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The Sanctuary Movement: Above the Law or Beyond It's Reach?

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THE SANCTUARY MOVEMENT: ABOVE THE LAW OR BEYOND ITS REACH?

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INTRODUCTION

In January of 1985, the Reagan Administration launched the sternest governmental challenge to a religious movement in this country since the Mormon prosecutions of the last century. Sixteen clerics and lay religious workers, including a Protestant minister, two Catholic priests, and three nuns, all members of the "sanctuary" movement providing succor to Central American refugees, were indicted in Phoenix, Arizona on charges of smuggling, transporting, and harboring illegal aliens. Twelve of the sixteen were recently on trial facing prison terms of as much as fifteen years.

The Phoenix indictments escalated a simmering conflict between the government and religious activists to a full-blown church-state confrontation. Four indictments of sanctuary workers had been filed in 1984, three in Brownsville, Texas and one in Tucson, Arizona, but these cases arose from isolated instances of transporting refugees and involved only three defendants. The Phoenix indictment was directed at the founders and most visible leaders of the sanctuary movement, prompting charges by 200 bishops and church leaders that the prosecution was a politically motivated effort to silence critics of federal policy toward Central American refugees.

One need not be a social historian to appreciate the danger of such tension between the representatives of God and Caesar. Secular powers rarely need fear defeat at the hands of religious forces, the execution of Thomas More on the order of Henry VIII being a far more representative outcome of church-state conflict than the rout of the Shah of Iran by religious fundamentalists. Friction between the first and second estates inevitably

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erodes a society's political compact, however, and the sanctuary battle holds that disturbing prospect.

Over strenuous objection from federal immigration officials, municipal governments in major population centers such as Los Angeles and San Francisco already have stated their intention to join churches in shielding Central American refugees from deportation. No one can welcome the political and social divisions created by the sanctuary prosecutions. Why this conflict has arisen and how it can be resolved are the questions this essay will address.

THE PRESIDENT VS. THE PASTORS: THE SOURCES OF THE CONFRONTATION

In the summer of 1980, "coyotes," or commercial smugglers, deserted a group of Salvadorans in the Arizona desert. Half died of dehydration; the remainder stumbled into Tucson on their hands and knees and immediately were targeted for deportation.[1] The response of the religious communities of Tucson to this tragedy provided the impetus that began and continues to sustain the sanctuary movement.

In early 1982, churches in Tucson and the San Francisco Bay Area, another locus of large numbers of Hispanic immigrants, publicly declared they would provide sanctuary for refugees from Central America. Hundreds of other churches across the country have joined this sanctuary network. Each takes in Central American refugees knowing they have entered the country without being processed by immigration officials. Refugee families are given food and clothing, are housed either in the church proper or in the home of a parishioner, and become a part of the religious community of that church.

While immigration officials have condemned the provision of sanctuary as an illegal form of harboring of aliens, no church or person associated with the movement has been prosecuted for engaging in it alone. Rather, all five sanctuary movement indictments have been directed at religious workers who allegedly either have assisted refugees in entering the United States without documentation or in moving refugees from border areas to safer quarters in major cities. The movement does not deny that some

1. BAU, THIS GROUND IS HOLY 10 (1985) [hereinafter BAU].

of its members interview Central American emigrants in Mexico and other countries and surreptitiously shepherd those considered to be *bona fide* political refugees across our national borders. Once the refugees are in the country, the movement finds a church that will grant them sanctuary. The historical parallel favored by the movement to describe this most controversial aspect of its work is that of the Underground Railroad created by abolitionists to aid escaping slaves in the nineteenth century.[2]

The sanctuary movement rests on a complex of perceptions shared by many American religious communities. The first is that political violence, perpetuated by forces in Central America actively or tacitly supported by the Reagan Administration, has produced a wave of refugees seeking to avoid death or injury by flight to the United States. That such violence exists is not subject to dispute. Civil wars have raged in El Salvador and Nicaragua for over five years, and an insurgency among Indians in Guatemala in the past decade was crushed at a cost of thousands of civilian deaths. Nor does anyone doubt that the United States has witnessed a tremendous migration of Central American refugees over the last five years, including five hundred thousand Salvadorans alone.[3]

That United States-backed forces play a role in Central American violence seems apparent. The Reagan Administration correctly claims that it has acted to curtail such violence—for example, right-wing death squad killings in El Salvador have dropped due to U.S. pressure. The commendable efforts of emissaries such as Vice President Bush to drive from the Salvadoran military dozens of officers identified as active in the death squads, however, are an acknowledgement of the role our military allies have had in the thousands of killings those squads have committed. Furthermore, the military sweeps identified as a major cause of Salvadoran migration are conducted with military equipment provided by the United States.

