B. CIVIL DISOBEDIENCE

The foregoing materials have discussed many kinds of conflict between law and the exercise of conscience, particularly the conscience formed and informed by religious teaching. In some of those instances the law has prevailed and in others the individual conscience, but at least the issue was submitted to the arbitration of the courts. A further stage is reached in the playing out of such conflicts when the courts have decided adversely to conscience or are expected to do so, or where—for that reason or some other—the issue is not submitted to them, but the conscientious person proceeds deliberately to obey conscience in defiance of the law, adopting a posture similar to that of the Christian apostles who announced (when warned by the magistrates to refrain from preaching in the name of Christ), "We must obey God rather than men."[1] This intentional disregard of law for the sake of conscience or a higher law is often termed "civil disobedience," and has an honorable though disquieting history. It is honorable because undertaken openly and for the sake of principle; disquieting because it speaks defiance of the accepted order and casts into question the legitimacy of the law—as it is designed to do.

In most of human history those who for the sake of principle resisted the will of rulers were treated in the same brusque way as those who resisted for baser motives. Only relatively recently has a distinction been recognized, and motivation by principle considered to some degree a mitigating factor, perhaps on the theory that persons acting from principle, even in disobedience of the laws, are an asset to society in the long run, not to be wasted by needlessly punitive measures.[2]

Such persons, however, are often still subject to the criticism that they have departed from the ordered structure of society and become outlaws by their refusal to submit to the rules that others obey. Christians in particular are admonished to obey the injunction of Romans 13:

> Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who is in authority? Then do what is good, and you will receive his approval, for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain! He is the servant of God to execute his wrath on the wrongdoer. Therefore, one must be subject, not only to avoid God's wrath but also for the sake of conscience.[3]

---

1. Acts of the Apostles 5:29, RSV.
2. See McConnell, M., "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harv. L. Rev.* (May 1990), discussed at § A4 *supra.*
3. Romans 13:1-5, RSV.

This passage would seem to rule out civil disobedience by Christians, and has indeed been often quoted to that end, despite its seeming contradiction by Acts 5:29, "We must obey God rather than men." Karl Barth[4] has suggested a clarification of the Romans passage that eliminates much of the seeming contradiction. The word translated "be subject to" is, in the original Greek, *hypotassestho*. The root of that verb is *taxis—tasso*, the regular Greek word for "order." The Greek word translated "he who resists" is *antitassomenos*, in which appears again the same root, *tasso*. So the two words refer to being *under* "order" and *against* "order." The word translated "authorities" is *exousiai*, and was often used by Paul to refer to cosmic elements or angelic intermediaries who convey or mediate the Divine will to human beings.[5] Earthly governors, then, are the (very imperfect) embodiment of the divine principle of (governing) authority. Perhaps a more accurate rendering of the Greek would be as follows:

> Let everyone be sub-*ord*inated to the superior Authorities.... He who rejects (literally "steps out of or *against* order:" anti-*ord*inates) Authority, has opposed what God has appointed....

Sometimes it is the earthly ruler who gets "out of order," who becomes "insub*ord*inate" to the divine principle of authority, as by rendering *in*justice instead of justice. Then persons of conscience will still cleave to the divine order even at the risk of disobeying the earthly ruler. They will honor the divine principle of authority, which alone justifies the earthly ruler's exercise of governing power, and honor the earthly ruler who bears it, by calmly but firmly obeying God rather than men.[6]

Civil disobedience for reasons of principle usually entails an open avowal of intent (peaceably) to refuse obedience to an unjust law and a willingness to pay the penalty. The modern and humane development has been that society, out of respect for conscience, may not feel obliged to exact the full penalty. It is for that reason that conscientious objectors to military service are permitted in this country to render "alternate service" in the "public interest" rather than being sent to prison, as happens in some other countries.

1. The Fugitive Slave Laws and the "Underground Railroad"

During the nineteenth century in the United States a long and bitter struggle worked itself out over the issue of slavery, culminating in a terrible civil war that has had a deep and enduring effect on the nation's history and character. Actually the struggle began in the eighteenth century when the nation was forming. Slavery was coming to be rejected in many parts of the world, but it was firmly embedded in the economy and customs of the Southern colonies/states. One of the compromises essential to the formation of the new nation was that of protecting the property

4. Barth, K., "Church and State" (originally *Rechtfertigung und Recht*) in Barth, K., *Community, State and Church* (Garden City, N.Y.: Doubleday, 1960), pp. 136ff.

5. Ibid., p. 107. The same word is used in a series referring to such cosmic entities in Colossians 1:16—"thrones or dominions or principalities or authorities [*exousiai*]."

6. Ibid., p. 139.

interest of slaveholders in their human chattels. Though the Constitution never mentions "slavery," it provides that:

> No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[7]

That provision did not prevent a number of slaves from escaping, some of whom made their way to northern states or to Canada, where (in the latter) they were legally free. Most of them proceeded on their own, but some were assisted by persons and groups averse to slavery or actuated by human pity for the distressed.

None other than George Washington, writing in 1786, provided one of the earliest historical references to organized efforts to assist escaped slaves. In a letter of May 12 he referred to a slave of one Mr. Dalby of Alexandria, who ran away to Philadelphia, "whom a society of Quakers in the city, formed for such purposes, have attempted to liberate." In a letter of November 20 he wrote of a slave he had sent to a Mr. Drayton, but who later escaped: "The gentleman to whom I sent him has promised every endeavor to apprehend him, but it is not easy to do this, when there are numbers who would rather facilitate the escape of slaves than apprehend them when runaways."[8]

This continual traffic northward created increasing friction between the "slave" states and the "free," and resulted in the passage by Congress in 1793 of the first Fugitive Slave Law, designed to implement the constitutional guarantee of the return of fugitive slaves. That law empowered the slaveowner to seize or arrest such fugitive wherever found (in the U.S.) and to take him or her before a federal judge or state magistrate and, upon showing proof of ownership, obtain a certificate entitling the owner to return the fugitive to his domicile.

Notwithstanding the strictures of this law, there were many people in the northern states who "knowingly and willingly" violated it, some—like the Quakers referred to by Washington— for religious reasons. There were some indications that these people worked together at some times and in some respects, but by and large the movement to assist runaway slaves was occasional and impromptu, and the fugitives had to proceed mainly by their own devices. Some Northerners devoted major efforts to this enterprise, such as Levi Coffin, a Quaker businessman in Cincinnati, and Thomas Garrett, another Quaker businessman in Wilmington, Delaware. Coffin suffered no penalties for his defiance of the law, but Garrett was caught and fined by Judge Roger B. Taney some $8,000. The judge warned him to learn from his loss not to violate the law again, and Garrett replied: "Judge, thou has not left me a dollar, but I wish to say to thee, and to all in this court-room, that if anyone knows of a fugitive

7. U.S. Constitution, Art. IV, § 2.

8. Siebert, Wilbur H., *The Underground Railroad from Slavery to Freedom* (New York: Russell & Russell, 1898, 1967), p. 33.

who wants a shelter and a friend, send him to Thomas Garrett, and he will befriend him."[9]

Oberlin College in Ohio, a Congregational college and colony, was a "hotbed" of antislavery sentiment. Its president, James H. Fairchild, announced the Fugitive Slave Law of the Mosaic institutions: "Thou shalt not deliver unto his master the servant which hath escaped unto thee; he shall dwell with thee...in that place which he shall choose in one of thy gates where it liketh him best; thou shalt not oppress him."[10]

Theodore Parker, a noted Unitarian minister in Boston, preached a sermon in 1850 that ended:

> It is known to you that the Fugitive Slave Bill has become a law.... To law framed in such iniquity I owe no allegiance. Humanity, Christianity, manhood revolts against it.... For myself I say it solemnly, I will shelter, I will help, and I will defend the fugitive with all my humble means and power. I will act with any body of decent, serious men, as the head, or the foot, or the hand, in any mode not involving the use of deadly weapons, to nullify and defeat the operation of this law....[11]

(His reference was to a second Fugitive Slave Law, more stringent and comprehensive than the first, passed by Congress in 1850 in an effort to mend the growing split between North and South.)

