2006

No More Deaths: On Conscience, Civil Disobedience, and a New Role for Truth Commissions

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Publication Information

Repository Citation
https://open.mitchellhamline.edu/facsch/436

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Abstract
This article uses as its focal point the emerging civil disobedience movement in southwestern United States, aimed at providing humanitarian assistance to undocumented workers crossing the U.S. border, and the government's prosecution response to that movement. It argues that the courts that have considered such civil disobedience in previous cases, such as the 1980s Sanctuary movement, have a limited understanding of the right of conscience, and utilizes the insights of Reformation theology on the nature of the conscience to argue that it is necessary for the United States to respect the public role of conscience of civil disobedients in mass movements. The article also proposes that the United States should establish a national truth commission to investigate claims of mass civil disobedience movements as a more effective way of engaging mass civil disobedience movements toward truth-telling and a just society.

Keywords
Immigration, No Deaths volunteers, Conscientious disobedient, Free exercise, Federal immigration laws, Illegal immigrants, National truth commission

Disciplines
Immigration Law

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“NO MORE DEATHS”: ON CONSCIENCE, CIVIL DISOBEDIENCE, AND A NEW ROLE FOR TRUTH COMMISSIONS

Marie A. Failinger

I. INTRODUCTION

In 2006, the United States government attempted to try, convict, and imprison a young man and young woman for saving lives. This reality seems brutally improbable in a new American century that has left an unexpected psychological imprint of fear and death upon the American mind. If the turn of the century was marked by Y2K fears of global shutdown and shock at the easy ability of terrorists to strike at the heart of American government armed only with box-cutters, more recent American experience is defined by daily suicide strikes at civilians and military alike in Iraq, the brutal taunt to American moral authority that is Abu Ghraib, and the ominous breakdown of civil society in the wake of Hurricane Katrina. In such a time, when the government’s message is

1 A. J. Flick, No More Deaths; Pair Fail to Get Case Dropped, TUCSON CITIZEN, Jan. 13, 2006, at 4A (noting that U.S. Magistrate Judge had denied a request for dismissal of the charges against Shanti Sellz and Daniel Strauss for smuggling illegal aliens, and that the magistrate’s decision has been sent to U.S. Judge Raner Collins for final decision. However, on September 1, 2006, Judge Collins dismissed all charges against Sellz and Strauss, stating in his ruling that “Sellz and Strauss had made reasonable efforts to ensure that their actions were not in violation of the law, and that ‘further prosecution would violate the Defendant’s [sic] due process rights.” Charges Dismissed Against Tucson Humanitarians, No More Deaths website, http://nomoredeaths.org/index.php?option=com_content&task=view&id=38&Itemid=31 (last visited Oct. 10, 2006). The judge noted that Sellz and Strauss acted under the belief that they were following a protocol agreement between No More Deaths and the Border Patrol, though the Patrol now denies that such an agreement existed. See Djamila Grossman, Entrant Rescuers Believed Acts OK’d, ARIZ. DAILY STAR, Sept. 5, 2006, at B1).

2 See Ted Prince, Y2K + 5, J. OF COMMERCE L, Jan. 3, 2005, available at 2005 WLNR 217968 (noting that “[j]ust five years ago, the world was paralyzed with fear about the potential technical failure from the fin de siecle.”).

3 See Mike Fitts, Documentary Traces How America’s Treatment of Prisoners Went Wrong, COLUMBIA STATE, Oct. 18, 2005, Sect. A, available at 2005 WLNR 16836812 (describing the Pentagon decision to toughen up interrogation and detention at Abu Ghraib prison, and the resulting treatment by American soldiers: “Prisoners are stripped naked and held in stressful positions for hours; confronted with dogs, a particular fear for Arab men; subjected to other humiliations designed to break Muslim men, including the use of female interrogators in sexual role-playing.”).

centered on the nobility of risking one's life to save countless others' freedom, the irony that the government wants to imprison those who risk their freedom to save countless others' lives cannot be sharper. In the words of one humanitarian worker, "If the government wins this case . . . we will be faced with a government-sanctioned policy of killing migrants to enforce our laws."5

And yet, the government tried desperately to imprison two young people for as much as fifteen years for saving lives,6 as an example to others not to save lives (at least not in the same way).7 Shanti Sellz and Daniel Strauss were prosecuted for driving into the bleak Arizona desert, spotting three Mexican nationals immobilized by pain from drinking contaminated water from cattle tanks in their desperate attempt to complete an illegal border crossing, and taking them to the hospital.8 They were treated as criminals because the hospital is on the American side of the border, in Tucson.9 Charged with transporting undocumented workers in violation of federal immigration law and with conspiracy,10 they are, from the government's perspective, the legal equivalent of the "coyotes" who extort money from desperate families to smuggle immigrants across the border in trucks and freight cars, sometimes to die imprisoned in those cartons.11 They are, in the eyes of the government, the legal equivalent of alien drug smugglers, who carry weapons and contempt for human life, who have terrorized residents in the borderlands and caused the Arizona and New Mexico governors to declare a "state of emergency" in those counties.12

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7 Michael Marizco, No More Deaths; Activists to Reject Plea Deal, ARIZ. DAILY STAR, July 22, 2005, at B1, available at http://www.azstarnet.com/sn/border/85261.php (quoting USC law professor Jean Rosenbluth, who suggested that the case was brought to set "ground rules for what can and can't be done in helping illegal entrants," and that the government may be trying to tell citizens, "you don't get to decide when to help an illegal alien").
8 Gumbel, supra note 5, at 2.
9 Indeed, they were advised by 911 personnel whom they consulted that the Tucson hospital was the place they should take the aliens. See NEW AM. MEDIA, supra note 5, at 1.
10 Gumbel, supra note 5, at 1; Angie C. Marek, Border Wars, U.S NEWS & WORLD REPORT, Nov. 28, 2005, at 50 (describing coyotes charging more than $1,500 per head for "brutal treks through the sun-baked desert").
11 Marek, supra note 10, at 54.
Daniel Strauss and Shanti Sellz are not alone. They are part of an emerging American grassroots movement seeking to respond with compassion to those who seek an economically viable existence in the United States for themselves and their families. Perhaps the most prominent of the several organizations in this movement is the volunteer alliance No More Deaths, which leaves food and water in the Arizona desert for crossing immigrants who risk their lives in the brutal terrain in hopes of finding a livelihood.¹³ No More Deaths volunteers have provided food, water or medical attention to at least 175 Latin American immigrants; among them are a migrant given glucose in a diabetic coma, a victim of an assault and robbery after his four month journey to the United States, and a grandmother, mother, father and child who fell sick in the desert.¹⁴ These volunteers risk encounters with immigration coyotes and drug smugglers in the desert because they recognize the desperate need of others.

Moreover, this movement acknowledges, in a way the federal government does not, the difficult set of choices for the poorest citizens of Mexico—choices which some analysts attribute to deliberate American foreign and domestic policy initiatives. On one hand, analysts argue, the American embrace of NAFTA has substantially damaged the employment opportunities of the poorest of Mexico’s poor, making illegal border crossings increasingly more a necessity than a choice.¹⁵ On the other hand, years of federal “solutions” to the border wars, such as sealing more hospitable entryways through southern California, have driven desperate Mexicans into the arms of “coyotes” (who help undocumented workers cross, usually for an exorbitant fee) or into the forbidding Arizona desert.¹⁶

This is, of course, not the first time the United States has fought border battles against individual conscience. As Barbara Bezdek,¹⁷ Ignatius Bau,¹⁸ and other historians have documented, the Sanctuary movement of the 1980s, mounted along this same border with some of the same cast of characters, struggled against the United States government over the right of citizens to aid desperate immigrants crossing the border without government permission. The United States won that battle, successfully convicting a number of human rights

¹³ Gumbel, supra note 5, at 2.
¹⁴ Press Release, Faith-Based Group Rescues 175 People In the Sonoran Desert, at www.nomoredeaths.org (last visited Mar. 14, 2006); Franklin, supra note 12, at 1 (noting Defendant Sellz recounting the rescue of the family and telling the story of a seriously ill, dehydrated young man whom she held in her lap on the way to the hospital, who said to her, “‘Call my sister and tell her when I die.”’).
¹⁵ See notes 40 to 43 infra and accompanying text.
¹⁶ Marek, supra note 10, at 50 (noting that 37% of border crossers are now coming through the Arizona desert).
¹⁸ IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES (1985).
activists “crossing” immigrants who, in activists’ opinions, were legally in this country as political refugees from the death squads of El Salvador. 19

However, at least according to published reports, two legally relevant facts distinguish the new humanitarian movement in the Arizona desert. First, the current refugees flee not political persecution and death squads but the destruction of their employment and economy. Because federal law recognizes, for some small class of immigrants, the right to seek refuge in the United States if they are politically persecuted but does not recognize the right of the starving to cross the border, 20 neither these immigrants nor their saviors are on as juridically solid ground as Sanctuary movement workers would seem to have been. Indeed, members of the Sanctuary movement, under the rubric of civil initiative, argued essentially that they had virtually created a parallel legal system that was enforcing United States immigration law according to its true purpose and letter, while it was the federal government that was acting as the outlaw. 21

Conversely, unlike Sanctuary workers, those who volunteer for No More Deaths and other such groups do not explicitly seek to “cross” illegal immigrants into the United States so they can melt into the economy and find work. The movement, at least publicly, only seeks to provide crossing immigrants with humanitarian aid that makes it more likely that they will survive the desert when they cross the border. 22 As the defendants argued in the Sellz and Strauss prosecutions, that fact should militate against a finding that No More Deaths seeks to “aid and abet” foreign nationals crossing illegally into the United States. 23 Movement members claim that theirs is a textbook first year Criminal

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19 Reel, supra note 17, at 7 (noting that eight of the eleven Sanctuary workers arrested were convicted of felonies, though none went to prison; all but one who received a suspended sentence were placed on probation).

20 Bezdek, supra note 17, at 940-41.

21 Bezdek’s marvelous account of the history of the Sanctuary movement emphasizes the way in which the Sanctuary movement workers countered their portrayal as outlaws with the concept of civil initiative, which understands the state as a potential threat to the rule of law and the duty of citizens to carry out the rule of law when necessary. Id. at 941-45, 970-82.

22 Stephanie Innes, Lawyer: Aid to Migrants Was Legal, ARIZ. DAILY STAR, Jan. 6, 2006, at B5, available at 2006 WLNR 1423804 (defending Sellz and Strauss actions of humanitarian aid, including driving them to get medical attention, as within the law, and noting that the Border Patrol was aware of the 68 medical evacuations made by No More Deaths from October, 2004 to September, 2005); see also Tim Vanderpool, Arizona’s Underground Railroad, 65 THE PROGRESSIVE 26 (2001) (quoting Rev. Robin Hoover, distinguishing the movement from the Sanctuary movement for “lobbying to change immigration policies and providing only direct, emergency assistance.” However, former Sanctuary advocate John Fife claims “members are free to act upon their consciences . . .” by breaking the law by hiding and transporting immigrants, which is “up to each individual.”).

