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Towards The Cathedral: Ancient Sanctuary Represented In The American Context.

MICHAEL SCOTT FEELEY*

Chorus: Here let us stand, close by the cathedral. Here let us wait. Are we drawn by danger? Is it the knowledge of safety, that draws our feet towards the cathedral? What danger can be for us, the poor, the poor women of Canterbury? What tribulation with which we are not already familiar? There is no danger for us, and there is no safety in the cathedral. Some presage of an act which our eyes are compelled to witness, has forced our feet towards the cathedral. We are forced to bear witness. T.S. Eliot, Murder in the Cathedral 11 (1935).

INTRODUCTION

On December 29, 1170, beneath the altar of St. Benedict in Canterbury Cathedral, four knights of Henry II cut down Archbishop Thomas a Becket, sometime Chancellor of the Realm and Primate of All-England. The martyrdom of the powerful and respected prelate in his own Cathedral by soldiers of the State rocked the western world. As a result, the King surrendered much of his claimed powers over the Church and he trudged in sackcloth to Becket’s tomb to

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fast, beg pardon and receive scourging from eighty monks. The slaying of Thomas involved a threefold desecration: against the person of the archbishop, against the place of sanctuary, and at the hands of agents of the government. I contend that these three elements — person, place, governmental check — constitute the heart of the concept of sanctuary in its various incarnations over the millennia, including contemporary American Society.

Sanctuary is the power of guardians of a defined religious site to grant protection to one who seeks safety out of fear of life or limb. The early Christian model, which serves as the font for Western sanctuary practice, embodied the defining elements of person, place, and secular check. The representatives and ministers of God and His Church kept the sanctuary. They shielded those who sought protection based on an inherent and supernatural right to do so. The site of sanctuary was dedicated to the divine, and imbued with the protective power of the saints whose relics sanctified the spot. Church sanctuary stood independent of the State and defined the limit of earthly vengeance. Through its sanctuary power, the Church not only forced the pursuers to halt their pursuit, preventing summary retaliation against the accused, but also called the State to observe just procedures in adjudicating alleged wrongdoers. Thus, Church sanctuary served as a check on violence, a reproach and aid to a State striving to establish the rule of law, and a stimulus to due

2. Early and medieval sanctuary has attracted the attention of scholars for several centuries. This interest has produced a vast, international body of commentary on the subject. Two standard surveys of works on the origins of Christian sanctuary are Gabriel le Bras, A'asile in IV Dictionnaire d'Histoire et de Geographie Ecclesiastiques, col. 1035-47 (1930) and Missereys, L'asile en occident in V Dictionnaire de Droit Canonique 1089-1104 (1934). Important European studies include A. Rittershusius, De Jure Asylorum (1623); Pierre Timbal Duclaux de Martin, Le Droit d'Asile (1939); Charles de Beurepaire, Essai sur l'asile religieux dans l'empire romain et la monarchie francaise, IV Bibliotheque de L'Ecole des Chartes 351-75, 573-91 (1853), and V Bibliotheque de L'Ecole des Chartes 151-75, 341-59 (1854); L. Fuld, Das Asylrecht in Altertum und Mittelealter, VII Zeitschrift für vergleichende Rechtswissenschaft 102-57, 285-96 (1887); and M. Siebold, Das Asylrecht der Romischen Kirche mit besonderer Berlickichtung Seiner Entwicklung auf Germanischen Boden (1930). (These sources are available at Bodleian Library, Oxford University, Oxford, England).
3. Many Non-European societies also practiced sanctuary for both humanitarian and religious reasons. For example, the Bantu and Ashanti tribes observed sanctuary in North Africa, and Native American tribes practiced it in North America. The Aborigines of Australia and New Guinea created places of refuge as did the Hindus on the Malabar Coast and the Kafirs of Hindukush. C. Urrutia-Aparicio, Diplomatic Asylum in Latin America 14 (1960).
process and fair adjudication.

This article demonstrates that the American Sanctuary Movement contains the defining elements of historical sanctuary. Part I traces the concept of sanctuary as it existed in ancient Israel, Greece and Rome; early Christianity; and England. Part II presents the United States’ approach to immigration, the national ideology and character which motivates such an approach, and the legal doctrines and legislative framework which govern American refugee law and policy. This section uses the government’s response to the influx of undocumented Central Americans to illustrate the political nature of American refugee law. Part III describes the origins and nature of the Sanctuary Movement in the United States and the government’s legal action against it. An analysis of the Sanctuary Movement concludes that, despite its different features and cultural locus, the Sanctuary Movement embodies the ancient elements of person, place and government check transformed, rather than transubstantiated, by the American context.

I. SANCTUARY THROUGH HISTORY

A. Biblical Sanctuary

The world of ancient Israel involved the reality of blood feud and vengeance. Homicide not only conferred but commanded the right of the slain person’s family to pursue and kill the killer. Biblical society recognized such action as a private matter between families. This view is predicated on the blood-guilt of the pursued. The shedding of human blood, even if accidental and unintentional, stained the slayer, dishonored the victim and demanded satisfaction. The killing polluted the offender, his family, and the community of both slayer and slain. Originally, only the slaying of the slayer expunged the defilement.

In the three passages in the Bible which refer to laws of sanctuary, its use in attempting to control blood feuds is evident. This

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9. Id. at 127-28.
10. Exodus 21:12-14
Whoever strikes another man and kills him shall be put to death. But if he did not act with intent, but they met by act of God, the slayer may flee to a place which I will appoint for you. But if a man has the presumption to kill another by treachery, you shall take him even from my altar to be put to death.
Id. Numbers 35:9-34.

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Lex talionis approach withered under the development of three methods to combat retaliatory killing: altar sanctuaries, cities of refuge and expiation by the death of the high priest. A manslayer could flee to a city of refuge. If he survived the journey, he presented himself before a council of community elders to prove he had killed accidentally and request protection as long as he remained within the boundaries of the city. However, sanctuary was only available to those guilty of manslaughter; murderers found no shelter. When

The Lord spoke to Moses and said, Speak to the Israelites in these words: You are crossing the Jordan to the land of Canaan. You shall designate certain cities to be places of refuge, in which the homicide who has killed a man by accident may take sanctuary. These cities shall be places of refuge from the vengeance of the dead man's next-of-kin, so that the homicide shall not be put to death without standing his trial before the community. The cities appointed as places of refuge shall be six in number, three east of the Jordan and three in Canaan. These six cities shall be places of refuge, so that any man who has taken life inadvertently, whether he be Israelite, resident alien, or temporary settler, may take sanctuary in one of them.

Id. at 35:9-15.

If he attacks a man on the spur of the moment, not being his enemy, or hurls a missile at him not of set purpose, or if without looking he throws a stone capable of causing death and it hits a man, then if the man dies, provided he was not the man's enemy and was not harming him of set purpose, the community shall judge between the striker and the next-of-kin according to these rules. The community shall protect the homicide from the vengeance of the kinsman and take him back to the city of refuge where he had taken sanctuary. He must stay there till the death of the duly anointed high priest. If the homicide ever goes beyond the boundaries of the city where he has taken sanctuary, and the next-of-kin finds him outside and kills him, then the next-of-kin shall not be guilty of murder. The homicide must remain in the city of refuge till the death of the high priest; after the death of the high priest he may go back to his property. These shall be legal precedents for you for all time wherever you live.

Id. at 35:22-30; and Deuteronomy 19:1-13.


