Hofstra Law Review

Volume 15 | Issue 1 Article 2

1986

The Motion in Limine: Trial Without Jury - A Government's Weapon Against the Sanctuary Movement

Douglas L. Colbert

THE MOTION IN LIMINE: TRIAL WITHOUT JURY
A GOVERNMENT'S WEAPON AGAINST THE SANCTUARY MOVEMENT

*Douglas L. Colbert**

CONTENTS

* Assistant Professor of Law, Hofstra University School of Law. B.A., State University of New York at Buffalo, 1968; J.D., Rutgers Law School, 1972. My thanks for the assistance and contribution of Shari Greenstein and David Yaffe.

INTRODUCTION

The day after the jury declared eight of the eleven[1] sanctuary defendants guilty in *United States v. Aguilar*,[2] the prosecuting United States attorney declared that the verdict would have been the same if the defendants' moral, religious, and international law claims had been considered by the jury.[3] But the government's trial strategy in *Aguilar* casts serious doubt on his contention. From the moment indictments were returned against the original sixteen defendants[4] the government utilized a pretrial legal procedure—a motion *in limine*[5]—in a novel and seldom employed manner in order to limit

---

1. Six individuals—Reverend John Fife, Sister Darlene Nicgorski, Father Ramon Quinones, Maria del Socorro Pardo de Aguilar, Philip Willis-Conger, and Peggy Hutchison—were convicted of a conspiracy under 18 U.S.C. § 371 (1982), to violate immigration law 8 U.S.C. § 1324(a) (1982). United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Oct. 28, 1985). The remaining two individuals, Father Tony Clark and Wendy LeWin, were found guilty of violating 8 U.S.C. § 1324(a)(3) (1982), which prohibits anyone who "willfully or knowingly conceals, harbors, or shields . . . ," and 8 U.S.C. § 1324(a)(2), which prohibits anyone who "knowing that he is . . . in violation of law . . . transports or moves." In addition, Reverend Fife (under two counts), Sister Nicgorski, and Philip Willis-Conger were convicted of violating 18 U.S.C. § 2 (1982) which prohibits anyone who "aids" and "abets" in the commission of violating 8 U.S.C. § 1324(a)(2) (1982). Sister Nicgorski was also convicted under 8 U.S.C. § 1324(a)(3) (1982). Finally, Father Quinones and Philip Willis-Conger were also convicted under 8 U.S.C. § 1325 (1982), which prohibits "[e]ntry of alien at improper time or place; misrepresentation and concealment of facts . . . ." Each is a felony carrying a maximum sentence of up to two years in prison, if convicted for a subsequent violation. Defendants Jim Corbett, Nena McDonald, and Mary Kay Espinosa were acquitted of all charges against them. Interviews with Ellen Yaroshefsky, defense attorney for Wendy LeWin (June 27, 1986); Karen Snell, defense attorney for Maria del Socorro Pardo de Aguilar (Dec. 19, 1986).

2. United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Oct. 28, 1985).

3. Applebome, *Backers Say Guilty Verdicts Aid Alien Sanctuary Drive*, N.Y. Times, May 3, 1986, at 8, col. 1.

4. Prior to trial, charges against two persons originally charged with conspiracy to violate the immigration law and various substantive crimes were dismissed, and three others pled guilty to a reduced misdemeanor offense. On February 12, 1985, Assistant United States Attorney Donald Reno dismissed charges against Sister Ana Priester and Sister Mary Waddell on the grounds that Sister Ana Priester had severe health problems, and Sister Mary Waddell's care and support may have been needed to assist Priester during the period of her illness. Hawley, *U.S., 'Higher' Laws Clash in 'Simple' Sanctuary Trial*, Arizona Republic, Feb. 13, 1985, at A1, 14, col. 6. Following the dismissal, Sister Priester rejected the government's reason for taking this action and believed the charges were dropped because of weaknesses in the government's case. *Id.* Cecilia del Carmen Juarez pled guilty to a misdemeanor charge of aiding and abetting the illegal entry of aliens and received two years probation; Bertha Martel-Benavides received the same sentence for aiding and abetting the illegal entry of her son. *Id.* Finally, Katherine Flaherty pled guilty to a misdemeanor on October 18, 1985 and received a two year probation sentence. Fischer, *Sanctuary Worker Pleads Guilty to Reduced Charge*, Arizona Daily Star, Oct. 19, 1985, at A1.

5. *In limine* is defined as "[o]n or at the threshold; at the very beginning; preliminarily." BLACK'S LAW DICTIONARY 708 (5th ed. 1979). *See also* CASSELL'S NEW LATIN DIC-

seriously the defenses available to the defendant sanctuary workers and to bar absolutely testimonial evidence supportive of them.

The motion *in limine* is a pretrial[6] evidentiary ruling made upon application by either party to the trial court for the purpose of precluding the opposing party from ever using a particular item of evidence at any stage of the trial proceeding. It is intended to remove the possibility of prejudice from reaching the jury[7] and is directed to material which is inadmissible at trial. In a criminal case, the motion *in limine* was originally intended to protect an accused's right to a fair trial by excluding prejudicial evidence from the jury's consideration.[8] While the major advantage in employing motions *in limine* has traditionally worked in favor of defense counsel,[9] prosecutors also use this technique and, it appears, currently rely upon it even more creatively than the defense.[10]

TIONARY 346 (1968) (indicating it comes from the Latin word "limen" meaning "the threshold").

The motion *in limine* is defined as "[a] written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements." BLACK'S LAW DICTIONARY 914 (5th ed. 1979).

6. While a motion *in limine* may be made at any stage of a trial, it is most commonly made before trial. A court may choose, however, not to rule upon the application at that time. The trial judge may decide to issue a preliminary order prohibiting either party from referring to the subject matter in the jury's presence until the court makes a final ruling during trial. Some commentators refer to this ruling as a prohibitive-permissive order. A prohibitive absolute order, on the other hand, is a final *in limine*, pretrial ruling. *See* Gamble, *The Motion in Limine: A Pretrial Procedure That Has Come of Age*, 33 ALA. L. REV. 1, 12, 13 (1981); Lerner, *The Motion in Limine: A Useful Trial Tool*, 4 TRIAL DIPL. J. 14 (Spring 1981); Richardson, *Use of Motions in Limine in Civil Proceedings*, 45 MO. L. REV. 130, 134 (1980); Rodin, *The Motion in Limine: Its Uses and Abuses*, 65 CHI. B. REC. 230, 230-31 (1984); Rothblatt & Leroy, *The Motion in Liminie [sic] in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence*, 60 KY. L.J. 611, 615-17 (1972); Note, *The Motion in Limine—A Useful Procedural Device*, 35 MONT. L. REV. 362, 368 (1974) [hereinafter Note, *Useful Procedural Device*]; Comment, *Motion in Limine*, 29 ARK. L. REV. 215, 223 (1975); Comment, *Civil Procedure—New Mexico's Recognition of the Motion in Limine*, 8 N.M. L. REV. 211, 216 (1978) [hereinafter Comment, *New Mexico's Recognition*]; Comment, *The Motion in Limine: Pretrial Trump Card in Civil Litigation*, 27 U. FLA. L. REV. 531 (1975) [hereinafter Comment, *Pretrial Trump Card*].

In *Aguilar*, the court issued an absolute order before trial prohibiting the accused from relying upon specific defenses and precluding mention of several evidentiary items. *See infra* notes 230-31 and accompanying text. In this Article, the motion *in limine* shall refer to a court's absolute, pretrial order unless otherwise indicated.

7. Rothblatt & Leroy, *supra* note 6, at 611, 635; see also *infra* note 21 for other articles emphasizing that the primary purpose of the motion *in limine* is to eliminate prejudicial items or questions from being presented to a jury.

8. *See infra* note 21.

9. Rothblatt & Leroy, *supra* note 6, at 611, 613; *see infra* notes 77-87 and accompanying text.

10. *See infra* notes 88-98, 102 and accompanying text (describing a recent trend in the

The government used the motion *in limine* in *United States v. Aguilar* to exclude more than particular items of evidence. It urged the court to bar whole defenses or claims seeking to establish that the defendants' conduct was not criminal. Specifically, the prosecution sought preclusion of arguments based upon the following grounds: (1) the first amendment right to free exercise of religion; (2) the rights of refugees under international law and domestic legislation; (3) the traditional criminal legal defense of necessity or justification; and (4) the lack of specific criminal intent to violate any of the federal immigration statutes charged in the indictment.[11]

The government's use of this legal strategy raises serious constitutional questions as to whether defendants' fundamental rights were violated in *Aguilar*, specifically the defendants' due process right to a fair trial, and their sixth amendment rights to be judged by a jury and to present a full and meaningful defense. Moreover, by shifting the burden of proof and the order in which proof is presented, the government's use of the motion *in limine* threatens to modify significantly the fundamental rules and basic procedures by which a criminal trial is conducted under Anglo-American jurisprudence.

In every criminal trial, the prosecutor is required to prove guilt;[12] it would be extraordinary for a prosecutor to be assisted in meeting this burden through procedural pretrial discovery devices revealing the theories the defense intends to use to establish a reasonable doubt in the government's case.[13] Yet once the trial court denied the defense application to strike the government's motion *in limine* in *Aguilar*, the defense was compelled to detail the legal and factual theories it planned to introduce during extensive, time-consuming pretrial motion practice.[14] Far in advance of assuming its usual bur-

---

prosecution's application of the motion in limine).

11. *See* Government's Memorandum in Support of Motion In Limine, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Jan. 10, 1985).

12. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 1.4(a), at 17 n.8 (2d ed. 1986) ("This is a constitutional requirement under the due process clause.") (citing *In re* Winship, 397 U.S. 358 (1970)).

13. The government can only obtain through discovery reciprocal items of evidence from the defense, such as documents and other tangible objects in the possession of the defense, FED. R. CRIM. P. 16(b)(1)(A), or reports of examinations or tests (physical, mental, scientific, etc.), FED. R. CRIM. P. 16(b)(1)(B).

14. More than ten months passed following the government's motion *in limine* of January 10, 1985, before the federal district trial court entered its final order upon the motion on October 28, 1985. In this period, the defense and government submitted numerous motions, memoranda of law, offers of proof, and various written applications—a total of over 150 separate documents. The pretrial motion practice was voluminous. It began with the government's motion *in limine*, supported by a 31-page memorandum of law and 33-page appendix. The

den of proving guilt at trial, the prosecution had forced the defense to assume a unique burden: Before it could challenge the government's case through cross-examination and by presenting its own witnesses, the defense team was compelled by the motion *in limine* to reveal its trial strategies and to prove the relevancy of its defenses to the trial court.[15] The accused's fundamental right to remain silent,[16] to be free from self-incrimination,[17] and to insist that the prosecution assume its full burden of proving guilt[18] were each placed in jeopardy as a result of the government's motion *in limine*. In effect, the presumption of innocence, so fundamental to our criminal justice system, was undermined, if not eliminated.

Once the *in limine* discovery was completed in *Aguilar*, the court granted the government's motion *in limine* almost in its entirety,[19] thereby subverting the historic role of the jury as triers of the facts. The jury's verdict was based upon evidence ruled admissible by the judge's *in limine* ruling; evidence deemed irrelevant or prejudicial was excluded from its consideration. While a court's

---

defense then moved to strike the motion on March 15, 1985. An amicus brief was filed on March 25, 1985, by the Arizona Sanctuary Fund. Motions to dismiss upon religious grounds and international law were filed on March 27-28, 1985. The prosecutor's reply memorandum, dated March 29, 1985, included an additional 15-page appendix. The defense responded to the prosecutor's reply memorandum on April 12, 1985. The court denied the motion to strike, requiring the defense to answer the government's motion *in limine* on the merits. The defense then submitted the following memoranda to support the use of a defense based upon: Necessity, including the law related to futility (April 24, May 24, and June 7, 1985); the 1980 Refugee Act (April 24, 1985); Religion (May 3, May 14, May 16, May 24, & June 17, 1985); Intent (April 24, 1985); and International Law (March 28, May 2, May 5, May 30, & May 31, 1985).

The government answered with an omnibus, six-part memorandum in response to defendants' motions in opposition on May 6, 1985. The defense replied with a supplemental memorandum regarding the necessity defense and the issue of intent (undated memorandum). The government answered the necessity memorandum on May 16, 1985.

In addition to the pretrial motion practice relevant to resolving the government's motion *in limine*, the court also made rulings in the following areas: use and identity of government informants, search and seizure, selective enforcement, government misconduct, and infiltration of church meetings and of religious activities.

15. The defendants' memoranda of law in response to the government's motion *in limine* and oral arguments detailed their theory of defense with respect to each specific claim the government sought to exclude in the motion *in limine*: free exercise of religion; necessity defense, including the law of futility; reliance upon international and domestic law; and lack of specific intent to violate the immigration statute based upon the defendants' belief that their actions were lawful.

16. Miranda v. Arizona, 384 U.S. 436 (1966).

17. U.S. CONST. amend. V.

18. *In re* Winship, 397 U.S. 358 (1970).

19. United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Oct. 25, 1985) (order granting government's motion *in limine*).

power to rule upon the relevancy of evidence is clear,[20] this use of the motion *in limine* created a marked shift from jury to judge in carrying out the fact-finding role. By expanding its judicial role and becoming a fact-finder, the court crossed over the jurisprudential boundary and usurped decisions normally left to the jury.

The primary focus of this Article is upon the government's use of the motion *in limine* in *Aguilar*. Specifically, this Article argues that the exclusion of entire defenses is not the proper subject of a motion *in limine* in a criminal case, and, therefore, the defendants in *Aguilar* were denied fundamental rights. The author does not intend to present an exhaustive analysis of the relative strengths and weaknesses of the specific defenses excluded by the *in limine* ruling. Rather, this Article concentrates upon the propriety of the trial judge's barring of important defenses prior to trial and poses the question of whether the court should have permitted the jury to consider these issues.

In Part I the jurisprudential development and application of the motion *in limine* is analyzed. In Part II an historical background of the Sanctuary Movement is provided, including the circumstances leading to the government's commencement of criminal prosecution against some of the religious leaders and members of that movement in *Aguilar*. In Part III the government's motion *in limine* in *Aguilar* and the defendants' motion in opposition are reviewed. Part IV describes the individual defenses sought to be excluded by the government's motion *in limine*. Part V is devoted to the constitutional issues raised by the court's *in limine* ruling in *Aguilar*.

I. THE MOTION IN LIMINE

The motion *in limine* has become a valuable pretrial instrument in jury trials for preventing prejudicial[21] evidence from being intro-

20. FED. R. EVID. 401-03.

21. Most commentators agree that the primary purpose of the motion *in limine* is to avoid prejudicial questions or evidence from being heard by a jury. *See* Blumenkopf, *The Motion in Limine: An Effective Procedural Device With No Material Downside Risks*, 16 NEW ENG. L. REV. 171, 171-72 (1981); Davis, *Motions in Limine*, 15 CLEV.-MAR. L. REV. 255, 256 (1966); Davis, *The Motion in Limine—A Neglected Trial Technique*, 5 WASHBURN L.J. 232, 234 (1966); Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 256 (1976); Epstein, *Motions in Limine—A Primer*, 8 LITIGATION 34, 34 (Spring 1982); Gamble, *supra* note 6, at 1; Hazel, *The Motion in Limine: A Texas Proposal*, 21 HOUS. L. REV. 919, 921 (1984); Kromzer, *Advantages to be Gained by Trial Motions for the Plaintiff*, 6 S. TEX. L.J. 179 (1962); Lerner, *supra* note 6, at 15; Mahoney & Jacobson, *The Motion in Limine: A Remedy for Dirty Tricks*, 27 FED. INS. COMM. Q. 65, 68 (Fall 1976); Richardson, *supra* note 6, at 130, 131, 133, 143, 144; Rodin, *supra* note 6, at 230; Rothblatt & Leroy,

duced at trial and interfering with a party's right to a fair and impartial jury verdict.[22] Its use in civil practice is so extensive that one commentator suggests "few [civil] trial lawyers would risk beginning a jury trial without the protection [the motion *in limine*] affords."[23]

It is likely that the motion *in limine* was born as the civil counterpart to the suppression motion in a criminal trial,[24] established in the 1914 United States Supreme Court decision in *Weeks v. United States*.[25] In *Weeks*, the Court ruled during a pretrial hearing that physical evidence obtained in violation of the defendant's fourth amendment rights was inadmissible at trial. While the *in limine* motion is based on the rules of evidence and not directly on constitutional grounds,[26] both the defense motion to suppress and motion *in limine* seek to exclude anticipated prejudicial evidence or references to prejudicial matters at trial. In a criminal case, the result of both is

---

supra note 6, at 613-15; Spencer, *The Motion in Limine: Pretrial Tool to Exclude Prejudicial Evidence*, 56 CONN. B.J. 325, 325 (1982); Traster, *Protecting Your Client With the Motion in Limine*, 22 TRIAL LAW GUIDE 147, 165 (1978); Note, *Useful Procedural Device, supra* note 6, at 369; Note, *Pretrial Exclusionary Evidence Rulings*, 1967 WIS. L. REV. 738, 743 [hereinafter Note, *Evidence Rulings*]; Comment, *The Use of Motions in Limine in Civil Litigation*, 1977 ARIZ. ST. L.J. 443, 455 [hereinafter Comment, *Civil Litigation*]; Comment, *Motion in Limine, supra* note 6, at 215, 216, 218, 223; Comment, *Motions in Limine in Washington*, 9 GONZ. L. REV. 780, 783 (1974); Comment, *New Mexico's Recognition, supra* note 6, at 213; Comment, *Pretrial Trump Card, supra* note 6, at 531, 537, 541; 20 AM. JUR. TRIALS, *Motion in Limine Practice*, 441, 447 (1973).

22. Bruder, *Pretrial Motions in Texas Criminal Cases*, 9 HOUS. L. REV. 641, 653 (1972); Davis, *Motions in Limine: Tools for a Fair Trial*, 18 TRIAL 90, 90 (Nov. 1982); Rothblatt & Leroy, *supra* note 6, at 613, 618, 624; Traster, *supra* note 21, at 165; Note, *Evidence Rulings, supra* note 21, at 742, 757; Comment, *Useful Procedural Device, supra* note 6, at 362, 370; Comment, *Pretrial Trump Card, supra* note 6, at 532.

23. Hazel, *supra* note 21, at 919. *See* Blumenkopf, *supra* note 21, at 171-72; Lerner, *supra* note 6, at 16; Mahoney & Jacobson, *supra* note 21, at 74; Richardson, *supra* note 6, at 130, 140; Rodin, *supra* note 6, at 230; Saltzburg, *Tactics of the Motion in Limine*, 9 LITIGATION 17, 17 (Summer 1983); Comment, *Civil Litigation, supra* note 21, at 443; Comment, *Useful Procedural Device, supra* note 6, at 369; Dombroff, *Motions in Limine Help Speed Up Litigation Process*, LEGAL TIMES, May 2, 1983, at 16; 20 AM. JUR. TRIALS, *supra* note 21, at 458.

24. The relationship between the motion to suppress and the motion *in limine* has been recognized by several commentators. *See* Blumenkopf, *supra* note 21, at 174; Mahoney & Jacobson, *supra* note 21, at 67; Rodin, *supra* note 6, at 230 ("The motion in limine had its birth in the criminal law motion to suppress evidence.") (footnote omitted); Spencer, *supra* note 21, at 326; Comment, *Useful Procedural Device, supra* note 6, at 362-63; Comment, *New Mexico's Recognition, supra* note 6, at 213.

25. 232 U.S. 383 (1914).

26. Epstein, *supra* note 21, at 34; Annotation, *Modern Status of Rules as to Use of Motion in Limine or Similar Preliminary Motion to Secure Exclusion of Prejudicial Evidence or Reference to Prejudicial Matters*, 63 A.L.R. 3d 311, 315 (1975) [hereinafter *Modern Status*].

the suppression of evidence in order to protect the right of the accused to a fair trial, and to prevent the prosecutor from asking prejudicial questions or making prejudicial statements about the suppressed evidence before a jury.[27]

It is not certain when the motion *in limine* was first used. Almost every commentator refers to a 1933 Alabama case;[28] yet recently one writer[29] discovered an earlier 1926 decision and claims that Texas should be recognized as the birthplace of the motion *in limine*. During the preceding century, the phrase *in limine* was used in several United States Supreme Court decisions.[30] In most of these cases, *in limine* referred to a pretrial motion decided "preliminarily" and was analogous to a motion to dismiss for lack of jurisdiction[31] or for failure to state a cause of action.[32] In some instances, *in limine* was synonymous with its definitional meaning, "at the outset."[33]

---

27. *See* Bruder, *supra* note 22, at 653; Dolan, *supra* note 21, at 256; Rothblatt & Leroy, *supra* note 6, at 613, 618, 624; Traster, *supra* note 21, at 165; Comment, *Pretrial Trump Card, supra* note 6, at 531-32; Comment, *Evidence Rulings, supra* note 21, at 738, 740, 745.

28. Bradford v. Birmingham Electric Co., 227 Ala. 285, 149 So. 729 (1933). *See infra* notes 42-43 and accompanying text; Blumenkopf, *supra* note 21, at 174-75; Epstein, *supra* note 21, at 34; Gamble, *supra* note 6, at 3; Lerner, *supra* note 6, at 14; Rodin, *supra* note 6, at 230; Rothblatt & Leroy, *supra* note 6, at 615; Spencer, *supra* note 21, at 326; Note, *Useful Procedural Device, supra* note 6, at 363; Comment, *Motion in Limine, supra* note 6, at 221; Comment, *Motions in Limine in Washington, supra* note 21, at 784; Comment, *New Mexico's Recognition, supra* note 6, at 214; Comment, *Pretrial Trump Card, supra* note 6, at 533; 20 AM. JUR. TRIALS, *supra* note 21, at 458 n.43.

29. *See* Hazel, *supra* note 21, at 922 (citing Fort Worth & Denver City R.R. Co. v. Westrup, 278 S.W. 490 (Tex. Civ. App. 1925), *aff'd*, 285 S.W. 1053 (Tex. Comm. App. 1926)).

Clearly, Texas is recognized as the vanguard state to have promoted and developed the motion *in limine* in both civil and criminal practice. *See infra* notes 46-49 and accompanying text; Blumenkopf, *supra* note 21, at 176; Richardson, *supra* note 6, at 138 n.53; Rodin, *supra* note 6, at 230; Comment, *Useful Procedural Device, supra* note 6, at 363; Comment, *Pretrial Trump Card, supra* note 6, at 532.

30. Schick v. United States, 195 U.S. 65 (1904); The Telephone Cases, 126 U.S. 1 (1888); Osborn v. Nicholson, 80 U.S. (13 Wall.) 654 (1872); Watson v. Sutherland, 72 U.S. (5 Wall.) 74 (1867); Corporation of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816); *See* Comment, *Motion in Limine, supra* note 6, at 220 (citing Southern Pac. R.R. v. United States, 200 U.S. 341, 349 (1906)).

31. Corporation of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91, 94 (1816) ("proceedings of court . . . arrested *in limine* by a question respecting its jurisdiction"); Southern Pac. R.R. v. United States, 200 U.S. 341, 349 (1906) (trial court not obliged to entertain challenge to its jurisdiction in pleading "even though if taken *in limine* it might have been worthy of attention").

32. *See, e.g.*, Osborne v. Nicholson, 80 U.S. (13 Wall.) 654, 656 (1872) ("question . . . whether the facts pleaded were sufficient to bar the action").