23 Flick, supra note 1, at 5A (quoting Magistrate Judge Bernardo Velasco indicating, “the issue, therefore, is whether the illegal aliens treated at Southside Presbyterian Church and thereafter allowed to melt into Tucson, Arizona, have been assisted ‘in furtherance’ of their illegal entry . . . . The answer is yes.”); Innes, supra note 22; Marizco, supra note 7 (noting that the defendants took the sick immigrants a ride to their base camp, the Ark of the Covenant, and then offered them a ride to medical care).
Law elemental defense: to aid and abet a crime, one must not only seek to help the principal who commits the crime, but also have the purpose that the crime be committed. While No More Deaths workers clearly seek to assist the immigrant principals, they do not aim by their action to cause the ultimate result, an illegal border crossing, though federal law references to reckless assistance seem to ensnare more than the ordinary abettor.24

Neither of these distinctions seems to matter to the federal government. In the 1980s, Sanctuary movement participants charged that the government relentlessly stripped refugees crossing the border of their rights, ignoring their putative claim to be "legal" immigrants.25 In the contemporary successor struggle, the federal government has ignored No More Deaths participants' claims that they are not coyotes seeking to help illegal immigrants to cross the border.26

While this article presents a brief history of the current and historical controversy, it does not seek to enter the dispute on the international legality or the morality of the government's action in repressing illegal immigration across

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24 8 U.S.C. 1324 (1)(A) provides that

[a]ny person who—(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien.

However, under this statute, once the alien is in the United States, the mens rea requirement is relaxed. A person is a criminal if she

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law; (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation; (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.

This provision also punishes "any conspiracy to commit any of the preceding acts," or aiding and abetting such acts. Under the statute, defendants do not apparently have to possess traditional "accessory" mens rea. See, e.g., United States v. Guerra-Garcia, 336 F.3d 19, 25-26 (1st Cir. 2003) (accepting "willful blindness" jury instructions and circumstantial evidence to infer recklessness about the alienage status of a transported alien).

25 Bezdek, supra note 17, at 939-43.

26 Flick, supra note 1, at 5A (noting denial of motion to dismiss); Innes, supra note 22, at B5 (noting prosecutors' claims that the persons defendants aided "weren't in dire need of medical aid" and that defendants were illegally aiding their entry); Bezdek, supra note 17, at 903 (noting that federal officials responded to the 1980's sanctuary defendants as if they "were practicing coyotismo, the cruel servitude into which entrepreneurial alien smugglers sell any whom they can slip into the United States.")
the Arizona border or prosecuting No More Deaths volunteers for aiding such immigration, as much as that dispute sorely needs to be taken up. While the border-crossers do not appear to be refugees in the technical sense, the effect of the American position on the willingness of other countries to take economic refugees who are displaced by famine or destruction of economic infrastructures may be significant.

Nor does this article seek to recite long-standing and well-argued positions about objective situational criteria which may permit legal recognition of conscientious disobedience to statutory law, such as a Free Exercise Clause right of conscientious disobedients to “violate” immigration law to save the lives of foreign border-crossers. That dispute also needs to be taken up more seriously than it was by the government, either during the Sanctuary movement or today. However, the Supreme Court’s current unwillingness to budge from Employment Division v. Smith, with its harsh view that neutral and generally applicable laws cannot be challenged by most First Amendment “right of conscience” claims, leaves such a discussion for further development in light of the Court’s recent interpretations of the Religious Freedom Restoration Act.

Instead of these well-worn paths, I want to approach the problem of civil disobedience at the border from the other side; that is, from the experience of the conscientious disobedient. Drawing from theological sources, I want to probe the question, when do disobedients know that the conscience is true, such that it may make a moral claim against the positive law of the state for which a moral response is due? In concrete terms, what is the difference between a coyote scofflaw and a No More Deaths volunteer? Second, how might the government juridically respond to the conscientious disobedient in a practical way that

27 See United States v. Merkt, 794 F.2d, 950, 955-57 (5th Cir. 1986) (denying defendant’s right to bring a Free Exercise challenge on the grounds that the government had demonstrated that it used the least restrictive alternative toward its compelling state interest in protecting its borders); United States v. Aguilar, 883 F.2d 663, 694-96 (9th Cir. 1989) (holding that the government’s interest in controlling immigration outweighed defendant Sanctuary workers’ religious interests and that an exemption “would not be feasible”).


29 See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1216 (2006) (acknowledging that Smith rejected Sherbert v. Verner, 374 U.S. 398 (1963) in its application of the compelling state interest test to facially constitutional, generally applicable laws, and noting that the Free Exercise Clause does not prohibit governments from burdening religious practices through such laws).

30 Id. at 1216-17 (acknowldging that in RFRA, 42 U.S.C. § 2000bb et seq. Congress has statutorily required the federal government not to burden a person’s exercise of religion “even if the burden results from a rule of general applicability” unless the government can satisfy the compelling interest test—to “demonstrate that [the] application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.”) In Gonzalez, the Court held that the government had not demonstrated its burden with respect to these elements. 126 S. Ct. at 1216. In light of the previous Sanctuary cases, however, it is somewhat doubtful whether a No More Deaths volunteer could be successful even under the statutory standard.
accepts the mixed political, legal and moral nature of a disobedient’s claim against the state? This question implicates the relationship between natural or moral law and positive law in a way best summed up by defendant Sellz: “I still can’t understand how Americans can view some people as illegal and not worthy of their care because they’ve crossed this imaginary [border] line.”

My argument, borrowing from Lutheran theology, is that it is very difficult to determine when the conscience is true, either in the Free Exercise sense of when it might be considered “sincere,” or in the sense that it rightly perceives objective reality and acts correctly based on the moral situation presented to it. However, rather than implying, as Justice Scalia asserts in *Smith*, that this reality must necessarily result in government’s refusal to recognize the claims of individual conscience to avoid anarchy, where “every citizen [is] a law unto himself,” I will argue the opposite. I will suggest that the realities of human conscience make it incumbent on government to respond with an adjudicatory body capable of probing the arguments of conscientious disobedients and insisting that the government face the reality of its actions. That is, I will suggest that it is incumbent on Congress to establish, through legislation, a national truth commission that can probe the social and political realities of situations like the current Arizona border dispute and speak truth to power about the consequences of the United States policy.

II. A BRIEF HISTORY OF TWO BORDER DISPUTES: HOW IMMIGRANTS HAVE COME TO DIE IN THE ARIZONA DESERT

Even by the numbers, the story is tragic, almost surreal. In the year between October 1999 and September 2000, the Immigration and Naturalization Service apprehended 1.65 million border crossers in the Southwest, up more than 100,000 from the year before. During that same period, 369 people died trying to cross into the United States from Mexico, compared with 231 the previous year.

Between October 2004 and September 2005, some 279 to 460 persons died in border crossings, and an estimated 1.19 million were arrested as illegal. Since 1994, when the Border Patrol implemented its strategy to blockade Southern California cities of entry with fences and Texas borders with Border

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33 Vanderpool, supra note 22, at 26.
34 *Id.*
35 *See* No More Deaths website homepage, http://www.nomoredeaths.org/Links.html (reporting 279 deaths in a “counter”) (last visited Mar. 10, 2006); Vanderpool, supra note 22, at 26 (reporting 279 deaths); Marek, supra note 10, at 60 (reporting an FY 2005 figure of 460 deaths, and quoting an official estimating that the number is probably two to three times higher).
36 Marek, supra note 10, at 50 (also noting that the number of illegal aliens in the United States rose from 8.4 million in 2000 to 11 million this year).
Patrol cordons,\textsuperscript{37} an estimated 2600 people have died trying to make the border crossing,\textsuperscript{38} almost as many as the 2746 victims killed in the World Trade Center in the 9/11 attacks.\textsuperscript{39} For those willing to limit the cost to economic terms only, the numbers are equally chilling. In September 2005, Pima County (Tucson) administrator Chuck Huckleberry told county supervisors that it costs the county about $300,000 annually to “recover and store the bodies of illegal immigrants who die in Pima County,” more than ten times the annual cost of water stations placed in the desert to help illegal immigrants survive.\textsuperscript{40}

Critics of American border policy blame these deaths on what might be termed an unintended “pincer movement” of American foreign and domestic policy. On one hand, critics such as Professor Jose Alvarez have argued that the fallout of the U.S.-dominated NAFTA agreement has been that “Mexican policymakers are expected to complete and institutionalize an economic revolution without the resources needed to alleviate the inevitable adjustment pains.”\textsuperscript{41} As a result of U.S. indifference to the predictable consequences of these decisions, “the Mexican people, especially those on the bottom of Mexican society, are now facing severe economic dislocations, which range from sectorial unemployment to a rising tide of bankruptcies for small and medium-sized Mexican firms,”\textsuperscript{42} as well as the decimation of Mexican farmers’ livelihoods.\textsuperscript{43} Critics thus reject the prediction that NAFTA will stem the tide of Mexican emigration to the United States by increasing the flow of foreign investment; in fact, they argue, it will increase Mexican immigration as traditional wage labor

\textsuperscript{37} See id. at 50 (noting that the Border Patrol lined up agents along the Rio Grande within eyesight of each other, and built a fence with floodlights on the San Diego part of the border to keep immigrants out).


\textsuperscript{40} Garry Duffy, County OKs $25K for Water Stations in Desert, TUCSON CITIZEN, Sept. 7, 2005, available at www.tucsoncitizen.com/print/local/090705a6_supervisors. Duffy notes that it costs the county $8 million per year to hold detainees in the Tucson county jail. See also Marek, supra note 10, at 50 (noting that the Border Patrol has had to hire 1000 border agents to patrol 261 miles of Arizona desert).


\textsuperscript{42} Id.

