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BOOK ESSAY

OF MORALITY, POLITICS AND THE LEGAL ORDER

Sanctuary: A Story of American Conscience and the Law in Collision.
By Ann Crittenden.* Weidenfeld & Nicolson (1988), 393pp., \$21.95.

Reviewed by Katherine L. Vaughns**

“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”¹

The practice of providing sanctuary is a “persistent and recurring command” that dates back to biblical times — as demonstrated by the Old Testament passage admonishing the faithful to care for the alien in their midst.² *Sanctuary* relates the modern day story of those who responded to this recurring biblical command when increasing numbers of undocumented aliens seeking refuge from the turmoil and violence occurring in their Central American homelands began crossing the southwest border into the United States in the early part of the last decade. The book also raises, but fails to answer completely, the moral question: “What do we owe people who are not a part of our political communities?”³ A satisfactory answer to this question, one of the old-

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1. *Leviticus* 19:33-34 (King James).

2. I. Bau, *Sanctuary*, *NEW CATHOLIC WORLD* 97, 129 (May-June 1985); for an excellent overview of the historical development of the law of sanctuary and the legal status of the contemporary American sanctuary movement see generally I. BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* (1985); see also Carro, *Sanctuary: The Resurgence of an Age Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 *U. CIN. L. REV.* 747 (1986) (for a detailed discussion of the historical development of the law of sanctuary).

3. A. CRITTENDEN, *SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND LAW IN COLLISION* (1988) [hereinafter CRITTENDEN]; Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 *HARV. C.R.-C.L. L. REV.*, 493 (1986) [hereinafter Helton] (this article discusses the international and domestic law arguments which were raised in the context of the prosecutions of the Arizona sanctuary workers).

est in political philosophy, is problematic, however, given the complexity of the moral issues generated by the sanctuary movement and the legal context in which they arise.⁴

The answer to the moral question which *Sanctuary* raises is ultimately one the reader must draw on his or her own. An answer may be drawn from the story Ann Crittenden tells of the eleven clergy and lay church workers who, guided by religious beliefs, engaged in a form of

4. The sanctuary movement raises issues that relate to the legal protection accorded individuals who come to this country seeking refuge. These issues, however, arise in the context of the law and policies relating to the admission and exclusion of aliens, an area which courts consider a matter of sovereign prerogative. As the Supreme Court stated in *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (*quoting* *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)), "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."

The participants in the sanctuary movement contended, however, that the government's refusal to grant refugee status to those undocumented aliens fleeing from Central American countries violated international humanitarian law based on international conventions and customary state practice. *See* Helton, note 3, at 512 (Project on the Sanctuary Movement). However, the legal status of all aliens who seek asylum in this country, including the Central Americans in this story, is determined by immigration officials pursuant to immigration laws based on filed applications presented to the agency in accordance with regulations. Specifically, the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), which has both an international and domestic component, governs the nature of the legal protection accorded those seeking refugee status and this Act designates the Attorney General to determine refugee status. *See* *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 427, 107 S.Ct. 1207, 1211 (1987).

Although, the Central American aliens in this story are indeed refugees conceptually, the legal definition of a "refugee" is narrower than the popular conception — i.e., a victim of persecution, war, or natural disaster. "The most common legal definitions of 'refugee' focus only on persecution. They do not recognize economic deprivation or natural disasters, or even the outbreak of military hostilities in the homeland, as the source of refugee status." ALEINIKOFF AND MARTIN, *IMMIGRATION PROCESS AND POLICY* (1985) 615. Such is the case in the United States.

The Refugee Act of 1980 added a new section 208 to the Immigration and Nationality Act which ties the grant of asylum only to applicants who show that they have a "well-founded fear of persecution" if returned to their home countries "on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act, § 208, 8 U.S.C. § 1101(a)(42)(A) (Supp. 1989) [hereinafter INA]. This 'well-founded fear of persecution' standard tracks United States obligations under international law. *See* United Nations Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (U.S. acceded to the Protocol in 1968.) This language is taken directly from Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6259, 6276, T.I.A.S. No. 6577, 189 U.N.T.S. 137, 176.

civil disobedience which came to be known as the American sanctuary movement, a new underground railroad.⁵ However, this form of civil disobedience is distinctly different from the concept envisaged by Thoreau or Gandhi, who advocated passive resistance rather than active violations of criminal laws.⁶

Participants in the contemporary sanctuary movement viewed their involvement as a revival of the spirit that invigorated the mid-nineteenth century underground railroad movement and claimed protection under the religious freedom clause. These sanctuary workers, in effect, defied immigration laws that prohibited the smuggling, harboring and transporting of undocumented Central American aliens in the United States.⁷ The activity was similar to that in which the clergy and laity, participants in the Underground Railroad movement during the last century, engaged in defiance of the 1850 Fugitive Slave Law which prohibited the harboring or assistance of runaway slaves in the United States.⁸ According to the sanctuary workers, the undocumented aliens faced the constant possibility of deportation if arrested by immigration officers. Thus, dissatisfied with the asylum process involving Salvadoran and Guatemalan aliens who sought refugee status, sanctuary workers urged them to avoid immigration officials. The workers viewed their mission of providing sanctuary as one which, among other things, prevented the virtually automatic deportation and almost certain death of Central Americans if they were returned to their homelands. The government viewed the sanctuary mission quite differently. According to the government, the workers' activities were criminal.⁹ In order to

5. Beginning in Mexico, various sanctuary workers directed undocumented aliens from Central America across the Mexican border to several churches in Arizona that operated as self-described sanctuaries. See *United States v. Aguilar*, 871 F. 2d 1436, 1441 (9th Cir. 1989). From Arizona, the workers sent many of these aliens to Chicago where they were dispersed throughout the United States to what was termed "safe-houses." *Id.*

6. For example, in a letter to then U.S. Attorney General William French Smith, Rev. John Fife, one of the leaders of the sanctuary movement and minister of the first church — Southside Presbyterian Church in Tucson, Arizona — declared the church a sanctuary for undocumented Central American refugees in 1982, stated the following: "We believe that justice and mercy require that people of conscience actively assert our God-given right to aid anyone fleeing from persecution and murder. The current administration of the United States law prohibits us from sheltering these refugees from Central America. Therefore we believe that administration of the law is immoral as well as illegal." Korn, *Hiding In the Open*, STUDENT LAW. 25,28 (Jan. 1986).