33. White v. Leovy, 174 U.S. 91, 93 (1899) (motion to strike a portion of defendant's answer *in limine*); The Telephone Cases, 126 U.S. 1 (1888); Watson v. Sutherland, 72 U.S. (5

There is, however, one early case, an 1866 United States Supreme Court decision, which closely resembles the modern day version of the motion *in limine*. In *Mississippi v. Johnson*,[34] the state sought to enjoin President Andrew Johnson from executing the recently enacted Reconstruction Act of 1867.[35] The Act divided the Confederate states into five military districts, under rule of a Union commander, and was viewed by Mississippi as a law which would "annihilate the State" and lead to its "utter destruction."[36] When the state intimated that it intended to file a comprehensive bill to enjoin the President, the United States Attorney General objected *in limine* to the filing, arguing it "contain[ed] matters not fit to be received."[37] The Attorney General's argument was based, in part, upon the Mississippi bill containing prejudicial material:

> [W]hile as a general thing a motion to file a bill was granted as of course, yet if it was suggested that the bill contained scandalous or impertinent matter, or was in other respects improper to be received, the court would either examine the bill or refer it to a master for examination. The only matter, therefore, which would now be considered was the question of leave to file the bill.[38]

The Court granted the government's motion *in limine* and denied the state's motion for leave to file the bill, stating that because "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties . . . no such bill ought to be received by us."[39] The government's motion *in limine* had been employed to exclude scandalous, impertinent, or otherwise improper material from being considered by the judicial fact-finder.

The first reported state court decision in which the motion *in*

Wall.) 74, 79 (1867) (if "the common law fail[s] to reach the mischief . . . a court of equity steps in, arrests the proceedings *in limine*").

34. 71 U.S. (4 Wall.) 475 (1867).

35. Reconstruction Act, ch. 153, 14 Stat. 428 (1867) ("*An act to provide for the more efficient Government of the Rebel States*" (emphasis added)). This was a major piece of Reconstruction legislation enacted by the 39th Congress to protect the civil and political rights of the newly freed slaves following the Civil War. It was passed on March 23, 1867, overriding President Johnson's veto by a two-thirds vote of Congressional representatives.

36. 71 U.S. at 476. The bill described the political history of the sovereignty of the State of Mississippi, claiming "the Congress of the United States cannot constitutionally expel her from the Union and . . . any attempt which practically does so is a nullity." *Id.* The bill provides a passionate state's rights argument against the unlawfulness of federal power over the citizens of Mississippi.

37. *Id.* at 478.

38. *Id.*

39. *Id.* at 501.

limine was used was a 1926 case, *Fort Worth & Denver City Railroad v. Westrup*,[40] where a Texas civil court granted counsel's motion to preclude the defense from cross-examining the plaintiff about being a strike-breaker. The Texas Court of Civil Appeals affirmed the trial court's *in limine* ruling, stating that the question was "calculated to create prejudice"[41] and should not be asked in the jury's presence. In 1933, the Alabama Supreme Court rejected the *in limine* principle in another civil case, *Bradford v. Birmingham Electric Co.*,[42] by affirming a trial court's refusal to instruct defendant not to offer certain evidence regarding the plaintiff's character. The Alabama Supreme Court stated that "[t]o give judicial sanction to the procedure attempted to be engrafted upon our well-understood and long-established practice in the trial of cases would be . . . an unwarranted usurpation of judicial power and authority."[43]

The motion *in limine* later appeared in a criminal trial in a 1937 case, *State v. Smith*,[44] in which a Washington appellate court reversed the defendant's conviction when a prosecutor violated a trial court's *in limine* ruling, precluding the prosecutor from cross-examining the accused on his discharge from the military. A related Washington court decision in the same year, *State v. Morgan*,[45] held it was within the trial court's discretion to require the prosecutor to disclose pretrial whether he intended to cross-examine the defendant concerning his prior arrests.

Though the motion *in limine* was successfully applied in *Smith*, and referred to in *Morgan*, its use during the next twenty-five years was limited almost exclusively to civil cases in Texas,[46] and these were few in number.[47] The Texas Supreme Court used the phrase

---

40. 278 S.W. 490 (Tex. Ct. App. 1925). For a discussion of this case, see sources cited *supra* note 29.

41. 278 S.W. at 492.

42. 227 Ala. 285, 149 So. 729 (1933). *But see* Acklin v. Bramm, 374 So. 2d 1348, 1349 (Ala. 1979) ("motion *in limine* practice is available in Alabama").

43. *Id.* at 287, 149 So. at 730.

44. 189 Wash. 422, 65 P.2d 1075 (1937).

45. 192 Wash. 425, 429, 73 P.2d 745, 747 (1937).

46. Hazel, *supra* note 21, at 923-29; *see also* Blumenkopf, *supra* note 21, at 176; *Modern Status*, *supra* note 26, at 325-27.

47. After *Westrup*, Texas appellate courts made no mention of the motion *in limine* procedure until Ford v. Carpenter, 147 Tex. 447, 449-51, 216 S.W.2d 558, 560 (1949) (Texas Supreme Court recommending that the trial court could instruct the parties about permissible areas of inquiry before the trial commences). The term motion *in limine* was used for the first time by a Texas court in Montgomery v. Vinzant, 297 S.W.2d 350, 356 (Tex. Civ. App. 1957), and the court also made reference to the *in limine* procedure in Sisk v. Glens Falls Indemnity Co., 310 S.W.2d 118, 122 (Tex. Civ. App. 1958).

"motion *in limine*" for the first time in a 1962 civil case, *Bridges v. City of Richardson.*[48] In a per curiam opinion, the court explained that the motion was useful to "prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury with respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suit."[49]

It is not surprising that the motion *in limine* has been used so infrequently in the past. It has never been expressly authorized in a federal rule of criminal or civil procedure, nor has it been codified in any state statute.[50] In 1984, the United States Supreme Court cited the use of the motion *in limine* for the first time in a criminal case in a footnote to *Luce v. United States.*[51] The note indicated that the judicial authority for the motion stems from a district court's inherent authority to manage the course of a trial. Most commentators and recent court decisions concur in that view and acknowledge that the general authority for the motion *in limine* falls within "a trial court's inherent power to exclude or admit evidence in the furtherance of its fundamental Constitutional purpose which is the administration of justice."[52]

Today, the motion *in limine* is used widely in civil cases, where it is regarded as a general litigation tool.[53] Courts have, however, cautioned that judges "must walk a fine line" and bar only specific evidence and not foreclose a party's entire theory of defense through an overly broad ruling.[54]

---

48. 163 Tex. 292, 293, 354 S.W.2d 366, 367 (1962).

49. *Id.* at 293-94, 354 S.W.2d at 367.

50. See Hazel, *supra* note 21, at 919 n.3, 933, where the author indicates that the motion *in limine* is recognized, although not codified, in 46 states, and proposes that Texas become the first state to incorporate the motion *in limine* in the Texas Rules of Civil Procedure.

51. 713 F.2d 1236 (6th Cir. 1983), *aff'd*, 469 U.S. 38, 41 n.4 (1984).

52. Burrus v. Silhavy, 155 Ind. App. 588, 564, 293 N.E.2d 794, 797 (1973). *See* Good v. A.B. Chance Co., 565 P.2d 217, 221 (Colo. App. 1977); Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (Ct. App. 1977); Blumenkopf, *supra* note 21, at 174; Davis, *The Motion in Limine—A Neglected Trial Technique*, *supra* note 21, at 234 n.5; Epstein, *supra* note 21, at 35; Kromzer, *supra* note 21, at 179; Mahoney & Jacobson, *supra* note 21, at 67; Richardson, *supra* note 6, at 131 n.10; Rodin, *supra* note 6, at 230; Rothblatt & Leroy, *supra* note 6, at 615; Note, *Useful Procedural Device*, *supra* note 6, at 364; Comment, *Motion in Limine*, *supra* note 6, at 220; Comment, *New Mexico's Recognition*, *supra* note 6, at 215; Comment, *Pretrial Trump Card*, *supra* note 6, at 535.

53. *See* Blumenkopf, *supra* note 21, at 172; Dombroff, *supra* note 23, at 16; Richardson, *supra* note 6, at 130; Saltzburg, *supra* note 23, at 17; Spencer, *supra* note 21, at 343; Comment, *Civil Litigation*, *supra* note 21, at 443; Note, *Useful Procedural Device*, *supra* note 6, at 370; 20 AM. JUR. TRIALS, *supra* note 21, at 458.

54. Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708 (6th Cir. 1975), *cert.*

In *Lewis v. Buena Vista Mutual Insurance Association*,[55] the Iowa Supreme Court was the first state appellate court to review the use of the motion *in limine* in its jurisdiction. It recognized the motion as a "useful tool" but warned that "care must be exercised to avoid indiscriminate application of it, lest parties be prevented from even trying to prove their contentions."[56] The court saw the dangers in the motion being used to deprive a plaintiff who has "a thin case" or a defendant with "a tenuous defense" from trying to establish this claim before a jury and in being "required to try a case or defense twice—once outside the jury's presence to satisfy the trial court of its sufficiency and then again before the jury."[57] In the court's view,

> the motion in limine is not ordinarily employed to choke off an entire claim or defense. . . . Rather, it is usually used to prohibit mention of some specific matter, such as an inflammatory piece of evidence. . . . The motion is a drastic one, preventing a party as it does from presenting his evidence in the usual way. Its use should be exceptional rather than general.[58]

The Iowa court criticized the expansive use of the motion in its jurisdiction and concluded that "[t]he motion should be used, if used at all, as a rifle and not as a shotgun, pointing out the objectionable material and showing why the material is inadmissible and prejudicial."[59]

The principles stated in *Buena Vista*—that a motion *in limine* should be limited to specific items of prejudicial evidence and not be so overly broad as to restrict an opposing party's presentation of a case—are recognized as the guiding limitations in employing the motion *in limine*.[60] Yet the overwhelming consensus of commentators,

---

denied, 423 U.S. 987 (1975); Epstein, *supra* note 21, at 34. *See* Blumenkopf, *supra* note 21, at 181-82; Bruder, *supra* note 22, at 653-54; Gamble, *supra* note 6, at 11; Kromzer, *supra* note 21, at 187; Lerner, *supra* note 6, at 15; Mahoney & Jacobson, *supra* note 21, at 74; Rodin, *supra* note 6, at 234, 238; Rothblatt & Leroy, *supra* note 6, at 617; Comment, *New Mexico's Recognition*, *supra* note 6, at 217.

55. 183 N.W.2d 198 (Iowa 1971).

56. *Id.* at 200.

57. *Id.* at 200-01.

58. *Id.* at 201.

59. *Id.*

60. *Id. See* Libco Corp. v. Dusek & Leigh, slip. op. (N. Ill. Apr. 29, 1986); Reidelberger v. Highland Body Shop, Inc., 83 Ill. 2d 545, 416 N.E.2d 268 (1981); Duffy v. Midlothian Country Club, 135 Ill. App. 3d 429, 436, 481 N.E.2d 1037, 1043 (1985); Bradley v. Caterpillar Tractor Co., 75 Ill. App. 3d 890, 394 N.E.2d 825 (1979); People v. Brumfield, 72 Ill. App. 3d 107, 390 N.E.2d 589 (1979); People v. Williams, 60 Ill. App. 3d 529, 377 N.E.2d 367 (1978); State v. Quick, 226 Kan. 308, 597 P.2d 1108 (1979); State v. Bradley,

in both civil and criminal cases, praise the motion *in limine* as an effective technique for excluding prejudicial evidence from trial.[61]

In civil litigation, commentators have found "no material downside risk"[62] and there exists little written opposition to the *in limine* practice. Most lawyers agree that a judge's cautionary instruction is usually ineffective after a jury has heard the evidence.[63] While a court has described the motion as one which will "shorten the trial, simplify the issues, and reduce the possibilities of a mistrial,"[64] the most important advantage of the motion *in limine* is to reduce the likelihood that a jury will be irrevocably prejudiced against either party to the litigation by hearing inadmissible, irrelevant, or inflammatory evidence.[65] The motion *in limine* allows a judge to make a deliberate decision, while avoiding disruptive trial delays and inconvenience to a jury.[66]

While the motion *in limine* is employed extensively in civil cases, its use in criminal cases has remained relatively limited. Although this difference has not been adequately explained, one factor to be considered is that broad discovery is permitted in civil cases. Each party has a greater opportunity to know what evidence its ad-

---

223 Kan. 710, 713-14, 576 P.2d 647, 650 (1978); Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983); State v. Brechon, 352 N.W.2d 745 (Minn. 1984).

61. *See supra* note 21 and accompanying text.

62. Blumenkopf, *supra* note 21, at 171-72 (footnote omitted). *See* Epstein, *supra* note 21, at 35; Gamble, *supra* note 6, at 9; Hazel, *supra* note 21, at 919; Rothblatt & Leroy, *supra* note 6, at 613-14; Comment, *Pretrial Trump Card, supra* note 6, at 545. The disadvantages referred to in some articles are concerned with a court's possible abuse in excluding evidence which should properly be before a jury. *See* Gamble, *supra* note 6, at 9; Hazel, *supra* note 21, at 945; Rodin, *supra* note 6, at 234; Comment, *Motion in Limine, supra* note 6, at 219; Comment, *Pretrial Trump Card, supra* note 6, at 538. *See also* Note, *Evidence Rulings, supra* note 21, at 744 (suggesting that opponents to the motion *in limine* will argue that the length of trial has been increased). *Cf.* Dombroff, *supra* note 23; Richardson, *supra* note 6, at 144 (both asserting that motions *in limine* will reduce length of trial).

63. Blumenkopf, *supra* note 21, at 173; Epstein, *supra* note 21, at 34; Rothblatt & Leroy, *supra* note 6, at 635; Spencer, *supra* note 21, at 339-40; Traster, *supra* note 21, at 147; Comment, *Motion in Limine, supra* note 6, at 215; Comment, *New Mexico's Recognition, supra* note 6, at 211; Note, *Evidence Rulings, supra* note 21, at 738; Comment, *Pretrial Trump Card, supra* note 6, at 536.

64. Burrus v. Silhavy, 293 N.E.2d 794, 797 (Ind. App. 1973).

65. *See* Epstein, *supra* note 21, at 34; Hazel, *supra* note 21, at 919; Mahoney & Jacobson, *supra* note 21, at 69; Rodin, *supra* note 6, at 231; Rothblatt & Leroy, *supra* note 6, at 624; Traster, *supra* note 21, at 165; Comment, *Motion in Limine, supra* note 6, at 216; Comment, *Motions in Limine in Washington, supra* note 21, at 780; Comment, *New Mexico's Recognition, supra* note 6, at 219.

66. *See* Davis, *The Motion in Limine—A Neglected Trial Technique, supra* note 21, at 233; Gamble, *supra* note 6, at 9; Richardson, *supra* note 6, at 144; Rothblatt & Leroy, *supra* note 6, at 634-35; Comment, *Motions in Limine in Washington, supra* note 21, at 790.

versary intends to produce at trial,[67] and thus can learn what prejudicial material it may want excluded. Moreover, a plaintiff's discovery motion in a civil action compels the defending party to disclose possible defenses, a consequence which occurs in only limited instances in a criminal case.[68] Thus, in civil suits, there is little danger that a motion *in limine* will advise the opponent of something which she is not already aware.

A second explanation of why the motion *in limine* is used less extensively in criminal than in civil cases is a court's reluctance to permit the criminal defense to interfere with the prosecution's presentation of its case. In a 1951 case, *Johns v. State*,[69] a trial judge refused to rule on defense counsel's motion *in limine* to preclude the prosecutor from offering evidence that the defendant had engaged in similar criminal acts until the evidence was actually offered. The appellate court affirmed the decision, stating that "the State has the right to prove its case in any way it may see fit under proper rules and regulations, and an accused cannot be allowed to direct either the method or manner of such proof."[70] A 1963 Oregon decision also disapproved of a defendant's attempt to limit the prosecution's proof through a motion *in limine* in *State v. Flett*.[71] Ms. Flett, accused of killing her husband, sought to prevent the prosecutor from introducing evidence of her infidelity during the marriage. The Supreme Court of Oregon stated that there was no occasion in a criminal trial for seeking test rulings from a court upon the admissibility of oral evidence which may or may not be offered. The court added that "[w]e have found no authority, however, which requires the court to submit to a dress rehearsal in which the defendant may explore the state's evidence . . . ."[72]

Consequently, in the few reported cases after *Smith*, when defense attorneys sought to prevent prosecutors from introducing or referring to prejudicial evidence before a jury through the criminal *in*

67. FED. R. CIV. P. 26-37 (general discovery provisions).

68. If the defense intends to rely upon either an alibi or insanity defense, they must serve written, pretrial notice upon the government within a designated time period set by the court. FED. R. CRIM. P. 12.1-12.2.

69. 236 S.W.2d 820 (Tex. Crim. 1951).

70. *Id.* at 822.

71. 234 Or. 124, 380 P.2d 634 (1963).

72. *Id.* at 130, 380 P.2d at 637. *Contra* People v. Ventimiglia, 52 N.Y.2d 350, 362-63, 420 N.E.2d 59, 63-64, 438 N.Y.S.2d 261, 265-66 (1981) (New York Court of Appeals decision urging prosecutors to obtain court rulings before introducing potentially prejudicial evidence on its direct case, or prior to asking potentially prejudicial questions during cross-examination).

limine motion, judicial recognition was negative. The Texas Court of Criminal Appeals, for instance, denied the motion repeatedly because Texas criminal procedure did not provide for a preliminary motion to suppress evidence.[73]

Three landmark United States Supreme Court decisions—*Mapp v. Ohio*,[74] *Miranda v. Arizona*,[75] and *Wade v. United States*[76]—significantly improved state courts' views of criminal *in limine* motions. For the first time, state courts were required to establish pretrial procedure to determine the admissibility of prejudicial evidence against an accused upon the ground that such evidence may have been illegally obtained as a result of police misconduct. The motion to suppress soon became standard procedure in state criminal trials, and *in limine* motions were seen as an additional mechanism to disallow evidence that would abrogate a criminal defendant's right to a fair trial.

Criminal defense attorneys were encouraged to use this procedure, limited only by the imagination of counsel,[77] and to prevent the prosecutor from uttering any prejudicial question or statement before a jury which would prevent a fair and impartial trial for the accused. The motion *in limine* has since become a commonly used practice by defense counsel in a few areas, such as limiting a prosecutor's impeachment on the basis of a defendant's prior convictions[78]

---

73. Arrington v. State, 296 S.W.2d 537, 539 (Tex. Crim. 1956) (court found nothing in Texas criminal procedure to permit a preliminary motion to preclude prosecution's cross-examination on defendant's prior conviction). *See also* Padgett v. State, 364 S.W.2d 397, 399 (Tex. 1963) (motions to suppress evidence in advance of proof held not to exist in state criminal procedure); Lacy v. State, 325 S.W.2d 392, 394 (Tex. Crim. 1959) (no error in admission of testimony regarding unopened bottle of liquor found in defendant's auto in DWI prosecution); Bills v. State, 327 S.W.2d 751, 752 (Tex. Crim. 1959) (no error found in allowing prosecutor to elicit testimony pertaining to crimes or offenses other than those directly related to charge).

74. 367 U.S. 643 (1961) (limiting the admissibility of evidence obtained by search and seizures in violation of the Constitution).

75. 384 U.S. 436 (1966) (requiring that an individual be informed of his rights at the outset of a police interrogation).

76. 585 F.2d 573, *cert. denied*, 440 U.S. 928 (1979).

77. 20 AM. JUR. TRIALS 441, 479-88 (1973). *See* Richardson, *supra* note 6, at 140; Rothblatt & Leroy, *supra* note 6, at 624.

78. It has become common practice for defense counsel to use the motion *in limine* to preclude cross-examination on defendant's prior convictions in both state court, *see* Commonwealth v. Nighelli, 435 N.E.2d 1058, 1063-64 (Mass. App. 1982); People v. Sandoval, 34 N.Y. 2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974); State v. Bennett, 122 R.I. 276, 280-81, 405 A.2d 1181, 1186-87 (1979); and in federal court, *see* United States v. Luce, 469 U.S. 38 (1984); United States v. Bagley, 772 F.2d 482, 486-87 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1215 (1986); United States v. Costa, 425 F.2d 950, 953-54 (2d Cir. 1969), *cert. denied*, 398

and prior arrests.[79] In *Luce v. United States*,[80] the Supreme Court approved the use of the *in limine* motion by the defense to preclude the prosecution from cross-examining the defendant on his prior conviction. There are, however, few reported decisions in which the defense has used the motion *in limine* successfully to limit the prosecution in presenting its direct proof against an accused.[81]

Thus, the historic roots of the motion *in limine* in criminal cases are grounded in the constitutional soil that nourished the development of the motion to suppress, which is a device geared to protect the rights of the criminal defendant. But prosecutors have increasingly found this procedure useful for excluding specific evidentiary items from use by the defense at trial. As a result of state prosecutors' *in limine* motions, defense attorneys have been precluded from cross-examining a prosecution witness concerning a pending indictment,[82] or a prior conviction;[83] from referring to the deceased's prior burglary conviction, absent proof that the defendant knew about the convictions as part of a self-defense claim;[84] or to his alleged sexual assaults against the defendant's sisters and daughters;[85] from indi-

---

U.S. 938 (1970); United States v. Palumbo, 401 F.2d 270, 272-74 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969). It is, however, always within a court's discretion to grant or deny the application. Further, should the motion be denied, the right to appeal is only preserved if the accused testifies at trial. *See* United States v. Luce, 469 U.S. 38, 40 (1984) (disapproving United States v. Cook, 608 F.2d 1175 (9th Cir. 1979), *cert. denied*, 444 U.S. 1034 (1980)).

79. 20 AM. JUR. TRIALS 486. *See* Rothblatt & Leroy, *supra* note 6.

80. 469 U.S. 38 (1984).

81. *See* State v. Reeves, 234 Kan. 250, 253, 671 P.2d 553, 558 (1983) (denying defense motion *in limine* to exclude testimony of prior alleged incidents between complainant and defendant); People v. Von Riper, 127 Ill. App. 2d 394, 398, 262 N.E.2d 141, 143-44 (1970) (denying defense motion *in limine* to exclude evidence that defendant previously used or possessed narcotic drugs, and concerning his manner of appearance or dress at the time of the crime), *cert. denied*, 403 U.S. 918 (1971); People v. Ventimiglia, 52 N.Y.2d 350, 356, 420 N.E.2d 59, 62-63, 438 N.Y.S.2d 261, 262 (1981) (denying *in limine* motion to preclude state from using defendants' statement that they "have a place for disposing of the body").

Defense motions *in limine* have succeeded in some areas other than precluding cross-examination of an accused's prior criminal record. *See* Commonwealth v. Barber, 14 Mass. App. Ct. 1008, 441 N.E.2d 763, 766 (1982) (preventing prosecution from questioning defendant regarding his refusal to give a urine sample until the court heard the defendant's direct evidence); Commonwealth v. Lopez, 383 Mass. 497, 499 n.2, 420 N.E.2d 319, 322 n.2 (1981).

82. Scarborough v. State, 171 Tex. Crim. 83, 344 S.W.2d 886 (1961).

83. State v. Brown, 6 Kan. App. 2d 556, 557, 630 P.2d 731, 734 (1981) (concluding witness' prior conviction for arson was not a crime involving dishonesty and thus affirming trial court's granting of motion *in limine*).

84. Garcia v. State, 454 S.W.2d 400, 404 (Tex. Crim. App. 1970).

85. Kaiser v. State, 673 P.2d 160, 161 (Okla. Crim. App. 1983) (ruling that "the alleged misconduct was not connected in time with the homicide, nor was [there] a proper basis for a defense of justifiable homicide").

cating that the defendant made a prior payment of restitution;[86] and from mentioning in any manner that the defendant passed a polygraph test.[87]

Federal prosecutors have likewise shown great ingenuity and expanding reliance upon the motion *in limine* to exclude specific items of evidence from being used by the defense at trial. Defense lawyers have been prevented from impeaching a government witness concerning a pending murder charge[88] or a nonfelony conviction.[89] Courts have granted government's motion *in limine* to preclude defense cross-examination of a government agent about his alleged criminal conduct,[90] his possible entrapment of other taxpayers in unrelated bribery cases,[91] and his knowledge of Immigration and Naturalization Service (INS) officials "planting" marijuana on innocent persons.[92] Prosecutors have used the motion *in limine* to prevent disclosure of results of polygraph tests.[93] The motion has been employed frequently[94] by the government in a variety of instances,[95] leading to the conclusion that the *in limine* procedure is becoming a regular weapon in the government's arsenal to exclude specific items of evidence from trial which the prosecution considers prejudicial to its case.