12. In Numbers 35:6-34, God commanded Moses to establish six cities of refuge on Levitical land to which an individual who unintentionally killed another could flee for protection. So long as the person remained within the city, he was safe. See supra note 10. Elaborate rules and traditions concerning the cities of refuge form the subject of much Talmudic commentary. See Bau, supra note 11, at 124-27.

13. The death of the high priest released all those manslayers who resided in the cities of refuge from their blood guilt and, concomitantly, expunged the necessity of the slain's kinsman to kill the manslayer. Since bloodshed can only be expiated by death, religious guilt could only be expunged in religious terms. The high priest possessed such religious importance that his death alone acted as the acceptable payment for the resident manslayers. Greenberg, supra note 8, at 129-30, see Numbers 35:25-26.

the community convicted a man of murder — not manslaughter —
the penalty was death.¹⁵ Thus, Biblical sanctuary, spared the life of
the accidental slayer and provided him protection while an adjudica-
tory process determined the accused's guilt as to murder. If guilty of
intentional killing, the law handed the murderer over to death.¹⁶

B. Greeks & Romans

Greeks and Romans both recognized the sacredness of certain
places such as altars. In Greece, sanctuary initially arose to shelter
the wretched and powerless from their pursuers.¹⁷ As time passed,
the Greeks allowed sanctuary to anyone fleeing to a temple in fear of
life or limb. This open admission gave rise to widespread abuse and
criminals frequently used sanctuary to escape punishment.¹⁸ The
abuses increased when sanctuary privileges were expanded to include
cemeteries, forests and cities.¹⁹ The Greeks eventually restored sanc-
tuary to its original function of according protection only to those
accused of involuntary crimes or those in danger of swift and cruel
vengeance.²⁰

Like Athens, Rome at first granted sanctuary to all criminals and
fugitives who sought its protection.²¹ However, this quickly changed
when sanctuary became part of the Roman system of justice.²² The
Romans recognized this institutional sanctuary as a temporary place
of protection, a free space, where the accused prepared a legal de-
fense and underwent investigation and judgment.²³ In a sense, sanc-

¹⁵. J. Carro, Sanctuary: The Resurgence of an Age-Old Right or a Dangerous
¹⁶. Id.
¹⁷. J.C. Cox, The Sanctuaries and Sanctuary Seekers of Medieval England
2 (1911).
¹⁹. Bau, supra note 11, at 130.
²¹. Id. at 109.
²². Sanctuaries "were still to afford protection to the oppressed, not however un-
conditionally, i.e., they did not operate, ipso jure, immunity from punishment and farther
prosecution, but became only a ground for a formal inquisition, terminating with a judg-
ment resting upon the ground of ascertained facts." Mazzinghi, supra note 6, at 109-
10.
²³. The institution of Sanctuary remained in Roman eyes
a holy one worthy of the Gods, but it is abundantly evident from the ordi-
nances of their Emperor, that it was considered that the privilege should sup-
port, not abrogate the law, and that the due ordering of the state and a rever-
ence for the law demanded punishment on the one hand for evil does, and on
the other protection for the unfortunate only. In order however that an exami-
tuary traded safety from imminent harm for surrendering to the State's judicial system.

C. Early Christians

The early Christian Church, developing within the Roman empire yet faithful to its Hebraic and Hellenic pedigrees, asserted itself as an independent institutional force mediating conflict and protecting the pursued from summary punishment. As early as Constantine's Edict of Toleration in 313 A.D., the State recognized the Church's separate power to grant protection to those within its physical confines.24 The Theodosian Code, promulgated originally in 392 A.D. and amended over the years, explicitly referred to the sanctuary right of the Church and reinforced ecclesiastical power with imperial might.25 The Code defined the area which constituted the sanctuary,26 regulated where fugitives stayed and how they should behave,27 and provided for the removal of fugitives if the clergy so de-

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24. TRENHOLME, supra note 4, at 7.
25. Id.
27. Id.

Moreover, We grant this extent of space for this purpose, namely, that it may not be permitted that any fugitive remain or eat or sleep or spend the night in the very temple of God or on the sacrosanct altars. The clerics themselves shall forbid this for the sake of reverence for religion, and those who seek sanctuary shall observe it for the sake of piety.

1. We also command that those persons who seek sanctuary shall not have within the churches any arms at all, in the form of any weapon, either of iron or of any other kind. For weapons are barred not only from the temples and divine altars of the Most High God, but also from the cells, houses, gardens, baths, courtyards, and colonnades.

2. Hereafter if any persons should flee without arms to the most holy temple of God or to its sacrosanct altar, either anywhere else in the world or in this fair City, they shall be prevented by the clerics themselves, without any injury to such persons, from sleeping or from taking any food at all within the temple or
sired. Anyone who forcibly removed a sanctuary seeker who was unarmed and staying in his assigned area of the Church precincts received death.

Cannon law asserted the right of the Church to grant sanctuary to whomever the Church chose, but the Emperor demanded that the Church refuse sanctuary to certain categories of fugitives, such as public debtors, and the Church generally supported these exceptions. The Church, however, developed its own rules and customs concerning sanctuary independent from the secular government in an effort to reduce bloodshed and promote a regulated society.

Essentially, the clergy functioned as recognized intermediaries between pursued and pursuer to resolve the dispute without swift violence. This is exemplified in the use of sanctuary to moderate pun-

Id.

28. Id.
The clerics shall designate spaces within the ecclesiastical enclosures which shall be sufficient for their protection and shall explain that capital punishment has been decreed if anyone should attempt to enter forcibly and seize them. If the fugitive should not agree to these restrictions and should not obey them, reverence for religion must be preferred to humanity, and reckless lawlessness must be driven from these holy places to those that We have mentioned.

3. We warn beforehand those persons who dare to enter the temples with arms that they shall not do this. Then if they should be equipped with weapons in any place in the church, either near the enclosure of the temple or around it or outside it, We command that they be notified immediately and very severely by the clerics alone, under the authority of the bishop, to lay aside their arms, and they shall be given the assurance that they are defended by the name of religion better than by the protection of arms. But if, warned by the voice of the Church and by the declarations of so many and so important persons, the refugees should be unwilling to relinquish their weapons, then the case of Our Clemency and of the bishops is cleared in the sight of God; armed men shall be sent in, if the case so demands, and the refugees shall know that they will be dragged forth, dragged away, and subjected to all kinds of misfortunes. But no armed persons shall be dragged out from the churches without consulting the bishop or without Our order or the order of the judges either in this fair City or anywhere else, lest, if many persons should be generally permitted to do this, confusion may arise.

Id.

29. Id.
Churches and places dedicated to God shall so protect accused persons who flee to them, driven by fear, that no one shall presume to bring force and violence to holy places in order to seize accused persons. ... But if anyone should attempt for any reason to drag out from a holy place any accused person at all, the offender shall know that he will be condemned to capital punishment.

Id.

30. Id. at 9.45.1-3.
31. TRENHOLME, supra note 4, at 8-9.
32. RIGGS, supra note 5, at 23.
ishment for slaves. If a slave fled to the sanctuary out of fear of imminent punishment, the cleric notified the slave’s master and, as a condition for releasing the slave, extracted an oath from the master that the slave would not be harmed. As the power of the Church grew and the intercessory role of clergy, particularly the bishop, increased, sanctuary became a powerful force for both mediating conflicts and pressuring the State and citizenry to forsake quick vengeance and instead promulgate and observe fair procedures for adjudicating guilt and arbitrating resolution of disputes.

