En El Nombre De Dios--The Sanctuary Movement: Development and Potential for First Amendment Protection

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EN EL NOMBRE DE DIOS—THE SANCTUARY MOVEMENT: DEVELOPMENT AND POTENTIAL FOR FIRST AMENDMENT PROTECTION

I. INTRODUCTION

"... for I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you welcomed me."

Matthew 25:35¹

"We believe that justice and mercy require that people of conscience actively assert our God-given right to aid anyone fleeing from persecution and murder."

Letter from the Rev. John Fife
To Attorney General William French Smith.²

When the Southside Presbyterian Church in Tucson, Arizona declared itself a "sanctuary" for Central American refugees in 1982, it created a new element in an old conflict — the confrontation between church and state. Motivated by religious principles and perceived inequities in the treatment of aliens from El Salvador and Guatemala, that declaration marked the founding of a movement of persons willing to disobey the law in order to extend aid to those fleeing Central America. In response to the systematic deportation of aliens into areas which critics claimed were hazardous, many churches and religious groups joined the movement by sheltering those aliens from government prosecution. The circumstances surrounding these actions raised fundamental constitutional issues as those prosecuted began to raise the potential of First Amendment protection for their actions. Although rejected initially, new prosecutions insure that the issue will arise again.

The issue of creating religious exemptions for conduct otherwise prohibited by the government raises a delicate question in interpreting the free exercise clause of the First Amendment. Any claim for preferential treatment based on religious issues raises legitimate concerns regarding the extent to which personal belief should determine the scope of compliance with government authority.

The United States Supreme Court has attempted to accommodate the competing considerations in this area by predicking religious exemptions upon satisfaction of a balancing test, set forth in Wisconsin v. Yoder.³ The application

¹ Matthew 25:35 (Revised Standard Version).
² Korn, Hiding In The Open, STUDENT LAW. JANUARY, 1986, at 28.
of this test, and the weighing of the interests to be balanced, will determine the feasibility of a religious exemption for the activity of sanctuary workers. It is the purpose of this Note to consider the application of that test, and to speculate on the feasibility of such an exemption.

In order to analyze the legal questions raised by the sanctuary movement, its background must be examined. However, this is not intended as a definitive history of sanctuary. The movement raises important religious, moral, and political considerations that simply cannot be covered in the scope of this note. Similarly, the legal issues raised extend far beyond the first amendment, and will be developed only to the extent necessary to examine the free exercise analysis.

Before the analysis can be undertaken however, it is important to understand the conditions in Central America which have given rise to the influx of refugees to whom sanctuary is being offered, and to have some background of United States immigration law, under which the claims by refugees are evaluated.

II. Background

A. Central America

The sanctuary movement was founded to give assistance to refugees from Central America countries, primarily El Salvador and Guatemala. Thus, any understanding of sanctuary must begin with an examination of the political situation in that region. This is necessary to understand not only the source of the refugees to which the movement extends aid, but also the motivations of those involved in sanctuary. It is also essential to explain the role which the U.S. government has played in the treatment of refugees and those assisting them.

The current flood of aliens from Central America has been increasing drastically in recent years, but is the result of conditions which have been in existence for most of this century. These conditions in turn are a result of policies pursued during this period by the governments of the United States and the respective Central American countries. In order to demonstrate this connection, a brief examination of the recent history of El Salvador might be illuminative.

El Salvador, like most of Central America, has traditionally had an agrarian economy with a fairly large peasant class. This system led to the extreme centraliza-

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4 For a good overview of the development, historical context, and legal status of the sanctuary movement see I. Bau, This Ground is Holy: Church Sanctuary and Central American Refugees (1985). Another good source, covering the philosophical background and giving the perspective of the refugees is R. Golden & M. McConnell, Sanctuary: The Underground Railroad (1986).

5 See Comment, Eccumenical, Municipal and Legal Challenge to United States Refugee Policy, 21 Harv. C.R.-C.L. L. Rev. 493 (1986) for a more extensive view of the legal issues raised by the sanctuary movement.

6 “It is only in the past ten years that we have begun to suffer the misfortunes, and to assist the unfortunates who are the product of our foreign policy, which for the past half century has supported anti-democratic forces in the Caribbean and Central and South America.” Asylum Adjudication: Hearing Before the Subcommittee On Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 49-50 (1981) (statement of Ira Kurzban, Counsel for National Civil Liberties Committee).
tion of land ownership and a highly inequitable distribution of wealth.\textsuperscript{7} It also had a profound impact on the form of government of the country. The necessity for keeping tight control over the peasant population led to the creation of strong military organizations including the National Guard, which was formed in 1912. This strong military force in turn exerted influence over the central government, which continues to this day.

In 1932, a civilian president (Arturo Araujo) was forced out of office by the military. The ascension of General Maximiliano Hernandez Martinez to power marked the beginning of the Salvadoran army’s domination in contemporary Salvadoran politics.\textsuperscript{8} A peasant revolt ensued, and six weeks later, in an action later designated \textit{La Matanza} (the massacre), government troops killed as many as 30,000 peasants and Indians,\textsuperscript{9} a prelude to another practice of current significance. The revolt was blamed on the local communist party, whose leader, Augustin Farabundo Marti, was subsequently executed.\textsuperscript{10}

The military continued to exercise almost uninterrupted control in Salvadoran politics, and even stepped in to ensure the selection of its candidate in 1972 when a civilian candidate (Jose Napolean Duarte) appeared to be winning the election.\textsuperscript{11} Some signs of reform appeared in 1979, when a faction of the military containing some progressive elements staged a coup against the existing military president. This hope was quickly dashed however, as the more conservative elements of the junta took over, forcing the civilians and reform elements of the military from the government.\textsuperscript{12}

At the same time the United States increased economic and military support to the government of El Salvador. The United States has provided training and supplies to El Salvador since the 1940s through the Military Assistance Program, and later gave significant training to military groups through the Public Safety Program.\textsuperscript{13} However, in the period following the 1979 coup, economic and military aid increased significantly. Initially, the military support was limited to advisors serving in training roles and non-lethal aid (although licenses were provided to private American companies to sell arms to the Salvadorans).\textsuperscript{14} The Carter administration began providing lethal aid to El Salvador in January of 1981, and the levels were significantly increased by the Reagan administration following the

\textsuperscript{7} "Before 1980, nearly half of El Salvador's farmland was held by only 0.2 percent of the population." \textit{Senate Subcommittee on Immigration and Refugee Policy of the Comm. on the Judiciary, Refugee Problems in Central America, S.Prt. 98-139, 98th Cong. 1st Sess., 10 (1983)} [hereinafter cited as \textit{Refugee Problems in Central America}].


\textsuperscript{10} \textit{Id.}

\textsuperscript{11} \textit{Id.} at 32.

\textsuperscript{12} \textit{Id.} at 145-67.

\textsuperscript{13} \textit{Report on Human Rights, supra note 8, at 178-79.}

\textsuperscript{14} \textit{Id.} at 183.
The number of U.S. military personnel in El Salvador was also increasing. By February 1981, fifty-six such persons were serving in various support and training capacities. In the period between 1979 and 1982, the United States provided a total of $300 million in economic aid to El Salvador. Thus the United States was beginning to provide significant support for the existing government of El Salvador.

Such support was deemed necessary because the level of violence within the country was rising. Guerrilla groups had begun organizing in El Salvador in 1970, and opposition to the government was growing. In October 1980, many of these groups united under the common title of the Farabundo Marti National Liberation Front, or FMLN (which was named after the early communist leader). The conflict between government forces and the FMLN led to a significant increase in tensions in the early 1980s. The violence, however, was not restricted to clashes between the army and the guerrillas, but was increasingly directed against the civilian population as well.

