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Debating Conviction Against Conviction — Constitutional Considerations on the Sanctuary Movement

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Debating Conviction Against Conviction—Constitutional Considerations on the Sanctuary Movement

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"I had assumed that the welfare of the single human soul was the ultimate test of the vitality of the First Amendment."[1]

Democratic principles would prevail. There would be a fair presentation of both sides of the issue, followed by discussion and a vote. A majority would determine the future of the church—whether it would join the more than 309 churches, neighborhoods, and communities providing sanctuary for Central American refugees—in direct contravention of federal immigration law barring such assistance to illegal aliens.[2] The

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1. Gillette v. United States, 401 U.S. 437, 469 (1971) (Douglas, J., dissenting).

2. Section 274 of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1324(a) (1982). The INA is violated by:

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

Id. (emphasis in original).

stakes were high. Already, somewhere in the courts, sixteen church leaders, having participated in the sanctuary movement since 1981, were now defending themselves against criminal charges.[3]

In anticipation of the vote, the church's nave was packed. Members of the congregation rarely in attendance were present.

Reverend Faire advanced to the pulpit. He was quickly joined by Rabbi Fine from a neighboring congregation, who had been invited to lend an ecumenical air to the discussion. Also present on the panel was Mr. Follows, an attorney with the Immigration and Naturalization Service. Other church notables seated in the front, to the side of the pulpit, included the church's attorney, Mr. Goodwind, and Mrs. Helperson, the head of the church women's auxiliary volunteers.

"The congregation will come to order," requested the Reverend. "At issue today is whether our church ought to become a sanctuary. Because only some of you are familiar with the sanctuary concept, through a panel presentation we will hear various aspects of the issue, discuss them, and then put the question to a majority vote."

"Why must we vote?" asked Mrs. Helperson. "Isn't it enough if one of us thinks it's right?" Mrs. Helperson's question, magnified by the church acoustics, seemed to have flown up to the church rafters and lodged itself—hanging for the moment without an answer. But no one seemed to have heard her. Everyone's attention turned to Reverend Faire.

"Before we can embark on offering our church as a sanctuary," said Reverend Faire, "it is crucial that we at the church understand what we are doing. Otherwise, we will not have assumed the risks and responsibility of our actions. First, you will hear about whether sanctuary is legally justified. As you may know, justification is a defense to criminal charges.[4] Next we will see if this justification is constitutionally protected—'whether religious belief can be accepted as a justification of an

3. *See* N.Y. Times, Jan. 15, 1985, § 1, at 1, col. 3.

4. The justification defense comprises both necessity and duress defenses. The defense acquits a defendant of criminal charges if the defendant acted "in the reasonable belief that his conduct was necessary to prevent some harm to himself or others." *See* United States v. Aguilar, No. CR-85-008-PHX-EHC, Defendants' Opposition to Motion to Exclude Necessity Defense (D. Ariz. 1986). When, as in sanctuary cases, the defendant seeks to avoid a harm threatened by human forces—and not natural forces—the defense is characterized as one of "duress." *See* United States v. Bailey, 444 U.S. 394 (1980); United States v. Contento-Pachon, 723 F.2d 691 (9th Cir. 1984); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 383 (1972). The duress defense has three elements: "(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable

overt act made criminal by the law of the land.'[5]

"When we provide a sanctuary in our church, we open our doors to aliens sought by the Immigration and Naturalization Service (INS)," continued the Reverend. "In so doing, we bring ourselves into open conflict with federal law which bars the harboring of aliens.[6] According to INS statistics, the INS has for some time been treating Central American aliens as if they were merely economic, not political, refugees. About ninety-seven percent of Central American political refugee status applicants are routinely sent back.[7] By contrast, one of every two applicants from communist countries regularly obtains political refugee status.[8] In letting ideology determine refugee status, the government is violating existing immigration law providing for political asylum.[9] This is unjust, a violation of human rights, and of everything else we hold dear. These refugees are sent back to the turmoil in their homeland and to their likely deaths. This we cannot countenance.

"Now, here to give you the other side is Mr. Follows, from the INS."

Mr. Follows, the INS attorney, rose to the pulpit, feeling somewhat out of place. His heart went out to the plight of the church, and of the Central American aliens; yet, he was convinced the sanctuary movement was the wrong approach. He would try to appeal to the congregation's sense of fairness. "Thank you for the opportunity to speak here today," said Mr. Follows. "Like you, I am concerned about the plight of illegal immigrants. But I am convinced there are ways for you to improve mat-

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opportunity to escape the threatened harm." United States v. Contento-Pachon, 723 F.2d at 693. *See also* United States v. Shapiro, 669 F.2d 593, 596 (9th Cir. 1982).

The justification defense has been recognized in the United States since the early nineteenth century. *See, e.g.*, United States v. Ashton, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470); *The William Grey*, 29 F. Cas. 1300 (C.C.D. N.Y. 1810) (No. 17,694).

5. Reynolds v. United States, 98 U.S. 145, 162 (1878).

6. 8 U.S.C. § 1324(a)(3) (1982).