Continental Christian sanctuary rested upon two pillars: first, the place, i.e., a holy area dedicated to God where His mysteries were performed and sanctified by the relics of saints who lent supernatural protection to the site; second, the revered and powerful person of the bishop and his ministers who mediated conflict and wielded such devastating weapons as excommunication and interdict. The State theoretically acknowledged the Church’s independent and inherent right to grant sanctuary. In fact, the secular rulers frequently added royal sanctions to reinforce the Church’s laws on the subject. The complementary powers of Church and State formed the matrix for developing legal procedures to protect the accused from blood vengeance while bringing the individual to justice. The Church did not demand pardon for criminals, only a fair hearing and just punishment.

D. England

In 597, Augustine arrived in England to Christianize the island, and imported the Church’s sanctuary system. The quickly converted king acknowledged the Church’s right to grant sanctuary and decreed penalties for those who violated it. Two types of sanctuary developed in England. One type was Church sanctuary which was

34. Cox, supra note 17, at 3-5.
35. BAU, supra note 11, at 131-33.
36. RIGGS, supra note 5, at 26-27.
37. TRENHOLME, supra note 4, at 10-11.
38. Cox, supra note 17, at 6.
derived from the Church's independent power and included all sacred spots that the Church designated. The second type was Royal sanctuary which was extended by the power of the State to those places favored by the king. These chartered sanctuaries were often churches or religious establishments where local Church officials administered law for the king.

The State augmented Church sanctuary by adding royal protection to the preexisting canonical grant of sanctuary. De jure sanctuary of the king generally overlapped the de facto sanctuary of the Church. As in ancient Israel, Church sanctuary offered a means of controlling the Anglo-Saxon blood feud system which subjected the offender to group or family vengeance. The Church's abhorrence of unrestrained violence by either the citizen or the State motivated its mediatory stance. The combination of the Church's widening hold on the scattered people of the Island and the growing centralized royal control allowed promulgation of legal measures aimed at restraining private revenge by expanding the community's responsibility for punishing offenders. Those who submitted to arrest and adjudication received less severe penalties while those who resisted incurred death; but the State, not the injured party, authorized the sentence and execution.

Complex rules developed which were designed to substitute monetary compensation for the right of blood satisfaction. Since society assumed the injured party or group would and could retaliate, the law sought to promote peaceful settlements by instituting house-protection rules. The Laws of Alfred allowed the pursuers to besiege the offender for seven days but forbade violence until after a formal request for money restitution was attempted. This measure forced a temporary truce.

Both Church and king limited the time a seeker could remain in sanctuary. Often the permitted length of stay related directly to the nature of the alleged crime, the importance of the particular site, or the rank of the person administering the sanctuary (i.e., abbot, bishop). The punishment, usually monetary, for violating sanctuary

41. TRENHOLME, supra note 4, at 13.
42. BAU, supra note 11, at 135.
43. RIGGS, supra note 5, at 39-45.
44. Id. at 10, 29-31.
45. Id. at 17, 33-36.
46. Id. at 32.
reflected similar considerations. The purpose of sanctuary lay in preventing retaliatory bloodletting and fostering an internally regulated justice system where arbitration and due process replaced private vengeance.

As the years passed and centralized governmental control increased, Church and State clashed over control of sanctuaries and the scope of ecclesiastic power. Church and State bitterly disputed from which authority the right of sanctuary of a given place derived. This is an important distinction. If the State grants the privilege of sanctuary, it can also regulate and revoke it. However, if the sanctuary privilege flows from the independent and separate power of the Church, the State may not control it. In fact, this conflict played a part in the fight between Thomas a Becket and Henry II over the relative powers of Miter and Crown. It becomes self-evident that when Henry VIII broke with Rome and united Church and State in the person of the British monarch, the demise of legal sanctuary was then possible. After the schism, sanctuary rights both spiritual and secular flowed only from the English Sovereign and therefore, the Crown could extinguish the privilege, which it did in 1624.

E. Historic Function of Sanctuary

Church sanctuary is an assertion of an independent right, premised on natural and divine power, to prevent imminent harm to whomever the Church chooses to grant protection. The Church confronted the State when it was either unwilling or unable to control the administration of criminal justice. Church sanctuary required the alleged offender either to repent and accept legitimate punishment or to present his case to a just and procedurally fair tribunal. The sanctuary has been a catalyst for developing and upholding the secular justice system. It forces the avenger, the State, and the pursued to follow established procedures and rules in adjudicating the alleged offense. The use of religious power to correct individual or community failure, or the inability to render justice to the accused or prevent his unadjudicated harm is a sacred and civic deed. Sanctuary forces men and government to act rationally and justly rather

47. BAU, supra note 11, at 137-39.
48. Cox, supra note 17, at 17; Trenholme, supra note 4, at 25-27.
49. MAZZINGHII, supra note 6, at 35, referring to Henrici Knighton Leycestrensis
Chronicon, cap. xii.
50. BAU, supra note 11, at 156.
51. In the reign of James I, Parliament finally abolished all sanctuary privileges:
"And be it also enacted by the authority of this present Parliament, that no Sanctuary or Privilege of Sanctuary shall be hereafter admitted or allowed in any case." 21 James I, c.28 (quoted in BAU, supra note 11, at 157). For an explanation of the attempts to abolish sanctuary beginning with Henry VIII, see Cox, supra note 17, at 320-30 and BAU, supra note 11, at 153-57.
than with violence and without regulation.

II. SANCTUARY AND THE UNITED STATES

The United States is a non-sectarian nation where pluralism and fate dictate neither a pre-Reformation system of two spheres of temporal government nor a post-schism union of Church and State. In America there is no Church; there are churches composed of individual adherents who possess personal and collective rights under the Constitution and Bill of Rights as interpreted by the courts. Since James I abolished the last vestiges of sanctuary a decade before the Pilgrims sailed, the English colonists did not transplant the legal concept to America and it never took juridical root as part of the inherited common law tradition. Although the legal right of sanctuary was not recognized in early America, the mythic founding of the New World embodies the concept, or more properly, the ideal of Sanctuary. Early colonists often viewed their piece of North America as promised land, as the new Israel, as sanctuary from their persecutors.

Since most of the colonies supported an established church, one of the most difficult transitions from a collection of independent colonies to a nation, involved the loss of peculiar sectarian privileges. Many of the colonies were founded as sectarian enclaves where coreligionists could live in a community embodying a particular spiritual vision. The rise of dissent — or pluralism — in the individual colonies, combined with the linking of the colonies through the Revolutionary War, gradually forced toleration of a variety of faiths and equalization of governmental treatment. Judicial and legislative history from the Revolution through the first quarter of the 19th Century is fraught with conflicts surrounding the disestablishment of each new State's preferred faith. Contrary to popular historical

52. See generally The Encyclopedia of American Religions (2d ed. 1987) (describes some 1347 religious organizations).
53. BAIU, supra note 11, at 159.
54. Id. at 158-59.
55. See generally S. Ahlstrom, A Religions History of the American People (1975).
57. Massachusetts, for example, endured the struggle of Congregationalists fighting to retain a privileged position both through taxation and through laws reflecting their religious and moral beliefs. 1799 Mass. Acts 87, 88; 1811 Mass. Acts 6; Barnes v. First Parish, Mass. 401 (1810); Adams v. Howe, 14 Mass. 340 (1817). See generally, J.C. Meyer, Church and State in Massachusetts (1930).
self-perception, the American principle of religious toleration and equal treatment developed over many decades.

