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HELPING THOSE WHO HELP THE SOJOURNER AMONG US: VIABLE DEFENSES FOR MEMBERS OF THE SANCTUARY MOVEMENT¹

Ramon and Mercedes Sanchez lived in El Salvador. They watched while their country's soldiers kidnapped, raped, mutilated, and murdered their two daughters. Seeking a new life, Ramon and Mercedes fled El Salvador for the United States of America. They applied for asylum. The Immigration and Naturalization Service (INS) concluded that the Sanchezes had not presented written proof showing why their daughters had been killed. For that reason, the INS denied Ramon and Mercedes asylum.²

The plight of the Sanchez family reoccurs daily. Aliens from El Salvador, fleeing the civil war in their homeland, enter the United States at the rate of several thousand per month.³ INS estimates that it apprehends only about one-quarter of these 4,000 Salvadorans who enter monthly.⁴ Many of those who have entered, like the Sanchez family, have attempted to remain legally in the United States; yet this country's immigration and asylum policy has frustrated the hopes of most of these people.⁵

Although the system has been unresponsive to the plight of Salvadoran refugees, the American people have become increasingly aware of the lives of people like the Sanchez family. This awareness is due both to the extensive documentation on conditions in El Salvador⁶ and to the realization that the law of one's conscience may be

1. *Numbers* 35:15 (King James) ("[t]hese six cities shall be a refuge, both for the children of Israel, and for the stranger, and for the sojourner among them . . ."). The title of this Comment reflects the biblical roots of the concept of sanctuary. See *infra* note 31 and accompanying text for a discussion of these roots.

2. See R. GOLDEN & M. MCCONNELL, *SANCTUARY: THE NEW UNDERGROUND RAILROAD* 13 (1986).

3. AMERICAN CIVIL LIBERTIES UNION, ACLU PUBLIC POLICY REPORT No. 1, *SALVADORANS IN THE UNITED STATES* 3-4 (Dec. 1983).

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

5. From October 1983 until September 1984, only 328 out of 13,373 Salvadoran asylum requests were granted. See Note, *Membership in a Social Group: Salvadoran Refugees and the 1980 Refugee Act*, 8 HASTINGS INT'L & COMP. L. REV. 305, 330 (1985) [hereinafter *Membership*].

6. See, e.g., STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS AND SENATE COMM. ON FOREIGN RELATIONS, 99th Cong., 2d Sess., *STATE DEPT. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1985* 515-33 (Comm. Print 1986) [hereinafter *COUNTRY REPORTS*] (reflects belief that situation in El Salvador is improving, but cites numerous human rights problems); *Final Report on the Situation of Human Rights in El Salvador*, Submitted to the Commission on Human Rights, U.N. Doc. E/CN. 4/1984/25

superior to the law of one's land.⁷ The Sanctuary Movement is one form this awareness has taken. This movement, consisting of people of different faiths and political persuasions,⁸ seeks to provide a sanctuary—a safe haven—for illegal Salvadorans in the United States. To date, the Sanctuary Movement has been the target of two major government prosecutions.⁹ In both of these, the individual defendants have emerged as losers. The movement, however, has continued to thrive.

This comment seeks to determine which defenses are viable for sanctuary workers who are charged with violating United States immigration policy. First, this comment examines the current situation in El Salvador. Next, a history of the Sanctuary Movement is presented. This comment subsequently analyzes three viable defenses¹⁰ which sanctuary workers may utilize: first, United States vi-

(1984) [hereinafter *Final Report*] (investigation of murders, abductions, disappearances, terrorist acts, and violations of human rights and fundamental freedoms taking place in El Salvador); AMERICAS WATCH, HELSINKI WATCH, & LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, *FAILURE: THE REAGAN ADMINISTRATION'S HUMAN RIGHTS POLICY IN 1983* (1984) [hereinafter *FAILURE*] (extremely critical report of United States policy towards El Salvador that describes human rights situation there as disastrous).

7. Sanctuary workers are part of a long tradition of civil disobedience in the United States. Henry David Thoreau was perhaps the most well-known proponent of the proposition that a government that does not conduct itself in a moral manner need not be obeyed. Rather than pay a poll tax and thus participate in the evil of slavery, Thoreau went to jail. He defended his action, stating that "[u]nder a government which imprisons any unjustly, the true place for a just man is also a prison." 10 H.D. THOREAU, *THE WRITINGS OF HENRY DAVID THOREAU* 152 (1894). See generally *CIVIL DISOBEDIENCE IN AMERICA* (D. Weber ed. 1978) (extensive treatment of the history of civil disobedience in the United States, with a lengthy section on opposition to slavery). The late Dr. Martin Luther King, Jr. defined the doctrine of civil disobedience by stating: "[O]ne has a moral responsibility to disobey unjust laws." M. L. KING, JR., *Letter From Birmingham Jail*, in *WHY WE CAN'T WAIT* 84 (1963). See also *Cities Can't Make Immigration Law*, L.A. Daily J., Jan. 1, 1986, at 4, col. 1 (applying King's ideas to the Sanctuary Movement).

8. Religious groups supporting the movement include American Baptists, Church of the Brethren, three Lutheran Synods, Presbyterians, Quakers, United Church of Christ, Unitarians, the United Methodist Church, and the National Council of Conservative Rabbis. See Witt, *On the Line*, Chicago Tribune, May 5, 1985, Magazine, at 20; Ridgeway, *Refugees Aren't the Targets of Sanctuary Movement Crackdown*, L.A. Daily J., Jan. 29, 1985, at 4, col. 3. In addition, while the National Conference of Catholic Bishops has not officially endorsed the movement, some individual Roman Catholic bishops, including Milwaukee, Wis., Archbishop Rembert Weakland have joined the movement. Goldman, *Whose Law Governs Sanctuary for Illegal Aliens?*, L.A. Daily J., Aug. 27, 1985, at 4, col. 3. Weakland has said that "[s]anctuary is not really a way of avoiding justice, but a holy respite so that true justice can eventually be done." *Id.* Sanctuary churches exist throughout the United States, in such diverse locations as Champaign-Urbana, Ill., New York City, and Tucson, Ariz. Witt, *supra*, at 22.

9. See *infra* notes 44-55 and accompanying text for a discussion of these prosecutions in Texas and Arizona.

10. The only defenses discussed in this Comment are United States violation of international law, the doctrine of necessity, and the free exercise of religion, although other defenses exist. These other defenses include the fact that sanctuary workers

olation of international law; second, the doctrine of necessity; and third, free exercise of religion. Through the use of these defenses, an individual sanctuary defendant may ensure not only that he or she may prevail, but that the goals of the movement will be broadcast to the American people.

I. CURRENT CONDITIONS IN EL SALVADOR AND THE UNITED STATES IMMIGRATION AUTHORITIES' RESPONSE

Since 1979, a brutal civil war has raged in El Salvador.¹¹ Americas Watch, a human rights organization, described the situation in El Salvador as an "unabated horror."¹² More than 60,000 Salvadorans out of a population of 5.2 million have died.¹³ Death squads routinely murder dissenters of the current government without fear of repercussion.¹⁴ Civilian disappearances, indiscriminate bombings, abductions, torture, and arbitrary arrests occur with sickening frequency.¹⁵ In addition, the civil war has displaced approximately 500,000 Salvadorans—one-tenth of the country's population.¹⁶

The United Nations has repeatedly expressed concern for the current situation in El Salvador and for the problems of Salvadoran refugees.¹⁷ The United Nations High Commissioner for Refugees

lack the specific intent necessary to violate the anti-smuggling statute and the defense of duress. See Comment, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV 493 (1986).

11. This war pits the government forces against the leftist Farabundo Marti Liberation Front (FMLN) forces. See Schodolski & Rowley, *Salvadoran Peace Just a Cry in Wilderness*, Chicago Tribune, Sept. 21, 1986, at 14, col. 1. Although two rounds of peace talks between the two sides were held in October 1984 and November 1984, the scheduled third round of talks in September 1986 never occurred. *Id.* This failure has led some to suggest that the civil war could go on into the next century. *Id.* If this occurs, the current refugee exodus from El Salvador, which is already greater than the refugee flight from Indochina, will be a mere portend of the future numbers to come. See *Central American Refugees' Plight Described*, REFUGEES, May 1984, at 38.