7. *Status of Salvadorans Debated on Capital Hill*, 43 CONG. Q. WEEKLY REP. 787, 788 (April 27, 1985).

8. *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON IMMIGRATION AND NATIONALITY LAW REPORT (1984), *cited in* N.Y. Times, May 6, 1984, § 1, at 21, col. 1.

9. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), provides that a person who demonstrates a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" may not be deported back to the place of persecution. This well- founded fear of persecution standard tracks United States obligations under international law. For similar language see *United Nations Protocol Relating to the Status of Refugees*, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1968) (entered into force for the United States, Nov. 1, 1968) [hereinafter *Protocol*]. The *Protocol* incorporates the terms of the *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 137 (1951).

ters by working within the immigration system, as I do, or by criticizing the system in the media, or in Congress. However, there is no need to break the law. When you do, you must realize you undermine the whole immigration system, and you cannot be treated any differently than an alien smuggling ring.[10] Furthermore, in violating our immigration laws you challenge the rule of law in our country. We are 'a government of laws and not of men.'[11] '[T]he Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised.'[12]

"Now as to our refugees, first, the United States traditionally has served and continues to serve as a haven for the oppressed. In 1985, in addition to legal immigrants, we accepted an additional 70,000 refugees.[13]

"More problematic than the number of refugees is the question of from where they hail. The Refugee Act of 1980 provides that a person who demonstrates a 'well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion'[14] may not be deported back to the place of persecution. This 'well-founded fear of persecution' standard also tracks U.S. obligations under international law.[15] Raw statistical data, gathered pursuant to the Refugee Act, indicating a disparity between Central American and Soviet bloc citizens to whom refugee status is granted,[16] must be put in proper perspective. It may well be that the intentional, individual political persecution proscribed by the Refugee Act is better suited to describe the communist bloc; however, this is not to say there is no human suffering in El Salvador or Guatemala. For this purpose, the Refugee Act is an inadequate gauge. To the extent this is the basis for the sanctuary movement's confrontation with the Administration, it is misdirected. The Refugee Act was passed by Congress—if you feel the Act is inadequate to accurately measure comparative 'need for rescue' then it is to Congress you must turn your attention.

"Congressional action aimed at ensuring nondiscriminatory application of the Refugee Act of 1980 seeks to obviate the need for case-by-case

10. *See* 8 U.S.C. § 1324(a) (1982) (text reprinted *supra* note 2).

11. MASS. CONST. pt. 1, art. 30.

12. United States v. United Mine Workers of America, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring).

13. Helton, *Second-Class Refugees*, N.Y. Times, Apr. 2, 1985, § 1, at 27, col. 2.

14. 8 U.S.C. § 1101(a)(42)(A) (1982).

15. *See Protocol*, *supra* note 9.

16. Two to three percent of all applications filed by Central Americans are granted, compared to over forty percent of applications by Soviet bloc citizens. *See* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 253 (1984).

hearings and proposes that 'Extended Voluntary Departure' (EVD) status[17]—temporary relief granted at the Attorney General's discretion—be afforded to Central American refugees. EVD status is now being granted to refugees from Lebanon, Ethiopia, Afghanistan, and Poland. Such status would permit Salvadorans and Guatemalans to stay in the United States on a temporary basis until the turmoil in their countries subsides. Currently, there are measures pending in Congress, for example, the Moakley/DeConcini bill,[18] which recommend that the U.S. temporarily suspend the deportation of Salvadorans from this country as long as the conditions causing them to leave persist.

"Given the congressional alternatives," Mr. Follows continued, "and the Service's adherence to due process in these cases, the sanctuary movement cannot claim the INS is acting outside the law. It also cannot claim that the movement's only recourse is to violate the law. Alternatives exist. The sanctuary movement is therefore not justified in its actions. It is simply violating the law—in the same way alien smuggling rings do.

"Furthermore, religious beliefs do not provide you with a blanket exemption from federal laws, regardless of whether they concern paying taxes,[19] or following federal anti-discrimination laws[20] or minimum wage standards.[21] For instance, in the area of immigration, hundreds of marriages conducted by the Rajneesh which were intended to admit illegal aliens were recently found fraudulent and unlawful.[22] Providing sanctuary for fleeing refugees in the name of religion is no more lawful than bombing abortion clinics in the name of God. 'Every citizen [may not] become a law unto himself.' "[23]

"Mr. Goodwind, as our church's attorney, will you respond?" asked the Reverend.

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17. *See infra* note 18 and accompanying text.

18. S. Res. 377, 99th Cong., 1st Sess. (1985); H.R. 822, 99th Cong., 1st Sess. (1985). Senator Dennis DeConcini and Representative Joe Moakley have introduced legislation, S-377 in the Senate and HR-822 in the House, to grant temporary "extended voluntary deportation" (EVD) status to political refugees from El Salvador and Nicaragua. The suspension would extend for a period of two years to allow time for a General Accounting Office investigation and report on the conditions of the displaced persons. The legislation passed the House in the 99th Congress, second session, but it was dropped in conference. It is expected to be revived in the next session.