A. Self-image and Immigration

The tension between America’s self-image and her actual policies appears clearly in the area of immigration law. America maintains simultaneously her self-conception as a land open to all, and her self-interested desire to preserve the patrimony for those who are already within the national community. For over two centuries, America has not only thought of herself, but fostered her reputation, as the true democracy where all are welcome and achievement is limited only by individual ability and drive. While the possibilities and individual freedoms of the United States are unparalleled, the myth of America as the land of equal opportunity and unlimited promise overlooks much of the reality — not the least of which is the formidable hurdle of entry into the country. From the Alien Act of 1798 and the Chinese Exclusion Act of 1882, through the numerical and national origin limits of the 20th century, U.S. policy grew to regulate jealously who and how many could immigrate.

The power to admit and exclude is both vital and necessary. Fundamentally, a nation is the composite of its citizens, some of whom it admits from other countries. Since the government finds it difficult to regulate reproduction, it places its energies in scrutinizing the foreign-born seeking entry. In contrast to the rest of American law, governmental power is at its greatest and individual entitlement is at its lowest in the area of immigration law. The U.S. Supreme Court has long acknowledged border regulation as the quintessential function of sovereignty and has repeatedly recognized the plenary power of Congress and President to exclude aliens. Although there are

59. From the birth of the nation until the last quarter of the 19th century, national policy generally encouraged immigration in order to settle the vast expanses of the country. As the economy shifted from agrarian to industrial, exclusionary sentiment grew and barriers to immigration arose. P. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 2-3 (1984).
60. Act of June 25, 1798, ch. 58, 1 Stat. 570. This first federal immigration law permitted the President to deport any person he determined to be a threat to peace and safety.
62. The quota system, designed to protect a certain racial and ethnic makeup of the country, began with the Act of May 19, 1921, Pub. L. No. 67-5, 42 Stat. 5. For a history of American immigration law and policy, see Bau, supra note 11, at 40-48.
63. Schuck, supra note 59, at 1.
64. See, e.g., Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); Oceanic Steam Navigation v.
signs of change, currently and historically immigration is extraconstitutional and virtually non-reviewable. Hence, judicial deference to agency, legislative and executive decisions on these questions is nearly absolute.

The classic model upon which the judicial doctrine rests holds that the alien remains outside the national community and the State owes nothing to someone with whom the country has not agreed freely to enter into a legal relationship involving reciprocal rights and duties. Sovereignty means that the nation cannot be forced against its will to enter into a continuing relationship with an unwelcome intruder. Furthermore, since the alien is not an accepted member of the national community — often outside the geographic boundaries of the United States when applying for admission — constitutionally mandated procedures and protections may not apply in any significant manner.

The inscription on the Statute of Liberty has taken on totemic significance. It proclaims “Give me your tired, your poor,/ your huddled masses yearning to breathe free,/ The wretched refuse of your teeming shore./ Send these, the homeless, tempest-tost to me.” Yet with millions of such people yearly attempting to accept the invitation, choices must be made. Such decisions are inevitably political, especially when the executive branch enjoys broad discretion in deciding who may enter. This is particularly problematic when an undocumented alien is already in the country and seeks to remain within the United States through application for political asylum or through the withholding of a deportation order. It was the Reagan Administration’s response to these legal attempts by Central Ameri-


65. For an explanation and analysis of the structural and ideological changes in motion, see Schuck, supra note 59, at 34-73.

66. Id. at 18.

67. Immigration Policy and the Rights of Aliens, supra note 58, at 1311-12.


69. See Shaughnessy v. United States, ex rel. Mezei, 345 U.S. 206 (1953). The government has almost unlimited power to deny an alien admission to the country on grounds which would not pass Constitutional muster if applied to a U.S. citizen. For example, the courts have upheld refusal of admission based on national origin in Faustino v. INS, 432 F.2d 429 (2d Cir. 1970); on gender and illegitimacy in Fiallo v. Bell, 430 U.S. 787 (1970); and political ideology in Kleindienst v. Mandel, 408 U.S. 753 (1972).

70. The inscription on the statute of liberty is taken from the poem, “The New Colossus,” which was written by Emma Lazarus. The poem is reprinted in its entirety in: 8 THE WORLD BOOK ENCYCLOPEDIA 875 (WORLD BOOK, INC. 1990).

71. See infra notes 84-89 and accompanying text.
can immigrants which sparked the Sanctuary Movement.72

B. The Structure of American Refugee and Asylum Law

Congress passed the Refugee Act of 198073 (the “INA”) in an effort to sort out the patchwork of laws woven over the years in response to sporadic refugee crises ranging from the World Wars to the Cambodian boat people.74 The INA established a two-tiered system consisting of a regular refugee flow determined annually by the President in consultation with Congress75 and an emergency procedure for unforeseen humanitarian needs based on the President’s discretionary power.76 The ideologic (i.e., anticommmunist) and geographic (i.e., racial) bias of the pre-1980 immigration laws77 theoretically gave way to the definition of refugee adopted by the 1951 Geneva Convention on the Status of Refugees78 and the 1967 Protocol Relating to the Status of Refugees.79 A refugee is one who flees his or her country as a result of “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”80 This definition is central to determining refugee status or to granting asylum.

A distinction exists between a refugee and an asylee. A refugee is an individual who meets the statutory definition of a well-founded fear of persecution, resides both outside the United States and outside his own country when applying for admission, and is admitted as a non-quota immigrant.81 An asylee is a person already within the United States who first meets the statutory definition of refugee and then is granted asylum at the discretion of the Attorney General

72. See infra notes 112-20 and accompanying text.
76. Id. § 207(b), 8 U.S.C. § 1157(b).
of the United States. Since statistically Central Americans — the main focus of the Sanctuary Movement’s efforts — have virtually no chance to receive refugee status by applying outside the United States, most applications to remain in America are from aliens who have crossed illegally into the country and have been apprehended by the Immigration and Naturalization Service (the “INS”).

To forestall deportation, apprehended aliens may invoke two avenues provided in the INA to qualify the applicant to legally remain in the United States: withholding of deportation and political asylum. Both procedures are predicated on the INA’s adoption of the international law principle of “non-refoulement”. Thus, the INA forbids deportation of an alien to a country where the Attorney General determines that the alien’s life or freedom would be threatened due to his or her race, religion, nationality, membership in a particular social group, or political opinion. The applicant must meet the objective test of proving somewhat less than “whether it is more likely than not” that the alien would be subject to persecution. The burden of proof is weighty, particularly in light of the need for corroborative evidence and the skepticism with which the applicant’s testimony is often viewed. If the applicant demonstrates danger to life or limb if forcibly returned to his country, then U.S. law requires that he not be sent to the country in question. However, the INS may deport the applicant to a third country. A withholding of deportation does not guarantee that the applicant will be allowed to stay in America, it only prevents deportation to a persecuting nation.

82. Id. at 81-82.
83. Id. at 80-81.
84. INA § 243(h)(1), 8 U.S.C. § 1253(h)(1). “Non-refoulement” derives from the French verb refouler which means “to send back.” The international legal principle of non-refoulement was established first in the 1933 Convention Relating to the International Status of Refugees and has constituted a central provision of numerous subsequent international instruments including the 1951 Convention and 1967 Protocol. For an explanation and analysis of the place of non-refoulement in international instruments, see Bau, supra note 11, at 48-58.
86. The Sanctuary Movement, supra note 74, at 532-35.
87. Schmidt, supra note 81, at 86. See Walai v. INS, 552 F. Supp. 998 (S.D.N.Y.)
Political asylum on the other hand, permits the alien to remain in the United States. The applicant must first meet the refugee definition of "well-founded fear of persecution." Although the standard requires objective proof of a reasonable basis for the fear, the subjective fear, of the person must be considered. If the alien is determined to be a refugee, the Attorney General wields the discretionary power to admit or exclude him or her.