On the other hand, the motion *in limine* has been used by the

---

86. State v. Johnson, 183 N.W.2d 194 (Iowa 1971).

87. Robinson v. State, 309 N.E.2d 833 (Ind. Ct. App.), *superseded*, 262 Ind. 463, 317 N.E.2d 850 (1974).

88. United States v. Morgan, 757 F.2d 1074 (10th Cir. 1985).

89. United States v. Gloria, 494 F.2d 477 (5th Cir.), *cert. denied*, 419 U.S. 995 (1974).

90. United States v. Hill, 550 F. Supp. 983 (E.D. Pa. 1982), *aff'd*, 716 F.2d 893 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984).

91. United States v. Bocra, 623 F.2d 281, 288 (3d Cir.) (probative value of cross-examination outweighed by risk of confusing the jury by collateral explanation), *cert. denied*, 449 U.S. 875 (1980).

92. United States v. Love, 599 F.2d 107 (5th Cir.), *cert. denied*, 444 U.S. 944 (1979).

93. United States v. Traficant, 566 F. Supp. 1046 (N.D. Ohio 1983).

94. During the past five years there has been a trend in the use of the motion *in limine* by federal prosecutors to exclude entire defenses, particularly in politically sensitive cases. *See* Colbert, *Motion in Limine in Politically Sensitive Cases*, 39 STAN. L. REV. 1271 (1987). Furthermore, since 1980 it has become increasingly apparent that the motion is being employed more frequently to prohibit evidentiary items in criminal cases.

95. United States v. Mest, 789 F.2d 1069, 1073 (4th Cir. 1986) (videotaped hypnotic session of defendant precluded from trial), *cert. denied*, 107 S. Ct. 163 (1987); United States v. Curtis, 782 F.2d 593 (6th Cir. 1986) (granting government's motion *in limine* which precluded expert witness from testifying that the tax law involved in the case was unsettled and complex); United States v. Wyman, 576 F. Supp. 670, 672 (D. Neb. 1982) (granting government's motion *in limine* in part and denying in part, court stating that it will make a case by case analysis as to certain issues that arise).

government to obtain court rulings before introducing specific evidence on its direct case[96] or when conducting a cross-examination of a defense witness[97] in order to avoid unfairly prejudicing the defendant. Such rulings inform the prosecution of the evidentiary boundaries it must follow during trial, and prevent inadmissible evidence from being heard by the jury. Thus, the accused's right to a fair trial is enhanced, and the likelihood of government error necessitating retrial is reduced. New York's highest appellate court endorsed this use of the *in limine* procedure in *People v. Ventimiglia*,[98] and even suggested that a prosecutor should always file motions *in limine* before trial or before a witness testifies, to seek court rulings on whether potentially prejudicial evidence against an accused should be admitted in the first instance.[99]

In a criminal trial, protection of the defendant's fundamental right to a fair trial is the purpose of evidentiary rulings to exclude evidence. The motion to suppress provides for exclusions on constitutional grounds. Its offspring, the motion *in limine*, is available to both the defense and prosecuting attorneys to eliminate specific items of prejudicial evidence from the jury's consideration and to deter "intentional 'dirty tricks' or inadvertent but harmful statements"[100] at trial. In federal criminal cases, this objective is accomplished by Federal Rule of Evidence 403, which guarantees fairness in the judicial process by discouraging lawyers, especially prosecutors, from loading the record with inflammatory information they hope will influence a jury.[101]

---

96. United States v. Falco, 727 F.2d 659 (7th Cir. 1984) (government's motion *in limine* to permit it to introduce evidence of defendant's prior theft convictions on direct case); United States v. Clifford, 704 F.2d 86 (3d Cir. 1983) (government sought to introduce documentary evidence in direct case subject to proper authentication).

97. United States v. Mitchell, 397 F. Supp. 184 (D.C. Cir. 1974) (government's motion *in limine* sought ruling regarding proper cross-examination of defendant's character witness in a prior conviction for which defendant awaited sentence).

98. 52 N.Y.2d 350, 420 N.E.2d 59, 438 N.Y.S.2d 261 (1981).

99. *Id.* at 363, 420 N.E.2d at 63, 438 N.Y.S.2d at 263-64.

100. Traster, *supra* note 21, at 149. *See* Mahoney & Jacobson, *supra* note 21, at 65; Comment, *Civil Litigation, supra* note 21, at 443; *Modern Status, supra* note 26, at 311.

101. Dolan, *supra* note 21, at 228, 256. Rule 403 of the Federal Rules of Evidence states that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of *unfair prejudice*, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403 (emphasis added). Situations in this area call for balancing the probative value of and need for evidence against the harm likely to result from its admission. The phrase "unfair prejudice" has been defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* advisory commit-

In deciding a motion *in limine* in a criminal case, a court must carefully consider the effect its ruling will have upon the accused's right to obtain a fair trial. In recent years, prosecutors have attempted to expand the motion *in limine* from a pretrial procedure aimed at excluding prejudicial evidentiary items to one which would prevent entire defenses from being raised and considered by a jury in criminal trials.[102] *Aguilar*, where the government used the motion *in*

---

tee's note.

102. For an analysis of this recent trend, see Colbert, *supra* note 94. State court decisions which have reviewed this issue generally reflect a judicial concern that such broad *in limine* rulings impinge upon an accused's fundamental right to a fair trial and frequently reverse convictions based upon improperly granted motions *in limine*. *See, e.g.*, People v. Williams, 60 Ill. App. 3d 529, 377 N.E.2d 367 (1978); State v. Bradley, 223 Kan. 710, 713, 576 P.2d 647, 648 (1978); People v. Brumfield, 72 Ill. App. 3d 107, 113, 390 N.E.2d 589, 593-94 (1979); State v. Quick, 226 Kan. 308, 597 P.2d 1108 (1979); Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188, 197-98 (1983) (Liacos, J., concurring); State v. Brechon, 352 N.W.2d 745 (Minn. 1984).

Federal courts, on the other hand, rarely voice a similar concern in their rulings, and generally accept the government's motion *in limine* as a proper means of excluding or limiting certain defenses during the pretrial stage in the *ordinary* criminal case. For cases where the motion *in limine* was used to exclude an insanity defense because of untimeliness of notice, see United States v. Veatch, 647 F.2d 995 (1981); United States v. Buchbinder, 614 F. Supp. 1561 (D. Ill. 1985), *aff'd*, 796 F.2d 910 (7th Cir. 1986). *Cf.* United States v. Gillis, 773 F.2d 549 (4th Cir. 1985); United States v. Gould, 741 F.2d 45 (4th Cir. 1984) (denying government's motion *in limine*, permitting the accused to present an insanity defense, but ruling the evidence was insufficient to instruct the jury on the defense). For cases where the proposed defense was precluded when based on the defendant's compulsive gambling, see United States v. Davis, 772 F.2d 1339 (7th Cir. 1985); United States v. Torniero, 735 F.2d 725 (2d Cir. 1984); United States v. Lewellyn, 723 F.2d 615 (8th Cir. 1983). The motion *in limine* has also been used to exclude duress defenses in ordinary criminal cases. *See, e.g.*, United States v. Contento-Pachon, 723 F.2d 691 (9th Cir. 1984). *Cf.* United States v. Shapiro, 699 F.2d 593 (9th Cir. 1982).

There is evidence of a recent trend in the government's use of the motion *in limine* to preclude entire defenses in cases where the defendant challenges or opposes existing government policy. Such politically sensitive trials include anti-nuclear demonstrations, *see, e.g.*, United States v. Cottier, 759 F.2d 760 (9th Cir. 1985); United States v. Dorell, 758 F.2d 427 (9th Cir. 1985); United States v. Seward, 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); United States v. Best, 476 F. Supp. 34 (D. Colo. 1979); United States v. Fox & Manshardt, CR 85-112 (D. Ariz. 1986); prison escapes, *see, e.g.*, United States v. Williams, 791 F.2d 1383 (9th Cir. 1986), *cert. denied sub nom.* Sears v. United States, 107 S. Ct. 233 (1986); United States v. Peltier, 693 F.2d 96 (9th Cir. 1982); and in other cases, such as United States v. Martinez, No. CR-85-029-TUC-WDB (D. Ariz. filed Jan. 15, 1985), *rev'd*, 785 F.2d 663 (9th Cir. 1986); United States v. Rosenberg, Cr. No. 84-360 (D. N.J. 1984).

Recently, the United States Supreme Court decision in Crane v. Kentucky, 106 S. Ct. 2142 (1986), reversed a state court motion *in limine* ruling which precluded the defense from challenging the circumstances under which a confession was obtained. *Id.* at 2145. The Court was clearly concerned with a broad *in limine* ruling which deprives an accused of the right to present a meaningful defense. This decision may indicate a break in the recent trend if lower federal courts apply the same reasoning to reject federal prosecutors' motions *in limine* to

limine to exclude entire legal defenses contemplated by the sanctuary defendants, is an example of this recent trend. The following section details the history of the sanctuary movement, shedding light on the validity of those excluded defenses.

II. DEVELOPMENT OF THE SANCTUARY MOVEMENT

A. *Central American Sanctuary Movement*

When six churches held a press conference on March 24, 1982, and announced their decision to provide places of refuge for persons fleeing from El Salvador and Guatemala, the sanctuary movement in the United States was officially born.[103] This declaration by the Southside Presbyterian Church in Tucson, Arizona and five East Bay, California churches[104] brought to the surface a clandestine role played by sectors of the religious community for much of the prior year[105] in providing humanitarian assistance to Central Americans who had successfully crossed the United States-Mexico border. Their action was soon joined by many congregations,[106] and supported by

---

exclude an entire defense.

103. R. GOLDEN & M. MCCONNELL, SANCTUARY: THE NEW UNDERGROUND RAILROAD 14 (1986). *See* Medlyn, *'Underground railroad' still runs in the open*, Ariz. Daily Star, Dec. 25, 1982, at B1, col. 1; *Sanctuary: Church offers shelter to political refugees*, Phoenix Gazette, Mar. 25, 1982, at D1, col. 4.

104. The five churches were the University Lutheran Church, St. Mark's Episcopal Church, Trinity Methodist Church, St. John's Presbyterian Church, and the Holy Spirit Newman Center. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 48.

105. Reverend John Fife, pastor of Southside Presbyterian Church in Tucson, Arizona, indicated that he and his congregation provided food, clothing, and temporary shelter for undocumented Central Americans beginning in the summer of 1981. *See* R. GOLDEN & M. MCCONNELL, *supra* note 103, at 46-48; Quammen, *Knowing The Heart Of A Stranger*, NEW AGE JOURNAL, Aug. 1984, at 32, 36.

Jim Corbett, recognized as a cofounder of the sanctuary movement with Reverend Fife, acknowledged his involvement in an underground railroad began in June 1981, at which time Central Americans entered the United States and were moved to places of sanctuary within the country. Quammen, *supra* at 34.

106. On February 7, 1983, the sanctuary movement included twenty churches and synagogues. *Sanctuary drive to aid Salvadorans has spread among churches in the U.S.*, Tucson Citizen, Feb. 7, 1983, at B1, col. 1. By May 19, 1984, the number had grown to 110. Goldman, *Churches Becoming Home To Central American Exiles*, N.Y. Times, Apr. 1, 1984, at E9, col. 1. At the time the indictments were announced in *Aguilar*, almost 180 congregations had voted to make their places of worship sanctuary for Central Americans. Likewise, eleven cities declared themselves cities of sanctuary. As of January 1987, the number of congregations was 370, more than twice as many as when the prosecution commenced. This number includes about 70,000 sanctuary workers. In addition, there are now 19 sanctuary cities, 20 sanctuary universities, and two sanctuary states. Kemper, *Convicted of the Gospel*, SOJOURNER, July 1986, at 14; Interview with Michael McConnell, at Chicago Religious Task Force on Central America (July 16, 1986); Interview with Michael McConnell (Jan. 5, 1987).

religious leaders, including the Archbishop of the Catholic Diocese of Milwaukee, Rembert Weakland. He was the first Catholic bishop to endorse sanctuary and to give, in his words, "support to any Catholic parish that would want to be a sanctuary for Guatemalan and Salvadoran refugees."[107] On the evening when the first Catholic parishes in the United States declared themselves public sanctuaries, Archbishop Weakland said: "[W]e truly believe in the sanctity and sacredness of all human life. I had to weigh this act of civil disobedience with the very real threat to these people's lives if they were to return to their homeland."[108]

To understand what led religious people to risk criminal prosecution by sheltering and harboring Central American refugees who entered the United States in violation of INS regulations, one must look to United States policy in Central America and to the existing internal conditions in El Salvador and Guatemala since 1980. Most United States citizens are generally confused about the role of their government in this region.[109] For instance, few Americans are aware of the United States' involvement in overthrowing a popularly elected civilian government in Guatemala in 1954[110] or that the

---

The governing bodies or leading councils of the following denominations have affirmed their support of the sanctuary movement with various statements and resolutions: the American Baptist Churches, the American Lutheran Church, the Disciples of Christ (USA), Presbyterian Church (USA), the Rabbincal Assembly, the United Church of Christ, the United Methodist Church, and the American Friends Service Committee. Goldman, *U.S. Clerics Debating Ethics Of Giving Sanctuary To Aliens*, N.Y. Times, Aug. 23, 1985, at A1, col. 3.

A representative statement, passed by the Presbyterian General Assembly, endorses " 'the provision of sanctuary to refugees as an appropriate moral response to the policies of our government toward Central American refugees in the United States, even though the current administration may consider this to be illegal.' " Long, *U.S. Flouts Its Own Laws on Refugees*, Newday, Jan. 31, 1985, at 61, col. 1 (quoting statement by the Presbyterian Church).

107. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 6. Archbishop Weakland is the former head of the worldwide Benedictine Order of monks, *see* Goldman, *supra* note 106, at A1, col. 4, and is the chairman of the American Small Bishops Committee, which is currently drafting a pastoral letter on the economy and changes to help the poor.

108. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 12 (quoting Archbishop Weakland) (footnote omitted). On December 2, 1982, the Archbishop presided over a service in Milwaukee's Cathedral of St. John at which two Roman Catholic parishes, St. Benedict Moor of Milwaukee and Cristo Rey of Racine, Wisconsin, became the first Catholic parishes in the United States to declare themselves public sanctuaries. *Id.* at 11. *See* Golden & McConnell, *Sanctuary: Choosing Sides*, Christian Monitor, Feb. 21, 1983, at 31.

109. In July 1983, a New York Times/CBS poll indicated that only 25% of Americans knew that the United States supported the government in El Salvador, only 13% knew that it sides with the insurgents in Nicaragua, and only 8% knew both alignments. *Poll Finds Americans Don't Know United States Positions on Central America*, N.Y. Times, July 1, 1983, at B1, col. 3.

110. From 1839-1944, Guatemala was ruled almost continuously by military dictators.

United States continued[111] to provide support to the military regime there until March 1986[112]—a period in which it is estimated that over one hundred thousand citizens were killed by the Guatemalan

---

In 1944, democratic elections were held for the first time, and a civilian, Juan Jose Arevalo, was elected. In 1951, President Arevalo was succeeded by Jacobo Arbenz Guzman. President Guzman attempted to implement a more radical program of agrarian reform, and to limit the influence of United States corporations in Guatemala, such as United Fruit Company, International Railroads of Central America, and Empresa Electrica (a subsidiary of Electric Bond and Share Company). In 1954, the CIA financed and directed an exiled invasion force which overthrew the Guzman government and forced him to resign in June 1954. Affidavit of Dr. Milton H. Jamail at 7, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. 1985) (defense expert witness who submitted a 13-page affidavit, dated May 30, 1985, as part of a defense offer of proof in support of their international law motion for duress) [hereinafter Affidavit of Dr. Jamail]. *See* R. IMMERMAN, THE CIA IN GUATEMALA: THE FOREIGN POLICY OF INTERVENTION (1982); Engelberg, *CIA's Paramilitary Operations: The Record Since The 50's*, N.Y. Times, July 12, 1986, at B4, col. 1.

For a history of Guatemala, see GUATEMALA IN REBELLION: UNFINISHED HISTORY (J. Fried, M. Gettleman, D. Levenson, N. Peckenham eds. 1983) [hereinafter GUATEMALA IN REBELLION]; M. MCCLINTOCK, THE AMERICAN CONNECTION: STATE, TERROR AND POPULAR RESISTANCE IN GUATEMALA (1985); S. SCHLESINGER & S. KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA (1982).

111. From 1967 to 1976 the United States was the main military supplier of the military dictators who ruled Guatemala. In 1977, the United States Congress acted, with President Carter, to ban military aid and sales to the Guatemalan government because of the country's extreme human rights violations. In 1981, however, the Reagan Administration permitted the sale of $1.5 million of military equipment by reclassifying the equipment as something other than security assistance; in January 1984, the U.S. government issued licenses for the sale of over two million dollars of military equipment and spare helicopter parts. President Reagan asked Congress to increase direct military spending aid from $300,000 in 1985 to $35.5 million in 1986. AMERICAS WATCH, LITTLE HOPE: HUMAN RIGHTS IN GUATEMALA JANUARY 1984 TO JANUARY 1985 (Feb. 1985) [hereinafter LITTLE HOPE]. *See* W. LAFEBER, INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA 106-36 (1983); R. WHITE, THE MORASS: UNITED STATES INTERVENTION IN CENTRAL AMERICA (1984).

112. From 1954 to 1986, every President of Guatemala was a military officer except for one, Julio Cesar Mendez Montenegro (1966-70) who "maintained office only by pledging to follow the dictates of the Army." Affidavit of Dr. Jamail, *supra* note 110, at 8. As early as 1960, according to Dr. Jamail, the Guatemalan army, in conjunction with "death squads," killed anyone who was part of the guerrilla movement, a sympathizer, or suspected of being a sympathizer. *Id.* The most brutal regime was that of General Lucas Garcia (1978-1982). During the first ten months of 1979, the death squads killed or caused the disappearances of 1,252 "subversives." The statistics were comparable in 1980, but during the next two years the killings had risen to over 300 deaths per month. Affidavit of Dr. Jamail, *supra* note 110, at 12. Amnesty International concluded that "there were no independent 'death squads' operating out of government control, and that official security units, sometimes operating in plain clothes, were responsible for the vast majority of abuses." 1983 AMNESTY INT'L ANNUAL REPORT 139 (citing 1981-1982 AMNESTY INT'L ANNUAL REPORTS). A military coup in 1982 installed General Efrain Rios Montt into office until his overthrow by another military coup in 1983. *See* GUATEMALA IN REBELLION, *supra* note 110, at 121-34, 145-47; P. BERRYMAN, INSIDE CENTRAL AMERICA 135-36 (1985). Finally, in January 1986, a civilian, Vinizio Cerezo Arevalo, was inaugurated as Guatemala's first nonmilitary President in over 30 years.

army.[113]

Numerous international reports have described the egregious human rights violations in Guatemala during the past five years.[114] Amnesty International exposed the Guatemalan government's program of political murder in 1981,[115] charging the government with a policy of systematic murder and torture.[116] The Organization of American States' (OAS) *Report on the Situation of Human Rights in the Republic of Guatemala*, concluded in October 1983, that "the Guatemalan army has been principally responsible for the most grievous violations of human rights, including destruction, burning and sacking of entire towns and the death of both combatant and non-combatant populations in these towns."[117] The report noted that the government's violence

> has shown characteristics of brutality and barbarism by the massive assassination of peasants and indians with guns, machetes or knives; the bombing and machine-gunning of villages by land and

---

113. Affidavit of Dr. Jamail, *supra* note 110, at 6. Americas Watch is a group established by the Fund for Free Expression in 1981 to monitor and promote observance of free expression and internationally recognized human rights in the Western Hemisphere. Americas Watch states that the actual number of deaths and disappearances is incapable of being determined because no human rights monitoring organization is permitted to operate openly in Guatemala: "[W]e are unable to estimate the number of persons killed in the political violence in Guatemala. We know that it must be calculated in the tens of thousands in the last five years, and in the thousands in the last five months. Greater precision is not possible." AMERICAS WATCH, GUATEMALA: A NATION OF PRISONERS 10 (Jan. 1984). *See* Manz, *A Guatemalan Dies And What It Means*, N.Y. Times, July 14, 1986, at A17, col. 3. Additionally, estimates by the Great Conference of Bishops indicate there are over one million displaced Guatemalans and 200,000 people who had fled the country to Mexico. AMERICAS WATCH, GUATEMALAN REFUGEES IN MEXICO 1980-84, at 11 (Sept. 1984); AMERICAS WATCH, WITH FRIENDS LIKE THESE: THE AMERICAS WATCH REPORT ON HUMAN RIGHTS AND U.S. POLICY IN LATIN AMERICA 180-204 (C. Brown ed. 1985).

114. *See* AMNESTY INTERNATIONAL, GUATEMALA, A GOVERNMENT PROGRAM OF POLITICAL MURDER (1981); AMERICAS WATCH, HUMAN RIGHTS IN GUATEMALA: NO NEUTRALS ALLOWED (1982); LITTLE HOPE, *supra* note 111; ORGANIZATION OF AMERICAN STATES (OAS), REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF GUATEMALA (1983) (English version) [hereinafter HUMAN RIGHTS IN GUATEMALA]. *See also* G.A. Res. 38/101, 38 U.N. GAOR (100th plen. mtg. Agenda Item 12) at 2, U.N. Doc. A/Res/38/101 (1984); G.A. Res. 39/120, 39 U.N. GAOR (100th plen. mtg. Agenda Item 12) at 2, U.N. Doc A/Res/39/120 (1985) (Assembly "[*r*]*eiterates its deep concern* at the continuing grave and widespread violations of human rights in Guatemala, particularly the violence against non-combatants, the disappearances and killings and the widespread repression, including the practice of torture [and] the displacement of rural and indigenous people . . . .") (emphasis added).

115. GUATEMALA: A GOVERNMENT PROGRAM OF POLITICAL MURDER, *supra* note 114; *see* 14 AMNESTY INTERNATIONAL NEWSLETTER (Aug. 1984).

116. AMNESTY INTERNATIONAL, A SURVEY OF POLITICAL IMPRISONMENT, TORTURE, AND EXECUTIONS (1982).

117. HUMAN RIGHTS IN GUATEMALA, *supra* note 114, at 131.

air; the burning of houses, churches, and communal houses as well as crops.[118]

The 1983-84 Annual Report of the Inter-American Commission on Human Rights of the OAS found that human rights violations in Guatemala continued despite a change in military administrations. The Commission denounced the military for conducting bombings on civilian villages and attacking undefended internal refugee villages.[119] The report also suggested that the situation in Guatemala had worsened in at least one respect: death squads had reappeared, with "the phenomenon of disappearances of persons in Guatemala tak[ing] on serious proportions."[120] Another human rights report written in early 1984 described "Guatemalans in the thousands . . . crossing the frontier to escape terror and death. It is a daily struggle in Guatemala to attain the most elementary of all human rights, the right to life."[121] In its annual report covering human rights in Guatemala up to January 1985—the month indictments were returned against the sixteen sanctuary defendants in *Aguilar*—Americas Watch reported that "the barbaric killings and disappearances continue at an extraordinary rate" with "the Catholic Church, trade unions, and University students and faculty members . . . the targets of severe repression, as are all other persons perceived as fostering or expressing international political or economic independence."[122]

The United States was the sole military contractor to the Guatemalan military dictatorship from 1967-76, but aid was cut off during the Carter administration. When Ronald Reagan became President in 1981, covert aid was provided and, three years later, a five-

118. *Id.* at 61. A particular focus of attack by government forces has been the indigenous Mayan population of Guatemala. In 1983, a group of Nobel prize winners, theologians, and international law experts heard testimony at a Permanent People's Tribunal in Madrid, Spain and concluded that "the massacres and terror unleashed against the indigenous peoples, with the demonstrated purpose of partially destroying them, constitute genocide." R. GOLDEN & M. MCCONNELL, *supra* note 103, at 27 (citing S. JONAS, GUATEMALA: TYRANNY ON TRIAL (1984)).