These developments caused a worsening in the human rights situation of El Salvador, and a rise in the number of refugees. Amnesty International reported that by mid-January 1980, an average of three corpses bearing evidence of torture were discovered in El Salvador each day. The overall civilian death toll rose from an estimated 1,000 in 1979 to between 9,000 and 10,000 in 1980. In 1981, a human rights organization reported more than 12,000 murders. In addition to those civilians killed outright, many "disappeared"—usually to turn up later among the dead, and often showing signs of torture. These victims of the notorious "death squads" have received widespread attention. While accurate data is difficult to collect, one U.S. government source estimated that in 1982 and 1983, disappearances were occurring at a rate of forty per month. Other sources have placed the figure much higher.

The source of political violence is unclear given the number of factions among the combatants. While some responsibility may probably be placed on all groups in the conflict, government forces are often named as the principal violators of...
human rights in the area. Much of the "death squad" activity has been attributed to government forces operating unofficially. Amnesty International has even gone so far as to conclude that, "the majority of the reported abuses against non-combatant civilians have been inflicted by forces under the authorities' control and that most so-called 'death-squads' are in fact made up of members of the Salvadoran security and military forces acting under direct orders of superior officers."

This pattern of violence has continued, in varying degrees, to the present day. It has received widespread attention in this country following the killings of high visibility figures or North Americans, such as the assassination of Archbishop Oscar Romero or the deaths of four American churchwomen (both in 1980). It can be said that conditions have recently improved; but, as the Senate Judiciary Committee staff noted in 1983, "[it is unfortunate that the political murder of 200 to 400 persons a month is considered an improvement of human rights. Yet, in El Salvador it is considered 'progress' since the toll of mutilated bodies along its streets has dropped from a monthly rate of 800 to 900 a month."

Recent reports indicate that significant abuses still continue. The result of the violence against civilians has been that more people have died from political violence than have been killed in combat.

This unrest has created a massive flight in recent years of Salvadoran refugees fleeing the violence. In 1983, one source estimated that over ten percent of the entire population of El Salvador was either displaced within the country or had fled across its borders. The resulting refugee flow has spread across Central America and into the United States. The U.S. Immigration and Naturalization Service (INS) currently intercepts over 1,000 Salvadorans a month, but believes that this may represent only 25% of the total number entering the United States. Estimates of the number of Salvadorans in this country range as high as 500,000. It is this population which has presented a problem for American immigration
law, and which ultimately has become the recipient of assistance from the sanctuary movement.

B. U.S. Immigration Law

The legal status of Central Americans reaching this country is determined by the immigration laws of the United States. The provisions of immigration law at issue are those relating to refugee status—recognizing the rights of a person fleeing persecution in their home country. This right has developed somewhat haphazardly over the years and has only recently been granted to all persons entering this country. The interpretation of its scope lies at the heart of the present controversy.

Refugees have been admitted into this country on an ad hoc basis over the years, through laws such as the Displaced Persons Act of 1948. The general rights of a refugee fleeing persecution were first recognized in the 1950 Internal Security Act, which gave the Attorney General discretionary authority to withhold deportation of persons subject to persecution in their own country. A similar provision was included in the 1952 Immigration and Nationality Act (hereinafter INA). However, this power was still entirely discretionary and was often applied following political criteria.

The INA was amended in 1965 to include a special class within the general immigration law under which refugees meeting statutory criteria could enter the United States. Under the so-called “seventh preference,” the alien was required to prove: 1) that they had come from a communist country, or one in the Middle East; 2) that the departure was the equivalent of flight; 3) that the flight was motivated by persecution, or fear of persecution, based on race, religion, or political opinions; and, 4) that the alien was unwilling or unable to return. The use of the “seventh preference” had several shortcomings as a means for admitting refugees. It retained a political bias in allowing admission to certain groups of refugees over others, thus, imposing a double standard. It also raised a more fundamental problem—inconsistency with international law.

The United Nations had addressed the issue of refugees in 1951, when the U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless

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9 “[This discretion was used only as a part of a broader Cold War foreign policy rather than because of humanitarian considerations.” I. Bau, supra note 4, at 45.
Persons defined "refugee," and extended significant protections to them in the Convention Relating to the Status of Refugees. A refugee was defined as one who:

[Owing to a 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.]

Under the Convention, refugees were afforded the protection of nonrefoulement. This prevented the government from deporting those who met the definition of a "well-founded fear of being persecuted." The original protection was limited to refugees from events occurring prior to 1951, and could be restricted to European refugees, if the signatory so chose. These restrictions were lifted in 1967 when the United Nations Protocol Relating to the Status of Refugees was adopted. The 1967 Protocol adopted the definition of refugee from the 1951 Convention without geographical or temporal restrictions.

Although not a signatory to the 1951 Convention, the United States was a party to the 1967 Protocol. Thus, the U.S. would presumably be bound by the definition of a refugee as one possessing a well-founded fear of persecution. This obviously conflicted to some degree with the "seventh preference" category which was restricted to those fleeing countries with communist governments, or which were located in the Middle East. This conflict was resolved, at least facially, by the congressional enactment of the Refugee Act of 1980.

The Refugee Act adopted the language used in the 1951 Convention by defining a refugee as one outside their native country or country of residence, who is "unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The adoption of this language was intended to apply refugee status to all those who met the U.N. definition. In addition to clarifying the definition of

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43 19 U.S.T. 6260, T.I.A.S. No. 6577.  
44 Convention Relating to Status of Refugees of 1951, art. 1(a)(2) [hereinafter cited as 1951 Convention].  
45 "Refouler is a French word meaning to expel or return." I. Batu, supra note 4, at 48. Nonrefoulement was first established in the 1933 Convention Relating to the International Status of Refugees (159 L.N.T.S. 199), and refers to a prohibition upon returning an alien to the country from which he came.  
46 1951 Convention, art. 1(B).  
48 See U.S. Const. art. VI.  
49 See Note, supra note 42, at 128-29.  
refugee, the 1980 act also recognized for the first time a right of those already in this country to apply for asylum. This right was guaranteed through the establishment of a set of procedures through which that right would be adjudicated. The process of adjudication was extremely important because the INA recognized the international principal of nonrefoulement in § 243 (h) which prohibits deportation of an alien where there is a finding that the alien's life would be endangered.

To apply for asylum, the alien initially files an application with the Immigration and Naturalization Service. The application involves giving information including prior instances of detention in the applicant's home country, an opinion as to what would happen if they returned and their willingness to do so, prior activities by the applicant which they believe would result in persecution upon return, any mistreatment by authorities, and the likely effect of current conditions in the applicant's home country on their freedom if they returned. The applicant is then interviewed by an INS officer, who forwards the application to the INS District Director. In reviewing the application, the District Director also considers an advisory opinion submitted by the Department of State (Bureau of Human Rights and Humanitarian Affairs) which is prepared by the diplomatic desk for the home country of the applicant. This advisory opinion is not mandated by the Refugee Act, but is required in the INS regulations. There is no direct review of a denial of asylum, but the issue may be raised in subsequent deportation proceedings before an Immigration Judge, the decision of which may be reviewed by the Board of Immigration Appeals, and then by the U.S. Circuit Court of Appeals.

The outcome of the process essentially depends on the determination of what is a "well-founded fear of persecution." This requirement, as applied in the context of the U.N. Convention and Protocol, is determined at least partially through the subjective frame of mind of the applicant. This subjective element

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52 INA § 208, 8 U.S.C. § 1158. An alien applying for protection under the Act from inside the United States is applying for *asylum*. The same alien applying for the same protection from a point outside the United States is seeking to become a *refugee*. While there is a technical difference between refugee status and asylee status, they are adjudicated under the same standards by almost identical procedures. Therefore no distinction will be drawn between the two for purposes of this article.

