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Toward a Universal Standard: Free Exercise and the Sanctuary Movement

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TOWARD A UNIVERSAL STANDARD: FREE EXERCISE AND THE SANCTUARY MOVEMENT

Since 1980, congregations of churches located on the Mexican-American border have consciously broken federal law by transporting and sheltering aliens from Central America. This concerted effort by churches is known as the "Sanctuary Movement," and those church members responsible for the actions taken are known as "Sanctuary workers."[1] The federal government has responded to this illegal activity by successfully prosecuting and imprisoning many of the Sanctuary workers in the border areas.[2]

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1. "Sanctuary" in this context simply refers to the ancient right claimed by churches to shield from whatever authority those people whom they consider in need of protection. This is the broadest statement of the churches' right. Precisely due to its breadth (and the frequency of its assertion), various governments at various times have sought to limit the right. For an excellent historical survey of the right of sanctuary, see *Project on the Sanctuary Movement*, 21 HARV. C.R.-C.L. L. REV. 493 (1986).

2. Blodgett, *Sanctuary: Church Workers Face Trial*, A.B.A. J., Apr. 1985, at 19; Applebome, *3 More are Given Probation in Alien Smuggling*, N.Y. Times, July 3, 1986, at 7, col. 1; Taylor, *16 Indicted by U.S. in Bid to End Church Smuggling of Latin Aliens*, N.Y. Times, Jan. 15, 1985, at 1, col. 3; *see, e.g.*, United States v. Merkt, 794 F.2d 950 (5th Cir. 1986); United States v. Remer-Thamert, No. 87-476 (D.N.M. Aug. 4, 1987); United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985); United States v. Socorro, No. CR 85-008 PHX-EHC (D. Ariz. Oct. 28, 1985).

In *Elder*, the defendant was convicted and sentenced to 150 days imprisonment at a halfway house, while Merkt received a 179-day jail term and three years of probation. *Top Court Rejects Alien Helpers' Plea*, Detroit News, March 31, 1987, at 3A, col. 1. "Amnesty International has added [Merkt's] name to its list of worldwide prisoners of conscience." *Id.* In the highly publicized Arizona trials, eight of the original 11 defendants were convicted on May 1, 1986, though all received suspended sentences ranging from three to five years each. Applebome, *supra*, at 7, col. 1. Although the prosecutions have been limited to the border areas so far, the Sanctuary Movement now includes churches throughout the country, as explained *infra*, note 13.

The law under which the prosecutions of Sanctuary workers have proceeded, 8 U.S.C. § 1324 (Supp. IV 1986), states, in relevant part:

> **(a) Criminal penalties**
>
> (1) Any person who—
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> (A) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States

This Note will first look at the combination of circumstances and beliefs that compel members of the Sanctuary Movement to break the law.[3] Second, it will examine current free exercise doctrine that may provide first amendment protection to Sanctuary workers,[4] concluding that the cases reflect two parallel, yet incompatible, rationales. Following one line of cases, Sanctuary activity should be protected; following the other line, it should be condemned. Third, this Note will resolve the inconsistency of these rationales by proposing a new universal test for free exercise claims. Fourth, it will explore the details of recent cases involving Sanctuary workers who have raised free exercise defenses to prosecutions by the government. Finally, this Note will use the proposed standard to evaluate the claims of Sanctuary workers, concluding that courts should recognize an affirmative defense to prosecution for transporting and harboring illegal aliens.

I. BACKGROUND

In order to appreciate why the Sanctuary workers feel compelled to disobey the law, it is important to understand the history of the Sanctuary Movement and to discuss the responses to

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and regardless of any future official action which may be taken with respect to such alien;

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

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

(D) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law, shall be fined in accordance with title 18, imprisoned not more than five years, or both, for each alien in respect to whom any violation of this subsection occurs.

3. For a reasonably objective analysis of the political history of Central America as it relates to the Sanctuary Movement, see Note, En El Nombre De Dios—*The Sanctuary Movement: Development and Potential for First Amendment Protection*, 89 W. VA. L. REV. 191 (1986).

4. The first amendment states, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

the workers' actions that are theoretically available to the government. The motivations behind the Sanctuary Movement also become significant in evaluating the plausibility of first amendment protection.