119. HUMAN RIGHTS IN GUATEMALA, *supra* note 114, at 131; INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, FOURTEENTH REGULAR SESSION, 1983-84 ANNUAL REPORT 105 (1984).

120. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, FOURTEENTH REGULAR SESSION, 1983-84 ANNUAL REPORT 104 (1984).

121. COMMITTEE FOR JUSTICE AND PEACE IN GUATEMALA & THE WORLD COUNCIL OF CHURCHES, HUMAN RIGHTS IN GUATEMALA 1 (Feb. 1984).

122. LITTLE HOPE, *supra* note 111, at 1-2.

year embargo on arms sales was lifted.[123]

The United States government has also supported the ruling government in El Salvador,[124] despite the deaths of more than 50,000 Salvadoran civilians by security forces and government troops since 1980.[125] Not one party responsible for any of these crimes has ever been brought to justice.[126]

International human rights organizations reported on the conditions in El Salvador during the five years of 1980-84.[127] The United

---

123. *See supra* note 111 and accompanying text.

124. From 1979-1985, the United States invested $1.835 billion in El Salvador. From $9.5 million in 1979, military and economic aid grew to $518.5 million in 1985. *Duarte: Prisoner of War*, ESTUDIOS CENTROAMERICANOS, *reprinted in* NORTH AMERICAN CONGRESS OF LATIN AMERICA (NACLA), REPORT ON THE AMERICAS 14-20 (Jan./Mar. 1986).

125. The number of Salvadorans killed by security forces, death squads, and government troops can only be approximated. Soccorro Juridico, the legal aid office of the Salvadoran Archdiocese, estimated that 42,000 people were killed between January 1978 and December 1983. *1983 Death Toll*, 9 HUMAN RTS. INT'L 614 (Mar.-June 1984) (published by Soccorro Juridico).

U.S. Ambassador Deane Hinton, in a speech to the American Chamber of Commerce on October 29, 1982, estimated that since 1979 "perhaps as many as 30,000 Salvadorans have been killed illegally, that is, not in battle." AMNESTY INTERNATIONAL, EXTRAJUDICIAL EXECUTIONS IN EL SALVADOR 1, 6 (July 1-6, 1983) [hereinafter EXTRAJUDICIAL EXECUTIONS]. *See* INTER-AMERICAN COMM'N ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES, 1983-84 ANNUAL REPORT 97, which states that "with respect to the right to life, as is well known and had been detailed by the Commission, the statistics in El Salvador are alarming." The Commission estimated that 50,000 people had died as a consequence of the violence, "many of them assaulted in the most inhumane way in acts attributable to the security forces or those that operate with their acquiescence." *Id. See also* NACLA, REPORT ON THE AMERICAS 12 (Mar./Apr. 1984) (an estimated 45,000 killed and disappeared since 1979); NACLA, *The Second Circle: the Armed Forces*, REPORT ON THE AMERICAS 29 (Jan./Mar. 1986) (an estimated 50,000 people have been killed and 4,000 disappeared); EL SALVADOR: CENTRAL AMERICA IN THE NEW COLD WAR Readings 7, 19 & ch. VI, VII (2d ed. 1987) [hereinafter NEW COLD WAR].

126. LAWYERS COMMITTEE FOR HUMAN RIGHTS, EL SALVADOR: HUMAN RIGHTS DISMISSED ON 16 UNRESOLVED CASES v-vi (July 1986). The only trial in which the government assumed responsibility for the deaths of any civilians was in the killing of the four Maryknoll missionary workers. Five soldiers were tried and convicted. Despite evidence suggesting involvement by high level Salvadoran government and military officials, none were brought to trial. *Id.* at 80-83 (citing H. Tyler, The Churchwomen Murders: A Report to the Secretary of State (1983)). *See infra* note 132 and accompanying text.

127. *See* G.A. Res. 35/192, 35 U.N. GAOR (Agenda Item 12) U.N. Doc. A/Res/35/192 (1980); G.A. Res. 36/155, 36 U.N. GAOR (Agenda Item 12) U.N. Doc. A/Res/36/155 (1981); G.A. Res. 37/185, 37 U.N. GAOR (Agenda Item 12) U.N. Doc. A/Res/37/185 (1982); G.A. Res. 38/101, 38 U.N. GAOR (Agenda Item 12) U.N. Doc. A/Res/38/101 (1983); AMNESTY INTERNATIONAL, EL SALVADOR: A GROSS AND CONSISTENT PATTERN OF HUMAN RIGHTS ABUSES (Supp. 1982); EXTRAJUDICIAL EXECUTIONS, *supra* note 125; AMERICAN ASS'N FOR THE ADVANCEMENT OF SCIENCE, INSTITUTE OF MEDICINE OF THE NAT'L ACADEMY OF SCIENCES, INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, NATIONAL ACADEMY OF SCIENCES & NEW YORK ACADEMY OF SCIENCES, REPORT OF A MEDICAL FACT-FINDING MISSION TO EL SALVADOR (Jan. 11-15 1983); COMMITTEE FOR HEALTH RIGHTS IN EL SALVA-

Nations General Assembly adopted a resolution in December 1983 which

> *expressed its deep concern* at the reports which prove that government forces regularly resort to bombarding urban areas which are not military objectives in El Salvador, and its concern for the several hundred thousand displaced persons, who are currently harassed in camps in which they are subjected to abuse and [where] even the minimum conditions of internment . . . are not observed.[128]

While a 1984 human rights report[129] indicated that disappearances and torture showed a downward trend, the number of civilian deaths nevertheless increased as a result of the Salvadoran army's aerial bombings and military sweeps. In August 1984, a report of the Americas Watch and the Lawyers' Committee for Human Rights indicated that "[t]housands of noncombatants are being killed in indiscriminate attacks by bombardment from the air, shelling and ground sweeps. . . . As best we can determine, these attacks on civilian noncombatants in conflict zones are part of a deliberate policy . . . that flagrantly violates the laws of war."[130]

The Catholic Church was a particular target of violence because of its efforts to improve the living conditions of the peasant population.[131] In 1980, the North American religious community be-

---

DOR, HEALTH AND HUMAN RIGHTS IN EL SALVADOR (July 1983) (report of the Second Public Health Commission to El Salvador); AMERICAN PUBLIC HEALTH ASS'N, HUMAN RIGHTS IN EL SALVADOR (Jan. 1983) (report of the Public Health Delegation of Inquiry); AMERICAS WATCH & LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, FREE FIRE: REPORT ON HUMAN RIGHTS IN EL SALVADOR (5th Supp. Aug. 1984) [hereinafter FREE FIRE]. *See also* G. MACEOIN & N. RILEY, NO PROMISED LAND: AMERICAN REFUGEE POLICIES AND THE RULE OF LAW 9 (1982); NACLA, REPORT ON THE AMERICAS 36-38 (Mar./Apr. 1984).

128. G.A. Res. 38/101, 38 U.N. GAOR (100th plen. mtg. Agenda Item 12), U.N. Doc. A/Res/38/101 (1984).

129. G.A. Rptr. 39/636, 39 U.N. GAOR (Agenda Item 12) U.N. Doc. A/39/636 (1984).

130. FREE FIRE, *supra* note 127, at iii. *See* R. GOLDEN & M. MCCONNELL, *supra* note 103, at 21-22 (account of bombing raids and use of white phosphorus in early 1983).

131. The Catholic Church, through its "*communidades de base*," or popular church communities, began organizing in the countryside in the 1970's with a theology that encouraged the people to see themselves as children of God and worthy of the right to life with dignity. In 1977, the persecution of the church began when two priests were murdered by security forces and others were arrested, tortured, and forced to leave the country. The White Warriors Union threatened to assassinate all Jesuits who did not leave the country. When one Salvadoran Jesuit, Rutilio Grande, was shot twelve times and killed along with two friends, 100,000 persons attended their funeral mass. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 18-19. *See* P. BERRYMAN, RELIGIOUS ROOTS OF REBELLION (1984); GUATEMALA IN REBELLION, *supra* note 110, pt. III, ch. 3; G. GUTIERREZ, A THEOLOGY OF LIBERATION: HISTORY,

came acutely aware of the indiscriminate violence in El Salvador and the breakdown of its legal order through two tragic and brutal events. On March 24th, Archbishop Oscar Romero was assassinated while performing Mass; on December 2nd, four Maryknoll missionaries[132] were raped and murdered by National Guardsmen. By the year's end, the El Salvadoran archdiocese's Human Rights Commission had recorded 8,398 civilians killed by death squads and security forces, and the creation of seventy thousand internal refugees.[133] By 1985, the number of refugees had grown to nearly half a million.[134]

As Salvadorans and Guatemalans fled their homelands and began entering American cities closest to the Mexican border, the religious community's work for the needy began to focus on providing humanitarian assistance such as food, clothing, and shelter, as well as spiritual assistance to the Central Americans.[135] They also assisted their Salvadoran and Guatemalan parishioners with deportation problems, accompanying them to the Immigration and Naturalization Service (INS) to apply for asylum.[136]

In 1980, the United States Congress enacted a Refugee Act[137]

POLITICS AND SALVATION (1973); NEW COLD WAR, *supra* note 125, at 105-210.

132. The four—Ita Ford, Jean Donovan, Dorothy Kazol, and Maura Clark—were killed while driving from Ilopongo airport to San Salvador. This road is feared by Salvadorans deported from the United States and is known as the "road to death" because of the many persons found murdered alongside it. See AMERICAS WATCH & ACLU, REPORT ON HUMAN RIGHTS IN EL SALVADOR 40-44, 54-56, 156 (Jan. 26, 1982) for a report describing how the traditional respect normally shown the clergy is nonexistent in El Salvador.

133. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 20.

134. Most reports estimate there are between 300,000—500,000 Salvadoran refugees living in the United States. COMPTROLLER GENERAL'S REPORT TO THE CONGRESS, CENTRAL AMERICAN REFUGEES: REGIONAL CONDITIONS AND PROSPECTS AND POTENTIAL IMPACT ON THE UNITED STATES 3, 40 (July 20, 1984); Lindsey, *A Flood of Refugees From Salvador Tries to Get Legal Status*, N.Y. Times, July 4, 1983, at A1, col. 1.

135. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 14.

136. Defendants' Offer of Proof re: Futility re: Motion to Dismiss—Religion and Motion in Limine—Duress at 1-2, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. May 24, 1985) [hereinafter Futility Defense].

137. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The Refugee Act of 1980, 8 U.S.C. § 1253(h)(1) (1982), amended the prior language of Section 243(h) of the Immigration and Naturalization Act, and now mandates that the Attorney General shall not deport an undocumented person if the alien's life or freedom would be threatened. Section 208(a) of the Refugee Act, 8 USC § 1158(a) (1982), gives the Attorney General discretion to deny or grant political asylum to an undocumented person who qualifies for refugee status under the "well-founded fear of persecution" standard. The United States Supreme Court in INS v. Stevic, 467 U.S. 407 (1984) held that the burden of proof for a § 1253 mandatory prohibition of deportation was a higher standard than the well-founded "fear-of-persecution" language in the Refugee Act. The court held that a "clear probability," i.e., a likelihood, must be shown that the undocumented person would be subject to persecution. *Id.* at 430. In 1985, the Ninth Circuit Court of Appeals ruled that the phrase "well-founded fear of persecution" required

which placed the United States in conformity with its international obligations as signatory to the 1967 Protocol Relating to the Status of Refugees.[138] The Refugee Act of 1980 provides for granting refu-

---

only that an alien have a subjective belief that he or she would be persecuted if deported, and that the fear have a sufficient objective basis to be well-founded. The Supreme Court, in a 1987 decision, affirmed this holding. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1452-53 (9th Cir. 1985), *aff'd*, 107 S. Ct. 1207 (1987).

138. The Multilateral Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T.S. 6223, T.I.A.S. No. 6577, was acceded to by the United States in November 1968. The Protocol Act incorporates articles 2-34 of the 1951 Convention Relating to the Status of Refugees. Article 33 of the 1951 Convention provides a right of "non-refoulment" for refugees, i.e. the right not to be sent back to a country where an individual's life or freedom would be threatened because of an ongoing armed conflict, individual persecution, or gross violations of human rights. Under the 1967 protocol, the refugee obtains temporary haven in the country of safety until the threat to his life or freedom is removed. *See* H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, *reprinted in* CLASSICS OF INTERNATIONAL LAW 819 (J. Scott ed. 1925) ("It is not contrary to friendship to admit individual subjects who wish to migrate from one government to another. Such liberty . . . is not only natural but also advantageous.").

The United States government has not applied the non-refoulment provision to Salvadorans or Guatemalans, thereby declining to recognize that they were fleeing from countries which violated their human rights. Attorney General William French Smith denied granting Salvadorans or Guatemalans temporary refugee or an extended voluntary departure, despite the request of 89 Congressmen to do so. Such status, accorded to an entire group as compared with the individualized relief granted at a political asylum hearing, has been previously granted in numerous situations:

Cuba	- 1960-1966
Dominican Republic	- 1966-1978
Czechoslovakia	- 1968-1977
Chile	- 1971-1977
Cambodia	- 1975-1977
Vietnam	- 1975-1977
Laos	- 1975-1977
Lebanon	- 1976-present
Ethiopia	- 1977-present
Uganda	- 1978-present
Iran	- 1979
Nicaragua	- 1979-1980
Afghanistan	- 1980-present
Ireland	- 1981-present

ACLU, SALVADORANS IN THE UNITED STATES: THE CASE FOR EXTENDED VOLUNTARY DEPARTURE 35 (Rep. No. 1 Apr. 1984); INS, Memorandum on the History of Extended Voluntary Departure (Jan. 19, 1982).

gee status for

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion . . . .[139]

The church workers believed that the legal system would recognize the Salvadorans' and Guatemalans' "well-founded fear of persecution" as the reason they were forced to leave their home country and allow them to stay in the United States. Church communities in Tucson and Phoenix developed a legal advocacy project,[140] organized by the Manzo Area Council,[141] which included an extensive bail program. Members of the Tucson Ecumenical Council, a coalition of sixty Tucson churches, and the Phoenix Valley Religious Task Force, composed of eleven religious denominations, mortgaged their homes and raised over a million dollars to bond out hundreds of Salvadorans and Guatemalans incarcerated in detention centers.[142]

---

139. 8 U.S.C. § 1101(a)(42) (1982). Individuals applying for political asylum in the United States are not permitted to remain in this country while their applications are processed and reviewed, but must await the INS determination in a third country which is frequently Mexico. The INS backload of cases creates a substantial delay in the decisionmaking process. During the waiting period, the Salvadorans and Guatemalans are frequently deported to their home country, since they are not accorded refugee status in Mexico.

The proposed necessity defense in *Aguilar, see infra* text accompanying notes 311-24, was intended to justify defendant's sanctuary activities on two grounds: first, to provide a safe place in this country until the asylum claims were adjudicated; and second, if the application was denied, to argue that the immigrants were entitled to temporary refuge here until the armed conflict in their country had ended. Interview with Ellen Yaroshefsky, attorney for Wendy LeWin (Dec. 15, 1986), and Karen Snell, attorney for Maria del Socorro Pardo de Aguilar (Dec. 19, 1986).

140. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 14, 40; Futility Defense, *supra* note 136, at 3.

141. Manzo is a private legal aid group which established a lay advocacy program and provided legal representation to undocumented workers at asylum hearings. Manzo also helped raise over one million dollars in bail money in both Tucson and Phoenix. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 46; Medlyn, *supra* note 103, at B1, col. 2; Telephone interview with Lupe Castillo, legal worker with Tucson Ecumenical Council Legal Assistance Program (July 15, 1986).

142. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 40. Practicing lawyers representing Salvadorans and Guatemalans now say the setting of high bail in these cases is one of the most serious due process abuses by INS. *See* Futility Defense, *supra* note 136, at 2-4. In *No Promised Land*, the authors refer to interviews with several immigration lawyers who assert that other due process violations for Salvadorans and Guatemalans include: not being informed of either the right to counsel, or the right of asylum; inadequate access to counsel; inhuman prison conditions; separation of family at the time of arrest; and a general systematic

Lawyers were recruited and represented the Central Americans at political asylum hearings before the INS.[143]

The legal efforts did not, however, prevent the Salvadorans and Guatemalans from being deported[144] to face the perils of their homelands from which they had fled. Of fourteen hundred persons who filed for political asylum through the Arizona legal projects during 1980-82, not one was granted political asylum.[145] Nationwide, the results were similar: during 1981 and 1982, fifty-five hundred Salvadorans requested political asylum and only two were successful.[146] From January 1982 through January 1985—the month when the government filed criminal charges against the sanctuary defendants—the INS decided 18,796 asylum applications. Of this number, 18,298 were denied and 498 granted, a 2.6 percent approval rate.[147] Eight hundred and sixty-two Guatemalans applied for political asylum during this same period and only four were successful, a percentage of less than one-half of one per cent.[148]

Compared to the treatment received by other nationalities who apply for asylum, the approval rates for Salvadorans and

---

policy of denial of asylum claims. G. MACEOIN & N. RILEY, *supra* note 127, at 36-54. *See* Orantes-Hernandez v. Smith, 541 F. Supp. 351, 377 (C.D. Cal. 1982) (principles of due process require advising of rights before deportation).

143. Futility Defense, *supra* note 136, at 3. In a telephone interview with Lupe Castillo, a legal worker with the Tucson Ecumenical Council Legal Assistance Program (July 15, 1986), Mr. Castillo described a system where lay advocates represented Central Americans at the hearing stage, and about 50 lawyers from Tucson and Los Angeles continued the legal representation at the appellate level.

144. Between 1980 and 1983, about 35,000 Salvadorans and Guatemalans were deported. Currently, about 1,000 are deported back to their countries each month. ST. RAYMOND'S SOCIAL JUSTICE COMMITTEE, CENTRAL AMERICAN REFUGEE REPORT 3, 4 (May 1984) [hereinafter REFUGEE REPORT].

145. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 14. During 1981-82, not one of the approximately 1400 individuals involved in the Tucson and Phoenix task forces received sanctuary.

146. *Id.*

147. REFUGEE REPORT, *supra* note 144, at 6. From 1979 until September 1983, the INS ruled on 7,788 Salvadoran applications for asylum. Only 234 were granted, a 2.9% approval rate. The following fiscal year, from October 1983 until September 1984, the approval rate dropped to 2.45%. During this period, 328 Salvadorans were granted asylum out of 13,373 who applied. *Id. See* Comment, *Salvadoran Illegal Aliens: A Struggle To Obtain Refuge In The United States*, 47 U. PITT. L. REV. 295, 299 (1985); Helton, *Second-Class Refugees*, N.Y. Times, April 2, 1985, at A27, col. 2; King, *Leaders of Alien Sanctuary Drive Say Indictments Pose Church-State Issue*, N.Y. Times, Feb. 3, 1985, at A30, col. 1.

148. In 1983, one out of 67 Guatemalans received political asylum. In fiscal year 1984, three were granted asylum out of 761 who applied; the remainder of the calendar year 1984 saw every one of 225 Guatemalan applications denied by INS. REFUGEE REPORT, *supra* note 144, at 2, 6; Helton, *supra* note 147, at A27, col. 2.

Guatemalans are significantly lower. For instance, in 1983,[149] seventy-two percent of the Iranians who applied were granted political asylum; in 1984,[150] this figure was almost sixty-one percent. In 1983,[151] sixty-two percent of Afghanistan nationals were given asylum and forty-one percent were successful the following year.[152] Over thirty percent of Polish citizens who applied were granted asylum in 1983 and 1984.[153] Most commentators agree that someone who applies for political asylum from a country which is either communist or one with which the United States has unfriendly relations has a tremendous advantage over a national of a country with whom the United States considers its ally, e.g., El Salvador, Guatemala, Haiti.[154]

Lawyers representing the Salvadorans and Guatemalans concluded that their clients had almost no possibility of successful hearings:

> The [INS] immigration judges commonly deny due process, refusing to hear witnesses or motions, and applying much stricter scrutiny to witnesses in these Central American cases than in cases from any other country. . . . The judges rarely believe the appli-

---

149. REFUGEE REPORT, *supra* note 144, at 2.

150. *See*, Pretrial Memorandum in Support of Right to Present Evidence at Trial Regarding Futility of Asylum Procedures for Salvadoran Applicants at 9-10, United States v. Merkt, No. B-84-746 (S.D. Tex. filed Feb. 1985) [hereinafter Futility Memo].

151. REFUGEE REPORT, *supra* note 144, at 2.

152. Futility Memo, *supra* note 150, at 9-10.

153. *See* Futility Memo, *supra* note 150, at 9-10. See also *id.*, where the attorneys for the defendants in United States v. Merkt, No. B-84-746 (S.D. Tex. 1985) compared the conditions in Poland with those in El Salvador, stating:

> Although there was one recent (and highly publicized) assassination of a Priest by Polish security forces, there are no serious allegations of widespread state sponsored disappearances, torture, mutilations or death, such as even the Reagan Report acknowledges transpires in El Salvador. To the contrary, the Priest's murderers were tried, convicted, and sentenced to prison terms of up to 25 years, an occurrence unheard of with respect to the murder of Salvadoran priests, nuns, Archbishops, lay church workers, or any of the other 50,000 politically motivated murders of Salvadorans over the past five years.

154. About 90% of the refugees admitted to the United States since the enactment of the 1980 Refugee Act have been from Communist ruled nations. National Catholic Reporter, June 8, 1984, at 22. *See* Note, *The State Department Advisory Opinion: A Due Process Critique*, GEO. U.L. CENTER IMMIGR. L. REP. 1, 20 n.102 (1984); Comment, *The Sanctuary Movement*, 21 HARV. C.R.-C.L. L. REV. 495-97, 529 n.150 (1986); Comment, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539, 550-51 nn.83-86 (1981); Synopsis, *Significant Developments in the Immigration Laws of the United States 1985*, 23 SAN DIEGO L. REV. 441, 457 (1986); Nocera, *No Way to Judge Refugees*, N.Y. Times, May 8, 1986, at A27, col. 2; *Key Federal Aide Refuses to Deport Any Nicaraguans*, N.Y. Times, Apr. 17, 1986, at A1, col. 1.

> cants even where there is credible, verified testimony of personal danger. . . . The judges require proof impossible to obtain without risking family or personal safety, and even when it is supplied, often deny the case anyway. The Courts also require showings of such particularized risk that many who truly and reasonably fear for their lives cannot meet.[155]

The office of the United Nations High Commissioner for Refugees (UNHCR) had reached the same conclusion three years earlier.[156]

> There appears to be a systematic practice designed to secure the return of Salvadorans, irrespective of the merits of their asylum cases. Our impression is that the proceedings were carried out in a *pro forma* and perfunctory manner designed to expedite the cases as quickly as possible, and that the detainees were not given an effective opportunity to adequately present their cases and show good cause.[157]

The legal basis for INS denying virtually all political asylum cases brought by Salvadorans and Guatemalans rests upon a trial judge's factual finding that the asylee did not meet his/her burden of proof of establishing a well-founded fear of persecution. In a given case, the INS judge may conclude that the applicant's fears were based on pure speculation,[158] or that the testimony was a mere assertion of a possible fear,[159] or that the evidence presented lacked sufficient proof[160] or specificity.[161] Even when the evidence is not refuted, the Salvadoran has little chance of success. In one case, a member of a Salvadoran teacher's union fled after being tortured and almost

---

155. Futility Defense, *supra* note 136, at 5-6. "Our witnesses would detail specific examples of refugees who had well founded fear[s] of persecution and death [and these] cases were denied arbitrarily by the immigration [system]." *Id.* at 6. See also R. GOLDEN & M. MCCONNELL, *supra* note 103, at 42, where immigration attorney Patrick Hughes said the INS director in Southern Texas had never once accepted a political asylum application by a Central American.

156. *See* G. MACEOIN & N. RILEY, *supra* note 127, at 60.

157. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 45 (quoting investigators from the UN High Commission on Refugees).

158. Vides-Vides v. INS, 783 F.2d 1463, 1469 (9th Cir. 1986).

159. *See, e.g.*, Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1392 (9th Cir. 1985); Shoaee v. INS, 704 F.2d 1079, 1084 (9th Cir. 1983).

160. *See* Contreras-Aragon v. INS, 789 F.2d 777, 778 (9th Cir. 1986). *See* Lewis, *Well-Founded Fear*, N.Y. Times, Mar. 13, 1986, at A27, col. 1.

161. *See* Quintanilla-Ticas v. INS, 783 F.2d 955, 957 (9th Cir. 1986); Diaz-Escobar v. INS, 782 F.2d 1488, 1493-94 (9th Cir. 1986); Estrada v. INS, 775 F.2d 1018, 1021-22 (9th Cir. 1985). *But see* Argueta v. INS, 759 F.2d 1395, 1397 (9th Cir. 1985) (proof was specific enough to establish a well-founded fear of persecution).

killed, a fact substantiated by medical testimony and supported by Amnesty International.[162] The court nonetheless denied his application and demonstrated the difficulty, if not impossibility, of a Salvadoran establishing "a particularized risk" to support his asylum claim:

> The problems of the applicant and his family members, however, do not stem from persecution but from the civil strife which has torn El Salvador apart over the past five to nine years. The tragedy of El Salvador is that the suffering, the armed kidnapping and other excesses are not confined to one particular group, but are endured and perpetrated by all. For these reasons, the applicant has failed to establish that he qualifies as a refugee.[163]

In another well-publicized case, asylum was denied by INS despite the incontrovertible evidence that a couple fled El Salvador after watching their two daughters being kidnapped, raped by army soldiers, and mutilated. INS accepted the evidence but ruled it was insufficient because there was no written proof presented to show why their daughters had been killed.[164]

The Tucson religious community learned the limitations of the administrative remedy, calling it "an exercise in futility"[165] which "actually accomplished the more rapid return to El Salvador and Guatemala of those whose lives they sought to save."[166] Religious workers feared that there were increased risks to the personal safety of those who filed for asylum because the United States government notified the individual's country that an application for asylum had been filed, thus refusing to protect the confidentiality of the applicant.[167] Reverend Jim Fife, the first pastor to declare his church a

---

162. King, *supra* note 147, at A30, cols. 2-3.

163. *Id.*

164. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 13, referring to Ramon and Mercedes Sanchez, whose story was reported on television by a Chicago NBC news affiliate.

165. *Id.* at 46 (statement of Reverend John Fife, pastor of the Southside Presbyterian church in Tucson, one of the first churches to declare sanctuary).

166. Futility Defense, *supra* note 136, at 3.

167. *See* United Nations Report on U.S. Treatment of Salvadoran Refugees, *reprinted in* 128 CONG. REC. 1698, 1701 (1982); Futility Defense, *supra* note 136, at 6; G. MACEOIN & N. RILEY, *supra* note 127, at 42-46. *See also* ACLU, *Salvadoran in the United States*, PUBLIC POLICY REPORT (Apr. 1, 1984); ACLU, *The Fates of Salvadorans Expelled From the United States*, PUBLIC POLICY REPORT (Sept. 5, 1984). The latter report criticizes a United States' government survey which described, in favorable terms, the treatment given 482 deported Salvadorans, despite the government's failure to locate and interview almost one-half of the individuals named. ACLU, *The Fates of Salvadorans Expelled From the United States*, PUBLIC POLICY REPORT 10-17 (Sept. 5, 1984).

sanctuary and a defendant in *Aguilar*, concluded, "after that much involvement [with the legal system] and with legal defense efforts, I realized they were neither effective nor moral. . . . You recognize very quickly that nobody is going to get asylum except a tiny minority."[168]

In the face of mass deportations of people they had known and protected for almost two years, the Tucson religious community adopted a new strategy to assist Salvadorans and Guatemalans, one consisting of "[e]vasion services, sanctuary, and an extensive underground railroad."[169] Jim Corbett, a founder of the sanctuary movement and a defendant in *Aguilar*, said the decision to go public was necessary because "we had all become aware that a full-scale holocaust was going on in Central America, and by keeping the operation clandestine we were doing exactly what the government wanted us to do—keeping it hidden, keeping the issue out of the public view."[170]

B. *Historical and Theological Underpinnings of Sanctuary*

The religious community's decision to provide sanctuary for people fleeing persecution grows from a deeply rooted theological and historical tradition. Sanctuary is viewed by the Jewish and Christian communities as a place of worship and of refuge, separated from the world, where the ultimate authority of God is recognized as a higher law than that of government.[171] The first act of sanctuary was established thirty-five hundred years ago, according to some theologians,[172] when Yahweh, the God of the Old Testament, commanded Moses to set aside "cities of refuge"[173] in the Promised Land where Israelites, strangers and sojourners, could seek refuge from those seeking vengeance.[174] Both the Old and New Testament

---

United States policy in failing to maintain confidentiality was also publicized in the case of Ana Estela Guevara Flores, a Salvadoran woman who was mistakenly identified as a guerilla commandante. Her attorneys attempted to prevent the United States government from turning over its investigation files of Ms. Flores, but were told that the usual policy of giving this information to Salvadoran authorities, through the airline pilot, would be followed. *See* Futility Memo, *supra* note 150, at 11-13.

168. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 46.

169. *Id.*

170. *Id.* at 47.

171. CHICAGO RELIGIOUS TASK FORCE ON CENTRAL AMERICA, SANCTUARY: A JUSTICE MINISTRY 2 (Dec. 1982) [hereinafter CRTFCA].

172. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 14.

173. *Id.* (quoting Num. 35:11). *See* Goldman, *supra* note 106, at A1, col. 3.

174. Num. 35:19 (referring to "blood avengers"). *See* Kellerman, *The Hospitality*, in

welcomed the stranger or sojourner in their midst. In Exodus, God is said to have commanded the Jewish people: "Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt."[175] The words of Leviticus have special meaning for the North American sanctuary workers: "When an alien settles with you in your land, you shall not oppress him. He shall be treated as a native born among you, and you shall love him as a man like yourself, because you were aliens in Egypt."[176] The New Testament continues this theme in the book of Matthew, obligating persons of faith to stand with the helpless, the stranger, and the person in need. A person's religious faithfulness is measured by treatment of those who are the least among the brethren.[177] In the gospel of Matthew, Jesus states:

> Depart from me, you who are cursed, into the eternal fire. . . . For I was hungry and you gave me nothing to eat, I was thirsty and you gave me nothing to drink, I was a stranger and you did not invite me in, I needed clothes and you did not clothe me, I was sick and you did not look after me.[178]

The words of the book of Hebrew echo this message:

> Do not forget to entertain strangers, for by so doing some people have entertained angels without knowing it.[179]

From the earliest times, religious sanctuary was associated with providing safe places of refuge for those accused by the State of violating its laws. For example, those who killed accidentally were protected from relatives or friends of the deceased intent on avenging death.[180] The Roman Catholic canon law recognized that "a church enjoys the right of asylum, so that criminals who flee to it are not to be removed from it, except in case of necessity, without the assent of the ordinary or the rector of the church."[181] Sanctuary was a place

---

SOJOURNERS 26-28 (Apr. 1983) (theological and historical meaning of Christian Sanctuary).

175. Exod. 22:20. *See also* Exod. 23:9 ("Thou shalt not oppress a stranger; for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt").

176. Lev. 19:33-34 (The New English Bible).

177. *See* Matt. 25:31-46.

178. *Id.* at 25:41-43.

179. Heb. 13:2. *See* F. NORWOOD, STRANGERS AND EXILES: A HISTORY OF RELIGIOUS REFUGEES (1969).

180. *See* Num. 35:15,20. *See also* Deut. 19:10 ("that innocent blood be not shed in thy land"); Josh. 20:1-9 (six cities of refuge appointed).

181. Kenyon, *Continuing a tradition: Churches have provided sanctuary for ages*, Milwaukee J., Dec. 4, 1982, at 6, col. 2.

where the accused could reflect upon the available alternatives in order to assure that due process would be followed by the ruling authorities. Under English common law, for instance, an accused felon could find safety in any monastery or convent for forty days and contemplate whether he wished to face trial, confess guilt, or leave the country in safety.[182] Until James I abolished religious sanctuary in criminal cases in 1697,[183] English common law provided for cities of refuge, replacing the monastery and convent, to shield alleged violators of the law from state prosecution.[184]

The sanctuary tradition continued in seventeenth century colonial America. In one case, two agents of King Charles II asked for the assistance of New Haven, Connecticut authorities in 1661 to capture three judges who had signed the death warrant of Charles I.[185] A Reverend's sermon instructed the people what was expected of them: "Hide the outcasts; [betray not] him that wandereth; let mine outcasts dwell with thee, Moab; be thou a covert to them from the face of the spoiler."[186] The officials and people of New Haven were in sympathy with the regicides and did everything in their power to harass the King's agents, including giving shelter to the strangers in their midst. Six months later, the King's messengers left the city empty-handed.

In a broad sense, colonial America provided sanctuary to all those who arrived to escape religious and political persecution in Europe.[187] In 1787, eleven years after the American revolution, the

182. *Id. See* R. GOLDEN & M. MCCONNELL, *supra* note 103, at 15; CRTFCA, *supra* note 171, at 3. In medieval England, "for several centuries at any given time there were more than a thousand people under protection of the church's peace." Kellerman, *supra* note 174, at 28. King Henry VII split from the Church of Rome in 1533 and closed most of the convents and monasteries, replacing them with "cities of refuge." Kenyon, *supra* note 181, at 6, col. 2.

183. *See* 40 W. BLACKSTONE COMMENTARIES * 326-27.

184. Kenyon, *supra* note 181, at 6, col. 2.

185. *See* CRTFCA, *supra* note 171, at 3.

186. *Id.* (quoting Rev. John Davenport's sermon from Isaiah 16:3-4).

187. The colony of Rhode Island provided shelter for many of the earliest American settlers who were fleeing religious and political persecution in England, and who soon discovered that little refuge could be found in puritan New England. In 1635, Roger Williams was banished from Massachusetts for advocating liberty of conscience, supporting separation of church and state, and denouncing the practice of settling on Native American Indian lands without payment. Three years later Ann Hutchison was banished for religious reasons. The settlements they founded were chartered as a separate colony by Charles I in 1644 and were called Rhode Island. As other religious groups became the target of persecution, they too found refuge in Rhode Island. The members of the Society of Friends, or Quakers, fled England after the English Revolution of 1649. When the first Quakers arrived in Boston in 1656, however, they were promptly reembarked to England. A Massachusetts General Court declared that same year that all Quakers be jailed after being severely whipped. In 1658, all

United States Constitution memorialized fundamental constitutional rights for many people; however, the "peculiar institution of slavery"[188] was given federal protection despite its denial of freedom to four million Black men and women. The Constitution itself protected slavery,[189] and the Fugitive Slave Act,[190] enacted by Congress in 1793, maintained an owner's legal right to recover "his human chattel" should his slave escape to a state which had abolished slavery. One state[191] sought to become a sanctuary for escaping slaves by passing a law which criminalized the abduction of free Blacks. The United States Supreme Court ruled, however, in *Prigg v. Pennsylvania*,[192] that such a state law was unconstitutional. The Court held that it was the duty of the federal government to protect the property rights of slaveowners.[193] The Fugitive Slave Act of 1850[194] toughened existing criminal laws and penalties for anyone who transported or harbored those who were considered to be the property of another.

Many people wanted this odious institution abolished and violated the Fugitive Slave Act by engaging in an extensive under-

---

Quakers were ordered banned from the Massachusetts Bay Colony upon pain of death, and two years later, four were hanged. They found temporary refuge in Rhode Island, as did Dutch Jews who were unwelcome in the colony of New Amsterdam (New York) and migrated to Newport, Rhode Island in 1659. Because Rhode Island welcomed exiles of other colonies who had been labeled as "heretics and infidels," it was frequently referred to as "Rogue's Island" in the early colonial days. N. KITTRIE & E. WEDLOCK, JR., THE TREE OF LIBERTY 1, 13 (1986).

188. *See generally*, K. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

189. U.S. CONST. art. I, § 9, cl. 1 (slave trade); art. IV, § 2, cl. 3 (fugitive slave law); art. I, § 2, cl. 3 (1778, amended 1868) (three fifths clause).

190. Fugitive Slave Act, ch. VII, 1 Stat. 302 (1793). The Act had as its object "to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude . . . . Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves." Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 611 (1842).

191. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 550-52 (1842) (citing Pennsylvania Statute of March 25, 1826, which criminalized the abduction of free Blacks).

192. 41 U.S. (16 Pet.) 539 (1842).

193. *Id.* at 613. The Court in *Prigg* had

> not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence.

Id.

194. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

ground railroad which provided safe conduct and places of refuge for Black people who escaped slavery.[195] Churches played an instrumental role in giving sanctuary and assistance,[196] and many individuals risked and lost their lives or went to jail for breaking the law.[197]

During World War II, Jewish people fleeing the holocaust found refuge in monasteries where they were given food, shelter, and protective identification. One Protestant parish in Southern France, Le Chambon, declared itself a sanctuary and is credited with saving the lives of over three thousand Jewish people who found shelter there.[198] Archbishop Weakland also witnessed monasteries along the German border harboring Jewish people who were fleeing Nazi horror.[199]

More recently, churches assumed the historic role of giving sanctuary to civil rights workers who sought to enforce the promises of *Brown v. Board of Education*,[200] in the face of segregationist resistance backed by local law enforcement authorities in the South.[201]

---

195. V. HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA (1981); A. TYLER, FREEDOM'S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY TO 1860, at 532-42 (1970); Blockson, *Escape From Slavery, The Underground Railroad*, 166 NATIONAL GEOGRAPHIC 3 (July 1984).

196. While the Quakers were at the forefront of the movement to help fleeing slaves, Methodists, Presbyterians, Colonists, and the Scotch Covenanters all participated. The seminary at Oberlin College, Ohio was an important and extremely busy station on the Underground Railroad, and signs were posted in the form of a person running in the direction of the town. *See* W. SIEBERT, THE UNDERGROUND RAILROAD FROM SLAVERY TO FREEDOM 32, 93-98 (1968).

197. *Id.* at 254-89. New England Minister Charles Torrey died in prison after helping 400 slaves escape; Oberlin College graduate Calvin Fairbank served 17 years in prison altogether; Black abolitionist David Ruggles, credited with helping 1,000 slaves escape, had his store burned and was nearly captured by a slave-owner; and Leonard Grimes, a freed slave, was sentenced to two years in a Virginia prison for transporting a slave family of three from Virginia to Washington, D.C. *Id. See also* D. DAYTON, DISCOVERING AN EVANGELICAL HERITAGE (1976).

198. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 15. The story of Le Chambon is told in P. HALLIE, LEST INNOCENT BLOOD BE SHED: THE STORY OF THE VILLAGE OF LE CHAMBON, AND HOW GOODNESS HAPPENED THERE (1979).

199. In 1984, the Rabbinical Assembly, which represents 1200 congregations around the world, passed a resolution giving sanctuary to Central Americans which stated in part, "[M]illions of Jews were murdered by the Nazis because the nations of the world, including the United States, did not open their gates to those fleeing the Nazi onslaught." Goldman, *supra* note 106, at B18, col. 6.

200. 347 U.S. 483 (1954) (segregated public school facilities violate the equal protection clause of the fourteenth amendment).

201. The church frequently provided a place of safety for civil rights workers seeking refuge from white mob violence as a result of efforts to desegregate the South and the North during the 1960's. *See* C. CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S 34-36 (1981); D. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND

Later, sanctuary was provided to draft resisters protesting the Vietnam War. Commenting on sanctuary for Vietnam draft resistors, one theology professor asserts that protest of immoral government policy is a central value of sanctuary: "Sanctuary is an extraordinary measure for extraordinary circumstances. . . . It gives government pause so that injustice might be avoided. It ensures that government will not act precipitously or arbitrarily. It asks that the government act justly and humanely."[202]

From the outset of the current Central American sanctuary movement, the United States government did not consider it " a serious threat to enforcement efforts . . . when viewed in its overall context," but was concerned that "the [Immigration and Naturalization] Service image [for fairness] could be adversely affected."[203] The government declined at first to prosecute any of the sanctuary workers, despite their open letter to the United States Attorney declaring their intent to violate the existing immigration policy of the INS.[204] The chief of the Tucson division of the border patrol believed it was a tactical decision by the government not to prosecute anyone involved in sanctuary activities:

This underground railroad—or the various church groups—wanted

---

THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 483, 486, 498-99 (1986).

Bob Zellner, member of the Student Nonviolent Coordinating Committee (SNCC) from its creation in 1961 until 1967, spoke of many occasions when SNCC members would find safety from white mob violence in local churches. Mr. Zellner stated that he and another SNCC member were chased by a mob and found refuge for an entire evening in the High Street Baptist Church in Danville, Virginia in July 1983. Mr. Zellner is currently coauthoring a book entitled *Wrong Side of Murder Creek*. Interview with Bob Zellner (Feb. 15, 1987).

202. Kenyon, *supra* note 181, at 6, col. 1 (quoting theology professor Keith Egan of Marquette University).

203. Memorandum from Dean B. Thatcher, Intelligence Agent, to Robert D. McCord, Chief Patrol Agent; James Rayburn, Criminal Investigator; William Glenn, Regional Intelligence Western Region; John Camp, Central Office Intelligence Central Office (Jan. 4, 1983) (discussing a sanctuary article appearing in church-published magazines and the viability of the church backed sanctuary movement).

204. The Southside Presbyterian congregation sent a letter to United States Attorney General William French Smith and to the director of INS stating the community's intent to offer a public sanctuary. The text of the letter read as follows:

> We are writing to inform you that the Southside Presbyterian church will publicly violate the Immigration and Nationality Act Section 274(a). We have declared our church as a "sanctuary" for undocumented refugees from Central America . . . . 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 U.S. law prohibits us from sheltering these refugees from Central America. Therefore we believe the administration of the law to be immoral, as well as illegal . . . . Obedience to God requires this of all of us.

Letter *reprinted in* R. GOLDEN & M. MCCONNELL, *supra* note 103, at 48.

> publicity. They were baiting us to overreact. Therefore, we have deliberately been very low key. . . . Certain arrests could have taken place if we wanted to, but we felt that the government would end up looking ridiculous, especially as far as going into church property—anything where the ethics involved would be questioned.[205]

In March 1984, the government's strategy changed. By this time, the sanctuary movement included over one hundred churches and synagogues which had declared their places of worship sanctuary for Central Americans fleeing El Salvador and Guatemala. The government decided to remove its hands-off policy against churches and infiltrated the Tucson religious community with two undercover INS officers and two paid informants as part of Operation Sojourner.[206] Two sanctuary workers at the Casa Romero church,[207] Stacy Merkt and Sister Diana Muhlenkamp, were arrested by border patrolmen and charged with conspiring to violate immigration laws.[208] Each was charged with transporting a Salvadoran couple

---

205. Medlyn, *supra* note 103, at B1, col. 4 (quoting Leon Ring, chief of the U.S. Border Patrol's Tucson sector). *See also* R. GOLDEN & M. MCCONNELL, *supra* note 103, at 71: "We're not about to send investigators into a church to start dragging people out in front of the television cameras. We just wait them out . . . . This is a political thing dreamed up by the churches to get publicity. If we thought it was a significant problem, then maybe we'd look at it. But there are plenty of 'illegal aliens' out there." (quoting William Joyce, INS Assistant General Counsel).

206. Operation Sojourner was launched in March 1984 with the approval of government officials in Washington, D.C., namely, Associate Attorney General D. Lowell Jensen, Assistant Attorney General Steve Trout, and INS Commissioner Alan Nelson, despite INS agents' previous warnings against commencing the investigation. Bassett & Tolan, *Agent urged caution in taking on 'Frito Bandito' railroad*, Ariz. Republic, June 30, 1985, at A1, col. 2-3. The informants, Jesus Cruz and Salomon Graham, attended and recorded church meetings held by sanctuary workers and provided information which led to the indictments returned against sixteen individuals in *United States v. Aguilar*. Bassett & Tolan, *'Sanctuary' informers 'broke law'*, Ariz. Republic, June 25, 1985, at A1, col. 5.

207. Casa Oscar Romero, named after the assassinated Salvadoran Archbishop, was founded by the Catholic Bishop of Brownsville, Texas and supported by several churches in the Rio Grande valley area. At Stacy Merkt's trial, Bishop Fitzpatrick testified that Casa Romero gives " 'shelter and food and care and hope to people who came here without shelter and clothing and hope,' and is 'open to refugees [from the land of El Salvador] escaping oppression.' " Brief for Appellant at 3, United States v. Merkt, No. Cr. B-84-219 (S.D. Tex. 1984), *rev'd*, 764 F.2d 266 (5th Cir. 1985) (quoting testimony of Bishop Fitzpatrick). Bishop Fitzpatrick also testified that the church " 'does not inspect the documents of those it serves; it provides them food and shelter regardless of the manner in which they entered the country.' " *Id.* (quoting Bishop Fitzpatrick). *See also* R. GOLDEN & M. MCCONNELL, *supra* note 103, at 67-68.

208. *See* United States v. Merkt, No. Cr. B-84-219 (S.D. Tex. 1984), *rev'd*, 764 F.2d 266 (5th Cir. 1985). *See also* 18 U.S.C. § 371 (1982), which provides:

> If two or more persons conspire either to commit any offense against the United

and their baby[209] within the United States, in violation of 8 U.S.C. section 1324(a)(2).[210]

Further prosecutions followed. In April 1984, the government indicted the director of Casa Romero, John Elder, for transporting "illegal aliens"[211] within the United States.[212] Four months later, Philip Willis-Conger, the director of the Tucson Ecumenical Council, was also arrested and charged with violating 8 U.S.C. section 1324(a)(2).[213] By the year's end, Stacy Merkt and John Elder were indicted again,[214] charged with conspiring to violate immigration laws and various substantive crimes under 8 U.S.C. section 1324.[215]

States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

209. The Salvadorans, Brenda Sanchez-Galan, and Mauricio Valle, were also accompanied by a Dallas Times Herald reporter to whom they told their reasons for fleeing El Salvador and for seeking refuge in the United States. Brenda had miraculously survived a mass killing by Salvadoran soldiers at age 15. She had worked at a Lutheran church refugee center where she had expected to be interrogated by army soldiers. After her co-worker had been gang raped, tortured, and killed during an "interrogation" session, she fled El Salvador. Mauricio Valle also worked for the Lutheran church in a refugee camp as an assistant ambulance driver. His father, a health worker, had committed suicide after receiving repeated threats that his family would be killed because he gave medical care to "communists." Mauricio narrowly escaped being killed after similar threats were made against him. For a full account, see R. GOLDEN & M. MCCONNELL, *supra* note 103, at 64-67.

210. 8 U.S.C. § 1324(a)(2) (1982) provides that

any person . . . who . . . knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves . . . within the United States by means of transportation or otherwise, in furtherance of such violation of law . . . shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs.

211. The government characterizes the Salvadorans and Guatemalans who enter or remain in the United States without having submitted to the INS as "illegal aliens." Elie Weisel, a professor of humanities at Boston University who, like many others who survived the holocaust, did not have a country for years following World War II, has stated a contrary proposition: "No human being is illegal." R. GOLDEN & M. MCCONNELL, *supra* note 103, at 31.

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

213. United States v. Willis-Conger, No. Cr. 84-106-TUC-ACM (D. Ariz. 1984).

214. United States v. Merkt, No. Cr. B-84-746 (S.D. Tex. 1984), *aff'd*, 794 F.2d 950 (5th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3658 (U.S. Mar. 30, 1987) (No. 86-1089). *See* R. GOLDEN & M. MCCONNELL, *supra* note 103, at 73-75.