As to Guatemala, Congress terminated military aid to that country some years ago precisely because it found that American

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2. *Id.* at 3, 160-161.

3. *Temporary Suspension of Deportation for Nationals of Certain Countries: Hearings on H.R. 822 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 4, 7 (Nov. 7, 1985)(statement of Congressman Moakley)[hereinafter *Suspension Hearings*].

assistance was being used to facilitate widespread abuses of human rights. Also it is no longer a secret that the insurgent "contra" forces in Nicaragua have received military and economic support from Washington.

The present administration does challenge the sanctuary movement's linking of this violence to the influx of Central Americans witnessed in this country, maintaining that these immigrants are economic refugees seeking economic opportunity rather than a respite from political persecution. To some extent the administration is correct. There has always been economic migration from Central America to the United States; it is illogical to assume it has not continued in the last few years.

It is equally nonsensical to suggest, however, that brutal civil wars, accompanied by rampant death squad activities and bombing of civilian populations, would not produce widespread migration unrelated to economic motivation. In fact, research by William Stanley, a doctoral candidate at the Massachusetts Institute of Technology, employing a sophisticated regression analysis of economic and political variables has established that there is "a strong statistical relationship between the level of political violence in El Salvador and the numbers of Salvadorans who migrate to the U.S."[4] and "that fear of political violence is *the predominant motive* behind the decisions of Salvadorans to migrate to the U.S. since 1979."[5]

Perhaps the pivotal perception upon which the sanctuary movement is built is that of an inequitable application by our government of refugee law. Under the 1980 Refugee Act,[6] a person possessing a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" is entitled to political asylum in the United States.[7] The movement claims that the 1980 Act is being enforced selectively so as to provide asylum only to those fleeing governments at odds with the United States—for example, Iran, Nicaragua, and Afghanistan—while denying it to those equally

4. Stanley, *Economic Migrants or Refugees From Violence? A Time Series Analysis of Salvadoran Migration to the United States, reprinted in Suspension Hearings, supra* note 3, at 125, 126 [hereinafter Stanley].

5. Stanley, *supra* note 4 *reprinted in Suspension Hearings, supra* note 3, at 157.

6. Pub. L. No. 96-212, 94 Stat. 109(Mar. 17, 1980).

7. 8 U.S.C. § 1101(a)(42)(1982).

meritorious applicants fleeing regimes the United States supports, notably El Salvador and Guatemala.

Statistics are a grossly imprecise tool by which to measure the results of a process as dependent on non-quantitative variables as is asylum adjudication. Nonetheless, the disparities in the success of asylum applicants on a country by country basis lend support to the sanctuary thesis. In fiscal year 1984, applicants from Guatemala were granted asylum in less than one percent of the cases decided; Salvadorans, at 2.5 percent, fared little better. These figures are in striking contrast to an approval ratio of approximately 20 percent in general, 32.7 percent for Poland, 40.9 percent for Afghanistan, and 60.9 percent for Iran.[8] An internal report of the U.S. Immigration and Naturalization Service (INS) itself confirms the use of a double standard:[9]

> [D]ifferent levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status while others do not. For example, for an El Salvadoran national to receive a favorable advisory opinion, he or she must have "a classic textbook case."

One thing is clear. For whatever reason, our government defines its duty of humanitarian assistance to Central American refugees far, far more narrowly than do many of America's churches. In the government's view, a Salvadoran fleeing his village because he fears death from government air raids or guerilla attacks is not entitled to asylum in this country unless he can prove that he personally was the prospective target of one assault or the other.[10] Conditioned by the teaching of Deuteronomy to "love the sojourner," the churches of the sanctuary movement maintain asylum should be available even if a refugee's name is not written on a government bomb or a guerilla bullet.[11] It was in this wide gap between the state's view of its

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8. BAU *supra* note 1, at 60.