12. FAILURE, *supra* note 6, at 32. Americas Watch, along with Amnesty International, has published numerous reports on the situation of civil strife in El Salvador, and of the concurrent refugee dilemma.

13. Schodolski & Rowley, *supra* note 11, at 14.

14. In the first nine months of 1983, the number of people murdered was 3,904, according to the Human Rights Commission of El Salvador. *Final Report*, *supra* note 6, at 14.

15. *Id.* at 20. In the first three months of 1983 alone, 75 cases of physical torture were documented, 18 cases of decapitation in the central zone of El Salvador were reported, and 10 cases of women raped and then murdered were reported. *Id.*

16. See LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS & AMERICAS WATCH, *EL SALVADOR'S OTHER VICTIMS: THE WAR ON THE DISPLACED* 12 (1984). See generally *A Long Journey to Find a Safe Place*, REFUGEES, May 1983, at 7 (report of refugees' trek from El Salvador to Honduras); *Honduras: A Short Walk Along the Border*, REFUGEES, Mar. 1985, at 17 (description of the United Nations Commission on Human Rights' roving protection officers in Honduras and how they assist refugees from El Salvador).

17. See, e.g., G.A. Res. 35/192, 35 U.N. GAOR (Agenda Item 12), U.N. Doc. A/

(UNHCR) has adopted resolutions on the violation of human rights in El Salvador.¹⁸ Furthermore, it has stated that no government—including the United States government—should return Salvadoran refugees, either directly or indirectly, to El Salvador.¹⁹

Regardless of United Nations' pronouncements concerning the intolerable conditions in El Salvador, the United States considers El Salvador a key ally. The United States continues to provide financial support to El Salvador.²⁰ Although the United States supports the current Salvadoran government over the rebel forces, the United States itself has recognized substantial human rights abuses in El Salvador.²¹ In February 1986, the State Department stated that government forces were still murdering civilians.²² Despite ample documentation of serious human rights abuses in El Salvador, and despite agreement by the United States government that such abuses do exist, United States immigration policy toward Salvadorans remains cautious.²³ The probability persists, therefore, that atrocities such as the one the Sanchez family endured will continue.

The Immigration and Nationality Act of 1952 (INA) and the

Res/35/192 (1980); G.A. Res. 36/155, 36 U.N. GAOR (Agenda Item 12), U.N. Doc. A/Res/36/155 (1981).

18. The United Nations first adopted a resolution in 1980, expressing concern at the "grave violations" of human rights in El Salvador. G.A. Res. 35/192, 35 U.N. GAOR (Agenda Item 12), U.N. Doc. A/Res/35/192 (1980). The 1983 resolution "expressed its deep concern" at numerous reports of government bombing of civilian areas. G.A. Res. 38/101, 38 U.N. GAOR (Agenda Item 12), U.N. Doc. A/Res/38/101 (1984).

19. *Membership*, *supra* note 5, at 328 n.169 (quoting letter from UNHCR Legal Advisor).

20. In 1985, the United States provided El Salvador with 518.5 million dollars in aid. Colbert, *The Motion in Limine: Trial Without Jury: A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 29 (1986) (quoting Duarte: Prisoner of War, ESTUDIOS CENTROAMERICANOS, reprinted in NORTH AMERICAN CONGRESS OF LATIN AMERICAN (NACLA), REPORT ON THE AMERICAS 14-20 (Jan./Mar 1986)).

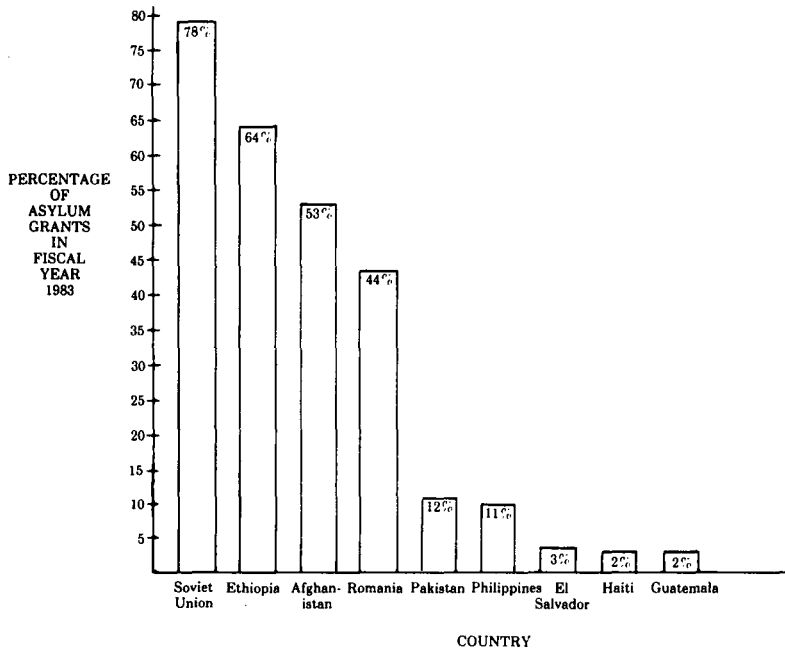
21. COUNTRY REPORTS, *supra* note 6, at 533.

22. *Id.* at 516. This report goes on to state that arrests can be made by Salvadoran security forces without a warrant, that the courts are hampered by judges' and juries' susceptibility to bribes and intimidation, that the government uses "networks of informers," and that security forces use forced entries in arresting and investigating civilians. *Id.* at 521-24.

23. The number of Salvadorans in the United States illegally has been estimated at 300,000 to 500,000. H.R. REP. NO. 1142, 98th Cong., 2d Sess., pt. 1, at 10 (1984). See also "Sanctuary" Movement Stirs Passionate Debate, REFUGEES, Nov. 1985, at 29 (statistics of Salvadoran immigration, legal and illegal, into the United States). The INS, however, has routinely denied Salvadorans asylum status. In 1984, only 328 out of 13,373 Salvadoran requests for asylum were granted. See *United Nations High Commissioner for Refugees Report*, reprinted in 128 CONG. REC. at 827-31 (daily ed. Feb. 11, 1982). This is a success rate of two percent. In comparison, the average success rate for asylum requests from aliens from all countries is 20%, and the success rate for aliens from the Soviet Union is 78%. For a graphic view of this, see the following chart.

Refugee Act of 1980 govern asylum law in the United States.²⁴ An

Success rates of aliens applying for asylum:



See Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 253 (1984) (addresses the failure of the Reagan Administration to follow the 1980 Refugee Act and proposes to depoliticize the asylum process); Korn, *Hiding in the Open*, STUDENT LAW., Jan. 1986, at 24, 26 (discusses Sanctuary Movement trial in Tucson, Ariz.). If a person is from a Communist country, or from a country not allied with the United States, he or she has a far easier task obtaining refuge or asylum. See Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 43 MD. L. REV. 91, 120 (1986); Note, *The Need for a Codified Definition of "Persecution" in United States Refugee Law*, 39 STAN. L. REV. 187, 203-04 (1986) [hereinafter Note, *Need for a Codified Definition*]. Unfortunately, for people like the Sanchez family, El Salvador is a non-Communist United States ally.

24. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163 (codified in scattered sections of 50 U.S.C.); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.). The congressional policy and objectives behind the Refugee Act of 1980 are stated in it:

(a) the Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States. The Congress further declares that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.

(b) The objectives of this Act [see Short Title of 1980 Amendment note set out under section 1101 of this title] are to provide a permanent and systematic procedure for the admission to this country of refugees of special hu-

alien may be eligible for asylum, or qualify as a refugee, under two sections of the INA, as amended by the Refugee Act of 1980. First, section 243(h) provides that the United States Attorney General may not deport any alien to a country where his or her life or freedom would be threatened on account of race, nationality, political opinion, religion, or membership in a specific social group.²⁵ The United States Supreme Court has held that in order for an alien to qualify for this withholding of deportation, he or she must demonstrate a "clear probability of persecution."²⁶

Second, section 208(a) of the INA provides that the Attorney General has the discretion to grant asylum to aliens meeting the definition of "refugees."²⁷ Under this section, a refugee may qualify for asylum by showing a "well-founded fear of persecution."²⁸ The Supreme Court recently held that this standard is something less than "more likely than not" that the alien will be persecuted for one of the five specified reasons.²⁹ Aliens' attempts to obtain either asylum under section 208(a) or withholding of deportation under section 243(h) have been generally unsuccessful.³⁰ As a direct result of this

manitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.

