The New Sanctuary Movement: When Moral Mission Means Breaking the Law, and the Consequences for Churches and Illegal Immigrants

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I. INTRODUCTION

Some of the main duties associated with churches include spiritual comfort, services, and advocacy for social causes. Indeed, their tax-exempt status under I.R.C. section 501(c)(3) depends in part upon their activities not being overly political. What happens, then, to a church when its moral mission becomes caught up in a tense political issue?

The issue of illegal immigration—immigrants entering the United States illegally, especially across the southern border—has grown in importance over the years and seems unlikely to abate. Currently, an estimated twelve million illegal immigrants live throughout the country. Many of them form a “shadow immigrant economy,” having forged documents in an effort to appear legal to work, but often paying a significant price in the form of employer exploitation, for which they have little legal redress. Many have been settled for several years and raise American-born children. Due to tightening security and heightened immigration enforcement, illegal immigrants face a situation where their status can be discovered and they can be deported, leaving their children behind.

Churches across the country took up their cause after the Republican-controlled House of Representatives passed House Bill 4437 in late 2005. House Bill 4437 would have made it a felony to not only be in the country illegally, but to provide aid to those in the country illegally. While House Bill 4437 never became law, it still frightened church leaders, who saw

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1 “Church,” throughout this comment, will be shorthand for religious houses of worship, which include several Christian denominations as well as Jewish synagogues.

2 See, e.g., Beth Am Mission Statement, http://www.betham.org/mission.html (last visited Dec. 14, 2008) (describing the Jewish reform temple’s commitment to individual and communal acts of “lovingkindness” and communal support and pastoral guidance); The Episcopal Church Welcomes You, http://www.episcopalchurch.org/ (last visited Dec. 12, 2008) (listing several services, including Advocacy); The United Methodist Church, http://unitedmethodist.org/heart5.htm (last visited Dec. 12, 2008) (stating that the church is willing to take a stand and “actually makes a difference”).

3 See discussion infra Part IV.A.


5 Villazor, supra note 4, at 134–35.


8 See, e.g., Margaret Ann Miille, Illegal Workers Often Face Exploitation, Workplace Dangers, LAS VEGAS REV.-J., July 8, 2007, at 5J.


10 Id.

11 See discussion infra Part II.E–F.

12 See infra note 108 and accompanying text.
their typical moral work for the needy being threatened.\textsuperscript{13} Inspired by the 1980s Sanctuary Movement, which sought to help refugees from Central American countries who could not gain asylum, the New Sanctuary Movement came of shape in 2007, and churches throughout the United States began sheltering illegal immigrants who faced deportation.\textsuperscript{14}

However, was this the wisest course they could have chosen? By adopting this approach, the churches face numerous dangers. One is that their activity could be viewed as overly political and therefore their section 501(c)(3) status could be revoked.\textsuperscript{15} Another is that the defenses used by the 1980s Sanctuary Movement will not work for them, making their activities illegal.\textsuperscript{16} Finally, given that even compromise legislation to give illegal immigrants legal status has struggled to pass,\textsuperscript{17} the flagrant approach adopted by the New Sanctuary Movement may do more to fray nerves than to garner support for illegal immigrants facing deportation.\textsuperscript{18}

This comment will explore the origins of the New Sanctuary Movement, the dangers it faces, and the effectiveness of its approach. Part II of this comment discusses the background of the New Sanctuary Movement, from the original movement’s inception in the 1980s to the political and social events that led to the current movement.\textsuperscript{19} Part III identifies the problems facing the movement, including whether its section 501(c)(3) status could be revoked, whether its legal justifications are valid, and whether its goals are out of step with recent reform efforts in Congress.\textsuperscript{20} Part IV analyzes the language of section 501(c)(3) and applies it to the New Sanctuary Movement, then compares it other situations where churches have been politically involved.\textsuperscript{21} Part IV then examines the movement’s legal justifications, compares them to those of the original movement, and determines the likelihood of success.\textsuperscript{22} Part IV ends with a look at how closely the New Sanctuary Movement’s goals match those of compromise legislation offered in 2007.\textsuperscript{23} Finally, Part V of this comment proposes ways in which the New Sanctuary Movement can push for reform of immigration law without running afoul of the law itself, which include advocating for a series of specific reforms that could be fairly easily adopted into legislation.\textsuperscript{24}

\begin{footnotesize}
\begin{enumerate}
\item[13] See infra note 114 and accompanying text.
\item[14] See discussion infra Part II.F.
\item[15] See discussion infra Part IV.A.
\item[16] See discussion infra Part IV.B.
\item[17] See Jim Rutenberg with Sheryl Gay Stolberg, As Senate Deal Sinks, So Does Bush’s Power, N.Y. TIMES, June 9, 2007, at A1 (discussing how the “grand bargain” on immigration reform finally failed when thirty-eight Senate Republicans voted against it).
\item[18] See infra notes 237–43 and accompanying text.
\item[19] See discussion infra Part II.
\item[20] See discussion infra Part III.
\item[21] See discussion infra Part IV.A.
\item[22] See discussion infra Part IV.B.
\item[23] See discussion infra Part IV.C.
\item[24] See discussion infra Part V.A–C.
\end{enumerate}
\end{footnotesize}
II. BACKGROUND

The concept of sanctuary has a long history in both the United States and in the Western world. Its earliest roots can be traced to the early Hebrews, who established cities where people under threat of law could find refuge, and continued into Christianity, where fugitives from justice were fed and lodged in the churchyards. The concept was eventually recognized by English common law. In the United States, prior to the current New Sanctuary Movement, the most recent mass sanctuary movement took place in the 1980s, concerning refugees from Central America. The New Sanctuary Movement would later seek to draw a connection to this movement.

A. 1980 Refugee Act and the Plight of the Central Americans

The 1980s mass movement formed in response to the Refugee Act of 1980 and its harmful effects on Central Americans who sought asylum in the United States. During this time, violent wars raged in El Salvador and Guatemala; El Salvador had been engulfed by civil war since 1979, while in Guatemala, 11,000 people were killed in just 1983 alone. Thousands of refugees from these countries fled to the United States seeking political asylum, only to be routinely rejected and deported. The main problem lay with the 1980 Refugee Act, which was supposed to be a fairer version of the refugee policy already existing in the United States, but proved to be quite the opposite. The Act intended to establish a nonideological standard for refugee and asylum determination, stating that a refugee was “any person” who was “unable or unwilling to return to . . . that country because of persecution or a well-founded fear of

26 Id. at 684.
27 Karen Musalo, Jennifer Moore & Richard A. Boswell, Refugee Law and Policy: Cases and Materials 10 (1997). Early Christian sanctuary was first written about in the Theodosian Code of 392 A.D., which said that fugitives could be fed and lodged only in the churchyards and surrounding church precincts, not in the actual churches themselves. Id.
28 Altemus, supra note 25, at 684.
29 See Villazor, supra note 4, at 134–35.
32 Villazor, supra note 4, at 139–40.
33 Altemus, supra note 25, at 684.
34 Villazor, supra note 4, at 138–39.
35 See Musalo et al., supra note 27, at 86–88.
36 Id.
In reality, someone fleeing a country friendly to the United States was less likely to gain asylum than someone fleeing an unfriendly country, such as one from the Soviet bloc, even if the harms suffered were the same.38

From June 1983 to September 1986, applicants from Iran had the highest approval rate at 60.4%, followed by Soviet bloc countries, while applicants from El Salvador and Guatemala were amongst those with the lowest approval rate, at 2.6% and .9% respectively.39 Furthermore, the United States had significant foreign policy interests in El Salvador and Guatemala, supporting their governments with extensive economic and military aid, and therefore had every incentive to characterize their situation as improving.40 This image would be undermined if asylum were granted to large numbers of refugees from those countries.41 Therefore, only refugees with a “textbook case” of persecution had hope of being admitted as political refugees, and oftentimes, even that was not enough.42