7. INA, *supra* note 4, § 1324(a).

8. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850).

9. The sanctuary defendants were charged with smuggling, transporting and harboring illegal aliens; some defendants were also charged with conspiracy to transport

avoid prosecution or conviction, sanctuary workers attempted to base their conduct on an exemption or a claim of legal privilege. However, no statute or rule of law in American jurisprudence recognizes the concept of sanctuary,¹⁰ and courts have upheld an exemption from criminal prosecution based on religiously motivated activities in only a very few cases.¹¹

Indeed, the authority for any provision of sanctuary today is moral and religious rather than legal.¹² Also, the modern day sanctuary movement marks the first time in recent history that religious groups engaged in the practice of sanctuary have ever sought a legal privilege for their activities.¹³ However, the asserted claim of religious freedom arises in an area of the law in which the nature of the sovereign's power has consistently been upheld as plenary,¹⁴ leaving thereby only a limited role for the courts. Thus, the book sets the stage for the inevitable collision between federal law and the American conscience.

The relationship of law and individual responsibility has always been a source of tension and conflict. Although an individual has a clear duty to obey the law, "the law cannot be the sole measure for his conscience"; and when confronted with a moral dilemma, the choice is not a clear one.¹⁵ Ultimately, however, each person must resolve any

illegal aliens. *United States v. Aguilar*, 871 F.2d at 1441.

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

11. Teitel, *Debating Conviction Against Conviction—Constitutional Considerations on the Sanctuary Movement*, 14 HASTINGS CONST. L. Q. 25, 35 (Fall 1986) [hereinafter Teitel]; see also *United States v. Elder*, 601 F. Supp. 1574, 1577 (D.C.S.D. Texas 1985) ("the enforcement of criminal laws can be constitutionally achieved even if the laws interfere with the religious practices of individuals." [citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)].)

12. I. Bau, *supra* note 2, at 133. Furthermore, the "moral obligation to assist others crosses religious and denominational lines." *United States v. Elder*, 601 F. Supp. 1574, 1579 (S.D. Tex. 1985).

13. For example, participants in the nineteenth century movement made no claim for legal recognition of the sanctuary activity. Members of the original underground railroad "seemed less interested in receiving any legal privilege sanctuary than in providing practical assistance to fugitive slaves. As abolitionists they were willing to violate what they perceived as an unjust and immoral law and did not claim any special privileges or immunities because of their religious character." I. Bau, *Sanctuary, supra* note 2, at 123. Also, during the Vietnam War — no legal recognition of the privilege of sanctuary was claimed. "Indeed it was precisely the illegality of the act — an act of civil disobedience — that gave the concept of sanctuary its symbolic power as a confrontation with an unjust and illegal war." *Id.* at 124.

14. *Id.*

15. *Id.* at 108 (see related article by J. Noonan, *The Conscientious Citizen*, NEW CATHOLIC WORLD 108 (May-June 1985)).

doubt of conscience within his or her own mind. Furthermore, the person who is guided by his conscience — as with Sir Thomas More — accepts the consequences of such an act.¹⁶ With one notable exception,¹⁷ whether the sanctuary workers depicted in the book were prepared to accept the consequences of their disobedience to the law is unclear.¹⁸ Establishing a legal preference exempting their sanctuary activities from prosecution appeared to be their paramount concern.¹⁹ Enter the lawyers who, perhaps unrealistically,²⁰ raised expectations as

16. *Id.*; see also e.g., I. BAU, THIS GROUND IS HOLY, *supra* note 2, at 170 (relating to the prosecution of sanctuary seekers during the anti-Vietnam War activities).

17. Jim Corbett, the Quaker farmer and iconoclastic leader of the sanctuary movement, also considered the father of the movement, is that notable exception. After the trial, Corbett, who had been acquitted, stated: "We will continue to provide sanctuary services openly and go to trial as often as is necessary to establish . . . that the protection of human rights is never illegal." CRITTENDEN, *supra* note 3, at 324.

18. When debating the pros and cons of declaring a public sanctuary, some of the sanctuary workers found the prospect of being charged with a criminal offense unappealing because they could end up behind bars "with no opportunity to explain their actions to the country." *Id.* at 61. Also, when two sanctuary workers were arrested in Texas for doing similar activities, "the nerves of the 'border breakers' were rattled." *Id.* at 124. Lastly, when returning to the courtroom to hear the jury's verdict, the defendants felt confident that the jury would see "the rightness and justice of their cause." *Id.* at 322. After the jury returned its verdict of conviction for eight of the eleven sanctuary defendants, "[a] grim pall settled over the defendants' side of the room." *Id.* at 323. Interestingly, the author reports that the defendants showed more composure than some of their lawyers. *Id.*

In the end, the author wrote that "a new note of anger and bitterness crept into some of [the sanctuary defendants'] public comments." *Id.* at 328. "They had been spied on, subjected to more than a year of criminal proceedings, and were now branded as felons; this meant, among other things, that unless they succeeded in eventually overturning the convictions, they had lost their right to vote. Psychologically many seemed to be circling the wagons, to see the world even more as 'us against them,' the good guys versus the bad." *Id.*

19. For example, early on it appeared that the sanctuary workers wanted to claim a legal preference for their activities. In an episode involving an earlier arrest of one of the sanctuary defendants, the author recounts that undocumented aliens traveling with sanctuary workers were told to tell the truth about their nationality so that "the activists could claim that they were not smuggling ordinary aliens but were assisting legitimate refugees." *Id.* at 128.

