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SANCTUARY: BECAUSE THERE ARE STILL MANY WHO WAIT FOR DEATH

*Toney Anaya**

"I could go on for hours about all the suffering the war has brought, but then I would only make myself more dejected. There is nothing we can do but wait as calmly as we can till the misery comes to an end. Jews and Christians wait, the whole earth waits; and there are many who wait for death."

Anne Frank¹

"[My] impressions are countered by one unforgettable experience: the Nuremberg Trial. I shall never forget the account of a Jewish family going to their deaths: the husband with his wife and children on the way to die are before my eyes to this day."

Albert Speer²

I. THE PAST

In 1939, the United States had a chance to rescue twenty thousand children from Nazi Germany.³ There was a refugee bill in Congress,⁴ and many American families willing to sponsor the children.⁵ The bill was defeated, with opponents arguing, inter alia, that the children would have exceeded the quota for Germans then contained in American refugee law.⁶

* Governor of New Mexico, Jan. 1, 1983 - Dec. 31, 1986; B.A., 1963, Georgetown University, School of Foreign Service; J.D., 1967, American University, Washington College of Law. This Article is adapted from a speech delivered by Governor Anaya on June 26, 1986 at the National Press Club, Washington, D.C.

1. A. FRANK, ANNE FRANK: THE DIARY OF A YOUNG GIRL 77 (Doubleday ed. 1967).

2. A. SPEER, INSIDE THE THIRD REICH Foreword (1970).

3. G. LOESCHER & J. SCANLAN, CALCULATED KINDNESS xiv (1986).

4. S.J. Res. 64 & H.R.J. Res. 168, 76th Cong., 1st Sess. (1939), reprinted in *Hearings: Admission of German Refugee Children Before the House Comm. on Immigration, 76th Cong., 1st Sess.* 4, 183 (1939).

5. See generally G. LOESCHER & J. SCANLAN, *supra* note 3.

6. See *Hearings: Admission of German Refugee Children Before the House Comm. on Immigration, 76th Cong., 1st Sess.* 183-98 (1939) (statements of Agnes Waters and Francis H. Kinnicut).

Perhaps some of those children were the ones Albert Speer heard about at his Nuremberg Trial. Unfortunately, we made a mistake half a century ago—we refused twenty thousand children sanctuary—and they paid the price.

II. THE PRESENT

Sanctuary is defined as “a place of refuge and protection” and as “a consecrated place.”⁷ It is described in current political discourse as the new Underground Railroad,⁸ a network of religious organizations and individuals of faith who are risking their freedoms to protect Central American refugees from deportation and persecution. And it is being debated today in the churches, congresses, and courtrooms of America,⁹ often without regard for the international context in which this movement is growing.

A. *New Mexico's Sanctuary Proclamation*

On Good Friday 1986, I issued a proclamation making New Mexico the first state in America to declare sanctuary.¹⁰ I took this action in the best traditions of this country, in the heritage of the Underground Railroad and the Nuremberg Trials, and in the spirit of the Easter Season and basic Judeo-Christian moral and ethical principles.

I was proud to issue a sanctuary proclamation in the one hundredth anniversary year of our Statue of Liberty, Mother of Exiles. There are many desperate people in our world, but few as desperate, as victimized, and as fundamentally exiled as the Salvadoran campesino or the Guatemalan Indian.

Judging from some of the criticism I have taken since I issued my proclamation, there seem to be many people who either do not know, or do not care: (1) that under American and international law we are *obligated* to help these refugees;¹¹ (2) that Salvadorans and

7. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2009 (P. Gove ed. 1971).

8. See, e.g., *Deporting Dissent*, 242 THE NATION 539, 540 (1986).

9. See, e.g., *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985), *aff'd*, 107 S Ct. 1207 (1987); *United States v. Aguilar*, No. CR-85-008-PHX-EHC (D. Ariz. 1986).