B. The 1980s Sanctuary Movement

Church leaders were outraged by the government’s treatment of Central American refugees and quickly took action.43 At first, their efforts were individual in nature; the movement began in 1981, when a retired cattle rancher in the Southwest, John Corbett, started transporting undocumented Salvadorans across the border into the United States, and Jim Fife, a Presbyterian minister, harbored some in his church.44 Soon after, six other congregations across the country announced that they would give advocacy, protection, and support to undocumented refugees from El Salvador and Guatemala.45 By 1982, churches and private individuals had established the Central American Sanctuary Movement, a network of sanctuaries across the United States devoted to offering refuge and assistance to these refugees.46 In doing so, they invoked past efforts to resist tyranny, such as the Underground Railroad and Jews fleeing Nazi persecution.47
The Sanctuary Movement ("SM") had two main goals: (1) the short-term goal of having the immigration status of “extended voluntary departure” granted to Salvadorans and Guatemalans and (2) the long-term goal of bringing peace and economic justice to the region.\(^{48}\) Accomplished in large part by a change in U.S. policy.\(^{49}\) Requiring each church that joined the movement to make a public statement of its intent,\(^{50}\) its members declared the current policy “illegal and immoral,” and that while it lasted, churches would continue to extend sanctuary.\(^{51}\) Beyond this, the SM’s aims were more amorphous.\(^ {52}\) Some members of the movement sought political change, while others thought theologically inspired humanitarianism should be the chief aim of sanctuary work.\(^ {53}\) They could not agree as to whether sanctuary work was a form of civil disobedience or a just cause that should not be criminalized.\(^ {54}\)

Nor were their methods the same, consisting of acts from smuggling to providing food and shelter.\(^ {55}\) While smuggling attracted a great deal of publicity for the SM, it was a small portion of the overall activity, consisting of Jim Corbett leading a group that brought fewer than 120 refugees per year across the border.\(^ {56}\) “Evasion services,” where members of the SM transported refugees to other locations to frustrate the efforts of local authorities, were more common.\(^ {57}\) The most common sanctuary work, however, consisted of providing “food, shelter, clothing, and medical assistance,” and many mainstream church participants resisted any agenda beyond that.\(^ {58}\) They objected to the political members’ efforts to accept only those refugees with “heart-wrenching tales of oppression” and an ability to describe their experiences in political terms.\(^ {59}\)

Just as the members of the SM had diverse goals and methods for offering sanctuary, they also had varying concepts of whether their actions were legal.\(^ {60}\) Some believed that providing sanctuary was illegal under federal law, but felt that open defiance was a way of drawing attention to the cause.\(^ {61}\) Others believed that they were following the law as defined by the 1980

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\(^{48}\) Altemus, supra note 25, at 687–88.

\(^{49}\) See Villazor, supra note 4, at 140–41.


\(^{51}\) Villazor, supra note 4, at 140–41.

\(^{52}\) See Loken & Babino, supra note 50, at 134.

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) Id. at 129–30.

\(^{56}\) Id. at 130.

\(^{57}\) Id. at 131.

\(^{58}\) Loken & Babino, supra note 50, at 129, 136. This was the definition of sanctuary as offered by the Chicago Religious Task Force on Central America, which became the national coordinator for the SM in 1982, and the definition was agreed upon by several churches and synagogues that joined the movement. Id.

\(^{59}\) Id. at 136.

\(^{60}\) See id. at 138.

\(^{61}\) Id.
Refugee Act and international refugee law.\textsuperscript{62} One sanctuary worker, Stacey Merkt, argued that she lacked the knowledge or intent to violate the 1952 Immigration and Nationality Act ("INA") prohibition against harboring undocumented aliens\textsuperscript{63} because she thought that they qualified for asylum under the Refugee Act\textsuperscript{64} and was just taking them to San Antonio to apply, as opposed to furthering their illegal presence in the United States.\textsuperscript{65} These types of justifications would soon collide with the federal government’s and the courts’ views of the law.\textsuperscript{66}

C. Federal Prosecution of the Sanctuary Movement

The federal government’s approach to the SM was to first leave it alone, then later to step in and prosecute its members.\textsuperscript{67} When the SM began, the government dismissed it as a ploy for publicity and avoided pursuing undocumented refugees in the churches.\textsuperscript{68} As the movement grew to include more than 100 churches and as many as 30,000 participants, however, the government finally took action.\textsuperscript{69} In 1984, the Immigration and Naturalization Service authorized four undercover agents wearing “bodybugs” to enter churches and tape private conversations, tap telephones, photocopy documents, gather personal information, and report regularly to the United States government.\textsuperscript{70} The results led to the indictment of sixteen SM members and the arrest of more than sixty people on charges of smuggling, transporting, and concealing, leading to the most critical of all the SM cases.\textsuperscript{71}

\textsuperscript{62} Altemus, supra note 25, at 705.

\textsuperscript{63} At that time, 8 U.S.C. § 1324(a)(2) defined “harboring” as transporting an illegal alien within the country, “willfully or knowingly” of their status. See Loken & Babino, supra note 50, at 162–63. Note that 8 U.S.C. § 1324 is sometimes referred to as I.N.A. § 274, but for the sake of clarity, this comment will refer to it by its United States Code designation.

\textsuperscript{64} Section 1101(a)(42) of the Refugee Act states: “The term ‘refugee’ means (A) any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, nationality, membership in a particular social group, or political opinion . . . .” 8 U.S.C. § 1101(a)(42) (2006).

\textsuperscript{65} Altemus, supra note 25, at 706.

\textsuperscript{66} See id. at 705–06.

\textsuperscript{67} See Villazor, supra note 4, at 141.

\textsuperscript{68} Altemus, supra note 25, at 704–05.

\textsuperscript{69} Villazor, supra note 4, at 141.

\textsuperscript{70} Altemus, supra note 25, at 711.

\textsuperscript{71} See id. at 710–11. This was not the first, but the fifth, case for smuggling, harboring, or concealing an illegal alien. See generally id. at 705–14. In the first, Stacey Merkt was charged for driving illegal aliens within the United States. Id. at 705–06. In the second, Phillip Willis-Conger and Katherine Flaherty were detained for driving with four Salvadoran refugees, but the charges against Willis-Conger were eventually dropped when the judge found that the Border Patrol had no probable cause for stopping the car. Id. at 707. In the third case, Jack Elder was charged in 1984 with unlawfully transporting Salvadorans to the bus station and was eventually acquitted by the jury. Id. at 708–09. In the fourth case, both Elder and Merkt were charged with smuggling, transporting, and conspiracy after transporting two Salvadorans across the border; Elder was found guilty of conspiracy and aiding in the illegal entry and transport of aliens, while Merkt was convicted of one count of conspiracy to transport illegal aliens. Id. at 709–10.
In *United States v. Aguilar*, the sixteen SM members put forth defenses such as mistake-of-law-as-mistake-of-fact regarding the 1980 Refugee Act, legality under international refugee law, and that the conduct of SM members was protected by a humanitarian exception to INA prohibitions. One by one, the courts rejected them. Extending a pattern set by previous judges, Judge Carroll of the United States District Court for the District of Arizona barred testimony about religious motivation, the civil war in El Salvador, and international law. The mistake-of-law-as-mistake-of-fact defense from *Liparota v. United States* was later rejected by the Ninth Circuit, which found that mistake in application of the Refugee Act was a mistake of law for which ignorance was no excuse. The only argument that the Ninth Circuit did not outright reject was that the harboring provisions of 8 U.S.C. § 1324(a) were not meant to criminalize the mere sheltering of undocumented refugees, absent a specific intent to help them evade INS detection. Nonetheless, after a six-month trial, a jury convicted eight of the eleven SM defendants, with six convicted of conspiring to smuggle Salvadorans and Guatemalans into the United States and the other two convicted of concealing, harboring, or transporting an illegal alien.

