Frankly, we want to send a message that our border is not open to illegal migration, and if you come here, you should not expect to simply be released” [Secretary of Homeland Security Jeh] Johnson said.” *Id.*

units” and “unaccompanied minors”<sup>120</sup>—who are being detained or removed by the United States Department of Homeland Security (DHS) immediately upon their arrival in the United States, before they have the opportunity to express their fear of return to their countries of origin and apply for asylum.<sup>121</sup>

The family units are currently being detained in three family detention centers in Texas and Pennsylvania: the Karnes County Family Residential Center in Karnes, Texas; the South Texas Family Residential Center in Dilley, Texas; and the Berks County Family Residential Center in Berks County, Pennsylvania.<sup>122</sup> Since the detention of family units by DHS was resumed in the summer of 2014,<sup>123</sup> two different federal judges have ordered the government to discontinue its policy of detaining women and children as a deterrent against undocumented migration, and of holding children in detention with their mothers in accordance with the settlement agreement in *Flores v. Reno*.<sup>124</sup>

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120. This is the terminology used by Customs and Border Patrol (“CBP”) to categorize women and child migrants who arrive in the United States together, and minors who arrive in the United States alone. *See, e.g., United States Border Patrol Southwest Border Sectors*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20FY16.pdf> (last visited Feb. 15, 2017).

121. *See, e.g., Eleanor Acer, Immigrant Families Not Treated Properly*, ALBUQUERQUE J. (Aug. 3, 2014, 12:05 AM), <https://www.abqjournal.com/439865/immigrant-families-not-treated-properly.html> (“Last week I visited the center, previously a training facility for Border Patrol officers. What I saw revealed a deeply flawed approach, one that unjustly—and unnecessarily—prevents women and children from getting the protection they need and the fair process American ideals demand.”).

122. There was an additional family detention facility in Artesia, New Mexico, which was permanently closed in December 2014. *See Wil S. Hylton, The Shame of America’s Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), [http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?\\_r=0](http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?_r=0) (“[O]n Nov. 20, the administration suddenly announced plans to transfer the Artesia detainees to the ICE detention camp in Karnes, Tex., where they would fall under a new immigration court district with a new slate of judges.”).

123. In the mid- to late-2000s, President George W. Bush detained families in the T. Don Hutto facility in Texas. Following a lawsuit filed by the ACLU and the University of Texas Immigration Clinic in 2007, alleging multiple violations of the *Flores* settlement agreement, the government agreed to substantial remedies to correct deficiencies in the facility, ultimately closing it for good as family detention center in 2009. Berks County Family Residential Center in Berks County, Pennsylvania, remained the only family detention center in the United States until President Barack Obama reinstated family detention as a deterrent to migration in the summer of 2014, when it opened the now-closed Artesia Family Residential Center in Artesia, New Mexico. For a detailed report on the T. Don Hutto and Berks County Residential Facility, see WOMEN’S COMM’N FOR REFUGEE WOMEN AND CHILDREN & LUTHERAN IMMIGRATION AND REFUGEE SERV., LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES (2007), <https://www.women-srefugeecommission.org/images/zdocs/famdeten.pdf>.

124. *See* discussion *infra* Section IV.B; *see also* Stipulated Settlement Agreement, *infra* note 149.

A. R.I.L.-R. v. Johnson<sup>125</sup>

In February 2015, a group of women detained in the family residential center in Karnes City, Texas filed a class action lawsuit against Secretary of Homeland Security Jeh Johnson in the United States District Court for the District of Columbia seeking to put an end to DHS' policy of detaining them and their children without bond as a way to deter other Central American refugees from fleeing to the United States.<sup>126</sup> The Complaint describes the proposed class representative Plaintiffs as:

[M]others and their children who have fled severe violence in their countries—predominantly Honduras, Guatemala, and El Salvador—in order to seek asylum in the United States. Each Plaintiff and similarly situated individual has been found by an immigration officer or immigration judge (“IJ”) to have a “credible fear” of persecution, meaning there is a “significant possibility” she or he will be granted asylum. Nonetheless, Plaintiffs and other members of the proposed class remain in detention pursuant to a Department of Homeland Security (“DHS”) policy of locking them up and refusing to consider them for release on bond, recognizance, or other conditions (the “No-Release Policy”). DHS applies the No-Release Policy to Plaintiffs and those similarly situated not because they individually pose a danger to the community or flight risk that requires their detention, but in order to deter other Central American migrants from coming to the United States.<sup>127</sup>

The Complaint further alleged that:

even though [the Plaintiffs] are eligible under the immigration laws to be considered for release on bond, recognizance, or other conditions, Defendants are refusing to consider them for release and instead ordering their continued detention. Defendants do so without making any individualized determination as to whether their detention is necessary to prevent flight or protect the community.<sup>128</sup>

Key to the prayer for relief filed by the Plaintiffs in *R.I.L.-R.* is the allegation that “[p]rior to [the ‘surge’ of Central American migrants in] June 2014, mothers who arrived in the United States with their children, and who sought asylum, were generally released into the community while they pursued their asylum claims.”<sup>129</sup> However, the Complaint alleges that “in June 2014, President Obama directed DHS to take ‘aggressive steps to surge resources to our Southwest border to deter both adults and children’

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125. 80 F. Supp. 3d 164 (D.D.C. 2015).

126. See Complaint, *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d. 164 (D.D.C. 2015) (No. 1:15-cv-00011-JEB).

127. *Id.* at 1.

128. *Id.* at 2.