9. *ACLU Statement on Displaced Salvadoran Refugees, reprinted in Suspension Hearings, supra* note 3, at 226, 232 [hereinafter *ACLU*].

10. *See, e.g.*, Bolanos-Hernandez v. INS, 749 F.2d 1316, 1323 (9th Cir. 1984).

11. The Supreme Court's recent decision in INS v. Cardozo-Fonseca, 107 S. Ct. 452 (1987) aids the sanctuary movement's position by recognizing that the well-founded fear standard used in evaluating asylum claims contains a subjective component. Whether the decision will alter the unequal fashion in which the refugee provisions of the Immi-

humanitarian obligations and those of the churches that the sanctuary movement was spawned. It is to possible solutions of the conflict that we now turn.

THE FREE EXERCISE DILEMMA

The sanctuary movement's preferred solution to its conflict with the federal government would be judicial recognition of a constitutional privilege for religious workers to assist Central American refugees. As demonstrated below, the movement's claim under the free exercise clause of the first amendment may well be sound; however, its adjudication is disfavored on procedural grounds.

The doctrinal waters of the first amendment's religion clauses are more than a little muddy at the moment, perhaps inevitably so given the inherent tension between the free exercise and anti-establishment safeguards.[12] It is clear that the free exercise guarantee under certain circumstances does protect conduct that otherwise would be proscribed by a criminal statute. To claim a constitutional exemption from criminal prosecution for religiously motivated conduct, a party must demonstrate that the conduct in question was undertaken pursuant to a belief that was (at most) central to one's religion[13] or (at least) sincerely held.[14]

Such a showing having been made, a religious claimant prevails unless the government can demonstrate an interest in the statute's application that has been variously described as "compelling,"[15] of the "highest order"[16] and of "sufficient magni-

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gration and Nationality Act (INA) are applied on a country-by-country basis remains to be seen. *See* text accompanying notes 6–9.

12. *See e.g.*, Comment, *Aid to Parochial Schools and the Entanglement of Church and State*—Aguilar v. Felton, 4 N.Y.L.S. HUM. RTS. ANN. 239 (1986).

13. Wisconsin v. Yoder, 406 U.S. 205, 235-236 (1972); People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) (Native American Church's use of peyote); *but see*, Bowen v. Roy, —U.S.—, 106 S.Ct. 2147 (1986)(receipt of federally funded welfare benefits).

14. Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707, 715-716 (1981).

15. Sherbert v. Verner, 374 U.S. 398, 403 (1963); *see also, In re* Jenison, 375 U.S. 14(1963)(remanding in light of *Sherbert*); Braunfeld v. Brown, 366 U.S. 599 (Sunday closing laws); West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 643–44(concurring opinion); Cantwell v. Connecticut 310 U.S. 296(1940).

16. *Yoder*, 406 U.S. at 215.

tude,"[17] and "essential to accomplish an overriding governmental interest,"[18] In at least some cases, the government has also been required to prove that the statute employs the means of achieving its objective "least restrictive" of religious practice.[19]

. There is little doubt that sanctuary activity meets the threshold constitutional test. In the first proceeding in which the issue was raised, the prosecution of Jack Elder, director of Casa Oscar Romero, a refugee center in Brownsville, Texas, a federal district court found that Elder's assistance of those fleeing Central America was undertaken in fulfillment of "his Christian obligations as he genuinely perceived them to be and that Elder presented substantial testimony to support his view of Christianity."[20] In the Phoenix cases, the government offered to stipulate to the defendants' satisfaction of the first prong of the free exercise test, perhaps to avoid a damaging testimonial display of the ethical and religious bases of the conduct for which they were charged.