D. Aftermath of the 1980s Sanctuary Movement

The federal prosecutor would later declare *United States v. Aguilar* to be the “death knell” of the movement. Yet the SM finally saw success for its efforts in the early 1990s with the adoption of amendments to the INA that gave asylum seekers from Guatemala and El Salvador special refugee status. Sanctuary work continued in a less conspicuous manner, with several new sanctuary declarations after the Gulf War and intervention on behalf of Haitian refugees. Meanwhile, notable changes took place in immigration law due to the 1986 Immigration Reform and Control Act (“IRCA”), which created a lower mens rea threshold for _____________________

72 See id. at 710.
73 See id. at 713; Loken & Babino, *supra* note 50, at 138–39.
74 See Altemus, *supra* note 25, at 713; Loken & Babino, *supra* note 50, at 140.
75 Altemus, *supra* note 25, at 713. In cases prior to *Aguilar*, judges did not permit the defendants to argue that they did not think they were breaking the law due to their understanding of the 1980 Refugee Act and international law, nor did they permit any defense based on civil war in El Salvador or religious beliefs. *Id.* at 705–06, 709.
76 Liparota v. United States, 471 U.S. 419 (1985) (holding that the Government must prove that the defendant knew his possession of food stamps was in a manner unauthorized by statute or regulation).
77 See Loken & Babino, *supra* note 50, at 140.
78 *United States v. Aguilar*, 883 F.2d 662, 689–90 (9th Cir. 1989) (“Appellants contend that it was reversible error to strip ‘harboring’ of an intent to evade detection. The refusal to provide a requested instruction is reviewed for an abuse of discretion.”); Loken & Babino, *supra* note 50, at 140–41.
79 Altemus, *supra* note 25, at 714. The convictions were upheld on appeal. Loken & Babino, *supra* note 50, at 121.
80 Loken & Babino, *supra* note 50, at 121.
82 Villazor, *supra* note 4, at 142 n.58.
the harboring provision of § 1324(a), so that instead of it being a felony to “willingly and knowingly” harbor undocumented aliens, one must merely be “knowing or in reckless disregard of the fact” of the alien’s unlawful status.\footnote{See id. at 162–63.} The IRCA also repealed the “Texas Proviso,” which had exempted employers of illegal immigrants from the harboring provision.\footnote{Id. at 164. See also I.N.A. § 274a(a), 8 U.S.C. § 1324a(a) (2006).} However, the IRCA may not be remembered for what it toughened, but for what it forgave: the Act implemented a one-time amnesty program for illegal immigrants who entered the United States prior to January 1, 1982.\footnote{Loken & Babino, supra note 50, at 165–66.} If these immigrants satisfied other minimal eligibility criteria, they could apply for temporary residence status for eighteen months, then for permanent residence status.\footnote{Id. at 166.}

The SM, meanwhile, would return with full force when Congress tried to implement another massive reform of immigration laws in the aftermath of September 11, 2001.\footnote{Other acts regulating immigration were implemented between 1986 and 2001. The Immigration Reform Act of 1990 “modified” immigration law by (1) increasing the number of immigrants into the United States, (2) changing the non-status of immigrants in such areas as visa waiver, (3) giving the Attorney General naturalization power instead of the federal courts, and (4) revising the grounds for exclusion and deportation. Laurence M. Krutchik, Note, Down But Not Out: A Comparison of Previous Attempts at Immigration Reform and the Resulting Agency Implemented Changes, 32 NOVA L. REV. 455, 462, 463 & nn.47–48 (2008). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 was intended to “strengthen and tighten” immigration laws by (1) enforcing criminal penalties for high-speed flight from checkpoints, (2) increasing criminal penalties and adding civil penalties for documents fraud, and (3) facilitating legal entry and interior enforcement of the law. Id. at 463.} E. Changes in Federal Immigration Policy After “9-11”

After the terrorist attacks of September 11, 2001, the federal government realized that restrictions on entry of immigrants, document security, and background checks were not stringent enough.\footnote{Id. at 464.} A report found that “more than [nine] million people are in the United States outside of the legal system.”\footnote{Id. The report was issued by the National Commission on Terrorist Attacks Upon the United States. Id.} Congress sought to remedy this problem by passing a number of security acts, including the 2002 Homeland Security Act, the 2004 Intelligence Reform and Terrorist Prevention Act, and the 2005 REAL ID Act.\footnote{See generally id. at 465–68. The 2002 Homeland Security Act established the Department of Homeland Security as a cabinet-level department responsible for strengthening security measures used to protect against terrorism. Id. at 465. The 2004 Intelligence Reform and Terrorist Prevention Act was designed to attack documents fraud that aided terrorists in entering the United States, setting a more uniform standard for new licenses or identification cards. Id. at 465–66. The 2005 REAL ID Act, amongst other things, modified the eligibility criteria for asylum and withholding of removal, expanded the scope of terror-related activity that made an alien inadmissible or deportable, and required states to meet certain security standards in order for state-issued drivers licenses and identification cards to be acceptable for federal purposes. Id. at 466–67.} While each act addressed issues
surrounding illegal immigration, Congress did not confront the issue directly until late 2005, when the House of Representatives passed the “Sensenbrenner-King” Bill, or House Bill 4437. By late 2005, it was clear that the IRCA of 1986 had done little to curtail illegal immigration or cure problems with the nation’s legal immigration policy. Designed to prevent future illegal immigration with its tougher provisions and its one-time amnesty program, it could not stop the population of illegal immigrants from swelling to nearly twelve million people. Many, if not most, had fled their countries due to economic reasons, rather than political. Federal immigration law does not permit people to remain in the United States on economic asylum. Nonetheless, in spite of IRCA provisions against hiring undocumented workers, many employers hired them willingly and without substantial penalty, claiming that their industries faced chronic shortages that only undocumented labor could fill. As a result, illegal immigrants, mainly Latino, have continued to settle in the United States, not just in border states such as California, but increasingly in other areas less accustomed to hearing Spanish. Many have lived and worked in the United States for several years and have American-born children. However, many Americans fear that they will take jobs from the native born, use up health and education services already in short supply, and not assimilate to American culture. While some communities have welcomed illegal immigrants, others, frustrated by the federal government’s lax enforcement of immigration laws, have taken matters into their own hands.

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92 See id. at 465–68.
94 See supra notes 84–87 and accompanying text.
95 See Villazor, supra note 4, at 143.
96 See Jeffrey L. Ehrenpreis, Note, Controlling Our Borders Through Enhanced Employer Sanctions, 79 S. CAL. L. REV. 1203, 1204 (2006) (“Despite the billions of dollars spent on immigration regulation, thousands of men and women come through the border every day in hopes of finding employment and prosperity.”).
98 Section 1324a states that it is unlawful for any person “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . .” 8 U.S.C. § 1324a(a)(1)(A).
99 Ehrenpreis, supra note 96, at 1206.
100 O’Rourke, supra note 93, at 195.
101 See Stephen Ohlemacher, Illegal Immigrants—Who are They?, ABERDEEN AM. NEWS, Mar. 29, 2006, at A8 (discussing the spread of illegal immigrants to states such as North Carolina, Iowa, Ohio, and Georgia).
102 See, e.g., Hendricks, supra note 9.
104 See, e.g., Pamela Constable, Immigrants Haven’t Worn Out the Welcome Mat in Arlington, WASH. POST, Nov. 15, 2007, at A01.
House Bill 4437 sought to address these fears, with supporters claiming that it aimed to “re-establish respect for our immigration laws” and to “crack down on a culture of indifference” that led to millions of illegal immigrants living in the country.\textsuperscript{106} It did so by including several measures that increased penalties for being illegally in the United States.\textsuperscript{107} In particular, it made having illegal status a felony and sought to revise § 1324(a) to make aiding someone “knowing or in reckless disregard” of their illegal status a felony.\textsuperscript{108} House Bill 4437 passed the House with overwhelming Republican support in December of 2005,\textsuperscript{109} but never became law.\textsuperscript{110} The Senate offered different legislation in the form of the 2006 Comprehensive Immigration Reform Act (“CIRA”), which was not as punitive and offered a path to citizenship.\textsuperscript{111} It, too, never became law, and a similar version with the same name was offered in 2007.\textsuperscript{112} However, by then, illegal immigrants and churches alike were reeling from fear of what House Bill 4437 could do to their status if it ever became law.\textsuperscript{113}

Both groups feared their status becoming criminalized, and the churches objected strongly to having their traditional work for the needy labeled a crime.\textsuperscript{114} Cardinal Roger Mahony of Los Angeles complained in a letter to President Bush that House Bill 4437 would “require of all personnel of [c]hurches and of all non-profit organizations to verify the legal immigration status of every single person served through our various entities,” which would force priests, ministers, and rabbis to become “quasi-immigration enforcement officials.”\textsuperscript{115} Meanwhile, illegal immigrants, facing threats of raids and deportation,\textsuperscript{116} responded with a series of nationwide protests that were joined by many clergymen.\textsuperscript{117} As they marched, they held up placards, such as: “[W]e are workers and neighbors, not criminals.”\textsuperscript{118} Cardinal Mahony also wrote a stinging editorial for the New York Times, pledging civil disobedience and stating