\textsuperscript{43} Michael Riley, Student Volunteers are Spending the Summer in the Treacherous Arizona Desert, Providing Water and Food to Save the Lives of Illegal Border Crossers. Their Goal is Forcing Change in Immigration Policy—and They’re Willing to Risk Arrest To Do So. Convictions On the Line Life-and-Death Lessons Abound of Those Aiding Migrants’ Pilgrimage, DENVER POST, Aug. 22, 2004, at A01.
structures are disrupted, and women take the place of men in the Mexican industrial workforce," creating the "desperate plight of the underclass."44

The other "pincer" of this movement has been the U.S. response to illegal immigration, both before and after September 11th. The immigration situation is chaotic, particularly in Arizona, where border crossers face death both from cold and heat,45 as well as bandits, scorpions, snakes, and vultures.46 Border Patrol pilot Joe Dunn summed up the situation in stark terms, "If we see signs [footprints] in the desert on Monday and we don't find the group . . . we start checking for their dead bodies on Wednesday."47 Women crossing have reportedly been raped by bandits or immigration coyotes.48

As an example of this state of chaos, in just one day, January 14, 2006, Arizona TV station KVOA reported that the Border Patrol identified 15-20 illegal aliens attempting to cross the border. The anchor noted, "Most ran away. But three ran into oncoming traffic. Two of those immigrants were airlifted to University Medical Center. The third fled the scene . . . Border Patrol has at least four of the illegal immigrants in custody."49 The next story, reporting that the case of Sellz and Strauss was headed to trial, noted that at the same time, Sergio Mendez-Gomea and Irma Morfin-Mendez were facing charges for holding two young border-crossers hostage for ransom while smuggling a larger group into the United States. A third story reported that lengthy security backups at the border were causing produce truck drivers to sit still for hours as their cargo withered, delivering a major multi-million dollar blow to Nogales, which has become a key center for storing American produce after hurricane damage in the Gulf.50

Human rights critics blame the tragedies in the Arizona desert on INS strategies of heavy enforcement near border towns, which has driven immigrants to cross the borders in the desert.51 Ironically, the decision of the INS to crack down in border cities such as Los Angeles was not driven by 9/11 security concerns but by the Clinton Administration's attempt to appease political critics of the porous southern border.52 Since 9/11, however, national concerns that the

44 Alvarez, supra note 41, at 311-12. See also Gumbel, supra note 5, at 2; Riley, supra note 43, at 3.
45 Silverstein, supra note 38, at 2 (quoting Rev. John Fife who notes that many migrants freeze to death up in the mountains, including 400 people who died in the desert during a January storm, as well as dying of thirst, heat stroke, or exhaustion because of lack of shade or natural water).
46 Id.; Riley, supra note 43, at 2.
47 Marek, supra note 10, at 52 (noting that the Border Patrol has erected rescue beacons, or "panic" poles that state in English and Spanish, "You are in danger of dying if you do not summon for help.").
48 Riley, supra note 43, at 3.
50 Id.
51 Vanderpool, supra note 22, at 27; Riley, supra note 43, at 3.
52 Gumbel, supra note 5, at 2 (noting that Republican conservatives in Congress "have co-opted the language of Mr. Bush's war on terror and the notion of a nation under threat from a shadowy
southern border presents a likely place of entry for terrorists, coupled with regional concerns about the growing violence on the border, have heightened the urgency of response to the problem.

While there is no evidence that terrorists have actually crossed the southern border, Congress has responded to this purported threat by authorizing more money for more border security and proposing the erection of a 2000-mile wall across the border to keep immigrants out physically,53 reminiscent of Israel's anti-suicide-bomber wall built at the Gaza strip, which Mexican president Vincente Fox has likened to the Berlin Wall.54 Moreover, scores of citizens are terrified by reports of growing violence by immigration coyotes, who now carry guns and increasingly represent Mexican organized crime gangs.55 Some citizens are forming armed patrols to monitor vast stretches of border that Border Patrol forces cannot sufficiently patrol.56 The border violence that has prompted these citizen posse groups to form is in part the result of attempts by drug cartels to cross illegal drugs into the United States, but the violence is being blamed on other illegal immigrants as well.57 T.J. Bonner, president of the Border Patrol agents' union, suggests that the government will need a 400-year plan because "that's how long he calculates it will take to bring security to the entire border at the agency's current pace."58

Into this breach have come scores of volunteers, largely operating out of religious communities, providing humane assistance to persons crossing the border in the Baboquivari Mountain region of Arizona (termed "the center of the universe" for undocumented workers trying to enter the country).59 The legally visible symbols of this movement, Daniel Strauss and Shanti Sellz, typify the idealism of their generation. Strauss, a twenty-four year old Manhattan native from a "not very religious" Jewish family, attended the Ethical Culture Fieldston School, a "school that promotes ethics, community service and academic excellence," volunteered in a Bronx soup kitchen, and mentored children as a foreign enemy, and adapted it to the impoverished Mexicans making their painful way through the desert brush night after night").

53 Gumbel, supra note 5, at 1; Marek, supra note 10, at 54 (describing the erection of the fence in San Diego, and the planned installation of railroad ties in the Arizona desert to prevent illegal aliens from driving into the U.S.).
54 Gumbel, supra note 5, at 1.
55 Marek, supra note 10, at 52 (noting that many residents of the Rio Grande Valley are "terrified to go outside their homes"); Riley, supra note 43, at A 01.
56 Gumbel, supra note 5 at 1; Marek, supra note 10, at 52 (discussing the Minutemen who have formed armed teams to patrol the desert, and "interior enforcement" groups that photograph employers who pick up day laborers). Marek discusses the dangers faced by Border Patrol agents, who are showered with rocks every night, and who were assaulted at least 687 times in FY 2005. Marek, supra note 10, at 52. Many agents drive "war wagons," equipped with metal caging around the windows. Id.
57 Marek, supra note 10, at 52. Marek quotes estimates that about 450,000 of the 11 million immigrants in this country have criminal records. Id. at 56.
58 Id. at 52.
59 Silverstein, supra note 38, at 1.
In 2004, Strauss joined the No More Deaths volunteers in the desert "out of compassion for the undocumented immigrants who flee poverty in their home countries and cross the border on foot." Shanti Sellz, twenty-three years old, who also grew up as a non-religious Jew in Iowa City, embraced her parents' emphasis on volunteerism, caring for others, and "doing something worthwhile for humanity," as demonstrated by her seven months' service as a volunteer in an Ecuadorian ecological center after high school.

These defendants are the media figureheads for a second wave of humanitarian immigration volunteers, organized by a number of faith-based groups. Some of the first-wave leaders, like Reverend John Fife, a Tucson Presbyterian minister, have re-activated their work from the 1980s in response to the current crisis. Others are converts to the movement, local citizens and others coming from around the country to help. One local woman explained her participation by saying, "[t]hey show up at your door and collapse in your arms weeping. How are you going to turn your back on that?" Others, such as Sellz, are driven by the indifference of both border patrols and average citizens who pass "dozens of people attempting to flag down assistance."

However, unlike the Sanctuary movement, these volunteers are not primarily focused on aiding immigrants in crossing the border. Rather, they are focused on saving lives. The Samaritan Patrol, which has operated since July 2000, "roam[s] the desert in Jeeps and vans [for six to eight hours after daybreak] looking for stranded migrants, to whom they offer food, water, and medical help. 'The bottom line is to save as many lives as possible,'" noted Fife. No More Deaths members distribute water bottles and "migrant paks," baggies of carbohydrate-loaded snacks, as they walk through desert washes frequented by crossers shouting in Spanish, "[w]e're friends, don't be afraid . . . . We've got water and food," in part to avoid attack. Humane Borders, another faith-based organization, has set up more than forty water stations in the desert. Often, the help these groups summon is from the Border Patrol, which takes thirsty and sick crossers to receive medical care before deporting them back to Mexico.

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61 Id.
62 Id.
63 Vanderpool, supra note 22, at 26.
64 Id.
65 Id.
66 Poe, supra note 31, at 1.
67 Silverstein, supra note 38, at 1.
68 Riley, supra note 43, at A01.
69 Silverstein, supra note 38, at 1. Silverstein notes that during the summer "season of death" volunteers patrol seven days a week; but in the winter, when migrants face less hazardous conditions, they go out only two to three days a week. Id.
70 Vanderpool, supra note 22, at 26.
The federal government has responded bluntly to the claims of volunteers that they are not breaking the law.\textsuperscript{71} Tucson Border Patrol Supervisor Gustavo Soto has stated, "It is illegal for anyone to transport undocumented persons regardless of the reason," adding that if anyone encounters an undocumented person in need of medical care, "the appropriate response would be to contact 911 and get the proper authorities there."\textsuperscript{72}

However, the volunteers' actions might be more clearly illegal under a little-noted provision of H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, passed by the House of Representatives in December 2005.\textsuperscript{73} One provision of that bill, humanitarians argue, could make it a felony to provide any humanitarian assistance to undocumented immigrants anywhere in the United States, punishable by up to fifteen years in prison and $500,000 in fines.\textsuperscript{74} The U.S. Conference of Catholic Bishops Committee on Migration, among others, has denounced this bill, noting:

Current federal law does not require humanitarian groups to ascertain legal status of an individual prior to providing assistance. However, in our view, the provisions in Section 202 . . . would place parish, diocesan, and social service program staff at risk of criminal prosecution simply for performing their job.\textsuperscript{75}

Although a House Judiciary Committee spokesman denies that this is the intent of Section 202, and the Senate has yet to draft its own bill,\textsuperscript{76} both attorneys and advocates are concerned about the vague scope of the House bill.\textsuperscript{77} One attorney for migrants recently suggested that the law would criminalize even

\textsuperscript{71} NEW AM. MEDIA, supra note 5, at 1.
\textsuperscript{72} Id.
\textsuperscript{73} H.R. 4437 provides that any person who assists, encourages, directs, or induces a person to come to or enter the United States, or to attempt to come to or enter the United States, knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to come to or enter the United States . . . [or] assists, encourages, directs, or induces a person to reside in or remain in the United States, or to attempt to reside in or remain in the United States, knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to reside in or remain in the United States, or transports/moves, harbors, conceals or shields, or conspires or attempts to do such acts will be imprisoned for up to five years or fined if not for commercial gain, and for three to twenty years for commercial gain.

\textsuperscript{74} Portillo, supra note 6, at 1.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} John Keller, Director, Immigrant Law Center, Minneapolis, MN, Statement to the Hamline University Public Law Community (Mar. 14, 2006).
attorneys’ advice to undocumented clients about their rights to avoid deportation or assistance in setting up businesses or gaining other legal protections.78

This characterization of humanitarians as criminals and the United States as a vulnerable victim of potentially violent border crossers, and the forceful determination of the United States government not to permit any exception to its policy of rounding up and returning border crossers,79 would strike any knowledgeable border historian as *deja vu*. The Sanctuary movement of the 1980s also arose somewhat spontaneously in response to the rising flow of Salvadoran immigrants to the United States, after the assassination of Archbishop Oscar Romero and amid reports that Salvadoran death squads were kidnapping and murdering Salvadoran citizens and Christian foreigners who had come to work in their midst.80 This history is instructive because of what it might portend for the future escalation of the dispute between American humanitarian groups and the United States government if some version of the House bill passes, or if Congress or the President direct the Border Patrol to tighten the border enforcement noose.