10. Sanctuary Proclamation, Office of the Governor (N.M. Mar. 28, 1986) (on file at Hofstra Law Review).

11. See Speech by Karen Parker, Univ. of N.M. (Oct. 17, 1985) (edited transcript on file at Hofstra Law Review). See also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force for U.S., Aug. 30, 1956) [hereinafter Geneva Convention]; Universal Declaration of Human Rights, G.A. Res. 217, 3 GAOR, U.N. Doc. 1/777 (1948); U.S. CONST. art. vi, § 2, cl. 2: “[A]ll Treaties made, or which shall be made, under the

Guatemalans, and even Nicaraguans until recently, are among the national groups most unfairly treated by our current refugee policies;¹² (3) that to send refugees fleeing civil war back to their homelands is a "grave breach" of the Geneva Conventions,¹³ of which the United States is a signatory; and that American churches and civilians have the international legal right to offer humanitarian aid to "protected persons" fleeing civil war¹⁴—in other words, the right to offer sanctuary to Salvadorans and Guatemalans, despite protestations of the Immigration and Naturalization Service (INS).

B. *Support for Sanctuary*

I do not want to overestimate the criticism the Sanctuary Movement has received. The INS has accused me of promoting anarchy and of perpetrating a "cruel hoax."¹⁵ Some critics have written to say I should swim back across the border or immigrate to Cuba or Nicaragua. The grand prize for racism goes to INS's regional commissioner in Los Angeles who lumps together all Hispanic immigrants as "wets,"¹⁶ and thinks anyone who speaks a language other than English ought to be investigated.¹⁷

The happy fact, however, is that, judging from the flood of communications I have received from all across this nation since Good Friday, my sanctuary proclamation has been praised by a factor of several fold. These obviously sincere messages of support reflect a deep humanitarian streak in Americans that many thought had disappeared in the 1980's.

One letter, in fact, dealt directly with the concerns of Anne Frank and Albert Speer. The letter, from a woman in Santa Fe,

Authority of the United States, shall be the supreme Law of the Land"

12. Cf. GENERAL ACCT. OFF., ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—Few Denied Applicants Deported 15-16 (1987) (Briefing Report to the Honorable Arlen Specter, United States Senate) (noting that "approval rates for [asylum] applicants from El Salvador (2 percent) and Nicaragua (7 percent) were much lower than approval rates for applicants from Poland (49 percent) and Iran (66 percent)").

13. Geneva Convention, *supra* note 11, art. 147, at 3618, T.I.A.S. No. 3365, at 104, 75 U.N.T.S. at 238.

14. Geneva Convention, *supra* note 11, art. 142, at 3614, T.I.A.S. No. 3365, at 100, 75 U.N.T.S. at 234.

15. *See Policy Is Succeeding*, Albuquerque Journal, Apr. 6, 1986, at B2, col. 1 (Editorials) (reporting that David Vandersall, the INS acting regional chief, stated that "[to] lure aliens into the Land of Enchantment in search of a utopia is nothing more than a cruel hoax.>").

16. *See* Izakowitz, *INS Official Criticized for 'Racist' Remark*, Ariz. Daily Star, Mar. 21, 1986, at B1, col. 1.

17. *Id.* at B3, col. 1.

thanked me for my action and went on to relate a piece of her family history: Her husband came to the United States from Italy in 1936. In 1939, his parents applied for United States visas, and were refused entry. In 1943, while her husband was fighting in the United States infantry in the Pacific, they were arrested in Italy and held for deportation to Auschwitz. Only the courage of a Catholic underground group, a sort of underground railway to the Swiss border, saved their lives.

Such a letter is obviously extremely gratifying. What is clear from all the letters I have received, and all the interviews I have given, though, is that neither supporters nor detractors fully understand the fundamental questions surrounding the sanctuary issue. Opponents, for example, never address three key questions: (1) Is the United States violating international and federal law by deporting Salvadorans and Guatemalans back to their homelands?, (2) Does the current application of American refugee policy discriminate against Central Americans?, and (3) Do the Geneva Conventions protect the right of American citizens to offer humanitarian aid to these refugees?

