

Fall 2008

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Recommended Citation

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AN ANALYSIS OF HISTORICAL AND LEGAL SANCTUARY AND A COHESIVE APPROACH TO THE CURRENT MOVEMENT

PAMELA BEGAJ*

I. THE SANCTUARY CONTROVERSY

In Victor Hugo's classic tale, "The Hunchback of Notre Dame," Quasimodo, the bell-ringer, sought sanctuary within the walls of the cathedral. He clearly was a "good guy," and we sympathized with him in his confrontation with the "bad guys." The line between good and evil was clearly drawn. Not so today. The line is not so clear. In fact it is, to say the least, downright murky.¹

On one side, the proponents of church sanctuary in the United States rely upon its biblical roots, as well as their personal religious beliefs and morals to provide a safe haven to illegal immigrants aspiring to reach the "American Dream."² On the other hand, foes of the movement are intent on rigidly applying this country's strict immigration laws, including the deportation of illegal aliens in order to protect the sanctity of our legal system, our borders, our jobs, and ultimately our "American way of life."³

* J.D. Candidate, May 2009, The John Marshall Law School. The author would like to thank her parents, her brother, and Tony Loutos for their outstanding support throughout law school, and especially the development of this Comment. Also, a special thank you to Annie Skrodzki and Daniel Saeedi for their advice.

1. Gene E. Flynn, Letter to the Editor, *More False Rhetoric of 'Anti-Semitism,'* THE JOURNAL NEWS (Westchester County, N.Y.), Sept. 13, 2007, at B4.

2. JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA 404 (Little, Brown, and Co.) (1931). He states:

But there has been also the *American dream*, that dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement. . . . It is not a dream of motor cars and high wages merely, but a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.

Id.

3. See ROBIN MURPHY WILLIAMS, AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION 459 (Alfred A. Knopf, 2d ed. 1961) (1951) (explaining how American nationalism is the "secular counterpart of the missionary spirit" and

Although sanctuary is an ancient religious practice, it has not officially been adopted in the United States within the realm of immigration law. It is still not clear why the government implicitly recognizes this concept without infringing upon it.⁴ Thus, begging the question: why the government permits open defiance of the legal system by allowing individuals to take refuge in a church, and more importantly, what prevents the authorities from raiding a church and forcing illegal immigrants on the first plane back to their respective countries?⁵ Is there a provision in the First Amendment of the Constitution that grants such a right? Is it based on historical tradition? Or is it just a politically entrenched issue that shapes immigration law and foreign policy, amounting to *de facto* recognition of sanctuary?

This Comment analyzes the existence, or lack thereof, of a connection between immigration law policy and church sanctuary by tracing how sanctuary evolved from an ancient Judeo-Christian tradition to a current nationwide movement with legal and political implications. In addition, this Comment will analyze the government's tacit approval of a tradition not explicitly recognized as a legal right in case law, or codified in legislation. Part II of this Comment will trace the history of sanctuary beginning with its ancient Judeo-Christian heritage, then exploring Greco-Roman practices, continuing with the emergence and abolishment of

that American culture, much like the religions that contributed to it, is viewed by many as "so morally superior that it should be widely adopted elsewhere.").

4. See Paul Wickham Schmidt, *A Symposium on the Sanctuary Movement: Refuge in the United States: The Sanctuary Movement Should Use the Legal System*, 15 HOFSTRA L. REV. 79, 98 (1986) (explaining how the government has not entered churches to arrest illegal aliens). In 1986, INS Commissioner Alan C. Nelson stated:

The government has shown extreme restraint. We do not infiltrate churches, and we do not go into churches and arrest people . . . the agency does not request search warrants to enter churches suspected of sheltering Central Americans who claim that they have entered the United States to escape death, arrest, or torture in their native countries.

Id. at 98 n.133.

5. See RENNY GOLDEN & MICHAEL MCCONNELL, *SANCTUARY: THE NEW UNDERGROUND RAILROAD* 53 (William E. Jerman ed., Orbis Books) (1986) (stating that officials have never taken a refugee from sanctuary in the U.S. by force); see also HERMAN BIANCHI, *JUSTICE AS SANCTUARY: TOWARD A NEW SYSTEM OF CRIME CONTROL* 147 (Indiana University Press) (1994) (arguing that "[T]he authorities felt constrained by emotional situations; it was difficult to oppose entire congregations bewildered by the attitudes of their own government . . . they realized the awe-inspiring respect for places of worship . . . these places exercise a numinous influence, and it is simply considered wrong to enter them by force of arms."). Although these reasons are based on moral and ethical beliefs, this Article will explore whether there are any constitutional imperatives as to why the government does not raid churches.

Anglo-Saxon sanctuary, and finally ending with the Sanctuary Movement of the 1980s in the United States. Part III will discuss and analyze the revived sanctuary movement in the United States and its constitutional implications.⁶ Finally, Part IV of this Comment proposes a functional policy as to how the U.S. government could implement a cohesive approach to manage the New Sanctuary Movement within the confines of the U.S. legal system.

II. BACKGROUND

A. *What is Sanctuary?*

Although the word sanctuary has various connotations, in this Article it is defined as “a place of refuge and protection” or as “a consecrated place.”⁷ A proper analysis of the current church sanctuary movement necessitates examining its historical development, including “reasons for its emergence, the source of its power, and the existence of any legal limitations.”⁸

B. *The Judeo-Christian Tradition of Sanctuary*

1. *Biblical Origins*

The concept of sanctuary is deeply rooted in biblical tradition and is mentioned in three passages in the Hebrew Scriptures.⁹ The Mosaic Law in the Old Testament references the “cities of

6. Although this Comment deals strictly with sanctuary with the Judeo-Christian and Western traditions, it is interesting to see that despite the religious beliefs of ancient societies, sanctuary seems to have been a ubiquitous practice. See CARLOS URRUTIA-APARICIO, *DIPLOMATIC ASYLUM IN LATIN AMERICA* 4 (Graduate Faculty, American University) (1959) (noting the practice of sanctuary among other cultures including the Ashantis in Africa, the Oman in the French Congo, the aborigines in Australia, Hawaiian, and various tribes of the American Indians).

7. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1040 (1983); see also Schmidt, *supra* note 4, at 93 (defining sanctuary as a place where fugitives can seek temporary refuge in a particular city or on religious property); BIANCHI, *supra* note 5, at 138 (explaining that once the fugitive entered sanctuary he was deemed to be under the protection of divine law, exceeding the control of “worldly powers”).

8. Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747, 749 (1986).

9. See IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* 124-29 (Paulist Press 1985) (explaining that there were two types of ancient sanctuary: communitarian, which the Hebrew Scriptures regard as the “cities of refuge,” and altar sanctuary, which refers to a cultural tradition not based in the Scriptures). Although it may seem counter intuitive that altar sanctuary referred to the immunity afforded to fugitives who took refuge in desert tents among the Arabs, the concept should not be confused with a church altar.

refuge" for those who are guilty of "involuntary homicide."¹⁰ Sanctuaries were considered a place of worship where God's authority superseded that of the government.¹¹ Sanctuary was recognized as a "mitigating response" to blood feuds¹² and a "necessary remedy for [the] barbarous state of society."¹³ These laws served a humanitarian purpose, reflecting the community's attempt to prevent vigilante retribution and intervene in what traditionally had been resolved privately between families.¹⁴ Therefore, anyone who captured the murderer of a family member outside of sanctuary was permitted to kill that person absent any legal consequences.¹⁵ Granting sanctuary did not presume innocence; rather, it was extended only to those who lacked the necessary *mens rea* in the commitment of a crime.¹⁶ Consequently,

10. J. CHARLES COX, *THE SANCTUARIES AND SANCTUARY SEEKERS OF MEDIAEVAL ENGLAND* 1 (London: George Allen Sons) (1911). The Mosaic Code references the six Levitical cities that provided refuge to those who had committed involuntary homicide, and who could only be released from the city borders upon the death of the high priest. *Id.* The Old Testament references these cities of refuge, stating: "And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place whither he shall flee." *Exodus* 21:13; *see also Deuteronomy* 19:4-5 (referring to cities of refuge and the idea that the crime must have been committed "ignorantly").

The label of "accidental homicide" is crucial because it resurfaces over and over in legislation. Although it is important to note that it is difficult to prove intent, the reason why sanctuary was limited to unpremeditated crimes was because it was easier to reach reconciliation with the family of the victim, as opposed to a willful crime where settlement between the parties was much more difficult. BIANCHI, *supra* note 5, at 139.

11. Douglas Colbert, *A Symposium on the Sanctuary Movement: The Motion in Limine: Trial Without Jury: A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 38 (1986).

12. Schmidt, *supra* note 4, at 93.

13. COX, *supra* note 10, at 1. The purpose of sanctuary was to limit the duration of blood feuds and prevent people from taking the law into their own hands. *Id.* The underlying Hebrew presumption regarding killing was that only blood vengeance, and not ransom, could expiate the original killing. BAU, *supra* note 9, at 125. One author, however, argues that the Old Testament has been wrongly interpreted to approve of retribution in the form of "an-eye-for-an-eye." BIANCHI, *supra* note 5, at 28-31. Bianchi calls this "The Great Misunderstanding" and argues that this is a faulty perception resulting from a misinterpretation of the Hebrew Scriptures. *Id.* Bianchi believes the Old Testament does not promote vengeance or retribution; rather, the Hebrew heritage of sanctuary in the Scriptures was an attempt to avert blood vengeance, not to promote it. *Id.*

14. Moshe Greenberg, *The Biblical Conception of Asylum*, 78 J. OF BIBLICAL LITERATURE 125, 125 (1959); *see also* BIANCHI, *supra* note 5, at 135 (referring to the possibility that a blood feud could easily become uncontrollable and exceed the purposes of achieving equity balance, which would then trigger a counter feud, eventually leading to a civil war).