20. "Conflicts between religious interests and the law have generally favored the latter." Teitel, *supra* note 11, at 35 (1986). There have been a few exceptions. However, they usually deal with behavior which is not like that in which the sanctuary workers depicted in this story advocated. *Id.* at 35-36. The government's interest here is identified as the uniform application of immigration laws in controlling its borders. This interest has been analogized to a national security concern. *United States v. Elder*, 601 F. Supp. 1574, 1578-79 (S.D. Tex. 1985).

In the *Elder* case — another case involving the prosecution of a sanctuary worker

to the viability of a legal claim of privilege, contending that fundamental constitutional issues would control the outcome.²¹

Thus, *Sanctuary* acquaints the reader with some of the participants in and opponents of the sanctuary movement (including their lawyers and the judge who presided over the Arizona sanctuary trial), their personalities and deeply held personal and religious beliefs. In fact, the greatest strength of this book is its compelling character studies that enable the reader to understand better how the movement got started, its direction and why the government, lawyers, and judge responded as they did. Although the beliefs of the adversaries at issue were at opposite extremes of the religious and political spectrum, their personalities depicted in this story were remarkably similar.²² As the author observes in the book's introduction, everyone has a reason for the things he or she does in life, noting that "[r]obes of self-righteousness are not becoming, whoever wears them."²³ The explicit goal of the book is to inform — "despite its unavoidable judgments" — the reader of this discourse on contemporary history.²⁴

Another commendable attribute of this book is the author's steadfast resistance to the temptation to paint the adversaries in black and white, using "right and wrong," "good and bad" terminology. Instead, the reader finds the story line as impartial as possible given the compelling circumstances of this case. The author accomplishes this feat by adopting what she perceives to be a responsible approach, in keeping with her "pragmatic, secular turn of mind."²⁵ The retelling of this important episode in our recent history is based on many hours of interviews with the principals on both sides of the story. As a result, the reader is unable to assign easily any obvious labels to the participants in and opponents of the sanctuary movement.

The *Sanctuary* narrative begins by focusing on the personal stories of the parties involved in this essentially grassroots movement that gained amazing popular support among members of mainstream

— this type of interest triggers judicial deference to congressional enactments and the Immigration and Naturalization Service in implementing the laws. *Id.*

21. This was not the first time that such a claim or defense had been denied sanctuary workers. *See United States v. Merkt*, 764 F.2d 266, 273 (5th Cir. 1985) (Merkt I); *see also United States v. Merkt*, 794 F.2d 950, 965 n.18 (5th Cir. 1986) (reaffirmation by different panel of *Merkt I's* rejection of this defense), *cert. denied*, 480 U.S. 946 (1987).

22. CRITTENDEN, *supra* note 3, at 115.

23. *Id.* at xi; *see also id.* at 155 ("Where the sanctuary workers saw persecuted individuals, the INS men saw dangerous radicals.").

24. *Id.* at xi.

25. *Id.*

churches throughout the country. Crittendon's focus then shifts to the events leading up to and encompassing the government's ten month-long undercover operation — ironically designated "Operation Sojourner" — in which government agents and informants, among other things, infiltrated church meetings; the various reactions and concerns expressed by the sanctuary workers about the possibility of prosecution are also set forth.

Federal prosecutors in Arizona indicted the sanctuary workers for violations of the immigration laws. The prosecutor characterized this case as a routine alien smuggling matter. However, as a defense attorney commented, it was anything but routine.²⁶ Admittedly, this case was not routine, as so demonstrated by the book; rather, this case was one of the most controversial cases that the Immigration and Naturalization Service had ever undertaken. According to the government, providing sanctuary in direct contravention to federal laws undermined the whole immigration system.²⁷ Therefore, participants in the sanctuary movement could not be treated any differently than participants in alien smuggling rings.²⁸

Sanctuary accurately captures the political overtones. From the beginning, the trial in Arizona, while not the first involving the prosecution of sanctuary workers, was considered the benchmark for the movement. It was largely a public event, receiving widespread media coverage and involving a significant number of sanctuary workers as defendants. Indeed, the defense team's decision to try these defendants together was an apparent tactical move designed to mount a "frontal attack" against the administration's Central American policy.²⁹ The government, on the other hand, saw this case as an opportunity to deter further sanctuary activities. Not surprisingly, the real issues — legal and moral — got lost because politics predictably permeated all facets of both the case and the sanctuary movement.

Critics of the government's case maintained that the real issues

26. According to this defense attorney, a former assistant United States attorney, "[i]f it was a routine criminal case, the decision would be to decline to prosecute because the policy. . . was that the government does not prosecute cases like this. . . unless there is some special element of violence". Lempinen, *Right Place, Wrong Verdict*, STUDENT LAW. 34 (Jan. 1987) [hereinafter Lempinen].

27. Teitel, *supra* note 11, at 28.

28. *Id.*

29. In a subsequent account, one of the defense lawyers opined on the wisdom of the decision to try the defendants altogether. Lempinen, *supra* note 26, at 35. Had there been a severance, "the case might not have appeared to be such a frontal move on the government." *Id.*

were never allowed to be heard in court.³⁰ While this accusation accurately states the legal posture of the case, other alternatives were available to the participants but were not pursued.³¹ Even if the sole motive of the participants in the sanctuary movement was religiously based, the publicity that surrounded the offer of public sanctuary and the letters that the leaders wrote to the administration, lent an unmistakably political aura to the movement's direction.