Whether sanctuary defendants can prevail as well on the second prong of the test appears to turn on a question of doctrinal definition. When courts that apply the free exercise clause permit the government to match its interest in *any* and *all* enforcement of a statute against the claim for a religious exemption, the claimant understandably loses.[21] On the other hand, if the burden on religious activity is weighed against only the government's interest in applying the statute to those few individuals seeking exemption, religious freedom is the winner.[22] It seems obvious that had *Yoder* defined the state's interest as broadly as *Lee*, or *Lee* as narrowly as did *Yoder*, the holding in each case would have been turned on its head.

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17. *Id.* at 214.

18. United States v. Lee, 455 U.S. 252, 257-58 (1982).

19. Bob Jones University v. United States, 461 U.S. 574, 604 (1983), and *Thomas*, 450 U.S. at 718-19. *But see* United States v. Lee, 455 U.S. at 259 (claimant in effect required to prove absence of restriction on the government's interest, rather than vice versa).

20. United States v. Elder, 601 F. Supp. 1574, 1578 (S.D. Tex. 1985)(denying motion to dismiss despite claim based upon free exercise of religion).

21. *See, e.g.*, United States v. Lee, 455 U.S. 252, 258–259 (government's interest in nationwide social security system outweighs Amish interest in religious exemption to mandatory contributions).

22. *See* Wisconsin v. Yoder, 406 U.S. at 221 (issue is not state's interest in public education generally, but in compulsory education of Amish children in particular, and that interest is outweighed by Amish interest in religious freedom).

In the *Elder* case, the district court defined the government's interest, as in *Lee*, as that of "protecting a congressionally-sanctioned immigration and naturalization system designed to maintain the integrity of this Nation's borders."[23] Having been so broadly defined, the government's interest in having any control over its borders whatsoever naturally prevailed over Elder's in practicing his faith.[24]

The outcome would be quite different if only the government's interest in controlling sanctuary activity were weighed in the balance. Estimates of the number of refugees assisted by the movement range from several hundred to three thousand.[25] This is to be compared to the hundreds of thousands of Salvadorans who have entered the country illegally since 1980,[26] the four million or more illegal aliens in the country, and the thousands of political refugees from other regions in the world—71 thousand in 1984[27]—upon whom the Administration bestows legal status each year. In the face of such statistics, a finding that the republic would collapse unless the government prevents the sanctuary movement from assisting a relative handful of undocumented aliens appears unwarranted.

Since Jack Elder was acquitted at his first trial, no appellate court has reviewed the denial of his free exercise claim. However, the same issue was presented before the fifth circuit and rejected in an appeal from another trial at which Elder was convicted.[28] Though the activist's first amendment claim remains strong, there is nonetheless a good reason for deferring a decision, rather than rendering one, upon this issue.

The relative absence of religious strife in this country must be attributed to a social and political climate that fosters, but does not favor, religious activity. Since any ruling permitting an exemption from criminal prosecution to a religious group can fairly be attacked as a form of favoritism on the basis of membership in a particular religious cult, the rule that decisions of

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23. 601 F. Supp. at 1578.

24. *Id.*

25. BAU, *supra* note 1, at 12.

26. *Suspension Hearings*, *supra* note 3 at 4, 7.

27. *ACLU*, at Table III, *reprinted in Suspension Hearings*, *supra* note 3, at 249.

28. United States v. Merkt, 794 F.2d 950, 954-57 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1603 (1987).

constitutional issues should be avoided where cases can be resolved on alternative grounds should be carefully observed in adjudicating the free exercise claims of the sanctuary movement.[29]

THE STATUTORY SOLUTION

Whether sanctuary workers have a constitutional right to assist Central American refugees is a question that need never be confronted if their doing so is not prohibited by statute. Despite the government's claims to the contrary, the statutory provisions under which sanctuary workers have been charged with illegally smuggling, transporting, and harboring refugees,[30] may well be inapplicable to the movement's activities.

The legislative history of portions of section 1324 makes clear that the targets of its proscriptions were commercial smugglers. As one of its authors stated:[31]

> I do not wish to center an attack on anybody except the smuggler and the man who tries to make money out of the misery of some of these workers. That is what I want

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29. Rosenberg v. Fleuti, 374 U.S. 449, 463 (1963).