15. Carro, *supra* note 8, at 750 (stating that this was viewed "as the only means of expunging the bloodguilt of the original manslayer.").

16. *See* Schmidt, *supra* note 4, at 93 (granting of sanctuary did not automatically result in complete forgiveness; rather it restricted the

those who willfully committed murder were denied sanctuary, left to the mercy of an avenger.¹⁷

2. Greco-Roman and Early Christian Sanctuaries

Similar to the biblical tradition, the Greeks eventually limited asylum¹⁸ in temples to those who committed unpremeditated crimes.¹⁹ In theory, the concept was rooted in the sacredness of the temple; in practice, however, there was widespread abuse of the system and often times the protection extended beyond the sanctuary itself.²⁰ Roman sanctuary was more limited than that offered by the Greek temples because it provided refuge only until a proper hearing could be held, without taking into consideration whether the temples' rules contradicted Roman law.²¹

wrongdoer's movement to a "particular sanctuary city").

17. Carro, *supra* note 8, at 751; *see also* Exodus 21:14 ("thou shalt take him from mine altar, that he may die"); Numbers 36:19 ("the revenger of blood himself slay the murderer").

18. In this section of the Comment dealing with Western traditions, the term "asylum" is interchangeable with the term "sanctuary," and it means to seek refuge within a temple. The old definition of the Greek word "asylum" was "untouchable" and meant if the criminal had found refuge in a sanctuary, blood vengeance was explicitly not permitted (i.e., the avenger was not allowed to touch the slayer). BIANCHI, *supra* note 5, at 135. The term "asylum" in this article is not to be confused with its common meaning under the U.S. legal system and international politics, which is to offer refuge to a fugitive from one state in another not only in sacred places, but within the nation itself. *Id.* at 136.

19. Carro, *supra* note 8, at 751; *see also* COX, *supra* note 10, at 2 (referring to Greek asylum as an alternative to the severe punishment of taking a wrongdoer's life and limb; instead providing an extended imprisonment). Generally, the types of people who sought asylum included mistreated slaves, soldiers, criminals facing trial, and fugitives. *Id.*

20. *See* WALTER YUST, *ENCYCLOPEDIA BRITANNICA: A NEW SURVEY OF UNIVERSAL KNOWLEDGE* 593 (1956) (stating that "Greek temples and altars were inviolable . . . it was a religious crime to remove by force any person or thing once under the protection of a deity."). The most famous case from the Greek tradition of providing asylum was the temple of Diana at Ephesus, "which exercised its right of protection beyond its boundary wall, at one time so far as to include part of the city." THOMAS SPENCER BAYNES, *THE ENCYCLOPEDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES AND GENERAL LITERATURE* 825 (9th ed. 1888).

In all cases, it seems that the refugee was retained under protection only so long as his means of subsistence lasted, and it may have often happened that pursuit was given up less out of respect for the right of a temple than from a conviction that want would soon drive the fugitive out of the asylum again. Asylums in this sense were an institution peculiar to the Greeks.

Id.

21. NORMAN MACLAREN TRENHOLME, *THE RIGHT OF SANCTUARY IN ENGLAND: A STUDY IN INSTITUTIONAL HISTORY* 6 (Frank Thilly ed., University of Missouri 1903); *see also* BAU, *supra* note 9, at 130 (stating that after the Roman conquest, the Empire required the Greek temples to "produce legal

With the emergence and spread of Christianity throughout the Roman Empire, the Jewish tradition of biblical sanctuary was reflected in the Christian churches.²² The first legal reference to sanctuary within the Christian tradition originated in the Theodosian Code, during which time, commentators explained, "eligibility for asylum depended on both the nature of the crime and the character of the accused."²³

3. *Sanctuary under the Anglo-Saxons*

Anglo-Saxon kings permitted the use of sanctuary in many churches.²⁴ The privilege of sanctuary was rooted in the view that the legal secular system was imperfect in achieving the model justice of divine law; consequently, the community relied on natural law to guarantee equity and provide refuge to those who were at the mercy of blood vengeance.²⁵ One of the most famous sanctuaries in medieval England was the Minster of Beverly in Yorkshire during the War of Roses, which housed approximately two-hundred people who were primarily guilty of manslaughter.²⁶ Fugitives could take refuge in the Minster for a month on the condition that they were willing to reconcile either with the private avenger or the prosecutor.²⁷

proofs of the right to exercise the privilege."). In both the Greek and the Roman traditions of sanctuary there was widespread abuse of the system. *Id.*

22. Carro, *supra* note 8, at 752; see also Colbert, *supra* note 11, at 39 (stating that "Roman Catholic canon law recognized that 'a church enjoys the right of asylum, so that criminals who flee to it are not to be removed from it, except in case of necessity, without the assent of the ordinary or the rector of the church.'").

23. BAU, *supra* note 9, at 131. Groups that were excluded from sanctuary included public debtors who embezzled from the state, Jews, heretics, and apostates. *Id.* The criteria for eligibility remained important throughout the practice of sanctuary and to its subsequent demise. *Id.*

Interestingly, during this time, the most prevalent use of sanctuary was for slaves who had fled from their masters. After a cleric had asked the master to forgive the slave, then it would be safe for the slave to return to the master. However, if a slave feared for his life and was badly mistreated, the clerics would go as far as to intervene in the slave-owner relationship, and would demand to buy the slave. As a consequence, because the majority of sanctuary seekers were slaves, the government was not involved, and the controversy was limited strictly between the slave-owners and the church. The clash between the church and the state eventually came to a head, once the sanctuary privilege conflicted with the secular authorities. *Id.* at 132.

24. BIANCHI, *supra* note 5, at 137.

25. *Id.* at 137-38.

26. *Id.* at 141-42.

27. *Id.* at 142. During the first month the refugees were treated as guests and were allowed to eat at the canon's table, the second month they were to eat in the kitchen, and although they could continue to stay at the church for a third month, they had to work in the garden while they attempted to settle the dispute surrounding their stay. *Id.* If the negotiations had not led to a successful reconciliation within three months, the monks would then take the

4. *The Abolishment of Sanctuary*

Although Anglo-Saxon sanctuary had its origins in ancient Judeo-Christian heritage, the privilege eventually became integrated into the judicial system.²⁸ The validity of sanctuary, however, was questioned during the English Reformation due to abuses by fraudulent debtors who took refuge to escape their creditors.²⁹ During the reign of Henry VIII (1509-1547), the sanctuary privilege became highly regulated and started down the path to abolishment.³⁰

The concern regarding sanctuary under Henry VIII was not crime control, but preventing Roman Catholics from seeking refuge from the mandatory Anglicization of their churches.³¹ In 1536, restrictions on sanctuary continued as a law was passed requiring all those in sanctuary to wear a badge, prohibiting them from carrying weapons, and placing them on a nightly curfew.³² In 1540, Parliament passed a statute that prohibited sanctuary for those who had committed murder, rape, burglary, arson, or sacrilege.³³ Finally, in 1623, "[d]ue to clerical abuses and the Crown's inability to prosecute political enemies," the privilege of sanctuary was abolished entirely.³⁴

C. *The Sanctuary Movement of the 1980s*

Unlike England, where the privilege of sanctuary was legally recognized, the U.S. has never adopted such a concept in its jurisprudence.³⁵ The unique facts surrounding the Sanctuary Movement in the 1980s, however, raised "important viable 'legal' issues"³⁶ Although the practice of sanctuary has roots in

fugitives elsewhere to provide a safe haven. *Id.*

28. Carro, *supra* note 8, at 759.

29. *Id.* at 765. Sanctuary led to a clash between the church and secular authorities because the church extended protection to all debtors; the crown opined that sanctuary should only be allowed for debtors avoiding imprisonment, which would afford them enough time to gather sufficient funds to liquidate their debt. *Id.* In England, debtors were imprisoned until death if they were unable to repay their debts. BIANCHI, *supra* note 5, at 145.

30. Carro, *supra* note 8, at 766.

31. See BIANCHI, *supra* note 5, at 143 (noting that although sanctuary was formally abolished in the first half of the sixteenth century, the practice continued in England well into the middle of the eighteenth century). *Id.*

32. Carro, *supra* note 8, at 766.

33. *Id.*

34. Kathleen L. Villarruel, Note, *The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values*, 60 S. CAL. L. REV. 1429, 1432-33 (1987).

35. Schmidt, *supra* note 4, at 94. In a general sense, "colonial America provided sanctuary to all those who arrived to escape religious and political persecution in Europe." Colbert, *supra* note 11, at 40. The focus of this Comment, however, is on physical, not conceptual sanctuary.

36. Villarruel, *supra* note 34, at 1434. "Some of the concerns with the

American history,³⁷ it only recently emerged in the United States on a nationwide basis in 1982 with the Sanctuary Movement.³⁸ Refugees from Central America suffering from political persecutions and civil war in their own countries were entering the U.S. illegally and taking refuge in American churches to evade deportation.³⁹ Church workers, motivated by their religious and moral beliefs, declared their grounds as public sanctuary "in

reasonableness of the legal system that were reflected in the biblical and English concepts of sanctuary are also addressed in the fifth amendment to the Constitution." Schmidt, *supra* note 4, at 94.