These were prototypical expressions of the commitment to a law higher than statute law, the commitment that helped to move the nation inexorably into a tragic civil war that was ultimately fought over the issue of slavery, and some scholars believe that slavery itself, and the deep sense of guilt that it engendered, was the main reason the Confederacy lost the war.[12]

Parenthetically let it be noted that religious leaders did not confine themselves to assisting fugitive slaves in their opposition to slavery. One of the notable accomplishments of religious movements in American history was the effort by the churches to recruit antislavery settlers to move to Kansas to keep it a free, rather than a slave, state. "[A]bout three thousand settlers went out from Boston in the crucial years...and they were joined by nearly as many others on the way out."[13] Charles Robinson, the first governor of Kansas under its free-state constitution, testified twenty-five years later that without the New England Emigrant Aid Company (organized and promoted by churchmen) and the settlements in Kansas it created, "Kansas would have been a slave state without a struggle."[14]

Henry Ward Beecher, attending a meeting at which a deacon was raising money to supply weapons for a company of settlers leaving for Kansas, "declared that a Sharpe's rifle was a greater moral agency in this struggle than the Bible—an incident

---

9. Ibid., p. 110.
10. Ibid., pp. 89-90.
11. Ibid., p. 90.
12. See Beringer, Richard, Herman Hattaway, Archer Jones, William Still, *Why the South Lost the Civil War* (Athens, Ga.: Univ. of Georgia Press, 1986).
13. Stokes, A.P., *Church and State in the United States*, II, p. 202.
14. Ibid.

from which sprang the popular phrase `Beecher's Bibles.'"[15] That did not mean that Beecher was necessarily advocating violence, since Kansas was rather wild territory at the time, but neither was he shrinking from the possible need to defend Kansas against incursions from slave states, as indeed occurred.

a. *Van Metre v. Mitchell* (1853). Some of the workers on the "Underground Railroad," like Thomas Garrett, paid the penalty for their civil disobedience of the Fugitive Slave Laws, and a few made their impress on the case law of the time,[16] but almost nowhere in the cases is any plea of conscience, let alone "free exercise of religion," noted. One exception may be some gratuitous remarks by Circuit Justice Robert C. Grier in the Pennsylvania case of *Van Metre v. Mitchell* (1853) on the "pretended rights of conscience." There is no indication in the arguments of counsel for Mitchell that he was advancing any such plea, but Justice Grier nonetheless took the occasion to deliver some minatory thoughts on the subject.

> This...fraudulent intent required by the act to constitute illegal harbouring, is not to be measured by the religious or political notions of the accused, or the correctness or perversion of his moral perceptions. Some men of disordered understanding or perverted conscience may conceive it a religious duty to break the law, but the law will not tolerate their excuse. If the defendant was connected with any society for the purpose of assisting fugitives from other states to escape from their masters, and in pursuance of such a scheme, afforded this shelter and protection to the fugitive in question, he would be legally liable to the penalty of this act, however much his conscience, or that of his associates, might approve his conduct. With any opinions of the defendant, you have no concern. He may adopt and entertain, as opinions, whatever folly like him: and as long as these remain opinions, he will go unpunished. He is on trial for his acts: and if his opinions, ceasing to be speculative, have ended in conduct, let no morbid sympathy—no false respect for pretended "rights of conscience"—prevent either court or jury from judging him justly without favor as without fear.[17]

For this reason or some others, the jury found against Mitchell, and he was fined $500, which the slaveowner had to go to court twice again to collect.

b. *U.S. v. Hanway* (1851). Perhaps the high-water mark of efforts by the federal government to enforce the (second) Fugitive Slave Law of 1850 occurred following the "Christiana riot" in 1851. Apparently a stream of runaway slaves made their way through southeastern Pennsylvania, and a number settled there. Slaveowners from Maryland made occasional forays into the area to recover their "property." Sometimes the agents of slaveowners were not too careful whom they seized, and so carried off free black persons or those who had formerly belonged to others than their

15. Ibid., p. 201.

16. See *Jones v. Van Zandt*, 5 Howard 215 (1842); *Johnson v. Tompkins*, 13 Fed. Cases 840 (1833); *Oliver v. Kaufman*, 18 Fed. Cases 657 (1850); *Driskell v. Parish*, 7 Fed. Cases 1093—1103 (1845, 1847, 1849), etc.

17. *Van Metre v. Mitchell*, 28 Fed. Cases 1036 at 1041 (1853).

employers. This threat of forcible seizure led many northern states, including Pennsylvania, to pass "personal liberty" laws to protect their inhabitants from such "kidnappings" unless valid title of ownership was proved to a magistrate. One such agent was prosecuted by Pennsylvania, leading to the historic Supreme Court decision in *Prigg v. Pennsylvania*, striking down the state law as in conflict with the federal Fugitive Slave Law and the provision in Article IV of the national Constitution.[18]

One such foray, led by a slave-owner named Gorsuch and his son, reached Christiana on September 11, 1851. Word of their coming preceded them, sent by the Vigilance Committee of Philadelphia to one William Parker, an escaped slave in whose house the two fugitives being sought were hiding. Parker was apparently one of the leaders of a group of former runaways living in the vicinity who had organized for self-protection. At daybreak Gorsuch and his friends broke into the house and demanded the fugitives. From an upstairs window a horn was sounded to summon help, and soon nearly a hundred black men arrived armed with guns, clubs, scythes and corn-cutters. About the same time two Quakers, Castner Hanway and Elijah Lewis, appeared on horseback at the scene and were sought to be pressed into the defense of the raiding party by one of its members, a deputy marshal named Kline bearing a warrant from a commissioner of the United States for the recovery of the fugitives. Hanway and Lewis both read the warrant and gave it back to Kline. According to Kline ("who was not a person of the best character for veracity"[19]), Hanway replied that "he would not assist—that he did not care for that act of congress or any other act,—that the negroes had rights and could defend themselves, and that he need not come there to make arrests, for he could not do it." Hanway and Lewis then withdrew to a distance, from which they viewed the subsequent events. As soon as they left the raiding group, the assembled blacks attacked. In the ensuing melee Gorsuch was killed, his son seriously wounded and the rest of the raiding party put to flight.

This altercation created quite a stir and came to be known as the "Christiana Riot." The president of the United States detailed a company of marines to assist the U.S. marshal, and a large number of police and special constables searched far and wide for those involved in what was viewed by some as an "uprising."[20] They arrested thirty-five blacks and three Quakers, including Hanway. The prisoners were taken to Philadelphia and there indicted by a federal grand jury for *treason*! Castner Hanway was the first to be tried. Trial was held in Independence Hall, presided over by Supreme Court Justice Grier, quoted in the section just preceding.[21] After impassioned arguments by the government and by the defense, Justice Grier delivered his charge to the jury.

---

18. *Prigg v. Pennsylvania*, 16 Peters 613 (1843).

19. *U.S. v. Hanway*, 26 Fed. Cases 110 (1851).

20. Siebert, *supra*, pp. 280-281.

21. Cf. *Van Metre v. Mitchell*, *supra,* Grier served on the U.S. Supreme Court from 1846 to 1870, during which time he presided over this trial, in tandem with a lower-court judge, while riding circuit, as Supreme Court justices regularly did in that era.

> Without intimating any opinion as to the guilt or innocence of the prisoner at the bar, it must be admitted that the testimony in this case has clearly established that a most horrible outrage on the laws of the country has been committed. A citizen of a neighboring state, while in the exercise of his undoubted rights guaranteed to him by the constitution and laws of the United States, has been foully murdered by an armed mob of negroes. Others have been shot down, beaten, wounded, and have, with difficulty, escaped with their lives. An officer of the law, in the execution of his duty, has been openly repelled by force and arms. All this has been done in open day, in the face of a portion of the citizens of this commonwealth, whose bounden duty it was, as good citizens, to support the execution of the laws, without any opposition on their part...! and who if they did not directly encourage or participate in the outrage, looked carelessly and coldly on.... That it is the duty, either of the state of Pennsylvania, or of the United States, or of both, to bring to condign punishment those who have committed this flagrant outrage on the peace and dignity of both, cannot be doubted....
>
> * * *
>
> [W]e think it due to the reputation of the people of this commonwealth to say that (with the exception of a few individuals of perverted intelligence, some small districts or neighborhoods whose moral atmosphere has been tainted and poisoned by male and female vagrant lecturers and conventions), no party in politics, no sect of religion of any respectable numbers or character, can be found within our borders who have viewed with approbation, or looked with any other than feelings of abhorrence, upon this disgraceful tragedy. It is not in this hall of independence that meetings of infuriated fanatics and unprincipled demagogues have been held to counsel a bloody resistance to the laws of the land. It is not in this city that conventions are held denouncing the constitution, the laws, and the Bible. It is not here that the pulpit has been desecrated by seditious exhortations, teaching that theft is meritorious, murder excusable, and treason a virtue. The guilt of this foul murder rests not alone on the deluded individuals who were its immediate perpetrators, but the blood taints with even deeper dye the skirts of those who promulgate doctrines subversive of all morality and all government. This murderous tragedy is but the necessary development of principles and the natural fruit from seed sown by others, whom the arm of the law cannot reach.

These remarks suggest the prevailing wisdom of the "established order" of the time, resistant to "troublemakers" trying to bring into being and effect a new understanding of morality in which human beings could no longer be viewed as some other human being's "property."

