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REFUGE IN THE UNITED STATES: THE SANCTUARY MOVEMENT SHOULD USE THE LEGAL SYSTEM

Paul Wickham Schmidt*

This Article will discuss whether the so-called sanctuary movement is a legitimate response to the problem of aliens entering the United States illegally from Central American countries. First, the legal process for the granting of refugee status, asylum, and withholding of deportation, and the definition of the various terms often used in the sanctuary debate, will be examined. Then, the various international instruments relating to claims of refuge and asylum will be considered. Next, the concept of sanctuary will be discussed in historical context. Finally, the Article will explore some of the alternatives available to those who wish to lend support to aliens fleeing from Central America.

I. UNDERSTANDING THE LEGAL PROCESS

A. Refugee Status

A refugee is a person who is outside the country of his or her 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

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This Article is an expansion of remarks made by Mr. Schmidt before the Center for Migration Studies in Washington, D.C., on March 21, 1986, and the American Society of International Law in Washington, D.C., on April 10, 1986. The views expressed in this Article are Mr. Schmidt’s own and do not necessarily represent the official position of the INS, the Department of Justice, or any other government agency.
social group, or political opinion . . . .”\(^1\) Under current United States procedures, refugee status can only be applied for outside the United States.\(^2\)

There is no specific statutory limitation upon the number of refugees who can be admitted in any year.\(^3\) Prior to the beginning of each year, the number of refugees to be admitted to the United States through the overseas refugee program is determined by the President and the Congress through a process known as consultation.\(^4\)

Not all refugees are eligible to be admitted to the United States under the overseas refugee program. Only those refugees who are of “special humanitarian concern” to the United States can apply.\(^5\) The consultation process helps the President and the Congress determine which groups of refugees will be considered of special humanitarian concern in any particular year. The number of refugee admissions is allocated among those groups of refugees.\(^6\)

For 1987, the Congress and the President agreed upon 70,000 as the total number of overseas refugee admissions.\(^7\) Of these, 40,500 admissions are earmarked for refugees from East Asia; 10,000 are for Eastern Europe and the Soviet Union; 8,000 are for the Near East and South Asia; 4,000 are for Latin America and the Caribbean; 3,500 are for Africa; and 4,000 are in an unallocated reserve.\(^8\)

Although the primary emphasis in the Latin American allocation continues to be former political prisoners, mostly Cuban, there is an attempt to broaden availability to other nationalities, specifically Central Americans.\(^9\)

2. 8 C.F.R. § 207.1(a) (1987).
3. INA § 207(a)(2), 8 U.S.C. § 1157(a)(2) (1982) (“[T]he number of refugees who may be admitted . . . in any fiscal year . . . shall be such number as the President determines . . . is justified by humanitarian concerns or is otherwise in the national interest.”).
4. Id. § 207(a)(2), (d), 8 U.S.C. § 1157(a)(2), (d).
6. Id.
9. Id. at 3. The INS Deputy Commissioner, Thomas C. Ferguson, described the purpose of the proposed allocation of 4,000 refugees for Central America and the Caribbean:

Finally, the proposed allocation of 4,000 for Latin America should signal our continuing interest in restoring the 1984 Migration Agreement with Cuba. At the same time, our proposal allows us to extend the opportunity for resettlement to
Thus, an alien fleeing from a Central American country has only a limited opportunity to participate in the United States refugee program. He could, of course, seek refuge in a country other than the United States. Otherwise, if he wished to be admitted to the United States legally, he would have to fit within the normal immigration requirements, or be granted asylum.

B. Asylum Process

Any alien physically present at the border or within the United States can apply to the Attorney General for asylum. Asylum may be granted to an alien who establishes that he meets the refugee definition, unless that alien has been firmly resettled in another country, committed certain types of aggravated misconduct, or would present a danger to the security of the United States. An alien claiming a well-founded fear of persecution within the meaning of the refugee definition must show something more than the fact that civil war or general conditions of random violence prevail in his other nationalities in the region. Among the 300,000 refugees in Central America there are some for whom resettlement outside the region may be the only solution. The United States will participate in a resettlement program for these refugees. It is significant to note that INS has granted asylum to more than 3,000 Central American refugees since 1984; grants by immigration judges have added to those numbers. Clearly a small resettlement program will further demonstrate our commitment to refugees from that region.

Id.

10. Id.
12. See supra text accompanying note 1.
13. 8 C.F.R. § 208.8(f)(1) (1987). This regulation sets forth certain regulatory preclusions to a grant of asylum by a district director. 8 C.F.R. § 208.8(f)(1)(ii) bars aliens who have been firmly resettled in a foreign country. 8 C.F.R. § 208.8(f)(1)(iii)-(vi) incorporates the statutory bars on withholding of deportation contained in INA § 243(h)(2), 8 U.S.C. § 1253(h)(2) (1982). See infra note 18. The Board of Immigration Appeals has stated: “Although those regulations are addressed to the District Director and are not binding on this Board, we consider them as useful guidelines in the exercise of discretion over asylum requests.” In re Salim, 18 I. & N. Dec. 311, 315 (BIA 1982). In fact, however, the Board has treated the requirements of 8 C.F.R. § 208.8(f)(1) in almost exactly the same way as binding eligibility requirements. See, e.g., In re Carballe, Int. Dec. No. 3007 (BIA Feb. 13, 1986) (asylum may be denied without full evidentiary hearing where alien is ineligible for withholding under INA § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B) (1982), because of particularly serious crimes committed in the United States). The author is unaware of any case in which the Board has granted asylum to an alien who fit within 8 C.F.R. § 208.8(f)(1). But see Arauz v. Rivkind, No. 86-0298 (S.D. Fla. Apr. 2, 1986) (immigration judge must conduct a full evidentiary hearing on asylum claim even if alien clearly fits within 8 C.F.R. § 208.1(f)(1)).
14. In INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987), the Supreme Court held that a “well founded fear” of persecution was something less than proving that persecution was “more likely than not.” See discussion infra notes 49-51 and accompanying text.
home country. 15