54 8 C.F.R. § 208.2 (1986).
55 U.S. Department of Justice, Immigration and Naturalization Service, Form I-589, Questions 31-38.
56 8 C.F.R. § 208.6.
57 Id. § 208.7
58 Id. § 3.1 (Board of Immigration Appeal); 8 U.S.C. § 1105(a) (Ct. of Appeals).
59 For an examination of the origins of this phrase and its application in international law, see Cox, "Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status, 10 BROOKLYN J. INT'L L. 333 (1984).
60 Id. at 351-52. Cox infers two propositions from the requirements of the Protocol: "[F]irst, any interpretation which is primarily objective and only secondarily subjective is inconsistent with Protocol mandates; and second, any State that demands objective proof but fails to assist the person in developing such proof is failing to implement the Protocol fully." (citations omitted) Id. at 352.
has been recognized by the international body charged with administering the Convention and Protocol—the United Nations High Commissioner on Refugees (UNHCR). The UNHCR Handbook on Procedure and Criteria for Determining Refugee Status (hereinafter the UNHCR Handbook) emphasizes both the subjective and objective components to a claim of persecution. The subjective element of the determination is based upon the applicant's testimony, and takes into consideration their opinions and feelings. This is weighed with objective criteria relating to the credibility of the applicants' testimony, such as testimony from other sources and conditions in the country from which the applicant has fled.

The standard for a "well-founded fear" applied to determinations made under the identical language contained in the Refugee Act of 1980 has been less than clear. Although the UNHCR Handbook has been cited with approval by federal courts in the determination process, it has never been adopted per se in adjudicating claims under the Refugee Act. Consequently, many claims continue to be denied by the INS for lack of an objective showing by the alien that they are subject to a well founded fear of persecution.

Perhaps more serious than the difference in standards is the fact that the rate of denials differ between countries, indicating that politics may play a role in asylum adjudication. The standards do indicate disparate treatment. In fiscal year 1985, the INS reported that 3.1% of the Salvadoran asylum applications which were decided had been approved. This represented an improvement over the previous year, in which the approval rate was 2.45%. Cumulatively, the Salvadoran approval rate in asylum adjudications between 1981 and 1985 was 2.7%. Salvadorans, however, were faring well when compared to Guatemalan asylum applicants, who enjoyed a success rate of 0.39% in FY 1984 (3 claims granted out of 761 adjudicated). By comparison, the asylum approval rate for all applicants was roughly 20%; and was 12.3% for Nicaraguans, 32.7% for Poles, 40.9% for Afghans, and 60.9% for Iranians.

The official response to charges that the INS takes political considerations into account when deciding asylum claims is that most Salvadorans and Guatemalans are economic rather than political refugees. Furthermore, INS sup-

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62. Id.
65. Application of a strict objective standard is particularly difficult where there is widespread civil strife. See N. Y. Times, Feb. 3, 1985, at 14, col. 6.
66. INS statistics cited in Halpern statement, supra note 27, Table 1.
67. I. Bau, supra note 4, at 60.
68. Id.
porters charge that those being deported do not have a well-founded fear of persecution, as indicated by the fact that there is no evidence that those deported are subject to persecution upon their return. This contention is strongly contested by groups that claim to have collected evidence that such persecution does in fact occur. The existence of widespread, generalized violence makes it difficult to determine when an individual is personally subject to fear of persecution.

Critics of the present practices charge that the actual motivation for widespread denial of asylum claims by Guatemalan and Salvadoran refugees is political—the U.S. government is reluctant to grant political asylum to refugees from countries with which it is on good terms. The problem stems from the fact that the State Department, which is charged with maintaining diplomatic ties with foreign nations, also influences the asylum decision—through its advisory opinions. This raises the possibility that officials will consider diplomatic concerns when deciding the merits of an asylum claim, perhaps at the expense of the individual case. For example, a State Department Desk Officer once noted that “there is no question that when we grant asylum to a refugee from a government . . . with which we are friendly, the government feels that its reputation is slighted, its honor impugned. This can only lead to resentment against the United States and both governments lose out.” Another desk officer articulated the same concern in commenting on a denial in a particular case. “We didn’t grant him asylum because the United States government doesn’t want to pass judgment on the internal conditions of allied countries. That would cause resentment on their part and hurt the bilateral relationship.”

In the context of contemporary Central America, it is obvious that the United States is heavily supporting the governments of El Salvador and Guatemala. As noted earlier, the U.S. government has committed a significant amount of resources to the Salvadoran government (in economic and military aid) during the current conflict to stabilize the present government. Thus, diplomatic consid-

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70 “Salvadorans who are currently being returned. . . are subject to the same violence every resident of that country faces, but there is clear evidence that there is no governmentally sanctioned program to target or harass returning Salvadorans simply because they have been in the United States.”

71 The Administration supports [continued deportation] on the premise that no evidence exists that persons have been persecuted in El Salvador because they were deported from the United States. This argument is disingenuous. There is substantial evidence that persons have been persecuted in El Salvador after their forced return from the United States.


73 Halpern statement, supra note 27, at 9-12.

74 Leibowitz, supra note 41, at 168.

75 See e.g., I. Bau, supra note 4, at 72-3; Korn, supra note 2 at 26.

76 See Preston, supra note 69.

77 Note, supra note 42 at 134.

78 See id. at 135. See also Kasravi v. INS, 400 F.2d 675, 677 n.1 (9th Cir. 1968) for a judicial recognition of the inherent limitations on the role of advisory opinions.
erations may well be present in making asylum determinations. In fact, an internal INS statement has noted that there are varying standards for applicants, in that “different levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status while others do not.”

For example, for an El Salvadoran national to receive a favorable advisory opinion, he or she must have “a classic textbook case.”

The United Nations High Commissioner has been critical of the method by which the U.S. makes asylum determinations. A UNHCR evaluation of U.S. procedures in 1981 led to an expression of concern that the United States was not living up to its responsibilities under the Protocol, and concluded that “there is a systematic practice designed to forcibly return Salvadorans, irrespective of the merits of their asylum claims.”

Reports suggesting that the United States was failing to adequately respond to a legitimate need created a perception in the early 1980s that something further needed to be done. Individuals began to aid Central American refugees in response to their belief that the government was committed to deporting aliens into potentially life-threatening situations. Motivated by religious and humanitarian concerns, these individuals eventually came to form the sanctuary movement.

III. SANCTUARY MOVEMENT

A. Historical Basis

When contemporary American churches began declaring themselves sanctuary for refugees, they did not create a new concept. The right of sanctuary has been recognized in various contexts since biblical times. In the Bible, entire cities were recognized as refuge, where persons who had accidentally caused a death could escape retribution from relatives of the deceased. So long as the refugee remained in the city, they could not be harmed or forcibly turned out.

The right to sanctuary was later recognized as applying specifically to churches, and was used in England—subject to certain restrictions. In fact the Catholic church sanctioned the practice in its Canon law for a period of time. However, sanctuary was prohibited in England by the time the United States gained independence, and independence, and thus it was never recognized in U.S. jurisprudence. Therefore,
thus it was never recognized in U.S. jurisprudence. Therefore, any legal basis for the contemporary sanctuary movement must be found on other grounds.

In spite of the lack of official recognition of sanctuary in United States history, a comparison with participants in the Underground Railroad prior to the Civil War would seem to give contemporary sanctuary some basis in American tradition. Such a comparison would be of limited utility however, because "the churches providing sanctuary [to fugitive slaves] did not seek to claim a legal privilege, but only sought to respond to religious commands regarding hospitality." Thus, the Underground Railroad, while enjoying significant church support was more analogous to a form of civil disobedience than to an exercise of a legal privilege. The exercise of civil disobedience provides very little direct protection to the actions of the participant in the short term, because the exercise presupposes the willingness to accept the consequences of the act to draw attention to the inequity of the enforcement.

This point is illustrated by the experiences of the only group in contemporary United States history to attempt to invoke sanctuary. During the Vietnam War, various churches (and other groups) declared themselves to be sanctuaries, and offered refuge to draft resisters and AWOL soldiers. These sanctuaries, however, claimed no special privileges, and instead operated in the context of a larger political movement—antiwar protests. Furthermore, all those seeking sanctuary were prosecuted, and accepted their punishment. Therefore, in considering the development of the present sanctuary movement, it must be remembered that sanctuary per se receives no protection, but that individuals involved in the movement are protected by constitutional guarantees. Any protection or legal privilege available to those involved in sanctuary will consequently stem from individual rights rather than group-based protection.