The government viewed the sanctuary movement as political in nature from the start, presenting the majority of its adherents with opportunities to make political statements about the administration's policies in Central America. According to its critics, the Reagan administration's response to the Central Americans' flight from the daily life-threatening dangers in their home countries seemed to be anything but compassionate.³² According to the critics, cold war ideology dominated the asylum decision-making process, contrary to the politically neutral

30.*E.g.*, Helton, *supra* note 3, at 494 (this article sets forth arguments which were not presented to the jury in the Arizona sanctuary trial).

31. Schmidt, *Refuge in the United States: The Sanctuary Movement Should Use the Legal System*, 15 HOFSTRA L. REV. 79, 96-100 (1986) (this article discusses the alternatives not pursued by the sanctuary movement.) Also, in *United States v. Aguilar*, the court found that the sanctuary defendants had failed to establish that no other legal alternatives to violating the immigration laws existed. *United States v. Aguilar*, 883 F.2d at 693. The defendants had argued that immigration officials improperly handled the asylum claims of the Central American aliens who sought refugee status. However, the court noted that the defendants had failed to "appeal to the judiciary to correct any alleged improprieties" and cited cases such as *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982) (granting provisional injunctive relief); *Orantes-Hernandez v. Meese*, 685 F.Supp. 1488 (C.D.Cal.1988) (granting permanent injunction) in which Salvadorans had effected changes in INS detention and asylum procedures involving Salvadorans in California. *Id.*; see also *Nunez v. Boldin*, 537 F. Supp. 578 (S.D. Texas 1982), appeal dismissed, 692 F.2d 755 (5th Cir. 1982) (granting provisional injunctive relief affecting changes in INS detention and asylum procedures involving Salvadorans and Guatemalans in Texas.)

32. Helton, *supra* note 3, at 500-501. However, as Judge Head observed in *United States v. Elder*, 601 F. Supp. 1574,1579, commenting on similar criticism:

"Elder wishes to limit this Court's view solely to the violence in El Salvador; however, the human condition remains miserable in many parts of the globe. Man's inhumanity to man, as well as nature's, has been unrelenting throughout history. Many people live on this planet who logically are no less worthy of Elder's Christian charity than the Salvadorans. The consciences of others religiously motivated may conclude that the starving and impoverished of North America, Asia, or Mexico are equally entitled to enter this country without review by the INS. "Obviously all cannot enter."

* * *

Id.

scheme which the Refugee Act contemplated by the Refugee Act.³³ Critics also asserted that the administration could have provided a "safe haven" status³⁴ to these aliens but chose not to because it viewed these Central Americans as economic, rather than political, refugees.³⁵

Disagreement existed within the movement over the goals.³⁶ Some workers viewed their actions as part of a religious and moral

33. *Id.* at 496; *see also* Teitel, *supra* note 11, at 30.

34. The term "safe haven" status refers to an executive prerogative to grant certain groups of aliens "extended voluntary departure" status which, in effect, delays their departure from this country until conditions improve in their home countries. In a civil action addressing the administration critics' contention, the court concluded that the executive branch was well within its discretion to decline to provide such status to Central Americans. In *Hotel and Rest. Employees Union v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988), the court observed that the decision to grant or to withhold extended voluntary departure ("EVD") status, which is a safe haven measure, falls within the broad latitude the Attorney General enjoys in enforcing the immigration laws. *See INA supra* note 4, at § 1103(a) (authorizing Attorney General to establish such regulations and perform such other acts as he deems necessary to carry out his authority).

On several prior occasions, the Attorney General has granted EVD status for several groups of aliens. Regarding the Salvadoran aliens, the Attorney General determined that circumstances did not warrant granting them EVD status. As the court noted, this assessment was based upon: (a) the number of Salvadoran aliens already in this country; (b) the current crisis in which our country is experiencing a "floodtide" of illegal immigrants (sometimes referred to as the "magnet" effect); (c) the prospect of inducing further immigration by Salvadorans; (d) the effect of illegal immigration on the United States' finite law enforcement, social services, and economic resources, and (e) the availability of statutory avenues of relief, including application for asylum. 846 F.2d at 1510 The court found these factors to satisfy its limited review based upon the facially legitimate reasons standard, concluding, essentially, that the Attorney General's decision not to extend EVD status to Salvadoran aliens was largely unreviewable. *Id.*

35. This view still persists. In Congress recently, Senator Simpson once again expressed the administration's view that economic motives dominate the flight of Central American refugees in opposition to a bill providing for safe haven status for El Salvadorans and Nicaraguans. *Interpreter Releases*, Vol. 66, No. 42, Oct. 30, 1989, p. 1199. Sen. Simpson also insisted "no proof that returnees' lives are in danger existed." *Id.* He further commented: "The advocacy groups who pressed so obsessively for this legislation, including the Sanctuary Movement, were primarily opponents of our foreign policy in Central America; they thought Reagan was the Great Satan." *Id.*

36. CRITTENDEN, *supra* note 3, at 92-93. As reported in another article, "[a]t the core of the matter is the politicization of the sanctuary issue. Where Renny Golden [a member of the steering committee of the Chicago Religious Task Force — the national coordinating body for sanctuary churches, synagogues and Quaker meetings] views sanctuary in terms of foreign policy, Jim Corbett sees it as a personal choice." Korn, *supra* note 6 at 31.

imperative; others included a politically activist duty in that equation.³⁷ For the latter group, involvement in the sanctuary movement afforded them an opportunity to raise public awareness about the administration's policies, in the hopes of bringing an end to the conflict. Nonetheless, it is difficult to neatly categorize the motives of the sanctuary workers, a difficulty also present when categorizing aliens from Central America who arrive with mixed motives insofar as their claims of asylum are concerned.³⁸

Finally, a truly political confrontation existed between the sanctuary workers and the government over the process by which Central Americans fleeing civil strife in their homelands are granted asylum status in this country. Initially, these workers attempted to work within the system. However, they quickly realized that most Central Americans were denied asylum and deported. For the sanctuary workers, the government's actions were unlawful. Therefore, avoiding the law seemed to them the only morally responsive activity under the circumstances.