30. 8 U.S.C. § 1324(a)(1),(2), and (3)(1982), respectively. The former proviso in § 1324(a) allowing an exemption to employers of illegal aliens has not been at issue in the sanctuary litigation and in the cases discussed in this article. The recent amendment to 8 U.S.C. § 1324(a), which eliminated the employer exemption, also changed the requirements of 8 U.S.C. § 1324(a)(1–3). *See* The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 112(a).

The new provisions in §1324 have not dispensed with the *mens rea* requirement of the former statute and thus will not be separately examined in great detail in this article. The new section requires that the defendant's acts be undertaken with knowledge, or with reckless disregard of the fact, that the alien is entering or within the United States in violation of law. *See* IRCA § 112(a), amending 8 U.S.C. § 1324(a) (the new provisions are designated § 1324(a)(A), (B), (C), and (D)). Former § 1324(a)(1) did not expressly have a "knowledge" requirement, although it was interpreted by the courts as having one. *See* discussion *supra* at notes 33 to 36 and accompanying text. The fact that all subsections of the new § 1324(a) explicitly provide that the defendant have acted either with knowledge, or with reckless disregard, of the fact that the alien's status in the United States is illegal, indicates congressional endorsement of the *mens rea* component. Arguably, the "reckless disregard" provisos of the new subsections broaden the frame of mind that will allow for a conviction. Nonetheless, the argument advanced elsewhere in this article that a defendant's good faith belief that an alien is entitled to refugee status or asylum under the Immigration and Nationality Act, is sufficient to establish that the defendant did not act in reckless disregard of the immigration laws. *See* discussion at notes 31 to 40 and accompanying text.

31. 98 CONG. REC. 1347 (1952) (statement of Mr. Cellar).

> to get after. Certainly we do not want to get after the good people. It is the bad at whom we aim our shafts.

Congress recognized that millions of Americans with innocent intent engage in a wide range of transactions with illegal aliens. If these citizens were to be protected from criminal liability, *mens rea* had to be made the essential element of crimes under section 1324: "*[T]his bill is not intended to get after those who desire to abide by the law.* It seeks to get after those who are endeavoring to entice innocent, harmless Mexicans over the border to harbor, to conceal them, and to exploit them."[32]

That viewpoint informed not only the drafting of the statute, but the judicial interpretation of it as well. For example, in *Bland v. United States*,[33] the defendants were charged with illegally smuggling two anti-Castro Cubans into the United States in violation of section 1324(a)(1).[34] The trial court made a finding that as a matter of law the aliens the defenadants were bringing into the country were not duly admitted. The defendants acknowledged this, but asserted that at the time of the charged offense they had believed the Cubans were entitled to enter and reside in the United States. Although no *mens rea* element is expressly stated in subsection (a)(1), the fifth circuit recognized that such a mistaken belief was a defense to the charge, and reversed the defendants' convictions because the the trial court had not reiterated the nature of this defense to the jury when it requested supplementary instructions.[35] A conviction under section 1324(a)(1) for smuggling thus requires a defendant's personal knowledge that the alien in question is not entitled to enter or reside in the United States.[36]

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32. *Id.* at 1346 (emphasis added).

33. Bland v. United States, 299 F. 2d 105 (5th Cir. 1962).

34. 8 U.S.C. § 1324(a)(1), Act of June 27, 1952, c. 477, Title II, ch. 8, § 274(a)(1), 66 Stat. 228.

35. 299 F.2d at 108.

36. In the current fifth circuit this is the accepted rule that has been applied concerning both subsections (1) and (2) of former 1324(a): United States v. Merkt, 764 F.2d 266 (5th Cir. 1985), *reh'g. denied*, 772 F.2d 904(1985). (dissenting opinion: defendant's mistake as to the legal status of transported aliens is a defense to a prosecution under § 1324(a)(2)), discussed below at text accompanying notes 46–49; United States v. Herrera, 600 F.2d 502 (5th Cir. 1979)(duress is a defense to knowingly transporting illegal aliens under § 1324(a)(2)); United States v. Madrid, 510 F. 2d 554 (5th Cir. 1975)(knowledge of alien's illegal status is an element of the crime defined by § 1324(a)(2)), *rev'd on other grounds and remanded*, 517 F.2d 937 (1975); United States v. Boerner, 508 F.2d