129. *Id.* at 8.

from coming to the United States,”<sup>130</sup> and the U.S. government “rapidly scaled up its family detention capacity as part of [its] overall deterrence strategy” that summer.<sup>131</sup> The Complaint also alleges that “DHS officials made clear that the detention of families . . . was intended to deter future migration,”<sup>132</sup> and proceeded to open three new family detention facilities in the Southwest in the following six months.<sup>133</sup>

Because the policy of detaining women and children from Central America seeking asylum was conducted “without any [individualized] determination of whether . . . detention is warranted based on flight risk or danger to the community,”<sup>134</sup> counsel for the Plaintiff class alleged that the DHS policy of “implementation of a ‘no bond’ or ‘high bond’ policy . . . in order to ‘significantly reduce the unlawful mass migration of Guatemalans, Hondurans, and Salvadoran[s]’”<sup>135</sup> interfered with the Plaintiffs’ ability to pursue their asylum claims in violation of the Administrative Procedure Act (APA) and the Due Process Clause of the Fifth Amendment to the United States Constitution.<sup>136</sup>

On February 20, 2015, United States District Court Judge James E. Boasberg issued a Memorandum Opinion granting Plaintiffs’ Motions for a Preliminary Injunction enjoining the U.S. government from continuing its blanket no-bond policy against Central American asylum seekers, as well as Plaintiffs’ Motion for Provisional Class Certification.<sup>137</sup> In his opinion, Judge Boasberg summarized the facts giving rise to litigation as follows:

The United States saw a surge in immigration in the summer of 2014 as people fled increased lawlessness in Honduras, Guatemala, and El Salvador. Plaintiffs (and other members of the class they seek to represent) are mothers and their minor children who escaped violence and persecution in these countries to seek asylum in the United States. After entering this country unlawfully and being apprehended, each was found to have a “credible fear” of persecution, meaning there is a significant possibility that she will ultimately be granted asylum here. Although, in the past, in-

130. *Id.* at 7 (citation omitted).

131. *Id.* at 8.

132. Complaint at 8, *R.I.L.-R v. Johnson*, 80 F. Supp. 3d. 164 (D.D.C. 2015) (No. 1:15-cv-00011-JEB) (“DHS Secretary Jeh Johnson testified before the Senate Committee on Appropriations. . . . [O]ur message to this group is simple: we will send you back.”).

133. The facilities opened in late 2014 were located in Artesia, New Mexico; Karnes City, Texas; and Dilley, Texas. As of late 2016, the only facility that has ceased operation is the one in Artesia. *See* Preston, *supra* note 119 (“Scrambling to respond to the surge of families across the Rio Grande this summer, Homeland Security officials opened a temporary center for 700 migrants on a law enforcement campus in Artesia, a remote town in southeast New Mexico. The last migrants in Artesia will be transferred out this week and the center closed, officials said.”).

134. Complaint at 10, *R.I.L.-R*, 80 F. Supp. 3d. 164 (No. 1:15-cv-00011-JEB).

135. *Id.* at 13 (citing affidavit of Defendant Philip T. Miller, ICE Assistant Director of Field Operations for Enforcement and Removal Operations (“ERO”) AILA Doc. No. 14080799).

136. *Id.* at 18–21.

137. *See R.I.L.-R*, 80 F. Supp. 3d at 171.

dividuals in this position were generally released while their asylum claims were processed, Plaintiffs were not so lucky. Instead, for each family, Immigration and Customs Enforcement determined that interim detention was the appropriate course. Chasing liberty, Plaintiffs turned to the courts.<sup>138</sup>

With that poignant introduction, Judge Boasberg held that “the circumstances here merit [the] extraordinary form of relief”<sup>139</sup> sought by the Plaintiffs, and went on to detail the ways in which the DHS policy of detention as a form of deterrence against further migration violated the law. Finding that “[*Plaintiffs in this case*] are entitled . . . to the protection of the Due Process Clause, especially when it comes to deprivations of liberty,”<sup>140</sup> Judge Boasberg found that the government’s stated interest in detaining the women and children asylum seekers from Central America who comprised the Plaintiff class in order to deter mass migration was “altogether novel.”<sup>141</sup> He further held that the Court found “[the government’s argument] that one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration . . . particularly insubstantial.”<sup>142</sup> Judge Boasberg explained that:

The Government has not . . . proffered any evidence that this reallocation of resources would leave the agency somehow short-staffed or weakened. Defendants have not conjured up the specter of an influx’s overwhelming the country’s borders or wreaking havoc in southwestern cities. The simple fact that increased immigration takes up government resources cannot necessarily make its deterrence a matter of national security, with all the attendant deference such characterization entails. In addition, a general-deterrence rationale seems less applicable where . . . neither those being detained nor those being deterred are certain wrongdoers, but rather individuals who may have legitimate claims to asylum in this country.<sup>143</sup>

Judge Boasberg ultimately determined that the government presented little evidence that its “detention policy . . . achieves its only desired effect [of] actually deter[ring] potential immigrants from Central America,”<sup>144</sup> and that the government’s “chosen vehicle [for its policy] demands significant deprivation of liberty.”<sup>145</sup> Thus, the Court concluded that “DHS’s current policy of considering deterrence is likely unlawful, and that the policy

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138. *Id.* at 170 (emphasis added).

139. *Id.* at 171.

140. *Id.* at 188.

141. *Id.*

142. *Id.* at 188–89.

143. *R.I.L.-R*, 80 F. Supp. 3d at 189.

144. *Id.*

145. *Id.* at 190.

causes irreparable harm to mothers and children seeking asylum,”<sup>146</sup> and enjoined the government from continuing to detain members of the Plaintiff class without bond on the basis of deterring future migration from Central America.<sup>147</sup>

*B. Flores v. Reno Settlement Agreement*<sup>148</sup> *and Subsequent Litigation*

In 1997, the U.S. government settled long-standing litigation challenging the detention of unaccompanied immigrant children.<sup>149</sup> Originally filed as a class-action lawsuit by the American Civil Liberties Union (ACLU) in July 1985 as *Flores v. Meese*, the *Flores* litigation “exposed the lack of standards for detaining immigrant children and the punitive conditions of their detention.”<sup>150</sup> The class representatives in *Flores* “claimed that they had a fundamental constitutional right to due process, which included the right to be released to ‘the custody of ‘responsible adults,’” rather than being detained by the government.<sup>151</sup> The case reached the United States Supreme Court in 1993, which held that the government’s detention policy toward unaccompanied immigrant children did not violate their substantive and procedural due process rights and was remanded back the District Court in California for a decision on the merits.<sup>152</sup>

Before the case was decided, however, the parties agreed to a settlement, which was finalized in January 1997.<sup>153</sup> The *Flores* Settlement Agreement (“FSA”) was sweeping:

The . . . FSA established a “nationwide policy for the detention, release, and treatment of minors in the custody of the INS.” The FSA required that “immigration officials detaining minors provide (1) food and drinking water, (2) medical assistance in the event of emergencies, (3) toilets and sinks, (4) adequate temperature control and ventilation, (5) adequate supervision to protect minors from others, and (6) separation [of children] from unre-

146. *Id.* at 191.

