

10-1-1986

Sanctuary: Reconciling Immigration Policy with Humanitarianism and the First Amendment

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Recommended Citation

Geralyn Passaro and Janet Phillips, *Sanctuary: Reconciling Immigration Policy with Humanitarianism and the First Amendment*, 18 U. Miami Inter-Am. L. Rev. 137 (1986)

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COMMENT

**SANCTUARY: RECONCILING
IMMIGRATION POLICY WITH
HUMANITARIANISM AND THE FIRST
AMENDMENT**

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I. INTRODUCTION

In recent years, vast numbers of Salvadorans who completed a long and arduous journey to the United States in search of safety have been quietly returned to El Salvador.¹ Many of the United States citizens who were aware of the massive deportations were forced to choose between obedience to civil authority and obedience to their religious principles which mandated that they protect innocent human life. Those who chose to protect life, acted upon their religious convictions, and founded the sanctuary movement.

In 1984, a church worker was charged with unlawfully transporting three undocumented Salvadoran aliens in violation of the Immigration and Nationality Act² which prohibits the transportation of illegal aliens within the United States. John Elder, the director of the church-sponsored refugee shelter, Casa Romero,³ provided sanctuary to Central Americans fleeing political persecution. Elder filed various motions to dismiss, some of which were based on freedom of religion, and domestic and international refugee law. The United States District Court for the Southern District of Texas denied the motions and *held*: neither the free exercise of religion clause of the first amendment nor domestic or international refugee law prohibited prosecution of a United States church worker for providing sanctuary to illegal aliens. *United States v. Elder*, 601 F. Supp. 1574 (S.D. Tex. 1985).

The events leading to this decision are significant. Immigration policy, political events, and public sentiment are of particular importance. These forces have culminated in a crusade aptly described as the sanctuary movement. In order to provide an understanding of the reasoning behind the district court's decision, this comment will briefly survey events giving rise to the movement. Second, this comment will analyze the grounds for prosecution of sanctuarians and defenses. Third, this comment will examine and evaluate the freedom of religion defense raised in *Elder*. Finally, this comment will evaluate the impact of the sanctuary movement on U.S. jurisprudence and society.

1. Comment, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 296 (1985).

2. 8 U.S.C. § 1324(a)(2) (1982).

3. Casa Romero, named in honor of Oscar Romero, an assassinated Roman Catholic Archbishop of El Salvador, was founded in 1982 and provides assistance and shelter to Central Americans who have fled from their homeland to the United States.

II. THE SANCTUARY MOVEMENT

The sanctuary movement consists of groups of church workers who provide shelter and transportation to Salvadorans who have entered the United States in violation of the immigration laws. The movement has quickly gained widespread publicity and support: in February 1983, there were approximately twenty churches offering public sanctuary and refuge.⁴ By January 1985, there were over 180 sanctuaries, with over 60,000 church members who supported the movement.⁵ While the sanctuary movement is associated most closely with the Catholic Church,⁶ other religious groups, including Protestants, Quakers, Presbyterians, and Jews have offered their support.

The first sanctuaries were independent units dispersed primarily throughout southwestern Texas and California. Currently, the heart of the sanctuary movement is in California, where sanctuaries are concentrated in San Francisco and Los Angeles. The sanctuaries have formed a network of common alliances as the result of increased pressure from the opposition and increased public awareness.

Although the movement began as a coalition of loosely-knit groups, it has acquired cohesion as a result of the recent wave of government prosecutions against sanctuary workers for transporting and harboring illegal aliens. The government views the sanctuary movement as a usurpation of governmental authority to regulate immigration policy. The church workers are thus being prosecuted as common alien smugglers who transport aliens into the country for a fee.

The church workers' principal defense is that the refugees have a right to asylum in the United States by virtue of the United Nations Protocol Relating to the Status of Refugees.⁷ The church workers contend further that under the Refugee Act of 1980,⁸ the Salvadorans qualify for refugee status because of their well-founded fear of persecution stemming from their adherence to par-

4. L.A. Daily J., July 20, 1984, at 1, col. 2.

5. L.A. Daily J., Jan. 29, 1985, at 4, col. 3.

6. The historic role of Catholicism in Central and South America is the primary explanation given for the predominance of Catholic involvement in the sanctuary movement.

7. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967).

8. 8 U.S.C. § 1101 (1982).

ticular political ideologies or membership in a particular social group.⁹ Therefore, the sanctuarians maintain, they are only assisting political refugees who would be entitled to enter this country legally under the U.S. laws defining refugee status.

The sanctuary movement and the government also differ in their respective beliefs regarding the motives of the Salvadorans who seek to enter the country. The government asserts that the Salvadorans, like the majority of other immigrant groups, are seeking admission to the United States for economic reasons: the flight of the Central Americans is an attempt to achieve a better economic way of life by utilizing alleged political persecution to their advantage.¹⁰ Leaders of the movement, on the other hand, respond that political motivations of the Salvadorans are of paramount concern, asserting that a "well-founded fear" of persecution exists. They argue that, notwithstanding any immigrant's desire for a better life, the Salvadorans qualify as political refugees.

A. Immigration Policy

The sanctuary movement is a product of changing immigration policy and foreign affairs, and is further shaped by constitutional limitations and political processes. Congressional power over immigration stems from two sources: the express constitutional provision conferring such authority in article I, section 8, clause 3 of the United States Constitution,¹¹ and the more obscure source of Congressional power to regulate immigration found within the

9. 8 U.S.C. § 1101(a)(42) (1982).

10. The Immigration and Naturalization Service (INS) has been reluctant to grant applications for political asylum by Salvadorans because of their possible economic motives. In 1984, the INS granted only 328 applications of 13,373 applications for political asylum made by Salvadorans. For example, on January 4, 1985, the INS denied the application of a twenty-nine year old Salvadoran who petitioned for political asylum contending he had been kidnapped and tortured as a result of his participation in the Salvadoran teachers' union. The INS, while sympathizing with the applicant's suffering, ruled that his claim was not unique since the persecutions were not confined to a particular group, but are imposed on all. L.A. Daily J., Feb. 5, 1985, at 4, col. 3. See also *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984)(the tragic and widespread danger or violence affecting all Salvadorans was not persecution sufficient to support a showing required for political asylum).

11. The constitution provides that Congress shall have the power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes." U.S. CONST. art I, § 8, cl. 3. This provision was inserted, apparently, as a solution to the immigration situation under the Articles of Confederation. The Articles of Confederation provided that each state had authority to regulate and enact its own immigration laws. ART. CONFED. art. 4.

concept of sovereignty; the United States as a sovereign nation delegates responsibility for immigration policy to the federal government.

1. Historical Perspective

While Congress was granted the power to regulate immigration under the constitution, early congresses did not invoke this power. The individual states controlled immigration according to their own rules until the middle of the nineteenth century. A significant force in eroding state power to regulate immigration occurred in 1849, when the Supreme Court ruled certain state statutes which imposed taxes on incoming aliens unconstitutional.¹² Not until 1882, however, did Congress take advantage of its power to control immigration by passing the first federal immigration law.¹³

Congress initially took an expansive view of immigration control. The need for cheap labor during the Industrial Revolution was a major motivation behind the open door policy. By the early twentieth century, however, Congress took a restrictive view towards immigration and implemented a system of quotas, which restricted immigration based on the immigrant's national origin. This restrictive approach combined with totalitarian regimes of the twentieth century culminated in a great number of people seeking entry into the United States under refugee status.

2. Refugee Act of 1980

The Refugee Act of 1980 was intended to furnish an orderly procedure for processing and admitting refugees.¹⁴ One of the objectives of the act was to provide a comprehensive statutory definition of the term "refugee." Other goals of the act included providing new quotas for the admission of refugees and for granting

12. *Norris v. City of Boston*, 48 U.S. 282 (1849).

13. The Chinese Exclusion Acts (22 Stat. 58), suspended Chinese immigration to the United States for 10 years. The acts were extended again in 1892 (27 Stat. 25) 1902, (32 Stat. 176) and 1904 (33 Stat. 394, 428). The propriety of the Acts would be litigated a few years later in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)(broadly mapping the powers of Congress with respect to immigration and the exclusion of foreigners).

14. Congress declared that the Act is to provide "a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States . . ." 8 U.S.C. § 1521 (1982)(congressional declaration of policies and objectives).

political asylum. The act also established resettlement procedures.

The act defines a "refugee" as an individual outside the country of his nationality or habitual residence who, because of a "well-founded fear of prosecution on account of race, religion, nationality, membership in a particular social group or political opinion" is unable or unwilling to return to that country.¹⁵ This new definition expanded the scope of refugee status because it allowed an immigrant to claim refugee status based on nationality or membership in a social group. In contrast, the act defines an "asylee" (a person applying for asylum) as an alien physically present in the United States or at a border.¹⁶ To qualify for asylum, a refugee must demonstrate refugee status.¹⁷ A one year period of asylum is authorized with the possibility of renewal, contingent on the political conditions of the original country.¹⁸

The act expressly provided for the admission of 50,000 refugees a year during 1980, 1981, and 1982.¹⁹ After 1982, the president, after consultation with Congress, is required to determine the number of refugees allowed to immigrate. This number must be justified by humanitarian concerns or must otherwise be in the "national interest."²⁰ This language suggests that the act is intended to facilitate a balance between political events and U.S. foreign policy.