The answer to all three questions is an unequivocal "yes."

C. *The Sadness*

Sadly, the United States is ignoring its own international treaties and its obligations under the Geneva Conventions.¹⁸

Sadly, the Refugee Act of 1980,¹⁹ which was supposed to protect refugees fleeing "authoritarian" regimes equally with refugees fleeing "totalitarian" regimes, has been distorted by the current administration to reflect cold war biases.²⁰ Citizens of Communist countries are favored in American asylum practice while those fleeing equally oppressive, although politically more palatable, regimes are virtually barred.²¹

Sadly, American refugee policy is being reflected through an ideological prism, with this bottom-line result: If you are fleeing a regime that the current administration does not like, your chances of

18. See *supra* notes 11 & 13 and accompanying text.

19. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

20. See Letter from Rep. Romano L. Mazzoli to Pres. Ronald Reagan (Sept. 27, 1985), reprinted in 131 CONG. REC. H9307, H9308 (daily ed. Oct. 29, 1985).

Generally, "totalitarian" refers to left-wing or Marxist regimes and "authoritarian" refers to right-wing regimes such as those in Haiti, Guatemala, and El Salvador. See G. Loescher & J. Scanlan, *supra* note 3, at 208.

21. *Id.* at 216.

being allowed to stay in the United States are very good; if you are fleeing a regime that the current administration likes, your chances of being granted asylum are slim to none.

III. THE COLD WAR AND DISCRIMINATION

Consider the conclusion of Gil Loescher and John A. Scanlan, former consultants to the Select Commission on Immigration and Refugee Policy:

Pursuing policies forged in the crucible of the cold war, the United States has grown accustomed to regarding only the opponents of Communism as deserving of rescue. In the current restrictionist era, that belief has translated into an asylum policy totally at variance with the spirit of America's refugee law, and totally alien to the belief that refugees are desperate people, not pawns in a global game of chess with the Soviet Union.²²

The cold war focus of American refugee policy in this hemisphere means that our policies today particularly discriminate against Hispanics from El Salvador and Indians from Guatemala. Consider the following statistics for calendar year 1984, based on INS's own records:

Of all Iranians who requested asylum in this country, sixty-six percent were granted it, and forty-nine percent of all Poles were granted it. Only a mere seven percent of all requests from Nicaragua were permitted, and a pathetic two percent of Salvadoran requests were granted.²³

Of all asylum applicants from Poland claiming fear of persecution because of political opinion, fifty-one percent were granted asylum. Such applicants from Nicaragua were approved at a mere seven percent rate.²⁴

Approval rates for applicants who stated they were arrested, imprisoned, had their lives threatened, or were tortured, were sixty-four percent for Iranians, fifty-five percent for Poles, seven percent for Nicaraguans, and three percent for Salvadorans.²⁵

These figures illustrate the bias against certain groups of Central Americans in our current refugee policy. This bias exists, and has existed throughout the current administration, despite the well-

22. *Id.* at 219.

23. GENERAL ACCT. OFF., *supra* note 12, at 15.

24. *Id.* at 21.

25. *Id.* at 42.

documented existence of massive human rights violations in recent years in El Salvador and Guatemala, including death squads, torture, bombing raids, massacres, rape, and other imaginative and sick forms of persecution.²⁶ Between 1979 and the present, for example, an estimated minimum of fifty thousand Salvadorans have been assassinated,²⁷ an incredible figure considering their population. This figure would translate proportionately to a United States equivalent of an astounding *two million* political assassinations.