As in the current conflict, the motivations of fleeing Salvadorans were complicated, though theirs was a more graphic and dire humanitarian disaster; turmoil born of political dissenters’ disappearances, civil war, and rising economic emergency. Jesus Solorzano’s deposition in the prosecution of John Elder, a Sanctuary movement volunteer for his assistance to Salvadoran border crossers, might be instructive. Solorzano testified that he fled El Salvador at a time when thirty-three members of his family were being killed by the army.81 One such fatality, a reluctantly appointed mayor, was killed with his wife, children, mother-in-law and neighbor after he returned from the United States, possibly on a mission to testify about human rights abuses.82 To Solorzano’s knowledge, none of those killed had been a guerrilla.83 Solorzano, his father, brothers and brother-in-law were driven from their lands by the government, which forced a reduced-price sale to a government electronic company led by the richest man in the country.84 Solorzano suspected that his brother, who was taken in the middle of the night by national guard forces, was killed because he and the other landowners had demonstrated against this forced removal.85

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78 *Id.*
79 Ironically, border crossers from countries other than Mexico arguably fare better. Because it is not convenient to return these entrants to their home countries, they are often detained in the United States for long periods, while Mexicans are promptly escorted back across the border. Rachel L. Swarns, *Tight Immigration Policy Hits Roadblock of Reality*, N.Y. TIMES, Jan. 20, 2006, at A12, available at 2006 WLNR 1081079.
80 Bedzek, *supra* note 17, at 916.
82 *Id.*
83 *Id.* at 5.
84 *Id.* at 9-15.
85 *Id.*
Solorzano himself crossed the border into Los Angeles after two members of the civilian patrol in his village warned him that the comandante of the patrol had accused him of illegal activities. Only months before, on December 25, 1980, the army had entered his village, required all inhabitants to lie face-down on the pavement for eight hours, and then began to take young people out of the village to be murdered. On Christmas Day, they took thirty teenaged men, then thirteen more the day after Christmas, and then four to five days later, thirty young women because there were no more young men left. Solorzano testified, “[t]wo days after the troops had came [sic] in, we went out looking for bodies and we buried them, but we only found pieces of bodies, because the dogs had eaten them away.”

After he crossed the border, Solorzano’s son was taken by the army from a bus stop when Solorzano was in the United States. After the family went looking for the son, the Human Rights Commission notified the family that he had been found in the street and buried as an unknown, his head in a box of garbage, his arms in another place, and the rest of his body in a third place. Virtually Solorzano’s entire community of 800 families left the area out of fear of the government, and subsequently, the entire village was destroyed by the government via bombings and raids.

Responding to this turmoil were the volunteers of the Sanctuary movement, who originally became involved by providing humanitarian assistance to fleeing refugees—food and shelter by the parishioners of Sacred Heart Church in Nogales, Arizona; advocacy for refugees arrested by the Border Patrol by people like Quaker rancher Jim Corbett; prayer vigils outside the federal building by Rev. John Fife and his barrio congregation, Southside Presbyterian Church; Central American resettlement help by religious advocates like Sister Darlene Nicgorski.

In Bezdek’s account, the efforts of the Sanctuary movement turned toward “illegal” assistance when the Border Patrol itself began to ramp up its “take no prisoners” approach to border crossings by Salvadoran refugees. While, in 1980, the INS would permit detainees to be released on their own recognizance if they had a letter from a church promising to care for them, after President Reagan’s inauguration, the policy of the INS shifted to “a policy of mass detention and aggressive deportation.” Finding detained Central Americans in “deplorable conditions,” Sanctuary workers made a valiant effort to raise money

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86 Id.
87 Id. at 9-15.
88 Id. at 19.
89 Id.
90 Id. at 25-26.
91 Bezdek, supra note 17, at 919-21.
92 Id. at 910.
93 Id. at 921.
to bail the Salvadorans out of jail, putting up their homes for bond and raising $1 million for bail within two weeks.\footnote{Bezdek, supra note 17, at 922.}

Yet, Bezdek writes, "the government's capacity to detain and deport seemed boundless."\footnote{Id. at 921-22.} First, the government began to raise bail bonds to keep up with the success of Sanctuary volunteers in bailing refugees out,\footnote{Id. at 922.} as well as pressuring Salvadorans to agree to voluntarily return home by threatening them with continued detention if they did not pay bonds of $4000-$5000 for themselves and each of their children.\footnote{Affidavit of Suzanne Rabe, attorney at law, entered in United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985) (No. B-84-276) (on file with author).} Moreover, the INS began to employ other unsavory methods of persuasion and deception to get refugees to waive their rights to due process and counsel.\footnote{Bezdek, supra note 17, at 922.} One attorney swore in her affidavit that the Border Patrol advised refugees that "they would be better off signing a voluntary return form than applying for asylum" since "asylum applications will eventually be denied and that it is no use for the Salvadoran to wait in INS detention for this eventuality."\footnote{Rabe affidavit, supra note 97, at 2.}

During the Sanctuary movement period, detained families were often separated in Tucson, some being held as far away as El Paso or Los Angeles, and, as a tactic to seek voluntary return agreements, family members were rarely informed where other members were taken.\footnote{Id. at 3-4.} Border Patrol workers rarely advised refugees about how they could seek a bond or bond reduction, or of the right to counsel, or even of the right to seek asylum.\footnote{Id. at 2-3.} Moreover, attorneys for the immigrants, like Sanctuary workers, were convinced that asylum applicants would rarely get fair and impartial consideration by the Immigration Office, with many immigration judges not bothering to read the evidence submitted or ignoring clear evidence of the likelihood of persecution.\footnote{Id. at 4-5 (Rabe noted that, to her knowledge, the INS district director had granted only one asylum application from August 1981 to May 1985. Rabe also indicated that in her first asylum hearing, the immigration judge refused to allow her to make any motions, refused to record the proceedings, and refused to go on with the hearing after she insisted on making a record. Another judge refused to change venue to the area of the country where released immigrants were currently living with friends or relatives, such as Los Angeles, San Francisco, or Washington D.C.).}

Responding to this mounting abuse of power, Sanctuary movement workers "did everything that [they] could think of to stop the deportations."\footnote{Bezdek, supra note 17, at 923.} Among their "legal" responses to the crisis, they filed lawsuits to stop INS misrepresentation and coercion of refugees.\footnote{Id. at 979.} One such lawsuit, Orantes-
Hernandez v. Smith, successfully enjoined summary deportations of Salvadorans, while other INS practices such as the transfer of aliens to detention centers were upheld. A Sanctuary movement lawsuit challenging the INS failure to properly apply asylum law and customary international law for refugees did not end until a 1991 settlement, providing that the stipulated class of Salvadorans and Guatemalans would be given asylum hearings de novo. Sanctuary movement workers also attempted to convince Congress to respond by protecting Central American refugees, amending immigration enforcement laws, and pushing home countries to curb existing abuses, but these efforts bore no fruit at all until 1990.

Because their legal efforts were not protecting Salvadorans from immediate deportation, Sanctuary movement volunteers also turned to allegedly illegal means, including holding their churches out as sanctuaries to fleeing refugees, assisting refugees in crossing the border when they were found in the desert, and helping these refugees on an “Underground Railroad” to a place of safety in the United States or Canada. In response, their churches were infiltrated by government informants seeking information they could use to arrest movement workers. A number of volunteers were put on trial, including eleven persons in United States v. Aguilar. The Aguilar trial court not only denied the defendants’ motion to dismiss these indictments based on the government informant’s testimony and selective prosecution, but refused defenses of international law, free exercise of religion, and necessity. Indeed, the Court also refused all but two of the 126 jury instructions proposed by the defense and virtually all witness testimony (including the testimony of the government’s own Central American witnesses) about the situation in El Salvador. The Ninth Circuit similarly dismissed the Sanctuary volunteers’ religious conscience arguments, as did the Fifth Circuit in prosecutions of Stacey Merkt and Jack Elder in Texas.

The political moral of the story, especially in light of recent Congressional legislation, is that this standoff could well happen again—and once again, between persons torn by their conscientious duty to save lives and an intractable government intent on enforcing the letter of the law, and indeed, going beyond

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106 Bezdek, supra note 17, at 979.
107 Id. at 979-80.
108 Id. at 980.
109 Id. (noting that in 1990, immigration laws were amended to allow the Attorney General to provide temporary protected status to certain classes of people from other nations).
110 Id. at 933-37.
111 See id. at 917.
112 883 F.2d 662 (9th Cir. 1989).
113 Bezdek, supra note 17, at 952-55.
114 Id. at 956-57.
115 Id. at 958-62, 963-65 (noting that the Fifth Circuit recast Elder and Merkt as “stubborn supplicants for a ‘free-exercise haven’” who chose “‘confrontational, illegal means to practice their religious views.’”).
the letter to ensure that no discovered immigrants escape the immigration dragnet. Already, the U.S. Conference of Catholic Bishops Committee on Migration have urged their employees to continue to provide humanitarian assistance that would potentially be illegal under the new Act, while disclaiming any intent to encourage violation of immigration laws.116

For purposes of this article’s focus on conscience, it is important that we note how these volunteers have responded to a tragedy in a much different way than so many other Americans who consider themselves good people; by risking imprisonment to save lives. In a complicated political situation, a maelstrom involving terrorism, drug trafficking, and profound economic implications for border states and employers who hire “illegals” alike, we might ask these volunteers to defend their conscientious choice to disobey the lawful authorities who also go into the desert and rescue crossers, only to send them right back to their miserable lives.

III. UNPACKING THE WORKINGS OF CONSCIENCE IN MORAL DECISION-MAKING: THEOLOGICAL ALTERNATIVES TO JUSTICE SCALIA’S ANARCHIC MAN.

In adjudging whether conscientious disobedients should be treated the same as immigration coyotes for legal, political and moral purposes, we need to identify with more depth and specificity how the human conscience actually operates to determine if there exists some distinction between the coyote’s justification for his actions and our disobedients’ actions. If the conscience is trustworthy, then when it determines to violate the law, it deserves a strong level of deference, perhaps akin to the Sherbert v. Verner117 strict scrutiny analysis denied to immigration humanitarians in cases such as Merkt.118 If, by contrast, the conscience is largely untrustworthy, then Justice Scalia’s view that the law should not permit individuals to govern themselves by a standard not applied to others seems more correct.

At the outset, we might reject some trivialized versions of human conscience that have given solace to lawmakers seeking easy answers. In holding these volunteers morally accountable for what they do, we might easily reject behaviorist claims—against the American intuition that people are morally responsible—that these volunteers are preprogrammed by their history or psychology to make the choices that they do.119 The behaviorist account would make the coyote and the volunteer morally equivalent, for neither knows what he does, nor why. Furthermore, there is no point in asking the question whether the volunteer’s conscience is telling all of us something about the moral truth of the situation in the Arizona desert.