A. The Origins and Development of the Modern Sanctuary Movement[5]

The modern American Sanctuary Movement originated in the early 1980's, when significant numbers of Central Americans (including those from El Salvador and Guatemala) began attempting to cross the Mexican-American border. According to the Immigration and Naturalization Service (INS), their purpose was, and is, to take advantage of the economic benefits (such as increased employment opportunities) of living in the United States.[6] Courts have noted the possibility, however, that the refugees' main purpose is to seek protection from the violence of their native countries.[7]

Prior to 1981, churches in border areas from Texas to California provided various kinds of assistance to aliens, including medical aid and bail money releasing refugees from INS custody while they awaited hearings on applications for asylum. In spite of what Sanctuary workers considered to be the INS's inability to evaluate fairly the Salvadoran and Guatemalan refugees' ap-

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5. The bulk of the historical information contained here was originally presented in MacEoin, *A Brief History of the Sanctuary Movement*, in SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE 14 (G. MacEoin ed. 1985) [hereinafter RESOURCE GUIDE]. *Resource Guide* is a collection of papers presented at the Sanctuary Symposium sponsored by the Tucson Ecumenical Council's Task Force for Central America.

6. The *Elder* court recognized the existence of conflicting assessments regarding the effects undocumented workers exert on the United States economy:

> David North, an immigration researcher who testified for the Government, concluded that undocumented aliens drained social resources, depressed wages, displaced minority and women workers, and impeded technological development in some sectors of the economy. Thomas Muller, an expert for the defense, found that undocumented immigrants filled unwanted jobs and helped to create new jobs and prosperity. . . . This existing controversy among experts proves, first, that the economic impact of illegal immigration remains unresolved and, second, that the Court should not resolve the dispute.

601 F. Supp. at 1579.

7. As one court said, "In short, the violent conditions in El Salvador are a matter of public record and are corroborated by all available accounts." Orantes-Hernandez v. Smith, 541 F. Supp. 351, 358 (C.D. Cal. 1982).

plications for asylum, the churches were able, through 1980, to post bond and secure work permits for many of those detained.[8]

The change of presidential administrations in 1981 brought changes in INS policy: bond was increased tenfold or more, and work permits were denied.[9] Sanctuary Movement leaders also claimed that the administrative hearings to determine the granting of asylum status became largely pro forma. Conforming their judgments to the administration's Central American policy, the judges involved allegedly gave little or no weight to refugees' claims of persecution in their home countries. Because acknowledging claims of persecution at the hands of a U.S.-backed regime might embarrass the government, applications for asylum from Central American refugees, especially those from El Salvador, were routinely denied.[10]

These changes in immigration policy sparked a declaration by several border churches that they would consider themselves "sanctuaries" for Central American refugees.[11] Initially, the Sanctuary churches merely asserted the right to shelter those fleeing Central America while the Sanctuary workers attempted to obtain "extended voluntary departure" status[12] for the aliens.

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8. MacEoin, *supra* note 5, at 16-17.

9. MacEoin, *The Constitutional and Legal Aspects of the Refugee Crisis*, in RESOURCE GUIDE, *supra* note 5, at 125.

10. *See id.* at 118-29.

11. The declaration consisted of public ceremonies, taped and photographed by INS officials, welcoming masked Salvadorans into churches in Tucson, Berkeley, Los Angeles, Washington, D.C., New York, Boston, and San Francisco. MacEoin, *supra* note 5, at 22-23. The date, March 24, 1982, was the second anniversary of the assassination of El Salvador's Archbishop Oscar Romero. Archbishop Romero had publicly denounced the sending of U.S. military aid to the Salvadoran government. *Id.* at 15.

An important clarification to be made at this point is the distinction between the "older" view of religious sanctuary and the "modern" view. From the perspective of the person seeking asylum or, perhaps, from that of the INS, the two views are quite different. From Biblical times onward, the right of sanctuary was supposed to be afforded those who had, in some sense, broken a law, though without moral culpability. Today, however, sanctuary is seen as a refuge for those who have fled their native lands, though not as a result of anything they have done or failed to do. From the perspective of the Sanctuary workers, the only relevant consideration in both cases is that "fellow creatures of God" need help, through no fault of their own. Although, in the modern situation, the Sanctuary worker is willing to work within whatever governmental framework happens to exist, the religious obligation to help takes priority over the governmental command to obey the law. For a balanced history of the ancient and medieval versions of sanctuary, see 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).