19. *See, e.g.*, United States v. Moon, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984).

20. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

21. *See, e.g.*, Alamo Found. v. Secretary of Labor, 105 S. Ct. 1953 (1985).

22. *See* N.Y. Times, Nov. 15, 1985, § 1, at 16, col. 1.

23. Reynolds v. United States, 98 U.S. 145, 167 (1878).

"We disagree both as to the status of the law, and as to our own status," said Goodwind. "First, we contend the Administration is violating its own immigration laws. Refugee statistics reflect, contrary to the politically-neutral process mandated by the Refugee Act of 1980,[24] that State Department '[i]deology . . . continues to dominate asylum decision making.'[25] The next question is what may we do in the face of this unlawfulness. We believe there are no alternatives to sanctuary.

"The present unlawful application of the Refugee Act of 1980 will not soon be changed.[26] Other than to pass legislation granting 'extended voluntary departure' status, the only way to change present asylum policy would be to reform the immigration process in order to depoliticize it. Further proposals for immigration reform, and specific congressional asylum proposals such as Moakley/DeConcini do not have much chance of success.[27]

"The government is also violating constitutional law governing criminal procedure," continued Goodwind, the church's lawyer. "The government prosecuted the sanctuary cases[28] in a discriminatory man-

24. The Refugee Act of 1980, providing asylum protection to all persons who are unable or unwilling to return to their native countries "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," prescribes a standard which is politically neutral. In theory, it differs from prior refugee standards which were a function of the political nature of the government from which the refugee hailed. For a comprehensive discussion of the history of United States law regarding political asylum, see Helton, *supra* note 16. Prior to 1968, there were three different procedures by which aliens could seek refuge in the United States. Under two procedures, that of "conditional entry" and the exercise of the Attorney General parole power, the admission of refugees in practice was determined by ideology and geography. Both were used to allow refugees chiefly from communist countries.

After the adoption of the *United Nations Protocol Relative to the Status of Refugees, supra* note 9, the United States committed itself to the politically neutral terms of the *Protocol,* which made no reference to ideology or geography. INS failure to follow the politically neutral terms of the *Protocol* prompted subsequent adoption of the Refugee Act of 1980, providing expressly for refugee protection under United States law without regard to ideology or geography. *See* Helton, *supra* note 16, at 250-52.

25. Helton, *supra* note 16, at 253.

26. The reasons are imbedded in the process. The reliance on the Department of State advisory opinions by the immigration authorities implementing the Refugee Act to determine whether the applicant's fear of persecution is "well-founded," ensures that the process will be determined by United States foreign policy considerations and therefore will not be politically neutral. *See Refugee Assistance: Hearings on H.R. 3195 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. 107-10 (1983) (statement of Arthur C. Helton, Director, Political Asylum Project, Lawyers Comm. for Int'l Human Rights).

27. *See supra* note 18.

28. United States v. Merkt, 794 F.2d 950 (5th Cir. 1986); United States v. Merkt, 764 F.2d 266 (5th Cir. 1985); United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985); United States v. Aguilar, No. CR-85-008-PHX-EHC (D. Ariz. 1986); American Baptist Churches v.

ner. Infiltration of the church by informers, without obtaining prior judicial warrant,[29] failed to meet even the minimum due process standards accorded first amendment interests.[30]

"Given the unlawful situation and the lack of alternatives,[31] we believe that under the common-law principle of justification,[32] we are permitted to violate the law. Moreover, because we are a church we believe this justification principle is constitutionally protected.[33] We need not follow a law contrary to our convictions.[34] I'll defer to the Reverend on

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Meese, No. C-85-3255-RFP (N.D. Cal. filed May 7, 1985); United Presbyterian Churches v. Meese, No. 86-0072-PHX-CLH (D. Ariz. 1986).

29. *United States v. Aguilar* concerned the use of informants equipped with recording devices in a church as an investigative technique against congregations involved in the sanctuary. No warrant was obtained prior to the use of this law enforcement technique. Under the Constitution, judicial control of informants to infiltrate a church is necessary to protect religious freedom. U.S. CONST. amend. I (Free Exercise Clause); amend. IV (Warrant Clause); amend. V (Self-Incrimination Clause). Accordingly, in the absence of such judicial supervision, the case presents the issue of whether the evidence might be suppressed.

30. *See, e.g.*, Marcus v. Search Warrant, 367 U.S. 717 (1961); *see generally* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 18 (1970).

31. *See* Rowe, *Murder by Deportation,* WASH. MONTHLY, Feb. 1984, at 13-22. A showing of absence of alternatives is an element both of the duress defense, *see supra* note 4, and an implied element of the first amendment free exercise claim which requires the making out of governmental compulsion. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972). United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985), holds that such compulsion exists in the sanctuary claim.

32. *See supra* note 4.

33. *See* Reynolds v. United States, 98 U.S. 145, 162 (1878) (discussing "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land").

34. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (excuse of criminal conduct recognized with the exercise of religious freedom); United States v. Elder, 601 F. Supp. at 1577 (citing *Yoder*); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

In *Elder*, the district court recognized a compelling free exercise interest in sanctuary. The court applied the two-part test recently reaffirmed by the Supreme Court in Bowen v. Roy, 106 S. Ct. 2147 (1986). At issue is whether the law involves governmental compulsion—whether the law burdens the free exercise of religion.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Id. at 2166 (O'Connor, J., concurring and dissenting) (quoting Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981)). The second part of the test is also stated by Justice O'Connor in her concurrence in *Bowen*: "Once it has been shown that a governmental regulation burdens the free exercise of religion, 'only those interests of the highest order and not those otherwise served can over-balance legitimate claims to the free exercise of religion.' " *Id.* (quoting *Yoder*, 406 U.S. at 215).

Variously stated, once a compulsion is shown, the government must show that its regulation stands as written—that it represents "the least restrictive means of achieving some compelling state interest." *Id.* at 2167 (quoting *Thomas*, 450 U.S. at 718). *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972). The test has been applied to sanctuary.

In *Elder*, the district court found a free exercise compulsion, and went on to find that the government's interest was such that the application of the immigration laws had to be uniform.

this point."

"The act of providing sanctuary comports with our longstanding church traditions," said the Reverend. "Since Biblical times, we have been commanded to treat our neighbors as we would ourselves. 'When a stranger sojourns with you in your land, you shall not do him wrong. The stranger who sojourns with you shall be to you as the native among you, and you shall love him as yourself: for you were strangers in the land of Egypt . . . .'[35] Moreover, ever since Constantine's Edict of Toleration, issued in 303 A.D., and particularly during the Middle Ages, under Canon law, the church has provided refuge for certain criminals.[36] Accordingly, if we act, we act out of our religious motivations.[37] These convictions are broad-based and cut across sectarian lines, do they not, Rabbi Fine?"

At the Reverend's prompting, the Rabbi joined him at the podium.

"Of course, there is also a basis for sanctuary in the Jewish tradition," said the Rabbi. "Yet, just as the principles discussed by Reverend Faire, they bear little resemblance to today's sanctuary movement. We too rely on the general Biblical injunctions concerning the treatment of the 'stranger in our midst.' In addition, we have the 'Levitical cities of refuge,' the ostensible models for the sanctuary movement. These cities were established as havens for those guilty of involuntary homicide—to offer a place where they might flee their avengers. The Levitical cities, therefore, like the sanctuaries created under Canon law, were for certain

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The only court of appeals which has dealt with the issue, the United States Court of Appeals for the Fifth Circuit, in United States v. Merkt, 794 F.2d 950 (5th Cir. 1986), rejected the free exercise compulsion—and found sanctuary not to meet the first element of the test. There was no compulsion, the court held, because the sanctuary workers had alternatives. "Whether such [religious] motivation, in turn, required defiance of the nation's border control laws . . . so as to inhibit and punish appellants burdened their religious practice, is another matter." *Id.* at 956.

The *Merkt* court's line of inquiry was in error. In *Bowen*, the Court accepted the claims of Little Bird of the Snow Roy— concerning her inability to have a social security number— notwithstanding that other members of the family, also Native Americans of the same religion, had social security numbers. In sharp contrast, the *Merkt* court evaluated the nature of Merkt's free exercise beliefs by comparing it to that of other Christians. *See* 794 F.2d at 956. The *Merkt* case suggests that courts may be uncomfortable with free exercise claims by those of majoritarian or large minority religions, such as Catholicism, for fear of the number of exceptions which will become necessary. *Cf. Bowen,* 106 S. Ct. at 2167 (O'Connor, J., concurring and dissenting). The problem is multiplied by the progressively more ecumenical nature of the sanctuary movement. *See* Project on the Sanctuary Movement, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 493, 553 n.248 (1986). This numbers game goes a long way toward explaining the relative good fortune of the Amish and the American Indians in bringing free exercise claims.

35. *Leviticus* 19:33-34 (revised standard).

36. *See* Brink, *Sanctuary and the Sanctuary Movement*, THIS WORLD 4 (1985).

37. *See Yoder*, 406 U.S. at 215.

types of fleeing criminals.[38] Aside from these rather tangential religious bases, is our historical experience of needing havens when we were political scapegoats. Ultimately, that history is the primary reason we support offering sanctuary."[39]

The historical exegesis caught Reverend Faire off guard. "Rabbi Fine has confused this issue somewhat," noted the Reverend. "We are asking to be treated differently because of our religious convictions or purpose.[40] Empathy for political scapegoats will not do, or else we would be regarded as everyone else. '[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.'[41] Can we at least agree on the 'golden rule' shared by most religions?"[42]

A stir among the congregants.

"But then let us get on to the more difficult question—the church's criminal liability under federal law. Here to explain this is our attorney, Mr. Goodwind."