Sanctuary, in effect, underscores the yearning for a bygone era. Given the tenor of the times in the early eighties, i.e., the dawning of the "Teflon presidency" and the apparent complacency of society, it is not surprising that participants in the sanctuary movement — and the media's attraction to it — harkened back to a more active and contentious time in this nation's history. *Sanctuary* allows the reader to reflect upon a period in contemporary American history which the media depicts as a time when the moral conscience of the country, once again,

37. See e.g., CRITTENDEN, *supra* note 3, at 234-35. For another example of the political overtones of the movement reported in another context, the attorney for a Texas sanctuary worker was quoted as saying:

The significance of these cases is that people like Jack Elder give help to these people and act from religious impulse. To solve the underlying problem, the political situation must be changed. Sanctuary workers aren't defining the parameters of the problem, they are simply working with it.

I. F. Herrera, *The Sanctuary Movement: When Politics and Religion Collide*, L. A. LAW. 24, col. 2 (nov. 1984).

And in another example, Renny Golden was quoted as saying:

I think we should say straight up, the sanctuary movement, we as religious people intend to stop our government's interference and intervention in these [Central American] countries.

Korn, *supra* note 6, at 30.

38. According to a former immigration official, the administration didn't recognize that the refugees from Central America — who came here with a mixture of economic and political reasons for their flight — presented the administration with new realities which needed to be addressed in formulating asylum policies. CRITTENDEN, *supra* note 3, at 61.

seemingly resided in the clergy and church communities. The subject of sanctuary aroused "passionate partisanship"³⁹ for some time and still continues to be the subject of commentary.

Indeed, commentators have speculated on the negative motivations for the administration's apparent "persecution" of the sanctuary workers.⁴⁰ This book, however, makes it fairly clear that the administration — strange though it may seem — was goaded into prosecution by demands from the media and others.⁴¹ In fact, initially the government adopted a "hands-off" approach in dealing with the movement, not wanting to give administration critics a platform.⁴² Admittedly, the government could have adopted a more moderate asylum policy in responding to its critics. Given the personalities of the officials the book depicts together with the religious fervor and moral outrage that motivated the sanctuary workers, the eventual decision by the government to prosecute was predictable. All principal players in this engrossing, real life drama were seemingly operating in the extreme.

Perhaps the most fascinating part of the book (certainly for lawyers) is the retelling of the trial and the portrait painted of the lawyers in the courtroom and of the presiding judge. The issues raised by the sanctuary movement were complex from the beginning. However, in a strategically critical move by the prosecutor on the same day the indictments were made public, the use of the procedural device known as the motion *in limine* considerably undermined the sanctuary defendants' entire case.⁴³ Central to the sanctuary workers' defense was the

39. *Id.* at x.

40. *Id.*

41. The book describes it as "media baiting" and the "pressure to act." *E.g., id.* at 101, 105, & 115. Also, even after the investigation had been on-going for a considerable period of time, the prosecutor "found his superiors [in Washington, D.C.] still wavering over whether the government should prosecute sanctuary workers at all." *Id.* at 190. And in "a final indictment review, [s]ome of the most experienced prosecutors in the [Phoenix] office were still dragging their feet." *Id.* at 192. On the local level, the majority of the higher-ranking members of the Justice Department in Phoenix and Tucson voted against indictment. *Id.*

42. *See e.g., id.* at 101-102 (the government, understandably, took a low-key approach at first).

43. This device is used to preclude a party from introducing certain issues and evidence at trial. One commentator observed that the government's utilization of this pretrial device was novel and had rarely been employed in the manner utilized during the pretrial stage of the Arizona case. Colbert, *The Motion in Limine: Trial Without Jury - A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5 (1986) [hereinafter Colbert].

The motion *in limine* is a pretrial evidentiary ruling made upon application by either party to the trial court for the purpose of precluding the opposing party from

claim that the undocumented aliens from Central America, for whom the government had indicted the defendants for smuggling, transporting, harboring, and concealing, qualified as political refugees under the Refugee Act of 1980 and the 1967 United Nations Protocol Relating to the Status of Refugees.⁴⁴ Accordingly, the defendants contended that they were acting in accord with United States and international law and that the government was not.

In the motion *in limine*, the prosecutor asked the judge not to admit any evidence relating to this defense or any evidence based on the legal concept of justification.⁴⁵ In other words, any evidence relating to a defense based on good motives or religious beliefs, tending to negate any criminal intent to violate the laws as charged, was to be excluded. The prosecutor also asked that the judge exclude any mention or evidence in the courtroom of matters relating to the atrocities occurring in Central American countries, past or present United States foreign policy in Central America, and past or present policies relating to the grant or denial of refugee or asylum status, including safe haven (i.e., extended voluntary departure) status.