B. Foreign Policy Towards El Salvador

The civil strife in El Salvador is the paramount reason for the growing sanctuary movement. El Salvador's oppressive regime began in 1977, when General Carlos Humberto Romero ascended to the presidency following sham elections,²¹ in which voters were in-

15. 8 U.S.C. § 1101(a)(42) (1982).

16. *Id.* § 1158.

17. *Id.* § 1158(a).

18. *Id.* § 1159(a).

19. *Id.* § 1157(a)(1). It is interesting to note that this limitation was not applied to the Cuban boat people who arrived on U.S. shores in 1980 as a result of the "Freedom Flotilla." These estimated 125,000 Cubans entered the United States as "special entrants" outside the framework of the Act. SELECT COMM. ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT TO CONGRESS AND THE PRESIDENT 93 (1981).

20. *Id.* § 1157(a)(1).

21. Fisher, *Human Rights in El Salvador and U.S. Foreign Policy*, 4 HUM. RTS. Q. 1, 1 (1982).

timidated at the polls and ballot boxes were stuffed.²² When the defeated candidate, Colonel Ernesto Claramount, denounced the election, protests began and approximately 100 people died as a result of military fire.²³ These series of events began a reign of terror which was to torment El Salvador in the years to come. Since that time, horrendous tales of murder, torture, and rape have been reported.²⁴

1. The Carter Administration

Initially, the United States Department of State condemned the regime. The Carter administration treated human rights as the paramount concern of U.S. foreign policy.²⁵ The Carter administration began a vigorous crusade against violations of human rights in El Salvador. The administration delayed naming a new Ambassador to El Salvador and sent the Head of the Human Rights Division of the State Department to investigate the situation.²⁶ Military and economic assistance to El Salvador was reduced as a further message to General Romero.²⁷

The administration relied on two laws, namely the Foreign Assistance Act²⁸ and the International Financial Institutions Act²⁹ to achieve these goals. In July 1977, Washington postponed approval of over ninety million dollars in loans from the Inter-American Development Bank, insisting that it would only relinquish its approval pending a reduction in human rights violations.³⁰ However, when the eight month siege of military force was lifted following Romero's inauguration, the loan was approved and a new ambassa-

22. C. ARNSON, *EL SALVADOR: A REVOLUTION CONFRONTS THE UNITED STATES* 34 (1982).

23. R. ARMSTRONG & J. SHENK, *EL SALVADOR, THE FACE OF REVOLUTION* 88 (1982)[hereinafter R. ARMSTRONG].

24. Fisher, *supra* note 21.

25. Carter's emphasis on respect for human rights was based on avoiding mistakes of the past. He was insistent upon dismissing the memory of Watergate and Vietnam, and sought to introduce morality into foreign affairs. R. ARMSTRONG, *supra* note 23, at 95.

26. *Id.*

27. See U.S. DEP'T OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979* 321 (1980).

28. 22 U.S.C. § 2304 (1982). The Act prohibits security assistance to any country which "engages in a consistent pattern of gross violations of internationally recognized human rights." *Id.* § 2304(a). The Act cuts off economic aid to any country guilty of human rights violations. *Id.*

29. 22 U.S.C. § 262g-3 (1982). This act compels the United States representative to lending institutions to vote against loans to repressive governments.

30. R. ARMSTRONG, *supra* note 23, at 95-96.

dor was appointed.³¹

The Carter administration continued to watch the situation in El Salvador. The Organization of American States (OAS) visited El Salvador in January, 1978 and reported the existence of torture and repression.³² By February, 1979, the Department of State presented a human rights report of its own to Congress.³³ El Salvador was no longer a pressing concern, however, because problems with Costa Rica and Nicaragua became paramount.³⁴

Concern over the Salvadoran situation was renewed in the fall of 1979 when the Romero regime was overthrown by military officers.³⁵ The military junta initially proposed changes in the economic situation of El Slavador by redistributing land ownership and wealth.³⁶ While these goals were sincere, military officers succeeded to key positions and denounced reform. Leftist groups condemned the new junta. During the first week of the new government, approximately 160 people died during police attacks.³⁷

Two juntas took control of El Salvador in the six months between October 1979 and March 1980. U.S. involvement in the region grew with the increasing U.S. commitment to control the violent upheaval El Salvador was experiencing.³⁸ The State Department sent warnings to the rightist groups to refrain from conspiratorial activities.³⁹ The administration supported the ruling junta because it was trying to restore order and provide a middle ground between the rightist groups and the oligarchy which opposed land reform, and the Liberal Christian Democrats.⁴⁰ Concern over the crisis in El Salvador mounted when four U.S. citizens, three nuns and a lay person, were murdered on December 2, 1980.⁴¹ President Carter immediately suspended all aid and sent an investigative team to the country to probe into the facts of the incident.⁴² Circumstantial evidence was clearly present despite the

31. *Id.* at 97.

32. *Id.* at 106.

33. *Id.* at 108.

34. *Id.* at 109.

35. C. ARNISON, *supra* note 22, at 41.

36. *Id.* at 42.

37. *Id.* at 43.

38. *Id.* at 50.

39. E. BALOYRA, *EL SALVADOR IN TRANSITION* 127 (1982).

40. R. ARMSTRONG, *supra* note 23, at 157.

41. The brutality of the murders increased public awareness of the situation in El Salvador. *Id.* at 176; C. ARNISON, *supra* note 22, at 64-65.

42. R. ARMSTRONG, *supra* note 23, at 177.

lack of direct evidence linking the murders to government officials or the military.

The Salvadoran government was reorganized following the murders and Napoleon Duarte, a civilian, was named president by the junta.⁴³ The State Department demonstrated its approval of the Duarte government by providing twenty-five million dollars in economic aid.⁴⁴ In his last three days in office, Carter renewed military aid to El Salvador in excess of five million dollars.⁴⁵ This action caused public outrage; the State Department regarded the action as a personal affront against a human rights victory. Carter explained that his policy reversal was required due to information obtained which revealed that the guerrillas were receiving arms and training from Communist countries.⁴⁶ The State Department vowed to support the Salvadoran government in opposing left-wing terrorism. Twenty U.S. military officers were sent to train Salvadoran officers in counterinsurgency techniques.⁴⁷

2. The Reagan Administration

When Ronald Reagan came into office in January, 1981, his administration quickly dispensed with the aura of human rights which had permeated the Carter administration. Specifically, Reagan "dropped all pretense of tying aid to reform."⁴⁸ Reagan's policy bolstered the local military in its efforts to maintain order. The public and Congress viewed U.S. military advisors' presence in El Salvador as reminiscent of Vietnam and charged Reagan with violation of the War Powers Act.⁴⁹ Reagan's anti-communist stance hardened in an attempt to prevent a leftist victory, but support for the Duarte government continued.

The Reagan administration has met with strong public criticism in the area of human rights. Reagan has consistently recognized the Salvadoran situation as a "textbook case" of communist oppression.⁵⁰ As a result, the Reagan administration's foreign aid

43. C. ARNISON, *supra* note 22, at 66.

44. R. ARMSTRONG, *supra* note 23, at 177.

45. *Id.* at 188.

46. *Id.*

47. C. ARNISON, *supra* note 22, at 69.

48. R. ARMSTRONG, *supra* note 23, at 189.

49. 50 U.S.C.A. App. § 1543(a)(1) (Supp. 1973). The act requires notification to Congress when U.S. military is sent to hostile nations. *Id.*

50. See BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, COMMUNIST INTERFERENCE IN

programs are tied to the political alliances between the United States and the country involved in the insurgency. A blatant example of Reagan's insensitivity to the Salvadoran human rights violations occurred in November, 1983. Reagan vetoed legislation which provided that military aid to El Salvador would only be furnished upon assurance by the President that the human rights situation had improved.⁵¹

Congress passed Section 728 of the International Security and Development Cooperation Act of 1981⁵² which required the President to certify that the government of El Salvador was complying with human rights standards. For two years, Reagan complied. When the certification provisions expired, however, and a bill was introduced to extend the certification procedure, Reagan refused to sign the bill. Members of Congress filed suit in federal court challenging the validity of the veto.⁵³ In addition, Congress brought suit⁵⁴ against President Reagan, urging that the President's policy of providing military assistance to El Salvador was violative of the prohibition on granting aid to "any country. . . which engage[s] in a consistent pattern of gross violations of internationally recognized human rights."⁵⁵ The district court dismissed the suit, on the grounds that review would improperly interfere with the political process. The dismissal was affirmed by the court of appeals.