215. 8 U.S.C. § 1324(a) (1982) provides:

Any person . . . who

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the

Though the government had only limited success in the outcome of these prosecutions,[216] the message to the religious community was clear: no longer would sanctuary workers be given immunity from criminal prosecution for their actions. INS Commissioner Alan Nelson plainly stated the government's position in November 1984:

> [R]eligious affiliation or motives cannot insulate anyone from the consequences which flow from a violation of the immigration laws. . . . INS officials and U.S. attorneys will continue routine[217]

United States, by any means of transportation or otherwise;
(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or
(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the term of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however*, that for the purpose of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

216. In the first case, Stacy Merkt was convicted at trial and sentenced to one year in prison. Sister Diane Muhlenkemp's case was severed when she agreed to enter a pretrial diversion program. John Elder was acquitted at his first trial. The case against Philip Willis-Conger was dismissed following a successful motion to suppress based upon a fourth amendment unlawful search of his automobile. Stacy Merkt and John Elder were convicted at trial; Merkt's conviction was reversed on appeal, United States v. Merkt, 764 F.2d 266 (5th Cir. 1985), and the government declined to reprosecute. John Elder received a sentence of probation which included living in a half-way house for six months. Of the six cases, the government obtained only two convictions and one individual received a sentence of incarceration.

In May 1985, following the indictments in United States v. Aguilar, Lorry Thomas, who succeeded John Elder as a Director of Casa Romero, was sentenced to two years in prison for hiding a Nicaraguan in her trunk. N.Y. Times, June 21, 1985, at A13, col. 1.

217. *See* Defendants' Motion to Dismiss Based Upon Selective Prosecution and Impermissible Political Interference, United States v. Aguilar, (No. Cr. 85-008-PHX-EHC) (D. Ariz. Oct. 29, 1985) [hereinafter Selective Prosecution], which claimed that the prosecution of sanctuary workers was not routine but rather was based upon singling out persons because of their religious convictions. Defense counsel proffered evidence to establish that INS had failed to prosecute other individuals who had rendered similar assistance (e.g. Salvadoran President Duarte arranged for members of his family to leave El Salvador and enter the United States because he feared for their safety). *Id.* at 2 (quoting Cody, *Duarte Sends Threatened Family Members to U.S.*, Washington Post, Oct. 15, 1985, at A11, col. 1). Furthermore, the INS had also failed to indict employers whose motivation for violating immigration laws was based upon

> prosecutions of all violators of smuggling, transporting, and harboring statutes where they have been apprehended in the normal course of business. No special exemption from prosecution can be tolerated based on the nationality or the political, economic, or social condition of the participant.[218]

The indicted sanctuary workers delivered their own message to the government. At a press conference held on December 5, 1984, John Elder stated, "As a member of the sanctuary community . . . , I am proud to be able to live my life in a way that allows my own alleged criminal actions to illuminate our nation's shameful policies."[219] Stacy Merkt said: "What motivates me to help people and to work for justice is my belief in a God of life and love. I have seen. I have heard. I don't need five hundred thousand more refugees to convince me that we act illegally when we deport refugees."[220]

Rather than deterring other congregations from joining or supporting the sanctuary movement, the criminal prosecutions appeared to have the opposite effect. By January 1985, the number of churches and synagogues publicly declaring sanctuary had grown to 180 and included eleven cities.[221] The religious community openly demonstrated their support for those indicted and opposition to the government's immigration policy by organizing car caravans which carried Central Americans from one part of the country to the other.[222]

---

exploiting the almost 500,000 undocumented workers who had unlawfully entered this country. *Id.* at 2-3. Additionally, defendants contended it was not a "routine" prosecution when an INS Special Agent travelled to Washington, D.C. on several occasions to discuss the facts of this case while working directly for the Attorney General of the United States. Defendants' Motion to Dismiss or in the Alternative for an Evidentiary Hearing: Selective Prosecution and Impermissible Political Interference at 7, United States v. Aguilar (No. Cr. 85-008-PHX-EHC) (D. Ariz. Nov. 5, 1985).

218. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 72 (quoting letter to California Congressman George Miller, Nov. 20, 1984).

219. *Id.* at 74.

220. *Id.* at 73.

221. *See* Kemper, *supra* note 106.

222. In March of 1983, a twenty car caravan left Chicago for Weston, Vermont, carrying a Guatemalan family. It passed through seven states, and Washington, D.C. *See* Donnelly, *Monastery becomes a refuge*, Boston Globe, May 13, 1984, at 34, col. 1. Forty cars drove from Tucson to Seattle, arriving on July 5, 1984, where they were greeted by Archbishop Raymond Hunthausen and the Mayor of Seattle, Charles Royer. *See* McCoy, *Archbishop will welcome illegal refugees*, Seattle Post-Intelligence, June 29, 1984, at A10, col. 1; McCoy, *Refugees arrive here for sanctuary*, Seattle Post-Intelligence, July 5, 1984, at A10, col. 3. In October, 1984, a Salvadoran family of five traveled from Los Angeles to the Chicago Operation PUSH public sanctuary. Caravans also openly transported Salvadorans from East Lansing to Detroit and from Cleveland to Chicago during this period. *See* R. GOLDEN & M. MCCON-

The government's response was to announce its biggest indictment on January 14, 1985, a decision which the sanctuary movement viewed as the government's intention "to seal the Arizona border and send a message to North Americans and refugees that their actions were criminal and severely punishable."[223] Sixteen sanctuary workers[224] were indicted, and forty-nine Central Americans were named as "illegal aliens unindicted co-conspirators" along with twenty-five unindicted North American coconspirators. Each was charged under 8 U.S.C. section 371 with engaging in a conspiracy to violate 8 U.S.C. section 1324[225] and 8 U.S.C. section 1325;[226] others were also accused of specific substantive crimes under 8 U.S.C. section 1324(a)(1)(a), (2)(a),(3), and some were additionally indicted on a charge of aiding and abetting[227] others to violate the immigration statutes. If convicted of any of these felony crimes, the accused faced a prison sentence of five years for every separate offense charged in the indictment, which meant that some defendants faced up to 25 years in prison.

III. UNITED STATES V. AGUILAR

A. *The Government's Motion in Limine*

Accompanying the sealed indictment of the sanctuary workers

NELL, *supra* note 103; at 70-71. *See also* Kreuger, *Land of the free, home of the eligible*, in CHRISTIANITY AND CRISIS, July 9, 1984, at 274-75.

223. R. GOLDEN & M. MCCONNELL, *supra* note 103, at 86.

224. Eleven defendants actually went to trial in *Aguilar*. Included were Reverend John Fife; Jim Corbett; Philip Willis-Conger; Sister Darlene Nicgorski, who was forced to flee Guatemala after her pastor was killed by security forces; Father Tony Clark of Nogales, Arizona; Father Quinones, a Mexican parish priest for 28 years in Sonora, Mexico; Mary K. Doan Espinoza, coordinator of religious education at Sacred Heart Church in Nogales, Arizona; Peggy Hutchison, director of border ministry for the Tucson Metropolitan Ministry; Maria del Socorro Padro de Aguilar, a 58-year old Mexican national from Sonora, Mexico; Wendy LeWin, a 26-year old refugee worker; and Nena McDonald, a Quaker and registered nurse. The remaining five individuals either pled guilty to a reduced misdemeanor charge or had the charges against them dismissed. *See supra* note 4 and accompanying text.

225. 8 U.S.C.§ 1324 (1982). For the full text of this section, see *supra* note 215.

226. 8 U.S.C. § 1325 (1982) makes it a misdemeanor, punishable by not more than six months imprisonment or a fine not more than $500 for a first offense of aiding or abetting any alien "who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact . . . ."

227. 18 U.S.C.§ 2(a) (1982) provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

was a prepared motion *in limine*[228] and memorandum of law[229] in which the government asked the trial court to preclude four separate defenses from being raised in any form by the accused at trial—defenses based upon international law, freedom of religion, the law of necessity, and lack of specific criminal intent. The government's motion *in limine* also sought to bar the defense and its witnesses from "testifying about, alluding to, or presenting any evidence, either directly or indirectly . . . on the following issues or subjects":[230] references to the unindicted Salvadoran and Guatemalan coconspirators as refugees or asylees, to the United States government's violations of international law, to "[a]ny alleged episodes, stories, or tales of civil strife"[231] in Central America, to past and present United States policy regarding the granting or denial of asylum or refugee status to aliens from Central America and from other countries, to the impact that a guilty verdict would have upon the immigration status of the unindicted coconspirators, and to the policy of amnesty and extended voluntary departure for Salvadorans.[232]

In its memorandum of law, the government indicated that it was able to anticipate these defenses by looking to those used in previous immigration cases[233] and by examining the media statements made by three[234] of the fifteen defendants. In their supplemental re-

228. Government's Motion in Limine, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Jan. 10, 1985) [hereinafter Government's Motion in Limine].

229. Government's Memorandum in Support of Motion in Limine, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Jan. 10, 1985) [hereinafter Memorandum in Support]. This memorandum included five point headings. The first discussed the proper procedure for obtaining asylee/refugee status under the Refugee Act of 1980. *Id.* at 3-8. The second argued that the Central Americans entering the country were "aliens," not refugees, under 8 U.S.C. § 1324. *Id.* at 8-13. The third sought preclusion of defendants testifying at trial that they did not have the specific intent to violate 8 U.S.C. § 1324. *Id.* at 13-19. The fourth asked for preclusion of a defense based upon the defendants' first amendment religious beliefs. *Id.* at 19-24. The fifth point heading argued that a "necessity" or "choice of evils" defense was meritless. *Id.* at 25-31. In addition, the government included a thirty-one page exhibit, containing five newspaper articles, one magazine article, and three documents written by the Chicago Religious Task Force on Central America.

230. Government's Motion in Limine, *supra* note 228, at 2.

231. *Id.* at 3.

232. *Id.* at 2-3.

233. The government's introduction to its Memorandum in Support states, "This is not the first indictment involving persons in the 'underground railroad' movement," and cited the following cases: United States v. Merkt, B-84-219 (S.D. Tex. July 3, 1984) (judgment entered on jury verdict of guilty); United States v. Willis-Conger, No. Cr. 84-1016 (D. Ariz. 1984) (defendant's motion to suppress granted on July 20, 1984); United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985); United States v. Merkt, No. B-84-746 (S.D. Tex. 1984) (indictment returned Dec. 4, 1984). Memorandum in Support, *supra* note 229, at 2.

234. Those quoted in numerous articles were Reverend John Fife, Jim Corbett, and

sponse to defendant's motion to strike the government's motion *in limine*,[235] however, the government relied substantially upon documents detailing proposed legal strategies and other personal papers recovered from a police search of the home of one of the defendants, Sister Darlene Nicgorski, on January 14, 1985. In addition, information was obtained from paid informants[236] who were used to infiltrate the Sanctuary movement and to attend church meetings at which legal strategies were discussed.

The government's memorandum cited one case, *Luce v. United States*[237] as authority for using a motion *in limine* to preclude entire defenses. In *Luce*, the Supreme Court approved the defendant's use of an *in limine* ruling to exclude the "anticipated prejudicial evidence" of a prosecutor referring to prior convictions for impeach-

---

Philip Willis-Conger. *See* Memorandum in Support, *supra* note 229, at 15 n.3.

235. Memorandum in Response to Defendants' Motion to Strike the Government's Motion in Limine, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Mar. 29, 1985) [hereinafter Memorandum in Response]. This memorandum, submitted on March 29, 1985, referred extensively to two exhibits recovered from Sister Darlene Nicgorski's apartment. One contained excerpts of minutes recorded at a two-day meeting of sanctuary churches, held June 20-21, 1984 in Tucson, Arizona. *Id.* at Exhibit 1. Among the items discussed were the different legal defenses and strategies planned for the upcoming sanctuary trials, *id.* at Exhibit 1, at 6, and reports on Merkt's, Elder's, and Willis-Conger's individual cases. *Id.* at Exhibit 1, at 6-8. The second exhibit recovered was a two-page "guidelines for your thinking," prepared by the Chicago Religious Task Force on Central America, discussing strategies during the trial to promote the objectives of the sanctuary movement. *Id.* at Exhibit 2. The government argued that the court had the inherent authority to entertain the government's motion *in limine*. *Id.* at 9-11 (Point A). The government also argued that they had established a prima facie case that the defendants intended to introduce irrelevant and prejudicial matters. *Id.* at 11-15 (Point B).

236. *See supra* note 206 and accompanying text. Jesus Cruz and Salomon Graham were the paid government informants. The government chose not to call Salomon Graham as a witness at trial, after defendants suggested he provided female prostitutes to migrant workers. The court granted the government's motion *in limine* to preclude the defense from referring to Salomon Graham's alleged activities during trial. Government's Motion in Limine Re: Salomon Graham & Memorandum in Support of Government's Motion in Limine Re: Salomon Graham, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Oct. 1, 1985).

237. 469 U.S. 38 (1984). The only other case cited in the Government's Memorandum in Support, which referred to a prosecution motion *in limine* to exclude entire defenses, was United States v. Seward, 687 F.2d 1270 (10th Cir. 1982), *cert. denied sub nom.* Ahrendt v. United States, 459 U.S. 1147 (1983). *See* Memorandum in Support, *supra* note 297, at 28-31. In the Government's Memorandum in Response, *supra* note 235, the government cited a criminal case and a civil case as precedents for upholding their motions *in limine* in *Aguilar*: United States v. Shapiro, 669 F.2d 593, 596 (9th Cir. 1982) (granting government's motion *in limine* to exclude a duress defense), and Sperberg v. Goodyear, 519 F.2d 708 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975) (trial court granting motion *in limine* to preclude expert testimony). The government also cited United States v. Peltier, 693 F.2d 96, 98 (9th Cir. 1982) (court ruling *in limine* that defendant could not present duress defense). *See* Memorandum in Response, *supra* note 235, at 12.

ment purposes.[238] On its face, the *Luce* decision encourages a defendant's use of the motion *in limine* in the traditional manner—to obtain a pretrial ruling on the preclusion of a particular, specific, prejudicial item of evidence.[239] In *Aguilar*, the government cited *Luce* as authority for a more expansive interpretation of the motion *in limine*: to allow the prosecution to exclude anticipated prejudicial *defenses* rather than individual items of evidence. As additional support for its motion *in limine*, the government's reply memorandum cited Rules 12(b)[240] and 12 (e)[241] of the Federal Rules of Criminal Procedure for the proposition that the court may decide a pretrial motion which is "capable of determination without the trial of the general issue." Rule 402[242] of the Federal Rules of Evidence, which permits only relevant evidence to be admitted at trial, and Rule 611,[243] which gives the court control over the interrogation of witnesses and presentation of evidence, were also cited.

In brief, the government urged the court to use the motion *in limine* to "provide . . . for effective judicial management of a complex trial . . . by precluding the parading of potentially prejudicial and irrelevant matters before the jury."[244] The government argued that "[t]he extensive delay and excessive judicial involvement that would be required by resolution of these issues at trial far outweigh any modest procedural inconvenience that may be visited upon the defendants by a hearing on the merits in limine."[245]

The government's main concern was that the trial not be "convert[ed] . . . into a political stage to advance the defendants' symposium on Central American conflicts."[246] In the government's view,

---

238. 469 U.S. at 40 n.2, 41 n.4. The Supreme Court in *Luce* held that a defendant must testify at trial in order to preserve an appealable issue of a trial court's denial of a defense motion *in limine* to preclude cross-examination on prior convictions. *Id.* at 41.

239. *See supra* notes 77-81 and accompanying text.

240. FED. R. CRIM. P. 12(b) ("Any defense, objection, *or request which is capable of determination without the trial* of the general issue may be raised before trial by motion.") (emphasis added in Memorandum in Response, *supra* note 235, at 10).

241. FED. R. CRIM. P. 12(e) ("A motion made *before trial shall be determined before trial* unless the court, for good cause, rules that it be deferred for determination at the trial of the general issue.") (emphasis added in Memorandum in Response, *supra* note 235, at 10).

242. FED. R. EVID. 402 ("Evidence which is not relevant is not admissible.").

243. FED. R. EVID. 611 ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time . . . .").

244. Memorandum in Response, *supra* note 235, at 13.

245. *Id.* at 14.

246. *Id.* at 15.

this trial was "nothing more than an alien-smuggling ring";[247] references to refugees, international law, conditions in Central America, right to freedom of religion, humanitarian assistance, asylum, or to a necessity defense were irrelevant and prejudicial to the prosecution's theory of the case.

The government's motion *in limine* urged the court to use its inherent authority to manage the course of the trial, warning that if the trial judge did not exclude these defenses and subject matters beforehand, a likely defense strategy would be to use the court as "an arena to put U.S. Central American policy on trial."[248] The government's reply memorandum urged the court to maintain "[t]he dignity and decorum of the courtroom"[249] and quoted extensively from sections of a two-page discussion paper on legal strategy written by one Sanctuary group:

> As soon as we step into a court of law, the rituals of the court and the power of the prosecution have a myriad of ways to tempt us to qualify our message, equivocate the facts, narrow our focus and reduce our effectiveness. We must be determined not to be coopted, muffled or compromised. . . . If we allow the court of law or lawyers to direct the sanctuary movement, we will be letting the U.S. law dictate the parameters of our work and the limits of our conscience.[250]

The government raised the specter of the trial turning " 'into an evaluation by the jury of competing horror stories,' "[251] and urged the trial court to exercise judicial control at the earliest stage of the proceedings by granting its motion *in limine*.

B. *Defendant's Reply to The Government's Motion in Limine*

The defense did not respond to the merits of the government's arguments, but rather opposed the impermissible use of a motion *in limine* "to bar broad categories of evidence and to silence the de-

247. *Id.* (statement made by Ronald Swann, INS Director, Milwaukee). *See* R. GOLDEN & M. MCCONNELL, *supra* note 103, at 12. William Johnston, head of Tucson INS, considered sanctuary workers no different from professional smugglers and said: "I put alien smuggling in the same category as slave-trading." Medlyn, *supra* note 103, at B1, col. 1. The prosecuting United States Attorney in *Aguilar*, Donald Reno, referred to the sanctuary defendants as an "alien smuggling conspiracy," King, *supra* note 147, at A14, col. 1, and to the trial as a "simple alien smuggling case." Kemper, *supra* note 106, at 14.

248. Memorandum in Response, *supra* note 235, at 7 (quoting *id.* at Exhibit 2).

249. *Id.* at 15.

250. *Id.* at 7 (quoting *id.* at Exhibit 2, at 1-2).

251. *Id.* at 15 (quoting United States v. Peltier, 693 F.2d 96, 98 (9th Cir. 1982)).

fendants at trial."[252] The motion *in limine*, according to the defense, was being used as "a device to choke off entire defenses rather than to exclude discrete items of inadmissible evidence."[253]

The defense objected to the prosecution's motion on several grounds. First, they argued that "a response to the merits is practically impossible"[254] because the government's motion was vague and overly broad: it failed to state, with any specificity, the particular items sought to be excluded and the legal grounds supporting exclusion in each case.[255]

Second, the defense characterized the motion as an "unauthorized discovery vehicle"[256] and a "wholesale discovery of defense counsels' files."[257] "To adequately respond to the motion, defense counsel must detail each anticipated defense, disclose witnesses' statements, disclose trial strategies before the government has presented its case in brief, and reveal defendant's statements, all of which are protected by the work-product doctrine."[258] Such disclosure, defendants argued, would interfere with their ability to prepare and present their case thoroughly " 'without undue and needless interference.' "[259]

Moreover, the defense contended, the prosecution's burden of proof would be shifted and lightened if the defense were compelled to disclose information prior to the prosecution's establishment of a prima facie case at trial. Such disclosures would operate as an "impermissible burden on the exercise of a constitutional right,"[260] the right against self-incrimination. According to the defense arguments, they would either have to respond to the motion *in limine* and waive their fifth amendment right, or to assert the privilege and risk preclusion of their defense.[261] The defense pointed out that "[a]mple procedures exist for determining the admissibility of proffered evidence at trial outside the hearing of the jury which do not violate

252. Defendants' Motion to Strike the Government's Motion in Limine at 15, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Mar. 15, 1985) [hereinafter Motion to Strike]. This motion was an eighteen-page memorandum submitted by attorneys for defendant Katherine Flaherty and joined by counsel for each defendant.

253. *Id.* at 4.

254. *Id.*

255. *Id.*

256. *Id.* at 7.

257. *Id.*

258. *Id.* at 9-10.

259. *Id.* at 8 (quoting Hickman v. Taylor, 329 U.S. 495, 510 (1947)).

260. *Id.* at 12 (citing United States v. Fratello, 44 F.R.D. 444 (S.D.N.Y. 1968)).

261. *Id.*

fundamental constitutional safeguards."[262]

Fourth, attorneys for the defense viewed the motion *in limine* as an attempt by the government "to convert a criminal trial by jury into a trial by motion"[263]—in effect a motion for summary judgment in which factual issues are decided by a court as a matter of law. "The government's use of a pretrial motion to test the adequacy of the entire defense case as a matter of law strikes at the very heart of the defendants' right to a trial by jury,"[264]—the right to have the jury determine all questions of fact which bear directly on the defendants' guilt or innocence.

Finally, the defense motion to strike argued that their fundamental due process right to their day in court and "to present a defense"[265] at trial would be violated by an exclusion motion precluding entire defenses before any evidence was heard at trial. The defense cited two state court decisions[266] which condemned the motion *in limine* when used to evaluate or to limit severely broad categories of defense evidence. In its conclusion, the defense argued that the government's motion *in limine* was being used "as a shotgun, not a rifle,"[267] seeking to discover defense theories and preclude areas of possible evidence "before the defense is even aware of the prosecution's case and before the defense has even fully developed its own theories."[268]

IV. Specific Defenses in United States v. Aguilar

The government's use of the motion *in limine* in *Aguilar* was extraordinary for two reasons. First, by convincing the court to entertain the motion at all, the government acquired a unique discovery method providing access to significant information about the defense trial strategy.[269] In addition, when the government won favorable rulings on its motion, it succeeded in placing substantial limitations upon the defendants' ability to present a full and meaningful defense at trial.[270]

---

262. *Id.* at 13 (citing Fed. R. Evid. 103(c), 104(c)).
263. *Id.* at 14.
264. *Id.*
265. *Id.*
266. People v. Brumfield, 72 Ill. App. 3d 107, 390 N.E.2d 589 (1979); Commonwealth v. O'Malley, 14 Mass. App. 314, 439 N.E.2d 832 (1982).
267. Motion to Strike, *supra* note 252, at 17.
268. *Id.* at 17-18.
269. *See infra* notes 340-45 and accompanying text.
270. On October 25, 1985, three days after jury selection began in *Aguilar*, presiding

In analyzing the government's motion *in limine*, several issues must be considered. For instance, what standard of proof was the government required to meet in its original moving papers in order to compel the defense to respond to the motion on its merits? In addition, was it proper for any of the anticipated defenses to be excluded prior to trial? If so, which defense(s)? And if it was not a proper procedure, how should the court have decided the issues raised in the government's motion *in limine*?

The government's prosecutorial theory in *Aguilar* was clear from the moment the motion was filed: first, it must establish that the Salvadorans and Guatemalans who entered the United States were "aliens" as defined by immigration law; and second, it must prove that these "aliens" had not been duly admitted by an immigration official or were "not lawfully entitled to enter or reside"[271] in this country. Any issue related to the right of Central Americans to

---

United States District Court Judge Earl Carroll granted the government's motion to exclude evidence of international law, stating "the 1967 United Nations Protocol Relating to the Status of Refugees is not self-executing and thus does not afford aliens any rights enforceable in courts of the United States." Order Granting Government's Motion in Limine at 2, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Oct. 25, 1985). On October 28, 1985, just prior to the government's opening statement, the court summarized its prior rulings, and restricted the introduction of evidence as follows:

1. No evidence will be received[,] offered in support of or in opposition to the wisdom of any government policy or regarding any political question respecting a foreign country.
2. No evidence will be received [or] offered to demonstrate that there was or is civil strife, lawlessness or danger to civilians in any foreign country.
3. No evidence will be received [or] offered to establish good or bad motive on the part of a defendant or defendants.
4. No evidence of religious beliefs will be received as a defense to the charges in the Indictment. *See also* Federal Rules of Evidence, Rule 610.
5. No evidence will be received [or] offered to prove either necessity or duress on the part of any defendant for the surreptitious entry of an alien into the United States.