> I have adverted to these matters...in order to warn you also against suffering them to bias your minds in this case. This defendant must stand or fall by the evidence in the case, and not be made the scape-goat or sacrifice for the offenses of others, unless he be proved to have participated in them. But if that shall have been made to appear by the

> evidence, it will be no excuse or defense for him that others are equally guilty with himself. It is due to him, however, to say that there is no evidence before us that the prisoner attended any of these conventions got up to fulminate curses against the constitution and laws of the country, to libel its best citizens, and to exhort to a seditious and bloody resistance to the execution of its laws. You will have observed that this bill of indictment charges the defendant with treason in resisting the execution of a certain law of congress concerning fugitives from labor, which has been the subject of much controversy and agitation....
>
> The learned counsel for the prisoner, having a due regard for the high character which they sustain in their profession, have not made the objection to this law which has been so clamorously urged by many presses and agitators, that it is unconstitutional. It is true some ecclesiastical assemblies in the North, treating it, we presume, as a question of theology or orthodoxy, have ventured to anticipate the decision of the legal tribunals on this subject. But, highly as we respect their opinions on all questions properly within their cognizance, we cannot receive their decisions as binding precedents on questions arising under the constitution.
>
> * * *
>
> The truth is, the shout of disapprobation with which this act has been received by some has been caused, not because it is injurious or dangerous to the rights of freemen of color in the United States, or is unconstitutional; but because it is an act which can be executed, and the constitutional rights of the master in some measure preserved. The real objection with these persons is to the constitution itself, which is supposed to be void in this particular from the effect of some "higher law," whose potential influence can equally annul all human and all divine law.
>
> It is true that the number of persons whose consciences affect to be governed by such a [higher] law is very small. But there is a much larger number who take up opinions on trust or by contagion, and have concluded this must be a very pernicious and unjust enactment, for no other reason than because the others shout their disapprobation with such violence and vituperation.... But this may be truly said, that while there are so many discordant opinions on the subject, it is not probable that a better compromise will be made, and most probably none of us will live to see any act on this subject made to please every one.
>
> Let it suffice for the present to say to you, gentlemen of the jury, that this law is constitutional; that the question of its constitutionality is to be settled by the courts, and not by conventions either of laymen or ecclesiastics; that we are as much bound to support this law as any other, and that public armed opposition to the execution of this law is as much treason as it would be against any other act of Congress to be found on the statute book.

These words of Justice Grier, seeming to seal the fate of the defendant, provide a revealing window onto the thinking of many people of the mid-nineteenth century, who saw the fugitive slave laws and the constitutional provision on which they were

based as a crucial and fragile linchpin holding together the two sections of the country. Indeed, Justice Grier said as much earlier in his charge.

> It is well known that, without this [fugitive slave] clause, the assent of the Southern states could never have been obtained to this compact of union. And if, contrary to good faith, it should be practically nullified—if individuals or state legislatures in the North can succeed in thwarting and obstructing the execution of this article of our confederation, and the rights guaranteed to the South thereby, they have no right to complain if the people of the South should treat the constitution as virtually annulled by the consent of the North, and seek secession from any alliance with open and avowed covenant breakers.... Those states in the North whose legislation has made it a penal offence for their judicial and executive officers to lend their assistance in the execution of this clause of the constitution, and compels them to disregard their solemn oath to support it, have proceeded as far, and perhaps farther, in the path of nullification and secession than any Southern state has yet done.

At length Justice Grier summarized the uncontested evidence in the case and concluded from it, "[W]e may say that the evidence has clearly shown that the participants in this transaction are guilty of riot and murder at least. Whether the crime amounts to treason or not will be presently considered." He asked the jury to determine whether the evidence indicated to them that Castner Hanway had "countenanced and encouraged" the riot, as the government charged, in which case he was as guilty as those who struck the fatal blows.

> If, on the other hand, as is argued by his counsel, he came there without any knowledge of what was to take place, and took no part by encouraging, countenancing, or aiding the perpetrators of the offence—if he merely stood neutral through fear of bodily harm, or because he was conscientiously scrupulous about assisting to arrest a fugitive from labour, and therefore merely refused to interfere, while he did not aid or encourage the offenders, he may not have acted the part of a good citizen; he may be liable to punishment for such neutrality by fine or imprisonment, but he cannot be said to be liable as a principal in the riot, murder and treason, committed by others—and much more so if, as has been argued, his only interference was to preserve the lives of the officer and his attendants.

Even if the jury found Castner to be a principal in the riot, it then had to inquire whether the event amounted to the crime of "treason against the United States," as alleged. Justice Grier defined that crime, as the Constitution defined it, as "levying war" against the United States. That term, in his view, included resisting by force of arms the execution of any law of the United States, but *only if done for a public purpose*.

> A number of fugitive slaves may infest a neighborhood, and may be encouraged by the neighbours in combining to resist the capture of any of their number; they may resist with force and arms, their master or the

> public officer, who may come to arrest them; they may murder and rob them; they are guilty of felony and liable to punishment, but not as traitors. Their insurrection is for a private object, and connected with no public purpose. It is true that constructively they may be said to resist the execution of the fugitive slave law, but in no other sense than the smugglers resist the revenue laws....
>
> Without desiring to invade the prerogatives of the jury in judging the facts of this case, the court feel bound to say, that they do not think the transaction with which the prisoner is charged with being connected, rises to the dignity of treason or a levying of war. Not because the numbers of force was insufficient. But (1) for want of any proof of previous conspiracy to make a general and public resistance to any law of the United States; (2) because there is no evidence that any person concerned in the transaction knew that there were such acts of Congress, as those with which they are charged with conspiring to resist by force and arms, or had any other intention than to protect one another from what they termed "kidnappers...." That the persons engaged in [this transaction] are guilty of aggravated riot and murder cannot be denied. But riot and murder are offences against the state government. It would be dangerous precedent for the court and jury in this case to extend the crime of treason... to doubtful cases, and our decision would probably operate in the end to defeat the purposes of the law, which the government seeks to enforce.[22]

The jury was out for twenty minutes and returned with a verdict of "not guilty." One of the black defendants was also tried, but not convicted. Subsequently a bill was brought against both Hanway and Louis for riot and murder, "but the grand jury ignored it, and further prosecution was dropped."[23] This case provides illuminating insights into how at least one jurist viewed the efforts by some "ecclesiastics" to upset the delicate legal provisions upon which the status quo was balanced. It was fortunate for Castner Hanway that he was not shown to have attended any of those conventions conducted by wild-eyed, fanatical abolitionists like Theodore Parker or Henry Ward Beecher!

The Underground Railroad, then, is a historic paradigm of civil disobedience. It was denounced by many contemporaries as threatening the peace and solidarity of the Union, and by some abolitionists as a diversion from the fight against the slave system and a safety valve for rebellion against it. It was spotlighted (and exaggerated), both by (other) abolitionists to prove the heinousness of slavery and their role in rescuing its victims, and by slaveowners to show the unprincipled perfidy of Yankee busybodies who were trying to undermine the institutions of the South. Judges normally tried to enforce the Fugitive Slave Laws vigorously, although the Supreme Court of Wisconsin in 1854 declared the federal Fugitive Slave Laws of 1793 and 1850 both to be unconstitutional.[24] This appeared to be an exercise of Northern nullification! When the Wisconsin court refused to render the record up to

22. *U.S. v. Hanway, supra.*
23. Siebert, *supra*, p. 281.
24. 3 Wisc. 39 (1854).

the U.S. Supreme Court for review, the federal Supreme Court in 1859 rebuked this impertinence and reversed the state court,[25] thus presaging and contributing to the rift that was soon to split the nation in civil war.

Though denounced and lauded at the time, and subsequently magnified and romanticized, the Underground Railroad did exist during the first half of the nineteenth century in this country; it was widespread, though largely localized and impromptu rather than national and systematic; and it was carried on for various humane, religious and political motives against federal laws deemed to be unjust and unworthy of obedience. A century later there are few who would condemn the men and women, black and white, who deliberately and repeatedly violated those laws for reasons of principle. The consensus today seems to be that *they* were *right*, and the *laws* they broke were *wrong*. History (and a dreadful Civil War) has vindicated them rather than the officials of law and order who apprehended, prosecuted, convicted and punished them, though the latter were only doing their "duty" as the accepted institutions of the time defined it. But sometimes civil disobedience points beyond the accepted institutions of the time to a better world that might be if humans prove worthy of it.

2. Civil Disobedience in Mid-Twentieth Century

Civil disobedience has been a recurrent phenomenon in virtually every decade of American history, in the demonstrations of the suffragettes, the sit-in strikes of the 1930s, and the civil rights struggles of the 1960s, when black students and others marched and picketed and then occupied segregated restaurants, bus stations and other "public" facilities, were arrested and jailed and—in the end—won. The Vietnam conflict produced its draft-card burnings, flag burnings and other acts of protest, some of which were religiously motivated, and some of which produced an impact in case law, but rarely both. That is, there is not much trace of free-exercise or conscience claims in the case law, either because such claims were not advanced or were not dealt with by the courts.

a. *Bridges v. Davis* (1971). As the Vietnam War wore on, disaffection with it on the part of potential and actual draftees, religious groups and the general public became more widespread.[26] A number of churches across the country offered "sanctuary" to young men refusing to serve in the armed forces if drafted, or deserting from the armed forces if assigned to go to Vietnam. Some of the denominations established an "Emergency Ministry to Draft-Age Exiles in Canada," operating out of the National Council of Churches,[27] and others sent clergy as

25. *Abelman v. Booth*, 21 Howard 510 (1859).