The Reagan administration's policy on human rights is inherently inconsistent, flawed, and lacks understanding and moral sensitivity. The Reagan administration's policy draws a sharp distinction between communist and non-communist regimes. Human rights violations by communists are vehemently opposed, while non-communist strife is tolerated. Examples of this inconsistent treatment are evidenced by Reagan's show of military force in Grenada and the bolstering of naval forces near Libya, as a warning against terrorism. Yet with El Salvador, the administration has refused to recognize that the Rightist regime, to which the U.S. is

EL SALVADOR, Spec. Rep. No. 80, at 8 (1981).

51. See H.R. 4042, 98th Cong., 1st Sess., 129 CONG. REC., H777 (Daily ed. Sept. 30, 1983).

52. International Security and Development Cooperation Act of 1981, Pub.L. No. 97-113, § 728, 95 Stat. 1519, 1555-57 (1981) (codified at 22 U.S.C. § 2370 (1982)).

53. See *Barnes v. Carmen*, 582 F. Supp. 163 (D.D.C. 1984), *rev'd sub. nom.*, *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985).

54. *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983).

55. 22 U.S.C. § 2304(a)(2) (1980).

supplying arms, is more dangerous than the Leftist insurgency which is simply advocating democratic reform.

C. Current Perspectives

As with any controversy, the sanctuary movement has its supporters and opponents. Several legislators, while not publicly condoning the movement's approach, have indirectly supported its objectives. Several House and Senate bills have been proposed urging that Salvadorans be granted temporary legal residence.⁵⁶ The legislation would allow extended voluntary departure for Salvadorans in the United States for approximately two and a half years, until an investigation is made of the conditions of displaced persons. At that time, Congress would be empowered to make permanent decisions on asylum for Salvadorans. While this legislation would limit deportation of refugees already within the United States, the prosecutions of sanctuary workers would not be eliminated.

The sanctuary movement recently instituted stronger means to spread its message. In May, 1984, approximately eighty religious refugee groups sued the federal government to enjoin criminal prosecution of sanctuary workers.⁵⁷ The suit was initiated not only to stop prosecution of sanctuary workers, but also to increase public awareness of the situation. By this gesture, the sanctuary workers transformed the debate into a political controversy.

The sanctuary movement is opposed not only by the Justice Department, but also by conservative citizen groups. For example, protesters gathered outside a federal courthouse in Brownsville, Texas urging the convictions of sanctuary workers. The group, which calls itself "Concerned Citizens for Church and Country," believes the Soviet Union is backing the sanctuary movement in its

56. See, e.g., S. 377, 99th Cong., 1st Sess. (1985); H.R. 822, 99th Cong., 1st Sess. (1985). The principal sponsors of the bills are Rep. Joseph Moakley (D-Mass.) and Sen. Dennis DeConcini (D-Ariz.). As of April 3, 1985, the Moakley-DeConcini bills had 18 co-sponsors in the Senate and 139 co-sponsors in the House. The bill is based on 8 U.S.C. § 1253(h) which gives the Attorney General authorization to withhold deportation of an alien to a country which would subject him to persecution. Interpreter Releases, Mar. 1, 1985, at 187; Interpreter Releases, Apr. 5, 1985, at 331.

57. The suit, *American Baptist Churches v. Meese*, No. C85-3255RFP, filed in U.S. District Court for the Northern District of California also requests that the Court should declare that refugees have a right to remain in the United States until human rights violations cease in El Salvador and Guatemala. See L.A. Daily J., May 8, 1985, at 21, col. 1.

acts of opposition to U.S. foreign policy in Central America.⁵⁸

III. SANCTUARY PROSECUTIONS AND DEFENSES

A. *United States v. Merkt*

One of the first sanctuary prosecutions involved Stacey Lynn Merkt.⁵⁹ Merkt was a church worker at Casa Oscar Romero which offers food and housing to Central American refugees. Merkt assisted two illegal aliens from El Salvador, in 1984, by driving them from Casa Romero to a farmhouse in another city where they spoke with an American reporter; the aliens planned to go to the Immigration and Naturalization Service (INS) office in San Antonio. Border Patrol agents intercepted, arrested and charged Merkt with transporting and harboring illegal aliens in violation of federal law.⁶⁰ Merkt was convicted and given a suspended sentence of ninety days; the court suspended execution and instead placed the defendant on two years probation.⁶¹

On appeal, Merkt argued that the government had failed to establish a *prima facie* case. In order to establish a violation of section 1324(a)(2), the government must prove (1) the defendant transported or moved an alien within the United States; (2) the alien was within the United States in violation of the law; (3) the

58. L.A. Daily J., Feb. 2, 1985, at 5, col. 3. For an interesting explanation of the sanctuary movement, see 14 *STUD. LAW.* 25 (1986).

59. *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985).

60. The Immigration and Nationality Act provides that:

(a) Any person including the owner, operator, pilot, master commanding officer, agent or consignee of any means of transportation who —

(2) knowing that he is in the United States in violation of law or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law; . . . any alien, including an alien, crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs; *provided, however*, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

8 U.S.C. § 324(a)(2) (1982). For the legislative history and purpose of this section see 1978 U.S. CODE CONG. AND ADM. NEWS, at 5566; see also 1981 U.S. CODE CONG. AND ADM. NEWS, at 2577.

61. *Merkt*, 764 F.2d at 269.

defendant knew the alien was an illegal entrant; (4) the defendant knew or had reasonable grounds to believe that the alien's last entry into the United States was within the last three years; and (5) the defendant acted willfully in furtherance of the alien's violation of the law.⁶²

1. Lack of Knowledge Defense

Merkt's primary defense centered around the knowledge element of section 1324(a)(2). Merkt did not know that the aliens were in violation of the law. Merkt sought to introduce a subjective test of intent in an attempt to exempt her actions from the purview of the statute. Specifically, she introduced evidence that she believed the aliens were political refugees entitled to legal status in the United States under the provisions of the Refugee Act of 1980. Merkt asserted that because of her belief, she did not act with the requisite intent. The Court rejected this argument, noting that a defendant's subjective belief based on a mistake of law concerning refugee status could not be used as a defense.⁶³

The court glossed over the real issue in this cursory conclusion: Merkt's defense attempted to go beyond a simple "ignorance of the law" defense. She sought to introduce one of the major objectives of the sanctuary movement, namely that the government, by failing to recognize the Salvadorans as refugees, is actually violating its own laws.⁶⁴

It appears that the Salvadorans do indeed qualify for refugee status under the Refugee Act of 1980. Under present immigration laws, in order to qualify for political asylum, a political or social group must show a well-founded fear of persecution.⁶⁵ While the granting of asylum is discretionary, pursuant to section 208 of the Act,⁶⁶ upon a showing of clear probability of persecution, relief

62. *See id.*

63. 764 F.2d at 273.

64. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (1982).

65. In *INS v. Stevic*, 104 S. Ct. 2489 (1984), the Supreme Court decided the contours of the well-founded fear standard. The Court concluded that the standard is more generous than the "clear probability of persecution" standard (more likely than not that the alien would be subject to persecution). It is arguable, however, that the Supreme Court really did not decide the precise meaning of the well-founded fear standard under section 1101(a)(42)(A) in *Stevic* because the Court there was concerned with section 1253(h), the deportation provision.

66. 8 U.S.C. § 1253(h) (1982).

from deportation is mandatory.⁶⁷ Thus, it is possible for an alien to qualify for refugee status by fulfilling the requirements of section 208. Under either procedure, the Salvadoran aliens qualify for refugee status. Once these facts are recognized, Merkt's defense is more persuasive.

The Fifth Circuit confronted the knowledge element of section 1324(a)(2) in *United States v. Pereira-Pineda*.⁶⁸ In *Pereira*, the defendant argued that the Salvadoran aliens he transported were automatically entitled to seek asylum. Therefore, the aliens had a right to remain in the United States until they applied for asylum.⁶⁹ The argument was based on the premise that once the aliens are eligible for asylum, they are no longer unlawfully in the United States. Thus, the government could not prove one element of a section 1324(a)(2) violation.⁷⁰

The court rejected the argument that every Salvadoran has an absolute right to "reside" within the United States from the moment he arrives. The court emphasized the fact that Pereira was fully aware that the aliens had not been lawfully admitted to this country and did not possess proper entry documents.⁷¹ Another factor influential in the court's decision to affirm Pereira's conviction was that the illegal transportation was not intended to facilitate attempts by the aliens to file applications for asylum.

2. Lack of Intent Defense

Merkt introduced a second defense based on the last factor in the court's decision in *Pereira*. She argued that she never intended to further the aliens' illegal presence in the United States.⁷² Merkt asserted that she sought to assist the aliens in reaching the INS office to apply for asylum and thus, she was intending to comply, and not violate immigration law.

The Fifth Circuit had never directly addressed the requirement that the act must be conducted "in furtherance of the aliens' violation of the law" until *Merkt*.⁷³ The court cited with approval

67. *Id.*

68. 721 F.2d 137 (5th Cir. 1983).

69. *Id.* at 139.

70. *Id.* at 138.