United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Oct. 28, 1985) (order summarizing prior rulings by the court). That same day, the court also eliminated any defense based upon lack of criminal intent, pursuant to the defendants' belief that they were acting in accordance with the Refugee Act of 1980, when it ordered the following evidence excluded from trial: (1) "defendants' belief that those aliens involved in the charges were refugees . . . ," and (2) "defendants' understanding of the immigration laws of the United States . . . ." United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Oct. 28, 1985) (order excluding particular evidence at trial) at 4. The court stated that the "defendants' mistaken belief that the aliens involved were refugees does not constitute a legal defense . . . ." *Id.* at 3. In sum, the court granted the government's motion *in limine* to exclude defenses based upon international and domestic law, defendants' lack of criminal intent, defendants' religious beliefs, and necessity.

271. 8 U.S.C. § 1324(a)(4) (1982).

be in this country, or to the defendants' belief that these people were entitled to recognition as refugees was irrelevant, according to the government, so long as they had not entered according to Immigration and Naturalization Service (INS) procedures. Thus, the motion *in limine* sought to reduce a complex trial into a "simple case of alien-smuggling."[272]

The defense, on the other hand, thought the issues involved more than whether or not the Central Americans had submitted to INS officials when they first crossed the border into the United States. The defendants believed that the circumstances which drove the Salvadorans and Guatemalans from their homelands were an integral element to establish that they were not illegal aliens but bona fide refugees, thereby constituting a legal basis for sanctuary activities.

In responding to the merits of the government's motion *in limine*, the defense argued four theories before the jury: (1) the defendants' activities were lawful because both international and domestic law recognize Central Americans as refugees and provide certain rights to them, including the right to nonrefoulment[273] and the right to political asylum;[274] (2) even if defendants' activities were not lawful, they reasonably believed them to be legal and therefore acted without the requisite specific criminal intent; (3) the defendants' activities were either protected by the first amendment, including the right to free exercise of religion, or that the defendants reasonably believed that their activities were constitutionally protected; and (4) any supposed violations of the immigration laws by the defendants were justified by necessity. The necessity justification was twofold: to prevent greater harm to the Salvadorans and Guatemalans if they were deported, and to provide a safe place until the asylum petition was adjudicated.[275]

A. *Standard of Proof Applied*

It is difficult to ascertain what standard of proof, if any, the court applied to determine that the government's motion *in limine* had established a legal issue with a level of certainty sufficient to require the defense to respond to the merits of the prosecution's motion. The government's memorandum of law in support of its motion

272. *See supra* text accompanying note 247.
273. *See supra* note 138.
274. *See supra* note 137.
275. *See supra* note 139.

in limine did not contain a single point heading or identifiable legal argument to amplify its contention that the defense intended to rely upon international law improperly.[276] The government never explained how such a defense would be employed at trial, failing even to elaborate upon the specific "international documents or organizations" it sought to exclude in its motion *in limine*. Nor did the government make even a minimal showing that prejudice would result if the court waited until trial to rule on the international law defense. Overall, the government failed to offer a persuasive argument to warrant the extraordinary relief sought, that of excluding the entire defense prior to trial. Yet, despite the lack of specificity concerning the international law defense in the prosecution's motion, the defense submitted a lengthy memorandum of law and several offers of proof in its effort to defeat that part of the government's motion *in limine* and to dismiss the indictment on international law grounds.[277]

Minimal standards of due process would require that such a prosecution motion describe the anticipated defense and its potential prejudicial effect at trial with sufficient specificity; otherwise, it appears that the government is merely engaged in speculation or educated guesswork. Because the motion *in limine* is a powerful weapon, due process would require that a court not permit the mere filing of the motion to, ipso facto, compel the defense to respond and prejudice its case.[278]

The government did state a related defense theory more clearly.[279] The government's memorandum of law in support of the motion *in limine* anticipated that the defendants would claim that the Refugee Act of 1980 entitled the "alien-unindicted co-conspirators" to reside lawfully in the United States based upon pre-crossing interviews defendants had conducted.[280] The government's memorandum devoted two point headings to an analysis of the administrative procedures required for seeking political asylum which have been in

---

276. *See supra* note 229.

277. *See supra* note 14.

278. *See, e.g.*, Washington v. Texas, 388 U.S. 14, 19 (1967) (basic element of due process is the "right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies").

279. The government's memorandum did not explain that the defendants' claim was based upon the international law definition of a bona fide refugee and the right of non-refoulment. It also did not anticipate that the defense would attempt to establish that the futility of the administrative remedy under the Refugee Act of 1980 would support a necessity defense. *See infra* text accompanying note 318.

280. Memorandum in Support, *supra* note 229, at 1-2.

effect since the Refugee Act was enacted in 1980, and suggested that the purpose of this new law was only "to revise and regularize the procedures governing the admission of refugees into the United States."[281]

The government wanted to ensure that the trial jury would regard the Salvadorans and Guatemalans as illegal aliens and not as refugees who were entitled to enter and remain lawfully in the United States. The government sought a pretrial ruling that, as a matter of law, the Salvadorans and Guatemalans were aliens, not refugees. While this probably was an issue of law which would be proper for the court to decide,[282] the total pretrial preclusion of mention of defendants' belief that the Central Americans were lawful refugees later resulted in a grave handicap on another key defense argument—that of lack of specific intent.

B. *Specific Intent Defense*

In the third point heading of its memorandum, the government argued: "As a matter of law, the defendants should not be permitted to testify at trial that they did not have the 'specific intent' to violate 8 U.S.C. [section] 1324."[283] Since determination of intent is ordinarily a jury issue, the effect of this argument was to urge the court to intrude upon the jury's fact-finding responsibilities.

Supreme Court decisions have consistently held that "the decision on the issue of intent must be left to the trier of fact alone."[284] In *Morissette v. United States*,[285] the Court expressly ruled that where the intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to a jury:

> However clear the proof may be, or however incontrovertible [the inference of a criminal intention] may seem to the judge . . . the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and jury are distinct, the one responding

281. *Id.* at 3-4 (citing INS v. Stevic, 467 U.S. 407, 425 (1984)).

282. This issue cannot be viewed in a vacuum. The defense argued that the status of the Salvadorans and Guatemalans was relevant to establishing that the defendants were mistaken about their legal status, and if believed by a jury, this would negate the element of criminal intent. *See* Memorandum in Support, *supra* note 229, at 13-15.

283. *Id.* at 13 (emphasis omitted).

284. United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978).

285. 342 U.S. 246 (1952).

> to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury.[286]

The Supreme Court also rejected a trial court's attempt to establish the element of intent as a matter of law in its jury instruction. In *Sandstrom v. Montana*,[287] the Court reversed a homicide conviction, stating that the trial judge's instruction conflicted " 'with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury."[288]

From the government's perspective in *Aguilar*, the motion *in limine* did not present any factual issues for a court to decide. In its memorandum, the government concluded, "[t]he defendants . . . exhibited the necessary intent to violate 8 U.S.C. [section] 1324, when they 'knowingly' and 'willfully' surreptitiously transported the aliens . . . [and] *did not intend to present* the aliens to INS officials . . . ,"[289] and that to allow "evidence which allegedly shows the contrary will only be prejudicial and confusing to the trier of fact."[290]

The government's memorandum contained other startling conclusions. While acknowledging that a good faith misunderstanding of the law could negate the specific intent required under 8 U.S.C. section 1324, the government asserted, "The defendants [cannot] contend that they misunderstood 8 U.S.C. [section] 1324."[291] The government recognized that a knowing and willful state of mind under 8 U.S.C. section 1324 is not committed if the act was done through ignorance, mistake, or accident.[292] Yet the government asserted that these defenses should not be available in *Aguilar*, because "[t]he defendants will not contend that they were ignorant of the applicable immigration laws. . . . The defendants knew that only the Attorney

---

286. *Id.* at 274 (quoting Andrews, J., in People v. Flack, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891)).

287. 442 U.S. 510 (1979).

288. *Id.* at 523 (quoting Morisette v. United States, 342 U.S. 246, 275 (1952); United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978)).

289. Memorandum in Support, *supra* note 229, at 13, 16 (emphasis added).

290. *Id.* at 13-14.

291. *Id.* at 17 (government's memorandum distinguishes a good faith disagreement of law which does not negate intent, with good faith misunderstanding of law which may negate criminal intent).

292. *Id.* at 15-16.

General could make a determination as to whether any alien has a right to reside in the United States."[293] Presumably, these predictions were based upon media statements attributable to three of the indicted defendants.[294]

The government anticipated that the intent defense would rely upon the defendants' belief that the Salvadorans and Guatemalans had a right to reside in the United States based upon the defendants' interpretation of the Refugee Act. The government argued:

> The basis for the defendants' "lack of intent" defense lies in the allegation that a factual determination had been made by them that the aliens whom they were trafficking were asylees/refugees within the meaning of the Refugee Act. Therefore, the defendants will argue, they are entitled to present evidence at trial that these factual conclusions negate any "specific intent" to violate 8 U.S.C. [section] 1324.[295]

Such a belief, according to the government, went to the defendants' motive and not to their intent. They argued that "[t]he law does not recognize political, religious or moral convictions as justification for the commission of a crime."[296] The government concluded that evidence of good motive would confuse a jury, and should, therefore, be prohibited by the court.

The defense, on the other hand, insisted that

> [t]his is not a case in which the defendants violated the law and will assert that because they are good people they should be acquitted. This is a case in which those accused by the government will show that they acted lawfully and never had any criminal intent as defined by 8 U.S.C. [sections] 1324 and 1325.[297]

In replying to the government's motion *in limine*, defendants further disclosed their anticipated defense strategy. Essentially, defense counsel sought to present evidence that the defendants acted under a

---

293. *Id.* at 15.

294. *Id.* at 15 n.3 ("defendants' public statements consistently acknowledge that their acts place them in jeopardy of criminal prosecution," and referring to government's Exhibits 1-9, containing newspaper, magazine, and other articles in which defendants Fife, Corbett, and Willis-Conger had been quoted).

295. *Id.* at 14.

296. *Id.* at 18 (citing United States v. Perl, 584 F.2d 1316, 1322 (4th Cir. 1977), *cert. denied*, 439 U.S. 1130 (1979); United States v. Cullen, 454 F.2d 386, 390 (7th Cir. 1971)).

297. Defendant's Response to Government's Motion in Limine—Intent at 2, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Apr. 24, 1985) (memorandum submitted on behalf of defendant Sister Darlene Nicgorski).

reasonable belief that the persons they assisted were not aliens, and that they had a right to reside in this country.[298] Additionally, they asserted their right to testify that the defendants did not act knowingly, but were ignorant of the unlawfulness of their acts. The defense argued that the defendants' mistaken belief regarding the Salvadorans' and Guatemalans' legal status negated the requisite criminal intent.[299]

The government's objection regarding evidence of defendants' motive might have been appropriate had it been raised during trial when the court could determine whether the testimony clearly went to their political, moral, or religious beliefs. If the court were to rule such testimony went to intent, rather than to motive, and was therefore admissible, each of the defense contentions concerning intent would be subject to cross-examination by the government. If the defendants' intent to violate the immigration laws was as "willful and knowing" as the government claimed, the weakness of this defense would be apparent at trial and the jury's verdict would reflect it.

Therefore, when the court permits the government to use the motion *in limine* to prevent an accused from testifying that she did not act with the requisite criminal intent, the nature of a criminal trial under our system of justice is fundamentally changed. Such use deprives the accused of the right to refute a basic element of the crime charged.[300] The adversary system is premised on the belief that the truth is revealed through the rigors of cross-examination. When used to preclude an accused from testifying to lack of the requisite intent, the motion *in limine* especially subverts the fact-finding process. A jury is thereby unable to consider the issues of credibility in determining whether or not an act was done through misunderstanding or by lack of knowledge of the law. This fundamental right to present a defense is jeopardized when a prosecutor need only assert in a pretrial motion that the accused acted with criminal intent, and that a jury would be confused if they heard evidence to the contrary.

Basic jurisprudential principles dictate that a prosecutor should not be permitted to avoid a jury's evaluation of the government's evidence by making broad assertions to eliminate factual defenses from consideration. The court should guarantee the accused's right to be judged by a jury and not assume the role of the fact-finder at a

298. *Id.* at 4.
299. *Id.* at 11-21.
300. *See* United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975).

pretrial stage. Moreover, counsel for the accused must not be required to divulge her trial strategy before trial commences, especially in regard to a defense which is as well established as that of lack of criminal intent. The government's motion *in limine* is indeed a dangerous and frightening weapon when employed in violation of these principles.

C. *Freedom of Religion Defense*

A different type of danger in the government's use of the motion *in limine* was revealed when the prosecution sought to foreclose an anticipated defense based upon the defendants' religious beliefs. In this instance, the government's memorandum also set forth the expected defense arguments with sufficient specificity. They believed the defense would be based upon one of two theories: (a) that the defendants' "firmly-held religious beliefs required them to follow a 'higher law' than the federal immigration statutes or (b) that the enforcement of the [Immigration and Naturalization Act], as applied, operate[d] as an unconstitutional restraint on their firmly-held religious beliefs."[301]

The government did not challenge the legitimacy of the defendants' firmly-held religious beliefs but argued that the defense was not available as a matter of law. The government cited *Wisconsin v. Yoder*,[302] where the Supreme Court established the rule that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[303] In that case, the Court found that a state's compulsory school attendance laws were not such an interest sufficient to overcome a parent's free exercise of religion claims. As an example of a compelling state interest sufficient to overcome the free exercise of religion, the government cited *United States v. Lee*.[304] In *Lee*, the Court ruled that payments to the nation's social security system could override religious belief prohibiting such payments.[305] Then, applying this standard to *Aguilar*, the government argued in its motion *in limine* that enforcement of the immigration law was an "interest of the highest order," which could not be overridden by first amendment rights to free exercise of reli-

301. Memorandum in Support, *supra* note 229, at 19.
302. 406 U.S. 205 (1972).
303. *Id.* at 215.
304. 455 U.S. 252 (1982).
305. *Id.* at 258-61.

gion.[306] Moreover, the government contended that the overriding interest of Congress in passing this law was to "stem the torrent of aliens unlawfully entering the United States across the southern border."[307]

The defense took issue with the government's claim that the state interest in enforcing immigration law attained this high level of importance, disagreeing with the government's interpretation of the legislative intent behind 8 U.S.C. section 1324. Reviewing the legislative history of this section, the defense concluded that the statute was not an expression of government interest in preventing immigration, but was enacted to "punish the smuggler and the man who tries to make money out of the misery of some of these workers."[308] Defendants asserted that they had neither subverted the governmental interest, nor was that interest sufficient to overcome their first amendment rights.

Thus, the court decided that the government, as a matter of law, had sufficiently established a compelling "interest of the highest order." This issue of law could well have been raised as a pretrial motion to dismiss by the defense. Since the pretrial ruling on the admissibility of the religion defense rested solely upon an issue of law, and the motion *in limine* was specifically detailed and demonstrated prejudice, the court concluded that this was a proper instance for it to decide the government's motion to exclude a defense.

Despite the apparent propriety, however, this ruling may have prevented the defense from rebutting or challenging the credibility of the main government witness at trial. Jesus Cruz, a paid government informant, testified that he saw one of the Central Americans give defendant Father Ramon Quinones one hundred dollars. The jury might easily have concluded that Father Quinones was performing his sanctuary activities for pecuniary gain. Ordinarily, the defense would have been permitted to offer evidence to rebut testimony which impugned the character of the accused and cast doubt upon his good motive.[309] According to defense counsel,[310] however, the

306. Memorandum in Support, *supra* note 229, at 22-23.

307. *Id.* at 23.

308. H.R. No. 529, 82nd Cong. 2d Sess., 98 CONG. REC. 1335, 1347 (1952) (statement of Congressman Emanuel Celler, a supporter of the 1952 amendments to § 1324).

309. The court's *in limine* order included prohibiting evidence of bad motive. *See supra* note 270. Once the trial judge has admitted evidence of the defendants' character and bad motive, the defense has the right to offer rebuttal evidence. RICHARDSON ON EVIDENCE § 150, at 121 (10th ed. 1973).

310. Interview with Michael Altman, counsel for Sister Nicgorski (July 24, 1986); Ellen

trial court barred testimony that Father Quinones acted solely because of his religious principles and not for personal profit, since such testimony required reference to defendants' religious beliefs—a defense which had been eliminated from jury consideration prior to trial. It is understandable that a court might have become confused when asked to admit evidence related to a subject matter it had previously excluded; however, this was an instance where testimony on religious beliefs should have been permitted.

Thus, even when the motion *in limine* to exclude a defense is decided solely as a matter of law, there is a risk that the ruling will prevent the defense from conducting a proper cross-examination and from presenting rebuttal evidence. In *Aguilar*, the exclusion of a defense based upon defendants' religious beliefs prohibited the defense from challenging the credibility of a prosecution witness and refuting prosecution evidence which brought the accused's character and motive issues into question.

D. *Necessity Defense*

The government's supporting memorandum urged the exclusion of a fourth defense—that of necessity.[311] The prosecution challenged the defendants' reliance upon such a defense, accusing them of using the aliens as "an adjunct to [their] political agenda of protesting the [Reagan] Administration's response to political conditions in El Salvador."[312] As with the motion to exclude international law, the prosecution again failed to provide specific details of the defense it sought to preclude. Instead, its memorandum asserted that the defense was unavailable as a matter of law, and referred to several cases where courts had rejected the necessity defense, although only one; *United States v. Seward*,[313] involved a motion *in limine*.[314] The government emphasized that the *Seward* court held that the necessity defense is inappropriate if there is a reasonable, legal alternative

---

Yaroshefsky, counsel for Wendy LeWin (June 27, 1986); Nancy Pastero, counsel for Mary Kay Espinosa (June 30, 1986); Karen Snell, counsel for Maria del Socorro Pardo de Aguilar (Dec. 19, 1986).

311. Memorandum in Support, *supra* note 229, at 25 (Point V).

312. *Id.* at 25.

313. 687 F.2d 1270, 1273 (10th Cir. 1982), *cert. denied sub nom.* Ahrendt v. United States, 459 U.S. 1147 (1983).

314. The government's memorandum cited one other case in which a motion *in limine* had been used to exclude a necessity defense: United States v. Contento-Pachon, 723 F.2d 691 (9th Cir. 1984). This case was not discussed in the context of a motion *in limine*, but rather was cited to show that a necessity defense is raised when a defendant claims to be acting in the "interest of the general welfare." Memorandum in Support, *supra* note 229, at 25 (Point V).

to violating the law.[315] The government concluded that the necessity defense had been narrowly circumscribed by recent court decisions and that the *Aguilar* defendants did not qualify to use it.

In response, defense counsel argued that a necessity defense must be evaluated on a case by case basis, and that in the cases cited by the prosecution, the defendants' offer of proofs had been insufficient. In some of those cases, the defendants had failed to establish a causal relationship between their unlawful act and the harm to be avoided, or that the harm was imminent. Hence, those courts ruled that the proffered evidence was not sufficient as a matter of law to establish the unavailability of a legal alternative.[316]

The defense argued that in *Aguilar*, however, several triable issues of fact concerning the necessity defense remained for the jury's consideration. From the defense perspective, it was up to the jury to decide whether the defendants' evaluations of the situation were reasonable, that is, (1) whether their otherwise illegal conduct was necessary, and was directly related to preventing a greater harm from occurring to the Salvadorans and Guatemalans were they to be deported;[317] (2) whether available legal alternatives, such as existing INS administrative procedures, were futile;[318] and (3) whether the anticipated harm to the Central Americans if returned to their coun-

---

315. 687 F.2d at 1275.

316. *Id.* at 1272.

317. The defense refers to the "balance of harms" and "direct causal relationship," which are two of the four elements recognized to support a necessity defense. See Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983), in which the court defined the defense of "necessity or competing harms" as follows:

> In essence, the "competing harms" defense exonerates one who commits a crime under the "pressure of circumstances" if the harm that would have resulted from compliance with the law exceeds the harm actually resulting from the defendant's violation of the law. At its root is an appreciation that there may be circumstances where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value . . . .

Id. at 590, 452 N.E.2d at 194 (quoting Commonwealth v. Brugmann, 13 Mass. App. 373, 376-77, 433 N.E.2d 457, 462 (1982)). *See also* State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973) (court rejected necessity defense during trial, rather than as a result of a pretrial government motion *in limine*, because they found no direct causal relationship could reasonably be anticipated to exist between the defendant's action and the avoidance of harm); People v. Chachere, 104 Misc. 2d 521, 428 N.Y.S.2d 781 (1980) (court rejected necessity defense during trial because defense failed to establish that an emergency condition existed within defendant's knowledge, or that his action had a reasonable certainty of success).

318. On the "unavailability of alternatives," see United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985); United States v. Seward, 687 F.2d 1270 (10th Cir. 1982); United States v. Best, 476 F. Supp. 34 (D. Colo. 1979). *See also* Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982) (court granted the prosecutor's motion *in limine* to exclude a necessity defense because other remedies were available to redress the present grievance).

tries was imminent.[319]

The trial court rejected the defense arguments and precluded the necessity defense prior to trial as a matter of law. The trial judge would have been wise to delay his decision until trial, after the prosecution had put forth its direct case. The court would have been more fully informed, and better able to rule after having heard the government's evidence; thus it would have avoided the appearance of bias in favor of the prosecution. The ruling would have also eliminated the court's tampering with the prosecution's burden of proof or impairing the accuseds' privilege against self-incrimination and right to remain silent. At the close of the prosecution's direct case, the trial court would then have had at least two options. It could have allowed the defense to present testimony and attempt to establish the elements of a necessity claim before ruling whether the evidence was sufficient to instruct the jury on the defense.[320] Alternatively, the court could have insisted that the defense make an offer of proof out of the jury's presence before deciding whether any testimony would have been admissible.[321]

Despite the fact that many of the same advantages would have resulted from a court striking the necessity defense during trial, under either of the above options, the government probably would

---

319. On "immediacy" or "imminence," see State v. Kee, 398 A.2d 384 (Me. 1979) (evidence was insufficient to raise a reasonable doubt as to whether there was imminent danger of physical harm to defendant or to plant workers); State v. Dorsey, 118 N.H. 844, 395 A.2d 855 (1978) (necessity defense, recognized by New Hampshire statute, was held insufficient at trial because it failed to deal with nonimminent or debatable harms, and with activities that the legislative branch of government expressly sanctioned and found not to be a harm); State v. Warshow, 138 Vt. 22, 25, 410 A.2d 1000, 1002 (1979) (defense was held inapplicable on the ground that "the hazards are long term, the danger is not imminent").

320. *See supra* notes 317-19 and accompanying text.

321. *See* United States v. Seward, 687 F.2d 1270, 1273 (10th Cir. 1982). In United States v. Best, 476 F. Supp. 34 (D. Colo. 1979), the court established the "narrow limits of justification defenses" and indicated that the court, not a jury, will decide whether the offer of proof merits that standard. *Id.* at 48. The elements of a justification defense in *Best* required:

1. A direct causal relationship between the defendant's actions and the avoidance of the perceived harm . . . [;]
2. The act to be prevented by defendant's conduct was criminal under the laws of the United States . . . [;]
3. The alleged criminal act which defendants wanted to stop was one occurring in their presence, and was one which would subject them to immediate harm which a reasonable [person] would think could be eliminated by defendants' conduct . . . [; and]
4. There was no alternative available to defendants accomplishing their purpose which did not involve a violation of the law . . . .