26. See *U.S. v. Sisson*, *Welsh v. U.S., Gillette v. U.S.*, and *Negre v. Larsen* at §§ A5i-k *supra.* A celebrated case was *U.S. v. Spock*, 416 F.2d 165, 174 (1st Cir. 1969), in which the noted pediatrician, Dr. Benjamin Spock, the chaplain of Yale University, the Rev. William Sloane Coffin, and three other defendants were charged with counseling resistance to the draft and with aiding and abetting the turning in of draft cards. Because no defense of free exercise of religion was offered—at least the court did not discuss any—that case is not discussed here.

27. The author was active in organizing this effort, as well as in developing programs for training draft counselors during this period.

chaplains to "draft exiles" in Sweden and elsewhere.

One of the legal cases that was tried in that period came before the Ninth Circuit Court of Appeals in 1971 from the District of Hawaii, which had dismissed a request by three ordained clergymen and eight servicemen for an injunction against military authorities in Hawaii. It seems that two Unitarian churches had offered themselves as "sanctuaries" for members of the armed services stationed in the islands who decided to absent themselves without leave (AWOL). The appellant clergy were connected with those churches; the servicemen were persons who sought sanctuary there while AWOL. They were arrested by military police and put in military prison, where the clergymen provided religious services for them until barred from the naval and marine bases by the commanders thereof on the grounds that the ministers' presence would be "inimical to morale and good order of the service." The action sought to enjoin the naval and marine commanders from barring the clergymen from the bases. The Court of Appeals issued a *per curiam* opinion, with one judge dissenting in part (with respect to one of the clergymen).

The Court of Appeals rejected the government's contention that the courts did not have jurisdiction to review the orders of military commanders in the governance of their commands. That limitation pertained to the scope of review, not to jurisdiction to undertake any review at all, the court said.

> The appellants claim that the orders here under scrutiny violate their freedoms of speech and religion under the First Amendment. Initially, we note that these rights are not absolute. Regulation as to the time, place, and manner of such rights is proper when reasonably related to a valid public interest.... The record before us leaves no doubt but that the orders in question could be justified in terms of a reasonable regulation of First Amendment activity....
>
> Moreover, persons in command of a military post, such as appellees, have wide discretion as to whom they may exclude from their posts. This discretion will be disturbed only upon a showing that the grounds for exclusion were patently arbitrary or discriminatory....[28]

The status of the two churches as "sanctuaries" for AWOL servicemen was not at issue in this case. "Sanctuary" is an ecclesiastical concept, and has no legal force in the common law or in the law of the United States. What was involved here was the question of access by three named clergymen to two U.S. bases, or more particularly, to certain identified servicemen imprisoned on those bases for offenses committed in connection with the churches' offer of "sanctuary."

The court seems to have based its opinion on the supposed "misconduct" of two of the ministers when holding religious services for the prisoners, at least as that misconduct was alleged by third parties, apparently at second or third hand. The supposed misconduct seems at most to amount to infractions of military decorum in the brig: smoking in a no-smoking zone, passing around a bottle of wine in a no-drinking area, using a four-letter word in the sermon, making remarks "in

28. *Reverend Gene Bridges, et al., v. Admiral D.C. Davis*, 443 F.2d 970 (CA9 1971).

derogation of the military," wearing a short-sleeved shirt and trousers on the base (rather than what: black suit and clerical collar?). Whatever the facts of the matter were, the attitudes and activities of the prisoners and the visiting clergy certainly seem to have rubbed the other base personnel the wrong way, if one can judge by the court's reference to the admiral's view of the matter.

Looked at from the standpoint of religious needs and interests, what can be said? The servicemen being detained in the brig for going AWOL in defiance of the military system were probably in need of spiritual support, to say the least, and had a legitimate claim to receive "the consolations of religion," as even the military rulebooks concede. Whether that need could be supplied by the base chaplain was not an open-and-shut question, as will be seen in the discussion of military chaplaincies in another volume.[29] The prisoners had placed themselves in opposition to the military system and might not be entirely receptive to the ministrations of those they might view as "house quacks" or functionaries of the system (as many service personnel viewed the military chaplaincy at that time). This does not mean the base chaplains would necessarily be insensitive to their undoubted spiritual needs, but that the prisoners might have supposed they would be.

So: assuming a certain disaffection toward the chaplains on the part of the prisoners, were they entitled to seek the counsel of clergy of their choice? Normally both chaplains and commanders are supposed to encourage that access where possible, though civilian clergy are not as readily welcomed in practice as they might be in theory because they are not fitted into the military system. But this event occurred in "wartime" (though undeclared) on bases that were key staging points for the Vietnam theater, and their commanders were therefore not as indulgent as they otherwise might have been, especially toward clergy they (perhaps rightly) viewed as instigators of desertion.

If the clergy had indeed inveigled otherwise innocent but impressionable members of the armed forces to desert their posts of duty in time of war, they were eligible for far heavier sanctions than merely being barred from the bases. That the government did not bring a prosecution for such conduct suggests that there wasn't sufficient evidence to convict or that the legal distinctions between incitement and advocacy were off-putting, as well they might be.[30] If, on the other hand, the clergy were merely trying to offer support and encouragement for stirrings of conscience already present in members of the armed forces facing having to fight and kill or be killed in Vietnam, the case is a little clearer. But it is part of the religious function, not just to support and confirm consciences already formed, but to assist in the formation of conscience by use of the moral teachings of the faith. When that function leads to rejection of military orders, a certain amount of conflict is to be anticipated, and at some level is irreducible.

The admiral portrayed himself as reluctant to bar the clergy from the base and bending over backward to try to reach an accommodation, but at some point he could be expected to conclude that his duty to the service outweighed his duty to

29. See VD1.

30. See, e.g., *Scales v. U.S.*, 367 U.S. 203 (1961).

accommodate "outside" and "trouble-making" (even in the best sense of the term) clergy. He owed them no great obligation of access to persons of his command, especially when—in his view—they were only going to make bad matters worse.

It is interesting that—so far as appears in the appellate court's opinion—the appellant clergy sought access to the prisoners as a vindication of their own freedom of speech and of religion. Surely the servicemen's claim must have been included too, since the way had been prepared by their signing a document the intent of which must have been to authorize the sanctuary clergy to have pastoral access to them if they were later incarcerated, as they were. The access would not be for the sake of the clergy but for the sake of the prisoners. The military commanders owed no access to the clergy, but they did have some obligation to consider the prisoners' desire for the spiritual ministrations of (outside) clergy of their own choice. That obligation might be outweighed by other considerations, as it obviously was, but the court seems not to have given any attention to this claim—if it was advanced—other than to note in passing that "[the clergy] assign a variety of reasons for reversal of the judgment of the trial court" and that they claimed that "the orders here under scrutiny violate their freedoms of speech and religion under the First Amendment."

But the court disposed of those by saying that "the orders in question could be justified in terms of reasonable regulation of First Amendment activity." When the activity is *discontinued* by state action, a higher level of justification than "reasonable regulation" is usually required, viz., a compelling state interest. Apparently, however, such "strict scrutiny" was thought not to be required within the military purview. At least it wasn't applied in this instance.

As to the alleged infractions of military decorum, the clergymen were possibly a bit imprudent in giving their critics so much ammunition to use against them. When bearding the lion in his own den, it is often wise to tread softly and circumspectly: Don't flout the rules, dress the part impeccably, don't dissipate the virtue of your cause by petty shows of defiance or contempt (or you may find yourself on the outside looking in—if not inside the lion looking out). Of course, it is unlikely that they could have mollified their critics by anything short of obtaining full, signed confessions to desertion from the prisoners, but that is no reason to let the critics win on minor peccadillos without having to confront the deeper moral issues, which were never reached by the court.

3. "Sanctuary" for Refuge-Seekers

The 1980s saw the emergence of a grassroots movement among some churches of the United States designed to assist refuge-seekers from Central America seeking a haven from the warfare in El Salvador and Nicaragua. Thousands of fugitives flowed north through Mexico and into the United States, many of them claiming the status of "political refugees" under the United Nations Convention and Protocol on Refugees, which was accepted as the legal standard in the U.S. Refugee Act of 1980. This law specified that the United States would give asylum to persons who could not return to their homelands because of well-grounded fear of persecution for reasons of race, religion, nationality or membership in a particular social group or political opinion.