71. *Id.*

72. *Merkt*, 764 F.2d at 271.

73. *Id.*

the Ninth Circuit case of *United States v. Moreno*⁷⁴ which held that in order for the government to show that the defendant had transported aliens in furtherance of the aliens' violation of the law, it must show a "direct and substantial relationship between that transportation and the furtherance of the alien's presence in the United States."⁷⁵ In other words, the defendant's act of transportation must be significant in furthering the alien's illegal presence.⁷⁶ The Fifth Circuit accepted the Ninth Circuit's rationale, holding that a person intending to assist an alien in obtaining legal status is not acting "in furtherance of" the alien's illegal presence in this country.⁷⁷

Merk t objected to the district court's instruction to the jury concerning her intent in transporting the aliens to San Antonio. The prosecution sought to demonstrate that Merkt's intent was not to assist the aliens in obtaining legal status because she did not proceed to the nearest INS office in Harlingen, Texas.⁷⁸ To rebut this inference, Merkt placed two expert witnesses on the stand who testified about the discrepancy of treatment of aliens by INS officials in San Antonio and Harlingen, and that the San Antonio office is known as the more favorable location.⁷⁹ The district court, however, instructed the jury that if Merkt intended to take the aliens to an INS office other than the nearest one, the jury was to find Merkt acted with intent to violate the statute.

The Fifth Circuit struck down the district court's jury instruction. The court claimed that this instruction had no basis in law and held that intent is not demonstrated by transporting an alien to an immigration office which happens to be further away than the geographically closest office.⁸⁰ The Fifth Circuit reversed Merkt's conviction on all three counts and remanded the case to the district court for a new trial.⁸¹

74. 561 F.2d 1321 (9th Cir. 1977).

75. *Id.* at 1323.

76. *Merkt*, 764 F.2d at 271-72.

77. *Id.* at 272.

78. *Id.*

79. The testimony indicated that at the Harlingen office the chances of a successful application for asylum were negligible. In fact, aliens would be immediately arrested and bond set at an exorbitant amount. In contrast, at the San Antonio office aliens would be documented, scheduled for an interview, and released. (An order to show cause for a deportation hearing will be issued only if asylum was denied.) *Id.*

80. *Id.*

81. *Id.* at 275.

*B. United States v. Elder*⁸²

Merkt never claimed a first amendment right to afford sanctuary to the persecuted Salvadorans. As a result, the decision never addressed this controversial claim. The District Court for the Southern District of Texas, however, was forced to confront this issue in the context of the sanctuary prosecution of John Elder.

John Elder was the director of Casa Romero, the same refugee haven where Stacey Merkt volunteered her services. On March 12, 1984, Elder transported three illegal Salvadorans from Casa Romero to a nearby bus station. Border Patrol agents observed the Salvadorans exiting Elder's vehicle and charged Elder with violation of section 1324(a)(2) of the Immigration and Nationality Act. Elder moved to dismiss the indictment on the basis of freedom of religion and domestic and international refugee law.

The district court refused to dismiss the indictment against Elder based on first amendment grounds, as well as domestic or international law. Elder was tried and acquitted on January 24, 1985 of the charges that he unlawfully transported illegal aliens.⁸³

1. Domestic Law Defense

Elder argued that under domestic law, particularly section 1253(h) of the Immigration and Nationality Act,⁸⁴ he could not be rightfully charged with violation of section 1324(a)(2) because the aliens he transported qualified for refugee status, and, therefore, could not be considered illegal aliens.⁸⁵ This argument is similar to Merkt's lack of knowledge defense. However, Elder attempted to go beyond the requirement of subjective knowledge by forcefully asserting that the aliens deserved refugee status under United States immigration laws. Elder argued that his actions were legal since the Salvadorans he transported qualified for protection as refugees, despite the lack of formal refugee status. The court repudiated this argument, noting that neither the court nor Elder are

82. 601 F. Supp. 1574 (S.D. Tex. 1985).

83. *Id.* at 1576.

84. The Attorney General "shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion." 8 U.S.C. § 1253(h) (1982).

85. *Elder*, 601 F. Supp. at 1580.

authorized by statute⁸⁶ to determine refugee status. The court refused to circumvent the statutory scheme and thus deferred action to the legislature.

2. International Law Defense

Elder also argued that his actions complied with the mandates of international law which Congress adopted in the Refugee Act of 1980.⁸⁷ The court refused to dismiss Elder's indictment on that basis, saying that it could not "interfere with political decisions which the United States as a sovereign nation chooses to make in the interpretation, enforcement, or rejection of treaty commitments which affect immigration."⁸⁸ The court simply concluded that Congress intended the Refugee Act of 1980 to fulfill its international obligations without determining the United States' obligations under international law concerning human rights.

The sanctuarians are faced with a dilemma. They hope to force the courts to evaluate their claim that the government's actions in deporting refugees to violent countries violates international law and that the government's actions in prosecuting those who offer sanctuary violates the religious freedom of those prosecuted. However, the courts do not accept that the sanctuarians have standing to assert these claims. If the sanctuarians have no standing to contest these issues, then no one has standing.⁸⁹

86. See 8 U.S.C. §§ 1158, 1253(h) (1982).

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

88. *Id.* at 1581. Other U.S. citizens have tried to uphold international law and have faced problems similar to those which the sanctuarians faced. See, e.g., *United States v. Allen*, 760 F.2d 447 (2d Cir. 1985)(anti-nuclear protestors).

89. Arguably, the violation of first amendment rights may, in itself confer standing to U.S. citizens to challenge governmental action. In *Valley Forge College v. Americans United*, 545 U.S. 464 (1982), a group of separatist taxpayers challenged the transfer of government property to a sectarian college. They claimed standing as taxpayers and as religious separatists. The Supreme Court evaluated their standing as taxpayers under the test developed in *Flast v. Cohen*, 392 U.S. 83 (1968). To have standing under *Flast*, a taxpayer must contest the constitutionality of acts of Congress pursuant to the taxing and spending clause. The separatists did not qualify under this test because the transfer of property was made by an agency, not by Congress. The sanctuarians also would fail this test as the acts which they object to are agency acts, not acts which fall under the Congressional spending and taxing powers.

The *Valley Forge* separatists also claimed standing under the establishment clause. The Third Circuit Court of Appeals had held that, as citizens, they had suffered in one way "to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" *Americans United for Separation of Church and State, Inc. v. United States Department of Health, Education and Welfare*, 619 F.2d 252, 261 (3d Cir.

3. Freedom of Religion Defense

Elder's strongest defense was based on the contention that his first amendment right to the free exercise of his religion entitles him to practice his religious beliefs, which require that he provide shelter and assistance to Salvadorans. He claimed that the enforcement of a criminal law, section 1324(a)(2) of the Immigration and Nationality Act, unconstitutionally interfered with his religious practices.⁹⁰ When a U.S. citizen asserts that his actions are protected under a freedom of religion claim, the claimant bears the initial burden of demonstrating that his religious beliefs motivate his protected conduct.⁹¹ The burden then shifts to the government

1980). The Supreme Court disagreed. While noting that an injury need not be economic, the court refused to accept a mere disagreement with the conduct of government as sufficient to confer standing to sue on the separatists.

Justice Brennan, dissenting, reasoned that the Framers of the Constitution intended that the establishment clause be enforced. How is it to be enforced if citizens do not have standing to contest government actions which violate it? The taxpayer, the citizen, was the beneficiary whom the framers had in mind when they wrote the establishment clause. It is the taxpayer, citizen and beneficiary, who suffers when the clause is violated.

90. The first amendment mandates that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ." The second clause, the free exercise clause, is the portion of the amendment under which Elder sought protection. U.S. CONST. amend. I.

More directly, "The First Amendment embraces two concepts— freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

91. This type of analysis is commonly referred to as a "two prong balancing test." It was first enunciated by the Supreme Court in *Braunfeld v. Brown*, 366 U.S. 599 (1961), wherein the Court considered the constitutionality of Sunday closing laws as applied to Orthodox Jews.

Subsequently, the Court has examined the right of U.S. citizens to act in accord with sincerely held religious beliefs when the exercise of their religion conflicted with a Wisconsin criminal statute. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The statute made school attendance compulsory until the age of sixteen. Members of the Old Order Amish religion, kept their fourteen and fifteen year old children at home. They believed that they would endanger their own salvation and that of their children if they sent the children to school. The Court, finding that the Amish way of life and the Amish religious faith were inseparable, held that Yoder and Miller's religiously motivated acts were protected by the first amendment.