147. *Id.* at 192. See also Michael Tan, *ICE Policy Announcement on Deterrence*, ACLU: CASE UPDATES, (Jul. 3, 2015), <https://www.aclu.org/cases/rilr-v-johnson>. In May 2015, following Judge Boasberg’s Order granting Plaintiffs’ Motion for a Preliminary Injunction, “U.S. Immigration and Customs Enforcement issued a policy announcing that it would not consider general deterrence in its detention decisions for families,” and the case was administratively closed by agreement of the parties. *Id.*

148. See Rebecca M. Lopez, Comment, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1646–51 (2012) for a detailed procedural history of the *Flores* litigation.

149. See Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), [https://www.aclu.org/sites/default/files/field\\_document/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement011797.pdf](https://www.aclu.org/sites/default/files/field_document/flores_settlement_final_plus_extension_of_settlement011797.pdf).

150. Lopez, *supra* note 148, at 1647–48.

151. *Id.* at 1648 (citing Case Profile: *Flores v. Meese*, CIVIL RIGHTS LITIG. CLEARINGHOUSE <http://www.clearinghouse.net/detail.php?id=9493> (last visited Feb. 12, 2017)).

152. *Reno v. Flores*, 507 U.S. 292, 294 (1993).

153. Stipulated Settlement Agreement, *supra* note 149.



lated adults whenever possible.” Additionally, the FSA required that the INS (1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the “least restrictive” setting appropriate to the age and special needs of minors; and (3) implement standards relating to care and treatment of children in U.S. immigration detention.<sup>154</sup>

Despite the FSA, however, “INS compliance with the FSA was inconsistent.”<sup>155</sup> When the INS was dissolved and the Department of Homeland Security (DHS) was created in 2003, responsibility for the care of unaccompanied immigrant children shifted to the Office of Refugee Resettlement (ORR), within the Department of Health and Human Services (HHS).<sup>156</sup> Despite several systemic improvements as a result of this shift,<sup>157</sup> “several deficiencies still existed in the DHS process of taking unaccompanied minors into custody,” and “DHS did not ‘provide legislative instruction to, or oversight of, DHS on unaccompanied children, whether in the form of oversight or through the requirement to subcontract with other organizations.’”<sup>158</sup> This lack of oversight by DHS would give rise to two major lawsuits challenging the conditions of family detention as violations of the terms agreed to by the parties in the *Flores* Settlement Agreement.

### 1. Challenge to the Conditions of the T. Don Hutto Facility

In 2006, the George W. Bush Administration began holding families in detention at the T. Don Hutto facility in Texas.<sup>159</sup> In response, the ACLU and the University of Texas School of Law filed a lawsuit challenging the condition of detention as violation of the FSA in March 2007.<sup>160</sup> The alle-

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154. Lopez, *supra* note 148, at 1649–50 (first citing Stipulated Settlement Agreement *supra* note 149, at 1, 6; and then citing Jessica G. Taverna, Note, *Did the Government Finally Get It Right? An Analysis of the Former INS, the Office of Refugee Resettlement and Unaccompanied Minor Aliens’ Due Process Rights*, 12 WM. & MARY BILL RTS. J. 939, 953 (2004)).

155. *Id.* at 1650–51.

156. *Id.* at 1651.

157. *Id.* at 1652–53 (“The ORR was directed to create a national plan for the coordination of the care and the placement of unaccompanied children and to create a plan ‘to ensure that qualified and independent legal counsel’ would be appointed to represent the children. The HSA also required the ORR to ensure that the interests of the child are considered in decisions and actions relating to the care and custody of the child. Finally, the ORR was charged with making and implementing placement determinations, overseeing the facilities where the children are residing, ‘reuniting unaccompanied alien children with a parent abroad in appropriate cases[,]’ and developing statistical data on unaccompanied minors who are processed through the ORR.”) (citations omitted).

158. *Id.* at 1653 (citing M. Aryah Somers, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL’Y 311, 334 (2010)).

159. *See supra* note 123.

160. *See Case Summary to the ACLU’s Challenge to the Hutto Detention Center*, ACLU, <https://www.aclu.org/case-summary-aclus-challenge-hutto-detention-center> (last visited Feb. 13, 2017).

gations contained in the Complaint against Hutto—which was run by the for-profit Corrections Corporation of America (CCA)—shocked the conscience:

Reports began surfacing in late 2006 about the prison-like conditions of Hutto. Children were forced to wear prison uniforms (including prison “onesies” for infants), were threatened with separation from their parents as a disciplinary tool, received little or no recreational or educational opportunities, and were detained for months. Parents reported that they had to meet with their attorneys as a family, in the presence of their children. This was problematic for asylum seekers who wished to shield their children from their horrible experiences of being tortured, raped, and abused in their country of origin. Additionally, children and their parents had to use open air toilets without privacy screens and they were unable to leave their cells. One family reported that their nine-year-old son was humiliated when he had to use the bathroom in front of his mother and when she had to do the same in front of him. Moreover, the families were subject to headcounts seven times a day.<sup>161</sup>

The Hutto litigation was settled in August 2007,<sup>162</sup> after United States District Judge Sam Sparks of the United States District Court for the Western District of Texas encouraged the parties to enter into voluntary mediation to resolve the case.<sup>163</sup> The settlement agreement required ICE to provide children with educational time and supplies, as well as outdoor recreation time, and forbade guards in the detention facility from disciplining children or requiring them to wear prison uniforms, among other conditions.<sup>164</sup> Following the settlement agreement, the Hutto facility stopped detaining families in 2009, and the fight surrounding family detention was

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161. Lopez, *supra* note 148, at 1658–59.