"Thank you, Reverend," said Mr. Goodwind. "I must say—the last interchange between you and the Rabbi unsettled me. Our only way to overcome the criminal charges resulting from violation of immigration law is to claim a constitutional first amendment free exercise exemption on the ground that our 'deep religious conviction'[43] compels us to provide refuge. Under the United States Constitution, we cannot be put in the position of choosing between the dictates of our conscience and those of the state.[44] Without this religious basis, we have no argument for an exemption, and would simply be in the position of violating the law. For this we would be prosecuted."

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38. *See* R. FEEN, SANCTUARY: A LOOK AT CHURCH TRADITION, RELIGION AND DEMOCRACY 1, 3 (1985).

39. Statement of Elie Wiesel, Inter-American Symposium on Sanctuary (Jan. 1985); Statement of President Franklin Roosevelt (1944), *reprinted in* R. FALK, G. KOLKO & R. LIFTON, CRIMES OF WAR 77 (1971) ("hide these pursued victims, help them to get over their borders, and do what [we] can to save them . . . . We call upon the free peoples of Europe and Asia temporarily to open their frontiers to all victims of oppression.").

40. *See Yoder*, 406 U.S. at 215-16.

41. *Id.* at 215.

42. The Golden Rule asks an individual to treat others as he would like to be treated. In the Jewish religion, it dates back to the writings of Hillel in the first century BCE: "Do not do unto others as you would not have them do unto you." Mishnah (Shabbat 312). The rule was restated by Jesus: "So whatever you wish that men would do to you, do so to them; for this is the meaning of the law [Torah] and the prophets." *Matthew* 7:12 (revised standard). Confucius similarly declared in the Fifth Century BCE "[w]hat you do not like when done to yourself, do not do unto others." *The Analects* 12:12.

43. *Yoder*, 406 U.S. at 216.

44. *See, e.g., id.* at 218; *see also* Thomas v. Review Bd., 450 U.S. 707, 716 (1981); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

Reverend Faire returned to the pulpit, saying, "What we seek to do is to tell the Administration that their implementation of the law is unjust, and that they may not continue to distinguish among refugees. Our church teachings compel us to object. Once we give shelter to a refugee, we will notify the Attorney General and the newspapers so that they know that we have joined the Movement."[45]

Mr. Goodwind responded, visibly discomfited. "The question is what the church is compelled to do. Is it compelled by religion to save lives or is it compelled to tell the Administration its laws are unjust? Is it rescue or civil disobedience?"

Reverend Faire began to look worried, and said, "But it's both. They are not inconsistent. As Thoreau said, 'It is not desirable to cultivate a respect for the law, so much as for the right.'[46] Telling the Administration their laws are unjust is merely another method to save lives—in the long run, more will be saved than in a secret operation. Why can't we do both?"[47]

Mr. Goodwind responded that "the publicity surrounding the offer of sanctuary and the notice to the Administration begin to look political, even if they are religiously motivated. Even the act of harboring refugees looks political. But then few religious acts don't have political overtones. The Jehovah's Witness' failure to say the pledge of allegiance although religiously motivated could also be regarded as political.[48] And, more recently, the Administration characterized the wearing of a skullcap by an Orthodox Jewish Army psychologist—as an act designed to foster 'separateness'—a political statement rather than a religious practice.[49] This characterization was accepted by the Supreme Court.[50] There may be no way for us to avoid charges of politicking."

Reverend Faire again returned to the podium and said, "Mr. Goodwind, this is how I see it. We want to save lives, thus we decide to provide sanctuary; with this public action we simultaneously inform the

45. *See* Korn, *Hiding in the Open,* THE STUDENT LAWYER, Jan. 1986, at 28.

46. H. THOREAU, THE VARIORUM CIVIL DISOBEDIENCE 33 (1967).

47. *Cf.* Bowen v. Roy, 106 S. Ct. 2147 (1986) (striking a religiously based objection to the state's use of social security numbers in its benefit programs). *Bowen* illustrates the difference between a free exercise challenge to governmental actions and a free exercise challenge to governmentally required individual actions. The case stands for the need for governmental compulsion. The religious objection may not merely be an objection to a governmental program. *Id.* at 2152.

48. *See* West Virginia v. Barnette, 319 U.S. 624 (1943); *see also* Widmar v. Vincent, 454 U.S. 263, 271 n.9 (1981) (speech about religion cannot be distinguished from prayer); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

49. *See* Brief for Respondents, at 35, in Goldman v. Weinberger, 106 S. Ct. 1310 (1986).

50. Goldman v. Weinberger, 106 S. Ct. at 1313.

Administration that the present situation is untenable, that the laws are unjust, and that they must be changed. Why can't we do both?"