The sheer magnitude of the problem — an estimated half a million undocumented aliens cross the border each year — has created a huge backlog in asylum applications. The overwhelming numbers have led to objectionable INS practices such as holding aliens in crowded and unsanitary detention centers, bullying them into signing voluntary departure waivers, and not informing them of the legal avenues available. Recent court cases against the INS have forced some procedural changes. However, while structural and ideological forces have begun to weaken the classical understanding of aliens as having no rights under the Constitution, usually it is still only a matter of time before an applicant is deported.

Salvadorans and Guatemalans receive almost blanket denial of their asylum applications. The government justifies this result by considering the vast majority of the applicants to be economic migrants, not political ones. To receive asylum or a withholding from deportation order, the applicant must be deemed a refugee and the government consistently finds the Salvadoran or Guatemalan applicant to have no "well-founded fear of persecution" based on race, religion, nationality, membership in a particular social group, or political opinion. The random nature of the violence and human rights abuses in Salvador and Guatemala renders it virtually impossible to label the action as persecution incurred due to one of the aforementioned statutory categories. Fleeing military unrest or economic disaster does not count; a generalized climate of fear and violence is insufficient. It must be persecution of the person due to one

1982) and Diaz-Escobar v. INS, 782 F.2d 1488, 1491 (9th Cir. 1986).
88. The Sanctuary Movement, supra note 74, at 533.
93. Schuck, supra note 59, at 34-53.
94. BAU, supra note 11, at 60.
96. See infra notes 102-04 and accompanying text for statistical support.
97. See, e.g., Vides-Vides v. INS, 783 F.2d 1463, 1469 (9th Cir. 1986); Zepeda-Melendez v. INS, 741 F.2d 285, 289-90 (9th Cir. 1984); Martinez-Romero v. INS, 692
of the enumerated reasons and it is very difficult to satisfy the government that the applicant meets the requisite burdens of proof.98

A more honest rational for the disparity in asylum approvals relates to the ultimately political nature of the keeper of the gate. The executive branch of government is vested with enormous power in controlling immigration policy. Such power functions as a formidable weapon in the foreign relations arena.99 Historically, the presidency, through the Attorney General and the State Department, has used its discretion to favor asylum seekers from communist countries or other nations whose governments expressed hostility to America. There, a grant of asylum is a judgment about the country or regime from which the applicant fled. Between 1968 and 1980, the executive branch granted asylum to applicants from communist countries over non-communist countries by a ratio of almost 80 to 1.100

The results have changed little since the Refugee Act of 1980 allegedly erased ideological considerations. In 1983, 78% of the Russians, 64% of the Ethiopians and 53% of the Afghans who applied received asylum as compared to 3% of Salvadorans and 2% of Guatemalans.101 In 1985, 73% of the Libyans, 59% of the Romanians and 57% of the Czech applicants were granted asylum against 3% of the Salvadorans and 1% of the Guatemalans.102 In 1987, 84% of the Nicaraguans, 3.6% of the Salvadorans and 3.8% of the Guatemalans who applied received asylum.103 These figures reflect major U.S. foreign policy concerns in the years in question.

It is to be expected that applicants from countries which the United States opposes, often on sound ideologic and practical grounds, should merit political asylum. The converse, however, is

F.2d 595 (9th Cir. 1982); and Sanchez v. INS, 707 F.2d 1523, 1527-28 (D.C. Cir. 1983). Although the Senate version of the INA included persons “displaced by military or civil disturbance or uprooted because of arbitrary detention” in its definition of refugee, S. 643, 96th Cong., 1st Sess. § 201 (1979), that the final legislation deliberately deleted this language has been taken as evidence of clear congressional intent not to provide refugee status to aliens escaping national unrest, even when violent and widespread.

98. The Sanctuary Movement, supra note 74, at 532-39.
101. Id.
102. The Sanctuary Movement, supra note 74, at 496-97.
also true. Nations which the United States support but which reek of oppression and human rights violations nonetheless are treated differently due to foreign policy considerations.\textsuperscript{104} It would not play well to the electorate for the government to champion morally offensive regimes. The Reagan and Bush Administrations have asserted that the United States has a vested interest in supporting the governments in El Salvador and Guatemala.\textsuperscript{105} To admit that many of the asylum applicants from those countries have a well-founded fear of persecution from their own government undermines American diplomatic strategy.\textsuperscript{106} In fact, congressionally authorized aid is tied to an assessment of the human rights situation in each recipient country. In order to continue giving aid to those countries, the United States government must characterize the undocumented aliens as economic migrants or people simply seeking a better life outside of their own chaotic country. Both are legitimate reasons for wanting to live in the United States, but neither is good enough to win admission to the limited places available.\textsuperscript{107}

In addition to foreign policy considerations, domestic pressures also militate for more severe treatment of Central American undocumented immigrants. With the thousands of such aliens flooding into the United States each year, the popular and accurate perception, particularly of those citizens in the southwestern states, is that the U.S. has lost control of its borders.\textsuperscript{108} Many believe that the influx depresses wages and employment conditions, displaces jobs in certain geographic areas and dries up work usually done by certain social groups, and adds more people to be cared for by taxpayers.\textsuperscript{109} Others counter these charges by asserting that the aliens perform tasks no one else will do, avoid public assistance out of fear of deportation, and are vital in such industries as agriculture.\textsuperscript{110} The widespread flouting of the laws — illegal immigration, alien smuggling operations, substandard benefits and working conditions for aliens, etc. — has a pernicious effect on American society.\textsuperscript{111} To remedy the problem, all parties agree that the laws must be stringently enforced; the disagreement rests on what the laws should be and how they should be interpreted.

\textsuperscript{106} Id. at 318-19.
\textsuperscript{107} Id. at 324-26.
\textsuperscript{109} Simpson, \textit{supra} note 90, at 152-56.
\textsuperscript{110} Schuck, \textit{supra} note 59, at 37.
\textsuperscript{111} Simpson, \textit{supra} note 90, at 154.
III. THE SANCTUARY MOVEMENT IN THE UNITED STATES

The U.S. Sanctuary Movement sprang into being in response to personal encounters by American citizens with Central Americans stumbling across the Mexican border into Arizona, New Mexico, California and Texas.\(^{112}\) The numbers of these Central Americans jumped dramatically as the situation in Central America worsened at the end of the 1970s.\(^{113}\) In 1980, two seminal events focused the American religious community on the chaos and violence in El Salvador: first, the assassination of Archbishop Oscar Romero of San Salvador while saying Mass\(^{114}\) and second, the rape and murder of four American Catholic missionaries by National Guardsmen.\(^{115}\)

Heightened awareness of the violence in Central America combined with the flood of Central Americans into the American border towns prompted religious communities to provide food, clothing, shelter, medical care and legal assistance to the aliens.\(^{116}\) The Central Americans recounted graphic stories of their suffering in their native countries, subsequent hazardous journeys to the U.S., and the horrors they believed awaited them at home.\(^{117}\) Such personal interaction galvanized the religious community, mostly made up of mainstream, middleclass Americans, to assist the aliens to remain in the U.S.\(^{118}\)

At first, church workers simply brought the aliens to the INS to apply for withholding from deportation and political asylum. The church workers assumed that the legal system would recognize that

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\(^{112}\) A. CRITTENDON, SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND LAW IN COLLISION XV (1988). Throughout her book, Crittendon details the personal encounters between various U.S. citizens and Central Americans which inspired individuals to begin assisting the undocumented aliens.