12. "Extended voluntary departure" (EVD) status is designed to allow aliens to remain in the United States indefinitely, if their native countries are presently uninhabitable for some reason. When the alien may go home safely, the status is revoked. For an excellent discussion of the statutory basis of the Attorney General's broad power to grant EVD status to, or withhold it from, groups of immigrants, see Hotel & Restaurant Em-

Today, however, with the spread of the Sanctuary Movement,[13] and with the continued lack of cooperation between the Sanctuary workers and the INS, a new "Underground Railroad" has developed to carry refugees to sanctuaries throughout the United States. The goal of this completely decentralized movement continues to be obtaining legal status for these refugees. Because the movement's methods in getting the aliens into and settled within the United States are illegal, however, the government has responded by prosecuting the Sanctuary workers.[14]

B. The Options

The tension between the state's legitimate interest in controlling immigration and the genuinely religious claims of Sanctuary workers may be resolved in three ways. First, courts could say that the free exercise of religion is such an important right that any alien reaching a sanctuary will be allowed to stay in this country, with no criminal prosecution of the Sanctuary worker. This is the most extreme free exercise claim, and it is essentially the one advanced by the defendants in the Sanctuary cases examined in Part IV.

At the opposite extreme lies the second possible approach to this problem: courts might hold that there is no free exercise right to transport or harbor aliens. Under this analysis, the Fifth Circuit found any illegal alien in any sanctuary subject to the regular procedures of the INS, and any Sanctuary worker who harbors or smuggles such a refugee subject to criminal prosecution.[15]

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ployees Union, Local 25 v. Attorney Gen., 804 F.2d 1256, 1270-72 (D.C. Cir. 1986). EVD status has been or currently is enjoyed by citizens of Uganda, Afghanistan, Ethiopia, Iran, Nicaragua, and Poland. Note, *The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act*, 32 CLEV. ST. L. REV. 117, 128-29 n.60 (1983-84). Because the decision whether or not to extend such status is an executive one, the blanket grants often coincide with stated foreign policy objectives. *See* MacEoin, *supra* note 9, at 119.

13. A 1986 report by the Chicago Religious Task Force on Central America indicates that, in 1985, the Sanctuary Movement involved 307 declared sanctuaries in the United States. Note, *supra* note 3, at 205. Moreover, there is some indication that a similar movement is growing up in other western nations. Epstein & Turner, *Sanctuary Concept Gaining Foothold in Western Europe: Religious Activists Offer Refuge Despite Government Opposition*, Christian Sci. Monitor, Sept. 17, 1986, at 3, col. 1.

14. *See* United States v. Merkt, 794 F.2d 950 (5th Cir. 1986); United States v. Remer-Thamert, No. 87-476 (D.N.M. Aug. 4, 1987); United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985); United States v. Socorro, No. CR-85-008-PHX-EHC (D. Ariz. 1985).

15. *Merkt*, 794 F.2d at 950 (denying defendant a putative free exercise right in light of important governmental policy considerations).

The third possible method of disposing of these cases separates the fates of the aliens and the Sanctuary workers. The solution posed by this Note would allow the INS to capture refugees, but would recognize a first amendment-based affirmative defense for Sanctuary workers prosecuted for harboring aliens. The proposed defense springs from the principles announced in the "subjectivist" free exercise cases.[16] These cases focus on the subjective belief of the claimant in granting first amendment protection. Their support for this Note's proposal becomes clear after examining the current paradoxical state of free exercise law.

II. THE OBJECTIVE-SUBJECTIVE TENSION IN FREE EXERCISE DOCTRINE

The Supreme Court claims to apply a three-part test to free exercise claims: to be protected, 1) an activity must be the result of a sincere religious belief, 2) the governmental interest must not be compelling, and 3) if protection is denied, no less restrictive means to serve the compelling governmental interest may exist.[17] In reality, however, two distinct approaches to deciding free exercise cases, an objective test and a subjective test, are discernible.

One method evaluates the claims with an objective standard of reasonableness, while the other focuses upon the subjective

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16. In addition to their free exercise claims, the Sanctuary workers have argued that both domestic and international law require that this country admit aliens whom they have attempted to help. Because these refugees had a right to be in this country, they cannot be considered "illegal" aliens, and, therefore, the statutory prohibition against harboring illegal aliens does not apply. *See Merkt*, 794 F.2d at 964; *Elder*, 601 F. Supp. at 1980.