In another case involving Cuban refugees, the eleventh circuit held that 1324(a)(1) was not intended to outlaw "the mere transportation of refugees seeking asylum," and thus could not be used to prosecute those who assisted Cubans to seek political asylum by bringing them to the shores of this country in the 1980 Freedom Flotilla.[37]

The same concern that the application of section 1324 be limited to those with evil intent is found in decisions interpreting subsection (a)(2), the ban on transportation of illegal aliens within the United States.[38] That subsection requires that in transporting the illegal alien the "defendant acted willfully in furtherance of the alien's violation of the law."[39] Similarly, it has

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1064 (5th Cir. 1975), *cert. denied*, 421 U.S. 1013(1975)(defendant's "guilty knowledge of the aliens' illegal status is an essential element in establishing violation of § 1324(a)(1)); Banderas-Aguirre v. United States (5th Cir. 1973), 474 F.2d 985 (§ 1324(a)(2) does not presume the defendant transporting an alien in the United States knows the alien is there illegally); United States v. Quinonez-Alvarado, 317 F. Supp. 1344 (W.D. Tex. 1970)(defendant who provides transportation to an alien must know such alien had lost his legal status in order to obtain a conviction under § 1324(a)(2)).

In as much as the other circuits have spoken on this issue they have agreed: United States v. Powell, 771 F.2d 1173 (8th Cir. 1985)(under § 1324 (a)(2) an inference may be drawn from the defendants' efforts to conceal aliens that they had requisite knowledge of the aliens' illegal status); United States v. Fierros, 692 F.2d 1291 (9th Cir. 1981), *cert. denied*, 462 U.S. 1120 (knowledge requirement under § 1324(a)(2) is one pertaining to alien's illegal status and not one pertaining to statutory proscriptions); United States v. Bunker, 532 F.2d 1262 (9th Cir. 1976)(although indictment may fail to charge defendant with requisite knowledge of alien's illegal status, evidence brought out during trial may establish such knowledge and thereby warrant a conviction under § 1324(a)(1)); United States v. Holley, 493 F.2d 581 (9th Cir. 1974), *cert denied*, 419 U.S. 861 (taxicab driver who is aware of illegal status of passengers bears the necessary knowledge for a conviction under § 1324(a)(2)); United States v. Perez-Gomez, 638 F. 2d 215 (10th Cir. 1981)(knowledge requirement under § 1324(a)(2) is established where defendant takes steps to hide aliens to avoid suspicion); United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982), described briefly in text accompanying note 37 (defendant's knowledge of aliens' illegal status is a requirement for a conviction under § 1324(a)(1)); United States v. Anaya, 509 F.Supp. 289 (S.D. Fla. 1980)(concurring opinion at 300: "guilty knowledge and criminal intent are essential elements of the crime prescribed by § 1324(a)(1)."). *See also*, United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977)(employee who knowingly transports illegal alien employees while in the course of his employment is only incidentally connected to furthering the aliens' illegal presence and such activity is not included within the statutory proscription).

37. United States v. Zayas Morales, 685 F.2d 1272, 1277 (11th Cir. 1982) (citing *Bland* with approval).

38. This ban now appears in 8 U.S.C. § 1324(a)(1)(B), as amended by § 112 of the IRCA, Pub. L. No. 99-603.

39. United States v. Shaddix, 693 F.2d 1135, 1138 (5th Cir. 1982); United States v. Moreno, 561 F.2d 1321, 1322 (9th Cir. 1977). Under the amended § 1324(a)(1)(B), as

been held that a mistaken belief as to the legal status of an alien whom a defendant is charged with transporting, if reasonable, is a defense to a charge under subsection (a)(2).[40]

In light of this precedent, can it be said that giving sanctuary violates section 1324, properly interpreted? As far as the bulk of sanctuary activity—the provision by churches of food, shelter, and clothing to refugees—is concerned, the answer must be no. The simple fact is that in following the dictates of the Sermon of the Mount, churches and religious charities, particularly Catholic agencies in California, have been clothing, housing, and feeding illegal aliens from Central America for decades. As Lutheran Bishop Gustav Schultz of Berkeley, a sanctuary leader, also points out, his church, at the urging of the federal government, provided the same services for Vietnamese refugees in the 1970s as they now do for Salvadorans. Humanitarian assistance has been judicially viewed as beyond the reach of a statute designed to prohibit commercial exploitation of aliens.[41] The fact that no church or sanctuary worker has been prosecuted for simply sheltering a Central American refugee appears to suggest governmental recognition that this act alone does not violate section 1324.