B. Development of the Contemporary Movement

The current manifestation of sanctuary arose from a perception by religious people in the southwestern United States that the swelling population of Central American refugees represented a problem which was not being adequately confronted by official means. Refugees were crossing the border in increasing numbers due to conditions in their own countries, and those passing through government

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See, e.g., Korn, supra note 2, at 25. For a more sophisticated development of the analogy, see R. Golden & M. McConnell, supra note 4.
I. Bau, supra note 4, at 160.
See W. Siebert, The Underground Railroad From Slavery to Freedom, 93-98 (1898, reissued 1967).
""Under a government which imprisons any unjustly, the true place for a just man is also a prison." H. Thoreau. Civil Disobedience, Works of Henry David Thoreau. 430 (1981).
I. Bau, supra note 4, at 167-71.
Id. at 169.
For a collection of first-hand accounts from refugees who have left Central America, See R. Golden & M. McConnell, supra note 4, at 8-11, 32-37, 64-67, 97-99, 125-28, 159-62, and 181-86.
channels were being deported back to those countries in almost equal number. As U.S. citizens became aware of these facts, and the apparent contradiction between U.S. policies and U.S. legal obligations, many people became convinced that individual action was necessary.\(^{93}\)

Although the sanctuary movement began on a grassroots level from activities that were occurring simultaneously in several areas,\(^ {94}\) the two people most often credited with founding modern sanctuary are the Rev. John Fife, of the Southside Presbyterian Church in Tucson, Arizona, and Jim Corbett, a Quaker and rancher who lives in that area.\(^ {95}\) Fife became interested in the problems of Central American refugees in the summer of 1980, when a “coyote” (professional alien smuggler) left a group of aliens in the desert nearby, which led to the deaths of half of them.\(^ {96}\) When the INS announced that the rest were to be deported, Fife and his church became involved. He organized a prayer vigil for the Central Americans, which led to meetings among persons concerned with refugee issues.\(^ {97}\) In the spring of 1981, Fife and other persons concerned with this situation created a Task Force on Central America under the Tucson Ecumenical Council.\(^ {98}\) This organization focused its activities on aiding detained aliens through legal means—providing legal services and bond money to those in detention, and providing housing to those who had been legally released.\(^ {99}\)

The other person given credit for starting the current movement was Jim Corbett. He became aware of the plight of refugees in the spring of 1981, when a friend in a van belonging to Corbett was stopped at a border patrol roadblock, and a Salvadoran hitchhiker riding in the van was detained.\(^ {100}\) In checking on the status of this refugee, Corbett became involved in the entire INS detention and deportation process.\(^ {101}\) By the summer of 1981, Corbett was harboring in his home aliens who were applying for refugee status and urging other Quakers in the area to do the same.\(^ {102}\) These activities led him to aiding refugees who were in this country illegally—in some cases smuggling them in himself—and first brought him into contact with Fife and other religious leaders in Tucson.

Corbett began encouraging Fife to involve Southside Presbyterian more directly in aiding refugees by sheltering undocumented aliens.\(^ {103}\) The church decided to do so, and for a period of time provided covert assistance to Central American

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\(^ {93}\) For a description of the motivations of some of the leaders of the movement see Interview, *Conspiracy of Compassion*, Sojourners, 14-18, March, 1985, (interview with S. Merkt, J. Fife, J. Corbett and P. Willis-Conger) [hereinafter cited as Interview].


\(^ {95}\) Korn, *supra* note 2, at 28.

\(^ {96}\) Interview, *supra* note 93, at 16.

\(^ {97}\) *Id.*

\(^ {98}\) *Id.*

\(^ {99}\) *Id.*

\(^ {100}\) R. GOLDEN & M. McCONNELL, *supra* note 4, at 39.

\(^ {101}\) Interview, *supra* note 93, at 15.

\(^ {102}\) Korn, *supra* note 2, at 28.

\(^ {103}\) Interview, *supra* note 93, at 16-17.
refugees.\textsuperscript{104} When it became obvious that such a project could not be carried out in secret, church leaders decided to make their actions public and to tie them into the historical tradition of sanctuary. The congregation of Southside Presbyterian voted to declare itself a public sanctuary and to publicly welcome a refugee family into the church.\textsuperscript{105} On March 24, 1982, the second anniversary of the assassination of Archbishop Oscar Romero, Southside Presbyterian and several other churches across the nation\textsuperscript{106} held ceremonies to mark their declaration of sanctuary. In addition, Rev. Fife sent a letter to the U.S. Attorney General explaining the position of the sanctuary movement:

\begin{quote}
We take this action because we believe the current policy and practice of the U.S. government with regard to Central American refugees is illegal and immoral. We believe our government is in violation of the 1980 Refugee Act and international law by continuing to arrest, detain, and forcibly return refugees to the terror, persecution, and murder in El Salvador and Guatemala.

We believe that justice and mercy require that people of conscience actively assert our God-given right to aid anyone fleeing from persecution and murder. The current administration of the United States law prohibits us from sheltering these refugees from Central America. Therefore we believe that administration of the law is immoral as well as illegal.\textsuperscript{107}
\end{quote}

This statement of the position of sanctuary supporters stresses not only the legal arguments regarding refugee status, but the religious motivations behind the movement as well. The religious belief component is vital, because this belief is what motivates many otherwise law-abiding people to engage in sanctuary activity.\textsuperscript{108} Materials distributed by the movement stress that giving sanctuary involves an expression of compassion, a resistance to injustice, and an act of hospitality, all rooted in the Christian tradition.\textsuperscript{109} Thus, the movement operates through churches, and the decisions about extending sanctuary are made by congregations on religious grounds.\textsuperscript{110}

The initial participants in sanctuary were primarily churches in the southwest. As the number of churches grew, and their geographic diversity increased, it became clear that some central coordination was needed. In the summer of 1982, Jim Corbett met with representatives of the Chicago Religious Task Force on Central America (hereinafter CRTF). The CRTF, which had been involved in

\textsuperscript{104} Id. at 17.

\textsuperscript{105} Id.

\textsuperscript{106} Five churches in California (East Bay area) also declared themselves sanctuary on the same day (R. Golden & M. McConnell, \textit{supra} note 4, at 48), in addition to a church in Washington, D.C., and one in New York. Interview \textit{supra} note 93, at 17.

\textsuperscript{107} Korn, \textit{supra} note 2, at 28.

\textsuperscript{108} See e.g., \textit{Wall Street Journal}, June 21, 1984, at 1, for a description of the process by which a conservative midwestern church reached the decision to declare sanctuary.

\textsuperscript{109} \textit{Chicago Religious Task Force on Central America, Sanctuary: A Justice Ministry}, 4-5 (undated pamphlet.)

\textsuperscript{110} Id. at 15-18.
political activities relating to Central America, later agreed to serve in a coordinating capacity. They provide a number of support services for the sanctuary movement, including the publication of *Basta!,* a newsletter which provides communication between local groups.

The CRTF also publishes several manuals to help churches interested in declaring themselves to be sanctuary, and initially sent out organizers to those churches until the overwhelming response made this prohibitive. CRTF takes requests for refugees from churches that have declared themselves sanctuary, and provides refugees who contact the sanctuary movement with the names of sympathetic churches. The Task Force even employed a full-time coordinator in the border area—Sister Darlene Nicgorski—who screened incoming refugees for participation in sanctuary.

Once refugees have agreed to go to a specific church, they are transported there by the sanctuary movement. Public caravans have been used to help draw attention to the plight of the refugees. After the refugees reach a sanctuary, they are encouraged to speak out about the conditions in their home country which drove them to the United States. Thus, the movement provides shelter for the refugee and raises public awareness about the conditions in Central America. It should be noted that not all refugees go into public sanctuary; many are simply helped in reaching and settling in areas of the U.S. with large Central American populations.

The initial response of the authorities was generally to ignore the movement, apparently in hopes of not creating any publicity for it. The number of churches involved continued to grow, however, and by May of 1985 the CRTF reported that there were 307 declared sanctuaries in the United States. The concept also began spreading beyond the context of churches. There are presently 22 cities which declare themselves to be sanctuary, including Los Angeles and Seattle, as well as the state of New Mexico.