The claims that the aliens are not illegally in this country are based upon the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. and in 22 U.S.C. § 2601), and the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 622.23, T.I.A.S. No. 6577, 606 U.N.T.S. 268. Although these arguments present interesting questions of international law, examination of the merits of this claim is beyond the scope of the present Note. For an excellent discussion of this problem, see Comment, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295 (1985).

17. For a brief discussion of this test, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, 1053-63 (2d ed. 1983). For application of the test to different factual situations, see United States v. Lee, 455 U.S. 252 (1982); Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707 (1981); Johnson v. Robison, 415 U.S. 361 (1974); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).

belief of the claimant.[18] The objective evaluation generally leads to a denial of the first amendment claim.[19] Under this analysis, courts in effect determine whether the action sought to be protected is something most people would think deserves Constitutional protection. The courts appear to attach particular significance in this inquiry to several factors, including what the social impact of affording protection to the proscribed activity will be,[20] how broadly the asserted right could be applied,[21] and how threatening the underlying activity appears to be.[22]

The other path focuses upon the subjective belief of the actor and asks whether she sincerely believes that what she is doing is central to her religion.[23] Here, the factors courts view include

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18. This discussion of free exercise cases will assume throughout that the phenomenon with which the Court is dealing is actually a "religion." Although this would be the first step in deciding the validity of any free exercise claim, most of these cases involve beliefs that would easily qualify as "religious." *See infra* note 35 and accompanying text. In any event, it is clear that the Sanctuary Movement may be so characterized, as the court specifically found in *Elder*, 601 F. Supp. at 1577.

19. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (upholding the imposition of Social Security taxes on members of the Old Order Amish, despite claimants' belief that it was wrong for them to accept or provide these benefits); Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion) (refusing to enjoin a Pennsylvania law requiring all businesses to close on Sundays; burden imposed by statute on orthodox Jewish merchants was "indirect"); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617, 631 (1961) (citing *Braunfeld*); Davis v. Beason, 133 U.S. 333 (1890) (holding that the Idaho territorial legislature may validly refuse the vote to any person who advocates the practice of polygamy); Reynolds v. United States, 98 U.S. 145, 164 (1878) (upholding conviction of a Mormon in the territory of Utah under a federal statute outlawing polygamy: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

20. *See Lee*, 455 U.S. at 258-59; *Braunfeld*, 366 U.S. at 608-09; *Davis*, 133 U.S. at 341; *Reynolds*, 98 U.S. at 167-68.

21. *See* Bowen v. Roy, 476 U.S. 693, 699-701 (1986) (upholding state's denial of Aid to Families with Dependent Children benefits to a Native American family who refused to obtain a social security number for their two-year-old daughter, despite claimants' belief that obtaining a social security number would violate their religious beliefs); *Lee*, 455 U.S. at 260; *Braunfeld*, 366 U.S. at 608-09; *Davis*, 133 U.S. at 341; *Reynolds*, 98 U.S. at 166-67.

22. *See Roy*, 476 U.S. at 709-11; *Lee*, 455 U.S. at 258-59; *Davis*, 133 U.S. at 342-43; *Reynolds*, 98 U.S. at 164, 165-66.

23. *See* United States v. Ballard, 322 U.S. 78, 81-82, 86 (1944); *see also* Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 716, (1981); *cf.* Hobbie v Unemployment Appeals Comm'n, 107 S. Ct. 1046, 1048 n.2 (1987) (noting that it was "indisputed that appellant's . . . religious belief was sincerely held"); Wisconsin v. Yoder, 406 U.S. 205, 209 (1972) (noting the state's stipulation to the sincerity of respondents' beliefs); Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963) (noting that the sincerity of appellant's beliefs was unquestioned).