116 See Portillo, supra note 6, at 2.
117 374 U.S. at 398.
118 794 F.2d at 950.
Identifying disobedient-suspicious jurists' assumptions about how the human conscience works is more complicated. The Fifth Circuit in the *Merkt* and *Elder* prosecutions\(^{120}\) describes this suspicion by casting the Sanctuary workers as asking for a free pass from laws that do not personally suit them. In *Merkt*, Judge Edith Hollan Jones wrote for the Court of Appeals that there are no "free exercise havens"\(^{121}\) from criminal laws, which 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. Enforcement of [the law criminalizing transportation or assistance to illegal border crossers] cannot . . . brook exceptions for those who claim to obey a higher authority."

\[^{120}\text{794 F.2d at 950. (Elder was also a defendant.)}\]
\[^{121}\text{Id. at 954.}\]
\[^{122}\text{Id. at 955-56 (emphasis added) (internal citations omitted).}\]
\[^{123}\text{See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (noting if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal . . . .).}\]

[Merkt and her co-defendants] chose confrontational, illegal means to practice their religious views—the 'burden' was voluntarily assumed and not imposed on them by government.\(^{122}\)

In this account, four key assumptions need to be highlighted. First, Judge Jones assumes that the disobedients are "creating" standards for themselves out of whole cloth, rather than responding to a tradition of morality which they have assumed as descendants and recipients of distinct religious and/or secular moral histories and cultures. It is not clear why she assumes that the Sanctuary workers "made up" their standards of conduct. Ironically, Judge Jones' reference to every person who makes "his own standards" is a quotation from the passage of *Wisconsin v. Yoder*, in which the Court explicitly distinguishes the private, philosophical and idiosyncratic views of the Thoreaus of the world, isolated by themselves at Walden Pond, from those who stand in a clear religious tradition and thereby are deserving of the Free Exercise protection afforded the plaintiffs in that case.\(^{123}\)

Second, and closely tied to the previous assumption, Judge Jones assumes that a disobedient has a fully free choice about whether to obey or not obey the law, that her choice is not constrained by either her own place in her tradition or any "reality" about truth or good that might be present in the universe. The immigration humanitarian "chooses" and "voluntarily assumes" the choice to
violates the law, as if she is choosing ice cream or a mate. In Judge Jones’ moral universe, truth and good are apparently contingent, relative, and certainly not "real" in the sense that the material world is real. In her moral universe, the need of the other imposes no duty upon us, not even to speak of any divine demand for moral behavior.

Third, Judge Jones casts suspicion on the credibility or honesty of disobedients, suggesting that they "claim to" obey a higher authority, while casting no such aspersions on the Border Patrol and government that prosecutes them. Indeed, in Judge Jones’ view, the Border Patrol is protecting the "peace, order, and very existence of society." It is not clear why Judge Jones believes that the Sanctuary workers only "claim to" obey a higher authority. It is not clear whether she is suggesting that no person could possibly know whether a higher authority mandated her behavior, thus casting doubt on the possibility of determining moral truth, or whether we should believe such a person is lying.

Finally, Judge Jones’ opinion that conscientious disobedients are asking for "preference" over other citizens, suggests that they are receiving some kind of windfall in being able to disobey the law. One might understand why judges or citizens might suspect that about, for example, the Amish who refuse to pay Social Security taxes for their employees, or draftees who want to be exempt from wartime service. However, it is difficult to imagine how Judge Jones—or any contemporary federal judge—could imagine that Sanctuary workers who are giving up their homes, their savings, their safety and even risking their freedom to drive out in the desert to save others’ lives are worthy of "suspicion" that they are seeking a social preference not accorded to others.

Justice Scalia later echoes some of Judge Jones’ assumptions about disobedients in Employment Division v. Smith. Quoting Reynolds v. United States, he recites, “[c]an a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of

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124 Merkt, 794 F.2d at 955.
125 See, e.g., United States v. Lee, 455 U.S. 252 (1982) (denying Amish employers the right to exempt themselves from paying Social Security taxes for employees based on their conscientious belief in their responsibility to care for their own). It is noteworthy that in Lee, the Court does not cast suspicion on the motives of the Amish, assuming that they are seeking to achieve a financial windfall by exempting themselves from the tax, but rather rests its argument on the difficulty of granting a multitude of tax exemptions to other groups. Id. at 259.
126 See, e.g., Gillette v. United States, 401 U.S. 437, 455 (1971) (though the Court in that case went beyond the assumption that uniformity was needed to prohibit fraud, noting it is not at all obvious in theory what sorts of objections should be deemed sufficient to excuse an objector, and there is considerable force in the Government's contention that a program of excusing objectors to particular wars may be 'impossible to conduct with any hope of reaching fair and consistent results . . . . To view the problem of fairness and evenhanded decision-making, in the present context, as merely a commonplace chore of weeding out 'spurious claims,' is to minimize substantial difficulties of real concern to a responsible legislative body.).

Id.
religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." In selecting this quote, Justice Scalia affirms Judge Jones’ view by suggesting that disobedient citizens are asking for a separate set of laws to be applied to themselves, and intimating that dissenting citizens are asking to “relieve themselves” from their duties as citizens, to “excuse themselves” from complying with laws that burden others.129

Justice Scalia’s blithe reference, which embraces the Supreme Court’s imprimatur of government persecution leveled against the Latter Day Saints,130 reflects his acceptance of what those who have written about the public/private or fact/value have termed a division between rationalist and expressivist views of moral judgment.131 Wayne C. Booth famously described the tenets of this “modern dogma” in ways that virtually track Judge Jones’ assumptions: because our actions are driven by deep motives, there are no defensible reasons for moral action or choice;132 the world is coldly impersonal and indifferent to human values;133 and the “truth” is better to be found by suspicion of others’ hidden motives and claimed “reality” than by assent to the truth proposed by others.134

Judge Jones’ and Justice Scalia’s assumptions play to one side of the rationalist/expressivist dialogue in modern social ethics. This debate assumes that public decisions will be governed by rationality and objectivity, while private “moral” decisions will be governed by emotion and intuition, and that neither type of moral choice belongs in the “realm” of the other.135 It is properly called the fact/value or public/private “split” because it assumes a schizophrenic moral imagination, which changes its nature, as it should, depending on what kind of judgment is at stake. As public rationalists, Sellz and Strauss are

128 Smith, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).
130 Like Scalia’s dissent in Romer v. Evans, 517 U.S. 620, 648 (1996), which famously and scandalously invokes Davis v. Beason, 133 U.S. 333 (1890) (a case which justified the stripping of the basic rights of citizenship of LDS members because of their church’s stance on polygamy), Scalia’s invocation of Reynolds in the Smith case represented neither good law—for the belief/action distinction has been clearly superseded since Sherbert—nor good rhetoric, given the Reynolds courts’ clear bias against LDS members for their religious views on marriage.
131 See, e.g., Booth, supra note 119, at 23. Booth described scientismic (rationalist) assumptions that “[t]here are no good reasons for changing [one’s] mind” about values; the mind is nothing but a chemical operation; “[t]he universe is inherently impersonal, indifferent to all human values”; “[t]ruth is found primarily by critical doubt,” and the purpose of trying to change anyone’s mind is to make one’s self-interested desires triumph. Irrationalists (expressivists), by contrast, believe “[t]he heart has reasons that the reason ignores,” that the mind is a subordinate and limiting factor in one’s total being; that the mind can kill the spirit and its drive for truth, and that the rational universe is impersonal such that I must assert my personal values in dissent and release my creativity in expression, and that rational truth is trivial. Id. at 23-24.
132 Id. at 24.
133 Id. at 50-51.
134 Id. at 57-58.
135 See, e.g., id. at 14-20 (describing the battle between scientismic and irrationalist forces on how things can be known).
assumed to have virtually unlimited moral freedom, and we should be able to expect that their choices to act in the matters concerning the public realm, including law, will and should be fully rationalized, well-informed and based on “objective” facts rather than opinions or intuitions.\textsuperscript{136}

For Justice Scalia, apparently, conscientious disobedients, acting on the basis of religious or moral concerns, are improperly using their “personal,” (not communally-based) irrational, “private sphere” emotions and intuitions to make public judgments about whether they should obey the law instead of relying on community determinations, presumably rationally based and embodied in statutory law. Their statements are not truth-claims but personal views held in a value-indifferent world. Alternatively, Scalia may be a pure positivist democrat, suggesting that all political decisions are irrational and expressivist, and that majority rule is justified by nothing else but the fact of a majority, a foundational if not morally defensible tenet of American government.\textsuperscript{137}

One might usefully contrast the simple “either/or” of the rationalist/expressivist view of moral decision-making with more complex medieval and Reformation understandings of how the conscience works. At least some of the scholastics followed Aristotle and Aquinas in locating the conscience within the intellectual or rational side of man’s nature, a “remnant of [his] original uncorrupted nature.”\textsuperscript{138} Many of them, as did the early Luther, thought that conscience accurately described to individuals the good that they were morally bound to, even though a stubborn human will could dissent from the judgment of the conscience and consciously choose evil.\textsuperscript{139} In making judgments about the rightness of a particular act—whether Sellz and Strauss, coming upon some dying migrants should pick them up and take them to the hospital, for example—these scholastics suggested that the conscience worked according to a sort of syllogism. What they termed the synteresis of the conscience contained the “major premise” of the syllogism; it held the moral precepts that guide human wellbeing,\textsuperscript{140} the notions that we should care for others and not harm them. Then, the workings of practical reasoning, or the syneidesis, would utilize those major premises about the good to judge what particular actions the person should engage in (or refuse to do) given the context, or to make a judgment on whether another person’s actions were good or evil.\textsuperscript{141}

At the risk of oversimplifying and overstating a complicated debate, the later Luther contributed to a more holistic understanding of the workings of the}

\textsuperscript{136} \textit{Id.} at 16-17.

\textsuperscript{137} \textit{Smith}, 494 U.S. at 890 (noting that the “consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs”).

\textsuperscript{138} See \textit{Michael Baylor, Action and Person: Conscience in Late Scholasticism and the Young Luther} 47-49, 130-31 (1977).

\textsuperscript{139} \textit{Id.} at 131.

\textsuperscript{140} \textit{Id.} at 131-32, 134-35. See also \textit{Charles E. Curran, Conscience in the Light of the Catholic Moral Tradition, in Conscience} 6-7, 25-27 (2004) (Charles Curran, ed.) (also discussing synteresis as human awareness of personal responsibility and syneidesis as the effort to make judgments).

\textsuperscript{141} Baylor, \textit{supra} note 138, at 131.
conscience. He suggested that the conscience worked in a morally complex way not at all reflected in the court opinions that discuss it. Speaking about a "twofold or double synteresis," Luther understood the synteresis as an element of both cognitive and affective sides of human nature, of the reason as well as the will and emotions. In that way, as suggested, his views contrasted with most in the scholastic tradition who understood the synteresis to be located only in the rational aspect of human nature, as well as with theologians like the Franciscan St. Bonaventura, who thought that the synteresis was only found in the affective or volitional part of human nature.

That is, Luther assumed that just as an individual "has some innate knowledge of God and of the first principles of morality, so too man has an inherent desire to do good; he is naturally inclined to seek or choose that which he perceives as good." Indeed, Luther frequently equated the conscience with the "heart" rather than the mind. This view that conscience was located in both cognition and affection is critical because it gives lie to the assumption that what some might term our moral "impulses" are likely to be selfish and morally untrustworthy, a theme resonant in Justice Scalia's view.