The monthly rate of civilian deaths and disappearances in El Salvador did decline for a while, especially around the time of the election.²⁸ Unfortunately, however, these deaths are again on the rise, and are now being complemented by deaths and casualties from an air war in the rural areas of El Salvador.²⁹

The tenth anniversary issue of *Mother Jones* magazine had a relevant comment:

Low intensity [conflict] simply means that El Salvador doesn't make headlines in the United States anymore. It's no longer news that military and paramilitary forces still assassinate 20 or more civilians each month. When two army officers fingered even by the Reagan administration as death-squad leaders received promotions this year, it rated only a few paragraphs. And it's hardly even news that the Salvadoran air force regularly bombs civilians "The Continuing Terror"—as the respected human rights group Americas Watch titled a recent report on El Salvador—is an old story to the American public, numbed by the banality that evil acquires when it goes on without end.³⁰

The recent persecution levels in El Salvador and Guatemala far outstrip the persecution levels of most of the rest of the world by almost any standard one would choose. Certainly there is more per-

26. See, e.g., R. BONNER, WEAKNESS AND DECEIT: U.S. POLICY AND EL SALVADOR 55-57 (1984); W. LA FEBER, INEVITABLE REVOLUTIONS 259-61 (1983); Shenk, *El Salvador: Central America's Forgotten War*, MOTHER JONES, July-Aug. 1986, at 60, 62, 72; Le Moyne, *San Vicente Journal: In the War for 'the People,' They Learn to Duck*, N.Y. Times, Feb. 4, 1987, at A4, col. 3.

27. Cf. W. LA FEBER, *supra* note 26, at 10 (noting that in 1980 and 1981 approximately 30,000 civilians were killed); Shenk, *supra* note 26, at 72 (noting that in the last six years more than 60,000 civilians were killed); LeMoyne, *supra* note 26, at A4, col. 3 (noting that more than 60,000 people have been killed in the civil war).

28. Shenk, *supra* note 26, at 64.

29. *Id.* at 64-65. *Contra* Walsh & O'Neill, *Sanctuary: A Legal Privilege or Act of Civil Disobedience?*, FLA. B.J., Feb. 1987, at 11, 15 (noting that the number of deaths is exaggerated and few civilians have been killed by aerial bombing in recent times).

30. Shenk, *supra* note 26, at 62-64.

secution of union members in El Salvador than there is of Chinese tennis players; obviously there is more persecution of Guatemalan Indians than of Russian ballet stars. Yet it is much, much easier for the tennis players and ballet stars to qualify as "refugees" than it is for the peasants and Indians.³¹

The rest of the world, taken as a whole, has a much easier time gaining refugee status in the United States than do Salvadorans and Guatemalans.³² The worldwide average for asylum requests granted is between twenty and twenty-five percent³³—more than *ten times* the average figures for El Salvador and Guatemala in recent years. There is something inherently unfair about these statistics.

United States refugee policy should: (1) be a reflection of humanitarian concerns, not foreign policy goals; (2) treat all national groups equally, not choose between those we favor, and those we deport; (3) treat different racial and ethnic groups the same; and (4) obey international and national law.

IV. INTERNATIONAL LAW AND SANCTUARY

The problem with United States refugee policy, however, is that, although international law is clear on this issue the United States is not acting in accordance with its own treaties.³⁴ The United States is a signatory to all four of the 1949 Geneva Conventions³⁵ and is supposed to adhere to the recognized international law principle of *nonrefoulement*, i.e., countries must give sanctuary to a refugee whose "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."³⁶

In 1980, the United States adopted a Refugee Act³⁷ which in-

31. See *supra* text accompanying notes 23 & 25.

32. See *supra* text accompanying notes 23-25.

33. See *supra* note 12.

34. See *supra* note 11 and accompanying text.

35. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (entered into force for U.S. Feb. 2, 1956); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (entered into force for U.S., Feb. 2, 1956); Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (entered into force for U.S. Feb. 2, 1956); Geneva Convention, *supra* note 11.

36. U.N. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6259, 6276, T.I.A.S. No. 6577, at 54, 189 U.N.T.S. 137, 176.

37. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

cluded a definition of refugee based on the United Nations' definition: one who seeks refuge due to "persecution or a well-founded fear of persecution."³⁸

The United States was also one of the driving forces behind the Nuremberg Trials,³⁹ which created the principles that individuals were responsible for what their national governments did, and that nations would be held responsible for humane treatment of civilians, even in time of war.⁴⁰ Yet when it comes time to enforce refugee policy with Salvadorans and Guatemalans, these principles go unheeded.

The argument I advance was summarized for me by Ms. Karen Parker, one of this nation's leading international and humanitarian law experts.⁴¹ Ms. Parker, a nongovernmental observer for the United Nations and an observer for the El Salvador Human Rights Commission, states that, under the 1949 Geneva Conventions, it is agreed that civilians have the right to flee civil wars such as those in El Salvador and Guatemala.⁴² These civilians are considered "protected parties" under the Geneva Conventions, with the legal right to cross borders to escape violence.⁴³

Furthermore, civilians in the country of refuge also have the international legal right to provide humanitarian aid, such as food, shelter, and clothing—in a word, *sanctuary*.⁴⁴ Additionally, it is the *obligation* of the new host country *not to deport* these protected parties back to their homelands as long as hostilities continue.⁴⁵

In short, since the civil wars continue in El Salvador and Guatemala, the United States violates the provisions of the Geneva Conventions every time it deports a protected party back to one of these nations. This is even more true when the original homeland nation is

38. *Id.* § 201(a).

39. R. JACKSON, *THE NÜRNBERG CASE V* (1947).

40. *See* W. HARRIS, *TYRANNY ON TRIAL* 496-98, 537-38 (1954).

41. Karen Parker is an associate of the International Institute of Humanitarian Law in Italy, and recipient of a diplôme from the International Institute of Human Rights in Strasbourg, France. She currently represents three nongovernmental organizations at the United Nations, and drafts U.N. resolutions and documents on international law at the U.N. in Geneva. She has consultative status to the Economic and Security Council and is consulting attorney to the U.N. High Commissioner for Refugees. She has written numerous articles on international law, has been on many fact-finding missions to Central America, and is an attorney *amicus curiae* in several sanctuary cases. *See* Speech by Karen Parker, Univ. of N.M. (Oct. 17, 1985) and Affidavit of Karen Parker (both on file at Hofstra Law Review).

42. Speech by Karen Parker, *supra* note 11, at 6-8.

43. *See* Speech by Karen Parker, *supra* note 11, at 6.

44. *Id.*

45. *Id.* at 7.

known to be a massive violator of international human rights, as both El Salvador and Guatemala are.

In recent years, the United States has deported forty thousand Salvadorans⁴⁶—forty thousand “grave breaches” of the Geneva Conventions. If the Salvadoran guerrillas ever followed the strategy parodied in *Doonesbury*,⁴⁷ invaded the U.S. through Brownsville, Texas, and took over the county, these “grave breaches” might have a different name: they might then be known as “war crimes.”

You will never see this international law argument discussed by any of the opponents of sanctuary, because they have no way to counter it.

Unfortunately, even as this nation celebrates the one hundredth anniversary of Ms. Liberty, it is violating its own treaties to the detriment of some of the most defenseless peasants in the world. This is not something I am proud of. It is not something that I believe most Americans would be proud of, if they knew about it. It is something that my sanctuary proclamation was intended to help change, by creating a national debate on the Central American refugee/sanctuary issue. And it is a situation that the legal profession can help illuminate for all American citizens.

I believe that most American citizens are humane and compassionate. I believe that most Americans support aiding those in need, and treating all refugees equally. I believe that most Americans would agree that this county, of all countries, should not be violating international law.

We need to change refugee policy as currently administered.