One must also note the Conscientious Objector cases. To qualify for an exemption from the draft on religious grounds, a Conscientious Objector need only show that "a given belief that is sincere and meaningful occupies a place in . . . [his] life . . . parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." Seeger v. United States, 380 U.S. 163, 166 (1965); *see also* Gillette v. United

the following: the likelihood that the claimant is attempting to mask a wholly secular motive with free exercise language,[24] whether the claimant is representative of a larger group likely to seek similar protection,[25] how well established the practice sought to be protected is,[26] and whether the denial of protection is likely to communicate governmental hostility to sincere religious practices.[27]

After a court finds that a claimant's actions stem from a sincere religious belief, it considers whether less restrictive means exist for the government to attain its legitimate end. Only if there are less restrictive means will an otherwise compelling government interest yield to an individual's right of free exercise. The objective-subjective tension, however, infects the "alternate means" inquiry also, for in all of the free exercise cases denying claims, less restrictive alternatives to the legitimate governmental interests were at least theoretically available.[28]

Despite the conflicting approaches, the Court consistently holds that a state may not force a citizen to choose between the free exercise right and other rights.[29] Further, a claimant's beliefs need not be shared by all adherents of a particular faith before a court will protect the actions associated with the belief.[30] In the Sanctuary cases, then, not all Roman Catholics must feel compelled to offer sanctuary to refugees, for example,

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States, 401 U.S. 437 (1971) (finding exemption available only to those who professed opposition to war as such, not simply to those wars the applicant considers unjust); Welsh v. United States, 398 U.S. 333 (1970) (holding that draftees were not required to oppose war on specifically religious grounds to qualify for exemption).

24. *See Yoder*, 406 U.S. at 215-16; *Sherbert*, 374 U.S. at 407; *Ballard*, 322 U.S. at 82.

25. *See, e.g., Yoder*, 406 U.S. at 207, 216.

26. *See Yoder*, 406 U.S. at 210-11, 235; *Sherbert*, 374 U.S. at 406. *But see Thomas*, 450 U.S. at 715-16.

27. *See, e.g., Yoder*, 406 U.S. at 212, 218, 235; *Sherbert*, 374 U.S. at 404.

28. In *Braunfeld*, the Court, simply citing a "poor fit," could have restricted the State of Pennsylvania to requiring one day a week of rest for all workers, without specifying the day. In *Lee*, there is no reason why the Old Order Amish could not have been exempted from paying Social Security taxes, given the complete homogeneity of that denomination's beliefs. Finally, in *Roy*, alternative ways of identifying the family's daughter were clearly available, though, as with the *Lee* case, such special provisions might have entailed additional administrative costs.

29. *See, e.g., Sherbert*, 374 U.S. at 404. "[N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable." *Id.*

30. "[T]he resolution [of what is a "religious" belief or practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 714 (1981).

for those Roman Catholics who do protect refugees to gain first amendment protection.

The Court has never explicitly said that two ways of deciding free exercise cases exist. Yet, two observations make this a plausible explanation. First, the members of the Supreme Court are naturally skeptical of exotic beliefs and practices seeking protection as "religious practices." Moreover, the Justices are unwilling to afford broad Constitutional protection to amorphous and unorthodox religious ideas and practices, when such protection can have unpredictable and far-reaching effects. Second, if there is no tension between the subjective and objective standards, *Sherbert*'s insistence on accommodation cannot be reconciled with *Braunfeld*'s emphasis on state interest, nor *Yoder*'s deference to religious practices with the deference to state rules in *Lee* and *Bowen*. In short, the free exercise area can only make sense when one admits that conflicting standards are being applied.

III. RESOLVING THE TENSION: A FREE EXERCISE PROPOSAL

Some argue that a wholly subjectivist approach to free exercise claims will lead to a flood of specious assertions of the right. This might be true, if it were not for the test announced in *Wisconsin v. Yoder*.[31] This Part will elaborate on that test as a universal standard in free exercise cases and discuss and defuse some of the most obvious objections to its use.

Under *Yoder*'s tripartite evaluation, only those claims in which the contested action is 1) a matter of deep religious conviction, 2) shared by an organized group, and 3) intimately related to daily living will be protected.[32] The first element of this test really just restates the criterion of sincerity.[33] The second and third elements, however, provide some measure of objectivity in evaluating the claim. The *Yoder* test provides the basis for a comprehensive interpretation of the free exercise clause that is new because it is both broader and possibly narrower than that we now have. It is possibly *narrower* because it affords automatic protection only to those actions of organized religious

31. 406 U.S. 205 (1972).

32. *Id.* at 216.