Even if an alien establishes that he is a refugee, and is therefore eligible for asylum, the decision whether or not to grant asylum is discretionary with the Attorney General’s delegees. 16 An applicant becomes an asylee only when that determination is made by the Attorney General’s delegees, and not before. 17 An alien, however, who is found eligible for asylum, but who is denied that relief for discretionary reasons, may still not be forcibly returned to a country where it is more likely than not that he will be persecuted. 18 Discretionary denial of asylum occurs principally in cases of Afghans who have been given refuge in Pakistan, and who then evade overseas refugee processing by coming to the United States with false or otherwise improper documentation. 19

15. See, e.g., Vides-Vides v. INS, 783 F.2d 1463, 1469 (9th Cir. 1986); Zepeda-Melendez v. INS, 741 F.2d 285, 289-90 (9th Cir. 1984); Chavez v. INS, 723 F.2d 1431, 1433-34 (9th Cir. 1984); Sanchez v. INS, 707 F.2d 1523, 1527-28 (D.C. Cir. 1983); Martinez-Romero v. INS, 692 F.2d 595, 595-96 (9th Cir. 1982). The original version of the Senate bill that later became the Refugee Act of 1980 contained a refugee definition that included persons “displaced by military or civil disturbance or uprooted because of arbitrary detention.” S. 643, 96th Cong., 1st Sess. § 201(a) (1979). However, the Refugee Act of 1980, as finally enacted, did not include such “displaced persons” in the refugee definition. See In re Acosta, Int. Dec. No. 2986, slip op. at 18, n.10 (BIA March 1, 1985).


17. United States v. Elder, 601 F. Supp. 1574, 1580-81 (S.D. Tex. 1985). See United States v. Merkt, 794 F.2d 950, 954-57 (5th Cir.), cert. denied, 107 S. Ct. 1603 (1987); United States v. Pereira-Pineda, 721 F.2d 137, 139-40 (5th Cir. 1983). Some sanctuary advocates have claimed that aliens are automatically “refugees” and “asylees” without any determination by the government. Such an interpretation is inconsistent with the plain language of sections 207(c)(1) and 208(a) of the INA, 8 U.S.C. §§ 1157(c)(1), 1158(a) (1982), and was rejected by the courts in Elder, Merkt, and Pereira-Pineda.


19. See infra note 48. The Board of Immigration Appeals has stated:

An alien who circumvents the orderly procedures for obtaining refugee status is not precluded from obtaining a discretionary grant of asylum. However, . . . the alien must establish that he has sufficient countervailing equities to warrant the favorable exercise of discretion. Generally, it will be necessary to balance the positive and negative factors in each case, particularly where a finding of fraud is not involved.


Since there has been no established overseas refugee program for Central Americans other than certain former and present political prisoners, this particular rationale does not appear to have much, if any, applicability to Central American asylum claims. Cf. Damaize-Job v. INS, 787 F.2d 1332, 1337-38 (9th Cir. 1986) (failure of Miskito Indian fleeing from Nicaragua to claim asylum in first country in which he arrived not a basis to doubt the credi-
An alien who is maintaining a lawful status in the United States can apply to an Immigration and Naturalization Service (INS) district director for asylum. Other aliens in the United States, or at a border port, can also apply for asylum to a district director, so long as no formal proceedings to exclude them or deport them from the United States have been instituted.

Before the district director, the applicant is entitled to be represented by counsel of his choice (at no expense to the government), to present evidence in support of his application, and to receive a written decision. Although there is no appeal of a district director's decision denying asylum, the application can be renewed in an exclusion or deportation proceeding before an immigration judge.

An alien who presents a nonfrivolous application for asylum to either a district director or an immigration judge may be granted authorization to work, by the district director, during the pendency of the application.

Most aliens who come to the United States from Central America outside of the legal immigration system, enter the country illegally without inspection. It is therefore likely that if encountered by the INS, they would be placed in deportation proceedings, and
would not have access to the asylum process before the district director. Nevertheless, they would be able to apply for asylum before an immigration judge and would obtain procedural rights and safeguards greater than those which attend the district director asylum process.

An immigration judge is a quasi-judicial officer who is not an employee of the INS. Immigration judges work for the Executive Office for Immigration Review within the Department of Justice. Their sole function is to preside and make decisions at various trial type hearings conducted under the immigration laws. While some of the immigration judges are former INS attorneys, some of the more recent appointments came from private practice, nonprofit or legal aid groups, state court systems, or other government agencies.

An alien appearing before an immigration judge is entitled to be represented by counsel of his choice. Although the law prohibits the government from appointing counsel in exclusion and deportation cases, all aliens appearing before immigration judges are given lists of local organizations which have stated that they will provide free legal services to aliens.