In determining whether a religiously motivated act is constitutionally protected, the court may also ask whether the act is an integral part of the religious ritual or merely religiously sanctioned way of seeking salvation. In *Leary v. INS*, 383 F.2d 851 (5th Cir. 1967), where a member of the Bramakrishna sect of the Hindu religion admitted that the use of marijuana was only one of many ways to attain salvation, the Fifth Circuit held that his use of the drug was not constitutionally protected. In *Peyote Way Church of God v. Smith*, 142 F.2d 193 (5th Cir. 1984), however, where the ingestion of peyote was a sacrament, the Fifth Circuit held that peyote ingestion by church members during carefully controlled religious rituals was constitutionally protected.

to justify placing limitations on the religious conduct by demonstrating a compelling governmental interest in imposing the limitation.⁹² Moreover, the limitation on religion must be the least burdensome way to accomplish the government's purpose.⁹³

The court first determined that Elder met the initial burden of demonstrating that his beliefs motivated his conduct: several clergymen testified that assisting those in need is a fundamental aspect of Christianity and that providing such assistance is an appropriate expression of the Christian gospel.⁹⁴ Elder demonstrated the necessity for his assistance by presenting evidence of the turbulent conditions in El Salvador.⁹⁵ The court indicated that this evidence was unnecessary because it did not have to make foreign policy judgments in order to determine that Elder acted in accordance with his religious beliefs. The court emphasized that it was not acting as the arbiter of canon law nor interpreting the Christian doctrine.

The government then offered proof of a compelling governmental interest which would justify governmental interference with religion. The court found that immigration control is conducted primarily for security reasons. Thus, the court concluded that there is an overriding governmental interest in maintaining the integrity of the nation's borders through the enforcement of its immigration and naturalization policy which justifies enforcement of section 1324(a)(2) against Elder.⁹⁶

The court next analyzed whether the government is utilizing the least restrictive means of accomplishing its goal in securing the nation's borders. Congress, by establishing procedures to regulate entry into the United States, has recognized that this country cannot accommodate all aliens who desire United States residency. The court reasoned that the government, as the sole authority for

92. *Braunfield v. Brown*, 366 U.S. at 613-14 (Brennan, J., concurring and dissenting).

93. *Id.* at 607.

94. Bishop John Fitzpatrick of the Roman Catholic Diocese of Brownsville testified at Elder's motion hearing as did Donovan Cook of the American Baptist Church, James Andrews of the Presbyterian Church, John Steinbrook of the Lutheran Church, and Gilbert Dawes and John Sopher of the United Methodist Church. They all agreed that "meeting material human needs represents an essential aspect of Christianity, and that each individual remains free to fulfill this obligation according to the dictates of his or her own conscience." *Elder*, 601 F. Supp. at 1577.

95. Elder presented testimony of "torture, murder, brutalities, and disappearances" of church workers, civilians, and government officials. *Id.* at 1578.

96. *Id.* at 1577-78.

regulation of immigration, cannot accommodate Elder's religious beliefs in its immigration policy.⁹⁷ The court concluded that the government was utilizing the least restrictive means of accomplishing its goal because Elder was still free to exercise Christian charity to those aliens who apply for asylum and proceed under INS rules.⁹⁸ The setting in which the freedom of religion defense was presented made it particularly significant.⁹⁹ A freedom of religion defense has strong ramifications in the criminal context where the claimant faces the imposition of a fine or imprisonment. The possibility of these consequences makes the defendant's religious interest weightier than it would be in a civil case and, more importantly, places the defendant's interest on par governmental concerns.¹⁰⁰

The importance of the defendant's religious interest deserves even more weight when the government's interest is closely examined. The government's interest can be analyzed as consisting of two distinct components: first is the concern of the government in stopping the smuggling of illegal aliens; second is the government's concern with impeding the harboring and concealing of aliens already in the country.¹⁰¹ While the government's interest in maintaining a regulated system of entry is quite strong, it cannot apply to those already within the country. In this respect, the government's interest loses its potency and the freedom of religion defense gains power and persuasiveness.

The Supreme Court was confronted with a variation of this issue in the conscientious objector cases.¹⁰² The interests of those who objected to the draft is similar to the interests asserted by Elder and the others. Both situations involve the government's interest in controlling the integrity of its borders. In the first situation, however, the conscientious objectors refused to participate in war because of their religious convictions. In the latter case, the sanctuary workers desire the right to assist aliens as an affirmative

97. *Id.* at 1580.

98. In concluding that individual circumvention of the immigration procedure thwarts the legitimate goals of immigration control, the Court noted: "Elder's do-it-yourself immigration policy, while charitable, gives away what is not his to give away the Government's legitimate right to examine every person who enters the country so that the Government can make informed decisions on who will be admitted." *Elder*, 601 F. Supp. at 1578.

99. See NAT'L. L.J., Feb. 25, 1985, at 3, col. 1.

100. *Id.*

101. *Id.*

102. See, e.g., *Gillette v. United States*, 401 U.S. 437 (1971); *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

exercise of religious practice. In the conscientious objector cases, the Court deferred to the government's interest in defense and refused to recognize a first amendment right to avoid military service in the absence of a statutory exemption.

Similarly, the Court recently faced this conflict between a religiously motivated act and a military regulation.¹⁰³ An Air Force psychologist and ordained rabbi wore his yarmulke when testifying as a defense witness at a court-martial. Opposing counsel complained that the wearing of a yarmulke violated Air Force regulations. Captain Goldman refused to comply with an order that he not wear the yarmulke outside the hospital when he was on duty. His request for permission to appear for duty in civilian clothing was denied, and a negative recommendation was given in connection with his application to extend his term of active service. Captain Goldman sued the Secretary of Defense and others, claiming that his right to freely exercise his religion had been violated.

The Court deferred to the military, stating, "to accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps."¹⁰⁴ The plurality conceded that an absolute bar to the wearing of a yarmulke might make military life objectionable to some people, but held that "[T]he First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations."¹⁰⁵

Justice Brennan, in his dissent, noted that the bar to the wearing of a yarmulke by military personnel did not make military service merely objectionable, it made it impossible for an observant Orthodox Jew to serve in the military.¹⁰⁶ He also objected to the Court's analysis saying, "Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a subrational-basis standard—absolute, uncritical 'deference to the professional judgment of military authorities.'"¹⁰⁷

103. *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986).

104. *Id.* at 1313.

105. *Id.* at 1314.

106. *Id.* at 1317 (Brennan, J., dissenting).

107. *Id.* (Brennan, J., dissenting).

The Supreme Court's current posture of deferral to administrative authorities can be seen in a series of recent cases. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (U.S. Court of Appeals, District of Columbia Circuit was reversed and a ruling of the Environmental Protection Agency upheld); *Jean v. Nelson*, 105 S. Ct. 2992 (1985) (Eleventh

Absent congressional authorization for a religious exemption, the courts are hesitant to impute a first amendment right. Based on the foregoing, it is doubtful that the Supreme Court, if faced with the sanctuary issue, will declare that the right to engage in one's religious practice overrides conflicting immigration laws.

IV. BEYOND MERKT AND ELDER

The decision in *Elder* remains noteworthy despite Elder's acquittal. First, it is the only published opinion discussing sanctuary prosecutions in relation to first amendment and international law issues. Although *Merkt* is the highest pronouncement by a United States Court of Appeals regarding sanctuary, the decision lacks mention of these important issues raised in *Elder*.

Second, the decision is influential for future sanctuary prosecutions. Although *Elder* was acquitted, the decision sets a precedent for the validity of freedom of a religion defense in a sanctuary prosecution case. Although the court rejected the freedom of religion defense, other defendants charged under section 1324(a)(2) may wish to raise other first amendment defenses.¹⁰⁸

A. *INS Asylum Processing of Salvadorans*

Sanctuarrians differ with the *Elder* court precisely on the point of efficacy of sections 1158(a) and 1253(h) because they are currently applied to otherwise deportable Salvadorans. Very few

Circuit was reversed and a ruling by the Board of Immigration Appeals upheld); *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986)(discussed in the text); and *INS v. Rios-Pineda*, 471 U.S. 444 (1985)(Eighth Circuit decision was reversed and the refusal of the Board of Immigration Appeals to reopen deportation hearings upheld).

It is not surprising therefore, that the Board of Immigration Appeals has refused to apply on remand the standards set by the Ninth Circuit in asylum cases. See, e.g., *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985). The court articulated the standard as: If Congress has not "directly spoken to the precise question at issue," but there is an administrative interpretation of the statute in question; the administrative interpretation is controlling law so long as it "is based on a permissible construction of the statute." 467 U.S. at 843.

108. For instance, a freedom of association claim may be asserted by a defendant charged under section 1324(a)(2). The test applied in such a context is (1) that the governmental interest is a compelling one, and (2) that the interest is the least restrictive means of protecting that interest. This is generally recognized as the strict scrutiny test. See *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) ("State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."). It is unlikely that this defense would succeed. Although the test utilized in the freedom of association is essentially the same test as used in the freedom of religion context, the defense may be equally unavailing in sanctuary prosecutions.

Salvadorans have been granted asylum in the United States. The United Nation High Commissioner for Refugees Mission to Monitor I.N.S. Asylum Processing of Salvadoran Illegal Entrants found that only one applicant out of two thousand Salvadorans who applied was granted asylum in 1981.¹⁰⁹ This dismal record prompted the sanctuarians to shelter the Salvadorans.