33. *See supra* notes 23-27 and accompanying text.

groups.[34] The test is also *broader* because it allows automatic protection for any organized religious group that can meet the other requirements.[35] In this way, the *Yoder* test provides a useful synthesis of the objective and subjective approaches.

It is the contention of this Note that, if the three *Yoder* requirements are met, then any state interest, however compelling, must yield with respect to the protected group. This leaves no room for the "least restrictive alternative" language, because it is clear enough that a less restrictive alternative is always at least theoretically available.[36]

One objection to this test might be that it could allow religious groups qua religious groups to obtain advantages over nonreligious groups, thus violating the establishment clause. Two responses defuse this objection. First, no violation of the establishment clause occurs when religious people qua religious people receive positive benefits from their governments.[37] Further, if one pushes this argument to its logical conclusion, then the free exercise clause ceases to have any independent meaning. If courts do not afford protection to religious activities as such, then the free exercise clause merely duplicates guarantees found in other Constitutional provisions.

A more serious objection is that, even with the *Yoder* safeguard, a subjectivist test of free exercise claims allows for specious assertions of that right. Naturally, the free exercise right, once made out, is not unlimited. As *Sherbert* and, particularly, *Yoder* make clear, the law at issue may still be upheld. As the *Thomas* court asserted, "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[38] This holds, however, only if the government shows that the interest it seeks to protect is compelling. "The essence of all that has been said and written on the subject is that only those interests of the highest order and those *not otherwise served* can overbalance

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34. This only *possibly* narrows the protection presently afforded under the free exercise clause, because it is not clear that one-person religions or unorganized group religions enjoy a great deal of protection at present.

35. The real question now becomes: Is this a bona fide "religious" group? The answer to such a question is beyond the scope of the present Note, though much interesting writing has been produced on the subject of the definition of "religion" for first amendment purposes. *See generally* Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982).

36. *See supra* note 28 and accompanying text.

37. Sherbert v. Verner, 374 U.S. 398, 409 (1963); *accord* Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987).

38. *Thomas*, 450 U.S. at 715.

legitimate claims to the free exercise of religion."[39] Nonetheless, the test is weakest on this point because it does not attempt a definition of "religion" or "religious activity" for free exercise purposes; rather, it assumes that whatever claims finally are protected as "religious" will not be sufficiently threatening to ordered liberty[40] to warrant their suppression. The concept of "ordered liberty" is necessarily quite elastic, but one hopes that judges will be sensitive both to individuals' beliefs and any real threat to society posed by such individuals' actions.

Respect for offensive and even potentially subversive religious practices, as in the Conscientious Objector cases,[41] is essential if conventional behavior is to remain clearly protected. Furthermore, it is precisely when out-of-the-ordinary claims are made that the guarantees of the Bill of Rights must be most scrupulously guarded. If they are not, then they become nothing more than goals on a liberal majority's agenda.

IV. THE SANCTUARY CASES

This Part examines the prosecutions of the Sanctuary workers. It then considers the arguments raised against the claim of a free exercise right to harbor illegal aliens.

A. Elder, Merkt, *and Beyond*

Those Sanctuary workers indicted, prosecuted, and imprisoned for violating the immigration laws have raised free exercise claims as defenses. In two Sanctuary cases, *United States v. Elder*[42] and *United States v. Merkt*,[43] the defendants asserted the right, founded upon their religious convictions,[44] to extend aid to persecuted refugees, regardless of the INS policy on the subject. In responding to these claims, the courts have held consistently that the importance of the governmental interests in-

39. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (emphasis added).

40. Like the problem of what constitutes a "religious practice," the problem of what is essential for the preservation of ordered liberty poses difficulties beyond the scope of this Note.

41. *See supra* note 23.

42. 601 F. Supp. 1574 (S.D. Tex. 1985).

43. 794 F.2d 950 (5th Cir. 1986).

44. For an explanation of the theological bases of these beliefs, see generally *supra* note 11 and RESOURCE GUIDE, *supra* note 5.

volved outweighs the free exercise interests raised by the defendants. As the Court in *Merkt* stated, "[a]ppellants' 'do it yourself' immigration policy, even if grounded in sincerely held religious conviction, is irreconcilably, voluntarily, and knowingly at war with the duly legislated border control policy. . . . [T]he claims of conscience must yield to the . . . imperative[] of . . . preservation of our national identity as defined by the immigration laws."[45]

B. The Arguments Against a Free Exercise Right

The primary argument used against the first amendment defense of Sanctuary workers is that important governmental interests in regulating the nation's borders preclude the exercise of the right.[46] This alleged governmental interest is a way of describing many other subsidiary interests, such as the regulation of potential job-seekers who could be competing with citizens for certain types of employment.