8 U.S.C. § 1521 (1982).

25. Section 243(h) states: "The Attorney General shall not deport or return any alien . . . if the Attorney General determines that such alien's life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 243(h)(1); 8 U.S.C. § 1253(h)(1) (1982).

26. *INS v. Stevic*, 467 U.S. 407, 424 (1984). The Court held that the question to be asked under the clear probability standard is "whether it is more likely than not that the alien would be subject to persecution." *Id.*

27. Refugee Act of 1980, Pub. L. No. 96-212, Title II, § 208 (a), 94 Stat. 102, 105 (1980)(codified at 8 U.S.C. § 1158(a) (Supp. 1985)). A refugee is defined as follows:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Refugee Act of 1980, Pub. L. No. 92-212, Title II, § 201(a), 94 Stat. 102, 102-03.

28. The "well-founded fear of persecution" standard is more generous than the "clear probability of persecution" standard. See *Stevic*, 407 U.S. at 425; *Yousif v. INS*, 795 F.2d 236, 243-44 (6th Cir. 1986); *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984). The well-founded fear standard is easier to meet because it "can be satisfied by credible subjective evidence and . . . the fear may be based upon group characteristics such as the petitioner's religion." *Dolores v. INS*, 772 F.2d 223, 226 (6th Cir. 1985). A request for asylum made under § 208(a) is also considered a request under § 243(h). *Id.* at 423 n.18. A § 243(h) request is not, however, automatically construed as a § 208(a) request. *Id.*

29. *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1212 (1987). The Court declined to define a precise standard, but stated that a "moderate interpretation" of the standard would indicate that when persecution is a "reasonable possibility," as established by an objective situation, the standard is met. *Id.* at 1217-18.

30. See, e.g., *Cruz-Lopez v. INS*, 802 F.2d 1518 (4th Cir. 1986) (upheld Bureau

dismal success record, the Sanctuary Movement has emerged as an alternative to working within the system.

II. THE SANCTUARY MOVEMENT

A. *Roots of the Movement*

The idea of sanctuary originated in biblical times. Six cities of refuge provided safe haven to people who had accidentally killed others, and as a result, were being chased in vengeance.³¹ In the

of Immigration Appeals (BIA) determination that illegal Salvadoran not entitled to asylum under either § 208(a) or § 243(h)); *Florez-de Solis v. INS*, 796 F.2d 330 (9th Cir. 1986)(affirmed BIA decision to deport Salvadoran not entitled to asylum under either section of INA); *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985)(Salvadoran's deportation upheld although he had been kidnapped and beaten); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1280 (9th Cir. 1985) (deportation of Salvadoran upheld even though he was former army officer and right-wing party member who had been recruited by guerillas to infiltrate government); *Zepeda-Melendez v. INS*, 741 F.2d 285, 290 (9th Cir. 1984) (deportation of Salvadoran who had been recruited by guerillas upheld); *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984) (BIA did not abuse its discretion in saying Salvadoran, who had been threatened because he was armed security guard, did not establish prima facie case that his fear of being singled out for persecution was well-founded); *Martinez-Romero v. INS*, 692 F.2d 595, 595-96 (9th Cir. 1982) (widespread and tragic danger affecting all in El Salvador is not persecution under § 243(h)); *Villegas V. O'Neill*, 626 F. Supp. 1241, 1245 (S.D. Tex. 1986) (Salvadoran's fear of persecution for deserting military is not fear of persecution that qualified him for political asylum). *But see Zavala-Bonilla v. INS*, 730 F.2d 562, 565-67 (9th Cir. 1984) (BIA's decision to deny Salvadoran's political asylum application under § 243(h) not supported by substantial evidence).

The major obstacle to be hurdled by those seeking refugee status or asylum is that they must present evidence that they have been, or will be, singled out for persecution. *See Note, Need for a Codified Definition, supra* note 23, at 202-05. This barrier is often insurmountable. *See R. GOLDEN & M. McCONNELL, supra* note 2, at 45 (noting that the UNHCR had concluded that there appeared to be "a systematic practice designed to secure the return of Salvadorans"). This approach was recently criticized:

Many of our fellow human beings live and die in a world where governments are more brutal than ours and less accustomed to documenting their misconduct; in considering evidence of how governments operate in that world, we ought not to jump to the assumption that what they have not documented they have not done.

Dawood-Haio v. INS, 800 F.2d 90, 96 (6th Cir. 1986).

31. Biblical passages relied upon by sanctuary members include:

He that smiteth a man, so that he die, shall be surely put to death. And if a man lye not in wait, but God deliver him into his hand, then I will appoint thee a place wither he shall flee.

Exodus 21: 12-13;

Also thou shalt not oppress a stranger: for yee know the heart of a stranger, seeing yee were strangers in the land of Egypt.

Exodus 23:9;

And among the cities which yee shall give unto the Levites, there shall be six cities for refuge, which yee shall appoint for the manslayer, that he may flee thither.

Numbers 35:6;

And the Lord spoke unto Moses, saying Speak unto the children of Israel, and say unto them, When ye be come over Jordan, into the land of Canaan: Then

fourth century, the Romans recognized Christian churches as sanctuaries.³² This concept of the church as a place of refuge reappeared in English law, which provided that a person accused of a felony could take refuge in a church for up to forty days.³³

In the United States, the Underground Railroad of pre-Civil War times was in many ways similar to the Sanctuary Movement. The Underground Railroad consisted of people who helped slaves flee the South and find freedom in the northern states and in Canada.³⁴ Many people defied the Fugitive Slave Act,³⁵ and often used churches as stops on the Underground Railroad flights.³⁶

The theory of sanctuary moved from the Civil War era into the twentieth century during the Vietnam War. Those evading the draft and those deserting the military found refuge in churches on a number of occasions.³⁷ Just as those in opposition to the Fugitive Slave Act signed public pledges of their intent to violate the law,³⁸ modern-day churches and congregations have designated themselves as sanctuaries.³⁹

ye shall appoint you cities, to be cities of refuge for you; that the slayer may flee thither which killeth any person at unawares. And they shall be unto you cities for refuge from the avenger, that the manslayer die not.

Numbers 35:9-12;

Then Peter and the other apostles answered and said, We ought to obey God rather than men.

Acts 5:29.

32. See Goldman, *supra* note 8, at 4.

33. *Id.* Cf. Pryce, *Ecclesiastical Sanctuary in Thirteenth-Century Welsh Law*, 5 J. LEGAL HIST. 1 (1984) (addresses inviolability of church sanctuaries and secular legitimization of churches' sanctuary rights). This privilege was eventually abolished by James I. See W. BLACKSTONE, COMMENTARIES 326-27.

34. See V. HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* (1981).

35. The Fugitive Slave Law of 1850 provided that all citizens were required to aid in the pursuit of a slave when ordered to do so by commissioners who were appointed by the federal courts. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462. Those who obstructed another person who was in the process of seizing a slave, or those who rescued or harbored slaves, were subject to a \$1000 fine and six-month imprisonment. See T.D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861* 145-46 (1974).

36. See S.W. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860* (1970).

37. In 1968, a convicted draft evader sought refuge in a Boston church. Federal marshals carried him away from the altar. See Goldman, *supra* note 8, at 4.

38. One such pledge read:

Whereas the late act of Congress makes a refusal to aid in the capture of a fugitive a penal offense the subscribers being restrained by conscientious motives from rendering any active obedience to the law, do solemnly pledge ourselves to each other, rather to submit to its penalties, than to obey its provisions.

THE FUGITIVE SLAVE BILL: ITS HISTORY AND UNCONSTITUTIONALITY Appendix, 21 (1850).