Id. at 48.

not have been satisfied with this approach. The prosecution would not have wanted the jury to hear testimony which could ultimately be ruled inadmissible, which is what would have occurred under the court's first option. Yet, in virtually every criminal trial, there is some evidence which is heard by a jury and later ruled inadmissible. A judge instructs a jury to follow the law as given, and there is little objective indication to suggest that jurors would not follow a court's instructions to disregard a particular defense. Had the jury in *Aguilar* heard testimony which the trial judge ruled was insufficient to establish the elements of a necessity defense, the court would have instructed the jury accordingly.

The government's likely dissatisfaction with the second option, the court's exclusion of the defense where an incomplete offer of proof had been made during trial, is, however, less understandable. A ruling at trial would not prohibit the defendants from raising a necessity claim at an earlier stage of the proceeding, such as during its opening statement to the jury. The prosecution may be concerned that the fact-finders would be confused by such evidence. This reason, however, conflicts with basic defense trial strategy and is thus an unlikely explanation.

Most criminal defense lawyers would refrain from preparing a jury for a defense which was not certain to be available at trial. This is especially true in the case of a necessity defense because it requires the defense to concede the acts charged in the indictment in its opening statement. The defense then seeks to convince the jury that ensuing testimony will show that the defendants' conduct was justified despite the violation of law. Defense lawyers would be loathe to admit their clients' guilt at the outset of a trial, thus pinning all hope on the necessity defense, if they were not absolutely certain it would be available. If a judge were subsequently to reject a defense's offer of proof during trial, the jury would remember counsel's admissions in her opening statement and her unkept promises.

If these are improbable explanations, why then was the government determined to exclude evidence of a necessity defense prior to trial? The most plausible explanation is that the government did not want any statements or evidence before a jury which would elaborate upon the reasons why Central Americans were walking hundreds of miles from their homelands to this country, or why members of the religious North American community were risking their freedom by lending assistance to these people. The government's memorandum stated that it did not want the issues of Central America to invade

the courtroom.[322] A necessity defense, more than any of the excluded defenses, would significantly answer the above questions for a jury. And while a defense attorney might not dive head first into a necessity defense in her opening statement, she would certainly lay the foundation and factual basis for it early in the trial.

United States Attorney Reno boldly proclaimed that the jury verdict would have been the same had a jury known all of these facts.[323] But what the government feared most was that a jury would acquit the defendants in *Aguilar*—an outcome far more likely had the jury thoroughly understood the case they were considering. Such a verdict, respresenting the collective voice of the community, would be viewed as a challenge to current United States policy in Central America and as a signal of approval for the activities of the sanctuary workers.

The government's use of the motion *in limine* in *Aguilar* will be subjected to severe criticism because it did not result in the "ascertainment of the truth,"[324] but rather allowed only *some* of the truth to be considered by a jury. The trial court would have been wise to reject the government's motion *in limine* to exclude entire defenses, except for the exclusion of the argument based upon defendants' religious beliefs. With respect to the international and domestic law defenses, the government failed to state the anticipated defense with sufficient particularity, and did not state the basis upon which a pretrial ruling was required. Whenever a court considers a government's motion to exclude an entire defense, it should insist that the government establish, by clear and convincing evidence, the exact nature of the purported defense and the basis for concluding that it contains prejudicial material. If the government does not sustain this burden, the motion *in limine* should be dismissed.

Considering the impact of these pretrial rulings on the accused's right to present a defense and in light of the need to respect the vital fact-finding powers of the jury, the court in *Aguilar* should have permitted the necessity defense to be raised at trial, however tenuous it might have appeared to the trial judge prior to trial. At the conclusion of the defense case, the court would have decided whether the elements of the defense had been sufficiently met, and would have

322. *See supra* notes 246-51 and accompanying text.

323. *See supra* note 3 and accompanying text.

324. FED. R. EVID. 611 provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses so as to (1) make the interrogation and presentation effective for the ascertainment of the truth . . . ."

instructed the jury accordingly. Insofar as the government's motion *in limine* to exclude a defense based upon the defendants' lack of specific intent is concerned, the trial court should have summarily denied the motion.

V. The Accused's Constitutional Rights

The government's motion *in limine*, served at the moment indictments were returned in *Aguilar*, immediately placed counsel for the accused on the defensive. Before a trial defense could be prepared—prior to any defense discovery, factual investigation, legal research, or motion practice—the government was urging the trial court to issue a pretrial order precluding from jury consideration four major strategies which the prosecution anticipated would be used to challenge the criminal charges. What the government referred to as a "procedural inconvenience"[325] was, in fact, a radical and bold tactic to compel the defense to choose, and defend the use of, a particular trial strategy at the very outset of the case.

The government's motion *in limine* in *Aguilar* permitted the prosecution to go on the offensive and attempt to establish the legal boundaries of permissible defenses by which the trial would be conducted. Prior to the government presenting its direct case, the trial judge was asked to rule upon the exclusion of several possible defenses, knowing little more about the case than what the government's motion papers contained. The government, meanwhile, had been preparing this case since Operation Sojourner was authorized nine months earlier.[326] Government attorneys were familiar with the probable defenses which would be raised at trial through information obtained from paid informants who had infiltrated the sanctuary movement,[327] and from legal documents confiscated from one of the defendant's homes.[328] If the defendants were to participate meaningfully at trial, they would first have to overcome the government's serious effort to curtail the use of several defenses.

At first blush, the government's motion *in limine* appears to be a logical, well-reasoned argument which merely seeks to exclude irrelevant and inadmissible evidence from ever being heard, much less considered, by a jury. The argument is almost seductive in its appeal. The court, having the authority in some instances, to rule upon

325. Memorandum in Response, *supra* note 235, at 14.
326. *See supra* note 206 and accompanying text.
327. *Id.*
328. *See supra* note 235.

the admissibility of evidence prior to trial,[329] is asked to guarantee the government's right to exclude evidence which it contends is inadmissible, either because it is irrelevant, prejudicial, or would be confusing to a jury.

The government argues that the motion *in limine* does nothing more than require that the defense demonstrate the admissibility of its intended trial theory by making a sufficient offer of proof, prior to trial and out of the jury's presence.[330] Counsel for the accused, the government reasons, benefits from knowing whether the court will permit such a defense well in advance of trial, thereby avoiding surprise at a court's ruling, and being better able to prepare a new strategy, if necessary. The court benefits, according to the government's argument, when its decisions are made in a deliberate and informed manner rather than during the heat and passion of a criminal trial.[331] Rather than making on-the-spot decisions, the court carefully reviews previously submitted memoranda before rendering its opinion. The result assures that a jury's verdict is based only upon legally admissible evidence, none of which is tainted by prejudice or irrelevance. Trials become shorter, judicial economy is enhanced, and the criminal justice system is streamlined in a manner which warms the heart of every court administrator.

There are some who need read no further to conclude that this new product—the motion *in limine*—is the greatest discovery since the Federal Rules of Criminal Procedure. Yet the critical thinker might begin by asking out loud: "If this is as good as you say it is, why hasn't it been around before now? Why is there no history of the motion *in limine* in the common law or for that matter, why has it never been codified in any federal or state statute? Why hasn't it always been used as a pretrial procedure to exclude certain defenses in a criminal case?"

The answers to these questions rest upon fundamental assumptions of how a criminal trial is conducted under the Anglo-American adversarial system of justice. The primary objective of a criminal trial is to guarantee the accused sufficient due process and constitutional safeguards to assure a fair trial. Paramount in these protec-

329. FED. R. EVID. 104.

330. *See* Memorandum in Response, *supra* note 235, at 14 ("The Motion in Limine tests the *admissibility* of the defendants' anticipated evidence on the defenses enumerated. The motion is *not* an attempt to test the *sufficiency* of the defendants' evidence." (emphasis in original)).

331. *Id.* at 13-15.

tions is the requirement that the government shoulder the burden of proof throughout the proceeding.[332] The prosecution's ultimate burden is to prove the accused guilty beyond a reasonable doubt. When the trial commences, however, and the government is first called upon to present its direct case against an accused, the prosecutor must produce sufficient evidence to establish a prima facie case.[333] The accused, on the other hand, need never testify or present any evidence on her own behalf, but may rely upon the presumption of innocence with which every criminal defendant is cloaked throughout a trial, and which is only removed if a jury finds that the government has met its burden of proof.[334]

The accused's constitutional right against self-incrimination, combined with the government's burden of proof, may lead the defendant to decide not to testify and to remain silent throughout the proceedings, or the accused may choose to offer evidence and present witnesses on her behalf.[335] Whatever the decision, the government's burden of proving guilt beyond a reasonable doubt remains the same.

Each of these constitutional and due process protections—the accused's right to insist that the government assume its full burden of proof,[336] the right to be presumed innocent,[337] to remain silent,[338] to present a full defense[339] and to be judged by a jury[340]—was seri-

---

332. *See* Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964) (accusatorial system requires "the government in its contest with the individual to shoulder the entire load") (quoting 8 J. WIGMORE, EVIDENCE § 317 (1961)).

333. The only pretrial notices of intended defenses which must be served upon the prosecution are stated in FED. R. CRIM. P. 12(1) & 12(2), pertaining to defenses based upon an alibi or insanity. There is currently a proposed rule 12(3) which would require pretrial notice of a defense based upon public authority. H.R. No. 94-241 § (A) (notes of the Committee on the Judiciary) (amendments proposed by the Supreme Court).

334. *See* Taylor v. Kentucky, 436 U.S. 478, 485 (1978) ("one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial"); United States v. Samuel, 431 F.2d 610, 614 (4th Cir. 1970) (fundamental notion that a person accused of a crime "is presumed innocent until his guilt is established beyond a reasonable doubt by competent evidence").

335. Taylor v. Kentucky, 436 U.S. 478, 484 n.12 (1978) (discussing the accused's right "to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion") (quoting J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940)).

336. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 1.4, at 17 n.8 (2d ed. 1986).

337. *Id.* § 1.8(f), at 58; MODEL PENAL CODE § 1.12; National Commission on Reform of Federal Criminal Laws, Final Report—Proposed New Federal Criminal Code § 103 (1971).

338. U.S. CONST. amend. V; C. MCCORMICK, MCCORMICK ON EVIDENCE § 130, at 315 (3d ed. 1984) ("[T]hus the privilege of an accused allows him not only to refuse to respond to questions directed at his alleged participation in the offense but also entitles him not even to be called as a witness at his own trial.").

339. *See* Crane v. Kentucky, 106 S. Ct. 2142 (1986) (citing California v. Trombetta,

ously encroached upon by the government's broad motion *in limine* in *Aguilar*. In the first instance, the motion provided an invaluable and immediate benefit for the government. Regardless of the court's eventual ruling, the defense was required to reveal the strategy and proof which it would offer at trial in support of each theory. From the prosecution's perspective, there was no more effective procedure to discover in advance of trial how the defense intended to challenge the government's indictment. Pretrial discovery by the prosecution is usually limited to specific items of reciprocal evidence.[341] The motion *in limine*, however, compelled the defense to disclose legal and factual arguments which, under ordinary circumstances, would be revealed at the earliest during the trial, and conceivably would not be fully discovered by the government until closing argument was delivered and charges to the jury requested.

Thus, the government's motion *in limine* to exclude entire defenses provided the prosecution with a clear view of the defense trial strategy. In answering the government's motion to exclude certain defenses, defense counsel were required, by the very nature of the response, to divulge their thinking, their ideas, their internal mental processes about how each defense would be applied given the circumstances of their clients' individual situations. Consequently, the government's motion *in limine* intruded upon a privileged area, the attorney's workproduct, which allows counsel to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."[342]

The work product doctrine was recognized by the Supreme Court in *United States v. Nobles*[343] as vital to assuring the proper functioning of the criminal justice system. "The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."[344] Motions *in limine* to exclude entire defenses intrude upon this sacred, privileged territory by allowing government prosecutors

---

467 U.S. 479, 485 (1984)); Washington v. Texas, 388 U.S. 14, 23 (1967); People v. Brumfield, 390 N.E.2d 589, 593 (Ill. App. 1979); State v. Bradley, 223 Kan. 710, 376 P.2d 647 (1978); State v. Brechon, 352 N.W.2d 745 (Minn. 1984).

340. U.S. CONST. amend. VI.

341. FED. R. CRIM. P. 16.

342. Hickman v. Taylor, 329 U.S. 495, 511 (1947).

343. 422 U.S. 225 (1975).

344. *Id.* at 238 (footnote omitted).

to compel counsel for the accused to reveal how it intends to use a certain defense at trial. In effect, a new burden of proof is created. The defense, prior to trial, must reveal as much of its case as is necessary to convince a trial judge that the claim is appropriate to be heard by a jury at trial. Prior to the prosecution presenting its first witness at trial, the defense is compelled to disclose its trial strategy or risk being barred from using it at trial. Defense counsel's pretrial offer of proof will, as a practical matter, include information which was obtained from the accused. Thus the government learns information which is normally protected by the accused's constitutional privilege against self-incrimination and her right to remain silent. Each of these safeguards is placed in grave jeopardy when a defense attorney must offer sufficient evidence of the client's individual facts and circumstances to persuade a trial court that a particular defense should not be eliminated from jury consideration at this early stage of the proceeding.

In brief, the government's motion *in limine*, when analyzed and understood to the full depth of its consequences, wrecks havoc upon traditional notions of how a criminal trial is conducted. No longer is "[t]he state required to bear its burden of proof before the defendants determine whether or not they will offer any evidence and, if so, what evidence they will offer."[345] Instead, the defense must make this determination in advance of trial. The motion *in limine* to exclude an entire defense creates a preliminary stage of the proceeding where counsel for the accused must reveal as much of her trial cards as necessary to convince a court to allow that particular defense to remain a viable alternative at the trial itself. If she fails to meet this burden, perhaps because that particular defense has not yet been fully developed, prepared, or investigated, she must fold that defense entirely.

If this initial burden is sustained by defense counsel, the prosecution gains an enormous advantage in having heard the arguments which will be employed at trial. The prosecution can prepare a stronger rebuttal argument once they have seen the defendant's "hand" and know the strengths and weaknesses of the cards they are holding. An accused no longer has the option to remain silent in the face of a government's motion *in limine* to exclude an entire defense, but must reply or risk waiving the right to present evidence regarding that defense. The presumption of innocence, which acts as a

345. State v. Brechon, 352 N.W.2d 745, 748 (Minn. 1984).

shield in a case where the government fails to meet its burden of proof, is a much less potent protection for the accused when she must assume an initial burden of stepping forward and submitting sufficient evidence to convince the trial court that a contemplated defense is legally permissible. In a sense, the full strength of the presumption of innocence becomes available on a conditional basis—only when an accused has demonstrated that a viable defense, in fact, exists.

An accused's right to prepare a defense and to insist that procedural due process is followed during a criminal trial is, therefore, substantially impaired when the accused is required to respond to a government's broad motion *in limine*. As the prosecution's burden of proof diminishes and the accused's due process safeguards are minimized, the likelihood of conviction increases. But even more serious consequences result when the government's motion *in limine* is granted and an entire defense is excluded from jury consideration.

The ability of the criminal justice system to guarantee the accused a fair trial is placed in jeopardy when the motion *in limine* is used to exclude an entire defense; the individual is deprived of her right to a jury trial and her right to be judged by a community of her peers which has heard all of the relevant evidence pertaining to the criminal charges against her.

The right to a jury trial in a criminal case, historically rooted in the Magna Carta,[346] was recognized by the United States Supreme Court in *Duncan v. Louisiana*,[347] as "fundamental to the American scheme of justice."[348] The Court in *Duncan* reflected upon the importance which the early colonists placed on the "privilege of being tried by their peers"[349] and commented: "Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."[350]

It is the community's participation in judging the facts of a case which has led one commentator to describe the right to trial by jury as "more than an instrument of justice and more than one wheel of

346. In the Magna Carta of 1215, it was declared that "No Freeman shall be taken, or imprisoned, or [dispossessed], . . . or be outlawed, or exiled, or [in any way] destroyed; . . . [except] by [the] lawful Judgment of his Peers, or by the Law of the Land." 17 John (Magna Carta) CAP XXIX (1215).

347. 391 U.S. 145 (1968).

348. *Id.* at 149.

349. *Id.* at 152 (quoting SOURCE OF OUR LIBERTIES 270, 288 (R. Perry ed. 1959)).

350. 391 U.S. at 156.

the constitution: it is the lamp that shows that freedom lives."[351] When citizens assume the role of jurors, they are empowered to judge collectively the fate of another individual. The deliberation process requires that jurors reveal and openly discuss the basis of their opinions. Others may challenge and disagree with a juror's thinking, but the process itself—an open dialogue in which all participate and contribute their ideas—explains why juries are, in the truest sense, the democratic backbone of the criminal justice system.[352]

Juries must be entrusted to perform their role as the fact-finder and to abide by their oath to follow the law as instructed by the court. Implicit in the government's motion *in limine* in *Aguilar* is a belief that the fact-finding process would be disrupted if any of the subject defenses were raised at trial. The government feared, at the very least, that the trial jury would not be able to follow a court's ruling if the judge excluded a particular line of questioning or a specific defense at trial.

It is more likely that the prosecution employed the motion *in limine* because it did not want the trial jury to hear evidence of any defense which might conflict with current government policy in Central America. The broad sweeping nature of the motion *in limine* went so far as to preclude the accused from testifying to their belief that their conduct was lawful. It is difficult to imagine any set of circumstances which would prevent an accused from testifying that she did not act with criminal intent, but reasonably believed her actions to be legal. The government always has the right to challenge this assertion through cross-examination.

The court's evidentiary rulings and legal instructions to a jury provide sufficient guidelines to assure that a criminal trial is conducted properly. It is critical that the motion *in limine* not be applied by the government to tamper with the historic role of the jury, nor to deny the accused her right to prepare and present a legal defense to the charges against her.

---

351. P. DEVLIN, TRIAL BY JURY 164 (1966).

352. A jury acts as the guarantor of the accused's right to be judged fairly and to be free from a government's politically motivated or "oppressive" criminal prosecution: "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies . . . ." 391 U.S. at 155-56.

CONCLUSION

In a criminal trial, the motion *in limine* must be scrutinized by the court in order to assure that the *in limine* procedure protects, rather than deprives, the accused's right to a fair trial.

When used to exclude a specific, individualized item of evidence which otherwise would have inflamed and prejudiced a jury against the accused, the motion *in limine* is a valuable defense tool which assists the jury's fact finding responsibilities. Prosecutors, too, have properly used the motion *in limine*, most frequently to limit defense cross-examination or to prevent its introduction of prejudicial items of evidence. Prosecutors may also rely upon it to obtain court rulings out of the jury's presence whenever they intend to present direct evidence or to conduct cross-examination which may be prejudicial or might jeopardize the accused's right to a fair trial.[353] Such rulings, out of the jury's presence, reduce the likelihood that a jury's verdict will be tainted by prejudicial and inadmissible evidence.

Prosecutors have nonetheless begun using the motion *in limine* to exclude entire defenses from being raised at trial. When presented with such broad motions, courts must view them as suspect and contrary to fundamental constitutional safeguards, including due process protections for an accused. The adversarial system is founded on the premise that an accused has the right to remain silent and is under no obligation to present any exculpatory evidence in order to be judged not guilty of the criminal charge. The burden of presenting evidence and of proving guilt falls solely on the government. The broad motion *in limine* violates these long-held jurisprudential principles by requiring the defense to reveal, frequently through the mouths of the accused and her witnesses, details of the defense theory sufficient to convince a court that the evidence should be admissible. Even if the motion is unsuccessful, the prosecution's discovery of important details of the defense trial strategy has already skewed the scales of justice. When the motion is granted, the accused's right to present a defense is sharply curtailed, if not actually eliminated.

The government's motion *in limine* in *Aguilar* is an example of the devastating consequences of this pretrial procedure upon the accused's right to a fair trial. The motion *in limine* in *Aguilar* was not a "modest procedural inconvenience,"[354] as the government asserted;

353. *See* People v. Ventimiglia, 52 N.Y.2d 350, 420 N.E.2d 59, 438 N.Y.S.2d 261 (1981). *See also supra* notes 72, 81, and text accompanying note 98.

354. Memorandum in Response, *supra* note 235, at 14.

rather it succeeded in fundamentally crippling any defense theory which might have justified or explained the reasonableness of the defendants' conduct. In *Aguilar*, the government's motion *in limine* prevented the jury from ever learning the circumstances underlying the defendants' involvement in the sanctuary movement, and limited the jury's consideration of the conditions which led the Salvadorans and Guatemalans to flee their homelands. It left only one option open for the jury to consider—that the defendants were guilty of violating the immigration laws.[355]

The government's use of the broad motion *in limine* in *Aguilar* challenges fundamental notions of fair trial guarantees for the accused. It also represents a bold attempt to change how a criminal trial is conducted by increasing the prosecutor's power in the courtroom while limiting the judiciary's role as an impartial arbiter during the course of a trial. The *Aguilar* court compromised its role as a check and balance upon executive power by accepting the prosecution's broad allegations prior to trial and by failing to require the prosecution to prove its entire case against the accused. Instead, the court in *Aguilar* compelled practically unprecedented disclosure by the defense, and rejected the notion that the admissibility of a defense should not be decided prior to trial.[356] The judiciary must never succumb to the temptation of simplifying trials by entertaining, much less granting, such broad motions which streamline the rights of the accused in the interest of a more efficient system.

---

355. One juror interviewed after the *Aguilar* trial expressed his sense of the conflict the jury faced in reaching its verdict: "Nobody felt good about it," said juror David McCrea. "We sympathized with them, but we had to follow the law . . . but if there was justice done or not, I'm not sure." Jones, *'Guilty Verdict Won't Stop Us,'* Guardian, May 14, 1986, at 1, 5.

356. The preferred method for a court to follow is that stated in Commonwealth v. O'Malley, 14 Mass. App. Ct. 314, 439 N.E.2d 832 (1982), where the court permitted the defense to introduce evidence of the proffered defense before ruling on its sufficiency as a matter of law. Alternatively, a court may require the defense to make an offer of proof out of the jury's presence before ruling on its admissibility. Limited situations do exist for the broad motion *in limine*. Where the notice requirement in an insanity defense has not been complied with, the prosecution may use the motion *in limine* to preclude the defense at trial. *See* FED. R. CRIM. P. 12.2(a) & (b); United States v. Torniero, 735 F.2d 725, 731 (2d Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985) (court excluded insanity defense because compulsive gambling, which had only recently been included in the American Psychiatric Association's manual on mental disorders, was the subject of much disagreement among the psychiatric profession regarding whether the disorder is a mental disease or defect); United States v. Veatch, 647 F.2d 995 (9th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982); United States v. Buchbinder, 614 F. Supp. 1561 (N.D. Ill. 1985), *aff'd*, 796 F.2d 910 (7th Cir. 1986). Furthermore, where the proposed insanity defense is arguably not recognized as a "mental disease or defect," the prosecution may seek a pretrial ruling on the admissibility of the defense. *Id.*

The motion in *Aguilar* accomplished the verdict sought by the government; yet it is doubtful that the government was pleased when the simple case of alien smuggling became a six month trial affording tremendous publicity to the sanctuary movement—especially when at the same time the movement grew to almost twice its original size. The government objective of deterring and intimidating churches and synagogues from joining or continuing the activities of the sanctuary defendants failed; and in the process, the government ran roughshod over fundamental principles of American justice.

The motion *in limine* raises serious questions about the nature of a criminal trial in our legal system today and in the future. If the judiciary is an independent branch of government, responsible for curbing executive power and for protecting the accused's right to a fair trial, doesn't the trial court forfeit this role by accepting the government's version of the case and granting the exclusion of entire defenses before the trial has even commenced? If the trial is a search for the truth, how is this reconciled with a motion *in limine* which suppresses substantial evidence from the jury's consideration? If the right to trial by jury is an accused's constitutional right, doesn't the broad motion *in limine* erode this fundamental protection by limiting the jury's fact finding responsibilities? Finally, if the jury is the collective conscience of the community, doesn't the recent use of the motion *in limine* represent an ominous threat to the vitality of a democracy?

In answering these questions, the judiciary must recognize the dangers of this developing trend of *in limine* motion practice, and must restrict the broad motion to conform with fundamental constitutional standards.