In addition to the governmental interests at stake, the courts have been particularly careful to note other situations in which free exercise of religion claims have been denied as defenses to criminal prosecutions. In *Merkt*,[47] the Fifth Circuit analogized the claims of Sanctuary workers to cases in which free exercise defenses were insufficient to excuse destruction of government property,[48] racketeering,[49] and refusal to testify before a grand

45. 794 F.2d at 957. The courts' failure to appreciate other constitutional rights may be seen in the *Elder* court's decision to prohibit Elder from speaking publicly about the Sanctuary Movement. 2 *Who Aided Salvadorans Get Jail Sentences*, N.Y. Times, Mar. 28, 1985, at A20, col. 1.

In addition to the criminal prosecutions, however, churches whose members were indicted in the *Socorro* case filed two civil suits, one of which is currently pending: Presbyterian Church (U.S.A.), Inc. v. United States, CIV 86-0072 PHXCLH (D. Ariz. 1986) (government's motion to dismiss granted Oct. 23, 1986) and American Baptist Churches v. Meese, No. C-85-3255 RFP (government's motion to dismiss denied, 666 F. Supp. 1358 (N.D. Cal. 1987)). The allegations in those cases are based upon actions taken by INS agents in investigating the activities of the churches.

46. *See Merkt*, 794 F.2d at 957. Although the Court in *Merkt* also mentioned the evenhanded enforcement of the nation's criminal laws as an important goal, the Conscientious Objector cases suggest that that goal may sometimes be compromised, since failure to serve in the military may be a criminal offense. *See supra* note 23. The stronger argument against a free exercise right in this context, then, seems to be the one based upon the need to regulate our nation's borders.

47. 794 F.2d at 954-55.

48. United States v. Allen 760 F.2d 447 (2d Cir. 1985) (attempting to destroy nuclear weapons not protected, even if religiously motivated).

49. United States v. Dickens, 695 F.2d 765 (3d Cir. 1982) (sustaining indictment alleging that RICO violations occurred as part of defendants' religious practices, despite

jury.[50] Although the proposed standard does not attempt to define "religion" for the purposes of the free exercise clause,[51] racketeering and other criminal acts seem sufficiently inimical to the concept of ordered liberty, even if genuinely "religious," to be beyond first amendment protection. This possibility was recognized by the Court in *Yoder:* "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[52]

V. AN EVALUATION OF THE FREE EXERCISE CLAIM

The primary assurance of a viable free exercise right comes from the subjective standard announced in cases such as *Cantwell v. Connecticut,*[53] *United States v. Ballard,*[54] *Sherbert v. Verner,*[55] and *Thomas v. Review Board of the Indiana Employment Security Division.*[56] These stand for the proposition that sincerely held religious beliefs that motivate the actions of individuals deserve constitutional protection. The *Yoder* test limits the exercise of this right in the face of governmental regulation by providing some objectively verifiable elements that do not go to the substance of the belief held. In the Sanctuary cases, the governmental policy is forcing a choice between obedience to the law and the exercise of sincerely held religious beliefs. This Part applies the *Yoder* test to the claims of the Sanctuary workers and provides a solution respecting the interests of both sides.

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possible negative reflection upon the underlying religious beliefs), *cert. denied,* 460 U.S. 1092 (1983).

50. Smilow v. United States, 465 F.2d 802, 804 (2d Cir. 1972), *vacated and remanded on other grounds,* 409 U.S. 944 (1972) (holding that a refusal to testify before a grand jury due to possible "[d]ivine punishment and ostracism from the Jewish community" as an "informer" was outweighed by the state's interest in the testimony).

51. *See supra* note 35 and accompanying text.

52. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

53. 310 U.S. 296 (1940).

54. 322 U.S. 78 (1944).

55. 374 U.S. 398 (1963).

56. 450 U.S. 707 (1981).