Although decisions to exclude certain aliens are difficult, they are necessary because "the United States cannot absorb all who wish to enter this country to take advantage of its relative tranquility and bounty."¹¹⁰ Congress has been charged with making these decisions, through sections 1158(a) and 1253(h) of the Refugee Act, and has provided for those who flee repressive countries, such as El Salvador because of persecution. The *Elder* court found "that the implementation of the immigration laws represents an important Government interest which, on balance, justifies enforcement of Section 1324(a)(2) against Elder."¹¹¹

The Sixth, Seventh, and Ninth Circuits have reviewed sections 1158(a) and 1253(h) of the Refugee Act and determined that the position of the two sections requiring equivalent levels of proof by an alien asylum applicant is manifestly contrary to the statute. Section 1158(a), drafted to comply with the Protocol Relating to the Status of Refugees (the Protocol),¹¹² requires that "(1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded."¹¹³ The requirements under section 1253(h) are stricter because the Attorney General has no discretion under the language of the statute.¹¹⁴ The Ninth Circuit found it could not defer to the administrative interpretation given to section 1158(a) because "[i]t is apparent from the very words of the statute that the burden under the asylum section (section 208(a)) is not identical to the prohibition-against-deportation section (section 243(h)) burden."¹¹⁵

The interpretation given to section 1253(h) by the INS was

109. See Comment, *supra* note 1.

110. *Elder*, 601 F.Supp. at 1579.

111. *Id.* at 1580.

112. United Nations Convention Relating to The Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force for the United States Nov. 1, 1968).

113. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452-53 (9th Cir. 1985).

114. *Id.* at 1451-52.

115. *Id.* at 1452.

upheld by the Supreme Court in *INS v. Stevic*¹¹⁶ in 1984. Prior to *Stevic*, an alien who applied for asylum was required to present *prima facie* evidence which showed a "clear probability of persecution" if he was returned to his homeland.¹¹⁷ This is an objective standard, under which the alien must present the court with evidence which is sufficient to demonstrate that there is a greater-than-fifty percent chance that his life or freedom would be threatened if he were deported to his homeland.¹¹⁸

The "well-founded fear" standard of section 1158(a) is a subjective standard which looks at whether it is reasonable for the individual to fear persecution; some courts have said that this is a more generous standard than the clear probability of persecution standard.¹¹⁹ Other courts, however, have interpreted the well-founded fear standard as simply a new version of the old "clear probability of persecution" standard. The Seventh Circuit reasoned that this standard requires more than the alien's subjective state of mind.¹²⁰ The court held that the alien must show by objective evidence either that "he actually has been a victim of persecution or that his fear is more than a matter of his own conjecture."¹²¹

Finally, the Supreme Court determined the standard to be applied in section 1253(h) cases in *INS v. Stevic*.¹²² Predreg Stevic, upon receipt of notice to surrender for deportation in 1981, filed a motion to reopen the deportation proceedings. He claimed that the standard under the new act was a subjective standard and that he should be allowed to stay in the United States because he genuinely feared that he would be imprisoned if he returned to Yugoslavia.¹²³ The Court held that the act changed the standard to be applied in evaluating Stevic's claim for asylum, stating that, "an alien must establish a clear probability of persecution to avoid prosecution under Section 243(h)."¹²⁴

The Supreme Court has not discussed the standard to be ap-

116. 104 S. Ct. 2489 (1984).

117. *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1320 n.5 (9th Cir. 1984).

118. *Cardoza-Fonseca*, 767 F.2d at 1452.

119. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1451 (9th Cir. 1985); *Argueta v. INS*, 759 F.2d 1395, 1396-97 (9th Cir. 1985); *Bolanos-Hernandez*, 749 F.2d at 1321.

120. *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977).

121. *Id.*

122. *INS v. Stevic*, 104 S. Ct. 2489, 2501 (1984).

123. *Id.* at 2491.

124. *Id.* at 2501.

plied when an alien applies for asylum under section 1158(a). The Ninth Circuit, however, has set forth a standard in *Argueta v. INS*¹²⁵ and *Bolanos-Hernandez v. INS*.¹²⁶ In these cases, the court set out a clear and logical procedure to be followed in evaluating those asylum petitions which are presented during deportation proceedings.¹²⁷

Both cases dealt with Salvadorans who had fled to the United States in fear of El Salvadoran death squads. Bolanos was threatened because he refused to infiltrate the government on the behalf of the guerrillas.¹²⁸ Argueta was threatened because he was suspected of being a member of the Guerilla organization FPL.¹²⁹ Both men wanted to remain neutral; both entered the United States illegally and requested asylum at their deportation hearings, claiming that they would be subject to persecution if returned to El Salvador. Their applications were denied by INS judges and the BIA.¹³⁰

An alien's request for asylum during deportation proceedings must be evaluated first under section 1253(h) and then, if he fails to meet the 1253(h) standard, under section 1158(a) of the Immigration and Nationality Act.¹³¹ Under section 1253(h), the Attorney General is forbidden to deport any alien who can establish a clear probability that he would be persecuted if returned to his home. The court of appeals applied the substantial evidence test in reviewing the factual finding that Bolanos had not proven that there was a clear probability that his life would be in danger if he were returned to El Salvador.¹³² Section 1158(a), alternatively, al-

125. 759 F.2d 1395 (9th Cir. 1985).

126. 749 F.2d 1317 (9th Cir. 1985).

127. *Bolanos-Hernandez* and *Argueta* were not the only post-*Stevic* cases which dealt with the standard for the application of Section 1158(a) of the Refugee Act, granting to the Attorney General the discretion to grant asylum, and the standard for the application of section 1253(h), prohibiting the Attorney General from deporting an alien to a country where his life or freedom would be threatened. The Sixth Circuit in *Youkhanna v. INS*, 749 F.2d 360 (6th Cir. 1984), and the Seventh Circuit in *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984), agreed with the Ninth Circuit that the standards under 1158(a) and 1253(h) are not the same. However, not all circuits which have dealt with this issue agree. The Third Circuit, in *Sotto v. INS*, 748 F.2d 832 (3d Cir. 1984); *Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982); and *Sankar v. INS*, 757 F.2d 532 (3d Cir. 1985), held that the standards under the two sections are identical.

128. *Bolanos-Hernandez*, 749 F.2d at 1318.

129. *Argueta*, 759 F.2d at 1395.

130. See *Bolanos-Hernandez*, 749 F.2d at 1319; *Argueta*, 759 F.2d at 1396.

131. *Bolanos-Hernandez*, 749 F.2d at 1319.

132. *Id.* at 1326.

lows the Attorney General to grant asylum on a discretionary basis if the alien demonstrates a well-founded fear of persecution. Because the decision is a discretionary one the *Bolanos* court held that the correct standard of review is abuse of discretion.¹³³

The court first reviewed Bolanos' request for asylum under section 1253(h). The government had denied asylum, claiming that Bolanos had not proven either that his life or freedom would be threatened if he were deported or that such threat would result from his political beliefs.¹³⁴ In support of his claim that his life would be in danger if he were deported, Bolanos testified about his ordeal with the death squads.¹³⁵ The INS judge did not question that the threat was genuine. Instead, the court found that Bolanos had not sufficiently demonstrated a threat to his life because his only independent corroborating evidence consisted of newspaper articles which described "the violent retribution that may follow the expression of political views in El Salvador and the executions conducted in retaliation for refusals to join political guerilla groups."¹³⁶ The INS judge and the BIA found this evidence, coupled with Bolanos' testimony, insufficient. They wanted Bolanos to provide affidavits corroborating his story. The BIA concluded that "the specific threat against Bolanos' life was merely 'representative of the general conditions in El Salvador.'"¹³⁷

The court of appeals held that, while proof of a general level of violence is not enough to satisfy the standard, a specific threat was more believable when made in a country where violence is prevalent.¹³⁸ Further, the requirement that a person whose life had

133. *Id.*

134. *Id.* at 1322.

135. Bolanos testified that a guerilla group had approached him and asked him to infiltrate the government. They felt that it would be possible for him to do this because he was a former member of the army, the Partido Nacional de Reconciliation and the voluntary police squad. The guerrillas threatened him with death if he failed to comply with their demands. These same guerrillas had killed five of his friends and had forced his brother to join them. Bolanos did not wish to join them, nor did he wish to ally himself with the government against them; he wanted to remain neutral. Eight days after the threat he fled to the U.S. *Id.* at 1318.

136. *Id.* at 1318-19.

137. *Id.* at 1323.