39. One of the leaders of the movement, John Fife, is a minister whose Tucson, Arizona, congregation voted to declare its church a sanctuary. Fife sent a letter to the Attorney General, stating that the participants took the action because "justice and

The concept of establishing a place of refuge to help those fleeing extreme hardship is therefore firmly grounded historically. It reflects this country's ongoing policy of helping those who seek refuge from oppression.

B. *The Sanctuary Movement Today*

At present, hundreds of churches and thousands of individuals are involved in the Sanctuary Movement.⁴⁰ Yet, a small group of individuals formed this modern-day version of the Underground Railroad. Jim Corbett, a Quaker, along with John Fife, a Presbyterian minister, assembled a group of people concerned about Central American refugees and declared Fife's church in Tucson, Arizona, a sanctuary.⁴¹ The Sanctuary Movement soon blossomed, and now counts among its supporters the National Council of Churches, the Presbyterian Church (U.S.A.), the American Lutheran Church, the American Baptist Churches, some individual Roman Catholic parishes and bishops, and the Rabbinical Assembly.⁴² In addition, numerous state and local governments have declared themselves to be in support of the Sanctuary Movement.⁴³

From the beginning of the movement, sanctuary members declared that they were violating United States' laws. As a result, confrontation with the government was inevitable. Two such confrontations have occurred to date. The first episode occurred in Texas and centered around the Casa Oscar Romero, a refugee center.⁴⁴ A lay worker, Stacey Lynn Merkt, was convicted of aiding and abetting

mercy require that people of conscience actively assert our God-given right to aid anyone fleeing from persecution and murder." Korn, *supra* note 25, at 28.

40. See, e.g., *Sanctuary on Trial in Tucson*, CONVERGENCE, Fall 1985, at 1 (report from the Christic Institute, a non-profit public-interest law center which helped represent the defendants in the Tucson, Arizona sanctuary trial); *Sanctuary: A Complex Case*, L.A. Daily J., Jan. 21, 1986, at 4, col. 1 (editorial focusing on government infiltration of sanctuary churches). As of January 1987, 370 congregations, 70,000 sanctuary workers, 2 sanctuary states, 19 sanctuary cities, and 20 sanctuary universities exist. Kemper, *Convicted of the Gospel*, SOJOURNER, JULY 1986, at 14.

41. Corbett, a Quaker rancher, lives in Arizona. He became interested in the plight of Salvadoran aliens after a friend of his picked up a Salvadoran hitchhiker whom the border patrol soon seized. See generally Witt, *supra* note 8, at 20 (Corbett's influence on the Sanctuary Movement, and its history). Fife's church was the first to be declared a sanctuary. *Id.*

42. See Korn, *supra* note 23, at 27.

43. State and local government actions which pertain to sanctuary include executive orders in Chicago and Massachusetts; a proclamation in New Mexico; and resolutions in San Francisco, Cal., New York City, Cambridge, Mass., Duluth, Minn., and Madison, Wis. See N.Y. Times, Mar. 30 1986, at A23, col. 1.; *Holding Out False Hope*, L.A. Daily J., Jan. 1, 1986, at 4, col. 1.

44. The center, named in honor of the assassinated Catholic Archbishop of El Salvador, provides help to Salvadorans who have entered the United States. The Catholic diocese of Brownsville, Texas donated the land on which the center was built. See *United States v. Elder*, 601 F. Supp. 1574, 1576 (S.D. Tex. 1985).

the unlawful transportation of undocumented aliens, in violation of a federal immigration statute.⁴⁵ She received a ninety-day suspended sentence and two years of probation.⁴⁶ Casa Oscar Romero's Director, Jack Elder, was arrested in March 1984, but was acquitted of violating the same statute.⁴⁷ In December 1984, Elder and Merkt were both arrested for the second time, and Elder was convicted of conspiracy in bringing in and landing illegal aliens and of transporting illegal aliens.⁴⁸ Merkt was convicted of conspiracy, but her conviction was reversed and remanded in June 1985.⁴⁹

In reversing the conviction, the Court of Appeals for the Fifth Circuit specifically addressed the defendants' claims that their actions were protected under the Free Exercise Clause of the Constitution and under instruments of international law. The court found no merit in either of these defenses.⁵⁰

The second confrontation between the government and sanctuary workers occurred in Arizona, at the movement's origin. In January 1985, sixteen people, including Jim Corbett, Reverend John Fife,

45. N.Y. Times, Mar. 27, 1985, at A16, col. 6. The statute under which Merkt was convicted provided:

Any person who - (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise; (2) knowing that he is in the United States in violation of law . . . transports or moves . . . in furtherance of such violation of law; (3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or (4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any alien 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.

8 U.S.C. § 1324(a)(1982). This statute was amended by the Immigration Reform & Control Act of 1986, S. Res. 1200, 99th Cong., 2d Sess. § 112.

46. N.Y. Times, Mar. 27, 1985, at A16, col. 6.

47. *United States v. Elder*, 601 F. Supp. 1574 (S.D. Tex. 1985) (Elder's motion to dismiss denied).

48. N.Y. Times, Mar. 28, 1985, at A20, col. 1.; N.Y. Times, Mar. 29, 1985, at A12, col. 6.

49. The reversal was based on an erroneous jury charge. *United States v. Merkt*, 764 F.2d 266, 272 (5th Cir. 1985). The court found that the jury should have been instructed to the effect that "[i]f the jury should find as a fact that Merkt intended to present the aliens to the proper officials so that they could seek legal status in this country, it should find that she did not have the requisite minimal intent necessary for a conviction under § 1324." *Id.* Merkt argued that she was unable to drive the Salvadoran refugees to the nearest INS office because that office refused to accept asylum applications from any Salvadoran refugees. *Id.* See *Sanctuary on Trial in Tucson*, *supra* note 40, at 6.

50. *Merkt*, 764 F.2d at 273; *Elder*, 601 F. Supp. at 1576-81. This confrontation between the Texas sanctuary workers and the INS had some victories for the sanctuary workers, but not as a result of utilizing the freedom of religion defense or the violation of international law defense. Of the six cases involved in the Texas prosecutions, only one person was sentenced to incarceration. See Colbert, *supra* note 20, at 46 n.216.

priests, nuns, and lay workers, were indicted on seventy-one counts of violating the criminal harboring and transporting statute.⁵¹ The government obtained evidence against those indicted through the use of informers and tape recordings.⁵²

In this case, *United States v. Aguilar*,⁵³ the trial court judge refused to allow the jury to hear evidence concerning international law arguments or freedom of religion arguments.⁵⁴ Six of the defendants were convicted of violating the criminal harboring and transporting statute.⁵⁵

As a result of these confrontations between church and state, and in anticipation of more confrontations, two lawsuits were filed against the United States government. In May 1985, over seventy religious groups that supported the Sanctuary Movement filed suit against Attorney General Edwin Meese seeking to bar new prosecutions of sanctuary members.⁵⁶ The suit also sought an injunction to prohibit the INS from deporting Central American refugees until civil war and human rights violations in the refugees' countries of origin cease.⁵⁷ In the other lawsuit, the churches which the government infiltrated in *Aguilar*, along with their national organizations, sued the United States, alleging violations of their first, fourth, and fifth amendment rights.⁵⁸

51. 8 U.S.C. § 1324 (1982). Only 11 of the defendants were actually tried. Charges against two of those originally indicted were dismissed. Hawley, *U.S., "Higher" Laws Clash in "Simple" Sanctuary Trial*, Arizona Republic, Feb. 13, 1985, at A1, 14, col. 6. In addition, three defendants pled guilty to misdemeanor charges. *Id.*

52. The arrests of the sanctuary workers grew out of a nine-month INS investigation, Operation Sojourner. Pacelle, *Sanctuary Jurors Dilemma: Law or Justice*, 8 AM. LAW., Sept. 1986, at 95, 96. The investigation consisted primarily of government informants who secretly infiltrated sanctuary groups and recorded 91 tapes of church meetings. *Id.* See also Blodgett, *Alien Search*, 72 A.B.A. J. 31 (Apr. 1986) (churches that were spied upon sued the federal government); *The Sanctuary Case*, L.A. Daily J., Oct. 30, 1985, at 4, col. 1 (editorial contending that infiltration of the churches was not necessary for the government to make its case).

53. *United States v. Aguilar*, No. CR-85-008-PHX-EHC (D. Ariz, 1985).