The "underground railroad" component of the movement raises a very different question. The federal government always has aggressively prosecuted smuggling of aliens into this country, conduct in which some sanctuary activists concededly engage. The precedent discussed above would suggest, however, that even the railroad's conductors do not violate section 1324 if they act in the belief that those immigrants they assist are entitled to enter and reside in the United States under the terms of the 1980 Refugee Act, regardless of whether that belief is correct. A recent decision of the United States Supreme Court lends strong support to this prosition. In *Liparota v. United States*,[42] the Supreme Court held that when knowledge of a legal

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amended by § 112(a) of the IRCA, Pub. L. No. 99-603, the defendant may be convicted for transporting an alien "in reckless disregard of the fact that [such] alien [is] in the United States in violation of law." *See* note 30.

40. United States v. Fierros, 692 F.2d 1291, 1294 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 3090 (1983).

41. *Moreno*, 561 F.2d at 1322 n. 3.

42. 471 U,S. 419 (1985).

status is an element of the offense charged, a mistaken belief as to that legal status constitutes a defense.

The defendant in *Liparota* was charged under 7 U.S.C. section 2024(b),[43] which prohibits knowingly acquiring food stamps coupons in a manner "not authorized by [the statute] or the regulations." The evidence admitted at Liparota's trial showed that he had purchased food stamps from an undercover agent for substantially less than their face value, a manner of acquisition in fact not "authorized." On appeal Liparota argued that the trial court had erred by failing to instruct the jury that the government was required to prove that he *knowingly* acted in an unlawful manner. The Supreme Court agreed and reversed Liparota's conviction. The Court found that because knowledge was an element of the offense charged, lack of knowledge as to the illegality of possession constituted a defense.[44]

Analogously, since any violation of section 1324 requires a defendant's knowledge that an alien he assists is not entitled to enter or reside in the United States or that he is in the country in violation of law,[45] a sincere belief, or at least a reasonable one, in the alien's entitlement to enter and enjoy political asylum here under the 1980 Act would relieve that defendant of criminal liability. The validity of this mental state defense has yet to be determined, although a divided panel appeared to reject it in some unconvincing dicta in the first sanctuary case in which the issue was raised. In *United States v. Merkt*,[46] the defendant was convicted of transporting illegal aliens after being arrested while taking Salvadoran refugees from the Texas border to San Antonio. The Fifth Circuit unanimously reversed the defendant's conviction because the trial court had failed to instruct the jury that Merkt could not be convicted if her ultimate intention had been to assist the refugees in applying for political asylum.[47]

Relying on the oft-cited maxim that "ignorance of the law will not excuse," a majority of the panel went on to reject

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43. 78 Stat. 708, as amended.

44. 471 U.S. at 425–26.

45. Bland v. United States, 299 F.2d 105, 108 (5th Cir. 1962); *See also*, United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977); United States v. Fierros, 692 F.2d 1291 (9th Cir. 1982), *cert. denied*, 103 S.Ct (1983).

46. 764 F.2d 266 (5th Cir. 1985), *reh'g. denied*, 772 F.2d 904(1985).

47. 764 F.2d at 272.

Merkt's broader contention that her belief that the refugees were entitled to asylum and were thus legally in this country constituted a complete defense to the crime.[48] The majority, however, failed to distinguish or even cite *Liparota*. Judge Alvin Rubin, in dissenting from this portion of the *Merkt* decision, relied upon *Liparota* stating:[49]

> The defendant's knowledge of the alien's illegal status is an essential element of the offense, which the government is required to prove . . . If Merkt could establish that she was ignorant of the true legal status of the two aliens, therefore, she should be allowed to assert this state of mind, however, mistaken it was, as a defense to her prosecution under § 1324(a)(2).