Mr. Goodwind, shaking his head from side to side, replied, "We can—only if we are compelled for religious reasons to do both. If not we will violate a law in protesting its unjustness, and we may be guilty of civil disobedience—thus we must prepare to accept the penalty.[51]

Now the Reverend's head was shaking. "Our religion makes us do both. The options are intimately related. Besides, so long as we are sincere, the government may not second-guess us as to the tenets of our religion.[52] Further, religiously motivated acts, as well as beliefs, have been upheld by the courts, even when the acts violate criminal law."[53]

"That's true," replied Mr. Goodwind, "but only in a very few cases. Conflicts between religious interests and the law have generally favored the latter. Regardless of whether the state interest was against polygamy,[54] against child labor,[55] protecting public health[56] and national security,[57] eliminating discrimination,[58] or enforcing the social security tax system,[59] all have overridden free exercise claims. The few exceptions have concerned the Amish school children in *Wisconsin v. Yoder*,[60] and the conditioning of government benefits on religious beliefs in three cases: *Bowen v. Roy*,[61] *Thomas v. Review Board*,[62] and *Sherbert v. Verner*.[63]

"Most of these Supreme Court decisions are arguably distinguishable from sanctuary in that they didn't involve violations of law, but merely deprivations of benefits as a function of conduct determined by

51. *See, e.g.*, United States v. Malinowski, 472 F.2d 850, 857 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973). When speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on first amendment freedoms.

52. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."); United States v. Elder, 601 F. Supp. 1574, 1578 (S.D. Tex. 1985) ("The Court . . . is not an arbiter of canon law.").

53. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (exemption from mandatory state attendance laws); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (exemption from state ban on the use of peyote).

54. Reynolds v. United States, 98 U.S. 145 (1878).

55. Prince v. Massachusetts, 321 U.S. 158 (1944).

56. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

57. Goldman v. Weinberger, 106 S. Ct. 1310, 1313 (1986).

58. Bob Jones Univ. v. United States, 461 U.S. 574 (1983). *See also* Ohio Civil Rights Comm'n v. Dayton Christian Schools, 54 U.S.L.W. 4860 (1986) (holding no church free exercise right to be free from employment discrimination regulation).

59. United States v. Lee, 455 U.S. 252 (1982).

60. 406 U.S. 205 (1972).

61. 106 S. Ct. 2147 (1986).

62. 450 U.S. 707 (1981).

63. 374 U.S. 398 (1963).

religious belief. However, it could be argued that the withdrawal of a benefit is comparable to the imposition of a government penalty.[64]

"Regarding the *Yoder* case, the only persons to benefit from that decision seem to have been the Amish. The *Yoder* Court appeared to treat the Amish specially because of the tradition posed by their religion. Why, they've been around since the Founders—so they had to be entitled to a constitutional exemption.[65] The same is true of the Native Americans in *Bowen*.[66] Now, sanctuary has an even more ancient tradition, dating back to Biblical times. So you could say we are like the Amish. . . .

"Let's assume we have a religious compulsion here. It would override all other state interests unless the government can show that barring a sanctuary church exemption is essential to achieving a compelling state interest. However, accommodation of religion would still be required if the compelling state interest may be achieved by less restrictive means.[67] This is where a difference between *Yoder* and sanctuary is likely. *United States v. Lee*,[68] a more recent case denying the Amish a social security tax exemption, suggests that *Yoder* was a truly special holding—the Amish don't always win. In *Yoder*, accommodation of the Amish religious interest did not prevent accomplishment of the compelling state interest.[69] The government's interest in *Yoder*—educating children—arguably was being effectuated through the Amish alternative of informal vocational education.[70] By contrast, in the instant case, there may be no less restrictive alternative. The government claims it has an interest in a uniform application of its immigration laws.[71] Arguably, if even one ex-

64. *See id.* at 404.

65. *Yoder*, 406 U.S. at 235. *Cf.* Lynch v. Donnelly, 465 U.S. 668 (1984) (Christmas display tradition); Marsh v. Chambers, 463 U.S. 783 (1983) (legislative chaplaincy tradition); Walz v. Tax Comm'n, 397 U.S. 664, 681 (1970) (church tax exemption tradition); McGowan v. Maryland, 366 U.S. 420 (1961) ("Blue Laws" tradition).

66. Bowen v. Roy, 106 S. Ct. 2147 (1986).

67. *See* Thomas v. Review Bd., 450 U.S. 707, 718 (1981); *see also* United States v. Lee, 455 U.S. 252, 257-58 (1982).

68. 455 U.S. 252 (1982).

69. *See id.* at 257-58.

70. *Yoder*, 406 U.S. at 225, 236.

71. *See infra* note 89. This interest in the uniform application of immigration laws was recognized in United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985), concerning the sanctuary movement. In *Elder*, the government had to show why the interest in immigration mandated that there be no exceptions—that the laws be uniformly applied. *Id.* at 1579. The Court considered the system to be the "least burdensome method" to accomplish the government's purpose of "securing the Nation's borders." *Id.* Other nonsanctuary cases have recognized the compelling interest of enforcement of our immigration laws but without consideration of whether the laws must be uniform—i.e., admit of no exception. *See* Goldman

emption is granted, the immigration law's objectives are jeopardized.[72]

"When we protest neutral laws applicable to all citizens, we have an uphill battle. Courts have been unwilling to provide exemptions based on religion or conscience, especially where Congress has remained silent."[73]

"How can we go against Congress?" piped Mrs. Helperson, head of the women's auxiliary. "Aren't they the voice of the majority?"