The defense, momentarily stunned by the prosecutor's sweeping motion, fired back with a barrage of motions in opposition, also seeking to have the case dismissed, all to no avail. The book vividly depicts the interplay of the personalities of the prosecutor, defense counsel, and the judge throughout the trial. Some observers viewed the courtroom proceedings as a "three-ring circus."⁴⁶ The Arizona sanctuary trial, bitter and contentious throughout its entire exhausting proceedings, became a first class media event.⁴⁷

In telling this part of the story, Crittendon captures all the power, acrimony, tension, and nuances of courtroom drama. The reader soon appreciates that the focus of attention is not on the prosecution's case

ever using a particular item of evidence at any stage of the trial proceeding. *Id.* at 7. Commentators have emphasized that the primary purpose of the motion is to eliminate prejudicial items or questions from being presented to the jury. *Id.*

44. CRITTENDEN, *supra* note 3, at 221.

45. CRITTENDEN, *supra* note 3, at 219-20.

46. Lempinen, *supra* note 26, at 32, 35. Also, the defense supplemented their case with attacks against the judge. *Id.* And while lawyers for the defense believed that the conflicts between them and the judge were not played out in front of the jury, jurors apparently sensed the tension according to a sanctuary trial observer. *Id.*

47. Defendants became "instant folk heroes of the left, which had few enough in the Age of Reagan, as the trial became a magnet for journalists, filmmakers, and activists hoping for a replay of the great civil disobedience scenes of the 1960s. CRITTENDEN, *supra* note 3, at 286.

but on the judge, appointed to the bench by Jimmy Carter.⁴⁸ The defense realized a limited victory during the pretrial proceedings, but for the most part, the judge's rulings favored the government. The judge ruled against all of the defense's most important motions relating to constitutional issues raising first, fourth and fifth amendment violations. Because of the judge's rulings, the defense was stripped of its key arguments. The essence of the humanity of the defendants' case was undermined considerably. Not surprisingly, the defense then focused attention on finding evidence to discredit the government's key witnesses, i.e., the undercover agents and informants who had participated in the undercover investigation, as well as selecting jurors sympathetic to their cause. However, the real focus of their attention was directed toward the judge who had now become their enemy.⁴⁹

Perhaps there is a lesson to be learned here. A lawyer handling a highly-charged, emotional case, ought not lose sight of his or her role.⁵⁰ In other words, having elected to play the game, certain established rules must be understood and observed. Without devaluing his or her social commitment to a just cause, a lawyer can still play the game effectively. The book leaves the reader with the impression that some of the defense lawyers may have lost their perspective in the courtroom because of the strong emotional overlay of the case and the distinct antipathy exhibited toward the judge.⁵¹ The book describes the court-

48. *Id.* at 167.

49. *See e.g., id.* at 278-279 ("...the raw hostility in the air.") Judge Carroll became the real adversary. *Id.* at 282-83.

50. In an article recounting the sanctuary trial, one of the defense lawyers stated that "[t]his trial was such an intense experience that it drew people's attention away from the outside world and became our only reality." Brosnahan, *Can Lawyers Afford To Do What Feels Good?*, *THE COMPLETE LAW*, 38,40 (Summer 1987) [hereinafter Brosnahan]. A reporter covering the sanctuary trial described it "as rancorous, emotional and complex as the immigration issue itself. CRITTENDEN, *supra* note 3, at 321. And an early chronicler of the sanctuary movement observed later that "[t]he sanctuary movement has to be a movement for refugees, and not for the churches to experiment with social justice, not for attorneys to test novel theories, and not for political activists to broaden their coalitions of support." Korn, *supra* note 6, at 31.

51. For example, as described by the prosecutor in the case, the judge had "an extremely difficult task in having to control eleven defense attorneys that persist in violating the Court's orders blatantly, notoriously. . .". CRITTENDEN *supra* note 3, at 311. The prosecutor stated further that the defense attorneys were making personal accusations against the court and that those accusations were "vindictive. . .[and] mean. . .". *Id.* at 312. Also, some local attorneys criticized the defense team's strategy of taking the offensive in intimidating the judge suggesting that "the sanctuary defense team should have shown a sitting judge more respect." *Id.* at 310.

After the trial, the acrimony and rancor that had permeated the courtroom spilled over

room as "a battlefield between the bench and the bar."⁵² For the defense, the case had become a "trial by ambush."⁵³ The prosecutor called it the worse "judge-bashing" he had ever experienced.⁵⁴ In Texas, two judges had ruled against sanctuary workers advancing similar arguments,⁵⁵ yet defense lawyers in later accounts depicted the judge in the Arizona trial, in effect, as evil incarnate.⁵⁶

In any event, the judge's rulings on the legal issues involving the fundamental constitutional rights asserted as defenses by the sanctuary workers were not aired in court nor considered by the jury. The defense rested after the government's case. After the deliberations, the jury found eight defendants guilty and acquitted three. Some of the jurors were sympathetic toward the defendants but felt duty bound to follow the law.⁵⁷ Defense counsel expressed confidence that their clients would be vindicated on appeal and that the legality of the sanctuary workers' conduct would finally be upheld.⁵⁸ However, such was not the case. The Court of Appeals for the Ninth Circuit determined, for the most part, that defendants' arguments were without merit. As described in that

outside as the author recounts the following:

As the spectators filed out of the courtroom, a red-faced William Walker approached Don Reno [the federal prosecutor] and said, 'Reno, you are a stinking, dirty dog.' It seemed a fitting end to the exhausting, acrimonious proceedings. Reno told his wife, Carole, who was standing beside him during Walker's outburst, that the defense attorney had snarled at him so often that 'by now I consider it nothing more than the usual 'Good morning' greeting from Bill.

Id. at 321.

52. "The raw hostility in the air transcended anything reflected in the official record of the trial, and at times various antagonists seemed to be almost choking as they struggled to repress the rage boiling inside." *Id.* at 279.

53. *Id.* at 282.

54. *Id.* at 311.

55. *Id.* at 167-8. Another sanctuary worker was tried before a jury in Brownsville, Texas with Judge Flemon Vela presiding. This particular judge refused to allow the jury to consider any defense theories — similar to Judge Carroll's rulings in the Arizona trial — relating to evidence involving the Central American refugees' applications for asylum. I. Bau, *Sanctuary*, *supra* note 2, at 108; *see also*, *United States v. Elder*, *supra* note 12.