138. For example, the type of proof which the Fifth Circuit considers sufficient to demonstrate a "clear probability of persecution" is discussed in *Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978). Fleurinor, a Haitian citizen, who had been living in the Bahamas from 1963 to 1968, returned to Haiti for a visit. While in Haiti, he was arrested, accused of taking part in an abortive invasion of the island, and imprisoned. He managed to bribe his way to freedom and fled Haiti. *Id.* at 132. At the deportation proceeding, he testified that he feared

been threatened provide independent corroborative evidence of the threat was unreasonable. Indeed, the court said, "Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."¹³⁹

After holding that Bolanos' evidence was sufficient to demonstrate that it was more-likely-than-not that Bolanos' life would be threatened if he were deported to El Salvador, the court held that the threat arose as a result of Bolanos' political opinion. The BIA refused to recognize the decision to remain neutral as a political decision. The court said that the Refugee Act of 1980 was enacted "to provide protection to all victims of persecution regardless of ideology."¹⁴⁰ People holding moderate opinions should be accorded the same protection as those whose opinions are more extreme. Further, a person's reasons for his political decision are irrelevant to the inquiry. The political decision, once taken, motivates the threat and therefore is sufficient for section 1253(h) and 1158(a) purposes.

After deciding that Bolanos had satisfied section 1253(h), the court briefly discussed asylum under section 1158(a). The court noted that, because 1158(a)'s well-founded fear standard is more generous than 1253(h)'s clear probability of persecution standard, the alien who could satisfy the requirements of 1253(h) concur-

for his life if he were forced to return to Haiti. The INS judge ruled that these facts were more indicative of extortion than of political persecution, noting Fleurinor's ability to purchase his return to the Bahamas with a new Haitian passport. *Id.* at 132-34.

On appeal, Fleurinor presented as evidence a report by Amnesty International which described political conditions in Haiti, in an effort to vacate the decision of the BIA. The court refused to consider the report, stating that under 28 U.S.C. § 2347(c), Fleurinor was required to satisfy both prongs of a two-pronged test by showing that the report was "material" and that there were reasonable grounds for his failure to produce it at the prior proceedings. *Fleurinor*, 585 F.2d at 133.

On the issue of the materiality of the report, the court held that, "[I]n order for evidence to be 'material' within the meaning of Section 2347(c), the evidence must be probative on the issue of this alien being subject to persecution, in the event of deportation." *Id.* The court found that Fleurinor had not satisfied the first prong of the test because he had failed to show that he would be subject to persecution, and agreed with the INS judge that, "[T]o prove probable persecution today, Fleurinor would have to produce some evidence that the Haitian government remembers him." *Id.* at 134.

Fleurinor also failed to satisfy the second prong of the test because he was unable to show reasonable grounds for not producing the report during the prior proceedings. It was shown that his counsel had been in receipt of the report a full year before the BIA affirmed the decision of the INS judge. *Id.* at 133.

139. *Id.* at 134.

140. *Bolanos-Hernandez*, 749 F.2d at 1325.

rently satisfied section 1158(a).¹⁴¹ Bolanos could not be deported because 1253(h) mandated that he be granted asylum.

The confusion over the proper standards climaxed when the BIA refused to apply the standards set by the Ninth Circuit. In *Cardoza-Fonseca v. INS*,¹⁴² the BIA applied the "clear probability of persecution" standard in evaluating the asylum petitions of two Nicaraguan women. The court responded rhetorically saying "The Board appears to feel that it is exempt from the holding in *Marbury v. Madison*, . . ."¹⁴³ The court reversed and remanded, instructing the board to "evaluate those claims under the proper legal standard."¹⁴⁴

On February 24, 1986, the U.S. Supreme Court granted certiorari in *Cardoza-Fonseca*.¹⁴⁵ Whether the Supreme Court will require deferral to decisions of the BIA or adopt the Ninth Circuit's analysis of section 1158(a) remains to be seen.

B. Sanctuary Plea in American Jurisprudence

The sanctuarians, who have acted in response to the frequent denial of asylum petitions by the INS, have presented the courts with a concept which is new to American jurisprudence—the idea that a religious group can offer protection to those who, although they are not criminals, would be harmed by their own governments, or by the opposition to their governments, or both if they were returned to their native lands. Although the idea is new in the United States, it was formerly a part of British jurisprudence.

How should the U.S. courts respond to the challenge posed by the sanctuarians? Roger Dworkin suggests that the judge in a hard case is forced to weigh policy considerations and moral principles.¹⁴⁶ The policy considerations are those which "justify a political decision by showing that the decision advances or protects some collective goal of the community."¹⁴⁷ The moral principles include those which "justify a political decision by showing that the decision respects or secures some individual or group right."¹⁴⁸ The

141. *Id.* at 1326.

142. 767 F.2d 1448 (9th Cir. 1985).

143. *Id.* at 1454.

144. *Id.* at 1455.

145. 106 S. Ct. 1181 (1986).

146. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 82 (1977).

147. *Id.*

148. *Id.*

policy considerations in the asylum cases are the need to protect U.S. citizens from the entrance of terrorists, the inability of the United States to absorb the vast numbers of persons who are fleeing their homelands because of the threat of violence, and the desire to avoid embarrassing our allies by accepting as refugees their citizens who claim that their lives are threatened by government terrorism.¹⁴⁹ The principles involved include freedom of religion and conscience and the responsibility of both individuals and the state for the protection of innocent human life.¹⁵⁰

The judge who is faced by such weighty decisions turns to the constitution. The constitution, however, says nothing about sanctuary.¹⁵¹ In fact, the precise limits of religious freedom are not contained in the constitution. There are only standards: guides to be followed by the courts.

Anti-slavery judges faced a similar situation in pre-civil war America.¹⁵² Although slavery was legal in the South, it was illegal in the North. Various issues arose for which there were no provisions in the constitution. Should slavery be legal in the territories? Should slaves become freemen when their owners moved to free states? Were the courts, police, and citizens of the free states required to assist in the capture and return of fugitive slaves when such assistance violated their religious principles, their moral beliefs, and their state constitutions?

The anti-slavery forces split three ways.¹⁵³ One group interpreted the constitution so that it did not support such immoral actions.¹⁵⁴ Another believed that the constitution did support pro-slavery actions and therefore should be amended.¹⁵⁵ The third group denounced the "immoral" constitution, believing that, to be justified, the North must secede from the Union.¹⁵⁶

Through crisis after crisis, Congress preserved the Union by passing compromise legislation. The Supreme Court interpreted these statutes in a way which favored slavery. Tremendous pres-

149. *Elder*, 601 F. Supp. 1574.

150. *Id.*

151. See generally F. MAITLAND & F. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY (1915) (brief history of the sanctuary doctrine).

152. R.M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

153. W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977).

154. *Id.* at 202-27.

155. *Id.* at 249-75.

156. *Id.* at 228-48.

sure was brought to bear on the anti-slavery judge. Some citizens pressured the judiciary to interpret the constitution as an anti-slavery document, but that became gradually more difficult as the body of controlling law grew more favorable to the interests of the slave states.¹⁵⁷ Many abolitionists declared that the only moral thing to do was to refuse to apply the constitution at all. A God-fearing man, they said, could not be a judge.¹⁵⁸

At the heart of the debate lay the distinction between natural and positive law. Slavery obviously violated natural law,¹⁵⁹ and therefore could only be maintained if created by a positive law.¹⁶⁰ The positive law was comprised of the laws of the Southern states and several provisions of the U.S. Constitution. But, whenever specific positive law did not apply to the situation, a judge was free to look back to the source of law—natural law—and decide the issue in a way which favored the anti-slavery interests.

Today, some jurists interpret the constitution according to a theory of strict construction.¹⁶¹ If a specific question arises, they try to interpret what the framers meant. However, this theory "makes strict interpretation of the text yield a narrow view of constitutional rights, because it limits such rights to those recognized by a limited group of people at a fixed date of history."¹⁶²

The plea of sanctuary, unlike slavery, was not a part of English common law when that body of law was adopted by the United States, and therefore could not have been included in the framers' intentions when the first amendment was added to the constitution. Thus, there is no positive law of sanctuary. The framers would have had to resort to natural law had they been confronted with a sanctuary case. Perhaps they did: the framers did not turn away refugees.

The alternative view, that the provisions of the constitution are moral concepts, allows the judge to evaluate the new situation in the light of constitutional norms.¹⁶³ The judge who adheres to this view is an activist judge. He would evaluate the sanctuary plea

157. R.M. COVER, *supra* note 152; W. WIECEK, *supra* note 153.

158. R.M. COVER, *supra* note 152.

159. *Somersets Case* cited in R.M. COVER, *supra* note 152, at 1760-1848.

160. *Id.*

161. R. DWORKIN, *supra* note 146, at 131-37.

162. *Id.* at 134.

163. *Id.* at 137-40.

in the light of congressional and executive acts,¹⁶⁴ and in the light of contemporary moral thought. If the court found that the various elements of U.S. society agreed that sanctuary should be provided, that it was immoral to refuse asylum to refugees from El Salvador, an activist judge could allow the use of the sanctuary plea although it had never before been a part of American jurisprudence. The court would make new law according to the moral standards laid down by the framers in the constitution.

There is no consensus. The sanctuary issue is so new that many Americans are not aware of its origin or development. Thus, the courts cannot come to a valid decision about it. Nor can the courts defer to the political decisions of the executive branch without forcing Congress to decide on the constitutionality of the application of its own statute against the harboring of illegal aliens to those who shelter refugees that would violate the separation of

164. See, e.g., The accession to the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force for the United States, Nov. 1, 1968).