During the hearing, the alien asylum applicant can present testimony, documentary evidence, witnesses, and legal arguments in support of his application. He can cross examine any witnesses for the government and can rebut any other evidence presented by the government. The alien is entitled to a reasoned decision from the

28. See 8 C.F.R. § 208.3(b) (1987).
30. 8 C.F.R. § 3.0 (1986).
31. Id.
34. 8 C.F.R. §§ 236.2(a), 292(a) (1987).
35. Id. §§ 208.10(c), 236.2(a), 242.16(a).
36. Id. §§ 236.2(a), 242.16(a). The views of the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State on the asylum application are requested by either the district director or the immigration judge, or both. Id. § 208.7. Unless classified, which is rare, the opinion is placed in the record and the applicant is given an opportunity to inspect, explain, and rebut the opinion if adverse to his application. Id. §§ 208.8(d), 208.10(b).
immigration judge.  

If the alien is dissatisfied with the immigration judge’s decision, he can appeal to the Board of Immigration Appeals.  

Like the immigration judges, the Board is part of the Executive Office for Immigration Review and is entirely separate from the INS. A decision by the Board against the alien can be reviewed in United States courts by life tenured federal judges. Eventually, review can be sought in the United States Supreme Court.

An alien who is granted asylum can remain in the United States. Eventually, such an alien will have a chance to apply for adjustment to lawful permanent resident alien status.

On March 30, 1987, the Department of Justice established a new Asylum Policy and Review Unit. The purpose of this unit, located within the Department's Office of Legal Policy, is “to advise the Attorney General and Deputy Attorney General on matters related to asylum policy . . . ,” and to “compile information relevant to asylum decisions and to coordinate asylum matters with the Immigration and Naturalization Service.” The Attorney General took this action to promote uniformity in asylum decision making, and to assure consistency with statutory and judicially established standards for asylum. The Attorney General stated that the establishment of a separate office within the Department to oversee asylum policy recognized the fact “that the decision to grant asylum to an alien is inherently a humanitarian act by the United States that is distinct from the normal operation and administration of the immigration laws.”

The final rule establishing this office was the result of a year-

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40. INA § 106(a), (b), 8 U.S.C. § 1105(a), (b) (1982). Review of deportation cases is by petition for review, directly to a United States court of appeals. Id. Review of exclusion cases is by habeas corpus filed in a United States district court. Id.
41. Id. § 209(b), 8 U.S.C. § 1159(b). Adjustments to lawful permanent resident alien status under this section are limited to 5,000 in any fiscal year. Id. This may be indicative of a congressional belief that only a relatively small number of aliens would qualify for asylum in the United States.
42. Final Rule, 52 Fed. Reg. 11,043-44 (1987) (to be codified at 28 C.F.R. §§ 0.15(f), 0.105(k), 0.23(b)).
44. Id.
45. Id.
long departmental study involving the INS and the Executive Office of Immigration Review (EOIR), as well as the Office of Legal Policy. Among other functions, the Asylum Policy and Review Unit will:

- Compile and disseminate to INS Officers information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion.
- Review cases decided by the Board of Immigration Appeals. Among other functions, the Asylum Policy and Review Unit will:
- Review INS asylum decisions in cases which the Deputy Attorney General directs the INS to refer to him.
- Assist INS in conducting training concerning asylum and assist in resolving policy questions.

C. Withholding of Deportation

In addition to the provisions relating to asylum, the law provides that no alien can be deported or removed from the United States to a country where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. This is called withholding of deportation.

Unlike asylum, which is discretionary, the Attorney General’s delegates must grant withholding of deportation to an alien who establishes that he meets the statutory criteria, unless that alien has committed, or is reasonably believed to have committed outside the United States, certain aggravated offenses, or constitutes a danger to the security of the United States. The granting of withholding of deportation does not guarantee that an alien will be permitted to remain in the United States. Since withholding of deportation is country specific, the alien could still be removed to a third country which would accept him and where he would not be persecuted. Withholding of deportation does not confer any right to become a lawful permanent resident alien at a later time.

46. Id.
48. U.S. Dep’t of Justice, supra note 43. These functions are codified at 28 C.F.R. § 0.15(f), as added by Final Rule, 52 Fed. Reg. 11,043, 11,044 (1987).
52. See, e.g., Diaz-Escobar v. INS, 782 F.2d 1488, 1491 (9th Cir. 1986) (discussing

http://scholarlycommons.law.hofstra.edu/hlr/vol15/iss1/3
The Supreme Court has held that an alien seeking withholding of deportation must establish that it is "more likely than not" that he will be persecuted for one of the five specified reasons. The government applied this same standard of proof to asylum applications, while several courts of appeals held that the standard for asylum was something less than "more likely than not." Recently, the Supreme Court held that the standard for asylum is something less than "more likely than not." Although leaving the precise standard for later articulation on a case by case basis, the Court suggested that a "moderate" interpretation would find a "well founded fear" whenever evidence established an objective situation where persecution was a "reasonable possibility." The Court also reiterated that even when the "refugee" standard is satisfied, the Attorney General still retains discretion to grant or deny asylum.