A. *Sincerity of Belief*

The *Elder* court recognized that a valid free exercise right was established in the Sanctuary cases.[57] The religious basis of the Sanctuary Movement is sufficient to meet the first *Yoder* requirement that the action be motivated by a deeply held religious belief. Further, there can be little doubt that the Sanctuary Movement, though decentralized, is an organized group, satisfying the second component of the *Yoder* test. The movement's ability to shuttle aliens from the border to churches throughout the nation illustrates this.[58] Finally, the Sanctuary Movement meets the third requirement, that the actions be intimately related to the workers' daily lives. The convictions dictate workers' daily routines as fully as if the workers had entered monastic orders: opening churches to refugees, providing for their needs, and attempting to secure legal status for them all require enormous sacrifice and work.

B. *The Affirmative Defense*

An affirmative defense to the specific crimes of transporting and harboring illegal aliens, modeled on the principles enunciated above, could be established by registration of the worker's name and home address with the INS. The presumption of first amendment protection would be confirmed, if at all, at trial, by whatever evidence could be produced to prove the sincerity of the worker's beliefs. As with the Conscientious Objector exemption and other affirmative defenses, the possibility would remain that the requisite elements of the defense would not be established, thus providing protection against a flood of "fair weather" workers.[59]

The use of an affirmative defense would not undervalue the government's interests in the enforcement of immigration law. Allowing an affirmative defense to the Sanctuary workers involved would not decrease the number of patrols along the borders, it would not prevent the INS from arresting any aliens it

57. United States v. Elder, 601 F. Supp. 1574, 1577 (S.D. Tex. 1985).

58. *See supra* note 13 and accompanying text.

59. For a sweeping view of the Conscientious Objector exemption, see Brown, Kohn & Kohn, *Conscientious Objection: A Constitutional Right*, 21 NEW ENG. L. REV. 545 (1985-86).

finds, and it would not entail any change in the INS's deportation hearings.

The potential adverse effects of an affirmative defense are highly speculative. First, such a defense would not make more Central Americans willing to risk coming to the United States, for there would be no real reason for them to be any more hopeful about their becoming legal residents here. It is absurd, as well, to assume that Central Americans can be more highly motivated to get out of their countries than they already are. Second, hundreds of "closet" Sanctuary workers would not surface if the threat of punishment disappeared. In fact, Sanctuary workers already declare themselves as being such to anyone who cares to know.[60]

The most obvious change to result from the use of an affirmative defense modeled upon that afforded Conscientious Objectors would be, ironically, that the regulation of the flow of Central Americans might actually become easier. Sanctuary workers might feel freer to admit their activities and, thus, inadvertently disclose where refugees are likely to be hidden. Although churches that harbor aliens already publicly *announce* their status as sanctuaries, it may be that the INS could benefit by trailing the workers to their churches, so that they would be certain of finding the correct location. This benefit to the INS makes the Fifth Circuit's characterization of the proposed situation as a "catch-me-if-you-can"[61] scenario the least likely possibility: Sanctuary workers are not running from anyone.

The assertion of an affirmative defense by the Sanctuary worker would not free captured refugees. They would still be turned over to the INS. But opportunities to avoid deportation still exist within the INS system,[62] and workers truly concerned with helping refugees at this stage could provide legal counsel during deportation hearings.[63] This too would allow workers to act on their religious beliefs without being punished.

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60. *See* MacEoin, *supra* note 5, at 14.

61. United States v. Merkt, 794 F.2d 950, 957 (5th Cir. 1986).

62. For a general description of the process involved in avoiding deportation, see Note, *supra* note 3, at 196-201.

63. Although the hearing process itself may be in need of reform, that question is beyond the scope of this Note.

CONCLUSION

This Note has suggested a universal standard for evaluating free exercise claims, using the Sanctuary Movement as an example of how the standard could work. The success of Sanctuary workers' claims of a free exercise right to transport and harbor illegal aliens depends largely upon whether courts adopt the "objective" approach to evaluating free exercise claims or the "subjective" approach. This fact suggests an unfortunate conclusion: current free exercise law is confused, and courts are able to allow or prohibit virtually any kind of novel religious activity, depending upon which line of analysis they choose to follow.

This proposal is merely an elaboration of the test used by the Supreme Court in *Wisconsin v. Yoder*. It provides Constitutional protection to only those actions that may, in some sense, be objectively defended, while respecting the variety of sincere beliefs of religious people, such as the Sanctuary workers.

—*Troy Harris*