A. *The Current Debate*

The current debate about sanctuary is sterile, and pitched at too low a level. The INS and other Sanctuary opponents are clouding the issue and blurring the distinction between illegal immigrants and bona fide refugees, while knowing full well there is a difference. Immigration for economic reasons is one thing; self-imposed exile because of a well-founded fear of persecution due to race, color, religious beliefs, national origin, political opinion, or social class is a far different activity that is protected by law and must be defended.⁴⁸

In a recent meeting in my office, INS regional officials from Dallas, El Paso and Albuquerque openly admitted that they receive

46. *Id.*

47. G. Trudeau, *Doonesbury* (nationally syndicated political cartoon).

48. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

their directives from Washington, D.C., and more specifically, from the U.S. State Department. The Reagan administration has frequently granted extended voluntary departure status to refugees entering the United States from countries with Marxist regimes, such as Poland,⁴⁹ because it is presumed that they will be subjected to persecution if they are deported. Central Americans, on the other hand, are presumed to be “economic migrants” and each one must meet the impossible task of providing on a case by case basis that they will be persecuted if returned to their homeland.⁵⁰ I believe the same logic of persecution should apply to Central American refugees as to those from countries such as Poland.

If the question is whether or not sanctuary activists are violating the mistaken interpretation of law by bureaucrats at the INS or the current administration, then the answer is clearly yes. The sanctuary activists openly admit this “violation.” But if the question rises to the next higher level, and becomes whether or not sanctuary activists are disobeying international law, while INS officials are enforcing it, then the answer becomes no—and it is this question which should dominate the discussion. American citizens have the right, not to mention the obligation, to obey international law; that is one of the lessons of Nuremberg.

History will vindicate the sanctuary movement. History almost always vindicates those who risk their freedoms on behalf of moral principles, despite the objections of government officials who are “just doing their jobs.”

Where would we be today if Raoul Wallenberg had waited for German immigration officials to agree to allow Jews to leave Europe? Where would we be today if Harriet Tubman had waited for Confederate bureaucrats to change the slave laws? Where would we be today if Martin Luther King had waited for southern bus companies to cancel Jim Crow?

Government bureaucrats, police officials, reactionary politicians, and media mouthpieces for the status quo always criticize agents of change. They always argue that they are moving too fast, that they should obey the law, that they should petition their leaders for redress rather than go to jail. But the Martin Luther Kings, and the sanctuary movement activists of today, cannot wait while people are persecuted. They cannot wait for government officials to obey inter-

49. G. LOESCHER & J. SCANLAN, *supra* note 3, at 196.

50. *Id.* at 188-93.

national law. They act on faith, nonviolently, on behalf of their neighbors, knowing that history will vindicate them.

The problem is that the vindication often does not come fast enough to avoid jail terms, government harassment, public defamation, and even martyrdom. That is where sympathetic politicians and the legal profession come in; the case has to be made that it is our federal government that is breaking the law, not the sanctuary movement. It is time to educate the American public to the responsibilities of international law. It is time to act before a Jim Corbett,⁵¹ or a Reverend John Fife,⁵² or a Darlene Nicgorski⁵³ becomes a martyr.

Sanctuary leaders have already seen their churches infiltrated by United States government agents,⁵⁴ as if they were the Ku Klux Klan. They have already found their files confiscated,⁵⁵ as if this were the McCarthy era. They have already found their private conversations wiretapped,⁵⁶ as if they were the Mafia. All this in the United States of America.

And now eight of them have been convicted of felonies⁵⁷ in a trial in which international law was not even allowed into testimony.

Why? So that the current administration could pretend that the one million Salvadorans and Guatemalans who are currently refugees⁵⁸ are *all* only economically motivated. So that refugee policy, which Americans assume is based on humanitarian concerns, can remain a tool of the cold war.