"Well," responded Mr. Goodwind, "sometimes Congress does afford exemptions based on conviction, for example, in the case of conscientious objectors.[74] Where Congress fails to do so, the Court, in some instances, may grant an exemption; yet only in a very few cases has the Court gone beyond Congress.[75] However, had Congress enacted these exemptions, they might not have withstood Court scrutiny, because of their potential violation of the Establishment Clause of the First Amendment.[76]

"When the state involves itself in accommodation of religious interests, this involvement may threaten other first amendment concerns protected by the establishment clause mandate.[77] Pursuant to the

v. Weinberger, 106 S. Ct. 1310, 1313 (1986) (where ostensible national security needs are at issue, Court defers to government's claim for uniformity); *Elder*, 601 F. Supp. at 1578-79.

72. *Cf.* United States v. Lee, 455 U.S. at 258-60 (no principled way to make individual exceptions to certain comprehensive national laws).

73. *See id.* at 263 n.3.

74. *See* United States v. Seeger, 380 U.S. 163 (1965); *cf.* Zorach v. Clauson, 343 U.S. 306 (1952) (providing release time from compulsory attendance for students to receive outside religious instruction).

75. Some examples include the Court's provision of exemption of the Amish from compulsory attendance laws, Wisconsin v. Yoder, 406 U.S. 205 (1972), and the exemption for Sabbath observers in unemployment compensation schemes, Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

76. The Establishment Clause of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend I. In all of the cases cited *supra* note 75, the Court addressed the tension between the establishment and free exercise interests and resolved the tension in favor of the latter. In *Thomas*, the Court recognized that the challenged practice "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Thomas*, 450 U.S. at 720 (citing *Sherbert*, 374 U.S. at 409). "[T]he danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause . . . cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise." *Yoder*, 406 U.S. at 220-21.

An example of an effort by a state legislature to protect a free exercise-Sabbath observer right, held by the Supreme Court to be in violation of the Establishment Clause, is Thornton v. Caldor, 105 S. Ct. 2914 (1985). Animating the decision seemed to be the Court's concern with discrimination in favor of Sabbath observers, as against nonbelievers. *Id.* at 2918 (O'Connor, J., concurring).

77. *See Yoder*, 406 U.S. at 220-21.

Establishment Clause, government-legislated accommodations may be considered to be religiously discriminatory, *i.e.*, preferential to the Amish or to Sabbatarians.[78] In contrast, we believe a government accommodation or exemption for church sanctuary, which on its face may seem to be preferential to churches by removing government regulation, is ultimately required so as to minimize government involvement in religion and hence the risk of establishment.[79]

"Aside from the potential first amendment establishment problems with an exclusively religious accommodation of sanctuary, at issue is whether the government's interest in the application of its immigration laws allows any exemption. Mr. Follows, here from INS, will enlighten us."

"Laws uniformly applicable to all," began Mr. Follows, "such as the draft and tax laws, have been upheld without a constitutional right to exemptions.[80] Government claims of the need for uniformity and even claims of administrative convenience have outweighed those of religious conscience.[81] Happily our insistence on uniformity ultimately helps preserve your religious liberty. Policing for fraud could excessively entangle the government in matters of religious conscience."[82]

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78. *See, e.g.*, Thornton v. Caldor, 105 S. Ct. 2914, 2919 (1985) (O'Connor, J., concurring); United States v. Lee, 455 U.S. at 263 n.2 (Stevens, J., concurring).

79. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970) (upholding church tax exemption); *see also* Zorach v. Clauson, 343 U.S. 306 (1952).

80. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (upholding uniform social security taxes); Gillette v. United States, 401 U.S. 437, 461-62 (1971) (draft exemption by legislative grace only); Lull v. Commissioner, 602 F.2d 1166 (4th Cir. 1979) (denying tax deduction for military expenditure based on religious objections to war); United States v. Malinowski, 472 F.2d 850 (3d Cir. 1973) (war taxes). *But see* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

81. *See* Jensen v. Quaring, 105 S. Ct. 3492 (1985) (four dissenters would uphold drivers license photo requirement over religious claims); United States v. Lee, 455 U.S. 252 (1982); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

82. United States v. Lee, 455 U.S. at 263 n.3 (Stevens, J., concurring). *Cf. Yoder*, 406 U.S. at 221-22. There are two concerns. One is the extent of the Court's inquiry into the centrality of an applicant's religious tenet. *See* Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 274-78.

In addition to the "extent of the inquiry" concern is the potential discrimination issue. As declared by Justice Stevens in *United States v. Lee*:

> In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.

455 U.S. at 263 n.2 (Stevens, J., concurring). *See, e.g.*, Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969) (holding that a drug user could be

Mr. Goodwind rose to rebut and said, "I disagree. The putative uniformity need simply stems from the government's unwillingness to determine the validity of claims to religious exemptions.[83] Fraud might be a special problem where exemptions are likely to be sought by others for reasons other than religious.[84] But this is not relevant here. While there are profitmaking alien smuggling rings, distinguishing between these and the sanctuary movement hardly requires government intervention. To the contrary—churches have gone out of their way to put the government on notice of their religious intentions.