162. Press Release, ACLU, Landmark Settlement Announced in Federal Lawsuit Challenging Conditions at Immigrant Detention Center in Texas: ACLU Urges Congress to End Policy of Detaining Immigrant Children (Aug. 27, 2007), <https://www.aclu.org/news/landmark-settlement-announced-federal-lawsuit-challenging-conditions-immigrant-detention-center>.

163. See Lopez, *supra* note 148, at 1659–60 (“Although the Judge agreed that the conditions at the facility likely violated the FSA, the Judge did not believe that detaining the noncriminal children in the secure facility violated the agreement. The FSA does not prohibit the detention of children; it only sets forth the standards for detaining children and encourages the use of alternatives to detention whenever possible. The Judge asked the parties to enter voluntary mediation. The attorneys who worked on the case stated that the Judge was concerned about the conditions at the Hutto facility, but the attorneys determined it was in the best interests of their clients to enter mediation and to settle.”) (citations omitted).

164. *Id.* at 1660. Among the conditions agreed to by ICE were the requirements that ICE allow children over the age of twelve to move freely about the facility; provide a full-time, on-site pediatrician; eliminate the count system which forces families to stay in their cells twelve hours a day; install privacy curtains around toilets; offer field trip opportunities to children; supply more toys and age- and language-appropriate books; improve the nutritional value of food; and be subject to external oversight to ensure their performance. Press Release, ACLU, ACLU Challenges Prison-Like Conditions at Hutto Detention Center (Mar. 6, 2007), <http://www.aclu.org/immigrants-rights/racial-justice/aclu-challenges-prison-conditions-hutto-detention-center>.

once again placed on the backburner until the Obama administration resumed large-scale family detention in 2014.<sup>165</sup>

## 2. Flores v. Lynch<sup>166</sup>

Following the opening of the family detention facilities in the Southwest by the Obama Administration in 2014, the conditions of the detention of immigrant children in those facilities was once again challenged by advocates as violations of the FSA.<sup>167</sup> The Plaintiffs filed documents seeking to enforce the FSA in the United States District Court for the Central District of California in February 2015.<sup>168</sup> On October 23, 2016, United States District Judge Dolly Gee issued her ruling, finding that the government was not in compliance with the terms of the Settlement Agreement.<sup>169</sup> Judge Gee began her decision with a quote from Mahatma Gandhi: “*An error does not become truth by reason of multiplied propagation, nor does truth become error because nobody sees it.*”<sup>170</sup> After a thorough analysis of the Settlement Agreement and the extensive briefing by both Plaintiffs and Defendants,<sup>171</sup> Judge Gee found that:

Defendants have offered no credible reason why they cannot comply with the INA while simultaneously adhering to the Agreement’s proscription against holding children for prolonged periods in secure, unlicensed facilities. The Court’s remedial order does not enjoin policies and practices that *comply* with the Agreement.<sup>172</sup>

However, despite her finding that the government was not complying with the FSA’s prohibition on the prolonged detention of children, the government has not complied with Judge Gee’s Order requiring that they modify

165. *Id.* at 1661 (“ICE discontinued using the Hutto facility to detain families, and stated that it would house families only at the Berks facility [and] Hutto was converted into a women-only facility.”).

166. 828 F.3d 898 (9th Cir. 2016).

167. See Memorandum in Support of Motion to Enforce Settlement of Class Action, *Flores v. Johnson*, No. CV 85-4544-RJK(Px) (C.D. Cal. Feb. 2, 2015), ECF No. 100-1, <http://www.aila.org/File/Related/14111359g.pdf>.

168. *Id.*

169. *Id.*; see also *Documents Related to Flores v. Reno Settlement Agreement on Minors in Immigration Custody*, AM. IMMIGR. LAWYERS ASS’N (Jan. 20, 2017), <http://www.aila.org/infonet/flores-v-reno-settlement-agreement> [hereinafter AILA.org] (“The court had ordered the government to bring its treatment of asylum-seeking families into compliance with the *Flores* settlement agreement by today, October 23. Because the government did not seek a stay, the court’s order stands while the government’s appeal to the Ninth Circuit moves forward, and as of today, children should be released ‘without unnecessary delay.’”).

170. *Flores v. Lynch*, 212 F. Supp. 3d 907, 908 (C.D. Cal. 2015) (emphasis in original).

171. See AILA.org, *supra* note 169, for a comprehensive summary of the briefing in the Motion to Enforce the Settlement Agreement.

172. *Flores*, 202 F. Supp. 3d at 915 (emphasis in original).

their practices in order to come into substantial compliance with the FSA.<sup>173</sup> Judge Gee's Order holds that:

[a]t a given time and under extenuating circumstances, if 20 days is as fast as Defendants, in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear, then the recently-implemented DHS polices may fall within the parameters . . . of the Agreement.<sup>174</sup>

Despite this flexible interpretation of how the government may comply with the Settlement Agreement, advocates assert that:

as of today, approximately 195 families that it represents have been detained in Texas for more than twenty days, and an approximate 507 represented families have been detained for more than five days. These numbers only include family units represented by the CARA Project; hence, the numbers of children and mothers held in violation of the court ruling is likely significantly higher.<sup>175</sup>

The government appealed Judge Gee's ruling to the United States Court of Appeals for the Ninth Circuit, and asked the Court to expedite the appeal on December 1, 2015.<sup>176</sup> Additionally, on May 15, 2016, the Plaintiffs filed a Motion to Enforce the Settlement Agreement with Judge Gee, alleging that the government had yet to substantially comply with the conditions of the agreement.<sup>177</sup> The Plaintiffs alleged that, as of the date the Motion was filed in May 2016,

in violation of this Court's Orders and the Settlement, conditions for children at CBP detention facilities remain deplorable with children forced to sleep in over-crowded cells on cold concrete floors with no mattresses or blankets, no change of clothes, no soap, towels or washing facilities, and entirely inadequate food and dirty drinking water.<sup>178</sup>

Subsequently, on July 6, 2016, the Ninth Circuit issued its decision on the government's appeal, affirming Judge Gee's ruling below and holding

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173. See AILA.org, *supra* note 169 ("To date, DHS has not complied with Judge Gee's order.").