B. *Time for Change*

It is time for a change. It is time to observe that if the Miami District Director of the INS has the right to decide, unilaterally, not to deport Nicaraguans due to possible persecution,⁵⁹ then the INS

51. Jim Corbett is a charter member of the sanctuary movement and was one of the three acquitted defendants in *United States v. Aguilar*, No. CR-85-008-PHX-EHC (D. Ariz. 1986). Medvesck, *Sanctuary Convictions: Law Over Justice*, THE CHRISTIAN CENTURY 541 (1986).

52. Rev. John Fife is one of eight convicted defendants in *United States v. Aguilar*, No. CR-85-008-PHX-EHC (D. Ariz. 1986). *No Sanctuary for Sanctuary*, U.S. NEWS & WORLD REP., May 12, 1986, at 10.

53. Sister Darlene Nicgorski is one of eight convicted defendants in *United States v. Aguilar*, No. CR-85-008-PHX-EHC (D. Ariz. 1986). See Medvesck, *supra* note 51; *Sanctuary*, THE NEW YORKER, June 30, 1986, at 22-23.

54. G. LOESCHER & J. SCANLAN, *supra* note 3, at 218.

55. *Sanctuary*, *supra* note 53, at 22, 24.

56. G. LOESCHER & J. SCANLAN, *supra* note 3, at 218.

57. *United States v. Aguilar*, No. CR-85-008-PHX-EHC (D. Ariz. 1985).

58. See G. LOESCHER & J. SCANLAN, *supra* note 3, at 215.

59. See Magnuson, *Double Standard for Refugees?*, TIME, Apr. 28, 1986, at 34.

District Directors in Dallas and Los Angeles have that same right not to deport Salvadorans and Guatemalans due to known persecution, a right they should now exercise.

The current situation evidences a double standard. First, it is unfair that Nicaraguans get special treatment⁶⁰ which Salvadorans and Guatemalans are denied. Second, it is wrong that an INS District Director can provide refuge to his chosen victims, while the federal government prosecutes church people who offer sanctuary to even more desperate refugees.⁶¹

Why is it that over ninety percent of all refugees granted asylum by the United States since World War II have come from Communist nations?⁶² Why is the current administration implementing American refugee law to continue its bias toward refugees from Communist nations?⁶³

The interpretation of the Refugee Act of 1980 is supposed to hinge upon subjective as well as objective facts.⁶⁴ In other words, it is relevant if a refugee from El Salvador feels that he or she may be persecuted if deported. In fact, the Court of Appeals for the Ninth Circuit has already ruled that, in order to qualify a person as a refugee, the phrase, "a well-founded fear of persecution," which is part of the Refugee Act of 1980, requires only: (1) a subjective belief on the part of the person that he or she would be persecuted if returned home; and (2) that the fear have a sufficient objective basis to be considered to be well-founded.⁶⁵

In my opinion, a typical Salvadoran or Guatemalan would almost automatically meet this standard.

Yet the INS continues to invoke a much harsher rule, the "clear probability" standard, which means the person must prove there is better than a fifty percent chance of persecution if deported. The

60. *Id.*

61. *Id.*

62. G. LOESCHER & J. SCANLAN, *supra* note 3, at xviii.

63. *See id.* at 215 (The Presidentially-determined refugee quota has continued to favor refugees from Communist countries. Although millions of people have fled from El Salvador, Guatemala, Afghanistan, and Ethiopia in recent years, the U.S. quotas for 1986 were for no more than 3,000 refugees from Latin America, 6,000 from the Middle East, 3,000 from Africa, but 55,000 from the Soviet Union, Eastern Europe, and Indo-China); Magnuson, *supra* note 59, at 34.

64. Either the objective "persecution" or the subjective "well-founded fear of persecution" can make an individual a "refugee" under the terms of the Act. Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102.

65. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452-53 (9th Cir. 1985), *aff'd*, 107 S. Ct. 1207 (1987).