\(^{114}\) Id. at 16-17. Archbishop Romero headed the Roman Catholic Church in El Salvador. An outspoken critic of the violence in the country, Romero was shot through the heart while celebrating Mass on March 24, 1980.


\(^{117}\) Id. Golden and McConnell provide numerous examples throughout their book of the terrible ordeals individual Central Americans endured.

\(^{118}\) See, e.g., VOSKY, U.S. CHURCHES OFFER SANCTUARY TO ALIENS FACING DEPORTATION, N.Y. TIMES, Apr. 8, 1983, § A, at 1, col. 1; GOLDMAN, CHURCHES BECOMING HOME TO CENTRAL AMERICAN EXILES, N.Y. TIMES, Apr. 1, 1984, § 4, at 9, col. 1; REINHOLD, CHURCHES AND U.S. CLASH ON ALIEN SANCTUARY, N.Y. TIMES, Jun. 28, 1984, § A, at 1, col. 4.
the Central Americans had a well-founded fear of persecution entitling them to reside in the States.\textsuperscript{119} An ecumenical religious community in Arizona put up the bail money to essentially ransom hundreds of Central Americans held in deplorable detention centers.\textsuperscript{120} In spite of an energetic legal advocacy program, the INS deported Salvadorans and Guatemalans in droves. Of the fifty-five hundred Salvadorans who applied for political asylum in 1981 and 1982, only two received it.\textsuperscript{121} The futility of applying to the INS, combined with expanding personal contact with scarred aliens and the realization that their legal efforts were actually facilitating deportation, caused the volunteers to adopt a new strategy of "evasive services, sanctuary and an extensive underground railroad;" and prompted the loosely affiliated religious communities to band together officially as the Sanctuary Movement.\textsuperscript{122}

On March 24, 1982 — the second anniversary of the assassination of Archbishop Romero — Southside Presbyterian Church in Tucson, Arizona officially declared itself a sanctuary for Central Americans fleeing violence in their native lands.\textsuperscript{123} Since then, several hundred churches have openly declared themselves sanctuaries.\textsuperscript{124} The loosely organized movement shepherds a small but symbolic number of Central Americans across the Mexican border clandestinely, provides physical and spiritual assistance to many who have already entered the country, and places serve them with sponsoring congregations throughout the country.\textsuperscript{125} An important part of the Movement involves testimony before congregations by the Central Americans on the conditions of their home lands and what specific events prompted them to flee.\textsuperscript{126}

Although the number of Central Americans actually brought across the border is minuscule compared to the overall number of

\textsuperscript{119} Crittendon details two accounts in her book, where church workers attempted to go through official procedures to obtain asylum for individual refugees, which only resulted in the rapid deportation of those refugees. \textit{Crittendon, supra} note 112, at 52-54, 85-86.


\textsuperscript{122} \textit{Golden & Mc Connell, supra} note 116, at 41-48. It is inaccurate to view the Sanctuary Movement as a monolithic, homogenous group. The original affiliates, the "Tucson School," arose spontaneously from religious individuals banding together to aid the Central American aliens. A second group of adherents, the "Chicago School," entered the scene with a focused political agenda of aiding Central American aliens as part of the larger goal of changing U.S. policy in Central America. \textit{See Crittendon, supra} note 112, at 88-93, 202-25. This component of the Movement raises further religio-political issues beyond this article's scope. The Sanctuary Movement discussed herein, therefore, refers to the Tucson School.

\textsuperscript{123} \textit{Bau, supra} note 11, at 10.

\textsuperscript{124} Villarruel, "The Underground Railroad," \textit{supra} note 100, at 1433.

\textsuperscript{125} \textit{See Bau, supra} note 11, at 13.

\textsuperscript{126} \textit{Golden & Mc Connell, supra} note 116, at 2-3.
aliens seeking refugee, and the amount of aliens actually assisted in any capacity is only around 2000 to 3000 to date, the Sanctuary Movement's impact is greater than these numbers indicate. The Sanctuary Movement is vocal: Press conferences are held; conventions meet; open letters are sent to the government.

The government initially ignored the activities of the management. However, this changed dramatically as the numbers of Sanctuary workers swelled and the publicity about the plight of the aliens and the atrocities committed in their native lands ignited a debate over both U.S. Central American policy and the treatment of undocumented aliens. The government faced a Hobson's dilemma: to ignore the Sanctuary Movement's activities would hold the law in derision and discredit American immigration and foreign policy, yet to invade churches and prosecute religious workers for humanitarian activity prophesied moral and political debacle.

The INS launched a full scale undercover operation in 1983 relying heavily on paid informants to infiltrate the Sanctuary Movement posing as volunteers. Ironically, the operation was code named Sojourner after the Civil War African-American who led thousands of slaves escaping from the Confederate states to the Northern free states by means of the so-called "underground railroad" made up principally of religious volunteers. The informants attended and taped Bible Studies, religious meetings and gatherings with aliens; and participated in transporting the aliens into and throughout the country. As a result of the operation, eleven church workers, including two Catholic priests, a Catholic nun, and a Presbyterian minister in Arizona, were indicted on charges of smuggling, harboring and transporting illegal aliens, and conspiracy. This indict-
ment led to the watershed case of *United States v. Aguilar.*

In *Aguilar,* the prosecution obtained an astonishing procedural ruling which effectively gutted the Sanctuary worker’s defense. The court granted the government’s motion *in limine* to preclude the de-

than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(B) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(C) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation; or

(D) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law,

shall be fined in accordance with title 18, or imprisoned not more than five years, or both, for each alien in respect to whom any violation of this subsection occurs.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each transaction which may later be taken with respect to such alien shall, for each transaction constituting a violation of this paragraph, regardless of the number of aliens involved —

(A) be fined in accordance with title 18, or imprisoned not more than one year, or both; or

(B) in the case of —

(i) a second or subsequent offense,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined in accordance with title 18, or imprisoned not more than five years, or both.


Section 1325(a) provides:

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both.


134. *U.S. v. Aguilar,* 883 F.2d 662 (9th Cir. 1989).
The defendant's four central defenses as irrelevant and prejudicial. First, the defendants argued, that their activities were lawful under international and domestic law because the Central Americans were refugees entitled to certain protections such as nonrefoulement. Second, even if their activities were not deemed lawful, the defendants argued that they lacked the requisite criminal intent because it was reasonable to believe that the aliens were within the statutory definition of refugee. Third, the defendants argued that the First Amendment right to free exercise of religion protected their conduct. Fourth, it was argued that necessity justified any alleged criminal violations since the alternative was to allow the aliens to be deported to probable death. By precluding these four essential defenses from the start, the court eviscerated the Sanctuary workers' case. The trial then became merely a question of whether the defendants knowingly harbored and transported undocumented aliens. On May 1, 1986, eight of the defendants were found guilty. The Ninth Circuit Court of Appeal affirmed the convictions on March 30, 1989.