174. *Flores*, 202 F. Supp. 3d at 914.

175. AILA.org, *supra* note 169. See CARA PRO BONO PROJECT, <http://caraprobono.org/partners/> (last visited Feb. 12, 2017). The CARA Project is the on-the-ground advocacy organization providing brief services and legal representation to women and children in family detention. CARA stands for the organizations that are members of the project – the Catholic Legal Immigration Network, the American Immigration Lawyers Association, the Refugee and Immigrant Center for Education and Legal Services, and the American Immigration Council.

176. Motion to Expedite Briefing and Hearing Schedule for Appeal, *Flores v. Lynch*, No. 15-56434 (9th Cir. Dec. 1, 2015), ECF No. 6-1, <http://www.aila.org/File/Related/14111359q.pdf>.

177. Notice of Motion and Motion to Enforce Settlement and Appoint a Special Monitor, *Flores v. Lynch*, No. CV 85-4544 DMG (AGRx) (C.D. Cal. May 17, 2016), ECF No. 197-2, <http://www.aila.org/File/Related/14111359t.pdf>.

178. *Id.* at 2.

that—despite the government’s arguments—that the FSA applies to all minors, whether unaccompanied or accompanied by their parents.<sup>179</sup> However, “[t]he court also found that the lower court erred in interpreting the agreement to provide an affirmative right to release for accompanying parents, but did not preclude such release and explicitly made no determination about whether DHS is making otherwise appropriate and individualized release determinations for parents.”<sup>180</sup> Although the Plaintiffs filed another Motion to Enforce the FSA on September 19, 2016,<sup>181</sup> as of the date of this writing, hundreds of Central American women and children seeking asylum remain detained in Karnes City, Texas; Dilley, Texas; and Berks County, Pennsylvania, in continuing violation of the FSA.<sup>182</sup>

#### V. THE ELECTION OF DONALD TRUMP AND THE NEED FOR A REVITALIZED SANCTUARY MOVEMENT IN HOUSES OF WORSHIP, CITIES, AND SCHOOLS

On November 8, 2016, Donald Trump was declared the President-elect of the United States of America.<sup>183</sup> This shocking development has struck fear in the hearts of immigrants and their advocates, particularly those who were targeted by the Obama administration for aggressive enforcement, or those who suffered from the benign neglect of President Obama to the immigrant communities he pledged to protect when he was first elected in 2008.<sup>184</sup> Almost immediately, in response to the news that Donald Trump had won the election, there was a rallying cry among immigrant communities and their advocates for a renewed sanctuary effort to combat the almost-certain increase in enforcement against immigrant communities once

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179. *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

180. See AILA.org, *supra* note 169.

181. Plaintiffs’ Combined Reply in Support of Motion to Enforce Settlement and Appoint a Special Monitor and Opposition to Defendants’ Motion for Evidentiary Hearing, *Flores v. Lynch*, No. CV 85-4544 DMG (AGRx) (C.D. Cal. Sept. 19, 2016), <http://www.aila.org/infonet/flores-response-motion-enforce-opposition-hearing>.

182. See generally *Family Detention Centers*, READINGEAGLE.COM (Dec. 8, 2016), <http://www.readingeagle.com/news/article/family-detention-centers> (“As of Monday, the U.S. currently holds a combined total of 2,479 asylum-seeking immigrants in family detention. Here is a snapshot of the three centers.”).

183. See, e.g., Matt Flegenheimer & Michael Barbaro, *Donald Trump is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), [http://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html?\\_r=0](http://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html?_r=0).

184. See Chris Riotta, *Will Donald Trump Repeal Obama’s Immigration Reform, DACA? Immigrants Fear the Worst in Next White House*, INT’L BUS. TIMES (Nov. 17, 2016), <http://www.ibtimes.com/will-donald-trump-repeal-obamas-immigration-reform-daca-immigrants-fear-worst-next-2447197>. The communities most betrayed by the Obama administration are the “Dreamers,” whom the President offered the half-baked “solution” of Deferred Action for Childhood Arrivals (“DACA”), an unenforceable promise not to be deported that came with work authorization. While many people lauded DACA, it can be revoked at any time, without notice and presumably with no or limited due process, which President-elect Trump seems intent on doing once he assumes office in January 2017. *Id.*

Trump takes office.<sup>185</sup> The renewed call for sanctuary can be broken down into three general locations: houses of worship, cities, and schools (primarily colleges and universities).