37. See ROBERT TOMSHO, *THE AMERICAN SANCTUARY MOVEMENT* 94 (Texas Monthly Press) (1987) (recalling the church's long tradition of civil disobedience and political involvement). In the 1850s, churches ran the Underground Railroad, providing refuge and transportation to slaves in defiance of the fugitive slave laws. *Id.* The way sanctuary was invoked during the 1980s Movement is not the first time churches have harbored those believed to be oppressed by the law, it was nonetheless on a much larger scale and much more reminiscent of the ancient principle of sanctuary discussed above, than the "sanctuary" provided slaves by the Underground Railroad. *Id.*

38. See GOLDEN & MCCONNELL, *supra* note 5, at 53-54 (indicating that the movement began with the support of a few churches, and grew to three thousand congregations); see also GARY MACEOIN, *A Brief History of the Sanctuary Movement*, in *SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE* 15-16 (Gary MacEoin ed., Harper & Row 1985) (documenting one of the first events that sparked the Movement). In 1980, a professional smuggler, after having collected his fees, abandoned twenty-six Salvadorans in the Arizona desert; half of the refugees died of heat and thirst by the time they were found, and the rest were arrested by the INS. *Id.* The Roman Catholic Diocese of Tucson contributed bond money to free the refugees until a decision was reached on their asylum application. *Id.* at 16.

Cases of sanctuary occurred prior to the 1980s Movement and included instances where churches granted sanctuary to civil rights workers who defied the segregation policies and attempted to enforce the holding of *Brown v. Board of Education*. Colbert, *supra* note 11, at 42. Sanctuary was also provided to those who protested the draft during the Vietnam War. *Id.* at 43.

39. Toney Anaya, *A Symposium on the Sanctuary Movement: Sanctuary: Because There Are Still Many Who Wait for Death*, 15 HOFSTRA L. REV. 101, 102-03 (1986); see also Alexia Salvatierra, *Sacred Refuge: With Comprehensive Immigration Reform Off the Congressional Agenda, the New Sanctuary Movement Steps Into the Breach*, SOJOURNERS MAGAZINE, Sept. 1, 2007, at 12 (stating that "[t]hese refugees were unable to receive a fair asylum hearing because different standards were set for asylum-seekers from countries allied with the U.S."). For example, if a refugee was a national from a U.S. ally, such as El Salvador, that person would be more likely to be denied asylum than a refugee from a U.S. opponent such as Russia or Cuba. *Id.* Foreign policy has been the major consideration in selecting which groups of refugees are granted asylum. Eli Coffino, *Note: A Long Road to Residency: The Legal History of Salvadoran & Guatemalan Immigration to the United States with a Focus on NACARA*, 14 CARDOZO J. INT'L & COMP. L. 177, 180 (2006). "U.S. asylum and refugee practices and policies have continued to be politicized and ideologically motivated." U.S. HELSINKI WATCH COMMITTEE, *DETAINED, DENIED, DEPORTED: ASYLUM SEEKERS IN THE UNITED STATES* 4 (1989).

defiance of federal immigration law," risking their own freedoms.⁴⁰

Advocates linked sanctuary to its Judeo-Christian origins and proclaimed that it applied to the Central American refugees.⁴¹ Conversely, opponents of the Movement argued that harboring illegal immigrants indefinitely was inconsistent with historical sanctuary, which had always regulated the duration and the type of wrongdoers who took refuge.⁴² Opponents further contended that the biblical heritage of sanctuary was distinguishable from the Movement because the former was implemented to discourage "self-help" justice and to supplement an imperfect legal system, which unlike today, "failed to recognize self-defense or lack of criminal intent as defenses to homicide."⁴³

The Movement brought the political struggle of the people in Central America to the attention of the media,⁴⁴ and exposed the human suffering for which the U.S. was partially responsible.⁴⁵

40. Villarruel, *supra* note 34, at 1433. One Chicago pastor, explaining why his church provided sanctuary, stated:

In deciding to become a 'public sanctuary' for refugees from El Salvador, we are responding faithfully to God's call and in the best American tradition. We do not take breaking the law lightly. Yet our congregation voted to meet the needs of these, the least of our brothers. We believe [sic] that it is against the law of God to send the Salvadorans back to imprisonment, torture and execution. We resist these unjust laws, just as church people gave sanctuary to runaway slaves prior to the Civil War.

Id. at 1434.

41. See Anaya, *supra* note 39, at 102 (comparing the Movement to other historical hallmarks such as the Underground Railroad and the Nuremberg Trials).

42. Carro, *supra* note 8, at 768. Carro argues that the Movement ignored the original function of sanctuary, which was to prevent blood vengeance during a time in which legal protection to defendants was inadequate. *Id.* at 769. The U.S., however, provides extensive legal guarantees and procedural safeguards in its judicial system, to citizens as well as aliens; the protection of sanctuary is no longer necessary. *Id.* Historical sanctuary involved criminals who admitted their crimes and were granted refuge for a short amount of time, whereas the Movement asks this nation to allow illegal immigrants to remain in this country indefinitely. Schmidt, *supra* note 4, at 94-95. Some churches, in fact, had contracts with the INS to "hold" refugees until they were deported. GOLDEN & MCCONNELL, *supra* note 5, at 56. One church worker explained the church's position: "Isn't it better for women refugees to have clean sheets and towels before they are sent back than to be kept in filthy county jails?" *Id.*

43. Schmidt, *supra* note 4, at 95. Although our current legal system is not perfect, it provides far more adequate protection to criminals than did its ancient counterpart. *Id.*

44. See BAU, *supra* note 9, at 20 (referring to the highly publicized and shocking deaths of four U.S. churchwomen in El Salvador, dramatically depicted in the PBS documentary "Roses in December").

45. During the 1980s, the Reagan administration supported oppressive, militaristic regimes in Central America, to oppose revolutionaries that the government believed were being funded by the Soviets in their quest to spread

U.S. foreign policy towards Central America was shaped by Cold War ideology to such an extent that the Reagan Administration was willing to fund one type of dictatorship in an effort to suppress another.⁴⁶ Proponents of the Movement argued the government was blinded by its foreign policy objective to curtail communism and spared no expense in achieving that result, including the sacrifice of thousands of innocent human lives.⁴⁷ The government, however, would not have been able to hastily dismiss the refugees and their advocates "without the support, or at least the indifference, of the public."⁴⁸

In addition to the public's acquiescence to U.S. policies in Central America, there was a growing sentiment that the government needed to curtail the influx of immigrants into this country.⁴⁹ The Reagan Administration reiterated the illegitimacy of the Movement and asserted that illegal immigrants were flocking to the country for economic reasons, not because they were facing persecution back home.⁵⁰ The Administration carefully orchestrated its response by avoiding direct criticism of the churches providing sanctuary; instead, it framed the issue as political opposition to the government's policy in Central America, implying that the Movement's leaders were hiding their political agendas behind humanitarian motivations.⁵¹

communism. TOMSHO, *supra* note 37, at 96-97. The Reagan Administration understood that the governments it was supporting, such as Guatemala and El Salvador, "might not rate among the world's great humanitarians," but failure to support them would leave the region susceptible to Soviet control. *Id.* Under the guise of fear of communism, the U.S. government provided over \$25 million in military aid, based on reports that the Salvadoran government "was making progress on human rights." *Id.* In 1981, the U.S. Embassy in San Salvador reported 5,407 political killings, while the legal office of the Salvadoran archdiocese estimated the figure at 13,353. *Id.* Despite accounts that thousands had been murdered and "bodies of the victims have been found piled up in ravines, dumped at the roadsides or buried in mass graves," the Administration sold \$3.2 million worth of military equipment to the Guatemalan government. *Id.*

46. *See id.* at 98 (referring to the magazine article "Dictatorships and Double Standards," authored by future U.S. ambassador to the United Nations Jeane Kirkpatrick, "where the author argues that it is acceptable for the U.S. to fund despots who are 'reliable anti-Communists'").

47. SUSAN BIBLER COUTIN, *THE CULTURE OF PROTEST: RELIGIOUS ACTIVISM AND THE U.S. SANCTUARY MOVEMENT, CONFLICT AND SOCIAL CHANGE SERIES 87-89* (Series Editors, Scott Whiteford and Illiam Derman ed., Westview Press) (1993).

48. TOMSHO, *supra* note 37, at 100. A 1983 poll indicated that only about twenty-five percent of the participants were aware that the U.S. was supporting the Salvadoran government. *Id.*

49. *Id.* This attitude, coupled with the Cold War ideology that the public was so attuned to, gave the Administration the ability to fund its dirty wars, without tarnishing its image at home. *Id.*

50. *Id.* at 93.

51. *See id.* at 93-94 (quoting INS commissioner Alan C. Nelson, in an

The Sanctuary Movement was “a dramatic response to the refusal of the United States government to grant legal sanctuary, or asylum” to immigrants facing deportation.⁵² As many as twenty-three cities and four states supported the Movement by passing “sanctuary laws” granting refugees the right to remain freely within their boundaries.⁵³ These provisions also prohibited local police from reporting the presence of sanctuary-seekers in these cities to immigration officials.⁵⁴ There was a clear divide between the U.S. government and supporters of the Movement regarding the legitimacy and purpose of sanctuary in the United States.