Moreover, Luther's understanding of the conscience also attacks the assumptions of the "rationalist" side of the moral reasoning divide, which jurists utilize to reject disobedients' claims. Essentially, many such jurists assume that community judgments, such as those embodied in law, will reflect disinterested, "purely rational" and empirically based decision-making about the moral good. They effectively assume (not unlike the scholastics) that the rational aspects of human thought are well-informed by conscience, especially as compared with "the will" or the affective aspects of moral response which are likely to be untrustworthy.

By contrast to this view, Luther recognized that original sin affected both reason and will—within both reason and will, good and evil were constantly contending with each other. In Luther's view, because cognition as much as will is affected by human evil, all conclusions that the rational mind reaches, even those that begin with correct "major premises" of the synteresis, have to be regarded as just as suspect as any refusal of the will to act upon what the rational mind has identified as good. Thus, Justice Scalia's instinct that the conscience should be suspected is not entirely displaced. Even if our conscientious disobedient seems to be able to lay out a logically defensible reason for his choice to violate the law, we should be just as concerned about his rational

142 Id. at 157.
143 Id.
144 Id.
145 Id. at 28.
146 Id. at 157.
147 Id. at 172.
148 See Merkt, 794 F.2d at 955.
149 Id.
150 Id. at 159-60, 180-81.
151 Id.
claims as we are about his affective or intuitive inclination to disobey. In Luther’s view, we should be as suspicious that the disobedient has manipulated his own moral reasoning, even unwittingly, to support his own agenda (including his interest in seeing himself a good person, like the humanitarian) as we are concerned that a law violator will know the right and still not choose to do it (like the coyote).

Again, however, the insight that good and evil are constantly contending for position in both reason and will did not eliminate, for Luther, the reality that the soul was inclined to good actions. That reality simply made it impossible to suggest that any internal or external manifestation of human thought—e.g., rational assessment, the will to act, or the action itself—was untainted by sin. In a graphic and overly pessimistic summary, Luther argued that the good within the human conscience is simply a “tiny motion toward God . . . [L]ook at the whole man full of concupiscence which is not obstructed by this tiny motion.”

These two insights—that what we call the conscience is operating in what we know, in what we feel, and in what we choose to do, and that evil and good are constantly contending as part of this process—led Luther to explain how the conscience functions to produce guilt for past actions. When the human desire for good is coupled with the recognition that we are somewhat morally free to consent to that good or to refuse, we can recognize, at least when our minds are not focused on justifying our behavior as good, when a sinful choice to act or refuse to act has been made, producing a sense of guilt. For Luther, then, conscience condemns all forms of human action designed to avoid the need for the mercy of God. It condemns “good people,” those who are sincerely trying to obey the moral law and whose actions reflect their piety, helping them to realize that neither their sincerity nor their actions can be counted as worthy given the countless choices they make not to do the good. The conscience also condemns those who mistakenly believe that they are acting for good in the world, whether their errors are vincible or invincible, bringing home to them the poor outcomes of their feeble attempts at goodness. Finally, it judges those who know that they are doing evil. In this account, Strauss and Sellz, the Border

152 Id. at 175.
153 Id.
154 Id. at 169. This also led him to turn away from an understanding of the synteresis as a location for the possibility that the human being could know and do the good, e.g., a theory of works-righteousness. Id. at 178. For the latter Luther, then, the focus of the conscience was on the consequent action of the conscience, and its action on condemning the whole person, not judging particular acts. The synteresis retained, at best, ethical but certainly not soteriological significance. Id. at 184.
155 Id. at 184.
156 Traditional Catholic theology has traditionally distinguished between vincible or culpable errors of moral judgment, cases in which the person has made a moral mistake due to negligence, where the conscience should not be followed; and invincible errors, mistakes that occur despite the person’s best efforts to understand the truth, where the conscience should be followed even to an erroneous end. CURRAN, supra note 140, at 4-5.
Patrol, and the coyotes, as well as the judges who seal their fate, are all similarly condemned by the conscience.

While Luther’s account of the condemning conscience shows it as a defining moment for salvation, because it is essential before a person comes to rely on the mercy of God, his account makes it truly difficult for persons of faith to know when they can trust their own assessments of what is morally required of them. That has a surprising two-fold result in terms of the question of the conscientious disobedient. On one hand, it means that persons of faith who are proposing to violate the law will never really know whether either their moral intuitions or their reasoned conclusions are sound, or merely attempts to justify themselves before God. Conversely, it also means that persons of faith, confronted with a situation of moral urgency that seems to call for disobedience, will never know whether their intuition or moral judgment that they should keep the law is a choice validly informed by the synteresis. The moral decision to obey the law and turn aside from human need may be just as infected with self-interest and self-rationalization—the reality that we would rather not put our lives and fortunes on the line for others dressed up in the guise of good citizenship.

Luther, unfortunately, elides this problem. He argues that good works will follow from faith, not because a Christian’s reasoning or intuitions suddenly become pure by faith, for Christians remain fully sinners. Rather, he believes that morally good action will flow from the Christian’s faith like an unstoppable river, welling up naturally in response to the need of the neighbor. In an anthropology that suggests we are simultaneously good and evil, that there is no human being not still living a life of partial self-absorption and self-delusion, there would seem to be no clarity on the question of whether a conscientious disobedient’s response is the overflow of faith active in love or the rationalization of a sin-infected conscience. To a sincere conscience trying to decide whether to disobey a secular law, thus might pose a dilemma. The terrible judgment of the conscience would seem to freeze the disobedient into inaction, for any moral good would seem insufficient to the overwhelming need he perceives, and any “good motives” for his action would be suspect.

A traditional legal solution to this problem is to borrow a denuded and distorted version of Luther’s “two governances” doctrine that masquerades in modern discussions as the fact/value or public/private split previously discussed. At the bottom of current jurisprudential judgments such as that, the

157 See BAYLOR, supra note 138, at 123-25.
158 Id. at 246-48; GEORGE W. FORELL, FAITH ACTIVE IN LOVE, 85-87, 109 (1954).
159 More traditionally referred to as the “two-kingdoms” doctrine, the doctrine argues that God exercises a two-fold simultaneous governance in the world—God’s “right hand” governance of the world, saving sinners through the Cross, brings about our ultimate salvation, and God’s “left-hand” governance, which participates with human beings in ordering the affairs of this world. For Luther, a key mistake of the Roman church was to conflate the two governances instead of understanding the parallel, but radically different, ways in which God participates in human history and the story of salvation. For a discussion of misinterpretations of the two kingdoms doctrine, see GEORGE W.
No More Deaths prosecution is the assumption that morality and religious belief—that is, the judgments of the conscience—must be consigned to the private voluntary sphere where law does not operate. In this view, disobedience has improperly brought what is private into the public sphere in challenge to the law. On the other hand, the response of government, whether it is the Border Patrol official deciding whether to arrest a No More Deaths worker or a judge adjudicating his First Amendment claim, must be based on “objective” grounds like law, not “personal” grounds like morality. In this solution to the problem posed by individual conscience, the government’s view, in effect, says:

Do what you must to save your soul, and do what your conscience judges in your private life where the law does not interfere. But in the ‘real’ world, we expect you to obey the law or take the consequences if you do not, just as any other lawbreaker. Because in the ‘real world,’ we have no choice—we have to respond to all law-breaking actions equally, regardless of what moral situation claims them and how.

For a Christian or for another religious believer who accepts Luther’s account of the relationship of the good to conscience, however, the rationalist view of public life misunderstands the nature of reality. There is no “private” world to which the demand to love one’s neighbor is confined. Rather, the demand of the Law writ large governs every aspect of human existence, including so-called secular lawmaking and law enforcement. That a state is secular does not mean that the state is out from under the moral demands of the law—it simply means that the Church, ordained to spread the Good News, has no business assuming the jurisdiction granted by the Creator to orders like the household and the state. If Shanti Sellz and Daniel Strauss are rightly convinced that love for the neighbor means rescuing immigrants in the desert without sending them back immediately to a desolate existence, so the Congress and the President should be convinced, and should not send them back.

The current regime involving conscience, however, suggests that a believer’s conviction about the moral demands of the law must be reinforced by external authority before it is worthy of credence by the state. In pre-Smith jurisprudence, that authority may be the Church. For example, a conscientious dissenter, like Yoder who refused to send his children to high school, or Sherbert who refused to work on her Sabbath, was more likely to prevail if she could show her conformity with the institutional demands of her religion.160 In post-Smith jurisprudence, however, the only authority that can justify the dissenter’s disobedience to the law is the state. The grant of an exemption to pacifists from conscription laws, or to peyotists from drug laws, is dependent upon the states’

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160 See, e.g., Yoder, 406 U.S. at 215-16 (distinguishing the Amish claim as “one of deep religious conviction, shared by an organized group” with a merely personal preference or subjective evaluation of community values); Sherbert, 374 U.S. at 402 n.1 (noting, “[N]or is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion’s interpretation of the Holy Bible.”).
willingness to enshrine such an exemption in statutory law. For Justice Scalia, the objectively expressed preferences of a democratic majority—in statutory law—outweigh the conscientious demands of the minority. It may not be clear whether that is because he believes that public moral decision-making is based on better data and reasoning than private decision-making (accepting the rationalist view) or because he believes that conscience is merely a taste or a preference. However, the result is the same: there is no practical way that state actors can distinguish between the moral demands of a No More Deaths volunteer and the selfish choices of a coyote or drug smuggler.

While Justice Scalia’s solution seems elegantly simple and egalitarian, it constitutes a form of judicial, as well as legislative and executive, willful blindness to the moral nature of human existence. The decision of the Sanctuary judges—much like the decision of today’s Border Patrol and their superiors—to return illegal immigrants to death or certain suffering, implies that human existence does not have a moral dimension to which moral persons must pay heed. They either pretend not to notice, like Justice Scalia, or refuse to recognize, like Judge Jones, that there is any legal import from the lessons of history that human institutions are as infected with sin as individual human beings. They refuse to grapple, even rhetorically and even as a dissenting critique, with the reality that majorities and governments will justify the pursuit of their own interests under the guise of moral policy, because they are human institutions, just as much as any law-disobedient will be prone to self-justification.

Indeed, Luther’s insight was that those institutions most entrusted by God and human beings with human welfare—the church, the state, the family—are most likely to be the loci where sinful, self-interested, and self-justifying behavior will get out of control. For in his view, the Devil exists, and the Devil naturally works hardest at turning away the heart of those in institutions most entrusted with the preservation of human community and human salvation. Thus, the “received tradition” or “common wisdom,” handed down within community or enshrined in institutional rules, is even more likely to reflect evil

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161 See Smith, 494 U.S. at 890 (noting that
[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well ... . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.).
as to correct the evil of individuals bent on being “a law unto themselves.” It suffices only to mention briefly some obvious examples of well-rationalized institutions backed by textual and traditional authority—the Nazi state, human slavery and women’s oppression, just for starters—to show that evil and oppression is not countered or cured by governments or institutions, but rather is exponentially magnified by such.