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O’Rourke, supra note 93, at 205.
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\textit{See generally} id. at 198–207.
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\textit{Id.} at 198, 201.
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Final Vote Results for Roll Call 661, http://clerk.house.gov/evs/2005/roll661.xml (last visited Dec. 17, 2008) (showing that the House Republicans voted in favor of the bill 203 to seventeen, while only thirty-six Democrats voted in favor, 164 against).
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Sylvia R. Lazos Vargas, \textit{The Immigration Rights Marches (Las Marchas): Did the “Gigante” (Giant) Wake Up or Does It Still Sleep Tonight?}, 7 NEV. L.J. 780, 783, 786 (2007).
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\textit{See} discussion \textit{infra} Part IV.C for more information about why churches and immigrants objected to House Bill 4437.
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Lazos Vargas, supra note 113, at 783 n.14.
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\textit{See generally} Lazos Vargas, supra note 113, at 786–98. The protests included several immigration marches between March and May of 2006, attended by an estimated three-and-a-half to five million protesters, in hundreds of cities from New York to Los Angeles. \textit{Id.} at 781.
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\textit{Id.}
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that “[p]roviding humanitarian assistance to those in need should not be a crime.”

Yet it was not until one illegal immigrant sought sanctuary in a Chicago church that churches organized en masse to form the New Sanctuary Movement.120

F. The New Sanctuary Movement

In August 2006, thirty-one-year-old Elvira Arellano, a Mexican national, took sanctuary in the United Methodist Church in Chicago.121 Arellano was scheduled to be deported, having violated immigration laws twice: once for having crossed the border illegally in 1997, then for working under a false Social Security number in 2002.122 Fearing separation from her American-born son, Arellano remained in the church for a year, until she decided to go to Los Angeles and speak out at a rally, where she was arrested just outside of the Our Lady Queen of Angels church and later deported.123 Inspired by her story, churches decided to join forces and protect against raids and deportations.124 On January 29, 2007, representatives from eighteen cities, twelve religious traditions, and seven denominational and interdenominational organizations joined together to strategize over how to keep immigrant families together until there was immigration reform.125 They formally declared the New Sanctuary Movement (“NSM”) on May 9, 2007.126

In forming the NSM, the churches drew a conscious comparison between their efforts and those of the original SM of the 1980s.127 They credited it with success in changing both immigration policy and protecting thousands of individuals and families.128 To an extent, they even treated the NSM as a natural extension of the original SM, with no genuine break in between.129 In several respects, the two movements had strong similarities. They both involved churches and religious groups offering sanctuary to illegal immigrants, with some in the new movement having been part of the original movement.130 Second, they both required each congregation that joined to make a public statement.131 Finally, both tended to seek out illegal

119 Id. at 783 & n.15.
120 Villazor, supra note 4, at 144–45.
122 Id.
123 Id.
124 Villazor, supra note 4, at 144.
126 James Barron, Churches to Offer Sanctuary, N.Y. TIMES, May 9, 2007, at B1.
127 New Sanctuary Movement: Building on a Powerful Tradition, supra note 30.
128 New Sanctuary Movement: Building on a Powerful Tradition, supra note 30.
129 See Vilazor, supra note 4, at 145–47.
130 Id.
immigrants for sanctuary whose stories fit their mission, while articulating somewhat vague goals for the movement as a whole. However, there have proven to be substantial differences as well. While the 1980s SM sought to help refugees fleeing for their lives from specific wars, the NSM appears focused on economic immigrants living in the United States, who were not necessarily endangered in their home countries and whose countries’ fiscal woes might continue indefinitely. Whereas the SM enjoyed strong public support for its actions, the NSM faces a public that is cynical towards illegal immigrants in light of their rapidly increasing numbers and perceived negative impact on society. The NSM’s goals, as articulated on its website, are to (1) take a public stand for immigrant rights; (2) to protect undocumented immigrants from “hate, workplace discrimination, and unjust deportation”; and (3) to reveal the “actual suffering” of immigrant workers and families to the religious community and the public, which is based on “current and proposed legislation.” To implement its goals, it has sought out immigrants whose legal cases “clearly reveal the contradictions and moral injustice of our current immigration system while working to support legislation that would change their situation.” The families involved must be in the deportation process, include citizen children, and the adults must have good work records.

While the NSM articulates the goals of protecting families and changing the public debate, it does not explain how these goals or the movement itself would translate into acceptable reforms that could pass both houses of Congress. Rather, when the NSM does mention legislation, it simply states a desire for a bill to “give legal status to undocumented people in the United States, set up jobs programs in communities with high levels of unemployment, and protect the rights of all workers, immigrant and native born.” It dismisses “Washington’s various reform proposals,” which assume “that immigrants should not be the equals of the people around them, or have the same rights” and instead advocates for a policy that allows immigrants to go wherever they can find the highest wages. The NSM does not refer to CIRA 2006 or 2007, except to use the passage of CIRA 2006 to claim that its position is legal, pointing out that CIRA provided a humanitarian exemption for individuals and organizations that harbored illegal aliens from detention, knowing or with reckless disregard of


133 See New Sanctuary Movement: Prophetic Hospitality, supra note 131 (mentioning “day laborers,” “immigrant domestics,” and workplace discrimination).

134 Villazor, supra note 4, at 144.

135 See supra notes 103–05 and accompanying text. Public opinion will be discussed further in Part IV.C.


137 New Sanctuary Movement: Prophetic Hospitality, supra note 131.

138 New Sanctuary Movement: Building on a Powerful Tradition, supra note 30.


140 Id. (“Today, working people of all countries are asked to accept continuing globalization, in which capital is free to go wherever it can to earn the highest profits. By that same token migrants must have the same freedoms, with rights and status equal to those of anyone else.”).
their illegal status. The NSM also uses a textual reading of § 1324(a) to justify its legality, stating that the section only applies to those who kept silent about illegal immigrants’ presence, rather than those who have reported the immigrants’ presence but continue to shelter them.

The NSM’s actions have not passed without criticism. Some have condemned the churches for being “staging grounds for political works,” stating that their tax-exempt status forbids such action. Various clergymen have called for a different approach, such as churches directing medical, educational, and spiritual services to the immigrants’ home countries, “where their family support system is.” Other critics have questioned whether Christian teachings even require churches to advocate for immigrants who have come to a country illegally for economic reasons. Biblical teaching requires adherence to a temporal sovereign. While Catholic teaching permits civil disobedience to unjust laws, and states that pastors must give care to all types of immigrants, the Vatican has also acknowledged that governments have a right to regulate migration for the common good, and Church documents limit reasons for migrating to life- and faith-threatening reasons. However, the biggest problem facing the NSM is that its actions may be legally indefensible.

III. IDENTIFICATION OF THE PROBLEM

The NSM’s actions both threaten the churches’ tax-exempt status and lack sound legal justifications for support, making it likely that the movement will fail and that churches and illegal immigrants alike will suffer the consequences.

First, churches have I.R.C. section 501(c)(3) tax status, which means that they are exempt from paying certain taxes as long as “no substantial part” of their activities is “attempting . . . to influence legislation” or “[intervening] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.” If, as critics claim, the NSM has been engaging in these sorts of political activities, should federal authorities choose to press the issue, they could revoke the churches’ tax-exempt status. The resulting loss of funds could make it more difficult for churches to fulfill their overall mission.

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141 New Sanctuary Movement: Prophetic Hospitality, supra note 131.
142 New Sanctuary Movement: Prophetic Hospitality, supra note 131.
146 Id. at 94.
147 Id. at 82, 86, 94–95.
149 See supra note 143 and accompanying text.
Another, graver problem is that the NSM movement may not have a true legal basis for its actions. While the NSM argues that its textual reading of § 1324(a) is valid and cites the original SM of the 1980s as a success, the NSM’s claims that it is following the law based on its understanding of the law may not pass scrutiny. If that is the case, two unwanted scenarios could result. One is that, like members of the original movement, the NSM members could face imprisonment. Another is that federal agents could decide to enter churches and arrest the illegal immigrants, as they are otherwise not legally barred from doing so. That they have not entered churches is a choice, rather than acknowledgement that sanctuary holds some sort of legal power. Just as the federal government did not immediately intervene in the original SM, its distance from the NSM may only be temporary.