D. Extended Voluntary Departure

The term "extended voluntary departure" often comes up in connection with the debate over the treatment of aliens entering illegally from Central America. Extended voluntary departure is somewhat of a misnomer, since it does not relate to the statutory and regulatory provisions on "voluntary departure" under the immigration laws. Rather, it refers to a nonstatutory exercise of some of the differences between asylum and withholding of deportation.

55. See, e.g., Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985), aff'd, 107 S. Ct. 1207 (1987); Carcamo-Flores v. INS, 805 F.2d 60, 64 (2d Cir. 1986); Guevara Flores v. INS, 786 F.2d 1242, 1250 (5th Cir. 1986), cert. denied, 107 S. Ct. 1565 (1987); Yousif v. INS, 794 F.2d 236, 243 (6th Cir. 1986); Youkhanna v. INS, 749 F.2d 360, 362 (6th Cir. 1984); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984) (dictum). But see Reyes v. INS, 747 F.2d 1045 (6th Cir. 1984), cert. denied, 471 U.S. 1061 (1985); Nasser v. INS, 744 F.2d 542 (6th Cir. 1984); Daly v. INS, 744 F.2d 1191 (6th Cir. 1984), in which the Sixth Circuit equates the standard of proof in asylum cases with that in withholding of deportation cases.
57. Id. at 1217-18. All courts to have considered the issue agree that some showing must be made of an objective basis for the fear of persecution. See, e.g., Vides-Vides v. INS, 783 F.2d 1463, 1469 (9th Cir. 1986); Quintanilla-Ticas v. INS, 783 F.2d 955, 957 (9th Cir. 1986); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984); Youkhanna v. INS, 749 F.2d 360, 362 (6th Cir. 1984).
59. INA §§ 242(b), 244(e), 8 U.S.C. §§ 1252(b), 1254(e) (1982); 8 C.F.R. §§ 242.2, 244.1 (1987). The Board of Immigration Appeals has held that immigration judges lack the authority to grant extended voluntary departure on a nationality basis. In re Rosa Elba Vas-
prosecutorial discretion by the Attorney General not to remove certain classes of otherwise deportable aliens. It is usually granted on a nationality basis after consultation with, or advice from, the State Department.

Currently, grants of extended voluntary departure are in effect for various classes of aliens from Afghanistan, Ethiopia, and Poland. The aliens benefitting from the most recent of these grants, such as Poles, must have arrived in the United States prior to a particular date in the past. This minimizes the incentive for illegal migration by prospective recipients of extended voluntary departure.

The Secretary of State has considered the possibility of recommending extended voluntary departure for El Salvadorans, and has specifically declined to do so. In July, 1983, Attorney General William French Smith, after considering the Secretary of State's views, determined that the circumstances did not warrant the grant of extended voluntary departure to Salvadorans.

Both the Attorney General and the Secretary of State pointed to United States efforts to improve the situation in El Salvador, the proximity of El Salvador, and to the historic pattern of illegal migration from that country, as reasons for not deeming extended voluntary departure to be appropriate. The Attorney General also pointed to the existence of the asylum and withholding of deporta-

61. Id.
62. Defendant's Motion for Partial Summary Judgment, Exhibit E, Hotel & Restaurant Emp. Union Local 25 v. Attorney Gen., 804 F.2d 1256 (D.C. Cir. 1986) [hereinafter Defendant's Motion]. Extended voluntary departure for Ugandans which had been in effect since June 8, 1978, was terminated on September 30, 1986, in light of the State Department's view that conditions had sufficiently stabilized. Memorandum from Hugh J. Brien, Assistant Commissioner Detention and Deportation, INS, to INS field offices (July 31, 1986) (on file with author).
63. Afghanistan, arrivals prior to June 30, 1980; Ethiopia, arrivals prior to June 30, 1980. Defendant's Motion, supra note 62. Currently, Polish nationals who were in the United States as of July 21, 1984, have been given extended voluntary departure until June 30, 1987. Telex from John C. Higgins, Assistant Commissioner, Detention and Deportation, INS, to INS field offices (Dec. 23, 1986) (on file with author).
64. Defendant's Motion, supra note 62, Exhibit C (Letter from George P. Schultz, Secretary of State, to William French Smith, Attorney General (June 23, 1983)) [hereinafter Schultz Letter].
66. Schultz Letter, supra note 64; Smith Letter, supra note 65.
tion processes as alternatives for Salvadorans who legitimately fear persecution.67

Several bills were introduced during the last Congress which would have required the Attorney General to grant extended voluntary departure to undocumented aliens from El Salvador.68 In fact, the House-passed version of the Immigration Reform and Control Act of 1986 contained a provision requiring the Attorney General to grant temporary stays of deportation to nationals of El Salvador and Nicaragua pending receipt of, and congressional action on, a report by the General Accounting Office on the situation of such displaced nationals.69 The Senate-passed version of the same bill contained no such provision. The Conference Committee considering the bill deleted this provision, and thus it did not become a part of the Immigration Reform and Control Act of 1986 as enacted.70 That Act did, however, provide that illegal aliens who had resided in the United States since prior to January 1, 1982, and aliens who had resided in the United States and worked in seasonal agricultural occupations for at least 90 man-days between May 1, 1985 and May 1, 1986, could qualify to have their immigration status in the United States legalized.71 New bills relating to extended voluntary departure for Central Americans have been introduced in the 100th Congress.72

67. Smith Letter, supra note 65.
70. H.R. REP. No. 1000, 99th Cong., 2d Sess. 98 (1986). In rejecting the proposal for extended voluntary departure, the Conference Committee stated:

The Conference substitute deletes the provision. The Conferees believe that deportations should be suspended on a case-by-case basis in cases such as El Salvador where natural disasters have added to other societal problems in a manner which adds significantly to the difficulties inherent in the resettlement of deportees.