The question then remains how government institutions can respond appropriately to the reality that majoritarian decisions probably deserve less, rather than more, moral deference, because they are less likely than individual moral decisions to reflect the demands of the good. The academic battle which usually ensues at this moment of recognition is one over separation of powers. What is a competent and constitutionally authorized court to do in the face of a majority’s decision either to oppress, or more frequently, to turn a blind eye to human suffering? This debate, while constitutionally interesting, has not begun to address the suffering caused by this constitutional stalemate.

IV. ACCEPTING THE CONSCIENCE AS PUBLIC

As I have suggested, moral reality cannot be, and should not be, ignored by legal institutions or actors, particularly the moral realities that face the United States as a result of the flood of illegal immigration. If all individuals, no matter their positions, personal integrity, or religious commitments, are likely to make judgments affecting public life that are tainted by self-interest, indifference, even bigotry or meanness, then a democratic polity that hopes to have any moral credibility must create institutional structures that account for this reality in hearing claims of conscientious dissenter communities.

Of course, not all dissenters are demanding a moral engagement with the state and the American polity. Many of those claiming Free Exercise exemptions are indeed arguing for a separate status for themselves and their religious communities alone, to be free from the constraints and responsibilities that define the lives of other citizens, such as the Amish request. Some are asking for a very limited relief from a generally applicable law that imposes a particular burden on them alone, in light of their religious beliefs, such as Native American Church members asking for exemption from criminal drug laws because peyote is sacred to them. Moreover, there will invariably be cases in which a religious community is demanding an accommodation which concededly causes harm to specific individuals rather than claimed harm to the national economy or social life as a whole, such as religious cults who want to engage in universally recognized malum in se behavior, such as abuse of children. But in many contemporary cases of disobedience, religious citizens are asking the state and the polity to change federal or state policy in order to reflect moral good in cases

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162 See, e.g., Yoder, 406 U.S. at 220-21 (noting that an exemption could be sought from a valid uniformly applicable law).
163 See Smith, 494 U.S. at 878 (1990) (noting that Smith sought an exemption that was concededly applicable to non-Native American Church users).
where there is no serious conflict over ultimate ends, but rather over the morality of means. For these cases, a political structure that recognizes that these are public moral demands upon us all is required.

Any such political structure needs to be able to interrogate both the private individual and agents of the state exercising claims that their actions are morally valid. That interrogation must have a two-fold consciousness. On one hand, the institution must be hospitable to claims brought to it, requiring the assumption that either the state or the individual may be raising valid moral arguments and making wise moral choices in good faith. At the same time, the institution must possess the competence and authority to question whether the claims of the disobedient or the claims of the state are infected with self-interest of some kind. Such an institution must be able to gather facts that go beyond the confines of a narrow legal case, facts that reflect the reality of government policy on individual lives and not just statistical trends, if any semblance of moral judgment is to be retained. Similarly, such an institution must have the mechanisms to ask both the disobedient and the state whether they have explored feasible options that might cause the crisis of disobedience against the state to dissipate. It must also be able to propose options for defusing that crisis.

However, as the Sanctuary movement and its contemporary successor sharply illustrate, the institution most clearly charged with engaging moral reality in the development of United States law—the Congress—is perhaps most ill-equipped to respond to that challenge. In the unlikely event that a sea-change in U.S. immigration policy obviates the need for a humanitarian response to illegal border crossings, Congress’ inability and refusal to deal with dissenter movements still needs attention. After all, this movement is not the only such concerted movement to claim moral authority to violate federal or state law for the sake of saving lives. A few examples are: the anti-nuclear movement which resulted in a number of prosecutions, the protests against Central American policy that resulted in illegal demonstrations in the 1980s, and the abortion clinic picketing movement.

Students of Congress could develop a lengthy and sophisticated laundry list of the reasons for Congressional failure to adequately respond to widespread conscientious dissenter movements in the United States. I will suggest, in

164 Charles R. DiSalvo, Necessity's Child: The Judiciary, Disobedience and the Bomb, 41 U. MIAMI L. REV. 911, 920 (1987) (noting that “since 1980, when the ‘Plowshares Eight’ entered a General Electric facility in eastern Pennsylvania to hammer on the components of a Mark-12 re-entry vehicle and spill blood on the builders' blueprints, there have been more than a dozen other direct attacks on the bomb”).


166 See, e.g., Leslie Gielow Jacobs, Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance, 59 OHIO ST. L.J. 185, 238-39 (1998) (listing protests against abortion clinics as well as civil disobedience involving civil rights, anti-war activism, environmentalism, animal rights, and gay rights).
passing, only three of the possible reasons. First and perhaps most obviously, there is the sheer immensity of that body's responsibilities: in a global world where terrorism, war, looming deficits, and critical domestic programs compete for attention, the outcry of a few humanitarians about people dying in the desert is most unlikely to be attended in the halls of legislative power.

Second, while Congress has developed investigatory powers to deal with emergencies of national scope, such as the Hurricane Katrina disaster, Congress has not traditionally evinced much interest in exploring in depth, or with much persistence, the effects of its economic, social, and political policies upon lives of individual campesinos who risk everything to cross the border. Even as Congress has been dragged into policy changes to ameliorate the most egregious human rights abuses, as in El Salvador, other refugee emergencies have cropped up. Local officials who presumably are in a better position to experience and assess these effects are caught in a political vise between government workers and private citizens reeling from the effects of massive immigration unaccompanied by federal resources, nationalists who are ideologically opposed to immigration, and those who would extend humanitarian aid to these refugees. Perhaps more importantly for this argument, however, Congress has largely resolved the question of whether it is going to be a "democratic" body, whose actions are shaped by coalitions of like-minded citizens pursuing their own self-interest, rather than a "republican body," in which legislators put aside self-interest to debate the public good, in favor of a democratic model. As such, Congressional debates about the morality of the federal government's laws and policies, more often than not, take a back seat to debates about the efficacy of those policies in achieving non-moral goods about which there is presumed to be a consensus. There are, no doubt, many sound reasons for Congress to focus on efficiency, fairness and other such values rather than the intrinsic morality of their actions. However, the result of those decisions leaves a large void in government leadership, at least over public conversation about the common good, what is morally required to achieve it, and where the United States has failed to conform to its own moral ideals. As the humanitarian immigration movements show, the church is one place where that conversation can occur, but it is not a commonly recognized ground in a religiously diverse polity. Thus, there is currently no "place" to have such a conversation.

The result of this void in moral deliberation at a national level is Congressional reinforcement of Justice Scalia's apparent view that conscience is a "private" matter that is all well and good, so long as it stays in its place and does not make a challenge to existing law. Indeed, such a view would be particularly attractive to the lawmaker: it is never the king who wants to have truth spoken to him after he has exercised his power. It would be difficult to find the Congressperson who would be willing to admit publicly that the democratic ideal—a legislative body that takes the time to listen to everyone and explore every facet of a political problem—does not work in practice. If only for symbolic reasons, the Emperor cannot admit to his lack of clothes.

For Americans, however, conscience must be a public matter, if for no other reason than that the Constitution enshrines a role for conscience in our political life in the First Amendment Speech and Religion Clauses. While the role of
Speech Clause dissenters in enriching our political and social life is a truism—any law student can recite the self-government, safety valve, and checking rationales for the clause—an equal acknowledgement of the institutional role of the Free Exercise Clause in our system of government has been at best understated in modern times.\(^{167}\) The consignment of matters of conscience to a private, expressivist role has been largely accompanied by the identification of Free Exercise concerns exclusively as a negative liberty provision designed to allow minorities to be “left alone” in the exercise of their religion by majorities. In the popular imagination about the Free Exercise Clause, religious dissenters have come to be known as “odd people”—the Amish, Jehovah’s Witnesses, Hare Krishnas, atheists—who are to be tolerated because their consciences compel them to be different, rather than citizens who may have something to teach us all about our common life. That portrayal is a portent for disaster for a super-power that, Madison and others have consistently reminded us, can be counted on to abuse its power the more its competitors fade from view.

To understand that conscience is a public matter and not private, irrational individual emotion or sentiment of isolated groups of “do-gooders” is to recognize that dialogue of power with dissent is an essential constituent of a public moral community. It is not necessary to imagine some ideal dialogical community where all individual citizens are accorded equal respect for their moral and political views and equal liberty to carry them out to see the necessity of group dialogue between governments and dissenting communities. Even the political realist can understand that the morally unresponsive government can provoke, on one hand, an Orange revolution,\(^{168}\) or on the other, citizen disgust and apathetic withdrawal from the political process.

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\(^{167}\) Many who have made this argument see the Free Exercise Clause as a limitation on government power, somewhat like the jurisdictional limits that the Constitution imposes on each branch of government. See, e.g., Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 IOWA L. REV. 1, 8-9 (1998) (noting: “[T]he Establishment Clause prevents the government from impinging too directly upon both government officials and those who may not share that understanding of the truth. The Free Exercise Clause prevents the government from impinging upon the ultimate truth of the believer. . . . [T]he religion clauses are prominent as one of very few provisions in the Constitution which clearly support mediating institutions.”).

\(^{168}\) The Orange Revolution of 2004-05 was a series of protests and political events in the Ukraine in response to corruption, voter intimidation and 2004 electoral fraud. In response to these protests, the Ukrainian courts ordered a new election and the opposition candidate was elected. See Orange Revolution, WIKIPEDIA, http://en.wikipedia.org/wiki/Orange_Revolution (last visited March 24, 2006).
Apart from those extremes, however, conscientious disobedients play a
variety of important roles in keeping our civic life true to our national ideas. For
example, like the immigration humanitarians, these disobedients keep in view the
tragic realities that are the consequence of national policies. If nothing else, they
force us to acknowledge that the consequences of national policies are not
unalloyed goods, but often contain tragic dimensions that harm real persons,
whether it is the tragic dimension that accompanies the exclusion of needy aliens,
or a decision not to rebuild New Orleans as it was before Hurricane Katrina.
Without recognition of these tragic choices, the ability of our political
community to exercise its powers humbly and carefully, with recognition of its
limitations and the consequences of the exercise of power, is severely
constrained.

Second, disobedients can call to national public attention localized
injustices that local communities either cannot see, because they participate in
and benefit from the injustices, or do not know about, because they are living
their business-as-usual lives rather than surveying their communities for want or
injustice. While the media play some part in bringing these realities to public
light, their attention is largely focused upon the immediate controversies that
make for traditional news stories, controversies that conscientious disobedients
can stir up through their dissenting behavior, both legal actions such as protests
and pickets and illegal actions such as trespass, property destruction, or illegal
border crossings.