Finally, the NSM’s goals for illegal immigrants are at odds with an American public substantially opposed to illegal immigration and in favor of tough enforcement provisions. If the NSM is to have a true positive effect on illegal immigrants’ status, it must find a realistic way to put its proposals into law without violating its tax-exempt status, most likely through the passage of compromise legislation, like CIRA 2007.

These issues present grave legal and social repercussions. Churches remain a vital part of our society, and illegal immigration is much more prevalent than it was during the 1980s. If what the churches are doing is illegal and the mass arrest of church members and illegal immigrants takes place, there could be a great social uproar, especially in light of the large-scale protests that followed the mere threat of House Bill 4437 becoming law. That makes it even less likely that a rational solution to the immigration crisis would be debated upon and passed into law, at a time when rational reform is sorely needed. The remainder of this comment will discuss and analyze whether the churches are engaging in illegal activity and how well their goals match up against those of recent compromise legislation, then will propose legal, realistic reforms that the NSM could adopt to keep families with illegal immigrants from being split apart.

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150 See supra notes 128 & 142 and accompanying text.
151 See supra notes 76–77 and accompanying text.
152 See supra note 79 and accompanying text.
153 Villazor, supra note 4, at 147.
154 See id. (discussing the law under 8 U.S.C. § 1357 (2006)).
155 See id.
156 See infra notes 237–43 and accompanying text.
157 See infra Part IV.C.
158 See supra note 117 and accompanying text.
159 See infra Part IV.C.
160 See infra Part V.A–C.
IV. ANALYSIS

A. Section 501(c)(3) Status

The first issue is whether the NSM’s actions violate the section 501(c)(3) prohibition against church involvement in political activities. Section 501(c)(3) permits charitable organizations, including churches, to avoid paying federal income and employment taxes as long as certain restrictions are met: they cannot use a “substantial part” of their activities for propaganda or other attempts to influence legislation, and they cannot participate or intervene in a political campaign on behalf of any candidate for public office. However, only one church in the past fifty years has lost its tax-exempt status: the Church at Pierce Creek, for urging Christians not to vote for Bill Clinton in 1992. That means churches included in the original SM did not lose their tax-exempt status. Nonetheless, the possibility remains that the Internal Revenue Service could enforce section 501(c)(3)’s prohibitions more stringently, so it is worth determining whether the NSM’s activities violate them.

The first question is whether the NSM’s disregard of federal immigration law goes against section 501(c)(3) provisions. Section 501 does not contain any language regarding law breaking. One might conclude, then, that a church could break federal law and still maintain its tax-exempt status as long as it did not violate the provisions having to do with politics. Therefore, the NSM’s actions in defiance of § 1324(a) would not violate section 501(c)(3) prohibitions unless they constituted a “substantial” part of the churches’ activities, attempted to influence legislation, or intervened in a political campaign.

The next question, therefore, is whether sheltering illegal immigrants in churches constitutes a “substantial” part of the NSM’s activities. “[S]ubstantial” is given no definition under section 501, so one cannot assess what percentage of the churches’ activities would qualify. The NSM website states that churches wishing to join must host one immigrant family and be ready with a place to live (on congregation-owned property), help with “material and spiritual support,” and be available for press conferences. While the burden might vary depending upon the congregation, it appears that hosting just one family would not take up a substantial amount of a church’s activity. As previously noted, providing services and spiritual

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161 In addition to facing revocation of their tax-exempt status, churches that violate the prohibitions will face a tax imposed by I.R.C. § 527(f). James, supra note 148, at 45.
162 “Charitable organizations” consist of “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . .” I.R.C. § 501(a) (2006).
163 James, supra note 148, at 43–45.
164 Id. at 71.
165 See id.
166 See I.R.C. § 501.
167 See James, supra note 148, at 44–45.
169 New Sanctuary Movement: Prophetic Hospitality, supra note 131.
support is part of a church’s larger mission.\textsuperscript{170} Therefore, it stands to reason that assistance offered to illegal immigrants would be like that offered to the rest of the congregation.

Finally, even if sheltering illegal immigrants did meet the test for “substantial,” one must ask whether it constitutes propaganda and other attempts to influence legislation, or intervention on behalf of a candidate.\textsuperscript{171} As with “substantial,” nowhere in section 501 is “propaganda” defined.\textsuperscript{172} Using a basic legal definition,\textsuperscript{173} one might argue that by making law-abiding families the public face for illegal immigration,\textsuperscript{174} the NSM is using propaganda to influence future legislation, providing selected information to promote a specific cause.\textsuperscript{175} On the other hand, such a definition could ensnare anyone; when promoting a point of view, it is difficult not to somehow provide selected information. Moreover, the NSM’s message is not nearly as dominant as the Catholic Church’s message opposing abortion, which it has expressed in an extensive, nationwide campaign with the goal of making it illegal.\textsuperscript{176}

The NSM has also not lobbied for specific legislation that reflects its goals or intervened on behalf of a candidate in an election. It is true that illegal immigration is an issue for which both major parties have drawn firm lines, and Democrats tend to support more rights for illegal immigrants.\textsuperscript{177} Yet while NSM members have praised legislative proposals from Democratic Congressmen Shelia Jackson Lee\textsuperscript{178} and Dennis Kucinich,\textsuperscript{179} while rejecting the anti-illegal-immigration stance of Republican Congressman Tom Tancredo,\textsuperscript{180} the movement has not gone so far as to promote the proposals on its website.\textsuperscript{181} Moreover, there is no evidence that the NSM intervened in an election on behalf of Lee, Kucinich, or any Democrat; in fact, the NSM expressed ambivalence toward most of the Democratic candidates for the 2008 election.\textsuperscript{182} This stands in stark contrast to Catholic churches endorsing candidates who were anti-abortion from

\textsuperscript{170} See supra note 2 and accompanying text.
\textsuperscript{171} James, supra note 148, at 44–45.
\textsuperscript{172} See I.R.C. § 501.
\textsuperscript{173} Black’s Law Dictionary defines propaganda as the “systematic dissemination of doctrine, rumor, or selected information to promote or injure a particular doctrine, view, or cause.” BLACK’S LAW DICTIONARY 1252 (8th ed. 2004).
\textsuperscript{174} See supra notes 137–38 and accompanying text.
\textsuperscript{175} See BLACK’S LAW DICTIONARY, supra note 173.
\textsuperscript{176} James, supra note 148, at 50.
\textsuperscript{177} See Raymond Hernandez, Opinions, Far Apart, Underscore Immigration Bill’s Obstacles, N.Y. TIMES, June 5, 2007, at 1 (demonstrating various Democrats’ concerns that immigrants could be exploited by a guest-worker program, while a Republican fears amnesty); Editorial, The Grand Collapse, N.Y. TIMES, June 30, 2007, at A16 (describing Republican Senators’ opposition to the 2007 immigration reform legislation, while Senator Kennedy and allies compared it to the Civil Rights legislation).
\textsuperscript{178} Bacon, supra note 139, at 8.
\textsuperscript{180} Id.
\textsuperscript{181} See New Sanctuary Movement: The Convening, supra note 125.
\textsuperscript{182} See Lopez, supra note 179, at 9.
the pulpit, or the Christian Coalition specifically advocating for President Bush’s tax cuts on its website.\(^{183}\)

When one considers the relative mildness of the NSM’s political activities compared to those of religious organizations allowed to maintain their tax-exempt status,\(^ {184}\) one must conclude that the NSM churches’ tax-exempt status should not be revoked. To avoid future risk, however, the NSM would be wise to refrain from endorsing particular candidates during election time or lobbying for specific legislation. This will be discussed further in Part V.