Nothing in this statement is intended to set a precedent for ignoring the basic standards set forth in the Refugee Act of 1980.

The Conferees strongly recommended that Congress consider and take up this issue expeditiously next Congress.

Id.

72. Battle Expected in Congress Over Asylum for Salvadorans, The Miami Herald, Feb. 2, 1987, at A10, col. 4. Recently, President Reagan rejected a request from El Salvador’s President Duarte that Salvadorans who are in the United States illegally be permitted to stay. President Reagan cited the undesirable precedent that would be set by such action. President
II. INTERNATIONAL INSTRUMENTS

A. United Nations Convention

The United Nations Protocol Relating to the Status of Refugees of 1967 (Protocol) was acceded to by the United States in 1968. It incorporates most of the provisions of the United Nations Convention Relating to the Status of Refugees of 1951, to which the United States was not a signatory.

The Protocol does not deal with the question of what refugees should be selected for admission to a particular country. In other words, it does not set up standards or guidelines for overseas refugee programs. It does, however, deal with the rights that should be accorded to refugees lawfully within a contracting state and, to some extent, with the rights that should be afforded to refugees who are unlawfully within a contracting state.

The most relevant provision of the Convention, other than the refugee definition, provides that, with certain exceptions for aggravated offenders, “No contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Congress, in enacting the asylum and withholding of deportation provisions of the Refugee Act of 1980, implemented this provision of the Protocol and Convention. The government has taken the

Duarte had expressed fear that the Immigration Reform and Control Act of 1986 would cause the return of thousands of Salvadorans thereby harming the fragile Salvadoran economy. U.S. Won't Let Illegal Salvadorans Stay, 45 Cong. Q. 1027 (1987).


75. Protocol, supra note 73; Convention, supra note 74.


77. Convention, supra note 74, art. 33, at 6276, T.I.A.S. No. 6577, 189 U.N.T.S. at 176.

position that the Protocol and Convention are not self-executing, that is, that they are implemented in domestic law only to the extent that Congress has passed specific legislation embodying their terms. Courts have generally agreed with this position. The “classical” definition of a refugee as an individual fleeing direct persecution or having a well founded fear of persecution on one of five specified grounds, is contained in the Convention, the Protocol, and the Refugee Act of 1980. The latter uses this definition in its overseas refugee and asylum provisions. Aliens in the United States or at its borders who can establish that they meet this definition may be granted asylum. At the very least, an alien who can establish that it is more likely than not that he will suffer persecution will have his deportation to a country where he faces persecution withheld.

A number of United Nations resolutions, however, have extended the mandate of the United Nations High Commissioner for Refugees (UNHCR) beyond the classical refugee definition to encompass “persons displaced from their countries because of severe internal upheaval or armed conflict (externally displaced persons in a refugee-like situation).” These so-called “mandate refugees” are not included within the Convention and Protocol and are not recognized as refugees under United States law.

Mandate refugee status is determined by the UNHCR on a group, rather than an individual case, basis:

Thus UNHCR has determined on a group basis that all Salvadorans in the camps of Honduras and all Guatemalans in the

80. See cases cited supra note 79.
81. Convention, supra note 74, art. 1, at 6261, T.I.A.S. No. 6577, 189 U.N.T.S. at 152.
84. See supra text accompanying notes 1-10 and 11-48.
85. See supra text accompanying notes 11-48.
86. See supra text accompanying notes 49-58.
88. See id.
settlements of Chiapas, Campeche and Quintana Roo in Mexico are refugees. UNHCR, however, has not adopted the position that all Salvadorans and Guatemalans in the United States are refugees, even in the broader sense—a certain percentage may well come exclusively for economic reasons.\(^8^9\)

The UNHCR has continued to urge that the United States permit mandate refugees to remain here either on a group or an individual basis, until the situation in Central America has stabilized and it is safe to return.\(^9^0\) The UNHCR has recognized that such determinations would be beyond the scope of the asylum or withholding provisions of the United States' immigration laws and would require either the decision to grant extended voluntary departure, or some other form of discretionary decision to temporarily forego enforcement of departure.\(^9^1\)

B. Other International Instruments and Customary International Law

A number of claims have been advanced that other international instruments, such as the Universal Declaration of Human Rights\(^9^2\) and the Geneva Convention Relative to the Treatment of Civilian Persons in Time of War,\(^9^3\) give aliens certain additional rights under United States domestic law. The government has taken the view, and the courts have consistently held, that these documents are not self-executing treaties, and that the Immigration and Nationality Act is the exclusive source of rights for aliens who claim a legal entitlement to remain in the United States.\(^9^4\)

One United States district court has concluded that the Universal Declaration of Human Rights is merely a non-binding resolution which creates no cause of action for any individual.\(^9^5\) An immigration judge has found that the Geneva Convention IV may have ap-