"Remaining only is the question of whether a uniform application of our immigration laws will be deemed a compelling governmental interest.[85] Unfortunately, if the Court has already found a 'substantial interest' in 'crowd control' at a state park,[86] *a fortiori*, the government's interest in policing our borders will be deemed compelling.

"Hasn't the Court already so held, Mr. Follows?" questioned Mr. Goodwind.

Mr. Follows returned to the pulpit answering, "Yes, in many cases.[87] Our immigration laws admit of no accommodations, and the

convicted regardless of whether use was part of a religious practice—based on ostensible fear of fraudulent assertions).

83. *See* Bowen v. Roy, 106 S. Ct. 2147, 2156 (1986) ("a policy decision by a government that it wishes to treat all applicants alike and that it does not wish the same involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference."); United States v. Lee, 455 U.S. at 263 n.3 (Stevens, J., concurring).

84. *See, e.g., Bowen*, 106 S. Ct. at 2157-58, 2167; Thornton v. Caldor, 105 S. Ct. at 2918 n.9.

85. *See Lee*, 455 U.S. at 257-58.

86. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

87. At this time only one reported case has dealt with a sanctuary free exercise defense and the government's counterbalancing interest in protection of the borders of the United States. United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985). While there are other cases evaluating the importance of government interests in immigration policy, *Elder* is significant because it is the decision which balances the importance of the government's interest in protecting its borders with the free exercise interests of those in the sanctuary movement. The decision does recognize the free exercise interest of those in the movement—holding that Elder has met his burden to demonstrate that religious beliefs motivated his conduct. Even as it recognizes the sanctuary free exercise interest, the *Elder* decision holds the government's interest in policing its borders to be ultimately more compelling, for the court goes on to find that "implementation of the immigration laws represents an important Government interest which, on balance, justifies enforcement of § 1324(a)(2) against Elder." *Id.* at 1580.

Elder is the first case balancing a constitutional free exercise interest with the government's immigration interest. The importance of the immigration interest is analogized to a national security concern. *Id.* at 1578-79. Characterization of the immigration interest as one of national security in *Elder* appears to trigger judicial deference to Congress and the INS—and an attendantly lower standard of protection of individual constitutional interests. *Cf.* Goldman v. Weinberger, 106 S. Ct. 1310 (1986) (deferring to military interest in uniformity

government's interest in enforcing the immigration laws is compelling. The immigration of illegal aliens to this country has rendered our national borders irrelevant. The problem is overwhelming. The number of illegal aliens is difficult to estimate but is expected to be greater than three million.[88]

"Justice Powell has recently described the substantial governmental interest in the enforcement of immigration laws to curtail illegal immigration: 'We have noted before the dimensions of the immigration problems in this country. . . . Recent estimates of the number of illegal aliens in this country range between 2 and 12 million. . . . Clearly the government interest in this enforcement technique is enormous.' "[89]

"Thank you, Mr. Follows. Any questions?" asked the Reverend.

"I don't understand what's going on," clamored Mrs. Helperson. "First, you tell us we must vote to decide if we should become a sanctuary. But how can we ignore the immigration laws and Congress? If Congress' vote doesn't matter . . . why are we voting here? Isn't it enough if one of us believes the law is unjust to decide in favor of sanctuary? Doesn't '[a]ny man more right than his neighbors constitute a majority of one?' "[90]

Reverend Faire rose and responded, "Of course, Mrs. Helperson, you and yours may always try offering your own home as sanctuary. But there are limits. An individual cannot always define his or her religious freedom.[91] Here we are debating what this church should do. Since we all belong to this church we must all vote. This is a democracy."

"But," Mrs. Helperson declared, "the church is part of the country—and subject to its laws, laws for which we voted—at least indirectly. That is also democracy. How can we have it both ways?"

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over individuals' free exercise right). In so doing, the *Elder* court relied on the line of cases where the Supreme Court rejected free exercise challenges to government regulation because of some harm to the "public safety, peace, order or welfare." Wisconsin v. Yoder, 406 U.S. 205, 230 (1972). *See* Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1878).

88. *See* J. CREWDSON, THE TARNISHED DOOR: THE NEW IMMIGRANTS AND THE TRANSFORMATION OF AMERICA 111 (1983).

89. INS v. Delgado, 466 U.S. 210, 222 (1984) (Powell, J., concurring). *See* United States v. Ortiz, 422 U.S. 891, 899 (1975) ("tide of illegal aliens . . . massive lawlessness") (Burger, C.J., concurring); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1046-50 (1984); Sure-Tan v. NLRB, 467 U.S. 883, 892-94 (1984); United States v. Valenzuela-Bernal, 458 U.S. 858, 864 (1982); *cf.* R. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 36 (1984) (regarding historical international concern with the regulation of immigrant refugee populations).

90. H. THOREAU, *supra* note 46, at 41.

91. *See Yoder,* 406 U.S. at 220; Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878).

"There is a clash," said the Reverend. "But no matter the end, the means will draw our country's attention to the refugee plight.

"Now then, let us vote."