\section*{B. Legal Defenses for the New Sanctuary Movement}

The second issue regarding the NSM’s actions is whether the legal justifications it puts forward provide any security against the trials and arrests that met the original movement. The NSM claims that its textual reading of § 1324(a) gives its actions legality, that the harboring provision only applies to those who hide illegal immigrants, rather than those who are open with their actions.\(^ {185}\) The intent of the law, however, is to prevent harboring, so it may be irrelevant whether the NSM’s actions are open or concealed.\(^ {186}\) One could argue that the NSM does harbor illegal immigrants in the churches, given that a church “conceals” illegal immigrants and shields them from immediate detection, or at least “attempts to conceal them.”\(^ {187}\) The NSM likely understands, from the previous movement’s history, that if illegal immigrants are sheltered within a church, the federal government would be more reluctant to arrest and deport them than if they were out in the open or in their own homes.\(^ {188}\)

Moreover, one could argue that because Congress lowered the mens rea threshold for harboring between the early 1980s and 2007, from “willingly and knowingly” to “knowing or in reckless disregard of the fact,”\(^ {189}\) it intended to make it more difficult for people to shelter illegal immigrants while claiming ignorance of their status. Certainly, it is clear that if harboring can consist of mere sheltering, the NSM meets even the toughest mens rea threshold for harboring an illegal immigrant, because its members “willingly and knowingly” keep illegal immigrants in their churches.\(^ {190}\) In any event, the NSM’s interpretation of what § 1324(a) permits resembles the mistake-of-law-as-mistake-of-fact defense employed by members of the original SM.\(^ {191}\)

\begin{itemize}
  \item \(^{183}\) James, supra note 148, at 50, 59.
  \item \(^{184}\) See generally id. at 48–69 (describing how the Catholic Church, the Religious Right, and African-American churches have overtly pushed for political issues and candidates without incurring penalty).
  \item \(^{185}\) Villazor, supra note 4, at 146–47.
  \item \(^{186}\) Id. at 147.
  \item \(^{188}\) Grace Dyrness & Clara Irazabal, A Haven for Illegal Immigrants, L.A. TIMES, Sept. 2, 2007, at 6 (stating that the original movement sheltered illegal immigrants in churches “on the assumption that federal authorities would not arrest people inside a church”).
  \item \(^{189}\) See supra note 84 and accompanying text.
  \item \(^{190}\) See supra notes 130–32 and accompanying text.
  \item \(^{191}\) See Loken & Babino, supra note 50, at 139.
\end{itemize}
United States v. Aguilar has demonstrated that this defense is untenable. During the trial, members of the SM argued that if one had a good-faith belief that an illegal immigrant was entitled to live in the United States because he fit the description of a refugee under the 1980 Refugee Act, that was a reasonable defense against the knowledge element of § 1324(a). The Ninth Circuit, however, rejected this argument, stating that a mistake about the Refugee Act was a mistake of law and ignorance was therefore no excuse. Moreover, among those convicted were SM members who merely provided shelter to illegal immigrants, such as Father Anthony Clark, who invited a Salvadoran to lunch and to stay in an apartment behind the church. The issue revolved around not how the SM members harbored illegal immigrants, but whether they knew they were illegal.

The court’s response to the SM, when applied to the NSM’s justifications, serves to strip away the latter’s legal defenses. The NSM argues that it is obeying the law by revealing to the federal government that illegal immigrants are staying within the churches. Yet as the example of Father Clark demonstrates, providing mere shelter to illegal immigrants, as opposed to hiding them, is no defense. Furthermore, whereas members of the SM could make a plausible case for lacking knowledge of the refugees’ legal status based on their understanding of the Refugee Act, the NSM members state openly that they are aware that people illegally in the United States are being sheltered under their roofs. That more than adequately satisfies the “knowing or in reckless disregard of the fact” portion of § 1324(a), which—given the Ninth Circuit’s decision under the previous, harder-to-meet standard—would be grounds for conviction.

It might be possible for members of the NSM to plead a mistake of fact defense, based on the immigrants’ otherwise lawful conduct in the United States. However, because immigrants like Elvira Arellano have a recorded history of breaking immigration laws repeatedly, such a

192 See id.
193 Id.
194 Id.
195 Id. at 124–25.
196 See id.
197 Villazor, supra note 4, at 146–47.
198 Loken & Babino, supra note 50, at 124–25.
199 Id. at 139–40.
200 See New Sanctuary Movement: Prophetic Hospitality, supra note 131.
201 Section 1324(a) states that any person who “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” receives a criminal penalty. 8 U.S.C. § 1324(a)(1)(A)(3) (2006).
202 See Loken & Babino, supra note 50, at 140.
203 See United States v. Smith-Baltiher, 424 F.3d 913, 925 (9th Cir. 2005) (citing Aguilar, 883 F.2d) (“[W]e also characterized a mistake as to alienage as a mistake of fact, concluding that such a mistake negates the specific intent required for culpability.”).
204 See Prengaman, supra note 121.
defense would likely fail. The NSM might also try to raise a defense based on the idea of a humanitarian exception to § 1324(a), much as members of the original SM sought to do. However, in Aguilar, the Ninth Circuit stressed that humanitarian aid was not a “complete defense” and that such aid must be “incidentally related” to furthering the alien’s illegal status. Since the NSM’s sheltering of illegal immigrants in the churches is largely an attempt to further their presence in the United States, it would not satisfy this requirement. The fact that the NSM cites the humanitarian exception in the CIRA 2006 legislation that passed the Senate suggests that it knows that such an exception does not exist in the current version of § 1324(a).

Given that the NSM does not have case law or legislative history to back up its claims that its interpretation of § 1324(a) is valid, and given that any other defense it raised would fail, the NSM would likely be illegal under current law. While it might still be possible for the NSM to achieve its objectives in spite of arrest and conviction, like the original movement, given the harsher social and political climate at present, such an outcome would be far from certain. The question therefore turns to what NSM members could do legally to further their goals for fair immigration policy. While section 501(c)(3) status might preclude the churches from lobbying for certain legislation or for a specific party or politician, it would not prevent them from stating the types of goals that they wish could be met, in a specific enough way that legislators of both parties could use it as a guide to craft legislation that could pass both houses of Congress.

C. New Sanctuary Movement Goals and “CIRA”

The final issue is whether the NSM’s goals for changing immigration policy are realistic enough to have a chance of becoming law. To determine this, it is helpful to compare them to recent comprehensive reform legislation. Although CIRA 2007 received its share of criticism and never left the Senate, it had notable assets that future reform legislation will likely need. First, unlike the Republican-backed House Bill 4437, CIRA had the enthusiastic support of a

205 See supra note 73 and accompanying text.
206 Aguilar, 883 F.2d at 687.
207 See New Sanctuary Movement: Prophetic Hospitality, supra note 131.
208 New Sanctuary Movement: Prophetic Hospitality, supra note 131.
209 See supra notes 79–82 and accompanying text.
210 See e.g., Larry Blasko, Editorial, Common-Sense Immigration Reform Should Focus on Economics, Not Emotion, CINCINNATI ENQUIRER, Aug. 1, 2007, at 7B (“The permanent-vegetative-state Comprehensive Immigration Reform Act from the a [sic] bipartisan Senate Coalition of Clueless was comprehensive only in that it irritated almost all concerned about the urgent problem of [twelve] million-plus illegal, mostly Mexican, immigrants.”); Albor Ruiz, Editorial, The Usual Invective Engulfs Immigration, DAILY NEWS (N.Y.), May 24, 2007, at 3 (“[T]he bill would create a pool of serfs to be used and discarded.”).
212 See supra note 109 and accompanying text.
bipartisan group of Senators, as well as President Bush. Such bipartisan support is necessary to push legislation through the Senate, where majority groups rarely dominate because of the filibuster option. Second, in contrast to the intentions behind House Bill 4437, CIRA represented a good-faith effort to help illegal immigrants in the United States obtain legality while addressing concerns about lax enforcement of immigration laws.

The NSM’s goals, meanwhile, are to prevent “unjust deportation” from breaking up families, prevent discrimination, and to bring attention to illegal immigrants’ plight. Further goals stated in the newsletter are for immigrants to have the same rights as citizens and for migrants to be able to move about freely to wherever they can earn the highest wage. At the same time, churches and illegal immigrants have reacted with horror to the measures of House Bill 4437. The question is whether CIRA is closer in nature to the NSM’s goals or to House Bill 4437. If CIRA is more like House Bill 4437, that could signal that both bills were addressing certain special needs that the NSM does not want to consider. The more uncompromising the NSM’s goals, the less likely they can be realized.