The United Nations High Commissioner for Refugees had stipulated that anyone fleeing El Salvador was entitled to refugee status, but the U.S. Immigration and Naturalization Service (INS) and the State Department took the position that such persons were motivated by economic rather than political considerations—i.e., seeking a better standard of living rather than fleeing persecution—and were therefore not entitled to asylum. Rather than giving such persons a hearing in which they could seek to prove their right to political asylum, the INS simply deported them back to El Salvador, where they faced the possibility of harassment, torture and death.[31] Since less than 3 percent of the persons from Central America applying for asylum were granted it, many were unwilling to apply, viewing it not only as an exercise in futility but a sure ticket back to the land they had fled. Thus they often preferred to take their chances remaining in the United States illegally. Consequently, anyone who helped them risked punishment under the immigration laws for harboring or transporting illegal aliens.

Nevertheless, many people—including church groups—were willing to risk fine and imprisonment to do just that: to violate the immigration laws in order to help fugitives find safety, just as some people in the nineteenth century violated the fugitive slave laws. By 1986, some 200 churches had announced that they would provide sanctuary for Central American refuge-seekers, and several cities and one state (New Mexico) had declared themselves sanctuaries as well (in the sense that they would not assist federal law enforcement agents seeking "illegal aliens")—a situation comparable to the passage by northern states of "personal liberty" laws in the nineteenth century.

At first the federal government seemed unwilling to proceed against these persons and groups engaged in civil disobedience, but in 1984 arrests began to occur. In December 1982, Bishop John J. Fitzpatrick of the Roman Catholic diocese of Brownsville, Texas, designated a small house in San Benito, Texas, as a center for social work with refugees. It was named "Casa Oscar Romero" after an archbishop who had been assassinated in El Salvador. Two of the workers at Casa Romero were the director, Jack Elder, and Stacey Lynn Merkt, who taught English and provided orientation for refuge-seekers. On February 17, 1984, Stacey Merkt was arrested near McAllen, Texas, while transporting Salvadoran refugees in a car registered in the name of Bishop Fitzpatrick. She was tried and convicted and sentenced to two years' probation. Jack Elder was convicted on three counts of transporting illegal aliens and sentenced to 150 days in a halfway house; he was later convicted a second time and sentenced to a longer term. Their cases were consolidated on appeal.

a. *U.S. v. Merkt and Elder* (1986). Stacy Merkt's and Jack Elder's convictions were both heard in the U.S. Court of Appeals for the Fifth Circuit by Judges Jerre Stockton Williams, William L. Garwood and Edith Hollan Jones, and their decision announced by Judge Jones, who dealt with the Free Exercise issue as follows:

---

31. The extent to which refuge-seekers were motivated by well-grounded fear of "political" persecution, and particularly the fate befalling those repatriated, were matters of intense controversy at the time. Facts on the latter issue were difficult to obtain since to identify and trace repatriated persons could itself be a life-threatening attention.

American society extols its tradition as a haven for those to whom obligations of piety and conscience rank higher than the goods of this world. The tradition, at one level, was embodied in the "free exercise" clause of the Bill of Rights. While respecting the rights of citizens to adhere to different religions, however, it has never been doubted that the government's duty to all may, in some circumstances, encroach upon the practices of a few. Appellants Merkt and Elder seek sanctuary in the "free exercise" clause against their violation of national border control laws. This court, whose sanctuary power is rigidly controlled by precedent, cannot grant their request....

[A] significant body of Supreme Court law has explained that legislation, religiously neutral on its face, may regulate the health, safety, and general welfare of the public, or certain activities within the purview of the federal government, even if individuals will thereby be penalized because the practice of their religious doctrine violates the law[32]....

The lower federal courts have consistently refused to create free exercise havens from violation of the national criminal laws against use and sale of marijuana.[33] Likewise, criminal laws prohibiting destruction of government property,[34] extortion,[35] racketeering[36] and refusal to testify before a grand jury[37] have been enforced against pleas for preferment based on "free exercise." The basis for these decisions was the conclusion that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[38]

Enforcement of [immigration controls] cannot, consistent with this authority, brook exceptions for those who claim to obey higher authority. The prohibition on the landing and transport of illegal aliens represents but one facet of the comprehensive legal framework governing entrance into the United States and admission to its citizenship. The importance of the prohibition is reflected in the criminalization of conduct, as opposed to milder enforcement sanctions. Control of one's borders and of the identity of one's citizens is an essential feature of national sovereignty. Relinquish this control and it may fairly be said that there remains no territorial or social body which can be called a sovereign nation.... [T]here can be no doubt that, until Congress changes the border control laws, they must be uniformly obeyed. On this basis alone, the first amendment challenge of

---

32. Citing *Sherbert v. Verner*, 374 U.S. 398 (1963), *Braunfeld v. Brown*, 366 U.S. 599 (1961), *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Davis v. Beason*, 133 U.S. 333 (1890), *Reynolds v. U.S.*, 98 U.S. 145 (1878).

33. Citing *U.S. v. Rush*, 738 F.2d 497 (CA1 1984); *U.S. v. Middleton*, 690 F. 2d 820 (CA11 1982); *Leary v. U.S.*, 383 F.2d 851 (CA5 1967).

34. Citing *U.S. v. Allen*, 760 F.2d 447 (CA2 1985).

35. Citing *U.S. v. Starks*, 515 F.2d 112 (CA3 1975), aff'd in relevant part *sub nom. Abney v. U.S.*, 431 U.S. 651 (1977).

36. Citing *U.S. v. Dickens*, 695 F.2d 765 (CA3 1982).

37. Citing *Smilow v. U.S.*, 465 F.2d 802 (CA2 1972?).

38. *Wisconsin v. Yoder, supra,* at 215-216.

> Merkt and Elder to their convictions fails.
>
> The appellants urge us to apply the analysis of Wisconsin v. Yoder...to their case.... [W]e reach the same result even under the Yoder test.
>
> First, it is not clear to us how enforcement of [the law] unduly burdens [their] free exercise of religion. The statute relates only to conduct that aids or shelters illegal aliens and contains no explicit prohibition on religious practices or beliefs. The sincerity of appellants' religious motivation to aid El Salvadorans was not doubted by the trial court. Whether such motivation, in turn, required defiance of the nation's border control laws, hence, whether enforcement of those laws so as to inhibit and punish appellants burdened their religious practice, is another matter. Representatives of Catholic and Methodist clergy testified at the pretrial hearing and at trial. None suggested that devout Christian belief mandates participation in the "sanctuary movement." Obviously, appellants could have assisted beleagured El Salvadorans in many ways which did not affront the border control laws: they could have collected and distributed monetary and other donations, aided in preparing petitions for legal entry and assisted El Salvadorans legally in this country, or, in the Christian missionary tradition, they could have performed their ministry in El Salvador or neighboring countries where El Salvadorans are refugees. They chose confrontational, illegal means to practice their religious views—the "burden" was voluntarily assumed and not imposed on them by the government....
>
> Finally, we emphatically reject appellants' suggestion that because enforcement of the border control laws has not been particularly successful, there is no compelling state interest in prosecuting violators. The argument is so broadly couched that it could be used to deny a compelling state interest in enforcement of the criminal drug laws. In any event, to the extent that appellants' conduct, amplified by the nationwide publicity given to the "sanctuary movement," has contributed to undermining compliance with the border control laws and encouraging illegal entries, appellants are trying to excuse their violation of law on the basis of other violations. This will not do. The compelling state interest becomes more compelling in proportion to the increasing magnitude of the violations.

The court rejected the suggestion that criminal penalties were not the least restrictive way of meeting the government's interest, but the court thought that the less stringent means suggested by the appellants—deporting the aliens and confiscation of vehicles used to transport them—would "reduce appellants' efforts to a pitiful farce. It would also implicate the Border Patrol in a wasteful `catch-me-if-you-can' scheme that would not further the law's objectives." After quoting with approval the trial court's rejection of the defendants' undertaking to set their own immigration policy, the appellate court concluded:

> Appellants' "do it yourself" immigration policy, even if grounded in sincerely held religious convictions, is irreconcilably, voluntarily, and knowingly at war with the duly legislated border control policy. In this

> case, the claims of conscience must yield to the twin imperatives of evenhanded enforcement of criminal laws and preservation of our national identity as defined by the immigration laws.[39]

The court, in suggesting that if the sanctuary workers were not *required* by their religious faith to transport illegal aliens, their religious practice was not really burdened, was resorting to an understanding of religion that demeans some of the most significant and profound aspects of religious behavior because they are not mandatory. As one commentator has observed about this line of argument:

> This position implies a wholly negative view of religion. It assumes that religions lay down certain binding rules, and that the exercise of religion consists only of obeying the rules. It is as though all of religious experience were reduced to the Book of Leviticus. It is the view of religion held by many secularized adults, who left the church in their youth after hearing much preaching about sin and failing to experience any benefits.
>
> Those who stay in the church are those who do experience benefits. In the view of religion as obeying the rules, all the affirmative, communal, and spiritual aspects of religion are assumed away, placed outside the protection of the Free Exercise Clause. Practices that merely grow out of religious experience, or out of the traditions and interactions of a religious community, are constitutionally unprotected unless they are mandated by binding doctrine.[40]

The First Amendment does not limit its protection to that aspect of religion that is mandatory, and an understanding treatment of the Free Exercise Clause would include within its aegis religious behavior that is sincere, even if not mandated by doctrinal commandments. Jack Elder and Stacy Merkt were following what they sincerely believed to be their religious duty—a conclusion arrived at reflectively, not reflexively—and that devotion should be as fully protected as any other. The court should not conclude that because they were not specifically commanded to aid illegal Salvadoran refuge-seekers, the border-control laws did not burden their free exercise of religion. That conclusion is not necessary to the court's holding that the state's interest is sufficient to override the religious practice, even if mandatory.