54. *Id.*

55. *Id.*

56. *American Baptist Churches in the U.S.A. v. Meese*, No. C-85-3255 RFP (N.D. Cal. Mar. 30, 1987) (LEXIS, Genfed library, Dist file).

57. *Id.* The United States District Court for the Northern District of California recently denied defendants' motion to dismiss plaintiffs' first amendment claim for failure to state a claim upon which relief can be granted. *Id.*

58. *The Presbyterian Church v. United States*, No. CIV 86-0072-PHX-CLH (D. Ariz. 1986), cited in Blodgett, *Alien Search*, *supra* note 52. The suit alleges that the government, the Justice Department, and the INS violated the first amendment right to free exercise of religion, the fourth amendment right against unreasonable search and seizure, and the fifth amendment right to due process of law. *Id.*

In addition, a committee composed of those who represent refugees sued Attorney General Meese and the INS Commissioner. *Committee of Cent. Am. Refugees v. INS*, 795 F.2d 1434 (9th Cir. 1986). In that case, the court concluded that transporting aliens to detention centers outside of the area in which they were living did not

The Sanctuary Movement, therefore, is a continuation of a centuries-old concept. Since its modern version began in Arizona and Texas, it has grown considerably, attracting a diverse group of supporters, all eager to lend a hand to help people like the Sanchez family.

III. VIABLE DEFENSES SANCTUARY WORKERS MAY ASSERT

A. *United States Violation of International Law*

Sanctuary workers contend that their actions on behalf of Salvadoran aliens are justified because the United States refuses to abide by international law.⁵⁹ Conversely, the workers contend that their own actions comply with international law.⁶⁰ According to sanctuary proponents, the United Nations Convention Relating to the Status of Refugees⁶¹ (the Convention) provides Salvadorans with a right to remain in the United States.⁶² The United States is bound to comply with the Convention.⁶³ The Convention defines a refugee as one who is outside the country of his nationality, and has a "well-founded fear of being persecuted" for reasons of race, religion, nationality, membership in a particular social group, or political

deprive them of any privilege or due process right. *Id.*

59. See, e.g., *United States v. Elder*, 601 F. Supp. 1574, 1581 (S.D. Tex. 1985).

60. *Id.*

61. The United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137, provides that those who were refugees prior to January 1, 1951, were entitled to protection from signatory countries to the Convention. In 1967, the United Nations Protocol Relating to the Status of Refugees, *signed* Jan. 21, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 was promulgated. The United States ratified the Protocol in 1968, and because it incorporates Articles 2-34 of the Convention, the United States is bound by both documents. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (1965). The Protocol eliminated the time restrictions inherent in the Convention. See generally Nanda, *World Refugee Assistance: The Role of International Law and Institutions*, 9 HOFSTRA L. REV. 449 (1981) (overview of international legal instruments, particularly United Nations documents); Nayar, *The Right of Asylum in International Law: Its Status and Prospects*, 17 ST. LOUIS U.L.J. 17 (1972) (extent to which the right to asylum is recognized in international relations).

62. The right to asylum is recognized by most countries in the world. See, e.g., CONST. preamble (France) and CONST. preamble (France 1946) ([a]nyone persecuted because of his activities in the course of freedom has the right of asylum within the territories of the Republic); GRUNDGESETZ [GG] art. 16, § 2 (W. Ger.) ("politically persecuted shall enjoy the right of asylum"). See generally Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183 (1984) (France's and West Germany's experiences in dealing with explosion of claims for asylum).

The United Kingdom abides by the Convention and the Protocol in providing that "leave to enter will not be refused if removal would be contrary" to its provisions. M. SUPPERSTORE, *IMMIGRATION: THE LAW AND PRACTICE* 84 (1983).

63. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1; § 138 (1980).

opinion.⁶⁴

A person from El Salvador must therefore demonstrate a "well-founded fear of being persecuted" in order to qualify as a refugee under the Convention.⁶⁵ As a means of satisfying this requirement, refugees from El Salvador can present extensive documentation from numerous groups. This documentation shows that those who express political opinions different from that of the ruling party, or those who belong to certain social groups disfavored by the government, run a great risk of incurring physical harm or death.⁶⁶

Another related and important protection expressed in the Convention is nonrefoulement.⁶⁷ By definition, this means that a refugee should not be expelled from the country of refuge or returned to the country of origin "where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion."⁶⁸ The goal of nonrefoulement is to prevent the expulsion of refugees to countries where the government would persecute them.⁶⁹

The United States incorporated the principle of nonrefoulement into the Refugee Act of 1980.⁷⁰ Section 243(h) of this Act provides that the Attorney General shall not deport or return any alien to a country if the Attorney General determines that the alien's life or freedom would be threatened "on account of race, religion, nationality, membership in a particular social group, or political opinion."⁷¹ An important element of the Refugee Act is that the Attorney General has sole discretion to determine conditions in the alien's country.⁷² The courts, however, have held that the Attorney General's

64. The Convention defines a refugee as one who:

[O]wing 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

U.N. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137, art. I(2)(3).

65. *Id.*

66. See *supra* note 6 for documentation from some of these groups.

67. "Nonrefoulement" means non-return. Nonrefoulement is described in article 33(1) of the Convention. Convention, *supra* note 63, art. 33(1). See generally Comment, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 23 HARV. INT'L L.J. 357 (1983) [hereinafter Comment, *Non-Refoulement of Refugees*] (efforts of Congress to conform United States law to international tenets).

68. *Id.*

69. See Comment, *Non-Refoulement of Refugees*, *supra* note 67, at 357.

70. See Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

71. Refugee Act of 1980, 8 U.S.C. § 1253(h)(1) (1982).

72. Because the Attorney General, and he alone, is able to decide if conditions

factual findings are subject to judicial review.⁷³ If an alien shows that he will face persecution if returned to his country of origin, the Attorney General must show substantial evidence to the contrary.⁷⁴

Notwithstanding provisions in United States immigration law that provide for refuge or asylum, the current policy of the INS after catching illegal Salvadorans is to return them to El Salvador.⁷⁵ Sanctuary workers argue convincingly that this is a clear violation of the principle of nonrefoulement, because those returned to El Salvador face persecution.⁷⁶ This issue, however, has only been litigated once, and the result was unfavorable to the sanctuary member defendant. In that case, *United States v. Elder*,⁷⁷ the United States District Court for the Southern District of Texas held that the Refugee Act of 1980 fulfilled the United States' obligations under international law, and that only the Attorney General could determine if a Salvadoran was a refugee.⁷⁸ Accordingly, defendant Elder's motion to dismiss the indictments based on international law was dismissed.⁷⁹ In the other major sanctuary prosecution, *United States v. Aguilar*,⁸⁰ the United States District Court for the District of Arizona refused to listen to arguments based on international law.⁸¹

in the alien's country are such that he would suffer persecution if forced to return, the possibility that the decision will be a subjective one is very real. See Comment, *Non-Refoulement of Refugees*, *supra* note 67, at 371.

73. *Id.* at 371-76.

74. *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981). This standard should be easier to meet for aliens than the previous standard, which required that the refugee show an abuse of discretion on the part of the INS. See Comment, *Non-Refoulement of Refugees*, *supra* note 67, at 375. An immigration judge refused to deport McMullen to the Republic of Ireland because McMullen would face persecution if deported.

McMullen, a former member of the Northern Ireland Provisional Irish Republican Army (IRA), defected and fled to the United States. *Id.* The immigration judge ruled that the Republic of Ireland could not protect McMullen from the IRA. *Id.* The *McMullen* court, however, found that the likelihood of persecution was not supported by substantial evidence. *Id.* at 1319.

75. See *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982). See also *Illegal Immigrants—Caught in the Fine Print of American Law*, REFUGEES, June 1985, at 36, 37 (INS buys a one-way, coachfare ticket to El Salvador for each of the 300 Salvadorans it deports each month).

76. An ACLU study found that 61 Salvadoran deportees had been murdered after they were returned to El Salvador. *Temporary Suspension of Deportation of Certain Aliens, 1984: Hearing on H.R. 4447 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 115 (1984). *Contra Zall, Asylum and Sanctuary: The American Dilemma*, 72 A.B.A. J. 66, 68 (Aug. 1986).