Third, disobedient communities are often well-versed in the national moral
vocabulary. Thus, they can engage the national community and its political
leaders for their inability to live up to some aspects of national ideas that are
short-changed or overlooked for more pressing concerns, such as security or the
delivery of emergency services.

V. TOWARD A PUBLIC SOLUTION: A TRUTH COMMISSION FOR
DISSENT

Unfortunately, the United States' lack of a practical mechanism for keeping
public attention focused on the complaints of civil disobedients is glaring.
Courts are inapt because they are so largely constituted and accustomed to
interpret and enforce law rather than to challenge national policy. Indeed,
judicial candidates are often publicly selected by appointing authorities for their
commitment to enforce the law, rather than to make it. See, e.g., Christopher E. Smith, The Supreme Court's Emerging Majority: Restraining the High Court or Transforming Its Role? 24 AKRON L. REV. 393, 394-95 (1990) (noting President Bush's
cconcern that his nominees exercise judicial restraint and his statements about Judge David Souter's
nomination that he is "'committed to interpreting, not making the law. He recognizes the proper
role of judges is upholding the democratic choices of the people through their elected
representatives, with constitutional constraints.'" (quoting Comments by President on His Choice of
Justice, N.Y. TIMES, July 24, 1990 at A8)).

Moreover, because they are often under attack for exceeding their constitutional powers by
politicians and as members of the public, judges naturally shy away from speaking any serious truth to power. The Executive Branch has little interest in seeing their initiatives undercut by dissenters, even when that undercutting is only symbolic, rather than a real threat as in the case of the No More Deaths volunteers saving a few lives in the desert.

This article proposes that the United States should adopt the time-honored and now well-tested structure of a national truth commission, but permanently constitute it as an independent agency, to respond to the claims of dissenter groups that immoral American policy is causing them to have to choose between the obligations of citizenship and the obligations of conscience. The truth commission as an international rubric for public accountability has existed in some form since the investigation of Balkan War crimes in 1912-13. In the contemporary period beginning in 1974, it has been successfully deployed in more than two dozen nation-states in Africa, Europe, South and Central America, and Southeast Asia to investigate and showcase human rights violations by government. Moreover, at least one scholar, Rose Weston, has suggested the employment of a truth commission to investigate historical mistreatment of Native Americans in the U.S. By examining the facts about human rights violations that have occurred, and by reporting and publishing these findings, the truth commission can have "a cathartic and educational effect on the society in transition," by acknowledging government wrongdoing and accepting how society has been involved in these tragic consequences so that reconciliation is possible. The purpose of a truth commission is to investigate moral wrongdoing in morally and politically ambiguous situations, to bring to public light the great harm to individual human beings caused by the rigid enforcement of government policy that violates basic human decency, or by the lawless behavior of politically ascendant groups.

The truth commission has the imprimatur of majoritarian legitimacy, because it is constituted by the government whose actions are complained of by

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170 Smith, supra note 169, at 394 (noting condemnations of Justice Brennan as "the worst kind of judicial activist, willing to substitute his whims for the legislated preferences of the majority") (quoting Kaplan, A Master Builder, NEWSWEEK, July 30, 1999, at 20).


172 Id. (noting that fifteen major truth commissions were conveyed in the two decades between 1974-94, including six between 1992-93). In one empirical study of post-World War II conflicts, the International Human Rights Law Institute at DePaul University documented nine conflicts that were the subject of truth commissions, while twenty-four resulted in national inquiries, twenty-two in domestic prosecution of government perpetrators, and two in international prosecution. Dr. Schlun notes that truth commissions were more popular in Latin America than in former Soviet Union states like Lithuania or East Germany, which utilized investigative commissions to assess the operations of KGB and other state repressive mechanisms. Angelika Schlun, Truth and Reconciliation Commissions, 4 ILSA J. INT'L & COMP. L. 415, 416 (1998).

173 See Weston, supra note 171, at 1019.

174 Schlun, supra note 172, at 415-16.
conscientious disobedients. Yet, it can speak truth to power, truth that power has a difficult time speaking to itself because of fears that its political and moral authority will be undercut by a public perception of vacillation or weakness. As an independent body, the truth commission can level the playing-field of power between officials and dissidents: it calls for accountability of powerful persons, stripped of the trappings and protections of their office, through the rubric of individual testimony, just as regular citizens bring forward their concerns through individual testimony. However, as a body constituted largely to investigate and report on moral wrongdoing, with little power to actually overturn laws or to grant relief against the government without its permission, as courts can do, it bears less risk that its actions will be attacked as improper constitutional or political overreaching. Like other independent federal agencies, the members of a truth commission can be appointed for terms of either six or ten years, which would outlast immediate political alliances or electoral changeovers. Yet, the appointment process brings to bear some accountability for the value and soundness of its work through the political appointment process.

The truth commission relies on private citizens and government authorities, both victims and perpetrators, to tell the stories of what they have heard and seen in a public forum, which permits the wider public to be engaged in these stories in ways that even Congressional investigations like Watergate cannot achieve. It permits government officials to confess to their moral wrongdoing, even when that wrongdoing is supported and required by their governments, by permitting such confessions without legal retaliation. It permits citizens to admit their violations of the law without criminal recrimination, by exchanging the right to punish for the truth.

To be sure, the truth commission has been developed in circumstances more tumultuous and dire than even the border “wars” in Arizona have become; in circumstances where political reconciliation is, as Truth and Reconciliation Commission research director Charles Villa-Vicencio recognizes, a political necessity rather than a moral nicety. But Dr. Villa-Vicencio’s point reaches beyond its location in African liberation wars. Political reconciliation is a necessity, no less in democratic nation-states facing hotly contested issues implicating strongly held beliefs, such as the United States, than in nations torn apart by war, such as in Africa. Some might term reconciliation that comes from truth-telling a “practical” necessity in the sense that it makes possible “engagement between strangers and adversaries” who must learn to deal with conflict in a humane manner rather than with physical or emotional violence, or political estrangement. However, reconciliation is also a necessity in the sense that it makes a future structured in justice possible, through the acknowledgement and remembrance of the truth as its pathway.

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175 Charles Villa-Vicencio, Reconciliation as Political Necessity 1 (unpublished paper, on file with author).
176 Id. at 23.
177 Id. at 21-22.
VI. CONCLUSION: A TALE OF TWO NATIONS—REWITING THE SCRIPT FOR NO MORE DEATHS

Creation of a truth commission would, of course, require numerous political decisions to be made. The obvious political question might be how Congress would take to being upstaged by an independent investigative body that could take over much of the moral authority possessed intermittently by Congressional investigating committees, such as the Watergate investigation. Presumably, the truth commission would not substitute for such investigations where Congress felt its own investigation was warranted; it would more likely respond to citizen complaints that were being largely overlooked by Congress. Similar separation of powers questions, such as whether such a commission could investigate conscientious dissent against a state or local government practice, or the activities of public non-governmental bodies such as a national corporation practicing environmental racism in the location of its waste plants, would remain to be decided.

The constitution of the truth commission, the delineation of its goals, the limitations on the types of cases that could be brought before it, and the types of relief it could offer would similarly need to be considered. In the case of South Africa, for example, the TRC had the power to recommend legislation, but did not have the power to award reparations to victims of government crimes. It had the power to give amnesty to wrongdoers if they would confess their crimes, though not all truth commissions do.

To judge the validity of such a proposal, however, we might imagine what difference it would make to Shanti Sellz and Daniel Strauss if the United States Congress constituted a permanent truth tribunal to investigate claims of citizens who felt morally drawn to civil disobedience to save lives.

If the Sanctuary cases, and the proceedings in the Sellz and Strauss case prove any harbinger, the government's trial of future volunteers will not bend to any claims that they were legally entitled to save lives. As the Sanctuary movement defendants in United States v. Aguilar found, either their claims that they were unsure whether the aliens they aided were truly illegal, or whether the workers' actions in fact violated the law carried no weight. In Aguilar, the Ninth Circuit rejected defenses that Sanctuary workers did not certainly know refugees' status because they might have been eligible for asylum, as well as claims that advice or assistance to persons crossing the border should not be considered aid in the criminal sense. Similarly, any arguments that defendants' actions were justified by the Free Exercise Clause or by necessity will most likely be excluded in future prosecutions.

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179 Id. at 761, 785.
180 871 F.2d at 1446-53.
181 Id.
The jury in such cases will not be permitted to hear testimony about the plight of those the defendants aided, the circumstances in which the defendants felt it was incumbent upon them to aid those found ill in the desert, or the defendants’ claim that their actions were justified. Any juror who knows the whole story or is sympathetic with their cause will undoubtedly be the subject of “for cause” strikes by a prosecutorial team bent upon obtaining a guilty plea or verdict. In the end, the federal judge will carefully instruct the jury to determine only whether the defendants committed the acts alleged, and whether those actions meet the narrow requirements of the law.

A truth commission, by contrast, would permit defendants like Sellz and Strauss to bring their cases to public attention before indictment. They and their fellow humanitarian workers might call upon the commission to investigate United States law and policy in a more thorough way, and specifically to examine the policy that has led to hundreds of thousands of immigrants risking their lives crossing the desert. They would have the opportunity to testify, perhaps under a grant of immunity from the commission, about their actions in saving the lives of these refugees. At the same time, the commission could call those responsible for border security to testify truthfully and in depth about the procedures they have put in place for responding to emergencies involving border-crossing refugees, their procedures for handling refugees that are arrested, and the alternatives they have considered to save more lives.

With a national truth commission, mediating institutions—church bodies and human rights advocacy groups—could present testimony about the effects of such humanitarian disasters on their human rights efforts. Local governments reeling under heavy financial and other burdens from immigration would have the opportunity to inform a national public about the humane efforts they have undertaken, and the enforcement measures they have taken. Media attention, potentially including national broadcasts of the proceedings, could be attracted to these stories. A true and somewhat objective record of the events occurring at the border, that is at least somewhat divorced from particular political partisans’ needs to find witnesses to support their legislation, would have a better chance of resolving the problem.

In the end, however, a truth commission will not be established nor will it be permitted to function properly to bring the truth of tragedies that humanitarian volunteers such as Sellz and Strauss are seeing, unless those who bear the power acknowledge the need for truth-telling and national moral reflection on the nation’s policies. Ultimately, the political branches will bear the responsibility for developing and sustaining a commitment to U.S. policy which is not only effective in preserving national interests narrowly understood, but in preserving a national moral identity, broadly understood. We may only wonder what a difference it might have made if the Wounded Knee or Kent State protesters, or those at the sites of many other conflicts of power and conscience, had had a nationally recognized forum to tell their stories.

182 See Bezdek, supra note 17, at 953-54, 957 (noting refusal of the Sanctuary defendants’ courts to submit jury instructions or other defenses to the jury).