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114 I. Bau, *supra* note 4, at 84.
117 R. Golden & M. McConnell, *supra* note 4, at 44, 47, and 71; I. Bau, *supra* note 4, at 87-88. (Statements by INS officials.)
118 *Basta!,* June 1986, 28. The denominations containing the most public sanctuaries were: Friends (with 50 sanctuaries declared), Catholics (49), Unitarian (47), Presbyterian (29), and United Church of Christ (14). The heaviest concentrations of sanctuaries were in California (containing 106 declared sanctuaries), Wisconsin (15), New York (19), Arizona (20), and Illinois (22).
The movement began to garner support from the leadership bodies of various denominations. For example, in 1984, the United Methodist Church adopted a resolution calling on congregations to "resist the policy of the Immigration and Naturalization Service by declaring their churches to be 'sanctuaries' for refugees from El Salvador, Guatemala, and other areas of the Caribbean and Latin America." The movement was supported by the American Baptist Church, American Lutheran Church, Disciples of Christ, Presbyterian Church (U.S.A.), United Church of Christ, American Friends Service Committee, Unitarian Universalist Association, and the (Catholic) Conference of Major Superiors of Men.

C. Governmental Response

In spite of widespread publicity surrounding the activities of the sanctuary movement—activities which were illegal under existing law—the U.S. government initially refrained from taking on the movement directly. However, prosecutions were begun in 1984 against individual sanctuary workers. The only successful prosecutions in this period were against employees of Casa Oscar Romero in San Benito, Texas, a shelter founded by the Catholic Bishop of Brownsville, and provides food and shelter to refugees, without regard to the legal status of the alien. The first worker from the shelter to be arrested was Stacey Merkt, who was stopped by the border patrol in Texas on February 17, 1984. She was charged with transporting illegal aliens in violation of § 274 of the INA, a charge which carries a maximum penalty of five years imprisonment and a $2,000 fine. She was convicted of the charge in May, and was sentenced to two years probation (and given a 90 day suspended sentence). In June of 1985, the Fifth Circuit Court of Appeals overturned the conviction and ordered a new trial. Although some groups had initially urged reversal on the grounds of religious

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120 United Methodist Church, Book of Resolutions, 281-82 (1984). See also Res. No. 8549, adopted by the Disciples of Christ at its convention, Aug. 2-7, 1985, resolving to "affirm the religious and moral rights churches and synagogues to provide sanctuary and protection for those fleeing persecution as an age-old expression of the biblical tradition of our faiths. . . ."

121 N.Y. Times, supra note 65, at 14, col. 2.


123 Id. at 179. See also R. Golden & M. McConnell, supra note 4, Appendix 2 ("Religious Leaders' Affirmation of Sanctuary Ministry").

124 This inaction had the incongruous effect of creating a de facto recognition of sanctuary privilege by the government, See I. Bau, supra note 4, at 89.

125 The legal liability of those involved in sanctuary is discussed fully in Sanctuary and the Law: A Guide for Congregations, published by the CRTF.

126 Philip Willis-Conger, Project Director of the Tucson Ecumenical Council's Task Force on Central America, was arrested, but the charges were dropped due to faulty arrest procedures. I. Bau, supra note 4, at 79-80.

127 Amicus Brief, supra note 26, at 9-10.

128 I. Bau, supra note 4, at 76.


130 I. Bau, supra note 4, at 78-79.

131 United States v. Merkt, 764 F.2d 266 (5th Cir. 1985).
freedom, the court ultimately reversed on the grounds that the trial court misstated an element of the offense in instructing the jury.

The second Casa Romero worker to be arrested was its director, Jack Elder. In April 1984, Elder was also indicted on similar charges. During his trial, Elder's attorneys attempted to have the charges dismissed on the grounds that the prosecution violated Elder's First Amendment rights to the free exercise of religion. The trial court judge rejected this assertion in a published decision, which is the only written opinion dealing with the free exercise clause as applied to the sanctuary movement. The rejection of this defense was irrelevant however, because on January 24, 1985, the jury acquitted Elder of the charges.

This was not the end of Elder's troubles. In December, 1984, prior to his first trial, Elder had been indicted again on charges of aiding illegal aliens. The indictment also named Stacy Merkt, who was serving her probation awaiting her appeal to the Fifth Circuit. They were both convicted, and on March 27, 1985 the first criminal penalties were imposed against sanctuary workers. Elder had been offered parole if he agreed to disassociate himself from the sanctuary movement. He refused. The judge then imposed a one year sentence, which was later reduced to five months (Elder served 135 days in a halfway house, and was released for good behavior). Merkt was sentenced to six months (and her earlier 90 day suspended sentence was reimposed), but was allowed to remain free on bond pending appeal.

In the meantime, Lorry Thomas had taken over as the director of Casa Oscar Romero. On May 12, 1985, Thomas was stopped by the INS while transporting an undocumented alien. She plead guilty to the charge, and on June 20 she was sentenced to two years imprisonment.

This level of response, while indicating an increasing government interest in stifling the movement, was fairly mild considering possible government reaction. By the time Lorry Thomas was arrested, the CRTF was reporting that there were 225 public sanctuaries operating openly in the United States. The opportunities for arrests were numerous, but they were not taken initially. That changed on January 14, 1985, when a federal grand jury in Phoenix, Arizona indicted sixteen people involved with sanctuary on seventy-one counts involving conspiracy and

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132 Amicus Brief, supra note 26. The amicus brief was filed by the National Council of Churches of Christ, U.S.A.; Presbyterian Church (U.S.A.); Friends United Meeting, American Lutheran Church, Commission on Social Action of Reform Judaism, United Church of Christ, and the Department of Church in Society Division of Homeland Ministries Christian Church (Disciples of Christ).
133 Merkt, 764 F.2d at 268.
134 I. Bau, supra note 4, at 80-81.
135 United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985). For a detailed discussion of this opinion, see section IV(B) infra.
136 I. Bau, supra note 4, at 81.
137 Id. at 83.
138 Id.
139 Charleston Gazette, June 21, 1985, at 8A.
the transportation of undocumented aliens.\textsuperscript{140} The indictments culminated a ten month undercover investigation of the sanctuary movement.\textsuperscript{141} Among those indicted were the Rev. John Fife, Jim Corbett, Philip Willis-Conger (from the Tucson Ecumenical Council’s Task Force on Central America), and Sister Darlene Niegorski (who had worked for CRTF in the border area). Of the original sixteen defendants, charges against five were dropped for various reasons, leaving eleven sanctuary workers to stand trial in Tucson.

The government gathered information for this trial through an undercover operation known as “Operation Sojourner.”\textsuperscript{142} The investigation involved using informants to infiltrate the movement in order to gather information. The informants, Salomon Graham and Jesus Cruz, wore recording devices into meetings dealing with sanctuary including those held in churches and carried out in the context of religious services.\textsuperscript{143} These informants were not INS officers or law enforcement professionals, but were former “coyotes” who had been caught by the INS and who were paid more than $16,000 for their infiltration efforts.\textsuperscript{144} These activities marked a new phase in the government’s treatment of sanctuary, not only because agents were entering churches, but also because such entries were carried out without a warrant.