\(^8^9\) Id.
\(^9^0\) Id.; Letter from Joachim Henkel, Deputy Representative, UNHCR, to Alan C. Nelson, Commissioner, INS (Oct. 28, 1985) [hereinafter Nelson Letter] (on file with author).
\(^9^1\) Nelson Letter, supra note 90; Brooks Letter, supra note 87.
\(^9^4\) See cases cited supra note 79.
\(^9^5\) Haitian Refugee Center v. Gracey, 600 F. Supp. 1396, 1405 (D.D.C. 1985), aff’d on other grounds, 807 F.2d 794 (D.C. Cir. 1987). See also Ishtyaq v. Nelson, 627 F. Supp. 13 (E.D.N.Y. 1983) (holding that even assuming the Universal Declaration of Human Rights created a right of recovery, it could only be exercised where the detention was arbitrary).
plicability in immigration proceedings, although relief was denied in the individual case.96 This matter is now pending on appeal before the Board of Immigration Appeals.97

Almost all courts to have considered the matter have rejected customary international law as a source of immigration rights for aliens in the United States, in light of the pervasive legislative and executive pronouncements in the area of immigration.98

III. WHAT IS “SANCTUARY?”

Sanctuary, or the ability of an individual accused of crime to seek temporary refuge in a particular city or on religious property, had its origins in biblical times.99 It appeared as a mitigating response to the rather harsh rule of blood vengeance which prevailed under the then existing legal system.100 The granting of sanctuary assumed, if not innocence, then at least lack of premeditation.101 The result was not a complete forgiveness of the act and the ability to go freely among the population at large, but restriction of movement to a particular sanctuary city.102

In its later forms in England, sanctuary involved a limited period of protection on church property, and then permanent banishment from the country.103 As stated by one authority:

Rather than being forced to pay compensation to satisfy the Anglo-


97. *Id.*


In *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied*, 107 S. Ct. 289 (1986), the court found that international law was not controlling in light of the executive actions and judicial decisions establishing the government's authority to detain excludable aliens.

99. For detailed discussions of the historical development of the law of sanctuary, see generally I. BAU, *THIS GROUND IS HOLY* 124-83 (1985), and *Carro, Sanctuary: The Resurgence of an Age Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747 (1986).


Saxon law of bloodfeud, the sanctuary seeker now had to submit to the operation of the criminal law. Limiting private revenge was no longer the primary purpose of sanctuaries. Instead, sanctuaries had become part of the criminal law, facilitating the imposition of the sentence of banishment without trial. Sanctuary seekers who abjured the realm chose this punishment instead of punishment after trial. In this sense, the abjuration of the realm was a refinement of the law of outlawry.¹⁰⁴

As a result of abuses, Parliament abolished sanctuary by statute in 1624.¹⁰⁵

Unlike England, there has never been a legal concept of sanctuary in the United States.¹⁰⁶ To the extent that there has been any embodiment of the sanctuary tradition in our legal system, it is in the warrant requirements and the prohibitions on unreasonable searches and seizures contained in the fourth amendment to the United States Constitution.¹⁰⁷ Some of the concerns with the reasonableness of the legal system that were reflected in the biblical and English concepts of sanctuary¹⁰⁸ are also addressed in the fifth amendment to the Constitution.¹⁰⁹

There is very little apparent connection between the so-called “sanctuary movement” and the historic principles of sanctuary.¹¹⁰ The sanctuary movement seeks the recognition of the right of individuals who have entered or remain in the United States in violation

¹⁰⁴. I. BAU, supra note 99, at 144.
¹⁰⁶. I. BAU, supra note 99, at 172; See Carro, supra note 99, at 768.
¹⁰⁷. The fourth amendment reads:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.
¹⁰⁹. The fifth amendment reads:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
U.S. CONST. amend. V.
¹¹⁰. See Carro, supra note 99, at 767-68.
of the immigration laws to be exempt from those laws, and to live and work here indefinitely. This bears little resemblance to the medi-

eval English concept of sanctuary which primarily involved criminals who admitted their crimes and were given a very limited temporary protection on certain church property before being banished for life and losing their property to the crown. Unlike the sanctuary movement, the English tradition was carried out with either the active or tacit consent of the civil authorities and was, to a large extent, an adjunct to the criminal laws of England.

Nor does the sanctuary movement bear a striking resemblance to the biblical tradition of sanctuary. The biblical tradition appears to be a response to a legal system which had not developed to the point of being able to adequately protect members of society against “self-help” justice, and that did not recognize self defense or lack of criminal intent as defenses to homicide. An analogous situation does not exist in the United States, where our democratically established legal system has a myriad of procedural protections to insure that individual rights are respected.

There is an American historical tradition that appears to be related to some aspects of the sanctuary movement. This is the tradition of civil disobedience. Its roots can be traced from the abolitionist movement through the antiwar movement. The refusal of certain aspects of the sanctuary movement to accept the law, or to work within the system to change results which they perceive as unfair or unjust, does resemble some aspects of other American movements involving intentional disregard of the law as a tactic.

As aptly stated by one commentator: “Today, the sanctuary movement also presents a significant challenge to the assumption that government is sovereign regarding immigration policy. Now individual citizens are implementing their own alien admission system and offering asylum outside the usual governmental processes.” In other words, the sanctuary movement advocates a “do it yourself” immigration policy under which each individual is guided by the dictates of his conscience as to which aliens should be admitted.