Churches and immigrants objected to many of House Bill 4437’s provisions, but especially to sections 203 and 202. Section 203 would have made “unlawful presence” in the United States an aggravated felony. Illegal immigrants would be required to serve jail time and would be barred from future legal status or re-entry into the country. Section 202 would have prohibited assisting an illegal immigrant to reside in the United States, and carried several criminal penalties. Many feared that this meant humanitarian aid workers, emergency health technicians, religious workers, and other well-meaning citizens would face imprisonment. There were other concerns as well, such as House Bill 4437 defining documents fraud as an aggravated felony, creating a new 700-mile fence along the Southwestern border, allowing an

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214 See Rutenberg with Stolberg, supra note 17.


216 See supra note 106 and accompanying text.

217 See Anna Varela & Shelia M. Poole, Illegal Immigration: Foes Cheer as Bill Fails; Backers Aim to Fight On, ATLANTA J.-CONST., June 9, 2007, at 1B.

218 See supra note 136 and accompanying text.

219 See supra note 140 and accompanying text.

220 See discussion supra Part II.E.

221 See supra notes 114–17 and accompanying text.

222 O’Rourke, supra note 93, at 198.

223 Lazos Vargas, supra note 113, at 782 n.10.

224 O’Rourke, supra note 93, at 201.

225 Id.
individual to be held indefinitely if he was determined to be a “dangerous alien,” and authorizing
state and local law enforcement to enforce federal immigration laws.\textsuperscript{226}

CIRA \textsuperscript{2007}, on the one hand, offered the reverse of what House Bill 4437 prescribed in
certain key areas—particularly, aid to illegal immigrants. Section 274(a)(3)(A) states that it is
not a violation “for a religious denomination having a bona fide nonprofit, religious organization
in the United States . . . to encourage, invite, call, allow, or enable an alien who is present in the
United States . . . .”\textsuperscript{227} If CIRA became law, the churches’ main fear about their personnel being
arrested for doing their usual work would be put to rest.

CIRA also provided methods of achieving legality for illegal immigrants or would-be
illegal immigrants, such as through a guest-worker program and through a tiered system of legal
status.\textsuperscript{228} However, while this might be closer to the NSM’s dream for greater legal rights for
migrant workers than House Bill 4437, it also might draw criticism from the NSM for not giving
equal rights, but rather qualified rights, to certain groups. CIRA would have established a work
visa, H-2C, but that would have only allowed migrants to stay in the United States
temporarily.\textsuperscript{229} Furthermore, CIRA would have placed illegal immigrants already living in the
United States into three groups, whose ability to gain legal status would have depended upon
how long each group had lived in the country.\textsuperscript{230} Those who had lived in the United States for
five years and had a good work and personal history could apply for green cards, while those
who had lived here for fewer than two years would have no path to legality.\textsuperscript{231} The part of
CIRA that the NSM would most likely welcome is the incorporation of the Development, Relief,
and Education for Alien Minors (“DREAM”) Act, which would have given illegal immigrant
children in-state residency status to attend college, thereby incorporating them more into
American society.\textsuperscript{232}

CIRA’s overall goals for illegal immigrants—preserving humanitarian aid and helping
them become legal, productive members of society—appear much more in line with the NSM’s
goals than with House Bill 4437. At the same time, CIRA merely softened, and in some cases
even expanded, House Bill 4437’s initiatives. While not advocating for a 700-mile fence, it did
require that the existing border fence be repaired and for 200 miles of vehicle barriers to be
constructed at “breach points” for illegal immigrants.\textsuperscript{233} It also increased the number of border
patrol agents and included unmanned border patrolling technology, such as cameras, unmanned
aerial vehicles, and scanners.\textsuperscript{234} Finally, it instituted a tough employee verification system,\textsuperscript{235}

\begin{thebibliography}{9}
\bibitem{226} Lazos Vargas, \textit{supra} note 113, at 782 n.10.
\bibitem{228} \textit{See} Krutchik, \textit{supra} note 88, at 475–76, 478–80.
\bibitem{229} \textit{See id.} at 475.
\bibitem{230} \textit{See id.} at 478–79.
\bibitem{231} Id. “Group B,” the illegal immigrants who have lived in the United States between two and five years,
would have been required to leave the country and apply for an H-2C visa or a green card. \textit{Id.} at 479.
\bibitem{232} \textit{Id.} at 481.
\bibitem{233} \textit{Id.} at 470–71.
\bibitem{234} Krutchik, \textit{supra} note 88, at 469.
\bibitem{235} \textit{Id.} at 477.
\end{thebibliography}
which could have made employment for illegal workers harder, not easier. What the NSM might find most disturbing, however, is that CIRA aimed to allow the federal government to detain illegal immigrants beyond the specified time periods, even when there was no significant likelihood of removal in the near future.\textsuperscript{236}

The NSM might pause, though, before demanding that any acceptable reforms drop employment verification or border enforcement, as public opinion polls taken over the past several years indicate strong opposition to illegal immigration.\textsuperscript{237} For instance, a 2008 Gallup Poll found that sixty-three percent felt that illegal immigrants cost society too much, compared to thirty-one percent who felt that they paid their fair share.\textsuperscript{238} This number has scarcely changed since a previous 2006 poll, which was conducted before the NSM began.\textsuperscript{239} A June 2008 CNN Poll found that a slim majority of fifty-two percent favored building a 700-mile border fence between the United States and Mexico, and one taken in January 2008 found that sixty-five percent wanted a decrease in illegal immigration.\textsuperscript{240} In a 2007 L.A. Times/Bloomberg Poll, when asked what should be the focus of immigration policy, more chose border security (thirty-one percent) than a pathway to citizenship (twenty-seven percent).\textsuperscript{241} However, there is reason for the NSM to be encouraged: several polls taken over the past few years show strong support for allowing illegal immigrants to stay in the United States if they are law-abiding, pay fines, and learn English.\textsuperscript{242} Overall, there is a strong indication that while Americans can be welcoming of newcomers, we also care a great deal about our laws being obeyed.\textsuperscript{243} The NSM ought to take this into account in its approach to illegal immigration. Enough common ground exists between the NSM’s goals and those of bipartisan lawmakers and the public, however, that with some modification, several of the NSM’s goals could be achieved.

\textsuperscript{236} \textit{Id.} This addition is based on a Supreme Court decision in \textit{Zadvydas v. Davis}, 533 U.S. 678 (2001), which found that an illegal immigrant with a criminal background and a history of flight could be held by the INS beyond the ninety-day removal period if he posed “a risk to the community,” without it being a violation of habeas corpus. \textit{Id.}


\textsuperscript{238} PollingReport.com—Immigration, \textit{supra} note 237.

\textsuperscript{239} PollingReport.com—Immigration, \textit{supra} note 237.

\textsuperscript{240} PollingReport.com—Immigration, \textit{supra} note 237.

\textsuperscript{241} PollingReport.com—Immigration, \textit{supra} note 237.

\textsuperscript{242} PollingReport.com—Immigration, \textit{supra} note 237 (showing that in a June 2007 L.A. Times/Bloomberg Poll, sixty-three percent supported allowing illegal immigrants who followed these procedures to stay, versus just twenty-three opposed).

\textsuperscript{243} An October 2007 CNN Poll found that seventy-six percent felt that illegal immigrants should not receive driver’s licenses; a March 2007 USA Today/Gallup Poll found that eighty-six percent favored requiring tamper-proof Social Security cards to be shown in order to gain employment; and a June 2007 NBC/Wall Street Journal Poll found that fifty-seven percent believed that fines should be imposed on businesses that hired illegal immigrants. PollingReport.com, \textit{supra} note 237.
V. PROPOSAL FOR THE NSM TO LEGALLY PROMOTE ITS CAUSE

In order to effectuate change, the NSM must do two things: end the policy of keeping illegal immigrants in its churches and adopt a concrete set of goals that can be conceivably passed in legislative form.