The infiltration and clandestine taping in churches raised a storm of protest from religious groups across the country.\textsuperscript{145} The investigatory tactics alone raised a potential First Amendment claim by sanctuary due to the possibility that such actions might exert a “chilling effect” over the free exercise of religion.\textsuperscript{146} For example, Arizona Evangelical Lutheran Church in Phoenix, Arizona had been holding a regular Bible class which drew a number of Central American refugees, including Jesus Cruz. After the indictments were announced and many of those in the class were arrested, the class broke up.\textsuperscript{147}

Concern that the investigation was not entirely within the bounds of the Constitution led to a civil suit filed against the government by a number of churches.\textsuperscript{148} The plaintiffs include the Presbyterian Church (U.S.A.), American Lutheran

\textsuperscript{140} N.Y. Times, Jan. 15, 1985, at 1.
\textsuperscript{141} See Ovryn, Targeting the Sanctuary Movement, BASTA!, Oct. 1985, 14 (reprinted from COVERT ACTION, Summer 1985).
\textsuperscript{142} See, Tolan and Bassett, Informers in the Sanctuary Movement, BASTA!, Oct. 1985, 9 (reprinted from THE NATION, June 20/27, 1985).
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 10.
\textsuperscript{145} See, e.g., Res. No. 8565 adopted by the Christian Church (Disciples of Christ), resolving that the denomination “protests the unwarranted and clandestine eavesdropping of church meetings by undercover agents of the government of the United States as a serious threat to the Constitutional guarantee of religious freedom and the separation of church and state.”
\textsuperscript{146} Government actions or practices may not operate so as to discourage the exercise of a constitutional right. See, e.g., NAACP v. Button, 371 U.S. 415 (1963).
\textsuperscript{147} Nute, Free Exercise of Religion in Phoenix, CHRISTIAN CENTURY, 728 (August 14-21, 1985).
\textsuperscript{148} See Blodgett, Alien Search: Churches Allege U.S. Spying, A.B.A. 31 (April 1986). A similar suit was filed May 7, 1985, by the National Lawyer’s Guild and the Center for Constitutional Rights. See Of International Law & Religious Freedom, GUILD NOTES (Summer 1985).
Church, and several local congregations affiliated with these denominations (including Southside Presbyterian and Alzona Evangelical Lutheran). They alleged that the infiltration violated the First, Fourth, and Fifth amendments; and that "Operation Sojourner" involved taping of noncriminal behavior, thus intimidating people from exercising constitutional freedoms. The plaintiffs therefore requested a declaratory judgment to proclaim the INS practices illegal and thus to establish a precedent for the protection of free exercise of religion against unwarranted governmental intrusion. Action on the suit has been suspended pending resolution of the present criminal trial.

In the Tucson criminal trial, the defense filed a motion to dismiss based upon free exercise of religion, and the prosecution filed motions to preclude the use of certain defenses, including religious motivations for actions. The trial judge issued an order on July 24, 1985, denying the motion to dismiss and granting the prosecution's motion to prevent presentation of evidence or arguments relating to "(1) defendants' religious beliefs and (2) enforcement of immigration laws as an unconstitutional restraint on defendant's religious beliefs." Thus, the latest trial was resolved without reference to a free exercise defense.

On May 1, 1986, the jury convicted 8 of the 11 defendants of various combinations of the impending charges, the most serious of which were six convictions on conspiracy charges. Among those convicted were the Rev. John Fife, Sister Darlene Nicgorski, and Philip Willis-Conger; Jim Corbett was acquitted. These convictions followed intense debate among the jurors over the propriety of enforcing criminal penalties against sanctuary workers, but were perhaps inevitable given the disallowance of defenses. Nevertheless, all of the convicted defendants were given probation.

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1 First Amended Complaint counts 30-31 at 9, Presbyterian Church v. U.S. No. Cir. 86-0072 (D. Ariz.).
2 Id. at 2-3.
3 See Blodgett, Sanctuary: Church Workers Face Trial, A.B.A.J. 19 (April 1985); N.Y. Times, Jan. 27, 1985, at 12.
4 Order of July 24, 1985 at 2, United States v. Aguilar, No. Cir. 85-8 (D. Ariz.).
5 The rejection of any defense based on religion also caused a stir in the community. For example, the General Board on Church and Society of the United Methodist Church adopted a statement noting the court's action and stating,
6 We denounce such denigration of the Church's mission and affirm the right of religious freedom and the principle of separation of church and state in the context of sanctuary. We encourage the courts to be more mindful of the historic right of the institutional Church to determine for itself its ministry and witness especially in areas where they conflict with the interest of the state.

Affirming the Churches Right to Self-Determination Through the Provision of Sanctuary, (Adopted October 3, 1985).

1 Matthews, Jury Convicts 8 Sanctuary Defendants, Washington Post, May 2, 1986, at 1, col. 1
The constitutional issue of applying the free exercise clause to the sanctuary movement has never been addressed squarely by an appellate court. The trial court in Jack Elder’s first trial rejected the defense in a published order, but Elder was acquitted and thus the order was never challenged on appeal. Such a defense was also rejected, without written opinion, by the trial court in one of Stacey Mertk’s trials, but the issue was not raised on appeal. The defense has now been rejected in the recent prosecution, but may arise again in the event of an appeal. Therefore, it would be worthwhile to evaluate the sanctuary movement in light of the current free exercise analysis.

IV. LEGAL ANALYSIS

A. Contemporary Interpretation of the Free Exercise Clause

In recent years, the United States Supreme Court has recognized circumstances under which the free exercise clause of the first amendment provides an exemption from application of otherwise valid laws and regulations. The first case to explicitly adopt such an exception was Sherbert v. Verner. In it, the Supreme Court adopted a balancing test to be used when considering such an exemption. If the state action infringed upon the exercise of a person’s religion, then the government, in order to sustain its action, must have a compelling state interest in the enforcement of the law.

This test was refined further in Wisconsin v. Yoder, decided eight years later. In Yoder, Amish parents were granted an exemption from compulsory education requirements, allowing them to withdraw their children from school two years earlier than was mandated by law, in order to accommodate Amish religious beliefs. In granting the exemption, the Court utilized the Sherbert concept that the government can override religious freedoms only by a showing of compelling
state interest. The analysis in *Yoder* more clearly explained how these interests were to be identified.

The first determination to be made in the balancing process is whether government action in fact imposes a burden on religious activity. This could obviously involve courts unnecessarily in defining religious practices. However, the Supreme Court was concerned that it not give free license to the exercise of personal philosophy, as opposed to organized religious belief. There is an underlying concern in all free exercise exemption cases that courts not "permit every citizen to become a law unto himself." In a subsequent case, the Court clarified its position on interpreting religious beliefs when it held that "courts are not arbiters of scriptural interpretation." The degree of scrutiny, therefore, seems to be low.

The *Yoder* court resolved the issue of burden upon religious belief in favor of the Amish, stressing four points: (1) the belief was shared by an organized group; (2) it was founded in an interpretation of religious literature; (3) the system of beliefs pervaded and regulated the daily lives of adherents; and (4) the system had been in existence for a substantial period of time. These limitations were probably imposed in order to limit exceptions based upon practices of lifestyle to those groups society would recognize as traditional or legitimate. This concern would presumably not be as strong in considering an application of the analysis to the sanctuary movement.

The second step of the *Yoder* free exercise analysis begins after a burden is found to be imposed upon religion; the focus then shifts to the nature of the government's interest in the regulation. The mere fact that the regulation is of a general nature will not alone preserve its constitutionality. The Court in *Yoder* went back to the *Sherbert* balancing test and held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." The test therefore requires a comparison between the interest the government is asserting and the imposition alleged by the religious party. However, the Court made it clear that the government interest

165 Id. at 215-16.
167 Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981). The Court noted that where there are differences of opinion within a particular creed, courts should not attempt to resolve the conflict by choosing a correct view. Therefore, so long as the belief arises in the context of an established religion, it seems that the courts will not exercise a searching review of the legitimacy of the belief. *Id.* at 715-17.
169 "The 'countercultural' movement was before the eyes of the Court, and its opinion appears to want to say 'yes' to the Amish while saying 'no' to the hippies." Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 335 (1981) (footnote omitted).
170 "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder*, 406 U.S. at 220.
171 *Id.* at 215.
to be weighed in the balancing test was not to be the overall interest of the
government in the general area of regulation, but the interest in applying the
regulation to the particular religious group claiming an exemption. If this gov-
ernment interest cannot outweigh the infringement, the exemption should be
granted.

The third element of the analysis enunciated in *Yoder* was to be invoked
where the state had shown that its interests outweighed the imposition on religious
freedom imposed by the government action. If this is so, the government must
finally show that there is no less restrictive means of imposing the regulation.
This is implied in the balancing test, which allows important interests, "and those
not otherwise served" to outweigh free exercise considerations. This element of
the test is stated more clearly in a later case: "The state may justify an inroad
on religious liberty by showing that it is the least restrictive means of achieving
some compelling state interest."