112. I. BAU, supra note 99, at 149-50; Carro, supra note 99, at 767.
113. See I. BAU, supra note 99, at 125; Carro, supra note 99, at 749-51.
114. See supra notes 107, 109 and accompanying text for a discussion of some of the constitutional protections of individual rights.
116. Id.
117. Id. at 180. Mr. Bau views this development favorably.
IV. ALTERNATIVES OPEN TO SANCTUARY ADVOCATES

The "do it yourself" immigration movement might have at least some theoretical validity in a system where no viable alternatives exist. Thus, in order to judge the reasonableness of the sanctuary movement in the United States, it is necessary to re-examine some of the alternatives which exist under our legal system, as described earlier in this Article,118 for individuals who disagree with the government's actions concerning illegal immigration from Central America.

First, the existing legal system clearly permits legal assistance to individuals raising asylum and withholding of deportation claims.119 Although Congress has specifically prohibited the appointment of counsel at government expense in civil immigration proceedings,120 groups can, and have been able to, retain attorneys to help asylum applicants to present their cases and to pursue appellate remedies.121

Statistically, the government has prevailed in the vast majority of asylum cases litigated in both the administrative and judicial system.122 While this is no doubt seen by sanctuary advocates as resulting from pro-government bias in the system, it is more likely a reflection of the fact that the correct legal standards are being applied.123 It is highly illogical to assume that federal court judges,

118. See supra text accompanying notes 1-67.
119. See supra text accompanying notes 11-58.
121. See supra text accompanying note 34.
122. According to Robert Bombaugh, Director, Office of Immigration Litigation, Civil Division, Department of Justice, during fiscal year 1985 the government prevailed in 87.3% of the cases decided by three judge panels of the courts of appeals. The government success rate for asylum cases during fiscal year 1985 was 85.4%. During the first six months of fiscal year 1986, the government prevailed in 88.8% of the court of appeals cases, and 83.9% of the asylum cases. The balance of the cases do not necessarily constitute "losses" for the government, since they include withdrawals, settlements, remands, and other types of non-definitive resolutions. A total of fifty-six asylum cases were decided by the courts of appeals in the first six months of fiscal year 1986, as opposed to forty-one during the entire fiscal year 1985. Conversation with Robert Bombaugh, Director, Office of Immigration Litigation (April 16, 1986).
123. The only study to determine the fate of the Salvadoran deportees found no substantial evidence of harm to those returned. The study, conducted by the Intergovernmental Committee for Migration (ICM), looked at the cases of 4,882 returnees and kept touch with more than seventy-nine percent of them:

Both in initial and follow-up contacts, "the large majority" of returnees said their "primary motives" for going to the United States were the "poor economic situation in El Salvador and the wish to find employment abroad." U.S. officials have said that the vast majority of Salvadorans are "economic refugees," not entitled to political asylum.

The report said ICM tried to help with the legal emigration of 13 of the 35
with lifetime tenure, are motivated by a need to support Administration foreign policy initiatives in Central America.

Notwithstanding the majority of government successes, asylum applicants have won some significant victories and have forced several changes in government procedures and interpretations. For example, one circuit court of appeals has held that an individual who makes a conscious decision to remain neutral in the face of pressure to take sides can establish persecution on political opinion grounds.\textsuperscript{124} Despite the contrary ruling of two circuit courts of appeals,\textsuperscript{128} a United States district judge has entered a preliminary nationwide injunction requiring the INS to specifically notify El Salvadorans apprehended in the United States of their right to apply for asylum.\textsuperscript{129} As mentioned earlier, aliens have successfully challenged the standard of proof applied in asylum cases, and have pre-

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returnees who complained of possible persecution. Two succeeded, seven awaited official decisions and four were rejected as being economic refugees, it said. Of the other 22, nine were thought to have solved their political problems or not to have had any; six had left the country on their own (as had about 23 percent of all the returnees studied), and ICM had lost contact with the other seven.

As of Dec. 31, 1985, ICM had reports that four returnees had died: two by natural causes, one in a bar fight and the fourth while committing a robbery.


It is also interesting to note that only a small percentage of denied asylum applicants are actually deported from the United States. A recent report by the General Accounting Office showed that of El Salvadorans covered by the study, only 212 out of 8,385 who had asylum denied by the INS were actually deported or had departure verified. The average rate of removal for denied applicants of all nationalities was two percent. \textit{GENERAL ACCT. OFF., ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED 38 (1987) (Briefing Report to the Honorable Arlen Specter, United States Senate).}

\textsuperscript{124} Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286-88 (9th Cir. 1985) (en banc). In Lopez v. INS, 775 F.2d 1015, 1016-17 (9th Cir. 1985), the Ninth Circuit pointed out that mere apathy was not the same as the affirmative choice of neutrality specified in \textit{Bolanos}.

\textsuperscript{125} Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), \textit{aff’d}, 472 U.S. 846 (1985); Ramirez-Osorio v. INS, 745 F.2d 937 (5th Cir. 1984) (en banc). \textit{See also} Duran v. INS, 756 F.2d 1338 (9th Cir. 1985) (asylum warnings not required when alien designates county of deportation); cf. Villegas v. INS, 745 F.2d 950 (5th Cir. 1984) (failure to advise aliens who have stated fear of returning to a particular country of right to apply for asylum is reversible error).

vailed before the Supreme Court.\textsuperscript{127} El Salvadoran claimants have also prevailed in some individual asylum cases.\textsuperscript{128}

Individuals interested in supporting the cause of Central American asylum applicants can provide bond for such individuals to get them out of detention during the deportation hearing process.\textsuperscript{129} In addition, they can house and support such individuals during the hearing process.