The court's recital of numerous cases in which lower courts have enforced criminal laws despite pleas of religious liberty was all too true, and presaged the holding to that effect in *Oregon v. Smith* in 1990, which largely nullified the "compelling state interest" test. Courts had sometimes tended to find the state's interest "compelling" as against conflicting religious practices, but in *Smith*, the Supreme Court held that the state did not even have to make that showing to prevail. It did not have to try to justify the "incidental" effect on religion of a "neutral law of general application" unless it explicitly targeted religion or religious practice (in which case it would no

---

39. *U.S. v. Merkt and Elder*, 794 F.2d 950 (CA5 1986).

40. Laycock, Douglas, "The Remnants of Free Exercise," 1990 *S.Ct. Rev.* 24. Copyright © 1991 University of Chicago. In another place Laycock has characterized this view as one that "views God as a great schoolmarm in the sky." Laycock, Douglas, *Summary and Synthesis: The Crisis in Religious Liberty*; Symposium: Religion in Public Life, 60 Geo. Wash. L. Rev. 841, 847 (1992).

longer be neutral). Congress in 1993 reinstated the "compelling state interest" test in the Religious Freedom Restoration Act.

While the court's characterization of the state's interest in protecting its borders may have been a bit inflated, particularly in view of the flood of illegal aliens pouring across the borders almost without effective hindrance from the INS, many of them filling low-level jobs that citizens and legal aliens didn't want to do, the court was not wrong to rank that interest as one of the central attributes of nationhood—for better or worse—to be safeguarded as the elected representatives of the people deemed best. While one can recall or conceive cases in which the courts should exercise some initiative and imagination in protecting the rights enshrined in the Bill of Rights, one would not want the courts to supplant the functions of the legislative and executive branches in the absence of total inaction or obstruction there, especially when the problem is posed confrontationally by religious activists who have deliberately undertaken to violate the law (supposedly) with the expectation of paying the penalty imposed by the law for such violations. Their intention in so doing is to demonstrate and dramatize the unjustness of the law in question by civil disobedience—a morally powerful act. But to seek to avoid the consequences of such disobedience is to deprive the act of much of its power.

The religiously motivated members of the "sanctuary movement" believed, not only that the refuge-seekers from Central America were in need of succor, but that they were being systematically denied asylum by the administration for political reasons. They contended that the Immigration and Naturalization Service was readily granting refugee status to refuge-seekers from Afghanistan and other areas of the world who were fleeing regimes opposed by the United States, but were denying such status to refuge-seekers from areas controlled by regimes no less threatening to them but allied to the United States. Some of the sanctuary movement workers were extremely critical of the administration's policies in Central America and believed that the refuge-seekers from there were victims of U.S. foreign policy, who were deliberately mischaracterized as "economic" refugees rather than "political" in order not to embarrass the regimes friendly to the United States. It was a key belief of the sanctuary movement that the refuge-seekers from El Salvador more than met the definition of "refugee" in the United Nations protocol and in the U.S. Refugee Act of 1980, but were not being granted the refugee status to which they were entitled by a government acting in derogation of its own laws.

b. *U.S. v. Aguilar* (1986). In January 1985, the U.S. Immigration and Naturalization Service arrested and indicted sixteen leaders of the "sanctuary movement" and sixty refuge-seekers, mainly from Tucson and Phoenix, Arizona. Trial of the first eleven defendants was held in Tucson, where Judge Earl Carroll excluded all testimony pertaining to the religious motivation of the defendants, political conditions in Central America from which the refuge-seekers were fleeing and the 1980 Refugee Act or international law on refugees, thus depriving the defendants of virtually all their projected lines of legal defense. The government had obtained most of its evidence from two informants who had infiltrated the sanctuary movement in churches in Arizona and elsewhere and surreptitiously tape-recorded conversations, meetings and religious services. Because of the outrage generated by

this tactic, the government did not use this material, but put one of its informants, Jesus Cruz, on the stand to give evidence orally as to the activities of the sanctuary movement.

The defense was able on cross-examination to show gaps and inconsistencies in Cruz's testimony and to bring out his unsavory history as a "coyote" (smuggler of illegal aliens) facing prosecution and trying to win leniency by spying on the churches. Because his testimony seemed to be so thoroughly discredited and because its main lines of defense had been precluded by the judge's rulings, the defense team rested its case without calling any witnesses, contending by this dramatic gesture that the government had failed to prove its allegations.

Unfortunately, the jury did not see it that way. It acquitted three defendants of all charges but convicted the other seven of one or more counts. Six of the defendants were found guilty of conspiracy to commit felonies under the immigration law, bringing to eight the total of defendants convicted. Appeals were taken on a number of grounds, foremost among which were the exclusion by the judge of the main lines of defense and the infiltration of churches by governments informants. The appeal of those convictions will be discussed below.

c. The Infiltration Issue. A collateral aspect that was even more troubling than the prosecution of sanctuary workers itself was the way in which the government went about getting evidence for that prosecution. As indicated in previous sections, the government had enlisted the services of two smugglers of illegal aliens to infiltrate the sanctuary churches posing as supporters of the movement, wearing hidden tape recorders with which they recorded every sound that occurred around them (most of it worthless as evidence but no less offensive as invasion of the privacy of church groups).

During hearings on pretrial motions the defense moved for exclusion of evidence obtained by warrantless tape recording. It offered the testimony of J. Philip Wogaman, Professor of Christian Social Ethics at Wesley Theological Seminary in Washington, D.C., on the implications of government infiltration of churches. The judge declined to admit the expert testimony but accepted a proffer of evidence in the form of a written statement of what Wogaman would have said. Because it provides such an articulate statement of the churches' interests in this matter, that statement is worthy of consideration here. It takes the form of answers to questions pertinent to the issue.

> **2. To what extent is the church a public institution, with activities open to the public?**
>
> Most, though not all, church activities in America are open to public participation. Church activities are, indeed, commonly advertised to the public in the hope that new participants might be attracted, new members recruited, and the influence of the church extended.... Bearing this in mind, it can be argued, at least superficially, that it is no intrusion upon this public setting for agents of the government to attend and record church events.
>
> To say this, however, is to overlook two very important considerations....

First, as a religious community the church does not think of its activities as theatrical performances or other entertainments where the audience is made up of passive onlookers or consumers. Rather the church is a community of shared experience in which participants are invited to and expected to express their deepest beliefs, values and questions....

Second, church activities are as public as they are in this country precisely because churches have felt secure in the protections afforded by the First Amendment to the U.S. Constitution.... Through the centuries dissenting religious groups of all kinds have often had to go underground in one way or another to escape persecution. The... Jewish communities of Europe felt the need to establish especially harsh penalties for informers within their midst.[41] In the conflicts of the sixteenth and seventeenth centuries, dissenting religious groups often had to practice their faith in private or to flee to safer countries in order to escape the power of the state. (That is the well-known history of the separatist, or "Pilgrim Fathers," who first fled England to Holland, and thence to Massachusetts in order to find a place where they could practice their faith openly.)....

Seen from the standpoint of the churches, it was and is the First Amendment protection of religious liberty that has made it possible for the church to be fully public and open in its activities and expression of faith. The church is a fully public institution in this country because the First Amendment provides it the security to be a public institution. Since it deals with the most sensitive, ultimate aspects of human life, the church would be peculiarly vulnerable if it did not have that protection.... To the extent that the protections of the First Amendment are weakened or withdrawn, the church may be forced to reconsider the extent to which it can function publicly in this country....

4. Does this mean, then, that under cloak of religion or religious pretension it should be possible for people to gain immunity from prosecution?

Of course not. The church also has a long tradition of respect for law, recognizing that law is the custodian of public order and, ideally, of social justice. Almost anything could be justified by misguided or dishonest people in the name of religion. But that is also true of law enforcement! The nice balancing of the government's interest in law enforcement with the church's expectation of freedom cannot be effected by law enforcement officials alone. Law enforcement officials, in their zeal, cannot be expected to act with sufficient restraint. The facts about the infiltration of paid government informants in the present case—as conceded by the government in pre-trial hearings—has already shown a clear lack of restraint. The court itself has indicated that this has "sullied" the government's case. When so important a privilege as religious liberty is at

41. This sentence may refer to a comment made to Dr. Wogaman at the meeting of the Committee on Religious Liberty of the National Council of Churches a few days before he was to testify on this issue. Rabbi Joseph Glaser, Executive Vice President of the Central Conference of American Rabbis, remarked that Jews have historically been averse to the death penalty, with one exception: the medieval ghetto community thought it an appropriate fate for an *informer*.

stake, prosecuting agencies cannot be trusted to arrive at the right balance of judgment when this might subject them to appreciable inconvenience....