There are two legal arguments at the core of the Movement's solution. First, the Movement believes that the undocumented Central American aliens are refugees whom the government is forbidden by international and domestic law to deport. Refugee is a de facto not de jure status. Proponents of the sanctuary assert that the government recognizes an alien to be a refugee; it does not confer the status. One is either a refugee or one is not, independent of any official ruling. The Sanctuary defendants aver that they reasonably believed these Central Americans to be refugees, i.e., having a well-founded fear of persecution and hence protected by the ban on deportation. The issue returns elliptically to the determination of what the situation in Central America really is and who makes that judgment. The executive branch claims itself to be the sole determiner of the situation, and asserts that if Congress thought otherwise, it could pass legislation. The courts, with their historic deference to the executive branch in such matters, generally agree.

135. For an analysis of the motion in limine, see Colbert, supra note 118, at 48-78.
136. Id. at 56.
137. Crittendon, supra note 112, at 322-23.
138. 871 F.2d 1436 (9th Cir. 1989).
139. For an in-depth discussion of the Aguilar defenses, see Helton, The Sanctuary Movement, supra note 74, at 560-81.
140. Courts have rejected this view in United States v. Periera-Pineda, 721 F.2d 137, 139-40 (5th Cir. 1983) and U.S. v. Merlet, 794 F.2d 950, 954-57 (5th Cir.), cert. denied, 107 S. Ct. 1603 (1987).
141. See supra notes 63-69 and accompanying text.
A second central tenet of the Sanctuary argument is the assertion that the First Amendment guarantee of free exercise of religion\textsuperscript{142} protects their religiously-motivated humanitarian assistance to suffering strangers.\textsuperscript{143} The Movement has continually proclaimed its basis as \textit{praxis} required of a community of faith. Sanctuary workers claim to act as part of a religious community living out their service to the pursued alien.\textsuperscript{144}

The government, as well as some sanctuary proponents, classifies the Sanctuary Movement as a part of the tradition of civil disobedience, not a reassertion of historic sanctuary. It contends that historic sanctuary was born out of societies with less well-developed legal systems and plagued by uncontrolled private vengeance codes. Furthermore, the State as a democracy recognizes no church as constituting an independent source of political government in America.\textsuperscript{146} Therefore, no matter how religiously motivated the members of the Sanctuary Movement may be, they are civil dissenters to be respected for their convictions but sanctioned for their actions.

Civil disobedience is an honored tradition in the United States. Moral opposition, based on theological or ethical belief, to what is perceived as unjust law or governmental policy is an integral part of the American political philosophy.\textsuperscript{148} Society, however, cannot allow each individual to select which laws he will and will not obey. Democracy expects compliance even with laws and regulations with which the individual disagrees because the political compact presupposes the overall fairness of the law-making process and treatment of the individual.\textsuperscript{147}

The distinction between the self-interested lawbreaker and the civil dissenter rests on fundamental loyalty to the system of laws and government comprising the American model. A distinguishing mark of American civil disobedience is the acceptance of punishment. The dissenter recognizes what a particular law declares, determines that it is wrong to the degree that he cannot acquiesce to it, and publicly defies it. Since the law \textit{qua} law is supreme — even when morally offensive — the dissenter accepts the sanctions imposed on her by virtue of the law. He or she attests both to the injustice of the complained of law and to his recognition of the authority of the legal

\begin{itemize}
\item \textsuperscript{142} "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend I. In Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), the Supreme Court held that the Fourteenth Amendment of the Constitution made the free exercise clause applicable to the States.
\item \textsuperscript{143} The Sanctuary Movement, supra note 74, at 576.
\item \textsuperscript{144} Bau, supra note 11, at 12-16.
\item \textsuperscript{145} Schmidt, supra note 81, at 94-96.
\item \textsuperscript{146} Comment, Civil Disobedience and the First Amendment, 32 UCLA L. REV. 904 (1985).
\item \textsuperscript{147} A. Fortas, Concerning Dissent and Civil Disobedience 47-55 (1968).
\end{itemize}
The Civil Rights movement in the United States illustrates this point. Martin Luther King’s nonviolent civil disobedience brought imprisonment and called attention to unjust or unenforced laws. The American democratic tradition celebrates individuals whose principles compel them to disobey the law and accept the consequences of their actions.

Sanctuary in the American democratic context seems a far cry from historical sanctuary. Indeed, the government argues that the use of the title for the current Movement is a misnomer, an attempt to claim an outmoded, unnecessary and non-American concept as a basis for illegal activity. The INS holds that the Sanctuary Movement does not resemble biblical sanctuary which protected against bloodjustice in a less developed legal system or Western sanctuary which protected criminals from summary violence but still allowed for their punishment. In America’s well-developed legal system, grounded on Constitutional rights and due process, the government contends historical sanctuary has no place.

The question remains, however, whether historic sanctuary is really obsolete and inapplicable within the American democratic framework or whether the essential elements of historic sanctuary can be refracted through the American prism for representation in this political context. The Sanctuary Movement differs from historic sanctuary in several respects, but these differences do not affect the three essential elements of sanctuary: person, place and government check. A first difference is that the Sanctuary workers actively seek aliens to transport and harbor. The churches do not wait for the alien to come to them, rather the churches go out offering sanctuary. The INS has stated that it is concerned with the smuggling of undocumented aliens across the border rather than the shelter and assistance accorded a small number of aliens once they are in the country. Professional smugglers, called coyotes, bring in the lion’s share of Central Americans. These coyotes make large profits, frequently subject the aliens to terrible conditions, and often have ties to drug importers. The statute under which the Sanctuary workers were prosecuted was drafted to curtail coyotes. The Sanctuary

148. Id. at 66-67.
149. Id. at 67-68.
150. Schmidt, supra note 81, at 94-100.
151. Id.
152. Id. at 98-99.
153. CRITTENDON, supra note 112, at 140.
154. The Sanctuary Movement, supra note 74, at 562.
workers raise the defense that the statute was not meant to apply to them, but to mercenary coyotes. A relatively few Sanctuary work-
ers actually bring a small number of Central Americans across the border into the country. The Sanctuary Movement spends the vast bulk of its time and resources assisting, sheltering and placing aliens once they are in the United States.

A second difference between the Sanctuary Movement and historic sanctuary is that there is no limit on the length of time an alien may remain in sanctuary. This is not, however, a material distinction. Temporal limits to sanctuary have always been arbitrary. The Church's decision to dispense and condition sanctuary is simply a voluntary decision on when and how to exercise its power. The number of days may be lengthened, shortened, or eliminated according to the prescription of the Church.

Third and most importantly, the State does not recognize the churches affording sanctuary as having the legal right to do so. As previously discussed, the colonial history, American revolution, and subsequent Constitutional democracy acknowledged no power of the then disestablished churches to grant sanctuary. The Constitution, however, guarantees the free exercise of religion to all citizens. The Sanctuary workers claim that they are compelled by religious beliefs to provide food, clothing, shelter and assistance to suffering strangers; in short, to fulfill the ancient mission of the Church to practice corporal works of mercy. The INS does not quarrel with such humanitarian aid; it quarrels with the undocumented condition of the recipient.

American jurisprudence accords great respect for the free exercise of religion. When free exercise clashes with another right or important interest, the Supreme Court has fashioned a two-part test. First, the court determines if the religious motivation is sincere, not whether the action is central to the faith and certainly not if it is a valid belief. Second, the court decides if the governmental interest outweighs the free exercise right and if the government could achieve its interest by a less restrictive means than infringing on free exercise.