A. End the Sheltering of Immigrants in Churches

First, the NSM must end the very thing that gave the movement so much publicity: sheltering illegal immigrants in the churches. The movement has no legal ground to stand on that justifies a continuation of the practice, given that it cannot plausibly claim that the immigrants meet a statutory definition that makes them legal, and that its textual reading of § 1324(a) would likely be ruled a mistake of law and therefore invalid.\textsuperscript{244} NSM members might consider it worth the legal risk if there were some tangible benefit, such as improved public opinion that put pressure on Congress to pass more favorable legislation. However, as the polls indicate,\textsuperscript{245} despite the fact that the NSM has been active for close to two years, public opinion has barely moved since Elvira Arellano first took shelter in a Chicago church. Moreover, given that the poll responses reveal a strong desire for respect of American laws,\textsuperscript{246} the NSM members may be hurting their cause by not only sympathizing with those who have broken immigration laws, but by breaking the law themselves.

The NSM could still highlight the tragedy of families being broken apart by raids and deportations through other means. They could use the media in the form of newsletters, articles and letters in newspapers, television news stories, radio, online advertising, and websites. By doing this, they could present their point of view without being accused of not caring about the law, leading the average American to be more receptive to the message. Moreover, the NSM could continue to offer the services that they offer everyone, legal or illegal, such as spiritual counseling. By just offering services, they could highlight what makes them so vital and why it is wrong to penalize churches and other community organizations for offering them without first inquiring about status.

B. Specify a Group of Illegal Immigrants to Help

Second, if the NSM is truly serious about wanting reforms in immigration policy, it needs to articulate more concrete goals than the ones stated on the official website. To begin with, it must consider for which illegal immigrants it is advocating. The movement’s choice of using immigrants with good work histories, no criminality, and American children\textsuperscript{247} suggests that the NSM is most concerned about illegal immigrants who would largely blend into, and be an asset to, American society. However, not every illegal immigrant is a law abiding, productive

\textsuperscript{244} See discussion supra Part IV.B.
\textsuperscript{245} See supra notes 237–43 and accompanying text.
\textsuperscript{246} See supra note 243 and accompanying text.
\textsuperscript{247} See supra note 138 and accompanying text.
individual with American ties, and it would be disingenuous for members of the NSM to claim otherwise. If the NSM is seeking to bring legality to all illegal immigrants, it may have a much more difficult time winning the sympathy of the public or Congress. Therefore, the NSM should consider whether to limit its advocacy to illegal immigrants whom it would seem the most unjust to deport—well-meaning, hard-working, law-abiding immigrants with families and roots in the United States.

C. Adopt Specific, Pragmatic Reforms

Next, the NSM should adopt a series of specific goals that relate to helping this class of illegal immigrants. In order to avoid risking the churches’ section 501(c)(3) status, it could just state them as goals rather than push for specific legislation, but at the same time be concrete and realistic enough that they could achieve the bipartisan support needed to pass both houses of Congress. It could aim for a series of separate initiatives, or a comprehensive package like the bipartisan CIRA 2007.

One major goal could be for an explicit humanitarian exception to § 1324(a)’s harboring provisions to be written into law. Until now, the NSM has acted as though one already exists, but has not actually advocated for one. Having this exception in place would be vital to allowing churches and other humanitarian organizations to continue their work without having to constantly second-guess recipients’ legal status. It would also be good public policy, as it would encourage other Americans to be neighborly and offer assistance to those who need it without fear of being accused of harboring.

Another goal in line with the NSM’s desire to keep families together could be for the two main groups listed in CIRA, consisting of five-year residents and two-to-five-year residents, to be combined into a single group, with the same path to legality. Two years would be long enough to establish ties to the United States and would make it so that not every illegal immigrant that lived in the United States, no matter how short a time, could apply for legality. The NSM ought to advocate for a streamlined process for law-abiding illegal immigrants to gain legality that does not require them to leave the country or be placed on tiers. At the same time, it ought to be sensible of the fact that majorities of Americans believe that illegal immigrants


It is possible that, given the larger Democratic majorities after the 2008 Election, this might be an easier task. See Thomas Ferraro & Richard Cowan, Obama’s Democrats Expand Majorities in Congress, REUTERS, Nov. 5, 2008, http://www.reuters.com/article/vcCandidateFeed2/idUSN0550953820081105. President Obama has indicated that he would like to see a comprehensive bill drafted by the end of 2009 and be ready by early 2010. Anthony Boadle, Obama Sees Early 2010 Start on Immigration Reform, REUTERS, Aug. 7, 2009, http://www.reuters.com/article/politicsNews/idUSTRE5765Y420090807. However, the president admits that he does not know if there are enough Congressional votes to pass comprehensive legislation, and that the situation is further complicated by the fact that 2010 is an election year. Id. Given the strong opinions on the subject of illegal immigration, it is difficult to predict if and when such legislation could be passed.

See supra notes 212–14 and accompanying text.

See supra note 141 and accompanying text.

See supra note 231 and accompanying text.
should only gain legality after paying fines and enduring other large penalties.\textsuperscript{253} As a way to balance its call for making the process easier to follow, it might advocate for more or higher penalty fees, so opponents could not claim that its plan was just another form of amnesty.

Regarding the NSM’s concern about deportation, the movement might advocate for fairness and openness in detention and deportation procedures. In situations where detention might go over the designated period and threaten habeas corpus, the NSM might advocate for a system that allows immigrants to stay under the watchful eye of the law while not actually being held, enabling them to lead a normal life until the judicial process is completed.

Finally, in order for any of the NSM’s goals to have a practical effect, it will have to agree on what goals \textit{not} to pursue. Americans do not show any tolerance for an “open borders” society where migrants can freely move across the border to obtain the highest wage.\textsuperscript{254} They support more border enforcement, penalties for employers who hire workers illegally in the country, and have no tolerance for documents fraud.\textsuperscript{255} Therefore, the NSM should accept that even if its highest aims are put into legislation, they will have no chance of becoming law unless accompanied by tough enforcement provisions. This could mean that the law-abiding people for whom the NSM advocates may not benefit from path-to-citizenship legislation until after enforcement measures have been implemented.

In the meantime, the NSM can focus on ways to help people from other countries while respecting the nation’s immigration laws. It can provide services to countries that experience economic hardship, so that the citizens have options and do not need to immigrate to the United States. It can also advocate for changes to the legal immigration process to allow more disadvantaged people to come legally, so that illegality is not an issue.

\section*{VI. CONCLUSION}

If the New Sanctuary Movement wishes to make its mark on the heated and ongoing debate over illegal immigration, it must abandon that which made it known in the first place—its movement to shelter illegal immigrants in the churches—and adopt an approach that urges targeted, specific legal reform.\textsuperscript{256} To reach this conclusion, this comment first traced the origin of the movement and the original Sanctuary Movement members’ inability to avoid arrest and conviction.\textsuperscript{257} Next, this comment considered the New Sanctuary Movement’s legal justifications and found that they were not sustainable based on statutory history and case law.\textsuperscript{258} This comment also considered legal ways in which the New Sanctuary Movement could achieve its goals and thus compared them to recent compromise legislation to see how realistically the movement’s goals could be implemented.\textsuperscript{259} Finally, this comment proposed that the churches should stop harboring illegal immigrants and instead shine light on their plight through use of the

\begin{itemize}
\item \textsuperscript{253} See supra note 242 and accompanying text.
\item \textsuperscript{254} See PollingReport.com—Immigration, supra note 237.
\item \textsuperscript{255} PollingReport.com—Immigration, supra note 237.
\item \textsuperscript{256} See discussion supra Part V.A–C.
\item \textsuperscript{257} See discussion supra Part II.A–C.
\item \textsuperscript{258} See discussion supra Part IV.B.
\item \textsuperscript{259} See discussion supra Part IV.C.
\end{itemize}
various media. The churches should also adopt a series of specific proposals for legal reform that include a more streamlined path to legality, reforms in areas such as detention, and enforcement.

If the churches, as well as Congress, adopted this approach, it could go a long way toward easing the tensions of illegal immigration. Finally, the question of what to do with the twelve million “shadows” would be resolved, and families could stay together. At the same time, American citizens might feel more at ease knowing that our borders and laws are being respected through tough enforcement, so that another twelve million do not come. It will never end the problems with illegal immigration because the United States will remain a cultural and economic draw for millions around the world, but it would bring some benefit and relief.

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260 See discussion supra Part V.A.

261 See discussion supra Part V.B–C.