77. 601 F. Supp. 1574 (S.D. Tex. 1985).

78. *Id.* at 1580-81.

79. *Id.* at 1581.

80. No. CR-85-008-PHX-EHC (D. Ariz. 1985).

81. The court granted the prosecution's motion *in limine* to preclude arguments based on the free exercise of religion, refugees' rights under international law, the defense of necessity, and the lack of specific intent to violate the immigration statutes. *Id.* (order granting government's motion *in limine*). By definition, a motion *in limine* is made at the beginning of a trial. BLACK'S LAW DICTIONARY 914 (5th ed.

Although a defense based upon international law has not succeeded to date, the defense is viable. The United States is obligated to follow the policy of nonrefoulement.⁸² However, the process by which the State Department or the Attorney General of the United States determines whether conditions in an alien's country are such that the alien would suffer persecution should he return is inherently political.⁸³ For example, in deciding whether to grant an alien asylum, the INS relies upon a State Department advisory opinion which "correlates with foreign policy objectives."⁸⁴ Similarly, in deciding whether to withhold deportation, the Attorney General—an executive branch official—is responsible for the decision.

In efforts to escape these political overtones, different proposals to solve this problem of the granting of asylum or refugee status based upon the political climate have been suggested. One proposal⁸⁵ seeks to codify the definition of "persecution."⁸⁶ The effect of this codification would be to reduce INS discrimination based upon the country an alien is fleeing, and to improve judicial effectiveness.⁸⁷ A second proposal seeks to amend the definition of "refugee" to include victims of civil strife.⁸⁸ This revised definition of refugee would conform with recent UNHCR statements.⁸⁹ Should either of these proposals become law, sanctuary workers would be more successful contending that their actions comport with international law, because most likely, the aliens would be permitted to obtain refugee or asylee status.⁹⁰

1979). In *Aguilar*, Judge Carroll ruled that testimony as to these defenses was irrelevant and inadmissible because it had to do with intention. No. CR-85-008-PHX-EHC (D. Ariz. 1985). See also Pacelle, *supra* note 52, at 97. Although the judge prohibited discussion of the international law defense, it was mentioned at trial by a prosecution witness. *Id.* at 98. See generally Colbert, *supra* note 20 (argues that the exclusion of these entire defenses was not proper in *Aguilar* and deprived the defendants of fundamental rights).

82. See *supra* notes 67-74 and accompanying text.

83. See Heyman, *Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife*, 24 SAN DIEGO L. REV. 449 (1987).

84. *Id.* at 454.

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

86. *Id.* The Note argues that "foreign and domestic policy considerations" have subordinated "United States commitments to fair and humanitarian" treatment of aliens because of uncertainty concerning the definition of persecution. *Id.* at 190.

87. *Id.* at 233-34.

88. Heyman, *supra* note 83.

89. The UNHCR stated that refugees include persons who have fled their homelands due to internal turmoil and armed conflicts. Report of the United Nations High Commissioner for Refugees, 40 U.N. GAOR Supp. (no. 12) ¶ 16, U.N. Doc. A/40/12 (1985).

90. In addition to relying upon international instruments such as the United Nations Convention and the United Nations Protocol, these supporters of the movement relying on international law point also to the Universal Declaration of Human Rights, signed Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948). This provides that "[e]veryone has the right to seek and to enjoy in other countries asylum

B. The Doctrine of Necessity

Another defense that a defendant sanctuary worker should employ is that of necessity. One asserting this defense admits that although he committed all elements of the crime for which he is charged, his actions are justified.⁹¹ The necessity defense has an extensive historical tradition in both England and the United States.⁹²

from persecution." *Id.* art. 14(1). See generally Parker, *Human Rights and Humanitarian Law*, 7 WHITTIER L. REV. 675 (1985) (refugees' rights under various international law instruments).

91. The necessity defense is one of several "choice of evils" defenses which include necessity, duress, self-defense, defense of others, and public duty. See generally Luckstead, *Choice of Evils Defenses in Texas: Necessity, Duress and Public Duty*, 10 AM. J. CRIM. L. 179 (1982) (analysis of Texas cases involving choice of evils defenses).

92. See *Reninger v. Fagossa*, 75 Eng. Rep. 1 (1551); *United States v. Ashton*, 24 F.Cas. 873, 874 (No. 14, 470) (C.C.D. Mass. 1834).

The defense has been codified in many state criminal codes. An example of a typical one is Illinois,⁹ which states:

Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.

ILL. REV. STAT. ch. 38, § 7-13 (1972). Most state statutes concerning the necessity defense are based on the Model Penal Code:

- (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
 - (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
 - (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
 - (c) legislative purpose to exclude the justification claimed does not otherwise plainly appear.
- (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

MODEL PENAL CODE § 3.02 (Official Draft 1985).

The necessity defense traditionally has been invoked in cases of prison escapes. See, e.g., *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974) (necessity is a limited defense to an escape charge); *People v. Unger*, 66 Ill. 2d 333, 362 N.E.2d 319 (1977) (necessity defense may be raised in cases of prison escapes). See generally Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free From Sexual Assault*, 49 S. CAL. L. REV. 110 (1975) (history of the use of the necessity defense in cases of prison escapes).

In addition, the defense was asserted in a case involving a fire in San Francisco, when a public officer ordered houses destroyed to stop the spread of the fire and one homeowner sued him. *Surocco v. Geary*, 3 Cal. 69 (1853). The court found his action proper, quoting the maxim: "*Necessitas inducit privilegium quod jura private* [Necessity leads to privileges because it is private justice]. *Id.* at 73. *Accord* *Cope v. Sharpe*, [1912] 1 K.B. 496 (necessity defense available to defendant, who burned plaintiff's land in order to stop spread of fire).

The defense was invoked unsuccessfully in the "lifeboat" cases. See, e.g., *Regina v. Dudley and Stevens*, 14 Q.B.D. 273 (1884) (two men adrift in a lifeboat who ate dying boy could not assert necessity defense).

The defense of necessity has four elements.⁹³ The first element is the balance of harms test: the defendant must show that the harm he or she sought to stop outweighs the harm of his or her act.⁹⁴ Second, the defendant must not possess another legal alternative.⁹⁵ The third element requires that the defendant acted to avoid an imminent danger.⁹⁶ Finally, the defendant must show a direct causal relationship between his or her actions and the threatened danger.⁹⁷

The necessity defense has recently been asserted in cases involving antiwar protesters and antinuclear protesters.⁹⁸ It has prevailed in a few cases involving antinuclear protests.⁹⁹ None of the

93. See *United States v. Dorrell*, 758 F.2d 427, 430-34 (9th Cir. 1985).

94. This test has been defined as a situation in which "a person is faced with a choice of two evils and must then decide whether to commit a crime or an alternative act that constitutes a greater evil." *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984).

95. *Dorrell*, 758 F.2d at 431. In *Dorrell*, the court held that the antinuclear protesters who were on trial had other legal alternatives available to them, specifically the use of the political processes. *Id.* at 432 ("defendant's failure to resort to the political process precludes the assertion of the necessity defense to charges arising from political processes").

96. See *People v. Patrick*, 126 Cal. App. 3d 952, 179 Cal. Rptr. 276 (1981) (cult deprogrammer denied necessity instruction in kidnapping case because no proof of imminent danger of physical harm to cult member). Accord *State v. Marley*, 54 Haw. 450, 509 P.2d 1095 (1973) (criminal trespasser at plant manufacturing weapons not entitled to necessity defense because danger not imminent). "Imminent" is defined as near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous." BLACK'S LAW DICTIONARY 676 (5th ed. 1979). This danger must not be debatable or speculative. See *Contento-Pachon*, 723 F.2d at 694.