56. *E.g.*, Lempinen, *supra* note 26, at 32. A defense lawyer believed the government was out to "crush" the sanctuary movement and was "substantially aided" by the judge. Also, this lawyer reported that: "[the judge] used to give us death looks — a look as though he wished we were dead." *Id.* at 35.

57. In one news report, one of the jurors stated that he wished the defense had put on its own case instead of arguing that the government had not proved the charges against them. *Jury Convicts 8 Sanctuary Defendants*, *The Washington Post*, May 2, 1986, A12, col. 1.

58. *Id.*

court's opinion in the case: "The tension between [defendants'] mistake of law explanation and their deliberate avoidance explanation is patent, and it permeates this entire case."⁵⁹

Most trial observers and commentators tend to point an accusatory finger at the judge for his rulings on the government's motion *in limine* and defense motions.⁶⁰ Admittedly, the ultimate course of this trial was

59. *United States v. Aguilar*, 883 F.2d at 667. According to the court, defendants — in asserting a mistake of law defense -- could not claim familiarity with the immigration procedures for filing political asylum applications on the one hand and then claim unfamiliarity with the requirement for presentment of those applications to immigration officials which was critical to the asylum process. *Id.* at 667-68.

Defendants believed sincerely that the undocumented Central American aliens were bona fide refugees under the Refugee Act of 1980 and that the government's disapproval of their asylum claims amounted to misfeasance. Thus, at the trial, the defendants attempted to establish a mistake of law defense by proffering evidence — based on their statutory construction of section 1324 and that section's interaction with the Refugee Act of 1980 — of their understanding of the aliens' status. The court, guided by the principle of *ignorantia legis non excusat*, concluded that ignorance or mistake of law was no defense in a case such as this one which involves a specific intent crime. *United States v. Aguilar. Id.* at 673. In so holding, the court noted that two practical considerations reinforced this doctrine. Specifically, "such a defense would become a shield for the guilty" because the government would have difficulty refuting this defense and such a defense would considerably undermine trial management because "a defendant, in presenting this defense, easily could convert a trial into a protracted and unruly proceeding." *Id.*

Also, the defendants' mistake of law defense was based on that part of the sanctuary movement's strategy in carrying out which counseled the undocumented Central American aliens to avoid immigration officials at all costs; but, if apprehended, counseled deception about the Central Americans' nationality to avoid deportation to Central America. The court declined to accept this posture of the case as part of the defendants' mistake of law defense. Defendants had offered two explanations to justify their counseling avoidance of immigration officials. First, defendants contended that INS acted improperly in handling asylum applications involving Central American refugees. Second, although defendants were aware of the procedures for filing asylum applications, they were aware that such filing — along with presentment of the alien to immigration officials — was a prerequisite to an alien's legal status as a refugee. According to the court, defendants could not have it both ways. *Id.* at 667-68.

60. For example, one commentator viewed the grant of the government's motion *in limine* as subverting "the historic role of the jury as triers of the facts." Colbert, *supra* note 43, at 9. However, the court in *United States v. Aguilar* found the use of a motion *in limine* appropriate in this case because the crux of the issues presented in the government's motion were legal and not factual. 883 F.2d at 671-673, 692. Moreover, the appeals court concluded that the trial judge had not erred in granting the government's motion *in limine* because the record demonstrated that the defendants had intended to provide a series of minitrials as to each alien's well-founded fear of persecution claim, contrary to sound trial management. *Id.* at 673. And, as an alternative holding in this case finding no error in the trial judges' ruling, the appeals court con-

dictated by these rulings. Had the defendants been allowed to put on their defenses, the Reagan administration's policy on Central America would have been put on trial. The book correctly underscores the prosecution's concern that the trial not devolve into discussions of refugee policy and definitions of what qualifies someone as a refugee or what constitutes religious freedom.⁶¹ However, the concerns expressed were tactical matters. Thus, the book fails to consider the fundamental problem with this defensive posture, an area admittedly easier to discuss now that these issues have received appellate review.

The appeals court decided that the crux of the matter was the misapprehension of the laws on the status of aliens claiming to be protected under the Refugee Act of 1980. At the heart of the defense was the contention that this Act did not require either an alien's formal presentment to the Immigration Service or an application for political asylum to accord an alien legal status in this country. Accordingly, the defendants were assisting bona fide refugees who were lawfully entitled to refugee status in this country.⁶² Under the pertinent provisions of this Act, however, only the Attorney General may accord the refugee status after the filing of an application for asylum.⁶³ The defendants, apparently, were aware of immigration procedures for filing asylum applications, yet they had argued that they could consider the undocumented aliens from Central America as refugees based on the defendants' interpretation of the law. Later, this was asserted as a part of their mistake of law and necessity defenses.

Not only did this defense highlight the fundamental misunder-

cluded that the defendants mistake of law defense — on which the proffered evidence in opposition to the government's motion was based — was "objectively unreasonable." *Id.* at 675, n.5.