INS has refused to adopt the more generous standard above, even after it was upheld by the courts.⁶⁶ This arrogance prompted the Ninth Circuit, in *Cardoza-Fonseca*, to note pointedly that “[i]n this respect the Board [of Immigration Appeals] appears to feel that it is exempt from the holding of *Marbury v. Madison* . . . and not constrained by circuit court opinions.”⁶⁷

It is time to call off the federal government’s war on the sanctuary movement. We do not need the FBI infiltrating our churches and INS agents spying on our citizens. It is not good for our country, and it is not good for the continuing legitimacy of our democratic system of government.

It is time to pass the Moakley/DeConcini⁶⁸ bill currently pending in Congress. This critical bill would grant Salvadorans extended voluntary departure status until hostilities cease.⁶⁹ The bill, however, should be amended to include Guatemalans, Nicaraguans, and Hondurans as well. As long as the United States is involved in supporting continuing, and even widening, wars in Central America, we must fulfill our obligation to ease the lives of the refugees created by those conflicts. Such an act of compassion would be new only for Central Americans. The United States has offered extended voluntary departure status⁷⁰ to Poles, Afghans, Lebanese, Cubans, Chileans, Ugandans and others;⁷¹ it is time for Salvadorans and Guatemalans to join this group.

C. *Time for Remembrance*

Finally, it is time to remember Anne Frank, and the brave Dutch people who hid her for years and went to concentration camps for trying to save her life. It is time to remember Martin Luther King. It is time to remember Harriet Tubman, and two hundred and fifty years of slavery, and the Underground Railroad to Canada.

66. See, e.g., *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1451-53 (9th Cir. 1985), *aff’d*, 107 S. Ct. 1207 (1987).

67. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1454 (9th Cir. 1985), *aff’d*, 107 S. Ct. 1207 (1987).

68. H.R. 822, 99th Cong., 1st Sess., 131 CONG. REC. H216 (daily ed. Jan. 30, 1985); S. 377, 99th Cong., 1st Sess., 131 CONG. REC. S1028 (daily ed. Feb. 5, 1985).

69. S. 377, *supra* note 68; H.R. 822, *supra* note 68 (“to provide for the temporary stay of detention and deportation of certain Salvadorans”).

70. “[E]xtended voluntary departure’ [is] a more neutral status than ‘political refuge.’ ‘Extended voluntary departure’ makes the United States a temporary haven when immediate repatriation is unsafe.” 131 CONG. REC. S1030 (daily ed. Feb. 5, 1985) (quoting the *Minneapolis Star & Tribune*, Jan. 26, 1985).

71. *Id.*

We are Canada now. We are the land of the free. We are the end of the rainbow for these "huddled masses yearning to breathe free."⁷²

We must not close the door. We must, as the verses in Proverbs say:

Open your mouth for the dumb,
for the rights of all who are left
desolate.

Open your mouth, judge righteously,
maintain the rights of the poor
and needy.⁷³

We must make the symbol of the Statue of Liberty come to life for the refugees from Central America who are most in need. We must not make the same mistake we made in 1939, when we denied entrance to those twenty thousand children from Nazi Germany.

We must instead remember the words of President Franklin Delano Roosevelt, who in 1944 gave a speech condemning the atrocities of Hitler, and asking everyone in the world to offer sanctuary to the millions of victims of Nazi Germany:

I ask every German and every man everywhere under Nazi domination to show the world by his action that he does not share these insane criminal desires. Let him hide these pursued victims, help them to get over their border, and do what he can to save them from the Nazi hangman We call upon the free peoples of Europe and Asia temporarily to open their frontiers to all victims of oppression. We shall find havens of refuge for them, and we shall find the means for their maintenance and support until the tyrant is driven from their homelands and they may return.⁷⁴

72. Lazarus, *The New Colossus*, in J. HARRIS, A STATUE FOR AMERICA 88 (1985).

73. Proverbs 31:8-9 (Revised Standard).

74. CENTER FOR CONSTITUTIONAL RIGHTS, HAVENS OF REFUGE 1 (1985) (quoting statement issued by President Roosevelt in 1944).