97. *Dorrell*, 758 F.2d at 433. The key is whether the defendant's belief is truly reasonable, *Id.* In *Dorrell*, which involved a prosecution of nuclear activists who trespassed at a submarine base, the court stated: "Here, Dorrell failed as a matter of law to establish that his entry into Vandenburg and his spray-painting of government property could reasonably be anticipated to lead to the termination of the MX missile program and the aversion of nuclear war and world starvation." *Id.*

98. See, e.g., *United States v. Kroncke*, 459 F.2d 697 (8th Cir. 1972). In this case, where Vietnam War protesters entered a Selective Service Office and removed draft cards, the court held that the defendants' actions were not done in order to avoid a specific harm, but to change the government policy. *Id.* at 698-701. See also *United States v. Quilty*, 741 F.2d 1031 (7th Cir. 1984) (defendant convicted of entering military property asserted necessity defense, but court held he had reasonable alternatives to violating the law and defense not valid).

99. E.g., *People v. Jarka*, No. 002170 (Lake Cty, Ill. Ct., Apr. 1985) (jury found defendants not guilty of trespassing after they blockaded Great Lakes Naval Training Center). Cf. *State v. Keller*, No. 1372-4-84 CnCr (Chittenden Cir. Dist. Ct. Vt. Nov., 1984) (jury found 44 people not guilty of trespassing after they remained in a Vermont Senator's office to persuade him to vote against military aid to El Salvador). See generally Aldridge & Stark, *Nuclear War, Citizen Intervention, and the Necessity Defense*, 26 SANTA CLARA L. REV. 299 (1986) (discussing how elements of necessity defense are satisfied in cases involving antinuclear protesters); *Necessity Defense Comes of Age*, 4 CAL. LAW. 20 (Mar. 1984) (California cases involving antinuclear protesters); Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173 (1987) (argues that this defense undermines the legitimacy of civil disobedience); Note, *Justification Defense by Antinuclear Demonstrators*, 59 TEMP. L.Q. 643 (1986) (discusses Pennsylvania an-

Sanctuary Movement defendants, however, have asserted the necessity defense.¹⁰⁰ Such defendants should employ this defense because the actions of the sanctuary members satisfy all four elements of this defense.

First, the harm the workers are doing—breaking immigration laws—is outweighed by the harm they are seeking to avert—returning aliens to El Salvador. Those returned face imprisonment or worse fates.¹⁰¹ Second, no other reasonable legal alternative exists for the sanctuary member.¹⁰² The political process—attempting to change the refugee laws—is sluggish, and will not help those who seek immediate refuge. Third, sanctuary members are acting to avert an imminent harm. The imminent harm is that the aliens will find no refuge in the United States, and that the government will deport them back to El Salvador to face bleak futures. Fourth, a causal relationship exists between the sanctuary workers' actions and the threatened harm. Their actions help save the lives of the refugees, and may help change United States refugee policy.¹⁰³

The necessity defense, therefore, is a viable defense for sanctuary workers charged with violating United States immigration law. Although no sanctuary cases to date have successfully asserted this defense, it should nevertheless be argued. Not only is there a possibility that it will prevail, but presenting the arguments in court will publicize the cause and educate the American public.

C. Free Exercise of Religion

Sanctuary workers contend that the Free Exercise Clause of the

tinuclear cases involving necessity defense); Low, *Appellate Court Rejects Necessity Defense in Nuclear Protests*, L.A. Daily J., Jan. 29, 1985, at 20, col. 2 (5,000 demonstrators have been arrested at California nuclear sites in past six years).

Where the defense has failed, the courts have held that adequate means existed to fight the danger the defendant was protesting. See *United States v. Seward*, 687 F.2d 1270 (10th Cir. 1982), *cert. denied, sub nom. Ahrendt v. United States*, 459 U.S. 1147 (1983). Accord *In re Weller*, 164 Cal. App. 3d 44, 210 Cal. Rptr. 130 (1985). They have also found that no causal relationship existed between the defendant's actions and halting the danger. See *United States v. Cassidy*, 616 F.2d 101 (4th Cir. 1979). In *Cassidy*, defendants were convicted of destruction of government property after they threw blood and ashes on the Pentagon's walls and ceilings. *Id.* The Court held that this action would not bring about an end to nuclear war. *Id.* at 102.

100. In *Aguilar*, the judge ordered that the defense of necessity could not be argued. No. CR-85-008-PHX-EHC (D. Ariz. 1985). See *supra* note 81.

101. See *supra* note 76.

102. *Contra Schmidt, Refuge in the United States: The Sanctuary Movement Should Use the Legal System*, 15 HOFSTRA L. REV. 79 (1986) (argues that alternatives include providing legal assistance and bond to those raising claims, bringing lawsuits against the government, and passing sanctuary cities' resolutions).

103. United States history abounds with examples of illegal actions which have changed United States policies, such as the Boston Tea Party, the Underground Railroad, the civil rights movement, and the antiwar movement.

Constitution protects their actions.¹⁰⁴ The Free Exercise Clause, although broadly stated, is not unlimited. Sanctuary workers maintain that their actions fall within the clause's boundaries.¹⁰⁵ They emphasize that a worker's right to offer sanctuary is more important than the government's interest in protecting society's health, safety, and morals.¹⁰⁶

The Supreme Court enunciated the modern test used in determining the validity of a free exercise claim in *Sherbert v. Verner*.¹⁰⁷ In *Sherbert*, the Court invalidated a state law which denied unemployment compensation to a Seventh-Day Adventist who could not find employment due to her refusal to work on Saturdays.¹⁰⁸ Justice Brennan, writing for the majority, articulated an "alternate means" test which first asks whether the state action imposes a burden on the person's religion.¹⁰⁹ If so, the Court then asks whether the government has a "compelling" interest that requires the infringement.¹¹⁰ If the government does satisfy the "compelling interest" requirement, it must then prove that no feasible alternate means exists by which the state could achieve its purpose.¹¹¹ The Supreme Court subsequently held that the state must grant an exemption to those whose free exercise of religion is burdened if the state's goals will still be substantially achieved.¹¹²

The Court has found that certain activities enjoy the free exercise claim. Among these activities are the right of conscientious objection from military service for those whose belief in a Supreme Being is sincere and meaningful.¹¹³ The Court has held that the conscientious objection protection does not exempt merely those who believe in God, but also "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give no rest or peace if they allowed themselves to become part of an instrument of war."¹¹⁴ Other activities which have been protected under the free exercise claim include the right

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

105. See, e.g., *Elder*, 601 F. Supp. at 1516.

106. *Id.*

107. 374 U.S. 398 (1963).

108. *Id.*

109. *Id.* at 406.

110. *Id.*

111. *Id.* In *Sherbert*, the Court for the first time affirmed a duty to balance the harm to one's freedom of conscience against the danger to a state's legislative freedom. See also Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 329 (1969).

112. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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

114. *Welsh v. United States*, 398 U.S. 333, 344 (1970). The right to conscientious objection, however, was held not to apply to people who objected only to the Vietnam War and not all wars. E.g., *Gillette v. United States*, 401 U.S. 437 (1971).

of sabbatarians to work¹¹⁵ and the Amish people's desire to limit the education of their children to an eighth-grade level.¹¹⁶ Under these decisions, sanctuary members asserting the freedom of religion defense have a valid argument. Applying the analysis from *Sherbert*¹¹⁷ and *Wisconsin v. Yoder*,¹¹⁸ the sanctuary workers contend that under their religious beliefs, they are compelled to offer sanctuary to those in need.¹¹⁹ As a result, the immigration laws burden this religious expression.¹²⁰ In response, the government contends that its interest in enforcing federal immigration policy is compelling.¹²¹ The workers argue, however, that the government could still substantially achieve its immigration goals if it granted an exemption to the workers.¹²²

This free exercise of religion argument was presented in *United States v. Elder*,¹²³ one of the two sanctuary prosecutions to date. In *Elder*, the United States District Court for the Southern District of

115. The Supreme Court has held that a sabbatarian employee was entitled to unemployment payments despite being unable to accept a job which included Saturday work. *Sherbert*, 374 U.S. at 406. Additionally, the Court has found that a Jehovah's Witness, a sabbatarian, could not be denied unemployment payments for refusing work in a weapons plant, an activity in opposition to his religious tenets. *Thomas v. Review Bd. Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981).

116. The Court has granted an exemption to the Amish people, holding that they need not comply with Wisconsin's compulsory education law. *See Yoder*, 406 U.S. 205 (1972).