### A. Sanctuary in Houses of Worship

In 2006, following the introduction in Congress of the Sensenbrenner Bill,<sup>186</sup> the “New Sanctuary Movement” re-energized the concept of sanctuary for a time.<sup>187</sup> However, unlike the Sanctuary Movement of the 1980s, the New Sanctuary Movement was not focused primarily on providing physical sanctuary to undocumented persons.<sup>188</sup> Despite this new focus, the media at the time reported that “there are at least 13 undocumented immigrants currently receiving physical sanctuary at congregations around the country.”<sup>189</sup> And yet, “[i]n 2009, the New Sanctuary Movement’s website was blank and the domain was up for sale . . . and the New Sanctuary Movement remained in obscurity until 2014.”<sup>190</sup>

Trump’s victory in November 2016 gave renewed life to the Sanctuary Movement and faith communities who feel an obligation to shelter and protect undocumented immigrants. In Minnesota—which was the site of many active Sanctuary churches<sup>191</sup>—more than thirty congregations announced in December 2016 that they would provide shelter in their congregations to immigrants facing deportation, or support the efforts of other congregations that elect to do so.<sup>192</sup> Southside Presbyterian Church in Tucson—the Church at the forefront of the Sanctuary Movement in the 1980s—has con-

185. See Alexa Ura, *Undocumented Immigrants Fear What Trump Will do to ‘Sanctuary Cities,’* TEX. TRIB. (Nov. 18, 2016), <https://www.texastribune.org/2016/11/18/undocumented-immigrants-fear-what-trump-will-do-sa/> (“[E]ven without any specifics from Trump or his aides yet, activists and immigrants already say they fear that future traffic stops could become more likely to lead to detention by ICE.”).

186. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

187. See Randy Shaw, *Building the Labor-Clergy-Immigrant Alliance*, in RALLYING FOR IMMIGRANT RIGHTS: THE FIGHT FOR INCLUSION IN 21ST CENTURY AMERICA, 82–100 (Kim Voss & Irene Bloemraad eds., 2011).

188. See RABBen, *supra* note 58, at 244 (“‘The New Sanctuary Movement . . . has been less about physical sanctuary than about providing a new means of telling the story of the human costs of current US deportation policy . . . . Participating churches believe that providing humanitarian assistance does not violate the law as long as it is done openly and they do not hide illegal immigrants.’”).

189. *Id.*; see also Brooke Binkowski, *Activist Deportee Elvira Arellano Released in San Diego*, KPBS (San Diego) (Mar. 21, 2014), <http://www.kpbs.org/news/2014/mar/21/activist-deportee-elvira-arellano-released-san-die/>. One woman who took sanctuary in a church in Chicago, Elvira Arellano, received a great deal of press before her capture and removal by ICE in 2007 and return to the United States in 2014. *Id.*

190. RABBen, *supra* note 58, at 249.

191. See, e.g., Elizabeth Evans & Yonat Shimron, ‘Sanctuary Churches’ Vow to Shield Immigrants from Trump Crackdown, RELIGION NEWS SERV. (Nov. 18, 2016), <http://religionnews.com/2016/11/18/sanctuary-churches-vow-to-shield-immigrants-from-trump-crackdown/>.

192. See Mila Koumpilova, *Minnesota Clergy Vow to Give Immigrants Sanctuary*, STAR TRIB. (Minn.) (Dec. 6, 2016, 11:38 PM), <http://strib.mn/2gNApdG>.

tinued to receive people into sanctuary over the years,<sup>193</sup> and vowed to continue to provide sanctuary to people during the Trump Administration.<sup>194</sup>

As of the writing of this Article in December 2016, “approximately 450 houses of various denominations nationwide have offered to provide some form of sanctuary, including living space” to undocumented immigrants, in places as diverse as Brockton, Massachusetts; Philadelphia, Pennsylvania; Denver, Colorado; and Los Angeles, California.<sup>195</sup> While it remains to be seen how widespread the call to sanctuary in houses of worship nationwide, it is clear that those who have answered the call do so out of a deeply held belief that as people of faith, they have an obligation to provide shelter and harbor undocumented immigrants who may be in danger of deportation.<sup>196</sup>

### B. Sanctuary Cities

Although the debate around sanctuary cities was around long before Donald Trump announced his run for President,<sup>197</sup> it was a controversial

193. See John Burnett, *U.S. Churches Offer Safe Haven for a New Generation of Immigrants*, NPR (Feb. 9, 2016, 6:02 PM), <http://www.npr.org/2016/02/09/466145280/u-s-churches-offer-safe-haven-for-a-new-generation-of-migrants> (“Alison Harrington is minister of Southside Presbyterian Church in Tucson, Ariz., one of the founding sanctuary churches. She says their congregation has resumed sheltering asylum seekers fleeing federal agents. The last immigrant who sought refuge in their church stayed there 461 days before her deportation order was halted.”).

194. See Evans & Shimron, *supra* note 191.

195. See *Churches Vow to Offer Sanctuary to People in US Illegally*, NEWTON DAILY NEWS (Dec. 14, 2016, 10:49 AM), <http://www.newtondailynews.com/2016/12/13/churches-vow-to-offer-sanctuary-to-people-in-us-illegally/a7iu8zt/?page=1> (“In Brockton, a poor city of about 95,000 people south of Boston, four churches have pledged to take in immigrants fearful of being deported. . . . In Philadelphia, a coalition of 17 churches and two synagogues said it has seen a huge uptick in the number of volunteers for a program offering support to immigrants when ICE raids their homes. . . . [and] the Episcopal Diocese of Los Angeles, with more than 140 congregations, has adopted a resolution calling for ‘holy resistance’ to Trump’s immigration proposals and declaring itself a ‘sanctuary diocese.’”).

196. See Rev. Dr. Katharine R. Henderson, *Will You Harbor Me?*, HILL, Dec. 14, 2016, <http://thehill.com/blogs/congress-blog/homeland-security/310352-will-you-harbor-me> (“It’s time for Christians to remember that we are those whom God calls to do justice, to love kindness and to walk humbly. It’s time to denounce the voices that try to divide us from one another by creating a mythical fear of ‘the other’ alongside a mythical false hierarchy of value—that some lives are more deserving and worthy than others. These values of justice and kindness are not just Christian but mirrored in the tenets and practices of people of many faith traditions, who work together to build multifaith movements for justice.”).