Under the Protocol, the United States must comply with article 33.1 of the United Nations Convention Relating to the Status of Refugees which states:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Id. art. 33.1.

Section 1253(h) drafted to comply with this language, states:

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h) (1982).

When the United States acceded to the Protocol, in 1968, it appeared to substitute a new, subjective standard for the old, objective one. The protocol, and section 1101(a)(42)(A) of the Refugee Act, define refugees as persons 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 (emphasis added).

Pub. L. No. § 208(a)(42)(A).

The Refugee Act of 1980, which was enacted to conform with the requirements of the statute, provides that the Attorney General shall,

establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1158(a) (1982).

powers.

What then should the U.S. courts do in this situation? Should they do nothing? It is unlikely that inaction would result in an even greater influx of refugees than that which the United States is now experiencing. The cost to the sanctuarians of sheltering refugees, in terms of time and money, is significant. Further, changes in governments and in political conditions in many countries may result in the voluntary return of many refugees to their homes. Indeed, if the United States and its allies work to stop terrorism throughout the world, the numbers of persons fleeing for their lives might diminish, reducing the need for the evaluation of asylum petitions.

Finally, what is the individual citizen to do if the Supreme Court upholds INS asylum proceedings, thereby sanctioning the return of men, women, and children to violent and dangerous countries? Should the citizen violate the law and offer sanctuary?

No law instructs individual citizens on the correct response to governmental acts that arguably violate national, international, or religious laws. It may be true that the acts of the INS in deporting nearly all Salvadorans who request asylum in the United States violates the U.N. Protocol to which the United States acceded in 1968. Sanctuarians cannot, however, claim protection under the international law for their actions in harboring illegal aliens because the treaty is directed at the acts of sovereign nations, not at the acts of individual citizens. The protocol which forbids refolement does not instruct the citizen in what he is to do if his government, a contracting state, returns persons whom the citizen believes will be persecuted upon their return to their homeland.¹⁶⁵

Nevertheless, sanctuarians can argue that they are simply living according to the principals which the United States espoused at the Nuremberg trials.¹⁶⁶ The International Military Tribunal at Nuremberg found many people guilty of participating in the torture and murder of innocent human beings, although they had acted under the orders of their government. The Nuremberg court found that these individuals had violated international law. A number of those convicted were executed.¹⁶⁷

The sanctuarians have seen and heard evidence of torture and

165. See *supra* note 127.

166. C. COHEN, *CIVIL DISOBEDIENCE* (1971).

167. *Id.*

murder in Central America. They feel that their participation in the deportation of those who have fled to the United States in search of safety would violate international law. They have chosen not to follow those orders which violate both their religious principles and international law.

Justice Douglas, dissenting in *Gillette v. United States*,¹⁶⁸ said, "I had assumed that the welfare of the single human soul was the ultimate test of the vitality of the First Amendment."¹⁶⁹ In *Gillette*, the Supreme Court held that a conscientious objector was exempt from the draft only if he averred that his religion forbade him to participate in any war. The objector who refused to fight in only those wars which he felt were immoral was not relieved from the obligation to serve. His exercise of discretion, said the court, demonstrated that his refusal to submit to the draft was not a religious decision, but was a decision based on the individual's moral code.

The statutory provision which exempted from the draft those who objected to all wars on a religious basis specifically excluded those who objected on a moral basis. Any other decision would require the court to go into the business of weighing an individual's moral choices against the precepts of his religion which would clearly violate the separation of church and state.¹⁷⁰ A morally good act can be described as one which enhances the survival of an individual or of the human race.¹⁷¹ The society which fails to recognize a category of persons and denies that category the protection of the laws which inure to survival has not advanced to the point that a sufficient number of its members accept the moral standard which mandates the protection of all persons.

"Though the law of some societies has occasionally been in advance of the accepted morality, normally law follows morality. . . ." ¹⁷² What, then, is a moral rule? H. Hart in discussing the characteristics of moral rules has identified four qualities of moral rules—internalized rules—which distinguish them from legal rules.

Moral rules are considered by many to be of primary importance.¹⁷³ The person who believes in them will adhere to them de-

168. 401 U.S. 437 (1971).

169. *Id.* at 469.

170. *Gillette*, 401 U.S. 437.

171. H. HART, *THE CONCEPT OF LAW* 187 (1961).

172. *Id.* at 196.

173. *Id.* at 166.

spite great personal sacrifice and will endeavor to teach them to others. When a sanctuarian shelters a Salvadoran refugee, he does so at the risk of criminal prosecution. The moral principle which directs him to protect innocent life is, to him, of such overriding importance that he is willing to risk a prison sentence in order to follow it.

A moral rule is also immune from deliberate change.¹⁷⁴ The rule that one should give shelter to a person whose life is endangered has recurred throughout history. Indeed, the U.S. citizens who decided to offer shelter to Salvadorans borrowed the term "sanctuary" from Medieval England.

Hart's third characteristic of a moral rule is that an individual is only morally responsible for his acts insofar as he can control them.¹⁷⁵ If a moral rule mandates the protection of refugees, and an individual does not know that the refugees exist, he has no moral culpability for his failure to offer shelter. The very publicity engendered by the actions of the sanctuarrians forces others to make moral choices. The presence of a large number of aliens who are being deported forces those aware of their plight to make similar choices. Perhaps this is one of the reasons that the newest detention facility for such refugees is located far from any city, in the swamps of Louisiana.¹⁷⁶

The final characteristic of a moral rule is the type of sanction attached to its violation.¹⁷⁷ If a man breaks a law, he may be jailed. If he believes that the law required him to act in an immoral fashion, he may go to jail feeling like a hero, and he may be perceived as a hero by society. But, if a person violates a moral rule, a rule which he has internalized, he will undergo feelings of guilt and shame. The sanctuarian may prefer going to jail to standing idle while Salvadorans are deported. The actions of the government in apprehending and convicting the sanctuarrians are, therefore, counterproductive.

The *Gillette* decision was also counterproductive. As Dworkin indicates, "[t]he question arises in each case whether the issues are ripe for adjudication and whether adjudication would settle these issues in a manner which would decrease the chance of or

174. *Id.* at 171.

175. *Id.* at 173.

176. Radio Broadcast, Morning Edition, National Public Radio (Aug. 6, 1986).

177. H. HART *supra* note 171, at 175.

remove the grounds for further dissent."¹⁷⁸ The *Gillette* decision did not deter those who truly felt that the Vietnam War was immoral. Objectors were unmoved by the decision: they still felt that the war and the draft were immoral. Moreover, they felt that they were forced to act in a manner which the court had ruled was criminal or to violate the dictates of their own consciences.¹⁷⁹

The controversy over the Vietnam War parallels the Salvadoran situation. No consensus had been reached about the war when *Gillette* was decided. No consensus has been reached about the plight of those who flee Central American violence in the 1980's.

V. CONCLUSION

The sanctuary movement, in its most basic sense, is a condemnation of the Reagan administration's foreign policy towards El Salvador. In a different sense, the sanctuary movement opposes the U.S. lack of moral sensitivity to the plight of its fellow men. A nation's view of human rights is embodied in its immigration policy. Insensitivity to human rights violations in El Salvador is indicative of the receding commitment by the United States to help others in need.

This lack of commitment to human rights is inconsistent with current immigration law. The Refugee Act of 1980 places "special humanitarian concerns" as the primary objective of United States foreign policy.¹⁸⁰ In section 101(a), Congress declared that "it is the historic policy of the United States to respond to the urgent needs of persons subject to prosecution in their homelands, including where appropriate, humanitarian assistance for their care and maintenance. . . of refugees of special humanitarian concern to the United States"¹⁸¹ By ignoring the human rights violations in El Salvador and prosecuting those persons committed to the historic policy enunciated by Congress, the United States is engaging in a flagrant disregard for its own laws and its commitment to "humanitarian concerns."

The sanctuary movement initially began as a response to the huge numbers of displaced Central Americans fleeing oppressive

178. R. DWORKIN, *supra* note 146, at 220.

179. *Gillette*, 401 U.S. 437.

180. For example, the term "special humanitarian concern" is referred to at least eleven times in the act. Amazingly, the act does not define the term anywhere.

181. 8 U.S.C. § 1521(1) (1982).

political regimes. The movement has entrusted itself with the duty to preserve the human rights commitment of the Carter administration embodied in the Refugee Act of 1980. While it may be said that both the United States and the sanctuary movement are acting outside the law, the movement is at least attempting to preserve the moral integrity of America.

Tradition instructs us that the proper method for U.S. citizens to protest government conduct is to effect changes by way of the voting booth. The courts are unwilling to second guess the executive branch of the government by making rulings about immigration affairs during the trials of those who have been accused of harboring illegal aliens. If American society desires to offer shelter to fleeing Salvadorans, then that wish will have to be expressed through the political process, not by way of the courts.

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* *Editor's note:* this comment is the product of two separately written papers, combined for the purpose of publication.