D. The New Sanctuary Movement

The New Sanctuary Movement was born on January 29, 2007, when religious leaders and immigrants met to discuss the current immigration policy in the U.S. and the immigration raids separating families comprised of illegal aliens and their U.S. born children.⁵⁵ Building on the movement of the 1980s, this New Movement is taking advantage of the timeliness of the immigration debate and calling for a comprehensive reform of immigration laws.⁵⁶ The New Movement campaign is gaining

interview with “Frontline,” as saying that the sanctuary people were “well meaning,” but “[m]any of them will admit what they are really doing is opposing the president’s policy in Central America.”).

52. BAU, *supra* note 9, at 38.

53. Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and The Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1383 (2006). Even though the asylum-seekers had violated federal immigration laws, they were free from arrest not only within the churches, but within the boundaries of the cities. *Id.* An example of a typical “sanctuary law” is the one passed by Takoma Park, Maryland, in 1985: In a resolution, Takoma Park asserted that under international law, the U.S. had a responsibility to grant asylum to those facing political persecution in their countries, that the U.S. had violated international law in denying asylum to the refugees, and finally that the sanctuary workers and movement “deserved government support.” *Id.* The city prohibited its employees from assisting immigration officials in arresting sanctuary seekers for violations of immigration law. *Id.* at 1383-84. Although the federal government criticized these laws, it never challenged them in court. *Id.* at 1384.

54. *Id.* at 1383.

55. New Sanctuary Movement, <http://www.newsanctuarymovement.org/the-convening.htm> (last visited Oct. 8, 2008) [hereafter New Movement]; see also Grace Dyrness & Clara Irazabal, *A Haven for Illegal Immigrants: The Sanctuary Movement Hopes that By Sheltering a Few, it will Highlight the Plight of Millions*, L.A. TIMES, Sept. 2, 2007, at 6 (indicating that representatives from eighteen cities, twelve religious traditions, and seven denominational and interdenominational organizations met in Washington, including: Immanuel Presbyterian Church, St. Luke’s Episcopal Church in Long Beach, Our Lady Queen of Angels Catholic Church, Echo Park United Methodist Church, and Angelica Lutheran Church).

56. New Movement, *supra* note 55.

more attention and generating great controversy as the Bush Administration and Congress struggle with immigration reform, debating whether an estimated twelve million undocumented immigrants should be placed on the path to attaining legal status.⁵⁷

The Catholic Church has taken a stand against deporting illegal aliens by designating its chapels as sanctuaries, which has become a highly controversial aspect of the immigration debate.⁵⁸ Opponents of the New Movement argue that it "is a religious and political network of radical left congregations."⁵⁹ Advocates, however, contend the New Movement is well-founded on biblical and historical tradition.⁶⁰ According to proponents of the New Movement, providing sanctuary to the twelve million illegal immigrants in this country is not the objective of the New Movement; rather supporters contend that showcasing individuals

57. James Barron, *Churches to Offer Sanctuary*, N.Y. TIMES, May 9, 2007, at 1; see also Audrey Hudson, *Chertoff Warns Meddling 'Sanctuary Cities'*, WASH. TIMES, Sept. 6, 2007, available at <http://www.washingtontimes.com/apps/pbcs.dll/article?AID=/20070906/NATION/109060085/1001> (noting that the government will not "tolerate interference" by sanctuary cities "that have adopted policies banning police officers or other city employees from asking about immigration status.").

58. Laura B. Martinez, *Anti-Border Fence Movement Growing: Bishop to Deliver 'Non-Political' Message of Charity, Unity at Protest Pachanga*, THE BROWNSVILLE HERALD (Texas), Sept. 29, 2007; see also Samantha Henry, *No Guarantees on Sanctuary; Churches in Region Torn Over Providing Haven*, HERALD NEWS (Passaic County, N.J.), Sept. 23, 2007, at A01 (indicating that there are currently twenty-four sanctuary communities concentrated in five large cities). During the week of September 17, 2007, a sanctuary Church in Simi Valley, California, was ordered to pay \$40,000 in fines for providing sanctuary to an undocumented woman and her American-born child. *Id.* The municipality explained that the fine would compensate the cost of police overtime needed control a protest outside the church that resulted in a clash between supporters of the movement and opponents. *Id.* The municipality later stated that although it would not rescind the \$40,000 fine, which has been currently placed on hold, it would not charge the church for police services for future protests. Anna Bakalis, *Simi Valley, Calif., Won't Charge Church for Future Protests*, VENTURA COUNTY STAR, Sept. 25, 2007. Mexican President Fox also weighed in on the Simi Valley situation, particularly the sanctuary movement, by saying: "It's not that they try to hide (people) or try to break the law. The human rights of these people are being violated . . . I think it's OK [to shelter them] for humanitarian reasons." BRIDGET JOHNSON, *The Scoop On Immigration, Politics, More; Fox Opens Up On Tour*, THE DAILY NEWS OF LOS ANGELES, Oct. 14, 2007, at N4.

59. Christopher Orlet, *No Sanctuary*, THE AMERICAN SPECTATOR ONLINE, Aug. 22, 2007, http://www.spectator.org/dsp_article.asp?art_id=11912 (last visited Oct. 8, 2008).

60. See Salvatierra, *supra* note 39, at 12 (documenting the views of religious leaders spearheading the New Movement, who believe that laws against harboring illegal immigrants are immoral, and that similar to the Holocaust or the Civil Rights movement, "the only effective way to change an unjust law is to break it.").

who voluntarily seek sanctuary will raise national awareness to the “plight of the millions of immigrants who live in fear of arrest and separation from their families.”⁶¹ The New Movement views the immigration debate through a human, ethical, and moral lens, as opposed to focusing on economic and political concerns.⁶²

E. Recent High-Profile Sanctuary Cases

1. Elvira Arellano: Hero or Felon?

The high-profile sanctuary case involving Elvira Arellano has brought the sanctuary issue to the forefront of the immigration debate.⁶³ She emerged as the symbol of civil disobedience for the New Movement and an activist for illegal immigrants after she took refuge in a Chicago Methodist Church to evade a federal deportation order,⁶⁴ becoming the first immigrant to do so since the 1980s.⁶⁵ Arellano, who had been deported once before, proclaimed that she sought sanctuary in a desperate effort “to prevent being separated from her 8-year-old U.S. born son.”⁶⁶ The

61. Dyrness & Irazabal, *supra* note 39, at 6; *see also* Louis Sahagun, *L.A. Church in Forefront of Sanctuary Movement; Our Lady Queen of Angels Joins a National Effort to Shield Illegal Immigrants*, L.A. TIMES, Mar. 23, 2007, at B1 (documenting the unique selection process of those who are eligible for sanctuary). In an effort to gain exposure in the media, undocumented immigrants seeking sanctuary, must “agree to undergo training to overcome their fear of public exposure and articulate their cases at news conferences and public gatherings.” *Id.* Furthermore, an illegal alien must also be in deportation proceedings, have a good work record, and have children who are U.S. born citizens. *Id.*

62. Dyrness & Irazabal, *supra* note 55, at 6.

63. Henry, *supra* note 58, at A01.

64. Orlet, *supra* note 59. Elvira Arellano, who is 32 years old and was born in San Miguel Curahuango, Mexico, has been residing illegally in the U.S. since 1997. She was deported once before, after crossing the border in 1997. After re-entering the U.S., she obtained employment at Chicago's O'Hare International Airport using a fake social security number, and was arrested and convicted of a felony in 2002 after a post-9/11 sweep. After she was released on probation, Arellano remained in the U.S. for another four years, until a federal judge ordered her to report for deportation. Instead of obeying the order, Arellano sought sanctuary at Adalberto United Methodist Church in Chicago. During her stay in sanctuary, Arellano was named president of La Familia Unida (United Latino Family), a group that lobbies for families with anchor babies. *Id.*

Anchor babies are U.S. born citizens with undocumented parents. There are an estimated 3.1 to 4.9 million anchor babies currently living in the U.S. *Id.*

65. Dyrness & Irazabal, *supra* note 55, at 6.

66. *Id.*; *see also* Esther Cepeda, *Adios and Good Riddance, Elvira*, THE AUGUSTA CHRONICLE (Georgia), Aug. 28, 2007, at A05 (quoting Arellano that she needed to remain in the U.S. to get treatment for her son's “severe attention deficit disorder and severe separation anxiety.”); Louis Sahagun, *A Mother's Plight Revives the Sanctuary Movement; Refusing To Leave Her U.S.-*

church's policy of providing sanctuary to undocumented aliens attracted national media attention, as did Arellano's case when "she began dispatching high-profile rebukes of immigration authorities."⁶⁷

Although federal officials refrained from raiding the Chicago church, they arrested Arellano a year after she first took refuge, when she traveled to Los Angeles to speak at Our Lady Queen of Angels.⁶⁸ Arellano stated that she consciously risked deportation to raise awareness of the New Movement "in the effort to create a path to citizenship" for the nation's undocumented immigrants.⁶⁹ Many were surprised that the battle between a single mother and a tremendously powerful federal agency lasted so long.⁷⁰ Opponents criticized the Bush administration for failing to deport Arellano sooner, considering that she had knowingly violated federal law, and was living in the U.S. illegally, despite her invocation of sanctuary.⁷¹

2. *Leaving Their Families Behind: Who's Watching the Kids?*

The New Movement has placed a special emphasis on keeping families united, and reducing the number of immigration raids that have deported hundreds of illegal aliens, leaving family members behind struggling to survive.⁷² Reverend Alexia

Born Son, an Illegal Immigrant from Mexico Takes Refuge in a Chicago Church and Leads a New Crusade, L.A. TIMES, June 2, 2007, at B2 (quoting Arellano that she sought sanctuary out of desperation, remembering "how Joseph and Mary were given sanctuary. I asked my church for sanctuary, and they agreed.").