197. See, e.g., Alex Kotlowitz, *The Limits of Sanctuary Cities*, NEW YORKER (Nov. 23, 2016), <http://www.newyorker.com/news/news-desk/the-limits-of-sanctuary-cities> (“The American movement to provide sanctuary to undocumented immigrants dates back thirty-four years, to the Southside Presbyterian Church in Tucson, Arizona, where the Reverend John Fife announced that his church would protect refugees fleeing the civil wars in El Salvador and Guatemala. Because the Reagan Administration supported the regimes in those two countries, it was difficult, if not impossible, for Salvadoreans and Guatemalans who felt persecuted by government forces to gain political asylum in the U.S., and harboring them was done in open defiance of the federal government. Between fifty and a hundred people stayed at the church each night, sleeping on foam pads on the floor, or on the carpet in the chapel. Volunteers provided meals, legal assistance, medical care, and English-language classes. Over ten years, Southside Presbyterian harbored thirteen thousand

topic throughout his campaign in 2015 and 2016.<sup>198</sup> Although there had been a trend in the early twenty-first century where several states—and the United States Congress—attempted to pass legislation penalizing cities that enacted sanctuary laws,<sup>199</sup> many of those laws were never implemented due to litigation,<sup>200</sup> and other jurisdictions remained undeterred by threats to sue them if they enacted sanctuary laws.<sup>201</sup>

Following the Presidential election in November 2016, many jurisdictions publicly announced their continued commitment to serve as “sanctuary cities,”<sup>202</sup> while others announced their intention to officially and publicly label their city as one of sanctuary due to fears surrounding upcoming Trump Administration policies.<sup>203</sup> Donald Trump “pledged that one of the top priorities for his first 100 days in office is to ‘cancel all federal funding to sanctuary cities.’”<sup>204</sup>

As of mid-December 2016, more than three dozen “sanctuary cities” had stated their intention to remain sanctuary cities “despite the threat of pushback from the incoming administration.”<sup>205</sup> As with the movement for the establishment of sanctuary campuses,<sup>206</sup> whether the new administration follows through on its promise to punish state and local jurisdictions that

refugees, and some five hundred other congregations across the country ultimately joined the effort. These churches and synagogues physically protected refugees in an act of open civil disobedience.”).

198. See, e.g., Benjy Sarlin & Alex Seitz-Wald, *Donald Trump and Hillary Clinton Are Universes Apart on Immigration*, NBC NEWS (Sept. 2, 2016, 7:09 AM), <http://www.nbcnews.com/politics/2016-election/donald-trump-hillary-clinton-are-universes-apart-immigration-n641686>.

199. See RABBen, *supra* note 58, at 250 (“In several states, including Arizona, Georgia, and Pennsylvania, as well as in the US Congress, bills were introduced to prohibit cities from providing sanctuary and to criminalize anyone who aided and abetted an illegal alien for any purpose.”).

200. *Id.* (“Some of these bills passed but were overturned by state and federal courts before they could be implemented.”).

201. *Id.* An example of one such location is Takoma Park, Maryland, whose police chief stated in 2014: “We do not enforce immigration warrants from ICE. . . . The Takoma Park police does not make inquiries regarding the immigration status of individuals that are contacted or arrested. . . . We do not and did not participate in ICE cases based only on immigration status.” *Id.*

202. See, e.g., Matthew Green & Jessica Tarlton, *What are Sanctuary Cities and How are They Bracing for Trump’s Immigration Crackdown?*, KQED NEWS (Cal.) (Nov. 17, 2016), <https://ww2.kqed.org/lowdown/2015/07/10/explainer-what-are-sanctuary-cities/> (“Since Trump’s election victory last week, mayors and police chiefs in more than 10 major cities, including San Francisco, Oakland, Los Angeles, New York, Chicago and Washington, D.C., reaffirmed their commitment to upholding their sanctuary policies, even in the face of federal threats.”).

203. See, e.g., Nick Gerda, *It’s Official, Santa Ana is Orange County’s First Sanctuary City*, VOICE OF OC (Dec. 7, 2016), <http://voiceofoc.org/2016/12/its-official-santa-ana-is-orange-countys-first-sanctuary-city/?platform=hoosuite> (“Santa Ana on Tuesday became the first city in Orange County to officially declare itself a sanctuary for unauthorized immigrants, with the City Council vowing to stand up for families fearful of being separated by deportations when President-elect Donald Trump takes office next month.”).

204. See Ruarí Arrieta-Kenna, *Sanctuary Cities Stand Firm Against Trump*, POLITICO (Dec. 12, 2016), <http://www.politico.com/story/2016/12/sanctuary-cities-trump-immigration-232449>.

205. *Id.*

206. See *infra* Sectoin V.C.



declare themselves sanctuaries for persons at risk for deportation in one way or another<sup>207</sup> remains to be seen.

### C. *Sanctuary Campuses—A Ripe Environment for Operation Sojourner Redux?*

Perhaps the most novel development in the Sanctuary Movement following the election of Donald Trump was the call for college and universities to declare their intent to shelter undocumented students and serve as “sanctuary campuses.”<sup>208</sup> Although the concept of a “sanctuary campus” has some precedent in the Sanctuary Movement of the 1980s,<sup>209</sup> the fact that such a large number of colleges and universities immediately became the site of student activism for sanctuary is hardly surprising, given the anticipated repeal of Deferred Action for Childhood Arrivals (DACA) when Donald Trump assumes office in January 2017.<sup>210</sup>

Despite enthusiasm for the idea of a “sanctuary campus,” there is little knowledge about the legality or the consequences—both favorable and unfavorable—of the provision of sanctuary by colleges and universities.<sup>211</sup> Chief among the concerns of colleges and universities is the danger of prosecution by the federal government for harboring undocumented immigrants—the same charges brought against Sanctuary Movement workers by the Regan Administration in the 1980s.<sup>212</sup> One university that has declared

207. See Kotlowitz, *supra* note 197 (as Professor Christopher Lasch points out, sanctuary cities are not generally in the practice of providing physical shelter to undocumented persons: “Christopher Lasch, an associate professor at the University of Denver’s Sturm College of Law, who has written extensively on sanctuary policies, warns that the term can be misleading: ‘What people get all wrong is that they hear the word ‘sanctuary,’ and they think it’s about harboring people.’ Unlike sanctuary churches, sanctuary cities aren’t pursuing a public act of subversion but rather a course of non-coöperation, telling their police and jail personnel to refuse assistance to federal immigration authorities in their efforts to deport immigrants.”).