61. CRITTENDEN, *supra* note 3, at 219.

62. From the court's perspective, allowing the defendants to decide who qualified as refugees under the Act was tantamount to "sanctioning the creation of religious boards of review to determine asylum status." *United States v. Aguilar*, 883 F.2d at 693, n.28. However, "[t]he executive branch, not [defendants], is assigned this task." *Id.*

63. Congress directed the Attorney General to "establish a procedure for an alien physically present in the United States . . . to apply for asylum. 8 U.S.C. §1158. Notably, the law places the burden on the applicant to establish his or her eligibility for asylum status. *Matter of Mogharrabi*, Interim Dec. No. 3028 (BIA, June 12, 1987). And any entitlement to asylum must be based on a filed application and an affirmative grant under section 208 of the Immigration and Nationality Act of 1952, as amended. 8 U.S.C. § 1158. In addition to the provisions relating to asylum, the law provides that no alien can be deported and sent to a country where he or she would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion. Immigration and Nationality Act § 243(h)(1), 8 U.S.C. § 1253 (h)(1).

standing of the law permeating the proceeding, but, according to the court, it also underscored the political nature of this case. From the court's perspective, apparently, the sanctuary defendants disagreed with the Reagan administration's policy on Central America and sought to undermine the government's foreign policy in what appeared to be a well-orchestrated public sanctuary movement.⁶⁴ For the court, however, a rule permitting such a strategy would have led to chaos in the courtroom, exactly what the federal prosecutor sought to avoid tactically.⁶⁵

Another critical defense was the defendants' contention that the sincere belief they held about the aliens they assisted being bona fide refugees under the Refugee Act should excuse their otherwise criminally proscribed conduct. According to the appeals court, however, defendants had confused intent with motive.⁶⁶ As a matter of law, the court found that the defendants' sincere beliefs — which motivated their activities in participating in the sanctuary movement — did not negate their specific intent to bring these aliens clandestinely into the country without inspection by immigration officials, thereby violating immigration laws.⁶⁷ The key to establishing refugee status under the Act is presentment to immigration officials and the filing of an application for asylum. Thus, the defendants argument in this regard critically overlooked the procedural formalities of the immigration laws. Nor did the defendants' argument that they had a religious motivation for transporting the aliens constitute a defense. Finally, the appeals court held that the defendants were not entitled to a first amendment defense.⁶⁸ Thus, ultimately, the court concluded, notwithstanding the length of its opinion, that this case could be treated as a simple anti-

64. *See, e.g.*, *United States v. Aguilar*, 883 F.2d at 668, 673, 675, n.6.

65. *Id.* at 673.

66. *Id.* at 687. As long as the defendants intended "to directly or substantially further the alien's illegal presence [in this country], it is irrelevant that they did so with a religious motive." *Id.* (citation omitted).

67. *United States v. Aguilar*, 883 F.2d at 687.

68. The court concluded that "a religious exemption for these particular [defendants] would seriously limit the government's ability to control immigration. *Id.* at 695. The court also cited favorably the Fifth Circuit's opinion which rejected a similar claim:

The statute under which [defendants] were convicted is part of a comprehensive, essential sovereign policy. We cannot engraft judicial exceptions to the illegality of transporting undocumented El Salvadorans without thereby de facto revising, for the unique benefit of El Salvadorans, the legal conditions under which they may abide in this country. This would create [chaos].

Id. at 694-95 *citing* *United States v. Merkt*, 794 F.2d 950, 956 (5th Cir. 1986) (*Merkt II*), *cert. denied*, 480 U.S. 946 (1987).

smuggling case under the immigration laws. Thus, the vindication once heralded by defense counsel was not to be.

In the end, the reader of *Sanctuary* might conclude that the answer to the moral question posed in the beginning is two-fold. First, what members of a political community owe strangers in their midst depends on the law or established legal order that governs that community. If individuals take issue with the "official" treatment of such strangers, in this case undocumented aliens from Central America, Congress is the most likely place to seek relief or address the grievance.⁶⁹ If dissatisfied with congressional action, or, more appropriately in the case of the sanctuary movement, inaction, the "conscientious citizen" may choose to seek recourse in the courts. Second, if unwilling or dissatisfied with the outcomes in the foregoing pursuits, that individual faces the moral dilemma of obeying the law or following the dictates of his or her own conscience.⁷⁰

If the participants of the Arizona sanctuary movement ultimately hoped to be vindicated by the court system, they pursued a course of civil disobedience that was unrealistic as to the legal consequences of their activities. But upon closer scrutiny the asserted claim of legal privilege was seemingly their lawyers' conviction and not theirs. Admittedly they were disappointed in the outcome of the trial in Arizona, but *Sanctuary* conveys the impression that these individuals, if faced with the same moral dilemma again would, as a matter of conscience, make the same choice.⁷¹ In the end, *Sanctuary* achieves its goal of informing

69. Indeed, the political branches have been active in this particular area for some time. At this writing, a bill is pending in the Senate that would direct the Attorney General to suspend deportation of Salvadoran nationals among others. H.R. 618, 100th Cong., 1st Sess. §§ 301-303, U.S. CODE CONG. & ADMIN. NEWS 1986, 1812; see H. R. REP. NO. 212, 100th Cong., 1st Sess. 1 & 2 (1987).

70. In a fictionalized account, an attorney for a church congregation debating the issue of public sanctuary underscored the reality of being prepared to accept the penalty of civil disobedience if no claim of exemption is recognized for their sanctuary activities. Teitel, *supra* note 11, at 35.

71. As one of the sanctuary defendants later concluded with respect to the available choices:

I could lobby Congress; I could work for extended voluntary departure; I could educate people; I could visit jails and detention centers. That could be my ministry. Or I could get involved on a deeper level, with the sanctuary ministry. I studied the 1980 Refugee Act and the international refugee laws and concluded that it was the INS that was breaking the law. If the values I had been brought up by meant anything, I had to get involved in sanctuary.

CRITTENDEN, *supra* note 3, at 98.

And as one of the attorneys for the Arizona sanctuary defendants observed:
 "We began to understand what this case was all about. The defendants would hold

and not merely condemning in its essay on an important episode in contemporary history, a truly fascinating account of morality, politics and the legal order.

to their principles of helping and caring for the refugees no matter what the personal consequences. The lawyers weren't defending a case. We were learning a way to live."

Brosnahan, *supra* note 50 at 40.