67. *Id.* One of Arellano's letters posted on the internet stated, "[i]f Homeland Security chooses to send its agents on the Holy Ground to arrest me, then I will know that God wants me to be an example of the hatred and hypocrisy of the current policy of the government." *Id.* Immigration and Customs Enforcement ("ICE") authorities replied that "ICE has the authority to arrest illegal aliens in all locales and prioritizes its enforcement efforts based on investigative leads and intelligence." *Id.*

68. Randal C. Archibold, *Illegal Immigrant Advocate for Families is Deported*, N.Y. TIMES, Aug. 21, 2007, at 14. After Arellano was arrested on August 19, 2007, she was escorted to a border crossing in San Diego, where she crossed the border and walked into Tijuana, Mexico, leaving her son in the care of the Church leaders in Chicago. *Id.* Jim Hayes, the field office director of the Los Angeles immigration agency, said that Arellano's arrest was not a "message to the sanctuary movement as much as it is a message to criminal illegal aliens who are fugitives, that we are going to continue to target them." *Id.*

69. Sahagun, *supra* note 66, at 2.

70. Don Terry, *No Way Out*, CHI. TRIB., Aug. 5, 2007, at 10.

71. N.C. Aizenman & Spencer S. Hsu, *Activist's Arrest Highlights Key Immigrant Issue; She is Deported; Son is Left Behind*, WASH. POST, Aug. 21, 2007, at A05.

72. *Id.*; see also Salvatierra, *supra* note 39, at 12 (indicating that before the Immigration Reform and Control Act of 1986, the parent of a U.S. citizen had an opportunity, over time, to attain legal status; after passage of the Act,

Salvatierra, a leader and supporter of the New Movement, proclaimed that “[f]amilies are being broken by a broken immigration system.”⁷³ In order for a parent who has a U.S. citizen child to qualify for the opportunity to attain legal status, that parent must prove that the minor would suffer “extreme hardship” from the separation.⁷⁴ This is an almost impossible standard that leaves parents with no viable alternatives other than to leave their families and children behind or relocate as a family, often bringing the children to a foreign country that does not provide the same opportunities and access to education and healthcare.

III. ANALYSIS

A. *Disparities Between the Two Movements*

Comparing the Movement as it existed in the 1980s with the New Movement reveals disparities that are being overlooked in an effort to gain legitimacy. Unlike the Movement of the 1980s, where sanctuary workers felt compelled to prevent the deportation of those facing political persecution in their countries, the New Movement strives to raise awareness and gain sympathy for families affected by the immigration raids.⁷⁵ This New Movement focuses on unveiling the plight of “mixed-status” families facing deportation.⁷⁶ Even proponents of the New Movement recognize

having a child who is a U.S. citizen no longer satisfies the legal requirements to begin the naturalization process).

73. Lee Sustar, *The Fight Against Deportations, The New Sanctuary Movement*, May 18, 2007, <http://www.zmag.org/znet/viewArticle/15393> (last visited Oct. 8, 2008); see also Salvatierra, *supra* note 39, at 12 (explaining that the inherent trauma a child suffers from being separated from his parents does not qualify as an “exceptional hardship” under the Immigration and Reform Act of 1986, which would allow a parent to apply for legal status).

74. Coffino, *supra* note 39, at 196. In order to obtain “cancellation of removal” under The Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), passed to provide relief to certain illegal immigrant groups and to protect those who have been long-time residents from deportation, the alien must establish: (1) continuous physical presence in the United States for seven years; (2) good moral character; (3) extreme hardship to himself or herself or to a spouse, child, or parent who is a United States citizen or lawful permanent resident; and (4) a case worthy of favorable discretion. *Id.* at 195. The extreme hardship standard has caused significant debate because it is almost impossible to meet. In order to remain in the country, aliens must prove that they, or “a statutory relative, will suffer economic and emotional hardship as a result of the principal’s removal.” *Id.* at 196.

75. Sahagun, *supra* note 66, at 2. Reverend Jon Fife, a leader of the 1982 Sanctuary Movement, commented that “[i]t was a much different human-rights crisis than the one we are faced with now.” *Id.*

76. See Antonio Olivo, *Illegal Immigrant Sanctuaries Set; Religious Groups in 5 Cities Back Plan to Win Sympathy*, CHI. TRIB., May 9, 2007, at 10 (referring to families comprised of illegal immigrants and U.S. citizens that

the contrast between the two movements, admitting that today's cause is more ambiguous than in the 1980s, where the moral outrage over deportation was much stronger because of the brutal consequences of sending refugees back to a tumultuous political situation.⁷⁷ Therefore, advocates of the New Movement may have an even more difficult time than their counterparts in the 1980s convincing the government and the public that undocumented aliens should continue to remain in the country.

The New Movement focuses on all illegal immigrants, with a special emphasis on families, whereas the 1980s movement solely provided sanctuary to refugees facing deportation to Central American countries affected by civil war.⁷⁸ Unlike the 1980s Movement, which primarily provided sanctuary to refugees suffering from a well-founded fear of persecution, the New Movement focuses on illegal immigrants struggling to keep their families united.⁷⁹ One commentator criticizes the current movement, stating that "[b]y conflating economically motivated immigrants with true refugees, the new sanctuary movement has lost some of its moral authority and, most likely, its support from many Americans."⁸⁰ The primary distinction between the two movements seems to be the motivation behind invoking sanctuary; the former relying on human-rights discourse, the latter on preserving the jobs and lives of those who have established a family in this country.

Unlike the 1980s Movement, when churches opened their doors to refugees from Central America, today's leaders plan to offer sanctuary only to a select number of families facing deportation. These "spokespeople" provide leadership and inspiration for the movement, because among other reasons, the legal consequences of harboring undocumented persons under the Patriot Act are much more severe today than laws in effect during the 1980s.⁸¹ Another distinction that proponents believe sets the sanctuary seekers in the New Movement apart from the previous

are being separated as a result of the immigration raids).

77. *Id.*

78. See Tania Leah Haas & Sarah Brown, *Sanctuary: Old Idea, New Movement*, July 27, 2007, available at http://newsinitiative.org/story/2007/07/27/sanctuary_old_idea_new_movement (last visited Oct. 8, 2008) (discussing how the New Sanctuary Movement focuses on all immigrants in America, especially those, "who the religious institutions think, suffer under current and proposed legislation.").

79. See Anaya, *supra* note 39, at 109 (explaining the distinction between sheltering illegal immigrants and "bona fide refugees."). Anaya argues that because churches provided sanctuary to "bona fide refugees," this gave the 1980s Movement more legitimacy. *Id.*

80. Daniel J. Freed, Letter to the Editor, *Sanctuary: Shelter or Sham?*, L.A. TIMES, Sept. 8, 2007, at A18.

81. Salvatierra, *supra* note 39, at 12.

Movement, in a legal context, is the harboring of immigrants who are "in process" as opposed to sheltering refugees from federal immigration authorities.⁸² This distinction is important in terms of analyzing the legal implications of the New Movement because harboring people who are "in process" is not an illegal action.⁸³

Therefore, the invocation of the right to asylum during the 1980s is vastly different from the circumstances that exist under the New Movement. In recognizing that there is a fundamental distinction between the two movements, it is important to remember that the deep religious and humanitarian principles that ignited the zealous desire to help in the 1980s remain a part of today's movement.

*B. Legal and Constitutional Implications of Sanctuary:
The Confrontation between Church and State*

As the New Movement progresses, the inevitable debate regarding the proper relationship between church and state surfaces. To this day, courts have never directly considered the right to sanctuary, or whether it really has a constitutional, freedom of religion basis.⁸⁴ Sanctuary is not explicitly protected by the Constitution, nor have the courts impliedly recognized it within the framework of the Free Exercise Clause.⁸⁵ In fact,

82. Tom Lochner, *Pittsburg Church Event Features Family Under Deportation Order*, CONTRA COSTA TIMES (California), Oct. 28, 2007.

83. *Id.*

84. BAU, *supra* note 9, at 90. The U.S. Supreme Court made reference to the sanctuary privilege once, stating:

The right of privacy protected by the Fourth Amendment relates in part of course to the precincts of the home or office. But it does not make them sanctuaries where the law can never reach. There are such places in the world. A mosque in Fez, Morocco, that I have visited, is by custom a sanctuary where any refugee may hide, safe from police intrusion. We have no sanctuaries here.

Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 321 (1967) (Douglas, J., dissenting).