208. See, e.g., Sophie Quinton, *Controversy Over ‘Sanctuary’ Campuses is Misleading, Legal Analysts Say*, PBS NEWSHOUR, (Dec. 17, 2016, 2:22 PM), <https://www.pbs.org/newshour/nation/sanctuary-campus-controversial> (“There’s no consensus on what it means to be a sanctuary campus. And the word “sanctuary” inflates the relatively minor demands that activists are asking of college administrators.”).

209. See Joe Disipio & Rafael Bernal, *Universities Face Pressure to Become Immigrant Sanctuaries*, HILL (Nov. 15, 2016, 4:22 PM), <http://thehill.com/latino/306162-universities-face-pressure-to-become-immigrant-sanctuaries>. The University of Wisconsin at Madison served as a sanctuary campus in the 1980s. *Id.* (“The University of Wisconsin-Madison petition reads: ‘Given that many students and their families now live in fear of deportation threats, we urge the University of Wisconsin-Madison to immediately develop a protocol to reinstate itself as a sanctuary campus, as it once did in 1985.’ During the 1980s, the Madison campus acted as a sanctuary to Central American refugees from violent governments and civil wars.”).

210. See Serena Marshall, *What Could Happen to DACA Recipients Under Trump*, ABC NEWS (Nov. 16, 2016, 2:28 PM), <http://abcnews.go.com/Politics/happen-daca-recipients-donald-trump/story?id=43546706>.

211. See Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions Than Answers*, ATLANTIC (Nov. 22, 2016), <http://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/>.

212. See *supra* Sections II and III.

itself a “sanctuary campus,” Wesleyan University, has also taken steps to defend against such a prosecution by the government, should such accusations ever come to pass:

The school, one of the first in the country to adopt the identity, has reportedly created two clauses explaining in part that it would not willingly assist with government efforts to deport undocumented students, faculty, and staff. According to the Wesleyan Argus [the school’s student newspaper]: “These clauses are meant to give the University legal backing on constitutional grounds in a variety of cases. The most immediate would be preventing any University staff from assisting federal authorities in deportation efforts. The University’s statements also hedge against a potential federal lawsuit or seizure of funds, of which the federal government provides around \$200 million to the University each year.”<sup>213</sup>

In addition to Wesleyan University, the University of Pennsylvania has already taken steps to protect undocumented immigrants enrolled there, pledging to protect student data from voluntary disclosure to the federal government.<sup>214</sup> Given the call by elected officials to strip colleges and universities providing sanctuary to undocumented immigrants of their federal funding,<sup>215</sup> it seems likely that more institutions of higher education will respond to the call for sanctuary in ways big and small in the upcoming months and years.

### CONCLUSION

The Sanctuary Movement of the 1980s was mounted in response to the humanitarian crises in Central America, and the people who were fleeing those civil wars.<sup>216</sup> At that time, the United States government responded by infiltrating and prosecuting people of faith and conscience who were engaged in providing safety and shelter to those same immigrants.<sup>217</sup> Now, in 2016, we have a different Central American refugee crisis, and we are faced with the looming prospect of a president-elect who campaigned on the promise to rapidly deport as many undocumented immigrants as he can, as quickly as he can. Thus, the need for Sanctuary has never been greater,

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213. Deruy, *supra* note 211.

214. See Henderson, *supra* note 196 (“University of Pennsylvania President Amy Gutmann is leading the way with a clear ethical response: her institution will become a sanctuary campus by not releasing data on undocumented students to federal agents or allowing them access to campus without legal injunctions. Her actions to safeguard the freedom and spirit of the academic community are a model worthy of emulation and soul-searching among heads of educational institutions, faculty and students nationwide.”).

215. *Id.* (“The word ‘harbor’ becomes ever more urgent when Rep. Andy Harris (R-Md.), raises the ante by suggesting that colleges and universities should lose federal funding for providing sanctuary to students whose immigration status is in question.”).

216. See *supra* Section I.

217. See *supra* Sections II and III.

as we face the potential arrest, detention, and deportation of some of our nation's most vulnerable residents.

This renewed call for Sanctuary sweeps broader than the Sanctuary Movement of the 1980s, and includes not only the newly-arrived Central American refugees who are adults, but the children who have journeyed to the United States, alone or with their mothers. It also implicates the fate of the Dreamers and the young adults brought to the United States as babies and young children, who cannot remember the place they were born, who speak fluent English and for whom the United States is the only home they have ever known.<sup>218</sup> The renewed Sanctuary movement will be played out in houses of worship, in cities, and on college campuses, regardless of the Trump administration's decision to prosecute those who respond to the call or not.<sup>219</sup> More than thirty years later, the lessons of Operation Sojourner continue to inform those engaged in providing Sanctuary to undocumented immigrants, and provide a blueprint for activists and pacifists who remain involved in the movement and its struggles.

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218. See, e.g., Curt Prendergrast, *What Trump Might Do: Can He Send 'Dreamers' Back to Countries They Don't Remember?*, ARIZ. DAILY STAR (Nov. 10, 2016), [http://tucson.com/news/local/border/what-trump-might-do-can-he-send-dreamers-back-to/article\\_d287099c-a78e-11e6-ad90-f359e64ad01f.html](http://tucson.com/news/local/border/what-trump-might-do-can-he-send-dreamers-back-to/article_d287099c-a78e-11e6-ad90-f359e64ad01f.html).

219. See, e.g., Henderson, *supra* note 196 ("Some people are taking a 'wait and see' attitude, believing that the rhetoric of the incoming president will be worse than his actions. I take him at his word, however. This is a time when people of conscience must be prepared to make the moral choices needed to save lives.").