Individuals questioning the government's policies can, and have, brought lawsuits directly against the government to challenge such policies.\textsuperscript{130} They can, and have, petitioned Congress to change the law on asylum or to pass legislation requiring the Executive Branch to grant certain groups extended voluntary departure.\textsuperscript{131}

In terms of enforcement, the government has actually taken a rather restrained position.\textsuperscript{132} The government has not sought to enter churches to arrest aliens believed to be in the United States illegally.\textsuperscript{133} The government has not prosecuted individuals for well publicized displays or various parades transporting alleged sanctuary seekers.\textsuperscript{134} Certainly, the government has never suggested that individuals who disagree with its policies do not have a right to speak out against, challenge, or resist those policies through the established legal system.

Even so-called “sanctuary cities” resolutions\textsuperscript{135} can present a permissible channel for expression of disagreement, so long as (1) the issue is fairly and openly debated with an opportunity for full

\textsuperscript{127} See supra notes 54-58 and accompanying text.

\textsuperscript{128} See, e.g., Aviles-Torres v. INS, 790 F.2d 1433 (9th Cir. 1986); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985); Guevara Flores v. INS, 786 F.2d 1242 (5th Cir. 1986), cert. denied, 107 S. Ct. 1565 (1987).

\textsuperscript{129} See 8 C.F.R. § 242.2 (1987).

\textsuperscript{130} See, e.g., supra notes 124-28 and accompanying text.

\textsuperscript{131} See supra note 59.

\textsuperscript{132} One commentator has suggested that the government's response has been so restrained as to constitute an abdication of its law enforcement responsibilities to church groups in violation of the establishment clause of the first amendment. Carro, supra note 99, at 773-76.

\textsuperscript{133} See e.g., Harris, INS Chief's View of Sanctuary Movement, San Francisco Chron., Mar. 28, 1986, at 11, col. 1 (quoting INS Commissioner Alan C. Nelson: "The government has shown extreme restraint. We do not infiltrate churches, and we do not go into churches and arrest people."). "Nelson said the agency does not request search warrants to enter churches suspected of sheltering Central Americans who claim that they have entered the United States to escape death, arrest, or torture in their native countries." Id.

\textsuperscript{134} Id.

\textsuperscript{135} See, e.g., Green, Atlanta a 'City of Refuge'? , Atlanta J. & Const., Sept. 1, 1986, at D1.
input from both sides and the public before action is taken, and (2) the resolutions do not condone or encourage the breaking or ignoring of federal laws. Too often, such resolutions appear to be hurried through local legislative bodies by sanctuary advocates in a manner calculated to avoid, rather than encourage, a full and informed public debate on asylum and refugee policy.\textsuperscript{136}

Virtually the only place where the government has drawn the line is where the individuals actively engage in smuggling of undocumented aliens.\textsuperscript{137} This is a narrow range of prohibited activity, and one which the courts have recognized as a legitimate government prerogative.\textsuperscript{138}

This is not to suggest that the current system relating to refugee admission, asylum, and withholding of deportation is perfect, or that it could not be improved. As one commentator has stated:

American asylum law is unfinished and the debate over how to complete it will last as long as the need for refuge. The key question for lawyers concerned with the rule of law in the world is how such reform should be undertaken.\textsuperscript{139}

In light of the many opportunities available under our system for taking legitimate and lawful actions to support disagreement with government policy, the sanctuary movement’s position advocating the violation of federal laws is unreasonable, even if based upon conscience.\textsuperscript{140} Ironically, it is the very fact that our system permits

\textsuperscript{136} Voters in Seattle recently passed, by a vote of 55 percent to 45 percent, an initiative rescinding a so-called “sanctuary resolution” passed by the City Council. Earlier in the year, the Los Angeles City Council repealed a similar resolution. McCaslin, Seattle Voters Deal Painful Blow to City's Alien-Sanctuary Position, Wash. Times, Nov. 27, 1986, at A2, col. 1.

\textsuperscript{137} See INA § 274(a), 8 U.S.C. § 1324(a) (1982) (prohibiting the bringing in, transporting, and harboring of illegal aliens).


\textsuperscript{140} As the First Circuit recently stated:

If we are to continue to absorb refugees and asylum applicants in meaningful numbers, both the actuality and perception of equity must persist; we must have fair rules and we must administer them fairly. By the same token, those who wish to make the United States their home must themselves fairly abide by the system and its procedures. Each applicant who puts himself above the law not only jeopardizes
and encourages lawful methods of advocating or achieving change that distinguishes it from the disorder prevalent in the Central American countries which send us so many undocumented aliens. To the extent that the sanctuary movement holds itself above the law, it strikes at the very heart of our democratic processes and cannot be a legitimate response to disagreement with government policies.

the process, but also threatens to usurp a place which should be filled by an aspiring immigrant who has demonstrated a willingness to play by the rules. Sanctuary cannot be built solidly upon such porous foundations.

Amanullah v. Nelson, 811 F.2d 1, 18 (1st Cir. 1987).