An interesting argument can be made that the concept of sanctuary, providing a safe haven to someone within a church, is closely paralleled to the protections granted by the Fourth Amendment, which recognizes the sanctity and privacy of a person's home. BAU, *supra* note 9, at 91. The "sanctuary" of the home, however, is not absolute from government intrusion and "a man's castle" can easily be invaded with a search warrant. *Id.* The U.S. legal system has not recognized the privilege of sanctuary, and despite the protection of the Fourth Amendment, a church may be invaded just as the privacy of one's home is not inviolate. *Id.*

85. See *Warren v. United States*, 177 F.2d 596, 598-99 (10th Cir. 1949) (holding that counseling and encouraging others to violate the law for religious purposes is also not protected under the First Amendment); see also *Baxley v. United States*, 134 F.2d 937, 938 (4th Cir. 1943) (holding that counseling another to avoid the draft because of honest religious faith was a crime not protected under the Free Exercise Clause). It is important to note that the

Congress has expressly prohibited the harboring or transporting of illegal immigrants, and courts have upheld the view that the Constitution does not protect sanctuary workers when they engage in illegal activity.⁸⁶

Although there is no explicit law that prohibits immigration authorities from making arrests on church grounds, they have never raided a religious property suspected of harboring illegal immigrants.⁸⁷ Some argue that churches providing sanctuary to illegal immigrants are in violation of federal law.⁸⁸ Church leaders participating in the New Movement are cognizant of the federal indictments of sanctuary workers in the 1980s, and in an effort to avoid legal sanctions, they have followed the advice of immigration attorneys not to conceal the identity of the undocumented aliens seeking refuge in their chapels.⁸⁹

1. *Freedom of Religion Defense*

When the Movement began providing refugees from Central America with food and shelter, sanctuary "suddenly became a First Amendment issue."⁹⁰ Because those protected under

court has not expressly *denied* the right to sanctuary.

86. Carro, *supra* note 8, at 773; see also 8 U.S.C. § 1324(a) (2000), (decreeing that smuggling, harboring, transporting or encouraging illegal aliens is a felony and any person, business or organization is subject to fines up to \$10,000 and criminal penalty for up to 10 years in prison if they: assist aliens who they should reasonably know are illegal or who are not authorized to work in the U.S.; encourage those aliens to remain in the U.S. by transporting, sheltering, or assisting them to obtain employment; or, knowingly assist them due to personal convictions); *United States v. Elder*, 601 F. Supp. 1574, 1578 (S.D. Tex. 1985) (explaining that the state's statute against harboring and transporting illegal aliens serves a compelling state interest and provides a necessary means of maintaining security); *United States v. Merkt*, 794 F.2d 950, 951-57 (5th Cir. 1986) (challenging convictions for conspiracy and other offenses involving violations of 8 U.S.C.S. § 1324(a)(1) and 8 U.S.C.S. § 1324(a)(2), sanctuary workers argued that they were immune based on constitutional grounds). The court disagreed and held that, even if their motives for assisting the illegal aliens were truly rooted in religious convictions, they were nonetheless "irreconcilably, voluntarily, and knowingly at war with the duly legislated border control policy." *Id.* at 957.

87. Archibold, *supra* note 68, at 14. Authorities did not comment on why Arellano had not been arrested at the church where she was taking sanctuary in Chicago, but did say that arrests are made at a time that will "minimize the danger to the public, the danger to our officers and the people that are targeted." *Id.*

88. See Leo Sears, *It's Common Sense—It's Doable*, EUREKA TIMES STANDARD, Sept. 28, 2007 (arguing that churches that help immigrants illegally cross the border, or those harboring aliens under the guise of sanctuary, break federal law by actively aiding and abetting illegal aliens.)

89. Sahagun, *supra* note 61, at 1.

90. HILLARY CUNNINGHAM, GOD AND CAESAR AT THE RIO GRANDE: SANCTUARY AND THE POLITICS OF RELIGION 35 (University of Minnesota Press) (1995). The First Amendment grants the right to practice religion free

sanctuary were living within a church—a space protected from state intrusion—the government’s response was significantly limited.⁹¹ The Reagan Administration countered the moral framework of the 1980s movement, as well as the conflict between church and state, by asserting that the campaign was orchestrated to fulfill a political agenda to shape U.S. policy in Central America.⁹²

2. *Sanctuary and the Free Exercise Clause of the First Amendment*

Although harboring and transporting illegal aliens is a federal crime, the prosecution of sanctuary workers in the 1980s focused primarily on the “transporting” aspect of the federal statute.⁹³ In order to properly examine the legal and constitutional implications of sanctuary, however, the analysis must primarily focus on the harboring provisions that relate to the Free Exercise Clause of the First Amendment.⁹⁴

The First Amendment expressly protects the free exercise of religion.⁹⁵ Although it is undeniable that the First Amendment absolutely safeguards the freedom of belief, however extreme or repugnant that belief may be,⁹⁶ it is unclear to what extent it protects the freedom to act based upon that religious belief.⁹⁷ The government has the discretion to regulate actions “when they are found to be in violation of important social duties or subversive of

of government interference. *Id.*

91. *Id.*

92. See *id.* at 35-36 (describing the government’s response to the 1980s Movement). According to an INS official in 1990:

If sanctuary is feeding and clothing person in distress, then the INS does that. The immigration service feeds more and clothes more Salvadorans than [does] anybody in the Sanctuary movement. If that is what sanctuary is, then I’m for it. I’d be a member. But if it is encouraging illegal immigration, or if it is helping the surreptitious entry of an alien, I’m not only against it, Congress is against it, and Congress is reflected in the statute. And if I catch a person doing this, then I’m going to prosecute them.

Id.

93. BAU, *supra* note 9, at 92. The harbor provisions have been interpreted differently and it is still unclear what kind of actions they punish. The definition of “harboring” itself has been interpreted to mean “sheltering,” “concealing,” or “shielding from detection,” and all violate the federal statute. *Id.* at 98-100.

94. *Id.* at 92.

95. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

96. See, e.g., *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (holding that anti-religious speech that offended listeners was nevertheless protected).

97. See *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (stating that unlike belief, “the freedom to act, even when the action is in accord with one’s religious convictions, is not totally free from legislative restrictions.”).

good order, even when the actions are demanded by one's religion."⁹⁸ When religious belief and conduct are intertwined, therefore, a person cannot simply invoke the constitutional right of free exercise to evade criminal prosecution and punishment.⁹⁹

Sanctuary raises the very problem presented by the Free Exercise Clause: if sanctuary workers are free to believe that they have a religious duty to provide refuge to illegal aliens, but are restricted from exercising these beliefs, "then the First Amendment protection can become illusory."¹⁰⁰ On the other hand, if the First Amendment exempts all religious conduct from a "facially neutral" statute, the reliability of the criminal justice system would be undermined by endless claims of religious exemptions.¹⁰¹

Although the Court has not established a definitive interpretation of the Free Exercise Clause, it has articulated a three-part test to assess the competing interests of the government in regulating health, safety, and morals, versus that of the individual in practicing his or her sincerely held religious beliefs.¹⁰² In order to establish a free exercise claim a plaintiff must prove: first, the conduct is motivated by a sincerely held religious belief; second, the governmental interest is not compelling; and third, the method through which the government is regulating the conduct is not the least restrictive means.¹⁰³ The

98. *Id.* at 603-04.

99. See BAU, *supra* note 9, at 111 (referring only to statutes regulating religious conduct and imposing criminal punishment). It is important to note, however, that there are also civil statutes that regulate religious belief and conduct. See *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (holding that plaintiff, under the South Carolina Unemployment Compensation Act, was not disqualified from recovering unemployment compensation when she refused to work on Saturday, the Sabbath Day of her faith).

100. BAU, *supra* note 9, at 111-12. The Free Exercise Clause would be meaningless if one were allowed to hold a particular religious belief, but not be permitted to practice its message. *Id.*

101. *Id.* at 112. In *Cantwell*, the Court recognized that in order for the Free Exercise Clause to be legitimate, it must inherently protect some conduct that is unduly infringed upon by the government. 310 U.S. at 303-04.

102. *Cantwell*, 310 U.S. at 307.

103. This test has been enunciated and applied in several cases. See generally *United States v. Lee*, 455 U.S. 252 (1982) (holding an Amish person was not exempt from certain taxes); *Thomas v. Review Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981) (finding that withholding unemployment benefits from claimant who terminated his job due to religious reasons violated his First Amendment rights); *Johnson v. Robinson*, 415 U.S. 361 (1974) (holding conscientious objectors were properly exempt from veterans benefits despite their religious beliefs); *Wisc. v. Yoder*, 406 U.S. 205 (1972) (holding that compulsory state education beyond eighth-grade for Amish students violates the Free Exercise Clause); *Sherbert*, 374 U.S. at 398 (determining that a worker refusing employment which forced her to work on Saturday, in violation of her religious beliefs, still entitled her to unemployment benefits); *Braunfeld*, 366 U.S. at 599 (holding that limited

Court has interpreted the Free Exercise Clause by applying a subjective standard, which evaluates whether an individual's actions that are motivated by a sincerely held religious belief warrant constitutional protection.¹⁰⁴

3. Sanctuary Cases: Arrests and Indictments

During the 1980s Movement, instead of making arrests on church grounds, the government prosecuted sanctuary workers who claimed they were immune from criminal charges because the government's policies illegitimately infringed their First Amendment right to freely exercise their religious beliefs.¹⁰⁵

a. *United States v. Aguilar*

In January of 1985, the clash between church and state erupted after the government announced a seventy-one-count indictment against sixteen sanctuary workers from evidence gathered during a ten-month undercover investigation of the Movement.¹⁰⁶ In conducting this investigation, the INS solidified its position as a law-enforcement agency, providing "an adversarial model" in the confrontation between church and state,

retail activity on Sunday only had an incidental effect on religious exercise).

104. See *id.* (listing cases where the Court has reached different conclusions based on the facts particular to the case).