5. Is the use of government agents infiltrating church organizations and activities an inhibition of the church's practice of religion?

Testimony before the Court in pretrial hearing has already illustrated the problem, as perceived by the churches. In the churches directly affected by the paid informers, there is a strong sense of betrayal of trust, it has become much more difficult to conduct prayer meetings and Bible study, participants in tape-recorded worship services are fearful that their religious activity may be recorded in government files in such a way as to be damaging to their lives and careers at some future time, and pastors are fearful that their telephones may be tapped and their capacity to minister to troubled persons diminished through a breakdown of trust. These are not minor problems. They strike at the heart of the life of the affected church groups.

By acting as it has, the state has begun to determine the shape of religion. It has begun to affect the composition, manner, and style of the church's work....

8. Where can such a path ultimately lead?

Incidental to my work as a theologian and teacher I have had occasion to visit some countries not favored as ours is by secure protections of freedom of religion. In Czechoslovakia for instance, a country which I have visited three times, religious life is closely scrutinized by governmental agencies not accountable to an independent judiciary. I am impressed by the quality of church life even there; but many people are afraid to participate openly in religious activities.... But the many infringements upon religion in Czechoslovakia had made it difficult for outsiders to tell who the real Christians were....

Jewish colleagues complain of the KGB's practice of sending agents into synagogues in Moscow wrapped in prayer shawls, as though they were practicing Jews, in order to spy upon the community at worship. In a visit to El Salvador in 1984 I learned of the intrusion of unfriendly agents into the Catholic Cathedral of San Salvador in order to record the sermons and statements of the courageous Roman Catholic Archbishop Rivera y Damas, and many people spoke of the chilling effects of informant activity in that country....

America is not a totalitarian country. It has prized laws and traditions protecting the free exercise of religion, chief among these the constitution itself. But the free exercise of religion is not the fruit of the constitution alone. It has had to be interpreted and re-interpreted and applied to new problems.... The use of secret government infiltrators in the churches is a relatively new encroachment in this country. The prevention of the erosion of religious freedom from such a source is an issue that needs to be addressed by the courts, quite apart from the disposition of the sanctuary issue as such.[42]

42. Supplemental Offer of Proof of Philip Wogaman, Re: Motion to Suppress Infiltration, *U.S. v Aguilar*, U.S. District Court, District of Arizona, June 4, 1985.

Professor Wogaman was correct that these issues of religious liberty tower over the specific cases in which they arose. Whether the particular defendants in the specific case were convicted or acquitted (there were some of each), whether the Sanctuary Movement itself was advanced or hindered, serious issues though those are, they may be of less enduring significance in the long run than whether religious liberty for all citizens in the United States is safeguarded or, in the alternative, the nation becomes more and more like the alien powers that it has professed to oppose—Nazi Germany and totalitarian communism—in taking one step and then another to suppress the freedom of spiritual commitments and spiritual communities that has been one of the brightest ornaments of this society.

d. *Presbyterian Church v. United States* (1989). As a result of the disclosure of the government's infiltration of churches and in light of such considerations as Professor Wogaman outlined, two major religious denominations and a number of congregations filed suit against the Immigration and Naturalization Service for the infiltration they had suffered in the Arizona investigation. The two denominations were the Presbyterian Church (USA) and the American Lutheran Church. The congregations were those Arizona groups in which the infiltrators were known to have been active. (Many other local and national bodies would have joined the suit but were thought not to have "standing" as plaintiffs to be able to claim that they were directly and actually damaged by the infiltration, though—as Prof. Wogaman pointed out—*all* religious bodies in the nation were potentially damaged by the "ripple effect" of the government's use of paid informers in any one locality.)

Judge Charles L. Hardy of the federal district court granted summary judgment in favor of the government on the technical ground that the plaintiff church bodies did not have "standing" to claim interference with their free exercise of religion, which—the court ruled—is an attribute of individuals, not of groups! This remarkable ruling, which would seriously undercut the associational rights of churches, was appealled to the Ninth Circuit. On March 15, 1989, that court rendered its judgment in an opinion written by Judge William A. Norris for a panel that included Judges Alex Kozinski and Edward Leavy.

> In holding that the churches lacked standing to raise their First Amendment claim, the district court reasoned that the First Amendment protects "rights guaranteed to individuals not corporations" because "churches don't go to heaven." To the contrary, it is settled law that churches may sue to vindicate organizational interests protected by the Free Exercise Clause of the First Amendment.[43] On appeal, the INS [Immigration and Naturalization Service] does not dispute that in appropriate circumstances churches may raise free exercise claims on their own behalf as organizations, but argues that the churches have failed to allege that they have suffered an injury sufficient to establish standing in this case. We disagree, and hold that the injuries alleged in the complaint are an adequate foundation for standing in this case....

43. Citing *Serbian Eastern Orthodox Diocese v. Milovejevich*, 426 U.S. 696 (1976) and *Kedroff v. St. Nicholas Cathedral*, 244 U.S. 94 (1952), discussed at IB7 and IB3 respectively.

> When congregants are chilled from participating in worship activities, when they refuse to attend church services because they fear the government is spying on them and taping their every utterance, all as alleged in the complaint, we think the church suffers organizational injury because its ability to carry out its ministry has been impaired.
>
> * * *
>
> Churches, as organizations, suffer a cognizable injury when assertedly illegal government conduct deters their adherents from freely participating in religious activities protected by the First Amendment. The alleged injuries are not speculative; they are palpable and direct....[44]

One might have thought that this rather forthright deliverance would have settled the matter, but it only cleared the way for the churches to prove at trial that they did indeed suffer the harms alleged. The government did not cover itself with glory by its disingenuous defenses. In the trial court it had argued that the churches did not have standing to raise their members' Free Exercise claims, but on appeal it was heard to protest that the injuries alleged were to individuals worshippers, not to the churches as organizations, which sounds a little like "heads I win, tails you lose." The appellate court was rightly unimpressed by this evasive hairsplitting and sent the case back to be tried on its merits.

All of this posturing and positioning seemed somewhat elaborate for what appeared to church observers a totally inexcusable and unjustifiable invasion of the free exercise of religion. Judge Kozinski was drawn to replace Judge Anderson, who had died while the case was under submission. Others of the prinicpals may well have passed from the scene before a definitive resolution was attained at the rate this case moved on its way—on what should have been an open-and-shut matter. The government was far off base in this instance, but the courts seemed extraordinarily reluctant to tag it out—which does not enhance anyone's respect for courts, government or the First Amendment.

e. *United States v. Aguilar*: Appellate Review (1989). In due season (two weeks after the decision in *Presbyterian Church v. U.S., supra*), another panel of the Ninth Circuit Court of Appeals in San Francisco handed down its decision in the appeal of the criminal convictions in the "sanctuary" case, *U.S. v. Aguilar,*[45] which took a rather different approach to the question of infiltration than had the panel that decided *Presbyterian Church.* The panel considering *Aguilar* consisted of Circuit Judges Cynthia Holcomb Hall, Charles Wiggins and David R. Thompson, with its unanimous decision announced by Judge Hall.

> Appellants were convicted of masterminding and running a modern-day underground railroad that smuggled Central American natives across the Mexican border with Arizona....
>
> Appellants sought and received extensive media coverage of their efforts on behalf of Central American aliens. Eventually, the INS accepted

44. *Presbyterian Church v. U.S.*, 870 F.2d 518 (CA9 1989).

45. See § b above.

> appellants' challenge to investigate their alien smuggling and harboring activities. The INS infiltrated the sanctuary movement with several undercover informers and agents who tape recorded some meetings....
>
> * * *
>
> Appellants...argue that their religious motivation in transporting the illegal aliens would negate the requisite intent to directly or substantially further the alien's presence in the United States. They conclude: "Proof that the [appellants'] transportation was not intended to further the alien's illegal presence, but to fulfill the [appellants'] religious commitment to assist those in need, would thus constitute a defense to the [charge]."
>
> Appellants are confusing intent and motive. So long as appellants intended to...further the alien's illegal presence, it is irrelevant that they did so with a religious motive.

The court gave short shrift to the sanctuary workers' contention that the Free Exercise Clause afforded protection for their activities. It relied upon the reasoning of the Fifth Circuit in *U.S. v. Merkt*[46] and the district court in *U.S. v Elder*[47] to reach the following result: "In conclusion, appellants' free exercise clause is without merit. The government's interest in controlling immigration outweighs appellants' purported religious interest, and an exemption would not be feasible."