It is argued that the government's important interest in protecting U.S. borders and enforcing congressionally-authorized immigration law trumps the individual and congregational interest in transporting

155. BAU, supra note 11, at 108-09.
156. CRITTENDON, supra note 112, at 140.
157. See supra notes 53-57 and accompanying text.
158. BAU, supra note 11, at 12-16.
and harboring undocumented aliens out of religious conviction.\textsuperscript{161} To make an exception for religiously motivated workers raises establishment clause issues, i.e., the law cannot favor religion over non-religion.\textsuperscript{162} Rather than delve into the serpentine terrain of religious freedom, it is sufficient to say that the State may be able or may be forced to recognize in some fashion the religiously-based right to accord sanctuary — however labeled — in the American democratic system.

In spite of these three differences, the Sanctuary Movement embodies the essentials of historic sanctuary albeit transposed into an American key. As illustrated by the Becket martyrdom, three distinguishing marks of historic sanctuary are person, place and governmental check. These elements are hallmarks of the Sanctuary Movement as well.

Historic sanctuary was possible because the State respected the presence of the recognized representatives of God and Church. This respect arose from the power of the ecclesiastical office and its authority in the community. In the American context, Sanctuary proponents, particularly the ordained ministers and religious workers, also exert an authority respected by the State, since spiritual leaders have followings and are generally perceived as having moral power. The weapons of interdict and excommunication may not deter the United States government, but religious condemnation disturbs American politicians. Sanctuary workers act within and on behalf of religious communities. They are actively supported by congregations of generally law-abiding, middleclass citizens. This gives the government pause, for in a democracy, a mobilized and motivated electorate is an important force.

Furthermore, the State must always be aware whenever religious beliefs, particularly of powerful communities, are involved. Individual religious leaders and united adherents command governmental attention.\textsuperscript{163} The Constitutional basis for religious freedoms endows the Sanctuary Movement with augmented protection; sensitivity to religious claims forces the State to approach Sanctuary workers more gingerly. In practical terms, the religious status, motivation and membership of the person have significance in the government's

\textsuperscript{161} The Sanctuary Movement, supra note 74, at 580.
\textsuperscript{162} Carro, supra note 15, at 773-77.
Likewise, the place of sanctuary is afforded careful treatment. In historic sanctuary, reverence for God's place, for the numinous qualities of the spot, dictated special handling. In the American context, this respect for the physical church issues from two main fonts. First, the significance of the place derives from individual citizens according it religious meaning. The protected religious rights of each individual and the individuals collectively as a congregation make the place privileged: a place's privilege derives not from the fact that it is dedicated to God but from the dignity of those citizens so dedicating. In American jurisprudence, the source of the power of the sanctuary place lies in persons' Constitutional rights, not in the indwelling presence of, or the spot's commitment to, the divine. This is a fundamental shift from historic sanctuary with its emphasis on the objective reality of a supernatural claim over a place to the emphasis on the believer's belief privileging the spot. The subjective spiritual view of the citizen as to the religious significance of the ecclesiastical building heightens the importance of the structure and triggers First Amendment protection.

The Fourth Amendment provides additional protection for religious buildings. The courts have enforced the Fourth Amendment as a major safeguard of individual privacy. The Sanctuary Movement's buildings possess this protection. The religious nature and purpose of those gathering makes the State especially careful of intruding. As a result of the infiltration by government informants into the Sanctuary churches, the Ninth Circuit Court of Appeals has upheld the right of the monitored churches to sue the INS on the basis of, inter alia, the chilling effect such governmental activity has on religious free exercise. The place of sanctuary is accorded special

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164. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONSTITUTION AMEND. IV.

165. The government agents surreptitiously recorded church services using "body bugs," in four churches. The churches sued the government claiming, inter alia, that this caused participation in the church, and support for the church, to decline. The court concluded that a claim under the First Amendment had been asserted, stating "[w]hen congregants are chilled from participating in worship activities, when they refuse to attend church services because they fear the government is spying on them and taping their every utterance,. . . we think a church suffers . . . injury because its ability to carry out its ministeries has been impaired."

In arriving at this conclusion, the court relied on Meese v. Keene, 481 U.S. 465 (1987). The court determined that in Keene, the plaintiff had stated a cause of action by alleging that government action had influenced his constituency against him, which made it more difficult for the plaintiff to continue in his political career.

The court distinguished Laird v. Tatum, 408 U.S. 1 (1972), where the plaintiffs al-
consideration under both the First and Fourth Amendment aegis.

The third aspect of historic sanctuary which resonates in the Sanctuary Movement is its role as check on the State. Historic sanctuary stood between the pursuer and the pursued. It prevented summary violence and pressed for fair treatment. This action did not constitute civil disobedience because the State recognized the Church as a valid political entity with concomitant powers. Sanctuary supported and improved the development of a rational, regulated criminal justice system. It was not against the government but called for a better, that is, more just, State.

American civil disobedience is the conscious act of violating the law of the land due to personal conviction that it is unjust, and then the acceptance of legitimate punishment. The Sanctuary defendants do not claim to be such dissenters; rather, they contend that they are acting within the legal system and accuse the INS of not following the law. As in historic sanctuary, the Sanctuary Movement is reproaching the government and its agents. It demands that they play by the established rules and obey the law. The rules say no one with a well-founded fear of persecution may be deported regardless of whether or not the Administration backs the alien's home government. The Sanctuary Movement stands between the pursuing INS agents who summarily deport captured aliens and the alien in Church protection. As historic sanctuary was a part of the national system, so too the Sanctuary Movement claims to be. It reproaches the government for not acting with justice. The public position of mainline churches has called into question the Administration's Central American policy and the enforcement of immigration laws by spotlighting the plight of the aliens and the government's deportation treatment. From the deplorable mass detention camps to bugging churches, the Sanctuary Movement has discredited the government and stimulated a generally complacent citizenry to contemplate the issues.

The Sanctuary Movement is a powerful force, not because of the comparatively small numbers of Central Americans it actually helps, but because it focuses the nation's attention on a profoundly disturbing situation: the loss of control of the Mexican border, the en-

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leged only that the mere existence of the Army's domestic surveillance of peaceful civilian political activity chilled the exercise of their First Amendment rights. The court stated that Laird was not controlling because there the plaintiffs had failed to allege that the Army had actually engaged in surveillance of the plaintiffs, as opposed to the instant case, where the government had actually engaged in surveillance of the church services. The Presbyterian Church (U.S.A.) v. U.S., 870 F.2d 518, 520-23 (9th Cir. 1989).
forcement of the immigration laws, the plight of Central American immigrants, America's role in their native lands, the INS treatment of the aliens. All these issues are highlighted by the vocal, mainstream religious congregations involved in the Sanctuary Movement. In short, the Sanctuary Movement carries on the mission of historical sanctuary to provide a check on the government.

Whether the spate of court challenges will impact immigration policy or religious freedom is yet to be determined; it is clear, however, that the Sanctuary Movement is very much a scion of historical sanctuary. As usual in the United States, the ancient elements — person, place, and government check — have been recast in accordance within the American vision and context, resulting in a new embodiment of sanctuary. It remains to be seen if and how the country will incorporate the Sanctuary Movement into its legal and political framework, but it has already fulfilled its age-old function of calling the State to reconsider its policies and actions regarding Central American undocumented aliens. By interposing the Church between the agents of the government and the fleeing alien, hopefully a more just system will continue to evolve.