105. See Villarruel, *supra* note 34, at 1455 (discussing the constitutional defenses available to the sanctuary workers); see also GOLDEN & MCCONNELL, *supra* note 5, at 67 (stating that federal prosecutors argue that sanctuary workers break the law when they "willingly, knowingly, and unlawfully conspire, confederate, and agree to transport illegal aliens within the United States"); MACEOIN, *supra* note 38, at 15 (indicating that anyone convicted faces possible imprisonment for five years, and \$2,000 fine for each illegal immigrant aided); Carro, *supra* note 8, at 772 (arguing that the free exercise has not been interpreted to permit the right to violate the law, especially when there is a legitimate governmental interest in question).

106. BAU, *supra* note 9, at 83-86. Thirteen out of the sixteen workers who were indicted were Mexican citizens, not under the personal jurisdiction of the United States District Court. *Id.* at 86. Initially four agents investigated the Movement, but then "Operation Sojourner" was enlarged as the INS became increasingly wary of the movement. CUNNINGHAM, *supra* note 90, at 37-38. The agents could not engage in illegal activities, such as using unlawful techniques to obtain information, but they could attend meetings and transport illegal immigrants within U.S. borders. *Id.* The Justice Department had to authorize "any clandestine collection of evidence." *Id.* After James Rayburn, the head of the operation, realized that the agents were not eliciting the kind of damaging evidence that could suppress the Movement, he requested authorization to secretly tape conversations between the undercover agents and sanctuary workers. *Id.* The agents successfully collected evidence, as they taped private conversations in the homes of participants and in churches. *Id.* The infiltration was a massive operation where the agents recorded over one hundred hours of conversations and meetings, subsequently transcribed into 40,000 pages of evidence. BAU, *supra* note 9, at 86.

as each side sought to gain legitimacy in the eyes of the public.¹⁰⁷

The criminal charges included "five 'substantive' offenses and two 'shielding' offenses," which were accompanied by serious fines and prison sentences.¹⁰⁸ The U.S. Attorney assigned to the case, Don Reno, filed a motion *in limine* to preclude entire defenses and to exclude evidence or testimony (1) that the aliens involved in the movement were refugees under protection of asylum law in the U.S.; (2) that the acts for which defendants were being accused of, were justified on the basis of their religious beliefs; or (3) on any other good motives and beliefs that would negate criminal intent.¹⁰⁹ The government was concerned that the trial would be "convert[ed] . . . into a political stage to advance the defendants' symposium on Central American conflicts."¹¹⁰

According to the prosecution, the government anticipated these prejudicial defenses by analyzing precedent and relying on the media statements made by three of the fifteen defendants.¹¹¹ The prosecution urged the court to "exercise judicial control" and grant its motion *in limine* in order to preclude the defense from using the court as "an arena to put U.S. Central American policy on trial."¹¹²

The defense opposed the prosecution's use of a motion *in limine*, arguing that it was being used as "a device to choke off entire defenses rather than to exclude discrete items of inadmissible evidence."¹¹³ The judge ruled in favor of the prosecution and precluded the introduction of evidence that would have laid the foundation for the defense's argument that the charges ought to be dismissed on the grounds of religious freedom and protection of refugees under U.S. asylum law.¹¹⁴ Because the

107. CUNNINGHAM, *supra* note 90, at 38.

108. *Id.* at 44.

The five substantive charges involved crossing illegal aliens (this included 'masterminding an operation which aids an alien to walk across a border'); transporting illegal aliens; concealing, and harboring or shielding illegal aliens (three separate felonies). The derivative charges involved conspiracy, aiding, and abetting [citation omitted].

Each charge involved a prison sentence and/or a fine.

Id. These acts are punishable under 8 U.S.C. § 1324(a).

109. CUNNINGHAM, *supra* note 90, at 54.

110. Colbert, *supra* note 11, at 51. In an effort to downplay the importance these indictments had on the movement, the government also argued that the trial was "nothing more than an alien-smuggling ring." *Id.* at 52.

111. *Id.* at 49. Contrary to the government's statement, they relied heavily on documents detailing legal strategies and other personal papers taken from the home of the one of the defendants during a police search; the prosecution was also able to use the information it had obtained from undercover infiltration by paid informants. *Id.* at 50.

112. *Id.* at 52.

113. *Id.* at 53.

114. CUNNINGHAM, *supra* note 90, at 54. More specifically, the judge prohibited evidence and testimony regarding 1) violation of international law;

defense could not offer evidence on violence in Central America, it could not establish that the sanctuary workers, unlike the U.S. government, were upholding international law regarding refugee policy.¹¹⁵ The exclusion of comparative statistics also impeded the defense from presenting its argument that the U.S. government violated immigration laws when it discriminated against the types of refugees eligible for political asylum.¹¹⁶

Next, the defense moved to have the charges dropped based on three arguments: (1) the indictments violated freedom of religion and unconstitutionally infringed on the defendants' rights because sanctuary was a religious activity; (2) the undercover investigation was "outrageous," and violated the Due Process clause and the Free Exercise Clause of the First Amendment; and (3) that the government "engage[d] in selective prosecution."¹¹⁷ Although the judge admitted that the infiltration by undercover agents was "unacceptable," he still dismissed all of these defense motions, leaving the defense with absolutely no basis to argue that sanctuary was constitutionally protected.¹¹⁸ The tactics used by the government during its investigation raise First and Fourth Amendment concerns "about the chilling effect of subversive infiltration on religious services and practices."¹¹⁹

2) political persecution and violence against the refugees in their respective countries; 3) statistics comparing U.S. asylum policy towards aliens from allied countries, as opposed to communist ones; 4) statistics comparing refugees from Central America who have been granted asylum under the Refugee Act of 1980; and 5) religious principles. *Id.* The exclusion of the last category of asylum statistics prevented the defense from introducing statistics that were truly revealing. See Villarruel, *supra* note 34, at 1448 (noting the disparate statistics that demonstrated a discriminatory pattern of asylum grants by the government to aliens from communist nations).

In 1982, for instance, only 67 of 1,139 Salvadoran asylum applications were approved. In 1983, while 78% of Russian, 64% of Ethiopian, and 53% of Afghan applicants were granted asylum, only 2% of Guatemalan and 3% of Salvadoran applications for asylum were approved. In 1984, only 328 of 13,045 Salvadoran asylum applications were granted (an approval rate of 2.4%) and only three of 988 Guatemalan requests were approved (an approval rate of 0.3%).

Id.

115. CUNNINGHAM, *supra* note 90, at 54.

116. *Id.*; see also *supra* note 39 and accompanying text (referring to the argument that the United States only provided asylum to aliens from communist countries).

117. CUNNINGHAM, *supra* note 90, at 54-55. The defense referenced the fact that the government was not prosecuting Arizona ranchers who had induced aliens to enter the country illegally to perform work on their farms. *Id.* The defense also pointed to the fact that high-ranking U.S. officials had moved Salvadoran President Jose Napoleon Duarte's family to the United States, and unlike the sanctuary workers, those U.S. officials were not facing prosecution. *Id.* at 55.

118. *Id.*

119. Villarruel, *supra* note 34, at 1432.

b. *United States v. Elder*

In *United States v. Elder*, the court held that the defendant met the initial burden of establishing a sincerely held religious belief motivation, because as a Roman Catholic, "he fel[t] a charitable Christian commitment, founded in the Gospel . . . to assist those who fle[d] the violence in El Salvador."¹²⁰ The court recognized that other Catholics may not share Elder's religious views regarding sanctuary; however, this did not diminish the weight and sincerity of his Christian obligations and beliefs.¹²¹ Drawing on *Wisconsin v. Yoder*, the district court recognized that the exercise of religious freedom can sometimes excuse criminal conduct.¹²²

After finding that Elder had met his initial burden, the court then examined whether the governmental interest involved justified prosecution.¹²³ The court ruled that "the government me[t] 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."¹²⁴ The court determined the validity of the government's claim using, in essence, the "overriding government interest" test from *Lee*, rather than the "compelling interest" tests articulated in such cases as *Sherbert* and *Yoder*.¹²⁵

According to the court, the overriding governmental interest in protecting an immigration system sanctioned by Congress, along with the importance of border control for the nation's welfare and security, outweighed Elder's conduct.¹²⁶ While the

120. *United States v. Elder*, 601 F. Supp. at 1574, 1577 (S.D. Tex 1985). John Elder was charged with one count of conspiracy, two counts of transporting, two counts of bringing into and landing in the U.S. undocumented persons, and one additional count of conspiracy with unknown persons to bring into and land in the U.S. illegal aliens; the jury found Elder guilty on all counts, and sentenced him to six-one-year prison terms to be served concurrently, later reduced by the Judge to 150 days. BAU, *supra* note 9, at 82-83. The court held that Elder's illegal conduct, transporting three undocumented Salvadorans six miles to a bus station, was motivated by sincerely held religious beliefs. *Elder*, 601 F. Supp. at 1576-77. Elder presented the testimony of several Christian clergymen who "confirmed that assistance to those in need remains a fundamental aspect of Christianity." *Id.* at 1577. Although the court refrained from making factual findings on the political situation in El Salvador, it found that Elder's beliefs regarding the violence occurring there were legitimate. *Id.* at 1578.

121. *Id.*

122. *Id.* at 1577.

123. *Id.* at 1578.

124. *Id.*

125. BAU, *supra* note 9, at 122. The "overriding government interest" test from *Lee* is arguably a lower threshold than the "compelling government interest" test. *Id.* at 120.