*Wisconsin v. Yoder* established the basic test to be used in considering free
exercise exemptions today. However, one modification must be noted before that
test may be applied to the sanctuary movement. In 1982, the Supreme Court
decided *United States v. Lee* which, while following the *Yoder* format, suggested
a shift in the operation of the balancing test.

*Lee*, like *Yoder*, involved the Amish. The exemption being requested in *Lee*
was from paying social security taxes, since the Amish did not believe in receiving
aid from the government and therefore would not accept social security benefits.
The Supreme Court accepted the contention of the Amish that compulsory with-
holding of taxes did place a burden on their exercise of religion, but denied
the exemption on the grounds that the government had met its burden of showing
a compelling state interest. The method by which they did so is instructive. The
government interest in the withholding was defined as the fiscal vitality of the
comprehensive insurance system, and was equated with the interest in the national
income tax system. This would seem to contradict the approach taken in *Yoder*,
which would have suggested that the government interest in withholding social

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122 Thus, in *Yoder*, the Court responded to the contention by the state of Wisconsin that the
state interest was in preserving compulsory education by stating:
Where fundamental claims of religious freedom are at stake... we cannot accept such a
sweeping claim; despite its admitted validity in the generality of cases, we must searchingly
examine the interests that the State seeks to promote by its requirement for compulsory
education at age 16, and the impediment to those objectives that would flow from recog-
nizing the claimed Amish exemption.

123 *Yoder*, 406 U.S. at 221 (emphasis added).
124 *Id*. at 215.
125 *Thomas*, 450 U.S. at 718.
127 The trial court found that "the Amish believe it sinful not to provide for their own elderly
and needy and therefore are religiously opposed to the national social security system." *Id*. at 255.
128 *Id*. at 257.
129 *Id*. at 260-61.
security taxes from the Amish alone be weighed against the burden such an action would place upon the exercise of their religion.\textsuperscript{179}

In another shift, the Supreme Court did not even mention the less restrictive means element of the \textit{Yoder} analysis. It is unclear whether this is no longer included as an element of the analysis, or whether it has simply been subsumed in the \textit{Lee} statement of the balancing test. Whereas \textit{Yoder} spoke in terms of the interest of the state being sufficient to outweigh the exercise of religion,\textsuperscript{180} \textit{Lee} phrases the test as follows: "[W]hether accommodating the [exercise of religion] will unduly interfere with fulfillment of the governmental interest.\textsuperscript{181}

Thus, \textit{Lee} may have altered the analysis under which free exercise claims are analyzed, both by inflating the government interest to be considered and by shifting the balancing test to a consideration of how accommodating the belief would interfere with that interest.\textsuperscript{182} However, the Court also seemed concerned with the fact that \textit{Lee} dealt with taxes, and it is unclear to what degree the analysis might differ in a less sensitive area.

\section*{B. Applicability of Free Exercise Analysis to Sanctuary}

By using the preceding first amendment analysis, it should be possible to evaluate the contemporary sanctuary movement in the context of modern free exercise jurisprudence. The test which will be used is the \textit{Yoder} analysis, with references to possible modifications by \textit{Lee}.

\subsection*{1. Religious Motivation}

The first step in any free exercise case is to show that the challenged conduct was motivated by religious belief. This must be shown by the person claiming the exemption before the burden shifts back to the government to show its interest. In the context of sanctuary, this threshold issue could conceivably cause problems for adherents claiming an exemption. One persistent criticism of the movement has been that it is not religious in nature, but is instead simply another form of political protest against U.S. policies in Central America.\textsuperscript{183}

\footnote{\textsuperscript{179} See \textit{supra}, note 175 and accompanying text. Justice Stevens noted this fact in his concurrence when he stated "if we confine the analysis to the Government's interest in rejecting the particular claim to an exemption at stake in this case, the constitutional standard as formulated by the Court has not been met. . . . The court overstates the magnitude of this risk [difficulty in processing claims] because the Amish applies only to a small religious community with an established welfare system of its own." \textit{Lee}, 455 U.S. at 262 (Stevens, J. concurring) (Emphasis added; footnote omitted).
\textsuperscript{180} \textit{Yoder}, 406 U.S. at 205.
\textsuperscript{181} \textit{Lee}, 455 U.S. at 259.
\textsuperscript{182} For a criticism of the recent trend in analyzing free exercise claims. See Pepper, The Conundrum of the Free Exercise Clause — Some Reflections on Recent Cases, 9 N. Ky. L. REV. 265 (1982).
In fact, there has been significant tension within the sanctuary movement between those who feel that they are part of a religious movement and those who feel that sanctuary should be more political—attempting to stop the flow of refugees by improving the conditions in the countries from which they are fleeing and by raising public awareness through the statements of the refugees. To some extent this division represents differing perceptions on the nature of this religious practice. In its January 1985 newsletter, the CRTF published an article entitled “Some Considerations on Direction for the Sanctuary Movement,” which argued that,

[T]he sanctuary movement is profoundly religious but inevitably political. . . . All social religious activity is inevitably political, from Amish resistance to public schools to Protestant opposition to U.S. - Vatican diplomacy, from Roman Catholic teaching on abortion to our opposition to U.S. support for war in Central America. These political positions are made by fundamentally religious organizations operating with religious motivations and purposes.

The religious motivations of people within the sanctuary movement may simply lead to activity which can be labelled in different ways.

Beyond these definitional problems, differences of opinion within the movement exist regarding tactics and public stances. For the present analysis, however, that is irrelevant because the sanctuary movement in its entirety is not asserting the free exercise right — individuals are. Those individuals are generally able to demonstrate religious motivations for their actions. Evidence of religious motivation may be found in the widespread support from national denominations, as well as the numerous local denominations which have declared themselves to be sanctuaries. An amicus curiae brief filed by various national denominations during the appeal by Stacey Merkt described this religious foundation:

The Sanctuary Movement for Salvadoran refugees is but a current manifestation of a religious doctrine rooted in, and central to, the Judeo-Christian tradition. . . . The command that Church groups and Church people give sanctuary to refugees is a sustained and prominent theme of biblical teaching. It begins with the concept of sanctuary and cities of refuge in the Old Testament and extends through the understanding of the individual as God's holy sanctuary in the New Testament command of love. The roots are deep and strong. God's voice is clear and unmistakable.

Given this religious support, and the fact that courts will not evaluate religious beliefs very stringently, this portion of the analysis can probably be satisfied.

185 BASTA!, supra note 111.
186 It should be noted that the prosecutions thus far have been directed almost exclusively against sanctuary workers affiliated with the “Tuscon” wing of the movement. One of the defendants in the present trial, Sister Darlene Niegorski, worked for the CRTF, but in the border area.
187 See supra notes 120-23 and accompanying text.
188 Amicus Brief, supra note 26, at 10-11.
In the one reported decision dealing with a free exercise claim by a sanctuary worker (Jack Elder), this claim was met. The district court judge heard extensive testimony from religious leaders stating that sanctuary was an appropriate expression of Christianity. The court recognized that other Catholics could disagree with Elder's actions, but held that he "fulfilled his Christian obligations as he genuinely perceived them to be and that [he] presented substantial testimony to support his view of Christianity." It would seem therefore that, given adequate support in the record, sanctuary members could meet their initial burden of proof.

2. Governmental Interest

The real difficulty in a sanctuary-free exercise analysis arises in balancing the exercise of belief with the interests of the government. As noted earlier, the original mandate in *Yoder* was that the state's interest be defined narrowly, in terms of the specific exemption being requested. Analogizing to the present situation, the government interest might be characterized as that in enforcing immigration procedures against those refugees fleeing political violence in El Salvador and Guatemala who are being aided by the sanctuary movement. This number would presumably constitute a small fraction of the total refugee flow from those countries, and would be minuscule when compared to the entire influx of Central Americans. The government interest would be reduced accordingly. Furthermore, the nature of the government's interest is in maintaining control over the refugee flow through enforcement of immigration laws. Given the fact that many of those against whom the INS is now seeking to assert governmental control probably deserve to be granted refugee status under existing law, the actual governmental interest here is narrow. Thus, if the analysis is conducted in a manner most favorable to the sanctuary movement, it might seem that the governmental interest is sufficiently low to be outweighed by the burden placed on sanctuary worker's beliefs by imprisonment.