Acceptance of Judge Rubin's view, which is wholly consistent with both the legislative history of section 1324 and the holding of *Liparota*, would pose no appreciable impediment to prosecution of commercial smugglers, who have no greater success raising a "good faith" defense than one of entrapment or insanity. Nor would it necessarily preclude proceeding against sanctuary activists on the theory that the clandestine nature of their activity proves their knowledge of its illegality. It would, however, permit the movement's members to present a defense that they firmly believe that the 1980 Refugee Act legalizes their actions in bringing *bona fide* political refugees into this country, and that they act in secret only because the government dishonors the law by refusing asylum status to Salvadorans entitled to it.

In order to convict under this reading of section 1324, the government would have to prove to juries beyond a reasonable doubt that the priests, nuns, ministers, and religious faithful who present this "good faith" defense are lying about their subjective understanding of the law. The government cannot meet that burden. Prosecutors may well convince juries that the movement's view of the law is wrong, but not that it is insincere. Nor can they prove unreasonable the movement's belief that the refugees aided by the "railroad" are entitled to asylum: they

48. *Id.* at 273.
49. *Id.* at 275(footnotes omitted).

have been selected for assistance precisely because their stories of persecution are so compelling. If this limited view of the statute's scope judicially prevails, and it should, sanctuary prosecutions will be brought to a screeching halt. That would be in the government's interest. For no case in recent memory has done more damage to the image of federal law enforcement in this country than have the sanctuary prosecutions.

Normally when a prosecutor frees a thief, rapist, or murderer from jail or even pays him a stipend to inform on another criminal, nary a ripple of protest is heard. The public is either unaware of the practice or considers it a fair bargain. But the federal government's payment of a modern day slave trader to infiltrate and tape church meetings in Tucson and to befriend and later betray the Arizona sanctuary defendants prompted condemnation on editorial pages around the country.[50] It also brought a rebuke from the trial judge, who complained that the use of paid and wired informants in places of religious activity meant that "the whole process has been sullied in a sense."[51]

Furthermore, because the whole truth would damage its case, the government has sought to limit the playing field in the sanctuary cases. It has moved to exclude from evidence any mention of a defendant's religious beliefs or motivations, of the dangers refugees fled in Central America, or of international refugee law or the 1980 Act.[52] The Reagan-Meese Justice Department thus finds itself facing the same charges of distorting the truth it so frequently levels at the defenders of the fourth amendment's exclusionary rule.

Finally, if the Administration hoped to quell either the providing of sanctuary by churches or the criticism of its refugee policies from religious leaders, the prosecutions have been dysfunctional. Both appear to have increased exponentially since 1984.

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50. *See, e.g.*, Hentoff, *Undercover Agents Go To Church*, Wash. Post, at A27 (June 14, 1985).

51. *Id.*

52. *See, Sanctuary: Church Workers Face Trial*, April 1985 A.B.A.J. at 19.

CONCLUSION

There are other ways of dealing with the sanctuary movement conflict than the devices of statutory interpretation suggested here. El Salvador's President Duarte has called upon the United States to allow Salvadorans to remain within the United States for humanitarian reasons.[53] Legislation has been proposed in Congress, albeit unsuccessfully, to temporarily suspend the deportation of Salvadorans from the United States.[54] Allowances could be made for those Salvadorans who have not been in the United States illegally since January 1, 1982, and who are thus ineligible for the amnesty provision of the recently passed Immigration Reform and Control Act of 1986.[55] Passage of such a bill would hold the prospect of eliminating much of the problem that called the sanctuary movement into existence.

Absent congressional action, the best solution to the church-state friction caused by sanctuary prosecutions may be the simplest: the Reagan Administration should abandon them. Judicial limitation of section 1324 to its intended scope will promote the intelligent exercise of prosecutorial discretion under the statute.

53. Duarte, Letter to the Editor, N.Y. Times, May 12, 1987 at A30.
54. H.R. 822, 99th Cong., 1st Sess. (1985)(the Moakley Bill).
55. § 201 of the IRCA of 1986.