The Court, however has neglected to protect the activities of many others who have asserted the freedom of religion defense. The Court has found the state's interest in promoting monogamy to be more important than the defendants' free exercise right. *E.g.*, *Reynolds v. United States*, 98 U.S. 145, 161-67 (1878). Similarly, mandatory participation in the Social Security system was more important than the defendant's free exercise claim. *United States v. Lee*, 455 U.S. 252, 258-60 (1982). Recently, a court held that the free exercise claim of individuals who damaged a B-52 bomber as a form of protest against nuclear war was not as fundamental as the state's interest in protecting government property. *United States v. Allen*, 760 F.2d 447 (2d Cir. 1985). Defendants contended that the Bible not only directs them not to kill, but also to act affirmatively to prevent killing and war. *Id.* at 452. The court, however, found that no Supreme Court case supported the destruction of another's property based on free exercise of religion grounds: "[N]o plausible argument can be advanced why the Government must accommodate the religious beliefs of those who would destroy government property." *Id.* at 452-53.

117. 374 U.S. 398 (1961).

118. 406 U.S. 205 (1972).

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

120. *Id.*

121. The goal of immigration control "is to prevent entry by enemies of the state, criminals, and other classifications of immigrants which Congress determines to be undesirable." *Elder*, 601 F. Supp. at 1579.

122. The Sanctuary Movement to date has provided safe haven for only a small number of Salvadoran refugees. *See Goldman, supra* note 8, at 4; *Ridgeway, supra* note 8, at 4. This number is insignificant when compared with the number of Salvadorans illegally in the United States: it is between 0.2% and 0.3% of the total. *See supra* note 23 for figures on Salvadorans in the United States.

123. 601 F. Supp. 1574 (S.D. Tex. 1985). In *Aguilar*, the judge ruled that arguments based on the free exercise of religion could not be presented. No. CR-85-008-PHX-EHC (D. Ariz. 1985). *See supra* note 81 for a discussion of this *in limine* ruling.

Texas found that the defendant met the initial burden of demonstrating that religious beliefs motivated his actions in providing sanctuary.¹²⁴ The court relied first, upon the testimony of several Christian clergy who affirmed that Elder's commitment to aid those in need is a "fundamental aspect of Christianity," and second, upon the testimony of the brutal conditions in El Salvador.¹²⁵

The court then held that the government met its burden of showing a compelling state interest.¹²⁶ The court found that the state's interest in controlling immigration was "inherent in sovereignty" and "vital to the welfare and security of the people."¹²⁷ The court next considered whether an alternate means of enforcing the government's interest existed. It reasoned that if the government took into account Elder's religious beliefs, the result would be a "do it yourself" immigration policy.¹²⁸ Additionally, the *Elder* court speculated that a judgment in Elder's favor would open up the American border to an influx of the world's unfortunates.¹²⁹

Despite the *Elder* court's pronouncement to the contrary, the free exercise of religion argument is a viable defense for sanctuary workers. First, the court's speculation that United States immigration policy would become chaotic if sanctuary workers are not convicted is not based on a careful reading of the freedom of religion cases. Second, an exemption granted to sanctuary workers would still achieve the immigration laws' goals and would further United States humanitarian policies. Therefore, the argument based on free exercise of religion should be vigorously asserted.

The *Elder* court's reasoning was flawed because it stemmed from a fear that upholding Elder's right to engage in the Sanctuary Movement, despite violation of the criminal harboring and transporting statute, would result in other citizens who wished to help

124. "He is a Roman Catholic who feels a charitable Christian commitment, founded in the Gospel, which motivates him to assist those who flee the violence in El Salvador." *Elder*, 601 F. Supp. at 1577.

125. *Id.* at 1577-78. Clergy testifying for Elder included the Roman Catholic Bishop of the Brownsville, Texas diocese; and American Baptist, Lutheran, Presbyterian, and United Methodist ministers. *Id.* at 1577.

126. *Id.* at 1578-79.

127. *Id.* at 1578. The court emphasized the limited role the judiciary should play in immigration matters, and that Congress' power over aliens' admissions is paramount. *Id.* (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)(quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))).

128. *Id.* at 1579. The court stated that Elder was giving away that which was not his to give away. *Id.* at 1578. Compare I. BAU, THIS GROUND IS HOLY 180 (1985)(individual citizens implementing their own asylum system is beneficial) with Schmidt, *supra* note 102, at 95.

129. *Elder*, 601 F. Supp. at 1579 (others "may conclude that the starving and impoverished of North Africa, Asia, or Mexico are equally entitled to enter this country without review by the INS").

aliens from other oppressive countries, making similar claims.¹³⁰ The *Yoder* Court's opinion,¹³¹ however, the controlling precedent on the Free Exercise Clause, did not reach this conclusion. In *Yoder*, the Court concluded that the defendant had the right to practice his Amish religion and to not comply with compulsory state education laws.¹³² In other words, the individual defendant did not have to abide by the laws. Therefore, under *Yoder*, each individual sanctuary defendant would have to prove his or her free exercise claim. Because the courts do not rule invariably in favor of those asserting this defense, this defense would not cause the floodgates to open and refugees to pour into the United States' borders.¹³³ The *Elder* court's conclusion, therefore, is simplistic and fails to balance important societal interests with resolvable prudential concerns.

The second reason the free exercise of religion defense is viable is because granting an exemption to sanctuary workers will still achieve immigration goals, and will at the same time, further American humanitarian policies. The Sanctuary Movement provides safe haven for only a handful of Salvadorans in the United States.¹³⁴ An action affecting such a small number of aliens cannot be responsible for causing the United States' immigration policy to deteriorate.

Additionally, granting an exemption to the sanctuary workers will further the United States' humanitarian policies. In 1939, a bill pending in Congress would have saved 20,000 children from the Nazis, but it was defeated.¹³⁵ Yet traditionally, as symbolized by the Statue of Liberty, the United States has been the country to provide refuge to foreigners. This tradition began with its very origins as a country. The mistake of not providing refuge for the children in 1939 should not be repeated now.

IV. CONCLUSION

At present, the Sanctuary Movement, while yet to score a decisive victory in court, has succeeded in educating the American public about the problems faced by Salvadoran aliens.¹³⁶ At the next

130. *Id.*

131. 406 U.S. 205 (1972).

132. *Id.*

133. See *supra* note 116 for examples of when the courts have rejected this argument.

134. See *supra* note 122 for a discussion of the percentage of Salvadorans helped by the Sanctuary Movement.

135. S.J. Res. 64 & H.R.J. Res 168, 76th Cong., 1st Sess. (1939).

136. See *supra* note 40 and accompanying text for a discussion of how the movement has grown. The movement has drawn extended press coverage. See, e.g., *The Sanctuary Case*, L.A. Daily J., Oct. 30, 1985, at 4, col. 1 ("[T]he Sanctuary trial is consistent with current U.S. [immigration] policy. It, too, is a sham"). Additionally, Congress has taken notice of the problem. On Oct. 9, 1986, the House of Representa-

trial of sanctuary members, a vigorous defense based on international law, necessity, and the free exercise of religion may defend those who help the sojourners among us, such as the Sanchezes of El Salvador.¹³⁷

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tives, in an immigration reform bill, voted 199-197 to temporarily prohibit the United States from deporting Salvadoran and Nicaraguan aliens seeking asylum. See Drew, *Immigration Bill Passes—With a Catch*, Chicago Tribune, Oct. 10, 1986, 1, at 1, col. 2. On Oct. 14, 1986, however, the House of Representatives and the Senate hammered out a deal, in which the House sanctuary proposal was dropped, because of the fear of a Presidential veto. Drew, *Deal on Immigration Reform*, Chicago Tribune, Oct. 15, 1986, 1, at 1, col. 2. Thus, the most recent attempt to reform immigration policy leaves sanctuary workers, and the aliens they help, in no better position than in the past. Immigration laws are still such that a striking resemblance exists between "King Minos's Labyrinth in ancient Crete . . . and the Immigration and Nationality Act." Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).

137. Lazarus, *The New Colossus*, in J. HARRIS, *A STATUE FOR AMERICA* 88 (1985), quoted in Anaya, *Sanctuary: Because There Are Still Many Who Wait for Death*, 15 HOFSTRA L. REV. 101, 114 (1986) (article by former Governor of New Mexico, who declared his state a sanctuary).