There are however several problems with this analysis, beyond the fact that *Lee* would indicate that the interests should be defined differently. Courts are simply going to be reluctant to sanction any means of bypassing established immigration procedures. While the INS may have a valid right to deport only those refugees who do not meet the statutory criteria, they will undoubtedly assert a right to evaluate the merits of all claims. The interests of the government also extend beyond simply evaluating specific refugee claims. For example, the government might also raise the potential impact of refugee admissions on its foreign relations with other countries. While this might require an admission of the political considerations in asylum adjudication, it would also place the issue in an area in which courts would be reluctant to proceed. In fact, the entire field of

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190 *Id.* at 1577.
191 *Id.* at 1578.
192 *Yoder*, 406 U.S. at 221.
193 Under the "political question doctrine," courts will refrain from exercising review over political matters, such as foreign affairs. *See* Baker v. Carr, 369 U.S. 186 (1962).
immigration law has often been treated with deference by the judiciary.94

Beyond these problems in identifying the relevant interests are some basic difficulties of definition, both in terms of the sanctuary workers entitled to protection and the refugees entitled to safe passage. An exemption would potentially involve courts in determining who is or is not a "legitimate" sanctuary worker. While the movement is now composed of persons with sincere religious beliefs, the decentralized informal nature of the movement would make it difficult to insure that such would continue to be the case. Also, while many of the refugees protected are fleeing political violence, some probably are not. The sanctuary movement gives aid to refugees without distinction and thus deals with those who are legitimate targets of enforcement in the eyes of the government. Finally, courts will be reluctant to proclaim that the Refugee Act is being enforced selectively, and to announce a means of circumventing it entirely.

These problems in defining the governmental interest reflect an underlying concern raised by the issue of a sanctuary-free exercise exemption. There is a qualitative difference between allowing a person to avoid a compulsory education requirement and allowing them to avoid a felony criminal statute. The penalty which the sanctuary workers seek to avoid, five years in prison and a $2,000 fine, and the nature of their activity, bringing undocumented aliens into the country, seem to place this religious practice in opposition to stronger governmental interests than those which were present in the other free exercise cases.

If these problems appear to dim the chances of winning a sanctuary-free exercise exemption, U.S. v. Lee extinguishes them altogether. Lee indicated a trend toward inflating the government interest by characterizing it as the entire interest in the area of regulation rather than that which is being asserted against the individual religious adherent. In the present case, the government might well assert its interest in maintaining a coherent immigration policy and stemming the tide of illegal aliens.95

That is precisely how the court in U.S. v. Elder characterized this interest. The court held that "the Government meets its burden to demonstrate an overriding interest in protecting a congressionally-sanctioned immigration and naturalization system designed to maintain the integrity of this Nation's borders."96 Once the government interest is cast in these terms it will be virtually impossible to show any religious interest which could counterbalance it. The Elder court,

94 The Supreme Court has historically deferred to Congress in decisions regarding terms for immigration and naturalization. See J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 168, at 703; Kleindeinst v. Mandel, 408 U.S. 753 (1972) (Attorney General discretion in allowing entry of aliens is not limited by the First Amendment); Matthews v. Diaz, 426 U.S. 67 (1976) (a different standard of review is applied to laws applicable to aliens).
95 The area of immigration is similar to that of taxation (at issue in Lee) in terms of the high government interest.
96 Elder, 601 F. Supp. at 1578.
however, did characterize its balancing test in *Yoder* terminology rather than in the phrasing of *Lee*.

3. Less Restrictive Alternative

Although not mentioned in *Lee*, this was the third component of the *Yoder* analysis, and is still presumably a second burden which the government must meet. The district court in *Elder* recognized this element, but gave it little weight, stating that "the Government must retain the sole authority to determine who may cross the borders or travel further within the country." In holding that there was no less restrictive method of enforcement, the court raised the spectre of individually-created personal immigration policies, and of the masses of people who might also be proper objects of Christian charity.

The court in *Elder* closed out its free exercise analysis by noting the existence of asylum adjudication procedures, and using this as a further justification for finding no less restrictive alternatives "since nothing in this decision prohibits the exercise of Christian charity to those who present themselves before the INS to apply for asylum and who proceed under the INS rules." This cryptic statement ignored the fact that it was the selective enforcement of those procedures that led to the perceived need for sanctuary in the first place.

That comment does, however, suggest a potential less restrictive alternative to prosecution-proper enforcement of the Refugee Act of 1980 (possibly by adopting standards currently utilized by the United Nations). This would promote the government interest of stemming the flow of undocumented aliens into this country by reducing the number of undocumented political refugees seeking assistance from the sanctuary movement, and it would certainly impose a lower burden on sanctuary workers than imprisonment. There are two problems with this proposal. First, it would require judicial recognition of the fact that asylum adjudication is currently being administered improperly, which is not likely to occur. Second, this alternative is not directly related to the enforcement procedures the religious adherents seek to avoid. Asylum adjudication is carried out independently from prosecutions for transporting illegal aliens, and while its administration might have an effect on such prosecutions in this situation, courts would probably be reluctant to link the two.

V. Conclusion

The possibility of obtaining an exemption from prosecution on the grounds of first amendment freedoms is therefore very remote. The type of government...
interest involved, and the highly political nature of the issue, make it unlikely that any court would find such a religious exemption. It is worth noting that religious defenses were raised in the recent Tucson prosecution of sanctuary workers. The district court judge denied the motion, finding that:

1) The power to regulate and control the admission or exclusion of aliens is a fundamental sovereign attribute;
2) The immigration laws of the United States promote a compelling state interest;
3) The inference, if any, with religious practices resulting from application of the immigration laws is minimal and incidental;
4) The enforcement of immigration laws does not constitute a violation of defendants’ rights under [the First Amendment];
5) There is no court mandated religious exemption from [criminal sanctions for transporting illegal aliens] and this Court shall not interfere with Congress' authority to regulate immigration pursuant to Article I, Section 8 of the Constitution;
6) Religious leaders and persons of religious convictions have the same obligation as all citizens and persons present within this country to comply with constitutional statutes and regulations.

This ruling accurately summarizes the prevailing judicial attitude towards such a free exercise claim.

The major problem in asserting such a claim is the difficulty of meeting the analytical standard created in United States v. Lee. The Court has deviated from its earlier approach and has begun a practice of inflating the relevant government interest to the extent that any religious claimant would have difficulty meeting the required standard. This reflects the unwillingness demonstrated by courts towards granting religious exemptions from regulated activities. It will certainly pose a significant barrier to gaining such an exemption in this case.

The current form of analysis seems unlikely to change soon, so any future sanctuary claims will continue to be evaluated under Lee. It is unlikely that the rejection of a religious exemption will have a catastrophic effect on sanctuary however. The sanctuary movement was never premised on the existence of constitutional protection, and the leaders of the movement have demonstrated a willingness to undergo prosecution for the exercise of their beliefs. That fact alone might reflect a true measure of the sincerity of religious beliefs involved in sanctuary and the likelihood of its continuance. Given the growth of the movement

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200 Order, supra note 152.
201 In the absence of a constitutional exemption, one possible protection for sanctuary workers in criminal prosecutions is jury nullification — the refusal of a jury to enforce laws in a manner which they perceive to be unfair. For a debate over the merits of this practice, see Osterman and Marshall, At Issue: Should jurors be told they can refuse to enforce the law?, A.B.A.J. 36-40 (March, 1986).
since the beginning of the prosecutions, it seems probable that volunteers will be available and active within the movement. Given the recent history of Central America, it would appear that refugees will continue to enter this country in need of assistance. Therefore, with or without constitutional approval, the sanctuary movement will continue to assert what it believes to be its "God-given right to aid anyone fleeing from persecution and murder." 

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