126. *Elder*, 601 F. Supp. at 1578; see also *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (agreeing that controls over immigration are "inherent in

court recognized that Elder's actions were charitable, it explicitly stated that his "do-it-yourself immigration policy . . . gives away what is not his to give away—the Government's legitimate right to examine every person who enters the country."¹²⁷

After finding that an overriding interest existed, the court then examined whether the government was regulating the conduct through the least burdensome method.¹²⁸ Based on the argument that the government would lose control over all immigration policy if it permitted Elder to carry out his religious beliefs, the court found that the government had no other alternatives for retaining the necessary control over immigration.¹²⁹ Therefore, Elder's free exercise claim did not outweigh the government's overriding interest in regulating immigration.

4. Policy Implications

Sanctuary is not just a constitutional concern strictly for the courts to struggle with; rather, it becomes a highly divisive political issue when the church attempts to shape national politics, and specifically in this case, immigration policy.¹³⁰ While the government has not forcefully taken anyone out of sanctuary, it has indirectly attempted to discredit and control those who support sanctuary "through intimidation, co-option, or

sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers - a power to be exercised exclusively by the political branches of government"); *ILLEGAL IMMIGRATION IN AMERICA* 7 (David W. Haines & Karen E. Rosenblum, eds., Greenwood Press) (1999) (asserting that transporting and smuggling illegal immigrants has a negative impact on the U.S.).

[T]he world of labor trafficking feeds into criminal activities, competition for low-wage jobs may drive wages even lower, the unexpected appearance of many children (either undocumented themselves or the offspring of undocumented immigrants) may challenge school systems, and use of hospital emergency rooms by those with no access to other kinds of health care may strain resources.

Id.

127. *Elder*, 601 F. Supp. at 1578. The court emphasized the nation's interest in immigration and border control, in order to prevent entry by enemies of the state, criminals, and others Congress has deemed "undesirable." *Id.* at 1579.

128. *Id.* at 1579.

129. *Id.* The court noted that if it were to adopt Elder's argument, then the starving and impoverished people of North Africa, Asia, or Mexico would be equally entitled to enter and remain in the country free of INS review. *Id.* Because the court was not willing to permit an individual's religious beliefs to shape immigration policy, it denied Elder's free exercise argument. *Id.* at 1580. The court also stated that the government was utilizing the least restrictive method, especially because nothing in the decision prohibited the exercise of Christian charity to those who present themselves before the INS to apply for asylum and who proceed under INS rules. *Id.*

130. BAU, *supra* note 9, at 16.

infiltration.”¹³¹ Reasons for this approach include a failure by right-wing conservatives opposed to sanctuary to garner zealous religious support that could potentially cast a shadow of doubt upon the Biblical and moral foundation of the Sanctuary Movement.¹³²

By indicting sanctuary workers, the government tried to establish within a courtroom that the 1980s Movement had no legal basis. Supporters of the Movement believed the government was using these trials as “political targeting” in an attempt “to censor dissenting views” on its policy in Central America.¹³³

IV. PROPOSAL

Although sanctuary dates back to ancient times, it has evolved throughout history. In the U.S., each time the privilege has been invoked to protect illegal immigrants, its advocates have justified the practice by arguing sanctuary is absolutely necessary because it supports a greater moral and religious purpose. It is understood that the broader issue is illegal immigration in general and the path to citizenship for the millions of illegal aliens—Arellano’s activist cause.

Despite the fact that immigration is generally a foreign policy issue, and it has been proposed as such in this Comment, the justification for providing sanctuary now appears to be that of maintaining family unity. Because the illegal immigrants that are the subject of the New Movement have already been processed by immigration officials, the movement can no longer claim that is providing sanctuary until the situation improves. The kind of sanctuary that churches are granting appears to be indefinite. This is problematic because it excludes the government from an area which it is legally permitted to regulate—immigration policy.

This Comment contends that the New Movement does not warrant the privilege of sanctuary because the participating churches are in direct violation of federal law.¹³⁴ Although arresting immigrants within the church may not be a sound political strategy, the government has a legal basis to do so. The Court, therefore, should not create an exemption under the Free Exercise Clause of the First Amendment for churches to provide sanctuary to illegal immigrants.

A. *Enforcing the Harboring Provision of the Federal Statute*

Although at first glance this proposal may not appear

131. GOLDEN & MCCONNELL, *supra* note 5, at 87.

132. *Id.*

133. *Id.* at 55.

134. See 8 U.S.C. § 1324(a) (outlining the penalties for smuggling, harboring, and transporting illegal aliens).

innovative because it asserts that the government has a right to enforce an already existent federal law, the legal question of whether sanctuary is protected by the Free Exercise Clause of the First Amendment remains an unresolved legal question. The government's tacit approval of church sanctuary in the 1980s and during the current movement, may lead to the conclusion that sanctuary is legal.¹³⁵ When the government indicted sanctuary workers during the 1980s, it refrained from making arrests on church grounds and only enforced the "transporting" provision of the federal statute.¹³⁶ In effect, only the conduct of the sanctuary workers for transporting illegal immigrants was punished, leaving the church unaccountable for providing sanctuary.

1. *Who Should Enforce the Federal Statute?*

Because this is primarily an immigration issue, officials from the U.S. Citizenship and Immigration Services Department (USCIS—formerly the INS) should be in charge of enforcing the federal statute against harboring illegal aliens.¹³⁷ In previous sanctuary cases, the INS had an intrinsic role in arresting sanctuary workers and gathering evidence for their indictments. Although those cases primarily focused on transporting illegal aliens, the enforcement of the harboring provision is equally justified under the same legal analysis. Under this proposal, USCIS officials would enter church grounds to arrest those hiding in sanctuary, not the sanctuary workers.¹³⁸ This implicates a different freedom of religion problem—the free exercise of religion on the church's behalf, not from that of the sanctuary workers.¹³⁹

B. *No Violation of the Church's Free Exercise of Religion*

One potential issue with enforcing the harboring provision is the potential claim that it infringes on the church's free exercise rights under the First Amendment because the church has a sincerely held religious belief in providing sanctuary.¹⁴⁰ In response, churches would likely argue that even though providing sanctuary violates a criminal statute, the Court should recognize

135. Indicative of this view is the case of Elvira Arellano and the government's delay in arresting her until she traveled to Los Angeles. Archibold, *supra* note 68, at 14.

136. 8 U.S.C. § 1324(a)(2); *see also Elder*, 601 F. Supp. at 1574 (charging Elder with unlawfully transporting three undocumented Salvadoran aliens).

137. *See id.* at 1576-77 (noting how the INS enforced the statute).

138. The government in *Elder* and *Aguilar* did not prosecute the workers for harboring but for transporting illegal immigrants.

139. This is different from *Elder* and *Aguilar*, because it would not implicate the free exercise rights of the workers.

140. *See Elder*, 601 F. Supp. at 1579 (discussing the Court's view that the sanctuary workers had a sincerely held religious belief).

an exemption for sanctuary comparable to the exemption the Court found in *Yoder*.¹⁴¹ Both situations demonstrate conduct that acts upon a religious belief, and in the case of sanctuary, it is "conduct that is otherwise valued and encouraged by society: sheltering the homeless, feeding the hungry, giving transportation to the needy."¹⁴²

The government could argue that arresting those who take refuge in churches furthers an overriding governmental interest, similar to that in *Elder*, by enforcing the harboring provisions of the statute. The argument here would even be stronger than that in *Elder*, because unlike the 1980s, the New Movement provides refuge to illegal aliens who have been processed by immigration officials and have been found guilty of violating federal law.¹⁴³ Due to the significant, but overlooked, disparity between the two movements, the government is legally and morally justified in making arrests upon church grounds to remove illegal aliens for purposes of deportation.

Today, illegal aliens taking refuge in churches are not refugees suffering from political persecution and this fact strengthens the government's position for several reasons. First, this fundamental difference between the movements strengthens the basis of this proposal because legally the two groups of immigrants are distinguishable. Second, providing sanctuary under the New Movement is not rooted in human rights discourse and lessens the sympathy factor with the public. Finally, sanctuary now appears to be indefinite, whereas in the 1980s the refugees were primarily asking to remain in the U.S. until the political strife in their own countries subsided. The government has stronger legal and policy arguments in favor of enforcing the harboring provision of the federal statute.

V. CONCLUSION

Similar to ancient practice, when sanctuary supplemented an imperfect legal system, the 1980s Movement provided the indispensable asylum that a deficient immigration legal system failed to do and in turn justified granting sanctuary to refugees who were fleeing political persecution. Although the New Movement equates its religious and moral motivation to that of its counterpart in the 1980s, there is an evident disparity between the two. Unlike the 1980s when foreign policy dominated the discussion, the movement now seems to primarily focus on the

141. See *Yoder*, 406 U.S. at 218 (recognizing the Amish had a sincerely held religious belief in not wanting their children to attend public high school and upholding their claim that this would infringe on free exercise of religion).

142. BAU, *supra* note 9, at 123.

143. See *Lochner*, *supra* note 82 (asserting claims by the New Movement that it assists immigrants that are "in process" and is therefore not illegal).

domestic issue of keeping families together.

Immigration policy has undoubtedly been a controversial political, economic, and social struggle that has been greatly influenced by foreign policy and national security considerations. Although sanctuary has biblical and historical roots, its invocation in the U.S. has been limited to the illegal immigration cause. By providing indefinite sanctuary to illegal immigrants, the churches are directly violating federal law. Therefore, the government can make arrests upon church grounds without violating the church's free exercise claims.