The infiltration issue required discussion of the Fourth Amendment's protection against warrantless "searches and seizures." The government contended that a warrant was not necessary under the "invited informer" rule that communications with a person invited to participate in them cannot be privileged against disclosure.[48]

> Appellants correctly state that the critical fourth amendment inquiry — whether a person has a constitutionally protected reasonable expectation of privacy—necessarily entails a normative inquiry as to which expectations society is prepared to recognize as reasonable....
>
> The critical aspect of appellants' argument is their suggestion that the first amendment and the fourth amendment are necessarily intertwined in the context of an informer's infiltration of a church. Based upon first amendment principles, appellants contend that society is prepared to recognize as reasonable churchgoers' expectations that "they could meet and worship in church free from the scrutiny of federal agents and tape recorders." A churchgoer need not "assume[] the risk that apparent fellow worshippers are present in church not to offer homage to God but rather to gain thirty pieces of silver"....
>
> The first amendment requires this heightened expectation of privacy [appellants argue] because a "community of trust" is the essence of a religious congregation[,] and the ability of a person to express faith with his fellow believers "withers and dies when monitored by the state." Appellants argue that government "spying" on religious activities necessarily chills a person's ability to exercise freely his religious faith.

---

46. 794 F.2d 950 (CA5 1986), cert. denied, 480 U.S. 946 (1987).
47. 601 F.Supp. 1574 (S.D.Tex. 1985).
48. Citing *Hoffa v. U.S.*, 385 U.S. 293 (1966) and other cases.

> Appellants' argument has superficial emotive appeal, but it fails to acknowledge that the invited informer rationale inherently imposes a rather significant burden on first amendment free association rights. In approving this investigative technique the Supreme Court unmistakably declared that persons have no expectation of privacy or confidentiality in their conversations and relations with other persons, no matter how secretive the setting. While privacy, trustworthiness, and confidentiality are undoubtedly at the very heart of many instances of free association and religious expression and communication, the Court has recognized that legitimate law enforcement interests require persons to take the risk that those with whom they associate may be government agents....
>
> [F]irst amendment concerns do not require procedural protections for privacy rights over and above those provided by the fourth amendment.... [A]ppellants...contend that the government needed a search warrant to place informants at church meetings. But *Hoffa* and its progeny teach that appellants, by inviting Cruz [the informer, into their meetings] had no fourth amendment expectation of privacy in these meetings.[49]

The Ninth Circuit thus joined the Fifth in rejecting the Free Exercise arguments of sanctuary workers, holding that the First Amendment did not shelter deliberate violation of the border control laws, however unevenly enforced they might be. The Ninth Circuit, after devoting 77 pages to examining their other proffered defenses, found no merit in any of them and upheld their criminal convictions.

The difference between the two Ninth Circuit panels in their understanding of the infiltration issue was curious. The *Presbyterian Church* panel had held that the churches had a cause of action against the government for sending covert informers into their midst, but the *Aguilar* panel said that the churches had no expectation of privacy against persons invited to come in. How would the district court in Arizona deal with this perplexing anomaly on remand of *Presbyterian Church*?

f. *Presbyterian Church v. U.S. (II)* (1990). In due course, the federal district court of Arizona, Roger G. Strand, J., agreed that the churches and their members had no legitimate expectation of privacy against persons invited to attend their meetings, and thus no Fourth Amendment violation had occurred. But the First Amendment still posed limitations on governmental conduct, which the court dealt with under the "compelling interest" standard without following *Oregon v. Smith*,[50] a decision of the Supreme Court rendered eight months earlier that largely eliminated that test. The court first weighed the government's interest.

"[T]he government had a compelling state interest, based on boarder [*sic*] security and national sovereignty to conduct an investigation into the alleged unlawful activities of the Sanctuary Movement." But then it moved to the second stage of the compelling-state-interest test.

> Even though the court has concluded the state interest in... the prohibition against illegal aliens entering this country is substantial, "that

49. *United States v. Aguilar, et al.*, 871 F.2d 1436 (CA9 1989); 883 F.2d 662 (CA9 1989).

50. 494 U.S. 872 (1990), discussed at § D2e below.

purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."[51] "It is the `Least Restrictive Means' inquiry which is the critical aspect of the free exercise analysis."[52]...

Plaintiffs argue the least restrictive means available to the government was not the undercover infiltration of churches where informants surreptitiously tape-recorded religious services. [They] suggest the government could have "tailed" particular subjects, used trained law enforcement personnel to conduct witness interviews, or issued grand jury subpoenas to conduct investigations of the Sanctuary Movement.

[The government] strenuously object[s] to plaintiffs[']characterization of the least restrictive means. The government argues plaintiffs overlook the nature of the investigatory activity and its purposes, i.e., to identify criminal activity and its participants, and to gain sufficient information to secure criminal convictions. The government further argues the methods which plaintiffs would have the government employ would hold the government's criminal surveillance operations hostage if potential subjects in the criminal investigation chose religious or political meetings as a venue to engage in illegal activity.[53]...

The government, however, does not have unfettered discretion to conduct investigations and law enforcement activities. The first amendment limits the government's ability and authority to engage in these activities when groups are engaged in protected first amendment activities. There are "two limitations on the government's use of undercover informers to infiltrate an organization engaging in protected first amendment activities. First the government's investigation must be conducted in good faith; i.e., not for the purpose of abridging first amendment freedoms."[54]... "Second, the first amendment requires that the undercover informers adhere scrupulously to the scope of the defendant's invitation to participation in the organization."[55]

In view of the forgoing,

IT IS ORDERED granting in part and denying in part plaintiff Churches' Motion for Partial Summary Judgment by declaring the rights of the parties involved as follows:

Plaintiffs, in the free exercise of their constitutionally protected religious activities, are protected against governmental intrusion in the absence of a good faith purpose for the subject investigation. The government is constitutionally precluded from unbridled and inappropriate covert

---

51. *Shelton v. Tucker*, 364 U.S. 478, 488 (1960).

52. *Callahan v. Woods*, 736 F.2d 1269, 1272 (CA9 1984), discussed at § A9d above.

53. At this point the court cited *Oregon v. Smith* in the margin for the teaching that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct...`cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development'"—thus indicating awareness of that decision.

54. Quoting *U.S. v. Aguilar*, 883 F.2d 662, 705 (CA9 1989), discussed above.

55. Quoting *Aguilar, supra,* at 705.

> activity which has as its purpose or objective the abridgement of the first amendment freedoms of those involved. Additionally, the participants involved in such investigation must adhere scrupulously to the scope and extent of the invitation to participate that may have been extended or offered to them.
>
> This declaration of first amendment principles does not embrace a requirement for prior review or approval of any such activity on behalf of the investigating agency or governmental office. A warrant is unnecessary in situations where an undercover government agent is invited to participate in suspected criminal activities, although such activities may occur while an organization is "concededly engaging in protected first amendment activities" as such a requirement would "prohibit law enforcement officials from using an indispensable method of criminal investigation appropriate in any other circumstances."[56]

This Solomonic decision seemed to "cut the baby in two" and give each party half. The government was permitted to carry our warrantless undercover surveillance of church meetings, but only if its efforts were in "good faith" and did not exceed the scope of the invitation to its agents to participate—two provisos that depended heavily upon the government's self-characterization of its activities. In a repeat performance of what occurred in the Arizona churches, it would be hard to prove that the government did not *intend* to chill religious exercise, though that was the obvious effect of its actions when they were revealed. Likewise, the church would not be likely in advance as part of its open-door policy explicitly to forbid the use of secret tape-recorders as a condition of participation, and so the government would be able to construe its role as "not exceeding its invitation." The court did not say anything that would prevent "coyotes" with "body bugs" from infiltrating "in good faith" church services and recording conversations there so long as they were not explicitly told not to do so.

The churches, however, claimed an important victory in the court's (rather generalized) assertion of *some* limits—however vague—on governmental covert activities within churches. That their estimate of the force of the opinion may not have been entirely misplaced was suggested by the vehement objections of the government, which petitioned the judge for rehearing, essentially reasserting its earlier arguments—already considered by the court—that the alleged violations of the First Amendment were all in the past and did not give justification for orders pertaining to the future. "These matters of fact…pertain only to past injury. They do not constitute evidence of a real and immediate prospect that the plaintiff churches will again be subject to the surveillance of which they complain [which has not recurred in the five years since the original occurrence]."

But the government sedulously declined to say it would not do the same again. It seemed to be trying to persuade the court that it hadn't repeated its infiltration tactics on those churches in five years, and so there was no reason for the court to make an order declaring the rights of the parties, since such an order was not directed against

56. *Presbyterian Church v. U.S.*, 752 F.Supp. 1505 (1990), quoting *Aguilar, supra,* at 705.

any specific "real and immediate" intention of the government to repeat its conduct, which it characterized as "lawful," at some other time or place. Apparently unpersuaded by this rather strained line of argument, the court left standing its earlier order (quoted above). The government did not appeal, perhaps because it did not want a decision binding on the entire Ninth Circuit that might be more constrictive than the one at hand, and the churches (on these rather slim grounds) claimed a victory.